[COURT OF CRIMINAL APPEAL]

1952 *Present :* **Nagalingam S.P.J., Gratiaen J. and de Silva J.**

DAVID APPUHAMY *et al.*, Appellants, *and* THE KING, Respondent

Appeals 80-81 with Applications 120-121

S. C. 29—M. C. Deniyaya, C 397

Penal Code, s. 294, Exception 1—Meaning of grave provocation—Test of gravity—Test of loss of self-control.

In regard to the mitigatory plea of grave and sudden provocation under Exception 1 to Section 294 of the Penal Code—

Held (by the majority of the Court), (i) that the test to be applied to determine whether a particular provocation is grave or not is to determine the extent to which passions are roused, and if intense passion or deep resentment is the result of the given provocation, it would then be grave.

(ii) that whether, in the opinion of the Jury, the provocation is grave or not should be considered in relation to the ordinary man of the class to which the accused belongs and not in relation to the particular accused.

(iii) that in regard to the question whether or not the accused was deprived of the power of self-control the peculiar susceptibilities of the particular accused must be taken into account.

APPEALS, with applications for leave to appeal, against two convictions in a trial before the Supreme Court.

K. Sivasubramaniam, with *Austin Jayasuriya*, for the accused appellants.

T. S. Fernando, Crown Counsel, with *R. A. Kannangara*, Crown Counsel, for the Crown.

Cur. adv. vult.

February 1, 1952. NAGALINGAM S.P.J.—

What is the proper direction to be given to a Jury in regard to a defence of grave and sudden provocation that is set up in answer to a charge of murder is the topic that has been debated on these appeals. This judgment is the view of the majority of us and when the plural " we " is used in expressing any opinion it would be used in the sense that it refers to the majority of us.

The appellants, father and son, have by the unanimous verdict of the Jury been found guilty of having committed the murder of one Hendrick Appuhamy *alias* Kalumahathmaya. *Inter alia* a mitigatory plea under exception 1 to section 294 of the Penal Code was raised on behalf of the prisoners. There was ample evidence of provocation to

which the learned trial Judge drew the attention of the Jury in the course of his charge, and it will be sufficient for our purposes to refer to the following:

" Well, gentlemen, I hardly think that there can be any doubt—it is a question of fact—that the deceased offered provocation to each of the accused, that when the 1st accused saw his father being treated in this fashion, his father being addressed as ' this fellow ', and being accused of going about armed with a pistol, that coming on top of everything that preceded, the 1st accused may well have been provoked, and by all what the deceased said the 2nd accused too may well have been provoked . . . . . one question that you will have to ask yourselves, if you are satisfied—I have no doubt that you are satisfied—that there was provocation, is: Was it grave? "

Having thus made it clear that there was provocation given to both the prisoners, the learned trial Judge proceeded to explain to the Jury the expression " grave provocation ". The explanation is contained in the following passages:—

" What is meant by grave provocation? Grave provocation is not something that causes this first accused to lose his self-control. One man may be more sensitive than another, but the law does not take into account the hypersensitiveness of a particular individual. Some men may be extremely sensitive, others may be more philosophic, but provocation is grave if it could cause a reasonable man to lose his self-control. The question of the test of the gravity of provocation was recently debated at length and considered by a Bench of Five Judges and a decision was recently delivered. I do not think anything I am saying now conflicts with that decision. Provocation to be grave must be provocation that could cause a reasonable man to lose his self-control. Having made up your minds, first of all, as to whether there was provocation given by the deceased to the accused whose case you are considering, if you are satisfied that there was provocation, then ask yourselves, was it provocation that could cause a reasonable man to lose his self-control, not merely to be angry? . . . . Could the provocation that you find have caused a reasonable man to lose his self-control? If so, the provocation is grave. Then you will ask yourselves: did the accused, whose case you are considering in fact lose his self-control as a result of that provocation . . . . . "

On behalf of the appellants it has been contended that the effect of these passages was to invite the Jury to apply a test much higher than what is required by law by their being instructed that before they could say there was grave provocation they must be satisfied that the provocation was *such as would cause a reasonable man to lose his self-control.*

The first point that requires consideration is the meaning to be attached to the term " grave provocation ".

The term " grave provocation " received judicial interpretation recently in the Full Bench case of *King v. Perera* [1] where the Court was specifically concerned with the determination of the question whether

[1] *(1952) 53 N. L. R. 193.*

the gravity of the provocation could or should be measured by reference to the outrageous nature of the retaliatory act, and in the course of that judgment the following observation was made in regard to the meaning to be attached to the term:—

> " Provocation would be grave where an ordinary or average man of the class to which this accused belongs would feel annoyed or irritated by the provocation given to the extent that he would, smarting under the provocation given, resent the act of provocation or retaliate it. "

Very full arguments have now been addressed to us, and it seems to us that the retaliatory test is not quite satisfactory to determine the question whether a particular provocation is grave or not ; for retaliation is an uncertain and remote result of provocation and therefore cannot be made the true standard by which the gravity of provocation may be measured. Grave provocation need not necessarily produce retaliation in every case ; in one case as a result of grave provocation there may be retaliation while in another the identical provocation may result in no retaliation ; again, a slight provocation as well as a grave provocation may both equally lead to retaliatory acts.

It has, however, been urged by learned Crown Counsel that there is a very close and definite connection between grave provocation and the deprivation of powers of self-control, so much so, he asserts, that the proper yard-stick would be one that measures the loss of self-control of the person provoked. In other words, his argument is that provocation to be grave must be provocation that causes loss of self-control. A perusal of the language of the exception would clearly reveal that loss of self-control is not set out as a standard to be applied in determining the gravity of provocation. The exception does not say that there should be *such* grave provocation *as* would result in a deprivation of the power of self-control. Nor does it say that loss of self-control should always be the result of grave provocation. For a proper appreciation, however, of what the exception does imply, one must give full purport to the adverb " whilst " and the meaning would then be clear that only in such cases where there is a deprivation of the power of self-control as a result of grave and sudden provocation can the benefit of the exception be claimed by a prisoner. It would thus be apparent that the provision of the law fully recognizes that there may be cases where a deprivation of the power of self-control may not follow as a result of an undoubtedly grave provocation. Indeed a little reflection would show that loss of self-control need not result in every case where grave provocation may be given.

It is true that Ratanlal[1] seems to suggest loss of self-control as a test, for he says:—

> " The test to see whether the accused acted under grave and sudden provocation is whether the provocation given was in the circumstances of the case likely to cause a normally reasonable man to lose control of himself to the extent of inflicting the injury or injuries that he did inflict. "

[1] *Page 721.*

But this test is combated by Gour, who in dealing with this identical question[1] raises the topic by means of these questions:

> " What is then a grave and sudden provocation ? Is the loss of self-control a test of its gravity ? "

and proceeds to answer them thus:

> " It is no doubt a test, but by no means an infallible one. "

One begins to wonder whether the manner of formulation of the questions by Gour and the way he answers them are designed to meet pointedly the view suggested by Ratanlal. Gour returns to this subject again[2]:—

> " Again, the loss of self-control is not to be invariably measured by the gravity of provocation. "

The test of the loss of self-control, therefore, to determine whether a provocation is grave would be no better than the test of retaliation already referred to. The agitation of mind is the direct effect of the provocation, so that a proper yard-stick to measure the gravity of provocation would be one that would assess the effect it produces on the mind of the person provoked.

One might therefore say, grave provocation would be such as would cause deep resentment in the mind of a man, not that he should resent by acts violent or otherwise the provocation given ; or, again, provocation may be said to be grave when it arouses violent anger or violent passion. Here, " violent anger " or " violent passion " which is the equivalent of " rage " merely describes a state of mind, and not, as suggested at the argument, that the person subject to such anger or passion should act violently or use physical violence. In fact the term " violent " in these expressions means nothing more than intense or very strong, and in the dictionary the use of the term in this context is illustrated by the following sentence: " The intemperate life has violent delights and still more violent desires. " So that, the true test to be applied to determine whether a particular provocation is grave or not is to determine the extent to which passions are aroused, and if intense passion or deep resentment is the result of the given provocation, it would then be grave. We are justified in this view by the following explanation given by Gour:—

> " Now, before a provocation can be said to be grave, it must be one which the Court recognizes as sufficient to arouse a person's passions. "

It is also interesting to note that the authors of the Code themselves were of a similar opinion:—

> " We agree with the great mass of mankind and with the majority of jurists ancient and modern in thinking that homicide committed *in the sudden heat of passion* on great provocation is to be punished but that in general it ought not to be punished so severely as murder . . . . . In general, however, we would not visit homicide *committed in violent passion* which had been suddenly provoked with the highest penalties of the law. "[3]

[1] *Section 3303.* [2] *Section 3315.*

[3] *Tatanlal : Law of Crimes 14th ed., at p. 721.*

" In the sudden heat of passion " and " in violent passion " in these passages are the key words used to explain the meaning to be attached to the expression " grave provocation ". It may also be described as signifying the opposite of trivial provocation or, as suggested by Indian Judges and text-book writers as a provocation that has an adequate cause. See Ratanlal[1] and Gour[2] citing the cases of *Huri Gree*[3] and *Pratapa*[4] ; both these cases are not available to us here.

Having thus arrived at the meaning to be given to the term, we must next proceed to consider whether the test of provocation is to be applied objectively to an average or ordinary man of the class to which the offender belongs or subjectively to the offender himself. It will be noticed that the learned trial Judge in his charge referred to " the reasonable man " but equated him to the ordinary man of the class to which the prisoner belongs and nothing turns on it. An act which an ordinary man, meaning thereby an ordinary man of the class to which the accused belongs—and the term " ordinary man " will hereafter be used in this sense—would not regard as grave provocation may, on the other hand, be looked upon by a quick tempered or hypersensitive person as one of a gravely provocative character. Is a person of the latter class, then, to be entitled to the benefit of the plea ? In our Courts we have consistently taken the view that whether the provocation is grave or not should be considered in relation to the ordinary man and not in relation to the particular prisoner. In India there has been a conflict of views.

That an application of the subjective test would lead to anomalous results would be obvious. It is easy to conceive of cases where the same act of grave provocation may produce different results in different individuals. In the case of a man who has cultivated self-restraint, he would not lose his power of self-control, while a man of quick temper would lose his powers of self-control. Is it, then, to be held that the identical act of provocation is grave in the latter case while not in the former case ? Can it be said that the policy of the law is to deal lightly with a man who has a quick temper as against a man who has control of his passions ? In India, it would appear that in one High Court a subjective and in another High Court an objective test has been applied [5].

> " For while judging of the effect *provocation* produces on the mind of the accused, it is perfectly legitimate to take into account the condition of mind in which the offender was at the time of the provocation. Still . . . . . it must be such provocation *as will upset an ordinary man* . . . . . and not merely such as sufficed to offend the accused who was a hot-headed man. "

We have, however, adopted the view that in determining whether there was grave provocation or not, the objective test of the average or ordinary man should be applied :—

> " In truth and in fact the grave and sudden provocation given . . . . . can and must only be taken into consideration to determine

[1] *Ratanlal p. 721.*
[2] *Section 3310.*
[3] *10 W. R. 26.*
[4] *76 I. C. (P) 970.*
[5] *Gour : Section 2303.*

whether it would in the opinion of the Jury have been sufficient to cause the ordinary man of the class to which the accused belongs to lose his temper. "[1]

We now arrive at the stage when we have reached the conclusion that the act of provocation was such as to incite intense anger or passion in the mind of the ordinary man, that is to say, that the provocation was grave. This leads us to an acceptance of the proposition that the offender who claims the benefit of the plea and to whom the act of provocation was given was himself one who had been subjected to grave provocation. If, of course, the view is taken that the provocation given would not amount to grave provocation in the case of the ordinary man, then, the offender can claim no benefit and no advantage could be gained by a further consideration of the other requisites.

We have now to determine whether the objective test is also applicable to the loss of self-control suffered as a result of the violent passion induced by the provocative act. It would be profitable to look at the relevant words of the exception, which are:—

"If the offender, whilst deprived of the power of self-control by grave and sudden provocation. "

Unlike in regard to the element of provocation, in respect of which there is no clear designation as to whether it is the ordinary man or the offender whose case should be considered, the enactment expressly refers to the offender himself as the person who should lose the power of self-control. Unless the interpretation leads to some untoward or awkward result, one should be guided by the well known principle of construing a statute according to the ordinary and natural meaning of the words used. By holdng that the Legislature intended that as a result of the provocation given the offender it is who should be shown to have lost his power of self-control, there is no result reached which could in any way be said to savour of any incongruity.

Learned Crown Counsel, however, says that there should be a double test applied, firstly an objective test as to whether the provocation established to be grave would result in the ordinary man losing his power of self-control. If the answer to this first test be in the negative, then no other test is called for, for the prisoner would be deprived of the benefit of the plea. But it is said that if the answer to the test be in the affirmative, then a second test, namely a subjective test should be applied to determine whether the offender himself did lose his power of self-control ; and in this instance also, it is said that if the offender is proved not to have lost his power of self-control, then, again, the benefit of the plea does not accrue to him ; so that the tests are really and truly applied in every instance with a view, if possible, to exclude the prisoner from claiming the benefit of the exception.

For one thing, a criminal statute should not be construed against a prisoner unless the words themselves normally interpreted lead to that result. There is no reason why in this case, when the Legislature enacted that the offender should have been deprived of his power of

[1] *(1952) 53 N. L. R. 193.*

self-control, it is necessary to apply the test of the hypothetical ordinary man, and that not for the purpose of enabling a prisoner to claim some benefit but for the purpose of depriving him of his life. Of course, where the answers to both the subjective and objective tests be in the affirmative, as in a large majority of cases they would be, then the application of the double test will not result in any hardship. But to prevent the exclusion of the class of cases where the prisoner may be suffering from some susceptibility peculiar to himself which might make him lose his power of self-control more readily than the ordinary man, it is that it becomes important to direct the Jury along channels which would ensure that they do not deviate from the true principles that should be applied.

It is needless to observe that the English Law, which is essentially Judge-made law, has evolved one test only, namely, the test whether the provocation was sufficient to deprive a reasonable man of his self-control—*Lesbini's case* [1]. It will be observed there is no question of a second subjective test under the English Law. It is true that this principle of the English Law has been adopted in the Calcutta case of *Dina Bandhu Ooriya* [2], but no attempt has been made in that case to analyse the language of the section itself, but on an assumption that the doctrine under the English Law was identical with that embodied in the section the principle seems to have been applied. In Madras[3] and in Upper Burma, the subjective test has been applied.

We have, however, fully adopted the principle that the peculiar susceptibilities of an accused person to lose self-control must be taken into account—*King v. Punchirala* [4]. This view, if we might respectfully say so, is one which commends itself to us, and in fact it was having regard to this principle that the Full Court in *Perera's case* [5] lays down the proposition thus:—

> "It has to be stressed that the exception itself expressly refers to the offender being deprived of his power of self-control, and in view of this express reference to the offender, it would be altogether unwarrantable to hold, as contended for by the learned Solicitor-General, that one must first determine in this instance too whether the average man under contemplation would himself have been deprived of his power of self-control as a result of the provocation given before determining whether the offender himself did in fact lose his power of self-control. We are of opinion that once the conclusion is reached that the provocation, taking the case of the given average man, was grave and sudden, the next question that need receive the attention of the Jury is whether the prisoner himself, as a result of the provocation received did lose his power of self-control, it being immaterial whether the average man would or would not have lost his power of self-control."

There is evidence in this case that one of the accused in fact appeared to be tired at the time the provocation was given to him. There is also evidence which shows that the deceased person was a nephew of the

[1] *(1914) 3 K. B. 1166.*
[2] *31 Cr. L. J. 737.*
[3] *I. L. R. 2 Madras 122.*
[4] *(1924) 25 N. L. R. 458.*
[5] *(1952) 53 N. L. R. 193.*

second accused, and there is a suggestion that a nephew using the language which he is shown to have done towards his uncle would have tended to make the uncle lose his self-control more readily. Though these are small points, the Jury were nevertheless entitled to consider these aspects as well, and were not entitled to exclude them from their consideration. Besides, the passages in the summing-up complained of, taken by and large, show that the question whether the prisoners themselves lost their power of self-control was not left to the Jury but completely excluded from the scope of their consideration by their having been called upon to give their attention to the question whether an ordinary man would have lost his power of self-control. The exclusion from the Jury of this aspect of the question would have been to load the dice against the accused persons.

We are therefore of the view that the verdict cannot be sustained, and we therefore set aside the convictions and substitute therefor convictions under section 297 of the Penal Code, and sentence each of the prisoners to a term of ten years' rigorous imprisonment.

Convictions altered.