[COURT OF CRIMINAL APPEAL]

1952 *Present:* **Nagalingam A.C.J. (President), Gratiaen J., Gunasekara J., Pulle J. and de Silva J.**

JAMIS, Appellant, *and* THE QUEEN, Respondent

APPPLICATION No. 18 OF 1952

S. C. 4—M. C. Kurunegala, 1,925

Penal Code, s. 294—Exception 1—Charge of murder—Plea of grave and sudden provocation—Test of gravity.

Held (by the majority of the Court), that where the mitigatory plea of grave and sudden provocation is taken under Exception 1 to section 294 of the Penal Code, the accused must *inter alia* prove such provocation as is likely to destroy the self-control of an average man of the class of society to which the accused belongs. The modified test of gravity prescribed in *Rex v. Punchirala* (1924) 25 *N. L. R. 458*, as a special concession to a person in a state of intoxication, should not be extended to a case where a person pleading provocation relies on an idiosyncrasy or weakness of the will induced by some other condition peculiar to himself. The idiosyncrasies of the accused are material only in regard to the separate and distinct issue whether the accused had in fact lost his self-control under the stress of the provocation offered.

David Appuhamy v. The King (1952) *53 N. L. R. 313*, overruled.

APPLICATION for leave to appeal against a conviction in a trial before the Supreme Court.

V. S. A. Pullenayagam, for the accused applicant.

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

Cur. adv. vult.

April 24, 1952. GRATIAEN J.—

This appeal was reserved by my Lord the Acting Chief Justice for the decision of a Bench of five Judges of this Court in view of a disagreement between the members of the Bench before whom the matter was first listed for argument. We regret that we have failed to arrive at unanimity in our decision, and the judgment which I am about to pronounce sets out the views of my brothers Gunasekara and Pulle and myself who form the majority of the Court.

The appellant has been convicted for the murder of his mother-in-law, and we have been invited to quash the conviction on the ground that the learned presiding Judge misdirected the jury on the law with regard

to the appellant's plea that he had caused the death of the woman concerned under the influence of " grave and sudden provocation " within the meaning of exception 1 to section 294 of the Penal Code. It was contended that the jury had been misdirected as regards (*a*) the degree of provocation that had to be proved by the appellant and (*b*) the extent to which certain evidence about the state of his health was material to his plea of provocation.

On the first point, the learned Judge directed the jury that the provocation must be " so sudden and so grave as to cause the average man of the accused's class to lose his self control ". He said:—

> " Murder, gentlemen of the Jury, is reduced to culpable homicide not amounting to 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. First and foremost, there must be provocation, something must have been done to provoke this accused, then that provocation must be sudden—if a person provoked me yesterday and I tried to retaliate today, it can hardly be said that that provocation was sudden—and the provocation must be grave, the provocation must be both sudden and grave, gentlemen of the Jury, so sudden and so grave as to cause the average man of the accused's class to lose his self control. You must take the average man or the reasonable man as he is sometimes referred to in law and, of course, in considering the ' reasonable man ' you must consider the class of society from which the accused comes, his education or lack of education, and you must look at the suddenness and the gravity of the provocation from the standard of the ordinary reasonable man of the class of society to which the accused person belongs. Then if you are satisfied that the provocation proved in this case, established on a balance of evidence, was of such a nature in its suddenness and gravity as to provoke a person of this man's type or class or society, you will ask yourselves whether in fact he lost his power of self-control."

Similarly, at a later stage of his charge, the learned Judge, having referred in some detail to the evidence on which the defence relied in support of the plea of provocation, stated as follows:—

> " If it (i.e., the accused's version) is probably true, ask yourselves whether as a result of grave and sudden provocation offered to the accused he lost his power of self control and whilst deprived of the power of self control he caused the death of the deceased Dingiri. Ask yourselves the question whether an average man of the accused's type and class would lose his power of self control as a result of that provocation. If that be so, his offence would be one of culpable homicide not amounting to murder."

Learned counsel for the appellant submitted that the learned Judge misdirected the jury by telling them, in effect, that if they were convinced that the appellant had intentionally killed his victim, the plea of provocation could not succeed so as to reduce his offence to one of culpable

homicide not amounting to murder *unless they were satisfied upon a balance of probability that the provocation alleged to have been offered not only deprived him of his power of self control but was also of a kind which was likely to have caused an average man of the class of society to which the appellant belonged to lose his self-control.* For the reasons which will follow, we consider that this was an unexceptionable direction in law.

With regard to this ground of objection, we have been confronted with a recent decision to the contrary effect in *Rex v. David Appuhamy et al.*[1] in which the majority of a Bench of three Judges had ruled that a charge to the jury in almost precisely similar terms did amount to a misdirection. It was there conceded that the element of gravity did in fact introduce an objective standard, but the Court decided that, for the purposes of Exception 1, the provocation given would be sufficiently " grave " if it were " such as would cause deep resentment in the mind of a man ", or, to quote another passage, sufficient merely " to cause the ordinary man of the class to which the accused belongs to lose his temper ". This formula purported apparently to draw a distinction between provocation of a kind which may cause a *mere loss of temper* from provocation which is likely (although not necessarily certain) to result in an ordinary man *losing his power of self-control.*

David Appuhamy's case (supra) was the third of three recent decisions of this Court as to the meaning of the words of Exception 1 to section 294. On 10th October, 1951, the majority of a Bench of three Judges decided that in this country, as in England, the plea of provocation was not available in cases " where the mode of resentment was out of all reasonable proportion to the provocation alleged to have been given ". *Rex v. Naide* [2]. On 29th November, 1951, however, the majority of a Bench of five Judges over-ruled this decision, and held that " there was no room under our law for taking into consideration the mode of resentment in determining the question whether the provocation given was either grave and sudden or whether there was loss of self-control." *The King v. Perera* [3]. The Crown has since obtained special leave to appeal to the Privy Council against the decision in *Perera's case* and, pending the ruling of the Judicial Committee upon this appeal, we must assume that *The King v. Perera* (supra) was correctly decided with regard to the particular issue upon which the Court had made a considered pronouncement. I understand, however, that my brother Judges who heard *Perera's case* regard certain incidental observations made in the judgment of the Court with reference to other aspects of the law of provocation as *obiter dicta.* For instance, in *The King v. David Appuhamy* (supra) two of the Judges who had decided *Perera's case* took the view that the following passage in the earlier judgment:—

> " Provocation would be grave where an ordinary or an 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 "

[1] *(1952) 53 N. L. R. 313.* [2] *(1951) 53 N. L. R. 207.*
[3] *(1951) 53 N. L. R. 193.*

was " not quite satisfactory to determine the question whether a particular provocation is grave or not." They accordingly considered that they were free to lay down a different test of " gravity " to that which had been previously formulated and to which they had themselves subscribed on the earlier occasion.

In the present case, the learned Judge's charge to the Jury as to the test of " gravity " in relation to the plea of provocation was substantially the same as the following direction in the summing-up in *Naide's case* (supra) which is quoted in a passage labelled " A " in the dissenting judgment of my Lord the Acting Chief Justice:—

> " A. 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 him of the power of self-control."

The same test had on an earlier occasion been implicitly approved by this Court in *The King v. Kirigoris* [1] and it has received the express and unanimous approval of the Judges in *Naide's case* (supra), where the only point of judical disagreement related to what was regarded as a different aspect of the law of provocation. Thus, the judgment of my Lord the Acting Chief Justice in the latter case states:—

> " 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."

The majority of the members of the present Bench respectfully share this view. Indeed, Judges presiding at the Assizes in this country have for many years directed juries on the assumption that the propositions approved in this dictum are beyond controversy.

A mitigatory plea under Exception 1 to section 294 is not available to an accused person who can only satisfy the jury that, at the time when he intentionally killed a person who had provoked him, he was acting under the stress of that provocation. He must in addition establish that such provocation, objectively assessed, was " grave and sudden enough to prevent the offence from amounting to murder ". That depends upon the actual effect of the provocation upon the person provoked " *and upon the probability of its producing a similar effect upon other persons* ". *Gour's Penal Code of India, (5th edition) page 993 paragraph 3307.* Unless, therefore, the subjective and objective tests demanded by our law are both satisfied, a plea of provocation necessarily fails. This is precisely what the learned presiding Judge explained in so many words to the jury in the present case. The majority of us see no reason for taking the view that the approval given to this test of " gravity " by all the Judges who constituted the Court in *Naide's case* was based on a misapprehension of the true

[1] *(1947) 48 N. L. R. 407.*

meaning of Exception 1 to section 294 of the Penal Code. On the contrary, our statutory definition has in effect adopted the opinion of *East 1 P. C. 232* that in England the offence of murder is not reduced to manslaughter unless it ensues upon a " reasonable provocation ", and to that extent the Penal Codes of India and Ceylon subscribe to, and had perhaps anticipated, the criterion which was gradually developed by the English Judges that the provocation must be such as would be " likely to destroy the self-control of the ' reasonable man ' "—i.e., a hypothetical person who, in this context, is an average man of the class of society to which the prisoner belongs.

It has been suggested that the view taken by the Supreme Court in *The King v. Punchirala* [1] is in conflict with this general principle, and I therefore proceed to examine that decision in order to ascertain the extent, if any, to which it affects the present issue. *Punchirala's case* was argued before a most distinguished Bench of Judges, and was concerned only with the question whether, in considering the plea of provocation in relation to a charge of murder under our Penal Code, the jury could properly take into account the intoxication of the person provoked. Bertram C.J., with whose judgment Sampayo J. and Garvin J. agreed, referred to certain English authorities which decided that the drunkenness of the accused may be material to the question " whether the accused in fact acted under the impulse of provocation ". In *R. v. Thomas* [2] for instance, Jervis C.J. had ruled that " if a man makes himself voluntarily drunk, that is no excuse for any crime he may commit while he is so; he must take the consequences of his own voluntary act; or most crimes would go unpunished. But drunkenness may be taken into consideration *where what the law deems sufficient provocation has been given*, because . . . . . passion is more easily excitable in a person when in a state of intoxication than when he is sober ". To that extent we think that this is without doubt also the law of Ceylon, but as Bertram C.J. pointed out, *R. v. Thomas* and similar decisions of the English Courts did not deal with the relevancy of an accused person's intoxication to the distinct and further test demanded by the law, namely, the gravity, objectively assessed, of the provocation. Nevertheless, Bertram C.J. took the view that a " strong consensus of opinion " among text writers on the English criminal law, although " based upon an insufficient examination of the authorities ", entitled the Supreme Court to hold 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 ". Bertram C.J. explained, however, that this principle should be received with caution, and that " the provocation must still be grave. It must have some element of gravity " —an element involving presumably some lesser (though undefined) degree than the kind of provocation which would avail a man who was sober when provoked.

The majority of us are satisfied that the ruling in *Punchirala's case* is not of general application, and was not intended to be regarded as a pronouncement to the effect that Exception 1 can be successfully pleaded

[1] *(1924) 25 N. L. R. 458.*
[2] *(1873) 7 C. and P. 817 (—173 E. R. 356).*

by every person charged with murder who could satisfy the jury that the provocation relied on, though not grave to the extent that it was likely to deprive a normal person of the power of self-control, was nevertheless " grave to him " by reason of some personal irritability or unreasonableness, howsoever induced, which rendered him specially liable to lose his self-control. Indeed, the judgment recognises that in the generality of cases the test is far more strict, but the learned Judges proceeded nevertheless upon a view that the English law permits a somewhat reduced objective standard of gravity to be applied in the special case where the mental condition of the person provoked was unimpaired by intoxication. The judgment states that the " special point " for consideration was " whether in weighing the question of the gravity of provocation the jury is entitled to take into consideration the intoxication of the person receiving it ", and, quoting Exception 1 to section 294, holds that it is " clear that it was the intention of the enactment to give effect to the principles of the English law ".

Bertram C.J. next discusses these English principles and says that all " the text writers who have considered the subject affirm the proposition that drunkenness may be taken into account in estimating the gravity of the provocation, and although their remarks appear to be based upon an insufficient examination of the authorities they cite, such a consensus of opinion *in favorem vitae* cannot lightly be ignored ". He therefore decided " 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 ".

The opinion of the English text writers as to the relevancy of the provoked person's intoxication to the gravity of the provocation offered is apparently not unanimous today as it presumably was when *Punchirala's case* was decided. *Kenny's Outlines of Criminal Law (1952 edition) page 137*, for instance, makes the comment that *R. v. Letenock* [1] " does not clearly distinguish between a plea of self defence and a plea of provocation in relation to a charge of murder committed by an intoxicated person " while *R. v. Hopper* [2] seems to me to deal with a case which in Ceylon would give rise to the analogous plea of " sudden fight ". Certainly, the principle relied on in *Punchirala's case* has not been extended in England to cases, uncomplicated by intoxication, where a person pleading provocation relies on some " mental weakness or peculiarity which is alleged to render him constitutionally more excitable and passionate than an imaginary reasonable man is supposed to be." *R. v. Alexander* [3], *R. v. Lesbini* [4] and *Mancini v. D. P. P.* [5]. Such idiosyncrasies are unquestionably material to the separate and distinct issue arising both here and in England whether a prisoner had in fact lost his self-control under the stress of the provocation offered. Doubtless, they may also influence quite properly a subsequent administrative decision as to whether the prerogative of mercy should be exercised in favour of a convicted person. *Kenny, page 135, footnote 3.* But the law which the Judges are called upon to administer reconciles

[1] *12 C. A. R. 221.*
[2] *(1915) 2 K. B. 431.*
[3] *(1913) 9 C. A. R. 139.*
[4] *(1914) 2 K. B. 116.*
[5] *(1942) A. C. at page 9.*

only to a limited extent " respect for the sanctity of human life with recognition of the effect of provocation on human frailty ". As far as the present appeal is concerned, the decision in *Punchirala's case* deals only with the exceptional case of provocation offered to an intoxicated person, and has no bearing on the issue before us. Whether or not *Punchirala's case* was correctly decided, the extension of the dictum to idiosyncrasies unaffected by intoxication, so as further to reduce if not to jettison altogether the application of the true criterion demanded by Exception 1, is, in the opinion of the majority of the Court, not permissible.

In Ceylon the offences of murder and of culpable homicide not amounting to murder have been defined by statute, and we cannot with propriety approach the function of interpreting the Penal Code with the same latitude which may be permissible in the case of Judges administering the English common law. On grounds of public policy, the Legislature which enacted Exception 1 to section 294 designedly denies the mitigatory plea of " grave and sudden provocation " to a prisoner whose reaction to provocation in any particular case falls short of the minimum standard of self-control which can reasonably be expected from an average person of ordinary habits, placed in a similar situation, who belongs to the same class of society as the prisoner does.

Certain passages in the judgment in *David Appuhamy's case* appear to the majority of us to be based upon an erroneous impression that, while under the English law the test of gravity is whether the provocation is sufficient to deprive a reasonable man of his self-control, our law prescribes only a subjective test not known to the English law. " It is needless to observe ", says the judgment of my Lord the Acting Chief Justice in that case, " 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 . . . . 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* [2].

If we may say so with respect, the decision in *David Appuhamy's case* was based upon a misapprehension of the *ratio decidendi* in *Punchirala's case*, and must be over-ruled. On the other hand the learned Judge's direction in the present case as to the test to be applied in determining whether the provocation was " grave enough to prevent the offence from amounting to murder " was perfectly correct.

With regard to the second ground on which the appeal was pressed, the defence relies on the circumstance that the appellant was suffering from tuberculosis at the time of the alleged provocation. Beyond some loose evidence to the effect that some victims of that disease " may harbour grievances against the whole world " (a state of mind which is relevant if at all to the issue of murderous intention rather than of provocation) the only evidence of special irritability which was led at the trial was the appellant's own statement, made in the course of re-examination, that his malady had rendered him more prone to loss of

[1] *(1914) 3 K. B. 1116.* [2] *(1924) 25 N. L. R. 458.*

self-control than he had previously been. The majority of us have already decided that the modified test of gravity prescribed in *Punchirala's case* (*supra*), as a special concession to a person in a state of intoxication, should not be extended to cases where a person pleading provocation relies on an idiosyncrasy or weakness of the will induced by some other condition peculiar to himself. Besides, in the present case, the learned Judge had unequivocally directed the Jury that, if they believed the appellant's version of the facts, their verdict should be one of culpable homicide not amounting to murder. In this respect, the direction was, we think, unduly favourable to the appellant, and we are satisfied that the jury had rejected his evidence on which his plea of provocation was based. For both these reasons the second ground of appeal must fail.

The majority of the Court have taken the view that it would not be proper to indulge in any *obiter dictum* as to whether *Punchirala's case*, which prescribed a reduced test of gravity where an accused person was provoked while intoxicated, should be over-ruled. But we certainly reject the argument that so long as the dictum in *Punchirala's case* is allowed to stand, its *ratio decidendi* must logically be extended to every other case where a prisoner charged with murder pleads that he was peculiarly prone to loss of self-control under the stress of provocation which was insufficient in point of degree to produce a similar effect on the mind of an average person. It would be illogical and dangerous indeed if the true principle imposed by statute " in order to teach men to entertain a peculiar respect for human life " were, by a process of judicial interpretation, to be gradually whittled down and in due course completely superseded by some different principle recognising a lower objective standard of gravity than the law demands before provocation can be permitted to mitigate the intentional killing of a human being. It is impracticable to measure guilt always by degrees of moral culpability, howsoever much the latter may be relevant for assessing the quantum of punishment or for exercising the prerogative of mercy.

The appellant's application is refused and his appeal is dismissed.

Application refused.