[COURT OF CRIMINAL APPEAL]

1951 *Present :* **Nagalingam J. (President), Basnayake J. and Gunasekara J.**

NAIDE, Appellant, *and* THE KING, Respondent

APPEAL 58 OF 1951, WITH APPLICATION 84

*S. C. 15—M. C. Kurunegala, 454*

*Austin Jayasuriya* for the accused appellant.

*T. S. Fernando*, Crown Counsel, with *Boyd Jayasuriya*, Crown Counsel, for the Crown.

*Cur. adv. vult.*

NAGALINGAM J.—

The appellant in this case has been found guilty of the offence of murder and has been sentenced to death. The only point raised at the hearing of this appeal is that the accused has been prejudiced as a result of a misdirection in the charge of the learned trial Judge.

It would be advantageous to set out very briefly the salient facts necessary for a proper appreciation of the point debated at the Bar. The appellant made an unsworn statement from the dock in the course of which he admitted having stabbed the deceased woman, his sister-in-law. He also narrated the circumstances under which he inflicted the injuries. He said that he had come home that morning from the field hungry and asked his sister-in-law for rice. According to him, the deceased woman abused him saying, " I am not going to serve you rice; you had better obtain your rice from your own mother ", using the word " tho ". The appellant says he then was making his way into the kitchen to serve himself a meal of rice when the deceased woman came at him with an eakle broom, abused him and struck him with it and that while he was being so abused and struck with the eakle broom he picked up a knife that was on the floor of the kitchen and stabbed the deceased several times as he was provoked. The injured woman in her dying deposition, however, gave a different version of the incidents that led up to the injuries being inflicted on her. According to her, on the morning of the day in question while she was alone in the house the appellant attempted to outrage her modesty, she resisted and the appellant stabbed her in consequence.

The learned trial Judge very carefully dealt with all the aspects of the case and in regard to the defence set up on the ground of grave and sudden provocation directed the jury as follows (I have for convenience of reference separately lettered various parts of this passage):—

A. " In his story he tells us that the trouble first arose near the kitchen. He was angry and he was abused, contemptuously abused when he asked for a plate of rice. Nevertheless he decided to get the rice for himself, whereupon this woman came at him with an eakle broom, abused him again and struck him. That is the grave and sudden provocation which he asks you to accept as sufficient to reduce the offence to one of culpable homicide not amounting to murder. The question as to whether the provocation offered, assuming that you believe it was offered, was sufficient to deprive him of his self-control so that under the influence of that provocation he acted as he did is a matter entirely for you to decide.

It is important that you should not forget the emphasis that the law places on the need that the provocation should be grave. It must be provocation of a kind that a man belonging to the class of society to which the accused belongs would reasonably be expected to resent, and it must be provocation of such gravity as one would expect a person of that class to resent so deeply as to temporarily deprive of the power of self-control."

B. "Now, making every allowance for the person provoked you must ask yourselves whether the mode of resentment, even if you accept the whole of the accused's story as true, was or was not grossly disproportionate to the nature of the provocation given."

C. "Let me read out to you a passage from a recognised text book on the Indian Law dealing with exceptions on grave and sudden provocation which is similar to the Section in our Penal Code."

D. "This is what is said: 'It must not, however, be understood that any trivial provocation, which in point of law amounts to an assault, or even a blow (and according to our law even abuse may be regarded as provocation) will as a matter of course reduce the crime of the party killing to manslaughter. But where the punishment inflicted for a slight transgression of any sort is outrageous in its nature either in the manner or the continuance of it and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty'."

E. "So you have the accused's version of the kind of provocation given and we have the medical evidence as to the manner in which he gave effect to his resentment of that provocation. Ask yourselves whether in your opinion you can conscientiously hold that the gravity of the provocation alleged to have been offered was sufficient to reduce the offence to one of culpable homicide not amounting to murder."

No objection has been and in fact can be taken to the passage A which quite properly and correctly sets out the method of approach that the jury should adopt in dealing with this plea. Objection, however, is taken to the entirety of the rest of the passage excerpted. Appellant's Counsel contends that the passage B in particular lays down the law more widely than is warranted by the provisions of the first exception to section 294 of the Penal Code.

First of all what is the meaning to be attached to this passage B? It seems to me that appellant's Counsel's contention is correct that the jury were invited in this passage to consider whether the gravity of the provocation should not be measured by reference to the mode of resentment as well, that is to say, as the learned Judge in the passage E clearly indicates, the question of gravity had to be viewed from the mode or manner in which the person provoked attacked the person giving him the provocation and if they found that the nature of the attack was so brutal that one might say it was disproportionate to the provocation given, then the provocation would cease to be grave and not be capable of being regarded as entitling the accused person to the plea of grave and sudden provocation.

In order to entitle a person under our law to the benefit of exception 1 to section 294 it would be sufficient if he can establish that he was (1) deprived of the power of self-control, not anyhow but (2) as a result of grave and sudden provocation. There is nothing in the language of the exception which would enable one to say that the benefit of the exception will not be available to an accused person if he had acted brutally in retaliation of the provocation given to him.

Exception 4 to the same section may be contrasted profitably with exception 1. Under exception 4, although culpable homicide may have been committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, yet if it is shown that the *offender had taken undue advantage or acted in a cruel or unusual manner*, he would lose the benefit of the exception. No such qualifying words are to be found in regard to exception 1.

Apart from this aspect of the matter a little reflection would show that the plea of grave and sudden provocation is one that is put forward by an accused person. When he puts forward such a plea he is entitled to give evidence of all circumstances from which a Judge or jury may draw the inference that he had been offered grave and sudden provocation. It seems to me wholly untenable to say that the nature of the retaliatory act has any bearing on the question whether the offender received grave and sudden provocation. Provocation is something offered or given to the offender and must proceed from an adversary and cannot proceed from the offender himself. It is fallacious to say that the offender had been given provocation by

something he himself had done, for what the offender does is the result of the provocation received and not what induces or contributes to the provocation caused or given. To my mind it is clear that the brutality with which the resentment of the offender is carried out is foreign to the question whether he received grave and sudden provocation, while it may probably have a bearing on the question whether the offender was deprived of the power of self-control in consequence of having received provocation; but it is unnecessary to decide that point here. It is for a jury to say whether all the facts established by the offender lead to the conclusion, which is one of fact, that the offender has been given grave and sudden provocation. If the jury is asked to decide the question of the gravity of the provocation given by taking into consideration the nature of the retaliatory act of the offender, at once factors and elements altogether irrelevant to the question before the jury are admitted and must necessarily tend to warp their judgment.

The learned trial Judge proceeded to quote a passage from a text book, and that is the passage lettered D. This passage appears to be taken from Ratanlal [1]; the citation itself is an excerpt from an English case [2], and the citation concludes in Ratanlal with these two sentences:

> "It is one of the true symptoms of what the law denominates *malice;* and therefore the crime will amount to murder *notwithstanding such provocation.*"

In order to appreciate the citation one must turn to the English Law on the subject of provocation. The English Law is very authoritatively laid down by Viscount Simon in the recent House of Lords case of *Holmes v. Director of Public Prosecution* [3]:

> "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 will be apparent from this passage that under the English Law provocation *does not reduce* the offence of murder to one of manslaughter. On the other hand the theory is that the provocation that is received deprived the offender of his power of self-control, whereby he becomes incapable of forming an intention to kill. Under our law on the other hand the doctrine proceeds on the basis that though a man had received provocation to the extent of depriving him of self-control, he nevertheless retains sufficient mental powers to enable him to form an intention to kill, but that, as a concession to the frailty of human nature, the offence of murder is *reduced* to one of culpable homicide not amounting to murder. Under the English Law the nature of the act is not taken into consideration for the purpose of determining whether the offender had been given grave and sudden provocation but in order to determine whether he had lost his power of self-control or not.

Mr. Fernando for the Crown attempted to support the propriety of the charge by seeking to interpret the passage complained of as dealing with the question relating to loss of self-control. If, for instance, the Judge had in so many words told the Jury and directed them to consider whether the number and the nature of the stab injuries inflicted by the appellant on the deceased woman enabled them to reach a conclusion as to whether the appellant had or had not lost self-control, then Mr. Fernando's argument would be right. But in the passage complained of nothing seems to have been further from the mind of the learned trial Judge than the problem of loss of self-control, and at any rate no one listening to the passage complained of could reasonably have understood the learned trial Judge to mean that he was referring to the question of loss of self-control.

[1] *Law of Crimes, 16th ed. at p. 716.*
[2] *1 East P. C. 234.*
[3] *(1946) 2 A. E. R. 124.*

I am therefore of opinion that the charge contains a misdirection. I would set aside the conviction and substitute in its place a conviction for culpable homicide not amounting to murder and impose on the appellant a sentence of 15 years rigorous imprisonment. The other members of the Court are, however, of the view that there is no ground for interference with the conviction.

In these circumstances the order of the Court is that the appeal is dismissed.

BASNAYAKE J.—

The appellant, a young man of about 20 years of age, has been found guilty of the offence of murder and sentenced to death. The present appeal is against that sentence.

The relevant facts are brief and simple. The deceased, her husband, his brother the appellant, and their mother lived in the same house. It is common ground that on the day in question the mother of the appellant and the husband of the deceased were away at a polling booth, there being a Village Committee election on that day. The deceased and the appellant remained in the house. According to the statement of the deceased, in the morning at about seven the appellant attempted to outrage her modesty and when she resisted he stabbed her. When she escaped with her infant, the appellant pursued her and stabbed her fatally in a number of places both in the front and back of her chest. According to the statement of the appellant, when he came home after tending his cattle and asked the deceased for some rice, she abused him saying: "I am not going to serve you rice. You had better obtain your rice from your mother." She addressed him as "tho". When he went to the kitchen to serve a meal of rice for himself, the deceased came at him with an ekel broom, abused him, and struck him with it. While he was being abused and struck with the ekel broom, he came across a knife that lay on the floor of the kitchen. He picked it up and stabbed the deceased a number of times. The deceased had ten injuries, nine of them stab wounds. Four of these wounds were necessarily fatal. Two of them were in front of the chest and two behind. In all, four injuries were inflicted from behind. The medical witness expressed the opinion that whoever caused this woman's death made a pretty thorough job of it.

The only point taken by learned counsel is that the following passage in the summing-up of the learned trial Judge amounts to a misdirection:

> "Now, making every allowance for the person provoked, you must ask yourselves whether the mode of resentment, even if you accept the whole of the accused's story as true, was or was not grossly disproportionate to the nature of the provocation given."

Those words occur at the end of a very careful and impeccable direction on the question of grave and sudden provocation. The question is whether in the context the words complained of amount to a misdirection.

It is clear from the authorities cited to us that according to the law of England the direction complained of is unexceptionable. Our law on the point is to be found in the exception to section 294 of the Penal Code, which reads:

> "Culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident."

It is not necessary for the purpose of the instant case to consider the provisos to this exception. I shall therefore confine my attention to the provision quoted above.

For the exception to be pleaded successfully in a case of culpable homicide—

(*a*) there must be provocation,
(*b*) it must be grave and sudden,
(*c*) it must deprive the offender of the power of self-control; and
(*d*) the offence must be committed whilst the offender is bereft of the power of self-control.

The above analysis of the exception reveals that provocation however grave and sudden does not reduce the offence of murder to culpable homicide not amounting to murder unless it deprives the person provoked of the power of self-control. Our Code contains only two instances where grave and sudden provocation without more is regarded as a mitigating circumstance. Those instances are stated in sections 325 and 326 of the Penal Code. In those sections there is no requirement that the provocation should deprive the offender of his power of self-control. An offender cannot get the benefit of the exception under discussion unless he shows that the provocation deprived him of that faculty. Even then, his offence is not excused, but is only reduced to culpable homicide not amounting to murder.

The next question that merits consideration is the way in which the exception should be applied. First there must be provocation. That is, there must be on the part of the person killed an action or mode of conduct towards the offender that would excite resentment in a normal or reasonable man. The low on this point [1] is the same here as in England. It was thus stated so far back as 1869 by Keating J.:

> "The law is, that there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion . . . . The law contemplates the case of a reasonable man, and requires that the provocation shall be such as that such a man might naturally be induced, in the anger of the moment, to commit the act."

Later, Darling J. in the case of *R. v. Alexander* [2] elaborated the law thus:

> "It is plain that the jury had evidence before them which justified them in finding that the appellant was not insane in the legal sense; at the same time they considered him to be mentally deficient. All men who are sane are not of equal mental ability; the verdict means that the appellant was below the ordinary level of sane people, though not across the border-line of sanity. On that Mr. Fox-Davies has raised an ingenious argument, which he admits has never been suggested before. He says that where a man is not insane, but is mentally deficient, the jury should consider what amount of provocation would justify them in returning a verdict of manslaughter . . . . There is no authority for such a proposition, and this court cannot make laws; that is the function of Parliament."

This statement of the law was later approved in *Lesbini's* case [3]. Referring to an argument similar to that advanced in *Alexander's* case, Reading C.J. stated:

> "It substantially amounts to this, that the court ought to take into account different degrees of mental ability in the prisoners who come before it, and if one man's mental ability is less than another's it ought to be taken as a sufficient defence if the provocation given to that person in fact causes him to lose his self-control, although it would not otherwise be a sufficient defence because it would not be provocation which ought to affect the mind of a reasonable man. We agree with the judgment of Darling J. in *Rex v. Alexander* (9 Cr. App. Rep. 139) and with the principles enunciated in *Reg. v. Welsh* (11 Cox, 338), where it is said that 'there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion'."

In *Mancini's* case [4] this principle was reaffirmed by Lord Simon who said:

> "It is not all provocation that will reduce the crime of murder to manslaughter . . . . The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in *R. v. Lesbini* (11 Cr. App. Rep. 7) so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (1) to consider whether a sufficient interval has elapsed since the provocation to

[1] *Rex v. Welsh (1869) 11 Cox 336.*
[2] *9. Cr. App. Rep. 139.*
[3] *(1914) 3 K. B. 1116.*
[4] *(1942) A. C. 1 : 28 Cr. App. Rep. 65.*

allow a reasonable man time to cool, and (2) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter."

This test was repeated in *Gauthier's* case [1] and in *Holmes'* case [2] wherein Lord Simon himself once more laid down the test in these words:

"The distinction, therefore, is between asking '*Could* the evidence support the view that the provocation was sufficient to lead a reasonable person to do what the accused did?' (which is for the judge to rule) and assuming that the judge's ruling is in the affirmative, asking the jury: 'Do you consider that, on the facts as you find them from the evidence, the provocation was in fact enough to lead a reasonable person to do what the accused did?'."

The above cases show the development of the English Law. Our Penal Code does not enact anything different and we have consistently applied the principles enunciated in the cases cited above. Those principles are consistent with our enactment. The explanation to exception 1 to section 294 provides that whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact. That too is now the law of England though the earlier cases indicate that it was once regarded as a matter for the judge.

This brings me to the words "whilst deprived of the power of self-control". But before I pass on to it I must refer to an aspect of the development of the law of provocation which is to my mind irreconcilable with the principles stated above.

It has been held both here and in England that in assessing the admissibility of the defence of provocation drunkenness giving rise to a specially sensitive attitude of mind may be taken into account. With the greatest respect to the eminent judges who have stated this view of the law I am unable to find any authority for this departure from the standard of a reasonable man. Why should a self-induced sensitivity which leads him to be provoked where a reasonable man was not likely to act in the same way be a circumstance in the offender's favour any more than a peculiar sensitivity of an individual which the law says it does not take into account? That question does not arise here and I do not therefore propose to dwell further on that topic.

Now I come to the words "whilst deprived of the power of self-control". That against as in our law is an essential element of the English law on this subject. To quote the words of Lord Simon in *Mancini's* case (*supra*) :

"It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death."

In *Holmes'* case Viscount Simon stated the same thing in different words:

"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 muder is the appropriate verdict."

It will be seen from what has been stated above that our Code enacts in so many words what is today the law of England on the same subject. The law in that country has been clarified in the course of years by judicial decision. Though the legal position has not been stated earlier in the same language in which Lord Simon has expounded it in the case of *Holmes* and *Mancini* (*supra*) it would appear that Hale and Foster did contemplate loss of self-control as an essential ingredient for the reduction of what would otherwise be murder to manslaughter.

[1] (*1943*) *29 Cr. App. Rep. 113 at 119.* [2] (*1946*) *A. C. 588 at 597.*

Now I come to the last question. To what extent may we look at the mode of resentment for the purpose of determining whether at the time the offender inflicted the fatal injury he was deprived of the power of self-control. That is a matter that has to be inferred from the evidence. Loss of self-control being a mental state it is by looking at what the offender did that one may judge whether at the time he committed the offence he had command of himself or not. Was the offence committed under the almost automatic impulse of the provocation or did he apply his mind to his offence and does his act show deliberation and not an uncontrollable instinctive impulse to strike a fatal blow? Those factors cannot be determined without taking into account the time that elapsed between the provocation and the fatal blow, the number of blows inflicted by the offender, the way in which the death was caused, the nature of the weapon used by him—without considering whether the lethal weapon was at hand or whether it was brought for the purpose of wounding—and whether the attack was savage or not. Even the relative nature of the parties in size and strength may in certain circumstances be relevant. This aspect of the law was aptly stated by Baron Parke so far back as 1837 in *R. v. Thomas* [1]. He said:

"If a person receives a blow and immediately avenges it with any instrument that he may happen to have in his hand, then the offence will be only manslaughter, provided the blow is to be attributed to the passion of anger arising from that previous provocation; for anger is a passion to which good and bad men are both subject. But the law requires two things: first that there should be that provocation, and secondly that the fatal blow should be clearly traced to the influence of passion arising from that provocation. There is no doubt here but that a violent assault was committed; but the question is whether the blow given by the prisoner was produced by the passion of anger excited by that assault. If you see that a person denotes, by the manner in which he avenges a previous blow, that he is not excited by a sudden transport of passion, but under the influence of that wicked disposition, that bad spirit, which the law terms "malice", in the definition of wilful murder, then the offence would not be manslaughter. Suppose, for instance, a blow were given, and the party struck beat the other's head to pieces by continued, cruel, and repeated blows, then you could not attribute that act to the passion of anger, and the offence would be murder."

In the later case of *R. v. Duffy* [2] Devlin J. stated the law so precisely as to merit the approbation of the Court of Criminal Appeal where Lord Goddard described it as a classic direction. His words are in my view equally applicable in our country and will bear repetition.

"Similarly, as counsel for the prosecution has told you, circumstances which induce a desire for revenge, or a sudden passion of anger, are not enough. Indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had time to think, to reflect, and that would negative a sudden temporary loss of self-control which is of the essence of provocation. Provocation being, therefore, as I have defined it, there are two things, in considering it, to which the law attaches great importance. The first of them is whether there was what is sometimes called time for cooling, that is, for passion to cool and for reason to regain dominion over the mind. That is why most acts of provocation are cases of sudden quarrels, sudden blows inflicted with an implement already in the hand, perhaps being used, or being picked up, when there has been no time for reflection. Secondly, in considering whether provocation has or has not been made out, you must consider the retaliation in provocation—that is to say, whether the mode of resentment bears some proper and reasonable relationship to the sort of provocation that has been given. Fists might be answered with fists, but not with a deadly weapon, and that is a factor you have to bear in mind when you are considering the question of provocation."

[1] *(1837) 7 C. & P. 817.*

[2] *(1949) 1 All . E. R. 932.*

In this connection it is I think relevant to consider exception 4 to section 294 of our Penal Code which reduces what would otherwise be murder to culpable homicide not amounting to murder where death is caused " without premeditation in a sudden fight upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner ". The heat of passion spoken of here is to my mind something less than the " loss of the power of self-control ". A person who has lost the power of self-control has no command of himself and is yielding to uncontrollable instinctive impulse to strike a blow which even if it proves fatal reduces his crime even where the act is accompanied by those mental elements essential to the offence of culpable homicide.

I do not think I should say more for the purposes of this case. The direction of the learned trial Judge is in my view correct and proper.

The appeal is therefore dismissed.

GUNASEKARA J.—

The facts out of which this appeal arises are set out in the President's judgment and need not be recapitulated. The question for decision is whether the learned Judge who presided at the trial misdirected the jury when he told them that if they accepted the accused's story as true they must ask themselves whether the mode of resentment was or was not grossly disproportionate to the nature of the provocation given. It turns on the construction of *Exception 1* to section 294 of the Penal Code, which is in the following terms:—

> " Culpable homicide is not murder if the offender, while deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident."

The direction that is objected to occurs in a passage in which the learned Judge discusses the requirement that the provocation must be grave. As is pointed out in the President's judgment, no objection is taken to the immediately preceding direction that the provocation

> " must be provocation of a kind that a man belonging to the class of society to which the accused belongs would reasonably be expected to resent, and it must be provocation of such gravity as one would expect a person of that class to resent so deeply as to temporarily deprive him of the power of self-control."

In other words, to borrow the language of Viscount Simon in *Holmes v. Director of Public Prosecutions* [1], the provocation must be " enough to lead a reasonable persons to do what the accused did ". As several decisions of the Indian Courts have held [2], the test is that laid down in *R. v. Lesbini* [3], namely, whether the provocation was sufficient to deprive a reasonable man of his self-control.

I do not think that the learned Judge has said anything more, or anything different, in the passage to which exception is taken. He said:

> " Now, making every allowance for the person provoked you must ask yourselves whether the mode of resentment, even if you accept the whole of the accused's story as true, was or was not grossly disproportionate to the nature of the provocation given."

*Ex hypothesi* a reasonable man's mode of resentment would not be disproportionate to the nature of the provocation. Provocation that would be grave enough to lead such a person to strike a blow with his fist would not necessarily be sufficient to break down his power of self-control to such an extent that his inhibitions no longer

[1] *(1946) 2 All . E. R. 124.*
[2] For example,
*Sohrab, A. I. R. (1924) Lahore 450, at 451.*
*Khadin Hussain, A. I. R. (1926) Lahore 598, at 599.*
*Dinbhandu Ooriya, A. I. R. (1930) Calcutta 199, at 204.*
*Saraj Din (1935) 36 Cr. L. J. 306.*
*Ghulam Mustafa Gahno (1939) 40 Cr. L. J. 778, at 779.*
[3] *(1914) 3 K. B. 1116 ; 11 Cr. App. R. 7.*

restrain him from fatal violence. Acceptance of the whole of the accused's story as true might involve a conclusion that the provocation alleged by him was sufficient so to deprive him of self-control as to lead him to make a fatal attack with a lethal weapon; but the jury had still to consider whether it was sufficient to deprive a reasonable man of self-control to a like extent, that is to say, whether the provocation was grave. In the passage in question the learned Judge has in effect directed the jury to consider whether the provocation was sufficient to deprive a reasonable man of his self-control. The quotation from *Ratanlal's Law of Crimes* [1] is used merely to emphasis the point that trival provocation is insufficient to reduce the offence.

This quotation, which in turn reproduces an extract from *East's Pleas of the Crown*, reads as follows:

> "It must not, however, be understood that any trivial provocation, which in point of law amounts to an assault or even a blow will of course reduce the crime of the party killing to manslaughter . . . . For where the punishment inflicted for a slight transgression of any sort is outrageous in its nature either in the manner or the continuance of it and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty."

It is contended for the appellant that this passage could have misled the jury into a view that the exception of grave and sudden provocation is not available where the homicide has been committed with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death. In support of his contention learned Counsel for the appellant drew our attention to the rest of the extract, which reads as follows:

> "It is one of the true symptoms of what the law denominates malice; and therefore the crime will amount to murder, notwithstanding such provocation."

It has been pointed out in *Holmes'* case that under the English law "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". The difference between the English law and ours in this respect is adverted to in the following passage from the judgment of Bertram C.J. in *R. v. Punchirala* [2]:

> "It is clear that it was the intention of this enactment (*sc.* Penal Code, S. 294, exception 1) to give effect to the principles of the English law. The English law on this question requires two essentials:—
>
> (1) The provocation must be of a certain degree . . . .
>
> (2) The accused must have in fact acted under the impulse of the provocation. If he acted under pre-conceived malice, or owing to brutality of temperament, provocation is no excuse. In English law provocation is material, not as under our law, because it is conceived of as mitigating the offence, but because it is conceived of as negativing that legal malice which is an essential ingredient of murder."

There is nothing in the passage from Ratanlal's Law of Crimes that was read to the jury to suggest that provocation cannot mitigate the offence if the accused committed the homicide acting with a murderous intention. The question whether the jury could have been misled by the quotation must be decided upon an examination of what was read to them and not upon an examination of what was not read. What they could have understood from what was read to them is that provocation cannot reduce the offence to culpable homicide not amounting to murder unless it is grave provocation, for the reason that a homicide committed upon trivial provocation must be attributed to malignity rather than to frailty. In such a view of the reason for the requirement that the provocation must be

[1] *17th Edition (1948) page 726.* [2] *(1924) 25 N. L. R. 458, at 461.*

grave I can see nothing that could mislead the jury as to what would entitle the accused to the benefit of the exception. Moreover, the learned Judge has in other parts of his summing-up made it abundantly clear that the question whether the offence was reduced to culpable homicide not amounting to murder by reason of grave and sudden provocation could arise only if the jury were convinced that the appellant had committed the homicide acting with a murderous intention. He said:

> "*If you are convinced that he had a murderous intention* then the proper verdict is murder, unless there are facts placed before you at this trial from which you may legitimately infer a justification for the killing or the existence of mitigating circumstances which the law recognises as reducing the offence from murder to culpable homicide not amounting to murder. Let me tell you at once that no justification for the killing has been placed before you. You are therefore left to consider whether, *if you are convinced that there was a murderous intention*, nevertheless there was any mitigating circumstance which reduces the offence. The existence of such mitigating circumstances, gentlemen, must be proved by the defence and not disproved in advance by the Crown. The Crown, as I have told you, must establish beyond reasonable doubt the fact of the killing *and the murderous intention. Once that has been established* the burden shifts to the accused to satisfy you not beyond reasonable doubt but at least on a balance of probability that *in spite of the murderous intention proved against him* there was a mitigating circumstance of the kind which I have described."

Whatever may be the difference between the English law and ours as to the basis of the doctrine relating to provocation, there is no difference in this respect, that povocation can alter the nature of an offence of homicide only if it is grave and sudden and by its gravity and suddenness deprives the offender of his power of self-control so that he commits the offence. Nor is there any difference as to the test for determining whether the nature of the provocation is such that it can prevent the homicide from amounting to murder: the test is whether it is sufficient to deprive a reasonable man of his self-control. It seems to me, therefore, that in the application of this test it is no less relevant under our law than it is under the English law to consider the relation between the mode of resentment and the provocation. Its relevancy under the English law is pointed out in the following passage in the speech of Viscount Simon L.C., in *Mancini v. Director of Public Prosecutions* [1]:

> "It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death . . . . . The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in *Rex v. Lesbini*, so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (*a*) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (*b*) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter."

There is nothing in our law that justifies a view that there need be no reasonable proportion between the provocation and the mode of resentment. On the contrary, as I have tried to show, the requirement that the provocation must be grave implies that there must be such a proportion.

I would dismiss the appeal and the application.

[1] *(1942) A. C. 1., at 9.*