

Lee Chun-Chuen alias Lee Wing-Cheuk - - - - - - - - - *Appellant*

v.

The Queen - - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF HONG KONG

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH JULY, 1962

Present at the Hearing:

LORD MORRIS OF BORTH-Y-GEST.

LORD GUEST.

LORD DEVLIN.

[*Delivered by LORD DEVLIN*]

On 18th September, 1961, the appellant, having been tried for murder by a judge and jury sitting in the Supreme Court of Hong Kong in its criminal jurisdiction, was convicted and sentenced to death. He appealed to the Supreme Court in its appellate jurisdiction and on 1st December, 1961, his appeal was dismissed. The Supreme Court considered that the learned judge had misdirected the jury in law but, concluding nevertheless that no substantial miscarriage of justice had actually occurred, they applied the proviso in section 82 of the Criminal Procedure Ordinance, which is in the same terms as the proviso in section 4(1) of the Criminal Appeal Act 1907 in England. On 30th July, 1962, the Board announced that they would humbly advise Her Majesty that the appellant's appeal from the judgment of the Supreme Court should be dismissed and their Lordships now give their reasons for their decision.

On 15th May, 1961, about 5 p.m. Tsang Kan Kong, a Chinaman aged about 50 and of medium build, was found lying in a pool of blood by the side of a road. There was beside him a hammer weighing five pounds which might have caused the severe wounds which he had sustained. He died about 9.30 p.m. on the same day, the cause of death being shock and haemorrhage from head injuries and rupture of the spleen and kidney.

The dead man was the accused's father-in-law. Two letters written by the accused were found, one to a brother-in-law but found among the deceased's belongings and the other produced by an uncle, which pointed to the accused as the killer. The evidence showed that the two men, the accused and the deceased, had come to Kowloon four or five years before and set up in business together. They had parted and were on bad terms because the deceased had (or the accused believed that he had) written to his daughter, the accused's wife, saying that the accused was dead and telling her to marry again. The first of the two letters had been written on 21st August, 1960, and in it the accused charged the deceased with this malicious invention and threatened to kill him. The other letter was written two days after the killing and referred in rather an obscure way to revenge.

The accused had disappeared. He was found and arrested on 6th June, 1961. In a statement in his own writing (but which he said was prepared for him to copy) in a police officer's notebook he referred to his disagreement with the deceased and said that he stole an iron hammer to strike him to death and then jumped into the sea and was rescued by a boatman. Later

at the police station he signed a statement in which he elaborated on his grievance against the deceased. He said that he lay in wait for the deceased and hit him with the iron hammer which he had picked up twenty days before and that he had attempted to commit suicide by jumping into the water.

When he gave evidence at his trial he told a different story which in brief is as follows. He met the deceased by chance. The deceased, apparently thinking that he was going to be attacked, struck the accused on the chest and knocked him down. When he got up, the deceased rushed at him. Then they fought each other for about half-an-hour, chiefly by throwing stones from a heap that was admittedly by the roadside. The deceased started the stone-throwing with a stone that landed on the accused's leg and injured it. Finally, the accused said the deceased picked up a big piece of stone, and chased after him. He threw the stone and it rolled along the road. Then the accused saw a hammer and he picked it up and threw it at the deceased. The deceased fell down and did not get up and the accused was scared and ran away.

This story does not throw much light on how the deceased came by his grave injuries. The medical evidence about them was unchallenged and they can be summarised as follows. There were two fractures and an oval depression of the skull and laceration of the brain, the fracture above the left eye being a very serious one. There were also fractures of the breastbone and three ribs and the deceased's spleen and kidney were both ruptured. The main injuries must have been caused by at least three blows of considerable strength.

It was not suggested that the accused did not inflict all these injuries and so it was hardly possible to argue that he had not intended to cause at least grievous bodily harm. Self defence and provocation were therefore the matters chiefly stressed by the defence, the accused's story being obviously much more consistent with the former. Both issues were left to the jury but they found the accused guilty of murder with a recommendation to mercy.

The accused appealed on a number of grounds which were rejected by the Supreme Court and are not now relied upon. But the court perceived a serious misdirection by the trial judge on the law of provocation. Before the Board the Crown has not contended that there was not a misdirection. Nevertheless their Lordships think that they should state what in their opinion is the law on the point since, as was noted in the judgment of the Supreme Court, there is at present some uncertainty owing to an apparent conflict of authority.

The learned judge directed the jury that if the provocation caused in the mind of the accused an actual intention to kill or cause grievous bodily harm, then the killing would be murder. The judge may well have had in mind a passage in Archbold's *Criminal Pleading Evidence and Practice*, 34th edn. (1959) para. 2503 to that effect which is supported by a dictum in the speech of Viscount Simon in *Holmes v. D.P.P.* [1946] A.C. 588. The decision of the House of Lords in that case was that on the facts the trial judge was right in withholding from the jury the issue of provocation since the only material put forward by the defence consisted of provocative words. In the course of his speech Lord Simon laid down the law about the constituents of provocation and the functions of judge and jury in relation to it in terms that have been widely adopted and to which their Lordships will later refer. But he included at 598 the following passage:—"The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill (such as Holmes admitted in the present case), or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies."

It is plain that Viscount Simon must have meant the word "actual" to have a limiting effect and that he had in mind some particular category of

intention. He cannot have meant that any sort of intention to kill or cause grievous bodily harm was generally incompatible with manslaughter because that would eliminate provocation as a line of defence. In the present case, for example, earlier in his summing-up the judge properly directed the jury that they could not find murder unless there was an intent to kill or cause grievous bodily harm. By telling them that if that intent was present, they could not find manslaughter, he was telling them that they must find murder or nothing and so in effect excluding the issue of provocation.

In *K.D.J. Perera v. The King* 53 Ceylon N.L.R. 193 the Court of Criminal Appeal in Ceylon had to consider provocation in relation to section 294 of the Ceylon Penal Code. They came to the conclusion that there were certain differences between the Code and the law of England, one of them (which was not essential to their decision but which they gave by way of illustration) relating to the intention to kill. On this point they quoted at 199 the passage from Lord Simon's speech to which their Lordships have referred and continued as follows:—

“The principle underlying the English law, therefore, is clear and unambiguous that the provocation given must be such as to deprive the accused person of his self-control to such an extent that he causes death without forming or having an intention to kill. It is then and then only that the offence is one of manslaughter and not of murder . . . This is one of the fundamental differences between our law and that of England.”

When the case came up before the Board, their Lordships thought it desirable to say that this was not a correct statement of the law of England. Giving the opinion of the Board in [1953] A.C. 200 at p. 206, Lord Goddard said:—“The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation.”

Their Lordships think it right to reaffirm the law as stated by Lord Goddard and to do so with special reference to Lord Simon's dictum, to which Lord Goddard did not advert. Lord Goddard's statement can be reconciled with the dictum only if the word “actual” in the dictum is treated as the distinguishing feature. Their Lordships do not think it necessary to interpret the dictum any further than to say that it cannot be read as meaning that the proof of any sort of intent to kill negatives provocation. Lord Simon was evidently concerning himself with the theoretical relationship of provocation to malice and in particular with the notion that where there is malice there is murder; and he may have had it in mind that actual intent in the sense of premeditation must generally negative provocation. Their Lordships do not think that this part of his speech can safely be taken as a basis for a direction to a jury, since even with the most careful explanation it is liable to be misunderstood. Where, as in the present case, the substance of it was given to the jury without any explanation, their Lordships agree with the Supreme Court that it amounts to a serious misdirection in law. It is only fair to the trial Judge to say that *Attorney-General of Ceylon v. Perera* is not referred to in the edition of Archbold which was then current, though it was thereafter noted in the supplement.

Since the correctness of the Supreme Court's decision was not challenged on this point, the whole argument before the Board has been upon the Court's application of the proviso. Their grounds for applying it were stated by Hogan, C. J. as follows. He referred to an earlier case in which the Supreme Court had fully considered the application of the proviso and continued:—“Adopting the view therein expressed that we should determine whether if properly directed, the jury acting reasonably would certainly have come to the same conclusion, we are of the opinion that, having regard to the letter written by the accused to his brother-in-law some months prior to the killing, the letter written to his uncle and his conduct after the killing, together with the nature of the injuries inflicted on the deceased from which he died, no jury, acting reasonably, could properly have found manslaughter rather than murder.”

As their Lordships have said, the effect of the misdirection in the circumstances of this case was to tell the jury that they must find murder or nothing

and so the result was the same as if the issue of provocation had been expressly withdrawn from them. When that is done, a conviction for murder cannot be upheld if there is any evidence on which a verdict of manslaughter could be given; *Bullard v. The Queen* [1957] A.C. 635.

The Supreme Court did not approach the matter by considering in terms whether the issue of provocation need have been left to the jury at all but it is agreed that the test which they formulated and applied comes to the same thing. If there was some material on which a jury acting reasonably could have found manslaughter, it cannot be said with certainty that they would have found murder. It is not of course for the defence to make out a *prima facie* case of provocation. It is for the prosecution to prove that the killing was unprovoked. All that the defence need do is to point to material which could induce a reasonable doubt. The classic statement of this aspect of the law was made by Viscount Simon in *Holmes v. D.P.P.* as follows. "If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death, it is the duty of the judge as a matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (a) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (b) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict."

This is the right test to apply both when the trial judge is considering whether or not to leave provocation to the jury and when an appellate court is considering whether or not it was properly withdrawn from a jury. But their Lordships must observe that there is a practical difference between the approach of a trial judge and that of an appellate court. A judge is naturally very reluctant to withdraw from a jury any issue that should properly be left to them and he is therefore likely to tilt the balance in favour of the defence. An appellate court must apply the test with as much exactitude as the circumstances permit. Their Lordships are not therefore much influenced by the fact that there was no suggestion at the trial that this issue should be withdrawn from the jury. Counsel may well consider that if the question is open to any serious or prolonged argument, a judge is likely to say that it is better to take the verdict of the jury.

The appellant's criticism of the Supreme Court's judgment is that while they doubtless intended to consider the matter in this way, their enumeration of the relevant factors shows that they could not have correctly appreciated the nature of the test they sought to apply. With this criticism their Lordships respectfully agree. Three out of the four factors mentioned by the Court, that is to say, the two letters and his conduct after the killing, are such as might carry great weight with the jury but they do not elucidate the question for the judge. He must approach the issue "on a view of the evidence most favourable to the accused." The truth of an accused's story is always a jury question provided that it is credible, that is, unless there are clear and unchallengeable facts with which it cannot possibly be reconciled. Their Lordships will not examine in detail the effect of the three factors; it is sufficient to say that at the trial there were advanced denials and explanations which, while in some respects unconvincing, were not incredible. The duty of an appellate court in the present case is to assume that the accused's evidence, in so far as it can be reconciled with the unchallenged evidence of the injuries inflicted, is substantially true and to ask themselves whether it disclosed some material suggesting provocation. The three factors tend to show that that assumption is not well-founded but are irrelevant to the true question for the court.

Ought the Board, because in this respect it takes a different view of the problem from that taken by the Supreme Court, to entertain this appeal?

Their Lordships have heard much argument and considered several authorities about the principles on which in such a case the Board ought to act. The authorities show that the difference between the principles which guide the Board and those which should guide an ordinary appellate court in this type of case are not very profound. This is doubtless because a misapplication of the proviso must of its very nature cause "a substantial miscarriage of justice" and thus there inevitably arises the sort of matter with which the Board concerns itself. Nevertheless their Lordships must, as was said by Lord Porter in *Dharmasena v. The King* [1951] A.C. 1 at p. 8 "bear in mind that they are not themselves a Court of Criminal Appeal." Their Lordships apprehend that the Board will not put itself in the position of the first appellate court and review every exercise of the proviso as a matter of course. If the relevant factors have been considered and weighed by that court, the Board will not repeat the process in order to adjust the balance according to its own ideas. But if the process employed by that court is defective in that it has made a wrong approach to the problem or considered irrelevant factors or given them a weight that is gravely out of proportion to their true value, the Board will disregard the finding of the appellate court and approach the matter anew. That is what their Lordships must do in this case since they are satisfied that the Supreme Court either misunderstood or misapplied the correct test. Their Lordships will therefore now enquire into whether there was sufficient material to go to the jury on the issue of provocation.

Provocation in law consists mainly of three elements—the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other—particularly in point of time, whether there was time for passion to cool—is of the first importance. The point that their Lordships wish to emphasise is that provocation in law means something more than a provocative incident. That is only one of the constituent elements. The appellant's submission that if there is evidence of an act of provocation, that of itself raises a jury question, is not correct. It cannot stand with the statement of the law which their Lordships have quoted from *Holmes v. D.P.P.* In *Mancini v. D.P.P.* [1942] A.C. 1 the House of Lords proceeded on the basis that there was an act of provocation—the aiming of a blow with the fist—but held that it was right not to leave the issue to the jury because the use of a dagger in reply was disproportionate.

The main act of provocation relied upon was the throwing of the stone which struck the accused on the leg. When he was examined twenty days later he was found to have a laceration about an inch long on the right leg. There were no other marks of injury on the accused and he did not state that he had received any other wound. In their Lordships' opinion there was no act other than the one which caused the leg injury that could possibly provoke a reasonable man into losing his self-control to the extent of retaliating by battering the deceased almost to death, either with stones or with a hammer. Can it be said that this savage retaliation was proportionate to this single provocative act? Before that question is answered it is natural to enquire how the loss of self-control occurred and how quickly the retaliation followed on the act.

It is at this point that the case suggested by the appellant breaks down. There is no direct evidence of actual loss of self-control. In his examination in chief the accused did not testify at all about his state of mind during the struggle. In cross-examination he was twice asked the specific question and in reply said that he was angry, but not very angry: the whole tenor of his evidence was that he was throughout trying to break off the fight and that is inconsistent even with loss of temper.

Their Lordships agree that the failure by the accused to testify to loss of self-control is not fatal to his case. *R. v. Hopper* [1915] 2 K.B. 431, *R. v. Kwaku Mensah* [1946] A.C. 83. *R. v. Bullard* (*supra*) and *R. v. Porritt* [1961] 3 A.E.R. 463 were cited as authorities for that. These were all cases in which, as in the present case, the accused was putting forward accident or self-

defence as well as provocation. The admission of loss of self-control is bound to weaken, if not to destroy, the alternative defence and the law does not place the accused in a fatal dilemma. But this does not mean that the law dispenses with evidence of any material showing loss of self-control. It means no more than that loss of self-control can be shown by inference instead of by direct evidence. The facts can speak for themselves and, if they suggest a possible loss of self-control, a jury would be entitled to disregard even an express denial of loss of temper, especially when the nature of the main defence would account for the falsehood. An accused is not to be convicted because he has lied.

Their Lordships have carefully examined the four cases cited and are satisfied that in each of them there was in the narrative of events on which the jury might reasonably have acted material that showed a possible loss of self-control connecting the provocation and the retaliation. In all these cases there was, besides the accused's story, other evidence of the struggle on which a jury could act. A jury may reject, as well as an accused's denial of loss of self-control, a part or the whole of his account of events. What is essential is that there should be produced, either from as much of the accused's evidence as is acceptable or from the evidence of other witnesses or from a reasonable combination of both, a credible narrative of events disclosing material that suggests provocation in law. If no such narrative is obtainable from the evidence, the jury cannot be invited to construct one. Simon, L. C. said in *Mancini v. D.P.P.* (*supra*) at page 12:—"It is not the duty of the Judge to invite the jury to speculate as to provocative incidents of which there is no evidence and which cannot be reasonably inferred from the evidence. The duty of the jury to give the accused the benefit of the doubt is a duty which they should discharge having regard to the material before them, for it is upon the evidence, and the evidence alone, that the prisoner is being tried, and it would only lead to confusion and possible injustice if either Judge or jury went outside it." This warning which Simon, L. C. applied to provocative incidents applies equally to loss of self-control and to the other elements which constitute provocation in law.

In the case before the Board the only evidence of the nature of the struggle was the accused's own story and the unchallenged evidence of the injuries inflicted on the deceased. Can it be said on this material that there was a moment of time when, as a result of the single provocative act, the accused might reasonably be supposed to have lost his self-control? In the absence of direct evidence the only point of time at which in their Lordships' opinion a loss of self-control might possibly be inferred is immediately after the provocative act. But not only is there no evidence that the injuries were then inflicted, the evidence makes it impossible to suppose that they were. The evidence is that the struggle continued thereafter for some time and that at the end of it, just before the accused threw the hammer, the deceased had picked up a big piece of stone and was chasing the accused. He could not possibly have been doing that if he had by then received any appreciable part of the grave injuries from which he died—the fractures of the skull and of the breastbone and ribs, the ruptured spleen and ruptured kidney.

It is of course conceivable that the hammering followed immediately upon the provocative act and that the whole of the rest of the story was made up by the accused to support the case of self-defence. The defence could on the issue of provocation invite the jury to reject the whole of the accused's account of what followed on the provocative act if the evidence left them with anything to put in its place. But it does not; and it is not permissible to imagine a more plausible account of how the injuries might have been inflicted and to invite the jury to act upon that. Again it is imaginable that the accused lost his self-control right at the very end and inflicted the gravest of the injuries then. If he had said that he had then lost his self-control, it might have been proper to have invited the jury to infer (rejecting his statement that all he did was to throw the hammer once) that that was how the injuries occurred and to say that the loss of self-control and the retaliation followed reasonably on the provocative act sometime before. Their Lordships gravely doubt whether that would have been a proper case to go to the jury.

having regard to the slightness of the provocation and to the interval of time: it might perhaps depend on whether the accused gave a plausible enough account of a gradual loss of self-control to which other incidents besides the original injury contributed. But all this is speculation. The material produced is evidence of a provocative incident and of nothing more and that is not enough.

In their Lordships' opinion, the misdirection upon the law of provocation could not have caused any miscarriage of justice because there was no sufficient material on this issue to go to the jury. Accordingly, and for this reason, they have humbly advised Her Majesty to dismiss the appeal.

LEE CHUN-CHUEN alias LEE WING-CHEUK

v.

THE QUEEN

DELIVERED BY LORD DEVLIN

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
HARROW
1962