**RAMENDRA DUTT**

*v.*

**REGINAM**

[COURT OF APPEAL, 1971 (Gould V.P., Marsack J.A., Richmond J.A.), 20th April, 4th May]

Criminal Jurisdiction

*Criminal law—provocation—not relied upon at trial—issue not left to assessors—whether evidence fit to be left—duty of trial judge.*

*Criminal law—provocation—opposing groups—provocation offered by member of group other than member killed—particular circumstances—family quarrel—whether deceased participated in act of provocation or accused held reasonable belief to that effect—Penal Code (Cap. 11) s.235.*

The deceased woman died as a result of six stab wounds inflicted (as the court and assessors must have accepted) by the appellant in the course of a family quarrel between two groups of persons. The issue of provocation was at no time raised on behalf of the appellant at the trial and the trial judge did not leave it to the assessors. On the appeal it was argued that evidence given by the appellant of his having been struck with a hammer, not by the deceased but by her husband, was sufficiently cogent to have made it necessary for the trial judge to leave the issue of provocation to the assessors.

*Held:* 1. If there is any evidence of provocation fit to be left to a jury it is the duty of the trial judge to leave it open to the jury to return a verdict of manslaughter; whether or not the issue has been specifically raised at the trial, and whether or not the accused has said in terms that he was provoked.

*Bullard v. R.* [1957] A.C. 635; 42 Cr. App. R.1, applied.

2. The definition of provocation in section 235 of the Penal Code limits the doctrine to retaliation against the actual person by whom the provocative act was done, but is not intended entirely to negative the applicability of the defence where the provocation was caused by the joint action of more than one person.

3. In the circumstances that the members of the two groups were engaged in a family quarrel, were all known to each other and that it was daylight, it could not be accepted as a matter of law that a particular act of provocation by a member of one group to a member of the other, entitled the latter to stab any member of the first group whom he might select: where there is a specific and murderous attack upon an individual there must be participation by the victim in the actual provocation, or a reasonable belief by the accused, based on reasonable grounds, that he had so participated.

4. At the least such a matter will have a marked effect on the question whether the violence used was disproportionate and in the circumstances the trial judge was fully justified in his decison. A

Other cases referred to :

*Lee Chun Chuen v. R.* [1963] A.C. 220; [1963] 1 All E.R. 73.

*Holmes v. Director of Public Prosecutions* [1946] A.C. 588; [1946] 2 All E.R. 124. B

*Mancini v. Director of Public Prosecutions* [1942] A.C. 1; [1941] 3 All E.R. 272.

*R. v. Jackson* [1941] 2 D.L.R. 119.

*R. v. Gross* (1913) 77 J.P. 352; 23 Cox 455. C

*R. v. Brown* (1776) 1 Leach 148; 168 E.R. 177.

Appeal from a conviction of murder.

*K. C. Ramrakha* for the appellant. D

*T. U. Tuivaga* for the respondent.

The facts sufficiently appear from the judgment of the Court.

4th May 1971.

E

Judgment of the Court (read by Marsack J.A.) :

This is an appeal against conviction for murder entered in the Supreme Court sitting at Lautoka on the 26th of August, 1970. The trial was held before a Judge and three Assessors. All three Assessors were of the opinion that the appellant was guilty of murder as charged. The learned Trial Judge accepted this opinion, convicted the appellant of murder, F and imposed the mandatory sentence of life imprisonment.

The facts found by the learned Trial Judge may be shortly stated. Between 6.00 and 6.30 p.m. on 25th March, 1970, the appellant, his wife, his brother-in-law, Kissun Lal and Kissun Lal's wife and sister were on the Naikabula Road near Lovu. Kissun Lal's house is situated at no great G distance from the house of Ram Lakhan Sharma, husband of the deceased Ram Devi and half-brother of the appellant. Outside Ram Lakhan Sharma's house appellant called out to him, and Ram Lakhan Sharma and his wife went out to the road; Ram Devi carrying a broom and Ram Lakhan Sharma a hammer. Relations between the two groups were definitely unfriendly. A disturbance took place after angry words had been exchanged between the parties. Blows were struck, and some of H both parties received injuries. Ram Lakhan Sharma was confined to hospital for 14 days. Appellant had injuries, which he stated were inflicted by Ram Lakhan Sharma with a hammer, and which were described by the doctor as minor and superficial. Ram Devi received six stab wounds, two of which penetrated the chest wall and were extremely

serious. Ram Devi was taken to the hospital immediately, but was already dead when she was examined by Dr. Evans at 7 p.m. The cause of death was shock and severe internal haemorrhage arisng from the chest wounds.

Although in his evidence at the trial the appellant denied striking the blows which resulted in the death of Ram Devi, there was ample evidence, accepted by the learned Trial Judge and obviously by the Assessors, that the knife wounds which resulted in the death of the deceased were inflicted by the appellant.

At the hearing of the appeal Counsel for appellant informed the Court that he would rely solely on what were described as "Amended and Final Grounds of Appeal" filed on 31st March, 1971. These grounds were in the following terms :—

1. The learned trial Judge erred in law, and in fact in withdrawing the defence of provocation and/or self-defence from himself, and the Assessors and thereby there was a mis-carriage of justice.

2. The appellant in his own defence set up such facts as to raise a defence of manslaughter to the charge of murder, and the learned trial Judge failed to direct himself, and the Assessors, adequately on this point and thus there was a miscarriage of justice.

These grounds were argued together.

The issue of provocation was at no time raised by the appellant at the trial. In course of his summing up the learned Trial Judge drew the attention of the Assessors to this in these words :

> "The defence case is a complete denial of any assault on the deceased person by the accused by any means whatsoever. There was no suggestion by the accused at any time either to the police or to this Court during the trial that he in any way inflicted any injury on the deceased either accidentally or on being provoked or whilst acting in self-defence. Indeed it is his case that he at no time possessed a dagger or any similar instrument and that he does not actually know who inflicted the injuries on Ram Devi."

Later in his summing up the learned Trial Judge refers to the possible defences of self-defence and provocation, and explains why in the circumstances it was not incumbent on him to direct them on these defences. What he says is this :

> "Gentlemen, if a person kills another accidentally or whilst acting in self-defence he is not guilty of any offence. If he kills another upon being provoked which leads him to lose his self-control the offence is not murder but only manslaughter. Had the issue of provocation or self-defence been raised or suggested by the accused or by the evidence tendered, it would have been my duty to explain to you fully the law relating to self-defence and the law relating to killing under provocation, advising you that the onus of disproving that it was not a case of self-defence or manslaughter by reason of provocation, was on the prosecution throughout. As I have explained to you the accused's case is that he is not at all responsible for inflicting any injuries on the deceased and he is completely innocent as far as the injuries on the deceased person are concerned."

At the hearing of the appeal Counsel for the appellant submitted that the fact that the defence of provocation was not raised by or on behalf of the accused did not absolve the learned Trial Judge from directing the Assessors on that issue. It is clear from the Privy Council judgment in *Bullard v. R.* (1957) 42 Cr. App. R.1, cited by Counsel in support of his submission, that if there is any evidence of provocation fit to be left to a jury, whether or not this issue has been specifically raised at the trial by Counsel for the defence, and whether or not the accused has said in terms that he was provoked, it is the duty of the Judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked.

In Counsel's submission the learned Trial Judge erred in law in withdrawing the issue of provocation from the Assessors on the ground that it had not been raised by the defence. The extract quoted from the summing up, however, went further than that, and makes it clear that if the issue of provocation had been raised or *suggested by the evidence tendered* he would have been under an obligation to direct the Assessors on it.

The question of what evidence is required to raise the issue of provocation was authoritatively answered by the Privy Council in *Lee Chun Chuen v R.* [1963] A.C. 220. At page 231 Lord Devlin, who delivered the judgment of their Lordships, said:

> "Provocation in law consists mainly of three elements — the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other — particularly in point of time, whether there was time for passion to cool — is of the first importance. The point that their Lordships wish to emphasise is that provocation in law means something more than a provocative incident. That is only one of the constituent elements. The appellant's submission that if there is evidence of an act of provocation, that of itself raises a jury question, is not correct. It cannot stand with the statement of the law which their Lordships have quoted from *Holmes v. Director of Public Prosecutions.* In *Mancini v. Director of Public Prosecutions* the House of Lords proceeded on the basis that there was an act of provocation — the aiming of a blow with the fist — but held that it was right not to leave the issue to the jury because the use of a dagger in reply was disproportionate."

Applying these principles to the present case, we are unable to say that there has been produced a credible narrative of events suggesting the presence of these three elements. Without taking into account the fact that the appellant in his own evidence made no claim of being provoked, we find that the only acts which could possibly be considered as provoking the appellant into retaliation were the verbal abuse from Ram Lakhan and his party, and the very minor injuries to appellant which he states were inflicted by Ram Lakhan. Even if full weight is given to these acts it is in our opinion impossible to hold that the retaliation by the appellant, in inflicting lethal knife wounds on Ram Lakhan's wife, was proportionate to the provocation received. That being so there was, according to the

principles laid down in *Lee Chun Chuen* (supra), a complete absence of one of the elements necessary to make it incumbent on the trial Judge to direct the Assessors on the issue of provocation.

Counsel for appellant raised the further point that the defence of provocation may still be available to the accused, although the retaliation was directed against a person who was not solely responsible for the provocation received; and he cited the Canadian case of *R. v Jackson* [1941] 2 D.L.R. 119, referred to in 15 E. & E. Digest page 939 No. 5756. The full report of this case is not available to us; but if the principle is correctly stated in the Digest it cannot in our opinion be applied to the facts with which the present appeal is concerned.

It is important in this connection to note the statutory definition of provocation set out in the Penal Code, Section 235. This reads :

> "The term 'provocation' means, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."

Although this provision limits the doctrine of provocation to retaliation against the actual person by whom the provocative act was done, we do not think that it is intended entirely to negative the applicability of the defence where the provocation was caused by the joint action of more than one person.

The act of provocation relied on by the defence is the attack on the appellant by Ram Lakhan Sharma with the hammer. In the course of his cross-examination the appellant described the incident in these terms :—

> "Q. What you are saying is that these people went to the Naikabula road and effectively stopped you from passing, is that right?
>
> A. Yes, we wanted to cross the road and they came and blocked our way.
>
> Q. What, they put up a barricade, did they?
>
> A. Yes, they both stood on the road and they started making actions with the broom and sticks and the hammer.
>
> *COURT:* Who had the broom?
>
> A. My sister-in-law had the broom.
>
> COURT: And your brother had the hammer?
>
> A. Yes, sir.
>
> *COURT:* These are the two persons that blocked the road?
>
> A. Yes, sir.
>
> Q. With the broom and the hammer they managed to stop five of you, did they?
>
> A. Yes, sir, in the meanwhile their other children came too with sticks and knives.

Q. What did your brother do with the hammer?

A. He struck me with the hammer. A

*COURT:* Where were you?

A. As he swung the hammer at me I stepped back for support with my both hands and he repeated the second blow which landed on my shoulder and it was then I grabbed hold of the hammer.

Q. You snatched the hammer off him? B

A. Yes, sir, I got hold of the hammer, he punched me and I punched him.

Q. You grabbed hold of the hammer and threw it away?

A. No, sir, I still had the hammer in my hand. C

Q. And you punched him?

A. Yes, sir.

Q. And did you take any further part in the fight?

A. No, sir."

D

If this is to be regarded from the point of view of provocation, it must necessarily be assumed that the killing took place after this episode. At this stage, as the appellant had the hammer in his own possession, he can hardly have been under any apprehension from it; and, even if the murderous attack had been made upon Ram Lakhan Sharma himself, we gravely doubt, having regard to the disproportionate nature of the attack made by the appellant, whether it would have been incumbent on the E trial Judge to leave to the Assessors the issue of provocation based on this evidence.

But the person killed was not Ram Lakhan Sharma; it was his wife who had done nothing but "make actions" with the broom. There are among the authorities, cases in which an accused person, being sufficiently provoked to justify killing, has been held to be guilty of no more than manslaughter though he killed a third person; in the one case by accident, F and in the other, in the reasonable belief that the person he killed was a member of a gang who had violently attacked him. The cases are respectively *Gross* (1913) 77 J.P. 352 and *Brown* (1776) 1 Leach 148; 168 E.R. 177, and they are considered by *Glanville Williams* in his work on *Criminal Law* (2nd Ed.) at p.132 as being examples of the principle of transferred malice.

G

The present case was not one of accident, as the nature of the injuries inflicted on the deceased clearly shows. Nor was it a case of mistaken identity. In the circumstances of Brown's case it is implied that retaliaton against any member of an attacking group is justifiable. But that was a murderous and continued attack by night. The present case was in the nature of a family quarrel, in which all the participants were known to one another; and it was daylight. In such circumstances we cannot H accept, as a matter of law, that a particular provocation by a member of one group to a member of the other, entitles the latter to stab any member of the first group whom he may select. If he is provoked to such loss of control that he flourishes his weapon at random and someone is

killed accidentally, different considerations may well apply. But where there is a specific and murderous attack on an individual other than the one offering the provocation, we think that there must be evidence of participation by the victim in the actual provocataion, or a reasonable belief by the accused, based on reasonable grounds, that he had so participated. At the very least this is a matter which must have a marked effect upon the question of whether or not the violence used was disproportionate. There was no evidence at all that the appellant regarded the deceased as a party to her husband's assault with the hammer, which was the only act which could perhaps be relied upon as more than "a provocative incident"; and the fact that it was not the actual assailant but his wife who was deliberately made the specific object of retaliation is a fact that must necessarily carry great weight in assessing whether or not that retaliation was disproportionate.

Having considered the matter from this point of view we are satisfied that on the whole of the evidence, the trial Judge was fully justified in his decision not to leave the provocation issue to the Assessors.

Counsel for appellant did not address to us any detailed argument on the subject of excessive self-defence, but limited himself to a submission that that issue also should have been left to the Assessors. In our view there is no evidence to justify a finding that in inflicting the six stab wounds on the woman Ram Devi, appellant was defending hmself against an attack which threatened his life. The question of self-defence accordingly does not arise; and there was no obligation on the trial Judge to put it before the Assessors.

For these reasons the appeal is dismissed.

*Appeal dismissed.*