Privy Council Appeal No. 9 of 1964

Frank Parker – – – – – – – – – *Appellant*

v.

The Queen – – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD MARCH, 1964

Present at the Hearing:
VISCOUNT RADCLIFFE
LORD EVERSHED
LORD MORRIS OF BORTH-Y-GEST
LORD HODSON
LORD PEARCE
[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

This is an appeal by special leave from an order (made on the 24th November 1961) of the Full Court of the Supreme Court of New South Wales sitting as a Court of Criminal Appeal whereby an appeal by the appellant from a conviction of murder was dismissed.

The appellant made application to the High Court of Australia for special leave to appeal. That application was made long out of time but the Solicitor-General, being apprised of the circumstances, made no objection to the enlarging of the time. The High Court of Australia enlarged the time and after hearing full argument, by a majority, decided to refuse the application. Their reasons for judgment were given on the 24th May 1963. Thereafter by order dated the 23rd October 1963 special leave to appeal to Her Majesty in Council was granted.

The appellant was charged with the murder (on the 16th October 1960) near Jerilderie, in the State of New South Wales, of a man named Bingham (who was known as Kelly). The trial took place at Narrandera on the 5th, 6th and 7th April 1961. On the last named date the jury (of twelve) returned a verdict of guilty. They added a strong recommendation for mercy. The learned Judge passed the sentence prescribed by law i.e. that of penal servitude for life.

On the hearing of the appeal in the Court of Criminal Appeal consideration was mainly devoted to questions other than that to which the submissions before their Lordships were directed. The submission made for the appellant before their Lordships' Board related to the issue of provocation which had been raised at the trial. At the conclusion of the evidence at the trial the learned Judge after hearing the submissions of Counsel in the absence of the jury stated that he had decided not to leave the issue of provocation to the jury. There is no recorded statement of the basis upon which this decision was reached. Thereafter in the course of his summing-up to the jury the learned Judge said to them:

> " There is one other point that I think I should deal with briefly, and that is the matter you have heard mentioned from the bar table from time to time throughout this case—namely the question of provocation. Provocation in certain cases can be relied upon by an accused to reduce

what would otherwise be murder, to manslaughter. I have ruled that this is not one of those cases, gentlemen; I have ruled that as a matter of law, with the result that you are not in this case concerned with any question of provocation. That is an important matter for you to bear in mind and I emphasize what I said before, that you are not in any way concerned with the apportionment of responsibility or blame for the creation of the situation which gave rise to this very tragic event."

The submission on behalf of the appellant which was made before their Lordships was that the conviction should be quashed and that either a new trial should be ordered or that a conviction for manslaughter should be recorded: the submission was based on the contention that there was evidence of provocation and that the issue of provocation should have been left to the jury and that its withdrawal from the jury constituted a grave and substantial miscarriage of justice in that the jury were debarred from returning, if they saw fit, a verdict of guilty of manslaughter rather than one of guilty of murder.

After the conclusion of the hearing before the Board their Lordships intimated that for the reasons which would later be stated in their judgment their Lordships would humbly advise Her Majesty that the appeal should be allowed, that the decisions below should be set aside and that the case should be remitted to the Court of Criminal Appeal of New South Wales with a direction that they should quash the appellant's conviction for murder and either enter a verdict of manslaughter and impose sentence accordingly or order a new trial whichever course they considered proper in the interests of justice in the existing circumstances. It was submitted to their Lordships that it would now be manifestly difficult for witnesses to charge their recollections in regard to the details of the events of October 1960. It was further submitted that in deciding as to any sentence for manslaughter regard should be had to the fact that the jury recorded a strong recommendation for mercy and to the fact that the appellant has been in prison since October 1960. These however are considerations which can well be weighed by the Court of Criminal Appeal in deciding what course to follow within the powers given by the Criminal Appeal Act 1912.

The question whether the issue of provocation should have been left to the jury involves a consideration not only of the facts of this particular case but of the law of New South Wales in regard to provocation and to the circumstances under which, on a trial for murder, a verdict of manslaughter may be returned. In particular, questions are involved as to the interpretation of section 23 of the Crimes Act 1900 and as to the effect of the provisions of that section when considering how a jury must approach their task.

The Crimes Act of 1900 was an Act which consolidated the Statutes relating to Criminal Law. Section 23 was a re-enactment of provisions which appeared in section 370 of the Criminal Law Amendment Act of 1883 (46 Vict. No. 17). Sections 5, 18, 23 and 24 of the Crimes Act of 1900 are as follows:

" 5. 'Maliciously': Every act done of malice, whether against an individual or any corporate body or number of individuals, or done without malice but with indifference to human life or suffering, or with intent to injure some person or persons, or corporate body, in property or otherwise, and in any such case without lawful cause or excuse, or done recklessly or wantonly, shall be taken to have been done maliciously, within the meaning of this Act, and of every indictment and charge where malice is by law an ingredient in the crime."

" 18. (1)(*a*) Murder shall be taken to have been committed where the act of the accused, or thing by him omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him, of an act obviously dangerous to life, or of a crime punishable by death or penal servitude for life.

(*b*) Every other punishable homicide shall be taken to be manslaughter.

(2)(*a*) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.

(*b*) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only, or in his own defence."

" 23. (1) Where, on the trial of a person for murder, it appears that the act causing death was induced by the use of grossly insulting language, or gestures, on the part of the deceased, the jury may consider the provocation offered, as in the case of provocation by a blow.

(2) Where, on any such trial, it appears that the act or omission causing death does not amount to murder, but does amount to manslaughter, the jury may acquit the accused of murder, and find him guilty of manslaughter, and he shall be liable to punishment accordingly:

Provided always that in no case shall the crime be reduced from murder to manslaughter, by reason of provocation, unless the jury find:

(*a*) That such provocation was not intentionally caused by any word or act on the part of the accused;

(*b*) That it was reasonably calculated to deprive an ordinary person of the power of self-control, and did in fact deprive the accused of such power, and

(*c*) That the act causing death was done suddenly, in the heat of passion caused by such provocation, without intent to take life."

" 24. Whosoever commits the crime of manslaughter shall be liable to penal servitude for life, or for any term not less than three years, or to imprisonment for any term not exceeding three years;

Provided that, in any case, if the Judge is of opinion that, having regard to all the circumstances, a nominal punishment would be sufficient, he may discharge the jury from giving any verdict, and such discharge shall operate as an acquittal."

These sections were all re-enactments of provisions contained in the Act of 1883.

Before considering the questions of law which arise it is necessary to recount the substance of the evidence which was given at the trial. Some six weeks before the 16th October 1960 the appellant with his wife Joan (a woman of Maori extraction) and their six children went to live at an out-station of a property at Jerilderie which is in the plain country in the Southern Riverina. They joined a station-hand named Noel Craig who with his wife and family had been there for some weeks. The appellant's wife is a sister of Noel Craig. The appellant wished to find work and asked to be allowed to stay. The Craigs lived in a two-roomed dwelling. Some months previously, the deceased, who was known as Dan Kelly, had gone to the property. He was living in the shearer's quarters which were erected some distance from the Craigs' dwelling. The appellant and his wife met Kelly about one week before the 16th October. Thereafter during that week Kelly visited the Craigs' dwelling on five or six evenings and also once or twice during the day-time. There were various purposes for the visits by day. On the evening visits there were games of cards and one night the game went on late and Kelly was allowed to sleep the night on a stretcher in the kitchen. On one day (the 13th October) Kelly made a visit during the time when it might have been expected that his work would have demanded his attention. Prior to the 16th October the appellant more than once made comment to Craig that Kelly was paying attention to his (the appellant's) wife. On the morning of Sunday the 16th October Craig and the appellant had occasion to go by car to a neighbouring station in order to borrow some tools and Kelly was asked to accompany them. Kelly got into the car in order to go but then decided to stay behind—which he did. The appellant thought that Kelly was " hanging around Joan ". He (the appellant) called his wife to the car and told her to go inside the dwelling and to work there so that Kelly would not " hang around ". Craig and the appellant were away until shortly after one o'clock in the afternoon. When they returned they saw the appellant's wife and children, Mrs. Craig and the Craig children and Kelly proceeding together to a nearby dam upon the property: they were going for a swim.

The appellant whistled to his wife and called out something in Maori and she stopped: the appellant drove over to her and talked to her. About an hour afterwards when all concerned were back at the Craigs' dwelling the appellant said to Craig " I think there is something going on " and Craig later heard the appellant say to Kelly " Why can't you find a single girl? Have you no principles?" Kelly made reply " I lost my principles years ago ". Craig's evidence was that thereafter the appellant had a private talk with his wife outside the house and that subsequently the appellant spoke to him (Craig) and said " She is leaving with Dan, and if she does I will get him. There are a lot of dark nights, and one of these dark nights I will be waiting for him." A few minutes later when Craig was with the appellant and the appellant's wife and their six children the appellant told his wife that he had got work at Albury which he was to commence the following week. The children all said that they would like to go to Albury but the wife replied " It is no good Frank " and walked away. The appellant in his evidence stated that his wife said " It is no use Frank, I could not stop with a man I don't love. I am in love with Kelly. Three days ago we made arrangements to run away together. We didn't tell you because we did not want to hurt you." In his evidence Craig said that the appellant had asked him to tell the deceased to go away. Craig had done so. The appellant himself also told the deceased to get going while he was lucky. During one conversation between the appellant and the deceased the latter who, in contrast to the appellant, was a heavily-built powerful man, had said something to the effect that he could take the appellant's wife in one hand and beat the appellant with the other. Upon a mention by the appellant that his wife was a quarter-caste Maori the deceased had said that he " had never had a quarter-caste Maori before " and that " they ought to be pretty good."

There was evidence that the appellant was in a state of great emotional shock at the prospect of his wife's leaving him and their children. At one moment Craig saw the appellant take a broken rod from an old Ford car and after cutting the end of it off proceed to file it. Craig wrenched it from the appellant and told him to pull himself together and to think of the children. The appellant had replied " I won't be here to look after the kids—Joan will —and that other bastard will not be either." The appellant went down to a place near some trees where he sobbed and cried. In the meantime the appellant's wife had gone away. She went in the direction of a road to which the deceased had already gone and where he had left his bicycle. She joined the deceased and together they set off for the deceased's quarters: she sat on the main frame of the deceased's bicycle. Craig in his evidence gave a general description of the appellant's conduct in the time before his wife departed and said that he was very upset emotionally. Craig had formed the opinion that the appellant was deeply in love with his wife and had deep affection for his children in whom he took great pride.

Shortly after the appellant's wife had left the appellant entered his motor car and drove down the roadway which led towards the deceased's quarters. This was probably at about 3.0 p.m. The appellant then overtook his wife and the deceased. What then occurred was later described by the appellant.

At about 3.50 p.m. a police officer at Jerilderie received a telephone message from the appellant in the course of which he said " I have just killed a boy, will you come out and bring a doctor, I do not want my wife to die, and she is hurt bad." The appellant gave the police an account of the place where his wife was and said that he had forced an entry into the residence of a Mr. Little in order to make the telephone call. The police officer set out to the scene and made arrangements for a doctor to proceed there.

A Mr. Jukes gave evidence that the appellant hailed him on the road and said that he had run over a man and thought he had killed him and that he was waiting for the police to come. Together they went to the scene and then drove along the road to Jerilderie and sought out the police. In the course of the journey the appellant who was " just sort of crying to himself " gave an account of what he had done saying that he had run over the deceased on purpose and thought that he had killed him outright but had got out of his car and " bashed him up and then stabbed him " adding that if he had

thought of it he would have cut his head off. He made a statement to the effect that he had meant the deceased to be dead. Jukes added " The main thing he seemed to be worried about was hitting his wife."

In the meantime in response to the appellant's telephone message the police and a doctor had gone to the road position which the appellant had described. The police officer found the dead body of Kelly. Some distance away he saw the appellant's wife. She was injured but she was conscious. On the deceased there were numerous wounds to the face, throat and chest: some were consistent with having been caused by a knuckle-duster and some by a knife: both legs of the deceased were broken below the knee.

The police officer whom the appellant saw in Jerilderie gave evidence that the appellant said that he had intended to kill the deceased but had not meant to hurt his wife. In interviews with that and another police officer the appellant gave an account of the events of the afternoon and made statements to the effect that he had intended to kill the deceased: at one stage he said " I meant to kill him, but I did not want to hurt my wife. Thank God she is all right. The bastard was trying to break up our marriage and I meant to kill him. I am not sorry that I did it. He was trying to take my wife from me and the kiddies." Being asked by the police whether he had ever suffered from any mental illness he replied that he had not and added " I knew what I was doing as well as I know what I am doing now. I set out to kill him and I meant to kill him and I am not sorry at all that I did it." The appellant made a long written statement to the police which he signed at 11.30 p.m. that evening (Sunday the 16th October). In the course of it he described the events of the previous week as from the time that he and his wife had met the deceased. In the concluding part of it he gave an account of the final events which lead to the death of the deceased. It ran as follows:

> " The children asked the wife to stop and she wouldn't stop and Kelly was sitting outside grinning his head off and I turned around and started to get wild and I said to the brother-in-law it is time that Kelly got off the property and I said to Noel that if it had been my place from the word go I would have stopped Kelly from coming there as I knew what type of bloke he was, then Noel told Kelly to go and Kelly stopped around for a while and while he stopped there I put my fist through wind deflector on my car. I was getting that wild and I told him myself that he had better shoot through and he went up to the roadway and waited for the wife at the roadway and after he went away the wife I don't know whether she would be right up to the roadway or not I started the car up and drove up the road getting up the road I seen Kelly doubling my wife on his pushbike and as I got up closer to them they both got off the bike then stood alongside the road, he was standing on the gravel and the wife was standing on the grass. I aimed the front left hand mud-guard at him and the bike after I hit him I swerved and put my foot down on to the accelerator as I was going off the road and I went through a greasy boggy patch and then swerved up over the wrong side of the road with the nose of my car facing towards the table drain. I got out of the car and I looked for the wife and at first I couldn't see her and when I first seen her she was laying in the table drain face down and I thought that I had killed her. I done my block, lost my temper, and walked to where Kelly was and started hitting him, then I heard the wife moan and struggling in the water. I left Kelly and pulled the wife out of the table drain and she was in agony then. It flashed through my mind that if it had not been for Kelly I wouldn't have injured the wife, I pulled out my knife that I had in my belt and went back and stabbed him in the throat. After I done that the wife struggled and tried to sit herself up on the bank. I pulled her up further and told her to lay still and from there I went over to Johnny Littles through the paddock and when I got to Johnny Littles he was not there."

He then recounted his telephone call, his meeting Mr. Jukes and his drive to Jerilderie.

The appellant gave evidence on oath at the trial. In the course of his examination the appellant testified as follows:

" Q. You said you went in the car to get your wife to come back to the children. Do you recall when you left the camp what was your state of mind towards Kelly? A. I was not thinking of Kelly, all I was thinking about was getting the wife back and taking her back to the children. As regards Kelly I cannot explain anything, I cannot explain my feelings towards him. I had one set purpose in my mind when I left, the children, and that was to bring their mother back to them and stop her running away.

Q. Did you have any intention to hurt Kelly or do anything to Kelly that you can remember? A. Definitely not. Definitely I might have had intentions of having a fist fight with him or trying to have a fist fight with him, or maybe to hurt him some way, but definitely no other intentions whatsoever.

Q. When you got in the car do you remember anything about the knuckle duster you kept in the car? A. No, I do not remember at all. I could have picked it up when I got in the car. On that I am not really quite sure. All I do know is when I got out of the car apparently I had it with me.

Q. You say 'apparently'. Can you tell us when you came up, as you have told us in the dock you came up, to the spot where Kelly and your wife were standing on the side of the road—do you recall that? A. Yes.

Q. Do you remember how and where they were standing on the roadway and what they were doing? A. I cannot recall that quite well. I was driving up the left hand side of the road. The wife was standing on the grass, what I took to be the grass at the side of that roadway, and Kelly would be standing on the gravel. Say for argument sake I am facing you now and you are coming towards me, she would be on his right hand side.

Q. How was he standing? Was he side-on to the road, or how was he? Do you remember the details of the position in which he was standing? A. As I was coming up to them he was standing more or less as I am now, and I came up more or less from behind.

Q. You came up more or less behind him? A. Yes.

Q. Do you recall whether they had their heads turned towards you or were looking at you or anything like that, or can't you recall? A. Yes, vaguely I can.

Q. As you came up to them did something happen to you as you came up close to them? A. Yes, when I was driving up towards them myself, closer and closer, they were just standing there and I was driving up closer and closer all the time, and everything seemed to just go black.

Q. What happened after that? What do you remember after that? A. I lost control of the car just then and thinking back deeply, more still now while standing here, I have a vague recollection of a voice saying to me 'Frank, what is the matter with you?' The next thing I know I am over the other side of the road and the car is stopped.

Q. Do you recall what happened then, or is there anything about it at all that you can tell us about your recollection of what took place then? A. I got out of the car. I expected to see the wife standing there. I do not know, just I thought she would be standing there. I went to run over to her and she was not there, and I hesitated. I ran over and the further I got to the crown of the road I saw the wife laying face down on the table drain facing towards me. Kelly was lying up on the bank a bit further away from her. I do not know then, I just seemed to lose more or less control of myself, and I raced over and I started hitting him and bashing him with the knuckle duster. I can remember part of that pretty well. All of a sudden there was a moan and groan behind me. Something stopped, I stood up straight and looked around and here was the wife trying to push herself up out of the water. I went straight to her and pulled her from the water to the bank her head at my feet, and she collapsed.

From then on I do not know what really happened. The next thing I do really remember was the wife again trying to sit up, I went back to her and pulled her up further away from the water and told her to lay still and I would

go and get help. It was while I was going over to get help that things started to really penetrate and come back to me. Things that seemed unreal. I started thinking.

Q. What do you mean by that? A. It started to come back really that I seemed to visualise I had stabbed a chap and it started to come back and I remember as though I had stabbed him. Yet again it was not me that stabbed him. It was just as if I had been standing back and was looking on at myself stabbing him. That went on passing through my mind."

The direct or immediate question which is raised in the appeal is whether the issue of provocation should have been left to the jury: involved in this are the questions of general importance as to the effect of section 23 of the Crimes Act 1900 and as to the direction to be given to a jury in New South Wales if provocation is left to them.

As already stated section 23 is a re-enactment of section 370 of the Act of 1883. There can be no doubt that before 1883 it was accepted law that in certain circumstances a killing which followed upon provocation was manslaughter and not murder. The classical definition of murder recorded in Cokes Institutes (Inst. 3. p. 47.) included the words "unlawfully killeth . . . with malice fore-thought, either expressed by the party or implied by law." Malice prepensed was said to be "when one compasseth to kill, wound, or beat another, and doth it sedato animo. This is said in law to be malice forethought, prepensed, malitia praecogitata." One example of malice implied was said to be "as if one killeth another without any provocation of the part of him that is slain." It would seem therefore that there was "malice fore-thought" when there was premeditation. There could however be the necessary malice to sustain a charge of murder if there was a deliberate killing "without any provocation". In the notable case of *R. v. Mawgridge* in 1706 (Kel. J. 119) where the charge was one of murder the jury found a special verdict and prayed the advice of the Court whether on their findings of fact the case was one of murder or of manslaughter. Though before the day appointed for the resolution of the Court the prisoner had escaped, the opinion of the Judges (which was that the prisoner was guilty of murder) was given in a learned judgment. In the course of it it was said "Therefore when a man shall without any provocation stab another with a dagger or knock out his brains with a bottle this is express malice for he designedly and purposely did him the mischief." The judgment proceeded to consider "what is in law such a provocation to a man to commit an act of violence upon another, whereby he shall deprive him of his life, so as to extenuate the fact and make it to be a manslaughter only." Examples were given of circumstances which were "always allowed to be sufficient provocations." The cited examples would seem to include cases where there may have been or must have been an intention to kill.

In *Maddy's Case* (1 Ventris 159) where the charge was that of murdering one Mavers the jury found a special verdict to the effect that upon coming into his house Maddy had found Mavers in the act of adultery with his (Maddy's) wife and had immediately taken up a stool and struck Mavers on the head so that he died instantly. The jury found that Maddy had no "precedent malice" towards Mavers. The Court held that the case was one of manslaughter "the provocation being exceeding great and found that there was no precedent malice." It would seem to be clear that in employing the words "precedent malice" it was not being suggested that there was no intention to kill or to cause grievous bodily harm but rather that the accused had had no such intention prior to the time when he suddenly discovered Mavers in the act of adultery.

Many decided cases could be cited which showed in the period prior to 1883, that where provocation existed a crime could be reduced from murder to manslaughter even though the provocative act induced an intention to kill. The provocative act had to be such as was likely to arouse passion in the breast of a reasonable man and which did in fact arouse it in the accused so that his conduct resulted from his being suddenly though temporarily deprived of his power of self control and rendered not master of his mind.

To be attacked by blows might induce a killing which constituted the crime of manslaughter rather than murder. Insulting words, on the other hand, which led to a killing, were not sufficient to lessen the crime from one of murder to one of manslaughter (see e.g. *R. v. Taylor* (1771) 5 Burr 2793).

Without referring more elaborately to authority their Lordships consider that the background against which the Legislation of 1883 has to be considered is that a killing which took place when provocation caused the power of self-control to be overwhelmed by the heat of passion could constitute the crime of manslaughter rather than that of murder even though there might be an actual intention to kill produced by the provocation. Section 370 of the Act of 1883 effected certain changes. A jury could thereafter hold that if an act causing death was induced by the use of grossly insulting language or gestures on the part of the deceased the crime might be manslaughter rather than murder for the reason that the grossly insulting language or gestures could be held to have provoked just as a blow could be held to have provoked. The next part of the section enacted what is now subsection 2 of section 23 of the Crimes Act. That sub-section is not in its application limited to cases where provocation results from language or gestures rather than from a blow or blows: the sub-section refers to any trial of a person for murder. Nor is the proviso limited to any particular class of case where provocation comes in question. It applies whenever the facts warrant an examination by the jury of the question whether provocation could " reduce " a crime from murder to manslaughter. The proviso does not purport to define provocation nor to prescribe or categorise every one of the elements of provocation. It states that " in no case " can there be the reducing factor of provocation unless a jury find three things. They must find that the accused did not himself engineer the provocation or in other words that it " was not intentionally caused by any word or act " of his. Next they must find that the provocation was reasonably calculated to deprive an ordinary person of the power of self-control and that it did in fact so deprive the accused. Thirdly they must find that the act which caused the death " was done suddenly in the heat of passion caused by such provocation, without intent to take life." It is the last five words which have occasioned difficulty and a difference of judicial opinion.

It is clear that if (in a case where no question of provocation arises) the act of an accused person which causes death is done with intent to inflict grievous bodily harm, though not with intent to kill, the crime of murder is committed. (See section 18 of the Crimes Act 1900.) In dealing with provocation section 23 does not refer to an intent to inflict grievous bodily harm: it refers to an absence of " intent to take life." It would seem therefore that if the words of section 23 are construed according to the strictest possible literal interpretation then provocation could reduce the crime of killing from murder to manslaughter if the loss of self-control caused by the provocation induced an intent to cause grievous bodily harm but not if it induced an intent to take life. This would be a surprising distinction and also it would impose upon a jury the very difficult task of assessing with some precision the quality or quantity of the intent which, at a particular moment, actuated a man who, ex hypothesi, was deprived of the power of self-control.

If the most limited and most literal construction of the words of the proviso to section 23 is adopted it seems to their Lordships that even on that basis the issue of provocation ought not in the present case to have been withdrawn from the jury. On that basis it was open to the jury to say that though the act causing death was done with intent to cause grievous bodily harm it was not done with intent to take life. Their Lordships have referred to the evidence which was given. It was for the jury to determine what was the " act causing death ": it was for them to determine whether it was done suddenly in the heat of passion caused by provocation and without intent to take life. It was for them to consider the nature and duration of the provocation and whether it was reasonably calculated to deprive an ordinary person of the power of self-control and whether the appellant was so deprived and whether he continued to be so deprived at the time that he committed the act causing the death of the deceased. The jury might well have taken the view that the

appellant was tormented beyond endurance. His wife whom he loved was being lured away from him and from their children despite protests, appeals and remonstrances. In open defiance of his grief and his anguish his wife was being taken by one who had jeered at his (the appellant's) lesser strength and who had spoken with unashamed relish of his lascivious intents. Though there was an interval of time between the moment when the appellant's wife and the deceased went away and the moment when the appellant overtook them and then caused the death of the deceased a jury might well consider and would be entitled to consider that the deceased's whole conduct was such as might " heat the blood to a proportionable degree of resentment and keep it boiling to the moment of the fact " (see East's Pleas of the Crown p. 238). Furthermore even if it had to be considered whether or not there was intent to take life at the very instant of committing the " act causing death ", there was divergent evidence as to such matter. The issue was for the jury who were the judges of all questions of fact. Their Lordships are unable to share the view of those who considered that there was no issue for the jury or that what occurred both before and after the deceased had been knocked down by the accused's car left no room for doubting that the accused killed the deceased intentionally. There was much evidence which if accepted by the jury was very damaging to the accused. His evidence at the trial, however, summarised above, was to the effect that he had no intention of killing the deceased.

Their Lordships consider that whatever view is accepted as to the construction of the proviso to section 23 the case ought not to have been withdrawn from the jury. Indeed the learned Solicitor General for New South Wales (for whose assistance the Board is much indebted) did not resile before their Lordships from the position which he adopted before the High Court of Australia namely that the issue of provocation should have been left to the jury at the trial.

It would be sufficient for the determination of this appeal for their Lordships, agreeing with the conclusions of Dixon C. J. and Windeyer J., to hold that the appeal should be allowed for the reason that the issue of provocation should on any view have been left to the jury. Their Lordships consider however that they should express their conclusions more fully both as to the meaning of the proviso and as to its effect upon questions concerning the onus of proof.

In arriving at a conclusion as to the meaning of the relevant words in the proviso it is not unreasonable to have regard to the law concerning provocation as it had been laid down and as it was for the most part accepted before 1883. Reference may be made to East's Pleas of the Crown (1803) —where at page 232 it is stated that " whenever death ensues from sudden transport of passion or heat of blood if upon a reasonable provocation and without malice or if upon sudden combat it will be manslaughter." By " malice " the learned author meant, as he said, " express malice ".

Their Lordships have come to the conclusion that the relevant language in the proviso to section 23 should not be taken to have intented a disturbance of principles which were well recognised and long established. In argument the learned Solicitor General was prepared to concede that some qualification of the word " intent " must be accepted. He was prepared to accept " definite " or " conscious " or " formed " or " specific " or " actual " or (less readily) " deliberate ". He was not disposed to accept the epithet chosen by Dixon C. J. namely " premeditated ". Their Lordships consider however that in its context the word " intent " must denote a purpose of the accused which is distinct from a purpose which is the product of a state of passion caused by a provocative act. The words " without intent to take life " in the proviso must be regarded as an essential part of the larger formula which is contained in the words of paragraph (c). In agreement with Windeyer J. their Lordships consider that those words form a single composite description of an act which is provoked and that the words should not be read as if, broken into parts, they stated several matters to be considered separately and independently of one another. Something which is done " suddenly " and " in the heat of passion " caused by provocation is, as it were, something done automatically or impulsively and at a time when there is a temporary suspension of the

reason: an act so done is not controlled or planned or preconceived or deliberate. It would seem therefore that the concluding words in paragraph (c) were designed to cover an intent which in whole or in part does not arise from the passion and which is unrelated to the provocation and is not caused by it. As already indicated it has long been recognised that the defence of provocation may apply even where an intent to kill has been created. When in delivering the judgment of the Board in *Attorney-General for Ceylon v. Kumarasinghege Don John Perera* [1953] A.C. 200 Lord Goddard at page 206 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 " new doctrine was not being proclaimed. (See also *Lee Chun-Chuen v. The Queen* [1963] A.C. 220.) It would seem most unlikely that the words now being considered were designed to change the law so as to take away much of the substance of the conception of provocation as a reason for reducing a crime from murder to manslaughter. Their Lordships would therefore accept the adjective used by Dixon C. J., namely " premeditated " understanding that what is thereby meant is that the homicidal act was the result of the passionate impetus caused by the provocation (assuming always that the conditions of paragraphs (a) and (b) are satisfied) and that it was not done pursuant to an " intent " to take life which was either formed previously to or was formed independently of the provocation. Just as under paragraph (a) the provocation must not be intentionally caused by the accused so under paragraph (c) some provocative act must not be seized upon by an accused (who does not as a result act suddenly and in the heat of passion) as providing an appropriate moment and a convenient excuse for carrying out some previously existing purpose or acting upon an old grudge.

If the evidence given in a case contains some reasonable evidence of provocation i.e. some evidence fit for the consideration of the jury then the issue of provocation must be left to the jury even though the issue has not been specifically raised by the defence. (See *R. v. Mancini* [1942] A.C. 1, *Bullard v. The Queen* [1957] A.C. 635, *Kwaku Mensah v. The King* [1946] A.C. 83, *R. v. Hopper* [1915] 2 K.B. 431.) Whether in any case there is evidence fit for consideration by a jury on a particular matter is a question of law. A Judge may therefore in some cases properly withdraw any question of provocation from the jury (see *Holmes v. D.P.P.* [1946] A.C. 588 at p. 597 and *Kwaku Mensah v. The King* [1946] A.C. 83 at p. 92) but for the reasons which they have given their Lordships consider that in the present case the issue should have been left to the jury.

It remains to consider what effect the proviso has in New South Wales upon the question of the burden of proof in a trial for murder where the issue of provocation arises. It seems to their Lordships that the duty which lies upon the prosecution to prove the guilt of an accused person beyond reasonable doubt is not affected save to the extent that section 23 lays it down that there can only be a reduction from murder to manslaughter by reason of provocation if the jury positively find that the requirements of paragraphs (a) and (b) and (c) of the proviso are satisfied. The duty and onus of the prosecution to negative provocation is to that extent lightened for the reason that provocation may only be found if the evidence in a case entitles a jury to find that the requirements of the proviso are satisfied. To that extent there is in such cases an onus cast upon the accused but such onus does not require proof beyond reasonable doubt but is satisfied if on a consideration of the evidence and if on the balance of probabilities the jury consider that the requirements of the proviso are satisfied. In such cases and if the prosecution have not otherwise negatived the possibility of provocation then the jury may reduce a crime from murder to manslaughter.

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In the Privy Council

FRANK PARKER

v.

THE QUEEN

DELIVERED BY

LORD MORRIS OF BORTH-Y-GEST

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