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May 25, 2011

The Honorable Tani Cantil-Sakauye, Chief Justice
The Honorable Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102

RE: Petition for Review, People v. Tare Nicholas Beltran, S192644
Court of Appeal Docket No. A124392
San Francisco County Superior Court Nos. 175503, 203443

Dear Chief Justice Cantil-Sakauye and Honorable Associate Justices:

This letter is written on behalf of the Appellate Committee of the California District Attorneys Association under Rule 8.500(g), California Rules of Court, to express support for the petition for review filed by the Attorney General on behalf of the People of the State of California in the above-entitled matter.

The California District Attorneys Association (CDA), the statewide organization of California prosecutors, is a professional organization incorporated as a nonprofit public benefit corporation in 1974. CDA has over 2500 members, including elected and appointed district attorneys, the Attorney General of California, city attorneys principally engaged in the prosecution of criminal cases, and attorneys employed by these officials. The association has empowered its Appellate Committee to coordinate the presentation of prosecutor's views in appellate cases when it concludes that the issues raised in such cases will significantly affect the administration of criminal justice statewide.

This case raises matters of concern to prosecutors. The opinion of the Court of Appeal wrongly decides legal principles relating to homicide prosecutions, and both creates and highlights a conflict with and among other appellate court opinions on the standard for heat of passion and provocation in homicide cases.

ISSUES PRESENTED

Whether the objective test for heat of passion provocation in a homicide prosecution requires that the provocation be such that would induce a reasonable person to commit a lethal act due to heat of passion.

BACKGROUND

Appellant was convicted of the stabbing to death his estranged girlfriend Claire Tempongko. They met in November of 1998 and began living together in January 1999, but over the next 20 months there were multiple incidents of domestic violence. Appellant was convicted of domestic violence in June 1999, and sometime before September 2000 Claire obtained a domestic violence restraining order requiring him to stay away from her apartment. Appellant violated that restraining order in September 2000.

The homicide occurred the next month, on October 22. That evening between 8:30 p.m. and 9:00 p.m., appellant presented himself at Claire's apartment, letting himself in with a key he had. The events were described at trial by Claire's son, who was a witness, and by appellant.

The son (who was 10 years old at the time of the homicide, and 18 years old by the time of trial) testified that appellant banged open the door, and began yelling at Claire. After five to ten minutes of argument, appellant went into the kitchen, came back with a knife, and began stabbing Claire.

Appellant testified that he did not bang open the door or begin arguing with Claire, but that she had been expecting him, and berated him for being late. An argument developed. Appellant claimed he finally told Claire he was leaving, and that she then said, "I knew you were going to walk away. That's why I killed your bastard. I got an abortion." Appellant claimed he did not know until that moment that Claire had been pregnant, or had gotten an abortion. He testified that he did not remember what happened next, until he was standing over Claire holding a knife, with blood on his hands. He ran from the apartment.

Appellant fled to Mexico, but was ultimately apprehended and returned to face the charges more than six years later.

At trial, appellant did not deny killing Claire. The issue was the level of the homicide. The trial court instructed the jury under CALCRIM 570 as follows:

In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked *and how such a person would react* in the same situation knowing the same facts.

Following a jury request for further guidance on the nature of provocation, the trial judge told the jury:

The provocation involved must be such as to cause a person of average disposition in the same situation and knowing the same facts to do an act rashly and under the influence of such intense emotion that his judgment or reasoning process was obscured. This is an objective test and not a subjective test.

The Court of Appeal, in a 2-1 decision, reversed the conviction, stating that these instructions, "...did not expressly limit the jurors' focus to whether the provocation would have caused an average person to act out of passion rather than judgment, ... [but rather] invited the jurors to consider what would and would not be a reasonable *response* to the provocation. More specifically, it allowed, and perhaps even encouraged, jurors to consider whether the provocation would cause an average person to do what the defendant did; i.e., commit a homicide." Slip opinion, p. 19 (emphasis in the original).

DISCUSSION

As this Court has repeatedly stated, the standard for provocation is an objective one. See *People v. Logan* (1917) 175 Cal. 45, 49 ("...this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances, and that, consequently, no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man..."); *People v. Manriquez* (2005) 37 Cal.4th 547, at 583 – 584 ("The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to *act* rashly or without due deliberation and reflection." (emphasis added)). The doctrine does have a subjective component, but that relates to whether the defendant did in fact act under the heat of passion. *Logan*, supra, at 49; *Manriquez*, supra, at 584.

The Court of Appeal majority characterized the defect in the jury instructions here as relating to the issue addressed in dictum in *People v. Najera* (2006), 138 Cal.App.4th 212 at 226, "... as to whether the reasonable person test is the standard for becoming aroused or the standard for acting after becoming aroused." *Najera* did not decide this issue,

concluding that the defendant in that case was not entitled to a manslaughter instruction. Nonetheless, relying on the thin reed of the *Najera* dictum, the Court of Appeal in the instant case reasoned that "... provocation is sufficient if it would trigger such a *state of mind* in a reasonable person. It need not further cause a particular *level of conduct*, let alone cause a reasonable person to react with lethal violence." Slip opinion, p. 19

The Court of Appeal majority in the instant case misapplied the principles defining provocation, and mischaracterized the jury instructions given by the trial court. The jury charges here did not, as the majority opinion suggest, direct the jury to consider what would be a reasonable response to the provocation. Instead, they instructed the jury that they must measure the provocation as it would affect a person of average disposition. The two instructions, taken together, simply state that the standard for provocation is an objective one; that the question is whether and average (i.e. reasonable) person would have been provoked; how such a person would have reacted (the instruction does not direct the jury to decide the issue based on whether or not the action itself would be reasonable); and goes on (in the second disputed charge) to say that the provocation must be such that the reasonable person would have acted rashly, under the influence of intense emotions.

Carefully read, the instructions do not misstate the applicable law. In fact, the dichotomy the Court of Appeal would impose – making the focus on the distinction between the standard for whether a reasonable person would be aroused and whether a reasonable person would make a lethal response when aroused – is a false analysis in the context of this case. This case involved verbal provocation. It is difficult to conceive of any circumstance where verbal provocation would lead to a reasonable person resorting to lethal violence. Yet the law clearly contemplate that legally sufficient provocative conduct by the victim may be verbal (*Manriquez*, supra, 34 Cal.4th at 583-583).

So did the jury instructions in this case. The jury instructions here included the direction that "no specific type of provocation is required," and that provocation may arise "from a sudden quarrel." These instructions, when read together with the portions of instructions quoted above, do not suggest that some requirement of a reasonable person standard as to the level of conduct (lethal force) which the defendant undertakes due to the provocation negates the possibility of verbal provocation being sufficient under the law. Indeed, when read together (as all jury instructions must be), they clearly indicate the opposite.

The trial court's instructions did not improperly direct the jury to one aspect of the provocation analysis over the other. They did properly explain the objective nature of the standard for provocation, and that the defendant must act under the influence of what was, at an objective level, provocation sufficient to arouse passion in an average person. They did nothing more.

Finally, to the extent that the Court of Appeal highlighted a divergence in dictum in appellate cases including *Najera*, *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, and *People v. Superior Court (Henderson)* (1986) 178 Cal.App.3d 516, which could lead to confusion or differing conclusions among attorneys and judges, the criminal bar should be directed as to what is the proper standard for instructing a jury on the issue of provocation.

CONCLUSION

For the reasons set out in the Attorney General's petition for hearing, and the reasons set out above, the California District Attorneys Association respectfully requests that this Court grant a hearing in this case, and reverse the judgment of the Court of Appeal.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'ALBERT C. LOCHER', with a horizontal line underneath.

ALBERT C. LOCHER
Assistant District Attorney
County of Sacramento
Co-chair Appellate Committee
California District Attorneys Association

DECLARATION OF SERVICE BY MAIL

I am over the age of 18 years and am employed by the Office of the District Attorney of the County of Sacramento. I am not a party to this action. On May 25, 2011, I served the within

“Letter dated May 25, 2011 to Chief Justice Tani Cantil-Sakauye and to the Associate Justices of the California Supreme Court, RE: Petition for Review, People v. Tare Nicholas Beltran, S192644, Court of Appeal Docket No. A124392, San Francisco County Superior Court Nos. 175503, 203443,”

by placing a true and correct copy thereof in a sealed envelope, with postage fully prepaid, addressed as follows:

Jeffrey Michael K. Laurence
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Linda M. Leavitt
5214-F Diamond Heights Blvd., PMB 312
San Francisco, CA 94131-2175

I declare under penalty of perjury that the foregoing is true and correct, and was executed May 25, 2011 at Sacramento, California.


Stephanie Hofer