CITATION:	*Police v Geurds* [2002] NTMC 044
PARTIES:	POLICE v KEVIN JAMES GEURDS
TITLE OF COURT:	COURT OF SUMMARY JURISDICTION
JURISDICTION:	Criminal Code Act (NT)
FILE NO(s):	20204426
DELIVERED ON:	5 December 2002
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HEARING DATE(s):	2 AUGUST 2002, 27 AUGUST 2002, 4 NOVEMBER 2002
DECISION OF:	D LOADMAN, SM

CATCHWORDS:

AGGRAVATED ASSAULT – PROVOCATION DEFENCE – OBJECTIVE THRESHOLD TEST – WHETHER (APART FROM AGE) SUBJECTIVE FACTS SUCH AS PATHOLOGICAL JEALOUSY MUST BE TAKEN INTO ACCOUNT IN SUCH OBJECTIVE THRESHOLD TEST

Criminal Code Act

REPRESENTATION:

Counsel:	
Plaintiff:	Mr J Duguid
Defendant:	Ms E Leahy
Solicitors:	
Plaintiff:	Summary Prosecutions (Police)
Defendant:	Rob Jobson
Judgment category classification:	B
Judgment ID number:	NTMC [2002] 044
Number of paragraphs:	58

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20204426

BETWEEN:

PAUL FRANCIS TUDOR-STACK
Plaintiff

AND:

KEVIN JAMES GEURDS
1ST Defendant

DECISION

(Delivered 5 December 2002)

Mr David LOADMAN SM:

Preliminary

1. The defendant in this proceeding was charged that:

> "On the 8th day of March 2002 at Darwin in the Northern Territory of Australia,
>
> 1. Unlawfully assaulted Jessica Tynan:
>
> and that the said unlawful assault involved the following circumstance of aggravation, namely:
>
> (i) that the said Jessica Tynan suffered bodily harm
>
> (ii) that the said Jessica Tynan was a female and the said Kevin James Geurds was a male,
>
> contrary to Section 188(2) of the Criminal Code.".

2. The first day of hearing was 2 August 2002. The matter continued on 9 August 2002, 27 August 2002 and was completed on 4 November 2002. On 28 August 2002 there was a procedural ventilation of no relevance.

After completion of proceedings on 4 November 2002 the Court's decision in relation to the matter was reserved.

Submissions

3. Submissions on behalf of both defence and prosecution were delivered. They related to all the elements of the offence with which the defendant was charged.

4. By the conclusion of the submissions on behalf of the defendant, however, there remained only a single live issue, the determination of which would dictate the decision of the Court in respect of the matter.

5. It was ultimately conceded by the counsel for the defendant
(a) that there was an assault upon Jessica Tynan by the defendant;
(b) that the assault was intentional in the sense of being directed by the will of the defendant;
(c) that as a consequence of the assault Jessica Tynan suffered bodily harm;
(d) that Jessica Tynan was a female and the defendant was a male;
(e) that Jessica Tynan did not consent to the assault upon her.

6. In the circumstances the single issue for determination of the Court was whether, by virtue of provocation, the assault was either not unlawful as a consequence or if it was unlawful the provocation alleged by or on behalf of the defendant was sufficient to invoke the provisions of section 34 of the Criminal Code Act ("CCA"). That as a consequence the defendant was entitled to be acquitted because the prosecution had not negated the defence of provocation beyond reasonable doubt.

7. There was never any doubt that the defendant would be seeking to rely on the defence of provocation. That was made abundantly clear in terms which will be subsequently be examined in detail.

8. It was common ground between prosecution and defence that in light of the raising of the defence of provocation there arose as a matter of law an obligation resting on the prosecution to negate (seemingly more frequently expressed as an obligation to negative) beyond all reasonable doubt that the defendant was provoked within the meaning of CCA.

9. Relevantly in relation to the matter before the Court, the provisions of CCA having application are:

- section 34(1) CCA.

> **"34. Provocation, &c.**
>
> (1) A person is excused from criminal responsibility for an act or its event if the act was committed because of provocation upon the person or the property of the person who gave him that provocation provided –
> (a) he had not incited the provocation;
> (b) he was deprived by the provocation of the power of self-control;
> (c) he acted on the sudden and before there was time for his passion to cool;
> (d) an ordinary person similarly circumstanced would have acted in the same or a similar way;
> (e) the act was not intended and was not such as was likely to cause death or grievous harm; and
> (f) the act did not cause death or grievous harm."

- the definitions in section 1 CCA:

> "person similarly circumstanced" does not include a person who is voluntarily intoxicated;
>
> "provocation" means any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person, to deprive him of the power of self-control;"

10. The Court was referred to a decision of the High Court of Australia, namely *Stingel and The Queen* (1990) 171 CLR ("*Stingel*"), on behalf of the defendant, but that reference was in relation to another issue to which the Court will return.

11. Although the legislation with which the Court in *Stingel* was concerned related to a charger of murder, it concerned interpreting a provision of

Tasmanian legislation generally concomitant with section 34(2) of the CCA NT. It bears repetition for reason of facilitating comprehension of similarity in this case with some of the matters in *Stingel*, to which the Court will return and or refer to.

12. The relevant provision considered in *Stingel* was Section 160 of the Criminal Code (Tas):

> "**Provocation**
>
> 160. (1) Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.
>
> (2) Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, and which, in fact, deprives the offender of the power of self-control, is provocation, if the offender acts upon it on the sudden, and before there has been time for his passion to cool.
>
> (3) Whether the conditions required by subsection (2) were or were not present in the particular case is a question of fact, and the question whether any matter alleged is, or is not, capable of constituting provocation is a matter of law.

13. In the case before this Court, because of a factual issue which will be referred to later, but which concerned in temporal terms a second "meeting" of the defendant and Jessica Tynan ("Tynan"), it is beneficial to recite the basis upon which the Court must determine whether or not the prosecution has discharged the burden of proof incumbent upon it.

14. Although there was no issue in *Stingel* as to the facts or the version of the facts which was to be determinative of this question, it is in this Court's finding beyond contention that the issue of common ground in *Stingel* or which version of the facts is to determine the issue in *Stingel* (at page 318) falls "to be resolved by reference to the version of events most favourable to the accused" (the citations of various authorities supporting the proposition are set in the judgment at the page referred to).

15. That criterion is particularly significant in relation to conflicts of evidence between Tynan and the defendant which emerged in respect of the second "contact" on the night in question between Tynan and the defendant which preceded the assault on Tynan. It is the case that version of the facts most favourable to the defendant is comprehensively the evidence of the defendant which is set out in the transcript of the proceedings commencing at p152 continuing on p166 and after another witness was interposed, resuming at p186 of the transcript finally culminating at p205 of the transcript.

16. Leaving aside issues unrelated to the actual facts of contact or communication between Tynan and the defendant, that latter body of evidence can be summarised as follows (commencing at p156) of the transcript.

Evidence

17. On Friday 8 March 2002 the defendant went to work and finished work around 2 pm. After he had finished work, he went to his parents' place. He called in at a friend's place along the way, staying at the friend's place for 10 to 15 minutes before going on to his parents' place. At his parents' place, he had a chat with his stepfather to whom he owed money and after some discussion and a cup of coffee he left. As the Court understands it, during the visit to the defendant's parents, he received a phone call from Tynan saying that she had to

> "be picked up at a certain time, but she said don't rush, because she was going to go and do some shopping – go and do a bit of clothes shopping or something".

In essence this was denied by Tynan.

18. In the event, the defendant perceiving the position as set out above, went to Buffalo Creek and engaged in angling for a time. He said that he had a can of UDL straight after work and a second can which he didn't finish whilst he

was fishing. When he arrived to collect Tynan she was sitting out near the Casuarina Library. She was having a cigarette and didn't appear pleased to see him. No doubt, as she says in her evidence, firstly because she didn't tell him that she was going to embark on any shopping; secondly because they had agreed, each with the other, to refrain or substantially refrain from consuming alcohol. The defendant perceived that this misunderstanding about collecting Tynan plus the smell of alcohol on his breath, may have "triggered her off". He agreed that an argument took place in the motor vehicle. He could not recall the cause

> "but it's obvious it would have been because I was late picking her up or that maybe I'd had a drink".

19. They continued to argue once they had reached the unit. Whilst in the unit the duration of the continuing argument may have been about half an hour and again his recollection of the substance is not clear, but "Probably the same thing". They called each other names and he conceded he may have called her "a slut, or whore". He asserted Tynan called him a "jealous wanker" and "a fucking cunt". Further

> "She said I'm psycho I need help, you know, that I'm not getting the proper help, I need help there's something wrong with me. Very degrading things, I'm – you know – fairly sensitive and to hear her say things like that is a little bit disheartening".

20. He perceived the argument was different to preceding arguments because "there was a little bit more swearing and stuff". He said that prior to the commencing of the argument he'd actually been feeling pretty good and

> "she just turned the whole thing around by the mood she was in. So I sort of – yeah, I felt very down, very depressed".

21. Tynan left the unit. She went upstairs, changed out of her work clothes and

> "Didn't say where she was going. I asked her where she was going she said 'none of your business' and slammed the door. I might have

> yelled out something to her, she yelled something back and then she just drove off". [In fact she left on her pushbike]

22. In addition she said she was going to go and have a drink. This was the point of time when "the sun was sort of heading down but it was still fairly light". After she left, he made a cup of coffee. "Morbid thoughts" entered his mind, and "stupid thoughts" persisted to the effect that Tynan was drinking with some other fellow, which thoughts caused him to get more and more depressed. He was, as is apparent, not invited to accompany her. Spontaneously he decided to tip into his mouth an entire canister of tablets, identified as Propranolol, comprising prescribed medication for his mental condition. He did this because

> "I just wanted to end it all ... I just wanted to just sit there and just die, I'd had enough of life. That was my intention, just sit there peacefully and just maybe hopefully – just go to sleep and not wake up."

23. After ingesting these tablets his memory was impaired, answering his counsel's question "Do you remember anything else?" by "Not really. I have visions of the television, the football. I remember I started watching a pre season game and that starts at 7:30 I think or 8 o'clock". He said he recalled that Richmond were playing, but that he did not know who their opponents were and he did not remember the scores.

24. He was then asked "do you remember anything else happening?". He responded

> "From then on not really. I remember very vividly that Jessica – she just seemed to appear out of nowhere and she was standing in the kitchen, and then – I actually – I remember her turning the television off or turning the station over, maybe it hadn't – you know, she knows I like football so whether she was doing that to spite me, have a good [obviously go] at me or something I don't know".

25. Tynan denied these matters and stated that she had turned down the radio because the music was too loud.

26. The defendant continued that he remembered no words spoken. A matter which the defence counsel highlighted is significant and is encapsulated by the following evidence:-

> "So tell me, Jessica appeared, you think you were on the couch, do you remember anything else? Yeah I remember her throwing a coffee cup ... Her throwing a cup of coffee across the room ... I remember seeing her standing at the bench near the kettle. I didn't actually sort of – actually see her make the cup but she obviously made a cup and then sat down, and then maybe words were spoken, and then that coffee cup got thrown across the room, then she just – she walked off. I thought she'd gone, left the house again."

27. The following exchange then occurred:-

> "Do you remember anything else at all? From then on not really, no."

28. The defendant described his next 'memory' as hallucinations. It does not seem relevant to this Court to recite the nature of those hallucinations.

29. In Tynan's evidence in chief, she described her return to the unit at this latter point in time as entailing climbing up to the balcony and over the railing. She said that having gained entry, she walked downstairs. She said that the defendant was outside near the kitchen "because I went down to get a coffee". She maintained that he was out in the yard. She maintains that while she was in the kitchen making a coffee, she and the defendant started to argue. She said he spoke to her in the following terms: "Where have you been, you slut". She said that the tone of his voice was "angry, I suppose ... aggressive and mad". They were facing each other and it was thereafter that the assault, which is described by her, took place.

30. Since as has already been set out, the defendant's version of the facts being the most favourable must determine the answer to the issue, it serves little purpose to set out in detail the substantial conflict between Tynan's evidence and the defendant's evidence save to say that there are areas in which the evidence does conflict. It was common ground that in fact Tynan

had left the unit on a pushbike and returned in the same manner. She said she was not returning when she did at about 10 pm to have a confrontation and said that she was not angry. That she went downstairs following on her return to make a cup of coffee. She denied (Transcript 76) throwing any coffee mug. It was put to her that she had hit the defendant with her hand. That evidence did not emanate from the defendant at all. She said of the defendant that he was then out of control, that he wasn't rambling, he was "just mad, like he just gets so mad you can't stop him".

31. The Court will refer to the argument in the motor vehicle and continuing in the unit following the defendant collecting Tynan from Casuarina as 'the first incident'. The incident which occurred upon her return after she had been out to see her friend Nadia, the Court will refer to as 'the second incident'.

32. By virtue of the concessions which were made by defence counsel or had been made by the culmination of her submissions, the submission in relation to the issue of provocation to be addressed by the Court can be distilled into the following summarised propositions.

- That at least during the argument in the first incident Tynan deliberately enraged the defendant, knowing of his mental condition deposed to by Mr McLaren entailing unreasoning jealousy, ("she pushed his buttons");

- That Tynan deliberately left after the first incident to provoke the defendant and that she acted in so doing so insensitively;

- That the Court should infer that as a result of the second incident, the defendant lost control because of some overt provocative act perpetrated by Tynan;

- That the prosecution must show beyond reasonable doubt that there was not a second provocative act and that it must demonstrate the absence of such second provocative act at the culmination of the second incident and

discharge the burden of proof relating thereto beyond all reasonable doubt;

- That the method of Tynan entering the flat by climbing the balcony and during her absence consuming 4 cans of Victoria Bitter was designed to further aggravate the defendant;

- That going to make coffee in an area she knew the defendant must be instead of going to bed was in itself provocative and it must have been that she did so because she wanted to upset him;

- That Tynan knew her sudden appearance relating especially to his mental condition of which she was aware would upset him;

- That it was clear that Tynan never made any attempt at reconciliation;

- That the second incident was 'fuel on the fire';

- That to establish provocation as defined in Section 1 CCA necessarily required the employment of an 'objective threshold test'. If that test was not 'passed' there was no point or need in referring to the subjective elements necessary to establish the defence.

Provocation

33. The Court was referred to the decision in the Court of Criminal Appeal (NT) in *Gonzales Mungatopi* (1991) 57 A Crim R 341 at page 345. At that reference that Court referred to the following passage of the judgment in *Stingel*

> "The requirement that the wrongful act or insult be of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is clearly intended to involve an objective threshold test. It is only if that test is satisfied that it becomes necessary to consider whether the accused was, in fact, subjectively deprived of his or her self-control ... [A quotation from a case cited then follows}

> ‘The objective standard, therefore, may be said to exist in order to ensure that in the evaluation of the provocation defence there is no fluctuating standard of self-control against which accuseds are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard.’ [and then]

As we have seen, however, that does not mean that the objective test was intended to be applied in a vacuum or without regard to such of the accused's personal characteristics, attributes or history as serve to identify the implications and to affect the gravity of the particular wrongful act or insult.”

34. Their Honours in *Mungatopi* then referred (at page 346) to a decision of Kearney J relating to section 34(2)(d) CCA as including “an ordinary Aboriginal male person living today in the environment and culture of a fairly remote Aboriginal settlement such as Milikipati” (*Jabarula v Poore* (1989) 42 A Crim R 479) and further adopting Kearney J’s dictum in that case that, in relation to an ordinary person:-

> “He is neither drunk nor affected by intoxicating liquor, does not possess a particularly bad temper, is not unusually excitable or pugnacious, and possesses such powers of self control as everyone is entitled to expect an ordinary person of that culture and environment to have. He possesses such of the appellants' general cultural characteristics as might affect [his] reaction to the [insult] “

35. The judgment recited the fact that in *Mungatopi* the Crown had not argued that Kearney J was wrong in *Jabarula*. Further that in *Stingel* the sole express objective characteristic of the ordinary man to be taken into consideration was the age of the defendant. In keeping with analogous observations of the Court in *Stingel* the Judges in *Mungatopi* made it clear that in their view the provisions of CCA in the Northern Territory differed significantly from the provisions of the Tasmanian Code. Although they did not decide that Kearney J was correct in his propounding of the law, they did however agree with the judgment in *Stingel*

> "that the wrongful act or insult must therefore have been capable of provoking an ordinary Aboriginal person of the kind discussed "not merely to some retaliation, but to retaliation 'to the degree and method and continuance of violence which produces the death' "

Further

> "Likewise we recognise that conduct which in some circumstances may be quite unprovocative may be intensely so in other circumstances."

The Court then quoted with approval a dictum in *Stingel*, namely:

> "Particular acts or words which may, if viewed in isolation, be insignificant may be extremely provocative when viewed cumulatively."

And to a reference of Gibbs J in *Moffa* (1997) 138 CLR 601, where His Honour said

> "However, it is no doubt right to infer that the throwing of the telephone was only the last straw that caused the applicant's control to collapse. In any case, in deciding whether there is sufficient evidence of provocation, it is necessary to have regard to the whole of the deceased person's conduct at the relevant time, for acts and words which considered separately could not amount to provocation may in combination, or cumulatively, be enough to cause a reasonable person to lose his self-control and resort to the kind of violence that caused the death. Everything that the deceased said and did on 21st August must therefore be considered in deciding whether there was provocation."

Their Honours further observed

> ". . . that an "ordinary" person is neither the same as the reasonable person in the law of negligence, nor is he an average person:" [*Stingel*]

36. Significantly, in this Court's perception, the finding of their Honours in *Mungatopi* must be focused upon and was in the following terms:

> "In our view, no jury acting reasonably could fail to be satisfied beyond reasonable doubt that the conduct of the deceased which amounted to an insult in the manner in which we have described was

> not of such a nature as to be sufficient to deprive any hypothetical ordinary 29-year-old Aboriginal from Bathurst or Melville Islands of the power of self-control to the extent that he would take his wife away from his village and mercilessly beat her in the manner described by Dr Cummings in this case."

37. For the determination of the issue relating to provocation, it is vital to decide whether the ordinary person 'test' in this matter is confined to consideration of a Caucasian male born on 19 December 1968 as the criterion without more or whether added to that criterion there must be taken into account for the purposes of the decision those specified characteristics which are peculiar to the defendant before the Court. In this regard the Court digresses to highlight the evidence of a psychiatrist called by the defence counsel, the treating psychiatrist of the defendant (Dr McLaren), who commenced treatment of the defendant on 26 February 2002. The diagnosis (Transcript 168) was that the defendant showed features of

> "an anxious paranoid personality, which is a personality disorder. At the time he was also significantly depressed and I've seen nothing since then in my contacts with him to change that opinion"

38. The main thrust of the evidence of Dr McLaren related to issues concerning the effects of ingesting Propranolol Although Dr McLaren didn't refer to it, the defendant perceived that it was the jealousy that he constantly felt in relation to Tynan that was the circumstance upon which counselling by a psychiatrist was predicated.

39. Tynan (Transcript 59) perceived that the defendant consulted a counsellor "because we both realised he had a problem, has a very bad anger problem" and then in relation to consultations with Dr McLaren:-

> "the reason why he went to see a doctor, because we'd spoken about it, and he's got a problem with jealousy".
>
> Jealousy? ... Jealousy and
>
> Violence? ... Bad temper, yes

Anger ? ... Yes

Depression? ... I don’t know if it’s depression so much.”

And (Transcript 60) “Kevin has a very bad problem with jealousy”.

40. In CCA the word ‘likely’ appears in the definition of ‘provocation’. That definition is the same as the corresponding definition in the Tasmanian Code but for the word “sufficient” instead of “likely”. It does not seem therefore to this Court that the decision as to whether the objective test was satisfied in *Stingel* should not be a powerfully persuasive reason to follow that finding in respect of the issue before this Court. It is apparent from the report of *Stingel* that his legal representatives argued:

> “Any characteristics or life experiences of the accused which bear upon the quality or gravity of the alleged wrongful act or insult are to be attributed to the ordinary person for the purpose of deciding whether the wrongful act or insult was of such a nature as to be sufficient to deprive an ordinary person of the power of self control. Any characteristic of the accused which reduces his actual power of self control will not be attributed to the ordinary person. Accordingly, characteristics such as exceptional pugnacity, speedy loss of control and excitability will be excluded. The ordinary person should be endowed with the precise life experiences of the accused in so far as they relate to the source of the provocation.”

41. The corresponding submissions advanced on behalf of the respondent in *Stingel* were expressed as follows:

> “The characteristics to be attributed to the ordinary man include external characteristics such as race, colour, age, sex, physical appearance and capacity, but not those which make him extraordinary. The accused's emotion of being obsessed by or infatuated with the girl ought not to have been considered in applying the ordinary person test. [This Court interpolates to say that would seem to apply equally to pathological or obsessive jealousy] . . . To attribute that characteristic would deprive s 160(2) of its application and make the consideration of the ordinary man a waste of time. The attribution would make the ordinary person extraordinary, and would water down the objective ordinary person test and replace it with a subjective test. The ordinary person may be placed in the accused's situation so that previous events and

> background facts pertinent to the wrongful act or insult are considered. "

42. In *Stingel* the written judgment very early on propounded that the questions of law raised by the issue of provocation were "important and of some difficulty". That observation is adopted by this Court.

43. In addressing the issue expressed as "of such a nature as to be sufficient to deprive an ordinary person of the power of self-control" it is this Court's perception that the contra-distinction of "likely" with "sufficient" does not validly require any Court, including this Court, to so distinguish the propounding of the law in *Stingel* from the law applicable to the matter involving the defendant. In *Stingel* their Honours found that factors such as mental instability "or weakness of an accused" could in certain circumstances be taken into account but only so as not to undermine the "objective standard" "only for the purpose of putting the provocative insult into context" (Wilson J in *R v Hill* [1986] 1 SCR).

44. Significantly their Honours shied away from any acceptance that the "ordinary person" had become a term of legal art and they continued:

> "The function of the ordinary person of s160 is the same as that of the ordinary person of the common law of provocation. It is to provide an objective and uniform standard of the minimum powers of self-control which must be observed before one enters the area in which provocation can reduce what would otherwise be murder to manslaughter. While personal characteristics or attributes of the particular accused may be taken into account for the purpose of understanding the implications and assessing the gravity of the wrongful act or insult, the ultimate question posed by the threshold objective test of s160(2) relates to the possible effect of the wrongful act or insult, so understood and assessed, upon the power of self-control of a truly hypothetical "ordinary person". Subject to a qualification in relation to age (see below), the extent of the power of self-control of that hypothetical ordinary person is unaffected by the personal characteristics or attributes of the particular accused. [This Court's underlining] It will, however, be affected by contemporary conditions and attitudes (citation given)."

Reference is then made by their Honours to a decision of *Parker* (citation given) simply by way of example quoting Windeyer J in relation to provocation rulings which "show how different in weight and character are the things that matter in one age from those which matter in another".

And their Honours, after examining distinctions to be observed in the community propound:-

> "The principle of equality before the law requires, however, that the differences between different classes or groups be reflected only in the limits within which a particular level of self-control can be characterized as ordinary. The lowest level of self-control which falls within those limits or that range is required of all members of the community."

Their Honours of course concluded that

> "in at least some circumstances, the age of the accused should be attributed to the ordinary person of the objective test."

45. Helpfully, in this Court's perception, their Honours in *Stingel* postulated the effect of the threshold objective test (although in relation to the Tasmanian legislation) as follows:

> "It is to pose for the jury the question whether, in all the circumstances of the case, the wrongful act or insult, with its implications and gravity identified and assessed in the manner we have indicated, was of such a nature that it could or might cause an ordinary person (or, when appropriate, an ordinary person of the age of the accused), that is to say, a hypothetical or imaginary person with powers of self-control within the limits of what is ordinary (for a person of that age), to do what the accused did."

46. Their Honours descended to actually examine the situation which is directly analogous with the issue of jealousy raised on behalf of the defendant and they said

> "If, for example, a person is obsessively jealous or extraordinarily excitable and pugnacious, his powers of self-control are hardly likely to be within the range which might properly be regarded as

> "ordinary" [citation given]. In a case where it is necessary to take some such characteristic or attribute into account for the purpose of identifying the content or gravity of the wrongful act or insult (e.g. a case of a grave insult centred upon that characteristic or attribute), the objective test will, nonetheless, require that the provocative effect of the wrongful act or insult, with its content and gravity so identified, be assessed by reference to the powers of self-control of a hypothetical "ordinary person" who is unaffected by that extraordinary attribute or characteristic. In other words, the fact that the particular accused lacks the power of self-control of an ordinary person by reason of some attribute or characteristic which must be taken into account in identifying the content or gravity of the particular wrongful act or insult will not affect the reference point of the objective test, namely, the power of self-control of a hypothetical 'ordinary person'."

47. Notwithstanding that the Court in the Northern Territory in *Mungatopi* made a finding, binding of course upon this Court that there is a distinction to be observed, in that *Stingel* was focused on the Tasmanian Code which differs from the CCA in the Northern Territory, at least in the respects identified by this Court, this Court, as it is free to do, adopts the formulation of the test in *Stingel* as being applicable and required in respect of the test in the case before the Court. That is only altered necessarily where it is impossible to distinguish those findings in *Mungatopi* which went beyond the findings of the High Court in *Stingel* and for example were embraced in *Jabarula*.

48. It is common ground that the subjective circumstances referred to in section 34(1) CCA do not fall to be considered unless the objective threshold test in relation to provocation as defined in CCA is met.

49. The prosecutor, in this Court's perception generously, conceded that the test may have been met had the attack on Tynan by the defendant occurred immediately after the conclusion of the first incident. Whilst the situation is hypothetical it is not this Court's finding that would have been the case.

50. However, even accepting that a coffee cup was thrown by Tynan whether at the defendant or otherwise during the second incident, there is no objective factual evidence in this Court's finding that would justify the Court in

accepting the proposition pronounced by defence counsel as being sufficient for the objective threshold test to be met on all the facts.

51. This Court rejects further the contention that in the absence of such factual evidence that there is any basis on which the Court should infer that there must have been some overt act which caused the defendant to lose his control. Further, that the absence of proof of such is fatal to the prosecution case.

52. The Court reiterates that it must on objective facts most favourable to the defendant decide the issue as to whether or not the objective threshold test is met. It must be borne in mind that this Court is trying both the facts and the law. This Court finds the conduct of Tynan in relation to the first incident alone, the second incident alone, or both incidents together or cumulatively, could not be beyond reasonable doubt a wrongful act or insult of such a nature as to be likely to deprive the defendant, being the hypothetical Caucasian male born 19 December 1968, of the power of self-control, to the extent that he would physically and did physically assault Tynan in the merciless manner that he did. Strangely this Court observes that it *Mungatopi* the Court in addressing the issue actually referred to "sufficiency". The peculiarity being highlighted by this Court is the fact that word does not or did not appear in the definition in CCA. It is from the Tasmanian Code which their Honours were at pains to distinguish.

53. The extent of Tynan's injuries are graphically depicted in photographic evidence tendered to the Court and sufficient to cause the defendant himself to be reviled to a degree that he was unable to comfortably peruse and consider such photographic evidence.

54. Crisply then it is the finding of this Court that the objective threshold test is not satisfied beyond reasonable doubt. The prosecution as a consequence has negated beyond reasonable doubt the defence of provocation.

Conclusion

55. In light of the finding set out in paragraph 54 of this decision, there is no need for the Court to then consider the provisions of section 34(1)(a)(b)(c)(d)(e) and (f).

56. In the light of the concessions by the defence counsel otherwise in relation to the elements of the offence it follows that in the circumstances this Court finds the prosecution has negated the defence of provocation. The defendant consequently is found guilty of the offence with which he is charged.

57. There remains the matter of costs and issues discretely related to sentence. In relation to issues of costs, if there is no resolution the matter will have to be ventilated by being brought on for decision at some future time unless it is the wish of counsel in attendance when the judgment is handed down that they address the issue of costs then and there.

58. In relation to sentence the Court will hear submissions or fix a day suitable to the parties.

Dated: 22 November 2002

DAVID LOADMAN
STIPENDIARY MAGISTRATE