

Privy Council Appeal No. 7 of 1968

Glasford Phillips – – – – – *Appellant*

v.

The Queen – – – – – *Respondent*

FROM

THE SUPREME COURT OF JUDICATURE OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE
15TH OCTOBER 1968

Present at the Hearing :

LORD HODSON

LORD GUEST

LORD DIPLOCK

[*Delivered by* LORD DIPLOCK]

On 24th April 1967 the appellant killed with a machete his mistress who had brought her liaison with him to an end about one week earlier. Three days before the killing he had had a dispute with the victim in the course of which he offered violence to her. On the occasion of the killing he was not himself engaged in any altercation with her but was present at a quarrel between the victim and his mother in the course of which each spat at the other. The appellant then seized a machete from a bag which his mother was carrying and with it rained six blows upon the victim as a result of which she died.

At his trial the appellant did not give evidence on oath but made an unsworn statement in which he claimed that after his mother had been spat upon he turned round quickly to punch the victim with his hand but received a blow at the side of his head which rendered him dizzy. He had no recollection of what happened for the next two minutes during which the killing took place.

The defence presented on his behalf at the trial was that of automatism. His counsel expressly disclaimed any reliance upon provocation, but Mr. Justice Smith, taking the view that there was evidence on which the jury could find that the appellant was provoked to lose his self-control, and mindful, no doubt, of the admonition of the House of Lords in *Mancini v. D.P.P.* [1942] A.C. 1, thought it right to direct the jury on provocation as well as upon the defence on which alone the appellant's counsel had relied. It was upon the ground that part of his direction upon provocation was erroneous in law (together with a further ground that is no longer material) that the appellant sought leave to appeal to the Court of Appeal of Jamaica. That Court upheld the appellant's contention that the direction to the jury on provocation was wrong in point of law, treated the application as the appeal but dismissed it under the proviso to section 16(1) of the Jamaica Judicature (Court of Appeal) Law Chap. 178 as they considered that no substantial miscarriage of justice had actually occurred.

Section 3c of the Jamaica Offences against the Person (Amendment) Law No. 43 of 1958, contains a provision identical with that contained in section 3 of the United Kingdom Homicide Act 1957: viz.

“Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.”

The learned judge's direction to the jury upon provocation was thorough and no complaint was made of most of what he said. The passage which the Court of Appeal held to be erroneous came towards the end of this part of the summing-up and was in the following terms:

“When you are considering this question of provocation there is one other matter that you have to **consider**. If you are satisfied, if you find that the accused did commit the act as a result of provocation, you will have to consider the retaliation as against the type of provocation that he received. You have to determine whether the provocation under which the accused was labouring was enough to make a reasonable person do as the accused did. In deciding this question you must consider the provocation received and the manner of the retaliation, and ask whether a reasonable person provoked in the way that the accused was provoked would retaliate in the way that the accused retaliated. If a reasonable person would not retaliate in the way that the accused retaliated, the defence of provocation cannot avail the accused because the standard fixed by law is that of the reasonable man, and you, the jury, must be satisfied not only that the accused was so provoked that he lost his self-control and retaliated, but that a reasonable person would have lost his self-control in the same circumstances and do as the accused did. So, if you find that he was provoked by these circumstances that I have told you about, or any other circumstance in the case which you think fit, you will have to consider whether a reasonable person would retaliate in the way that the accused retaliated, and if a reasonable person would not retaliate in that way because of that type of provocation, then the defence of provocation is not made out. In other words, it would not avail the accused.”

The Court of Appeal treated this passage as being similar in effect to directions which had been held to be objectionable by the Court of Appeal of Jamaica in an earlier unreported case *R. v. Donald Bennett* decided on 3rd May 1967. In that case the trial judge in the course of his summing-up had twice directed the jury that the retaliation must bear “some proper and reasonable relationship” to the provocation received. This direction the Court of Appeal had held to be erroneous upon the ground that “the learned trial judge was treating the principles of reasonable relationship as an element of provocation thereby directing the jury that if the act of the appellant did not bear a reasonable relationship to the words which the appellant complains were used to him, then the jury could not find there was provocation”.

It is to be observed that in the passage complained of in the instant case the learned judge left it fairly and squarely to the jury to decide whether or not any reasonable man would react in the way in which the appellant had reacted to the provocation which the appellant had received. He avoided the more abstract expression “reasonable relationship” which had been condemned by the Court of Appeal in *R. v. Donald Bennett*. In a subsequent unreported case, however, *R. v. Samuel Gray* 15th May 1968 the Court of Appeal of Jamaica upheld a direction to the jury very similar in terms to that now complained of but which also included the sentence: “The mode of the resentment must bear a reasonable proportion to the provocation” though in a general context which made it plain that it was for the jury to form their own opinion as to whether the provocation was enough to make a reasonable man do as the accused did. The membership of the Court of Appeal which decided *R. v. Samuel Gray* included one who had been a party to the decision in *R. v. Bennett* and one who had been a party to the decision in the instant case. They expressly acknowledged that their decision was in

conflict with the two previous cases. It was because of this conflict of judicial opinion in Jamaica that their Lordships on 19th March 1968 advised that special leave to appeal should be granted in the instant case.

In their Lordships' view it is beyond question that at common law by which the matter was regulated both in Jamaica and in England until the legislation cited above the relationship between the degree of retaliation and the nature of the provocation was a relevant factor in determining whether the offence proved was manslaughter and not murder. It is sufficient to refer to the words of Viscount Simon L. C. in the House of Lords in *Mancini v. D.P.P.* (*ubi sup*) with whose speech the rest of the House agreed. "In short", he said at page 9 "the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter." This is an elliptic way of saying that the reaction of the defendant to the provocation must not exceed what would have been the reaction of a reasonable man.

In their Lordships' view the only changes in the common law doctrine of provocation which were effected by section 3c of the Jamaica Offences against the Person (Amendment) Act No. 43 of 1958 were (1) to abolish the common law rule that words unaccompanied by acts could not amount to provocation and (2) to leave exclusively to the jury the function of deciding whether or not a reasonable man would have reacted to the provocation in the way in which the defendant did. These two changes are inter-related.

The test of provocation in the law of homicide is two-fold. The first, which has always been a question of fact for the jury assuming that there is any evidence upon which they can so find, is "Was the defendant provoked into losing his self-control?" The second, which is one not of fact but of opinion, "Would a reasonable man have reacted to the same provocation in the same way as the defendant did?"

In *Holmes v. D.P.P.* [1946] A.C. 588, the case which finally decided that even a sudden confession of adultery could not amount to provocation at common law, it was laid down that although the second question was also one for the jury it was nevertheless the function of the judge to make a preliminary ruling as to whether or not the provocation was such as *could* provoke a reasonable man to react to it in the way in which the defendant did. It was this decision, not that in *Mancini v. D.P.P.* which was reversed by the English legislation of 1957 and the Jamaican legislation of 1958.

In their Lordships' view section 3c of Law No. 43 of 1958, in referring to the question to be left to be determined by the jury as being "whether the provocation was enough to make a reasonable man do as he [sc. the person charged] did" explicitly recognises that what the jury have to consider, once they have reached the conclusion that the person charged was in fact provoked to lose his self-control is not merely whether in their opinion the provocation would have made a reasonable man lose his self-control but also whether, having lost his self-control, he would have retaliated in the same way as the person charged in fact did.

Before their Lordships, counsel for the appellant contended, not as a matter of construction but as one of logic, that once a reasonable man had lost his self-control his actions ceased to be those of a reasonable man and that accordingly he was no longer fully responsible in law for them whatever he did. This argument is based on the premise that loss of self-control is not a matter of degree but is absolute; there is no intermediate stage between icy detachment and going berserk. This premise, unless the argument is purely semantic, must be based upon human experience and is, in their Lordships' view false. The average man reacts to provocation according to its degree with angry words, with a blow of the hand, possibly if the provocation is gross and there is a dangerous weapon to hand with that weapon. It is not insignificant that the appellant himself described his own instantaneous reaction to the victim's provocation in spitting on his mother as "I spin around quickly was to punch her with my hand".

In that part of his direction which the Court of Appeal held to be objectionable, the learned judge followed closely the actual words of the section and made it clear to the jury that it was their responsibility, not

his, to decide whether a reasonable man would have reacted to the provocation in the way that the appellant did. In their Lordships' view this was an impeccable direction.

Since the passing of the legislation it may be prudent to avoid the use of the precise words of Viscount Simon's in *Mancini v. D.P.P.* "the mode of resentment must bear a reasonable relationship to the provocation" unless they are used in a context which makes it clear to the jury that this is not a rule of law which they are bound to follow, but merely a consideration which may or may not commend itself to them. But their Lordships would repeat it is the effect of the summing-up as a whole that matters and not any stated verbal formula used in the course of it.

As already pointed out the learned judge in the instant case did not use the *Mancini* formula at all. He made it abundantly clear to the jury that it was their function and theirs alone to decide whether or not a reasonable man would have reacted to the provocation in the way the appellant did. In their Lordships' view the Court of Appeal of Jamaica should have dismissed the appeal on the ground that there was no error in the summing-up on provocation. The question of the application of the proviso to section 16 (1) of the Jamaica Judicature (Court of Appeal) Law, does not therefore arise.

At the hearing before their Lordships two additional grounds of appeal were argued which had not been advanced in the Court of Appeal of Jamaica. Complaint was made of the summing-up on the defence of automatism. It is sufficient to say that in their Lordships' view the learned judge summed up the evidence fully and fairly and gave an accurate direction on the law relevant to this issue. It was also contended that the learned judge ought to have insisted on himself calling a doctor whose name was mentioned at the trial by counsel for the appellant but whom that counsel expressly elected not to call. In their Lordships' view this contention was misconceived.

For these reasons their Lordships humbly advised Her Majesty that this appeal should be dismissed.

In the Privy Council

GLASFORD PHILLIPS

v.

THE QUEEN

**DELIVERED BY
LORD DIPLOCK**