[COURT OF CRIMINAL APPEAL]

1954 *Present:* **Rose C.J. (President), Pulle J., Swan J., Sansoni J. and Fernando A.J.**

D. M. MUTHU BANDA, Appellant, *and* THE QUEEN, Respondent

APPEAL No. 52 OF 1954

S. C. 39—M. C. Kandy, 5,286

Culpable homicide—Provocation—Intoxication—Scope of its relevancy—Penal Code, s. 294, Exception 1.

When considering, in a prosecution for murder, whether the accused was deprived of the power of self-control by grave and sudden provocation, the jury must apply an objective test, i.e., whether in the particular case under consideration a reasonable or average man with the same background and in the circumstance of life as the accused would have been provoked into serious retaliation. The effect of this proposition is that the intoxication of the accused is not to be regarded as affecting the gravity of the provocation offered, and should only be taken into account, together with the idiosyncrasies of health and temperament, when the jury determine subjectively whether or not the accused lost his self-control under the stress of the provocation.

The King v. Punchirala (1924) 25 N. L. R. 458, overruled.

APPEAL against a conviction in a trial before the Supreme Court.

G. E. Chitty, with *L. F. Ekanayake*, *A. S. Vanigasooriyar* and *Daya Perera*, for the accused appellant.

H. A. Wijemanne, Crown Counsel, with *V. S. A. Pullenayagam* and *E. H. C. Jayetileke*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 21, 1954. ROSE C.J.—

The principal matter that we have to consider is whether the law is correctly stated in a passage from the charge of the learned trial Judge dealing with the exception of grave and sudden provocation. The passage in question appears at page 11 of the charge and reads as follows:

"Mr. Carthigesu, I wish you to follow this carefully, because I am deliberately directing the Jury in a sense which I know is not the sense in which the matter is understood sometimes, and that there is authority in favour of your view. Now gentlemen, by provocation is meant anything which a reasonable man is entitled to resent. Provocation, as I said, must be sudden, and provocation must be grave. Grave provocation would be provocation that can cause a reasonable man, a man of ordinary sense and prudence and temper of the same class of life or station in life as the accused, to lose his power of self-control. It is quite possible that an act which may not cause a sober man to lose his self-control may cause a drunken man to lose his self-control.

2——J. N. B 42470–1,592 (2/55)

Once you are satisfied that provocation was grave and that it would be grave provocation to a reasonable man, then in considering whether this particular accused lost his self-control as a result of that provocation you should take into account the circumstance that he was drunk, if you are satisfied that he was drunk. But if you are considering whether the provocation was grave, it is not open to you to say, ' it is true that this act of the deceased man would not be grave provocation to a sober man but to a drunken man it would be '. You will not take into account the particular weakness of the accused when you are considering whether the provocation offered was grave. That question you will resolve by reference to an ordinary reasonable man, that is to a man who is sober. "

The direction criticized in this appeal is that which expresses the proposition that in considering whether a particular episode contains the elements of grave and sudden provocation the jury must apply an objective test, i.e. whether in the particular case under consideration a reasonable or average man with the same background and in the same circumstance of life as the accused would have been provoked into serious retaliation. The effect of this proposition is that the intoxication of the accused is not to be regarded as affecting the gravity of the provocation offered, and should only be taken into account, together with the idiosyncrasies of health and temperament, when the jury determine subjectively whether or not the accused was acting under the stress of the provocation. The matter has been considered in the English Courts, not of course in reference to Section 294 of the Ceylon Penal Code but in the context of the English Law which, however, in the matter which we are considering, would appear to be not dissimilar, in the recent case of *Bedder v. Director of Public Prosecutions.* [1]

In that case it was held by the House of Lords in a judgment delivered by Lord Simonds L.C. that the test to be applied in determining whether there had been provocation sufficient to reduce the homicide from murder to manslaughter was that of the effect of the alleged provocation on the mind of a reasonable man ; and in applying this test the hypothetical reasonable man did not have to be invested notionally with the physical peculiarities of the accused. In the course of his speech at page 803 Lord Simonds quotes with approval a passage from the speech of Lord Simon in *Holmes v. Director of Public Prosecutions* [2] : " If, on the other hand, the case is one in which the view might fairly be taken (*a*) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (*b*) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict", and goes on to say, " The argument, as I understood it, for the appellant was that the jury, in considering the reaction of the hypothetical reasonable man to the acts of provocation, must not only place him in the circumstances in which the accused was placed, but must also invest him with the personal physical peculiarities of the accused. Learned counsel, who

[1] *(1954) 2 A. E. R. 801.* [2] *(1946) 2 A. E. R. 124.*

argued the case for the appellant with great ability, did not, I think, venture to say that he should be invested with mental or temperamental qualities which distinguished him from the reasonable man; for this would have been directly in conflict with the passage from the recent decision of this House in *Mancini's case* which I have cited. But he urged that the reasonable man should be invested with the peculiar physical qualities of the accused, as in the present case with the characteristic of impotence, and the question should be asked: what would be the reaction of the impotent reasonable man in the circumstances? For that proposition I know of no authority; nor can I see any reason in it . . . . It was urged on your Lordships that the hypothetical reasonable man must be confronted with all the same circumstances as the accused, and that this could not be fairly done unless he was also invested with the peculiar characteristics of the accused. But this makes nonsense of the test. Its purpose is to invite the jury to consider the act of the accused by reference to a certain standard or form of conduct and with this object the 'reasonable' or the 'average' or the 'normal' man is invoked. If the reasonable man is then deprived in whole or in part of his reason, or the normal man endowed with abnormal characteristics, the test ceases to have any value. This is precisely the consideration which led this House in *Mancini's case* to say that an unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary person to act as he did".

In relation to the question of intoxication of an accused the same principle was applied in the case of *R. v. McCarthy* [1] where it was held that unless a man is in such a complete and absolute state of intoxication as to make him incapable of forming the intent charged, drunkenness which may lead him to attack another in a manner which no reasonable, sober man would do cannot be pleaded as provocation reducing the crime from murder to manslaughter if death results. In this case, of course, the jury had also to consider the question of whether the retaliation was in fact out of proportion to the provocation alleged. But on the matter which we are considering in the present case it is clear that the learned Judges of the Court of Criminal Appeal in England accepted and confirmed the principle that the existence of provocation had to be decided by the Jury objectively, whereas the question whether the accused was in fact provoked required subjective analysis.

Having regard to these high authorities it seems to us that there can be no doubt that the law was correctly stated by the learned trial Judge in the case now before us. It only remains to consider two local authorities which learned Counsel for the appellant in the course of his able argument suggested to us were to a contrary effect and should not lightly be disregarded.

To deal with the later case first, that of *The King v. Marshall Appuhamy* [2], it seems to us that there is in fact no real conflict between the view of the law therein stated and that which we propose to follow in the present matter. The headnote of this case states: "Intoxication which falls short of the degree of intoxication contemplated by Section 78 of the Penal Code could be considered in dealing with the question whether a man's suscep-

[1] *(1954) 2 A. E. R. 262.* [2] *(1949) 51 N. L. R. 140.*

tibility to provocation was affected by intoxication " and in a passage at page 142, from which presumably the headnote is taken, Wijeyewardene C.J. says : " The Judge appears to have expressed himself in such a way as to give the impression to the jury that any intoxication falling short of the degree of intoxication contemplated by Section 78 of the Penal Code should not be considered in dealing with the question whether a man's susceptibility to provocation was affected by intoxication ". The judgment then proceeds to express disagreement with that view.

So stated, we see no reason to dissent from the position there taken up as it does not conflict with the view which we have set out above that the question of intoxication, when it is insufficient to affect intent, comes properly to be considered when the jury is answering the question whether the accused was in fact provoked by provocation which has been objectively established.

The second case, *The King v. Punchirala* [1], might be held to give rise to difficulty. In his judgment at page 461, Bertram C.J. refers with approval to the case of *R. v. Thomas* [2] where Baron Park (incorrectly in the judgment described as Jervis C.J.) said as follows : " So drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober ". Moreover, at page 463 a passage from Stroud's book on Mens Rea is cited with approval. The first sentence reads : " Where an act of violence, with which a prisoner is charged, has ensued upon some provocation or aggression of such a kind that, if sufficient in point of degree, it would suffice to relieve or modify his responsibility for the act in question, the fact that he was drunk may be taken into consideration by the jury ".

Surprisingly, however, Bertram C.J. proceeds as follows : " It appears, therefore, that we should hold that the word ' grave ' is not an absolute but a relative term, and that in determining whether in any particular case the provocation received was grave, the Court or Jury may take into account the intoxication of the person receiving it ". With great respect to the learned Chief Justice, we feel that we have no alternative but to say that this passage incorrectly states the law. For the reasons that we have already given, the true position would seem to be that the intoxication of the accused in such a case as is contemplated in *King v. Punchirala* only becomes relevant for the consideration of the jury when they are considering the question whether the accused was in fact provoked by provocation which would, in the opinion of the jury, have provoked a normal or average reasonable man.

We therefore regard the learned Judge's summing-up in the case under appeal as being unexceptionable. Moreover, there is nothing in the record to indicate that a reasonable jury could properly have come to any other conclusion than to convict the appellant of murder.

For these reasons the appeal is dismissed and the conviction affirmed.

Appeal dismissed.

[1] *(1924) 25 N. L. R. 458.*

[2] *(1837) 7 C. & P. 817.*