1940 *Present :* **Moseley A.C.J., Soertsz and Keuneman JJ.**

THE KING *v.* COOMARASWAMY

8—M. C. Point Pedro, 18,682.

Plea of grave and sudden provocation—Charge of murder—Question of fact for jury—Mere abuse sufficient provocation—Penal Code, ss. 294, 396.

In a charge of murder, the question whether the evidence discloses the existence of provocation as well as the question whether such provocation was grave and sudden should be left to the jury.

Even where the defence has not set up grave and sudden provocation, the question should be left to the jury, if the evidence for the prosecution discloses facts upon which such a defence could be raised.

Mere abuse unaccompanied by some physical act may be sufficient provocation to reduce the offence of murder to culpable homicide not amounting to murder.

THIS was a case stated by Nihill J. under section 355 of the Criminal Procedure Code.

The facts are fully stated in the judgment.

H. V. Perera, K.C. (with him *G. G. Ponnambalam*), for the prisoner.—There are two questions for consideration, viz.: (1) Whether there was a misdirection in law when it was stated to the jury that mere words of abuse unaccompanied by any physical act could not constitute provocation, and (2) whether the Judge should not have left it to the jury to decide whether there was provocation.

English authorities seem to support to some degree the view taken by the trial Judge regarding the legal position. Our Penal Code, however, does not draw any distinction between provocation by words and provocation by acts. (*Vide Mayne's Criminal Law of India (4th ed.) p. 490.*) Exception 1 of section 294 draws no distinction between different varieties of provocation. For a conviction under section 326 the provocation need not even be such as to cause loss of self-control, for that section, unlike exception 1 of section 294, does not contain the words "whilst deprived of the power of self-control".

All questions of fact have to be determined by the jury. It is expressly provided in the explanation to exception 1 of section 294 that the gravity and suddenness of provocation is a question of fact. In the present case had the question of provocation been left to the jury they might well have brought a verdict under section 326 instead of section 317.

[SOERTSZ J.—Under section 105 of the Evidence Ordinance, was not the *onus* on the accused to plead and establish provocation?]

If in the very case presented by the prosecution there is evidence of provocation it is the duty of the Judge to leave the question to the jury notwithstanding that it has not been raised by the defence and is inconsistent with the defence which is raised—*Catherine Thorpe*[1]; *Golap Ali et al. v. Emperor*[2].

[1] *16 Cr. App. R. 189.*

[2] *A. I. R. (1933) Cal. 656.*

J. W. R. Ilangakoon, K.C., Attorney-General (with him *M. F. S. Pulle, C.C.*), as *amicus curiae*.—The question at issue is really the interpretation to be given to the explanatory note appearing in exception 1 of section 294 of the Penal Code. It was the province of the Jury to decide whether the words of abuse uttered by the deceased amounted to grave and sudden provocation. See *Queen v. Gunesh Luskur et al.*[1]; *Queen v. Huri Giree*[2]; *Queen v. Sohraie*[3].

Cur. adv. vult.

May 3, 1940. MOSELEY A.C.J.—

This is a case stated by Nihill J. under section 355 of the Criminal Procedure Code, as follows:—

"1. In this case the accused, on an indictment for murder, was found guilty of an offence under section 317 of the Penal Code by the jury's majority verdict of five to two. I thereupon sentenced the accused to five years' rigorous imprisonment. After sentence had been passed, Counsel for the defence requested me to state a case under section 355 of the Criminal Procedure Code on the grounds that I have misdirected the jury in my charge in not leaving to them the issue of provocation. Thereby the accused had been prejudiced insomuch as, had that issue been left to the jury, they might have found him guilty under section 326 and he could not then have received a sentence in excess of four years' rigorous imprisonment.

I granted the request for the following reasons:—

(*a*) My charge admittedly contained a misstatement or at least an incomplete statement of the law in regard to the sufficiency of provocation occasioned by mere words of abuse alone. I told the jury that mere abuse unaccompanied by some physical act was insufficient provocation. What I should have said and what, in fact, I intended to say was that mere abuse would be insufficient in this case if they belived the evidence which was to the effect that the accused after listening to the abuse had run some little distance from the scene and had returned with a rice pounder with which he had dealt a blow on the forehead of the deceased. The principle which I intended to make clear to the jury but may not have done is that set out in *Archbold (27th ed., p. 881)* under the paragraph entitled 'Insufficient provocation'.

(*b*) I then proceeded to direct the jury that if they held that it was the accused that had dealt the blow, then if they were satisfied that the accused had the intention or knowledge demanded by section 296 they should find him guilty of murder, but that if they had a reasonable doubt as to the presence in the mind of the accused of those ingredients, their proper verdict would be to find him guilty of an offence under section 317.

I considered briefly the Code exceptions which may reduce murder to culpable homicide not amounting to murder but indicated that in my opinion there was no evidence before them which could

[1] *9 Sutherland's W. R. 72 (Criminal).*
[2] *10 Sutherland's W. R. 26 (Criminal).*
[3] *13 Sutherland's W. R. 33 (Criminal).*

bring the case within the exceptions. I would add here that the defence made no attempt to prove the existence of any such circumstances (*vide* section 105 of the Evidence Ordinance). No evidence was called and the defence so far as it was suggested by cross-examination was to the effect that the accused was elsewhere at the time of the assault.

2. Counsel for the defence has submitted that the question whether the 'provocation' received by the accused (that is to say, words of abuse directed against him and his wife) was grave and sudden enough to prevent the offence from amounting to murder was a question of fact which should have been left to the jury. My view of the 'explanation' to section 294 of the Penal Code is that it is for the Judge to decide whether the issue of provocation can arise from the evidence, and if it does and only then it is for the jury to consider its sufficiency and suddenness. If this view be right, then I consider that although my charge contained a misstatement of law this did not amount to a misdirection because it was my duty to point out that mere abuse only could not in law extenuate the use of an instrument which, used in the way it was, was likely to cause death.

3. If however I am wrong in the above view then clearly there has been a misdirection which may have affected the jury's verdict and I accordingly felt that I should state a case for consideration by two or more Judges. In short the question that emerges is whether in telling the jury that on the evidence the issue of provocation could not arise, I was right, or whether I should have told them that it was for them to consider whether the abuse uttered by the deceased was calculated to deprive the accused of his power of self-control. That if they thought it was and they thought that intention or knowledge necessary to constitute culpable homicide was present they should find the accused guilty of culpable homicide not amounting to murder, or if intention or knowledge was present, of an offence under section 326.

4. As regards sentence I imposed only half the maximum permissible under section 317 and refrained from ordering a whipping because I took into account the effect on the accused of the abuse hurled at him and his wife by the deceased woman. Had I left the question of provocation with the jury and had they brought in a verdict under section 326, I should have imposed the maximum term of imprisonment."

The application by Counsel for the defence that a case should be stated was based upon the direction to the jury that " mere abuse unaccompained by some physical act was insufficient provocation ".

The principle set out in Archbold's *Criminal Pleading, Evidence and Practice*, to which the learned Judge refers, is stated as follows :—

" As a general rule, no words or gestures, however opprobrious or provoking, will be considered in law to be sufficient to reduce homicide to manslaughter, if the killing is effected with a deadly weapon or an intention to do the deceased some grievous bodily harm is otherwise manifested ". The proposition is based largely upon an excerpt from the summing-up of Keating J. in *Reg. v. Welsh*[1] and in a later case

[1] *11 Cox's Crl. Law Cases 336.*

Rex v. Mason[1], the Court of Criminal Appeal, *per* Ridley J. agreed that "mere words of provocation or abuse could not, but words of provocation coupled with such an act as spitting upon the appellant might (though they need not necessarily) have the effect of reducing the crime from murder to manslaughter". The trial Judge had directed the jury in those terms, the jury had declined to find a verdict of manslaughter, and the Court saw no reason to interfere with the verdict of murder.

It may therefore be taken for granted that the principle set out is well established in English law and that in the light of that principle the direction of Nihill J. is unnexceptionable.

It will, however, be observed that the relevant provision of the Penal Code, *i.e.*, section 294, draws no distinction between different varieties of provocation. Exception 1 to section 294 is as follows:—

> "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."

To this exception is added the following explanation:—"Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact". That mere verbal provocation is contemplated seems clear if one refers to illustration (*d*), which is as follows:—

> "(*d*) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words and kills Z. This is murder."

That the offence of A (in the illustration) is not reduced is undoubtedly due to the fact that the provocative words were uttered by a public servant in the lawful exercise of his powers, and not for the reason that the words in themselves did not amount to provocation.

To support this view of the intention of the Legislature, Counsel for the accused referred us to Mayne's *Criminal Law of India* (*4th ed., p. 490*), in which the commentator quotes the following words of the framers of the Code:—

> "We greatly doubt whether any good reason can be assigned for this distinction. It is an indisputable fact that gross insults by word or gesture have as great a tendency to move many persons to violent passion as dangerous or painful bodily injuries. Nor does it appear to us that passion excited by insult is entitled to less indulgence than passion excited by pain. On the contrary, the circumstances that a man resents an insult more than a wound is anything but a proof that he is a man of a peculiarly bad heart."

Counsel also invited our attention to the phraseology of section 326 of the Penal Code, under which it was contended that the accused might have been properly convicted if the question of provocation had been left to the jury. In section 326 there is no express condition that the

[1] *8 Cri. App. Rep. 121.*

offender shall be *deprived of the power of self-control,* but merely that he shall have acted on grave and sudden provocation. Counsel queried, probably without strong conviction, the necessity for such a degree of provocation that would deprive the offender of the power of self-control. There would, however, appear to be no justification for drawing a distinction to this extent between the provocation required by section 294 and that contemplated in section 326. Indeed, to relax the requirements in case of section 326 might well lead to an absurdity, such as an offender who had received grave and sudden provocation, but who had admittedly not been deprived of his self-control, proceeding, in cold blood, to break every bone in his provoker's body knowing that he was protected by the law against adequate punishment. In any case it is, in my opinion, unnecessary, for the purpose of the present case to draw any such distinction.

The Attorney-General, who appeared as *amicus curiae,* drew our attention to several Indian cases, of which I think it is necessary to refer to one only. In *Queen v. Huri Giree*[1], the accused was convicted of culpable homicide not amounting to murder, on the ground of grave and sudden provocation. Glover J., in delivering the judgment of the Court, said "No doubt, the question whether such provocation was sufficient to take the case out of the purview of section 300 was a question of fact". The Appellate Court found it impossible to say that the provocation that the accused had received was of such a nature as to take away from him all power of self-control. But inasmuch "as the Judge and Assessors have found on the evidence that the prisoner is not guilty of murder . . . . this Court cannot interfere, no question of law being involved . . . ." The Court, however, thought it right to say that the finding was not justified by the evidence

Nihill J. drew our attention to the fact that the only evidence of provocation was given by the witnesses for the prosecution, and that the defence was that the accused was elsewhere at the time of the assault. There is, however, ample authority for the proposition that even if the defence of manslaughter is not raised, the question should be left to the jury if the evidence for the prosecution discloses facts upon which such a defence could be based (18 Crl. App. Rep. 189).

In my opinion, the question whether the facts disclosed the existence of provocation and not only of the quantum is one which should be left to the jury, and had that been done in this case, the jury might well have convicted the accused of causing grievous hurt upon grave and sudden provocation. I think therefore that the conviction under section 317 should be set aside and that one under section 326 should be substituted therefor.

In regard to sentence the learned Judge has indicated that, had the jury returned a verdict under section 326, he would have imposed the maximum term of imprisonment, *i.e.*, four years. It has been urged that it is for this Court, in such a case as this, to form its own opinion as to the sentence which should be imposed. No doubt that is the correct view. Even so, it seems to me that the accused has received

[1] *10 Sutherland's Weekly Reporter (Criminal) p. 26.*

every benefit which the law confers and which he might reasonably expect to receive at the hands of a jury. The maximum sentence of four years' rigorous imprisonment is, in my view, no more than adequate and that is the sentence which the accused will undergo.

SOERTSZ J.—I agree.

KEUNEMAN J.—I agree.

Conviction varied.