

BEDELPH v. THE QUEEN

1980. Court of Criminal Appeal: Green C.J., Crawford and
Everett JJ.

Nov. 27-30, 1979, March 14, 1980.

Criminal Law — Criminal liability and capacity — Mens rea — Circumstances negating — Accident or involuntariness — Automatism — Arising from disease of the mind — Insanity, not separate defence.

Criminal Law — Offences against the person — Homicide — Murder — Alternative verdict of manslaughter — Provocation — What constitutes — Insult — Words — Degree of provocation — Characteristics of accused — General — Special — "Ordinary person" — Criminal Code, s. 160.*

Evidence — Weight and sufficiency of — Uncontradicted evidence — Expert evidence based on information — Jury entitled to disbelieve information.

The appellant had been convicted of murder. One of her defences was that she acted in a state of dissociation "triggered off" by external stimuli. It was contended that this was automatism distinct from insanity.

**Criminal Code*, s. 13—(1) No person shall be criminally responsible for an act, unless it is voluntary and intentional . . .

S. 16—(1) A person is not criminally responsible for an act done or an omission made by him —

- (a) when afflicted with mental disease to such an extent as to render him incapable of —
 - (i) understanding the physical character of such act or omission; or
 - (ii) knowing that such act or omission was one which he ought not to do or make; or
- (b) when such act or omission was done or made under an impulse which, by reason of mental disease, he was in substance deprived of any power to resist.

(2) The fact that a person was, at the time at which he is alleged to have done an act or made an omission, incapable of controlling his conduct generally, is relevant to the question whether he did such act or made such omission under an impulse which by reason of mental disease he was in substance deprived of power to resist.

...

(4) For the purposes of this section, the term "mental disease" includes natural imbecility.

S. 160—(1) Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

(Continued overleaf)

Held, that while there may be such action not involving disease of the mind, insanity was the only defence open to her on the evidence and automatism should not have been put to the jury as a distinct issue.

Williams v. The Queen, [1978] Tas.S.R. 98, followed.

Under the *Criminal Code*, s. 160, by reason of —

- (a) the words “any wrongful act or insult” words may constitute an insult for the purposes of the section:

R. v. Scott (1909), 11 W.A.L.R. 52, considered; and

- (b) the words “to deprive an ordinary person of the power of self-control” the question is whether an ordinary person of the accused’s age and sex would be so deprived, and any difference of the accused from such a person is irrelevant to that question but not to the gravity and effect of the provocation:

Reg. v. Camplin, [1978] A.C. 705, followed.

A jury is not bound to accept unequivocal and uncontradicted expert evidence unless they accept the truth of the facts on which it is based.

APPEAL AND APPLICATION FOR LEAVE TO APPEAL AGAINST CONVICTION.

This is the continuation of the application reported in 1979 Tas.R. 289. Sally Maree Bedelph was convicted at Hobart Criminal Sittings before Neasey J. on 30th October, 1978, of murder contrary to the *Criminal Code*, s. 158, and sentenced to imprisonment for the term of her natural life. It appeared that the appellant was a girl of sixteen with an unhappy childhood, feeling unloved and unlovable, known to the police and prone to drink, etc. She had left home and got a flat with another girl, the deceased. On the night of the murder she had an argument with the deceased about the care of the dog and then about using an unregistered motor car and drinking. The deceased said, “Get out, Sal, you’re no good”. The appellant replied that she had found the flat and there felt secure for the first time in her life. Later the deceased said, “You bitch”. The accused had been in an adjacent room eating bread and cheese and had brought the carving knife with which she had cut the bread into the deceased’s bedroom. At some time after the first words of the deceased above quoted the accused thrice stabbed the deceased with the knife,

* (continued)

(2) Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, and which, in fact, deprives the offender of the power of self-control, is provocation, if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

(3) Whether the conditions required by subsection (2) were or were not present in the particular case is a question of fact, and the question whether any matter alleged is, or is not, capable of constituting provocation is a matter of law.

(4) No one shall be held to give provocation to another only by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

...

making wounds of which she died. A psychiatrist, Dr Burges-Watson, gave evidence of his opinion of the appellant's state of mind and that she was in a state of dissociation when she stabbed the deceased.

The appellant appealed and sought leave to appeal on eight grounds to which were added the two considered and rejected in *Bedelph v. The Queen* 1979 Tas.R. 289. Of the eight original grounds only five were relied on finally. They were:

"1. THAT the Trial Judge was wrong in law in not leaving the defence of automatism to the Jury for consideration.

"2. THAT the Trial Judge misdirected the Jury in relation to the issue of provocation in that he did not direct the Jury to apply the test of an ordinary 16 year old female with the general type of background of the Appellant.

"4. THAT no reasonable Jury would have rejected the contradicted expert psychiatric evidence called by the Appellant.

"5. THAT on the whole of the evidence a reasonable Jury could only have brought in a finding of manslaughter or of 'not guilty by reason of insanity'.

"8. THAT the Trial Judge was wrong in law in failing to put to the Jury that they were entitled to take into account conversation between the deceased and the Appellant prior to the stabbing as constituting provocation."

Pierre Slicer and *M. Chambers* for the appellant.

W. J. E. Cox Q.C., Crown Advocate, and *A. N. Hope* for the Crown.

Slicer. We have three main grounds: 1, 2 and 8, and 4 and 5. Grounds 3, 6, and 7 are abandoned.

Automatism should on the facts of this case have been put to the jury because the medical evidence excluded insanity and there was an external factor, the provocation that triggered off the response so that the appellant is outside the tests in *Bratty v. A.-G. for Northern Ireland* [1963] A.C. 386 and *Williams v. The Queen* [1978] Tas.S.R. 98. The direction on provocation was wrong because it should have made the test the conduct of a sixteen-year old girl possessing ordinary self-control but having the general background of instability and depression possessed by the appellant and because it limited the provocation to the words "Get out, Sal, you're no good" and "You bitch". Properly directed, the jury should have found manslaughter by reason of the provocation, absence of criminal responsibility by reason of automatism, or, if we are wrong on ground 1, insanity. He referred to *Reg. v. Quick* [1973] Q.B. 910, [1973] 3 All E.R. 347; *Reg. v. Burns* (1973) 58 Cr. App. R. 364; *Watmore v. Jenkins* [1962] 2 Q.B. 572, [1962] 2 All E.R. 868; *Reg. v. Carter* [1959] V.L.R. 105; *Reg. v. Tsigos* [1964-5] N.S.W.R. 1607; *Reg. v. Cottle* [1958] N.Z.L.R. 999; *Reg. v. Wiseman* (1972) 46 A.L.J. 412; *Reg. v. Tobin* [1978] N.Z.L.R. 423; *Reg. v. Roulsten* [1976] 2 N.Z.L.R. 644; *Reg. v.*

Pentelic (1973) 21 F.L.R. 253; *Taylor v. The Queen* (1979) 22 A.L.R. 599; *Reg. v. Isitt* [1978] R.T.R. 211; *Reg. v. Parnorkar* (1972) 5 C.C.C. (2d) 11; *Reg. v. K.* (1970) 3 C.C.C. (2d) 84; *Parnorkar v. The Queen* (1973) 33 D.L.R. 683; *Reg. v. Cullum* (1974) 14 C.C.C.(2d) 294.

The attack took place at the end of an hour's argument. The whole thing triggered off her response. She did not consciously drive the knife in. Provocation should take account of her proven mental instability. The test in *D.P.P. v. Camplin* [1978] A.C. 705 is not novel: *Reg. v. Rankin* 1966 Q.W.N. 10. He referred to *Moffa v. The Queen* (1976) 13 A.L.R. 225, 51 A.L.J.R. 403; *Reg. v. McGregor* [1962] N.Z.L.R. 1069; *Reg. v. Enright* [1961] V.R. 663; *Parker v. The Queen* (1963) 111 C.L.R. 610. On grounds 4 and 5 he referred to *Reg. v. Matheson* [1958] 1 W.L.R. 474, [1958] 2 All E.R. 87; *Reg. v. Turner* [1975] Q.B. 834, [1975] 1 All E.R. 70.

Cox Q.C. It is clear that the appellant killed the deceased by stabbing her with the knife. She came home depressed and quarrelsome. It was she alone, who was shouting. There was no need for her to bring the knife into the deceased's bedroom. Either she used it intending to do at least grievous bodily harm or she was dissociated. On her own statements she knew more of what she was doing than one dissociated would. Dr. Burges-Watson's evidence is based on his view of the facts. That view the jury was entitled to reject. They must have rejected his evidence. Without his evidence there was no defence. The accused remembered more of the stabbing than one dissociated would.

A defence of automatism would not here be distinct from a defence of insanity: *Reg. v. Wiseman* (1972) 46 A.L.J. 412; *Reg. v. Pantelic* (1973) 21 F.L.R. 253; *Reg. v. Joyce* [1970] S.A.S.R. 184; *Williams v. The Queen* [1978] Tas.S.R. 98; *Reg. v. Barker* (Unreported, Crawford J., 13th May 1976).

On the facts of this case provocation should not have been put to the jury: *Holmes v. D.P.P.* [1946] 2 All E.R. 124, [1946] A.C. 588; *Lee Chun-Chuen v. The Queen* [1963] A.C. 220, [1963] 1 All E.R. 73; *Johnson v. The Queen* (1977) 136 C.L.R. 619; *Da Costa v. The Queen* (1968) 118 C.L.R. 186; *Reg. v. Minehan* [1973] 1 N.S.W.L.R. 659; *Reg. v. Lyden* [1962] Tas.S.R. 1; *Hall v. The Queen* (Unreported, C.C.A. 30th August 1968); *Packett v. The King* (1937) 58 C.L.R. 190; *Reg. v. Anderson* [1965] N.Z.L.R. 29; *Moffa v. The Queen* (1976) 13 A.L.R. 225, 51 A.L.J.R. 403; *Mancini v. D.P.P.* [1942] A.C. 1, [1941] 3 All E.R. 272; *Reg. v. Camplin* [1978] A.C. 705; *Reg. v. McGregor* [1962] N.Z.L.R. 1069; *Kwaku Mensah v. The Queen* [1946] A.C. 83. His Honour's direction is faultless. *Reg. v. Burns* (1973) 58 Cr.App.R. 364.

Chambers in reply. Provocation was not properly put to the jury, nor automatism. The conviction should be quashed: *Prestage v.*

The Queen [1976] Tas.S.R. 16, at p. 19; *Mraz v. The Queen* (1955) 93 C.L.R. 493, at p. 508.

Cur. adv. vult.

MARCH 14.

GREEN C.J. set out the grounds of appeal finally relied on and continued:

Ground 1:

For the reasons he has expressed I agree with the conclusion reached by Crawford J. that the learned trial judge correctly applied the decision of this Court in *Williams v. The Queen* [1978] Tas.S.R. 98 and was right to refuse to leave the issue of automatism to the jury. I only wish to add a comment upon the submission made by counsel for the appellant that if the jury were satisfied that the appellant had been in a state of dissociation at the time of the killing there was evidence upon which the jury could have found that that state had been brought about or "triggered" by external factors or stimuli and that therefore the issue of automatism should have been left to the jury at least in the alternative.

I accept that under certain circumstances it might be necessary for a trial judge to leave both the issue of automatism and the defence of insanity for the consideration of the jury, for example when conflicting psychiatric opinions have been given in evidence. I also accept that if the evidence is capable of leading to the conclusion that an accused person was in a state of dissociation because of the effect that some external factor or stimulus had upon a condition which did not amount to a mental disease within the meaning of s. 16 of the *Criminal Code* then a sufficient foundation for leaving automatism to the jury may be established. But in my view those conditions were not met in the evidence in this case. There was no evidence to suggest that if the appellant was in a state of dissociation at the material time that that state might have been brought about or triggered solely by external factors or stimuli: the only finding which would have been open to the jury had they accepted the psychiatric evidence was that the stimuli referred to in the evidence could not have brought about or triggered the state of dissociation but for the fact that the appellant was suffering from a mental disease. In other words a finding that the appellant was suffering from a mental disease was a *sine qua non* to a finding of the existence of a state of dissociation. There was no basis upon which the trial judge could have left the issue of automatism to the jury even in the alternative.

Grounds 2 & 8:

In *Reg. v. Camplin* [1978] A.C. 705, at p. 718, Lord Diplock said that when an issue of provocation was raised the judge should direct the jury in the following terms:

"The judge should state what the question is using the very terms of the section. He should then explain to them that the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him; and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also whether he would react to the provocation as the accused did."

That case changed the law as it had been laid down in *Bedder v. D.P.P.* [1954] 1 W.L.R. 1119 in which it was held that when a court or a jury are considering the effect which a provocative act might have had upon a reasonable man they should not take into account the fact that the accused suffered from a physical disability likely to render him peculiarly susceptible to the provocation alleged. The *rationale* for that change in the law was the passing of the *Homicide Act* 1957 (5 & 6 Eliz. 2, c. 11) which provided *inter alia* that "things said" were capable of constituting provocation. At p. 717 of *Reg. v. Camplin (supra)* Lord Diplock expressed the effect of that change in the law in these terms:

"... now that the law has been changed so as to permit of words being treated as provocation even though unaccompanied by any other acts, the gravity of verbal provocation may well depend upon the particular characteristics or circumstances of the person to whom a taunt or insult is addressed. To taunt a person because of his race, his physical infirmities or some shameful incident in his past may well be considered by the jury to be more offensive to the person addressed, however equable his temperament, if the facts on which the taunt is founded are true than it would be if they were not. It would stultify much of the mitigation of the previous harshness of the common law in ruling out verbal provocation as capable of reducing murder to manslaughter if the jury could not take into consideration all those factors which in their opinion would affect the gravity of taunts or insults when applied to the person to whom they are addressed. So to this extent at any rate the unqualified proposition accepted by this House in *Bedder v. Director of Public Prosecutions*, [1954] 1 W.L.R. 1119 that for the purposes of the 'reasonable man' test any unusual physical characteristics of the accused must be ignored requires revision as a result of the passing of the Act of 1957."

I agree with Crawford J. that for the purposes of s. 160(2) of the *Code* an "insult" may consist of words alone: the ordinary meaning of the word includes a merely verbal affront and that that is at least

one of the senses in which it is used in s. 160(2) is suggested by the fact that it is expressed as an alternative to and therefore presumably something which differs from an "act". Some support for that conclusion is derived from the decision of this Court in *Hall v. The Queen* (Unreported, C.C.A., 30th August 1968) in which it was held that the trial judge was correct in refusing to leave to the jury an issue of provocation which was constituted by words alone. The Court held that the words relied upon were not capable of constituting provocation as they would not have been sufficient to deprive the ordinary person of the power of self-control so as to lead him to do what the appellant did. But none of the members of the Court suggested that the matter relied upon was not capable of constituting provocation because it consisted solely of words. I record that counsel for the Crown did not seek to argue at the trial or before this Court that words alone are not capable of constituting provocation.

I see no reason for not applying the decision reached in *Reg. v. Camplin* (*supra*) to s. 160 of the *Criminal Code* including in particular the reasoning which impelled the House of Lords in that case to overrule *Bedder v. D.P.P.* (*supra*).

In my view in the present case, if it was appropriate to leave the issue of provocation to the jury, they should have been directed in accordance with the decision in *Reg. v. Camplin* (*supra*) and in particular, they should have been told that they should regard the "ordinary person" referred to in s. 160(2) of the *Criminal Code* as a person having the power of self-control expected of an ordinary sixteen-year old girl, but in other respects sharing such of the appellant's background, personal history and other characteristics as they think would affect the gravity of the insult to her.

It is clear that in considering the issue of provocation the jury are entitled to have regard to all the circumstances surrounding the act or insult relied upon: *Moffa v. The Queen* (1976) 13 A.L.R. 225, 51 A.L.J.R. 403; *Hall v. The Queen* (*supra*). In my view the learned trial judge properly directed the jury in accordance with that proposition.

Counsel for the Crown submitted in the alternative that the issue of provocation ought not to have been left to the jury at all. The onus of establishing that the killing was not provoked lay upon the Crown and thus the question raised by this submission is whether there was any evidence which could have led the jury to the conclusion that they were not satisfied beyond reasonable doubt that the deceased did not do any wrongful act or convey any insult of such a nature as to be sufficient to deprive an ordinary sixteen-year-old girl of the power of self-control to such an extent as to lead her to do what the appellant did.

In considering that question the evidence should be viewed in the light most favourable to the accused: *Lee Chun-Chuen v. The Queen* [1963] A.C. 220, at p. 230; *Hall v. The Queen* (*supra*).

The expressions "You're no good Sal, get out" and "You bitch" could no doubt properly be characterized as insulting or abusive assertions. I would also accept that their impact and capacity to hurt would be greater in the case of a person who had had the unhappy history of institutional care, maternal rejection, excessive consumption of alcohol and drugs, trouble with the police and general insecurity which the appellant had experienced. But the words used were not threatening, grossly insulting or violently abusive and in my view after giving the fullest possible weight to the special susceptibility which the appellant might have had to statements suggesting that she was inadequate or worthless I do not consider that a reasonable jury could possibly conclude that those statements would have been sufficient to deprive an ordinary sixteen-year old girl of the power of self-control to the extent that she would stab someone with a knife. I do not consider that the issue of provocation should have been left to the jury. It follows that any misdirection on that issue could not have caused a miscarriage of justice (see *Lee Chun-Chuen v. The Queen* (*supra*) at p. 235).

Grounds 4 and 5:

During the hearing counsel for the appellant accepted that if he could not establish grounds 2 and 8 he could not sustain that part of ground 5 by which it is said that the jury could only have brought in a finding a manslaughter. Ground 5 should therefore be read as if the words "of manslaughter or" were excised from it.

In order to uphold ground 5 this Court would have to be satisfied that it was not reasonably open to the jury to conclude that they were not satisfied that the appellant killed the deceased when she was afflicted with mental disease to such an extent as to render her incapable of understanding the physical character of the act or acts of stabbing which caused the death or of knowing that she ought not to have done that act or those acts. Although it was not the only evidence relevant to those issues, in order to be satisfied as to those elements of the defence of insanity it would have been necessary for the jury to accept Dr. Burges-Watson's evidence that at the material time the appellant was in a state of dissociation.

It is clear that there may be cases in which evidence given by expert witnesses at a trial is so overwhelming that an appellate court would be entitled to interfere with a verdict which was inconsistent with that evidence: see e.g. *Reg. v. Matheson* [1958] 2 All E.R. 87; *Reg. v. Bailey* [1961] Crim. L.R. 828; *Reg. v. Dick* [1966] Qd.R. 301 and *Taylor v. The Queen* (1979) 22 A.L.R. 599. However, in the end it is for the jury and not the witnesses or the court to determine the issue of insanity. As the Privy Council said in *Walton v. The Queen*

[1978] A.C. 788, at p. 793, [1978] 1 All E.R. 542, at p. 546 when a jury are considering a defence of diminished responsibility they should approach their task in a "broad common sense way" and they are bound to consider "not only the medical evidence but the evidence on the whole facts and circumstances of the case". In particular the Privy Council emphasized that as the jury "may properly refuse to accept medical evidence, it follows that they must be entitled to consider the quality and weight of that evidence". It follows that the jury are entitled to reject psychiatric evidence and conclude that they are not satisfied that a defence of insanity has been made out notwithstanding that no evidence challenging the expert evidence has been presented. For example, the jury would be entitled to reach such a conclusion if they were not satisfied as to the competence or honesty of an expert witness, or if they were not persuaded of the validity of the chain of reasoning which led to the witness' conclusion or if they were not satisfied that the facts upon which the witness' opinion was based had been established.

In the circumstances of this case before the jury could have returned a verdict of not guilty on the ground of insanity they would have had to accept Dr. Burges-Watson's opinion that at the time of the killing the appellant was in a state of dissociation which rendered her incapable of understanding the physical character of the act of stabbing or of knowing that it was an act which she ought not to do. No question was raised as to the expertise or honesty of Dr. Burges-Watson nor was the validity of the theoretical foundations of his opinions attacked. However, the Crown did contest some of the facts upon which his opinion was based.

It was clear that a significant part of the material upon which the opinion was based were the hypotheses or assumptions that the appellant had no memory of inflicting the fatal penetrating wound or wounds, that the onset of the dissociated state was not gradual but occurred suddenly and that after that state had endured for a period of time it ceased — apart from some momentary confusion or disorientation — just as suddenly. Upon all the evidence before them it would have been open to the jury to have made findings inconsistent with those assumptions. More generally, Dr. Burges-Watson's opinion was also derived from his understanding of the appellant's behaviour during the period leading up to the killing and afterwards. The jury had evidence of these matters before them and were entitled to make findings about them which did not accord with Dr. Burges-Watson's understanding of them.

In my view, it would have been fairly open to the jury to reject Dr. Burges-Watson's opinion that the appellant was in a dissociated state at the time of the killing. Grounds 4 and 5 should be rejected.

I would give leave to appeal and dismiss the appeal.

CRAWFORD J. referred to the defence of automatism and summarized the evidence of what occurred on the night of the murder. He then went through the evidence of Dr. Burges-Watson, quoting part of it, particularly of his cross-examination. In reference to a passage where the witness appeared to speak of the accused's state of mind at the time of the trial he said: The time when it is relevant that the appellant did not understand the physical character of the act or know that her act was one that she ought not to do is the time of the killing. The witness's understanding of s. 16 as applying to somebody who was in a conscious state of mind but, inferentially, not to one who was not in a conscious state of mind, is wrong in law. This section may apply to a person who was in a conscious state of mind as well as to a person who was in an unconscious state of mind. It is implicit in *Williams v. The Queen* [1978] Tas.S.R. 98 that this is so. The relevant question under the *Criminal Code*, s. 16(a) was whether the affliction rendered the person incapable of understanding the physical character of the act or of knowing that the act was one which she ought not to do.

At the conclusion of his quotations of the cross-examination, his Honour continued: It is clear that the evidence of this witness was of one opinion only, and not of two alternative opinions. His opinion was clearly that at the time of the killing the appellant had been, for four years or so, suffering from a condition of the mind in the terms used by Dixon J. in *R. v. Porter* (1936) 55 C.L.R. 182, at pp. 188, 189 held in *Williams v. The Queen* (*supra*) to be the law in Tasmania. As Sholl J. remarked at p. 310 of *Reg. v. Meddings* [1966] V.R. 306 (in which case the evidence was that the accused was liable to epileptic fits and that he had done the act constituting the crime during such a fit, triggered or possibly triggered by consumption of alcohol):

"If a man is liable to an epileptic attack by reason of a predisposition, whether resulting from injury or from some idiopathic cause, then I think it can properly be said he has a disease of the mind within the meaning of that phrase as it was used in the *M'Naghten* case. There is a predisposition to, with the potentiality of repetition of, violent outburst, and whether the trigger is alcohol, or whether it is a set of surrounding circumstances . . . does not seem to me to matter. If, in such circumstances, there is induced an epileptic fit as a result of which automatism supervenes, then I think it can properly be said, and ought properly to be said, that it is the result of a disease of the mind . . ." (p. 310)

And:

"There, I think, is evidence which is reasonably open to the interpretation that the man, on the probabilities, had a permanently injured state of the brain or a permanently disordered

state of the brain, such that, on the occurrence of certain circumstances, he may have a similar fit and act in a similar violent automatic fashion to that described in the evidence here.”(p. 311)

passages which I applied in *Reg. v. Reilly* (Unreported, Crawford J., 4th October 1979) (a case in which the evidence was that the accused had an underlying psychosis “exposed” or “released” by alcohol). The trial judge in my opinion was correct in following *Williams v. The Queen* (*supra*). It was proper to put to the jury the defence available to him under the *Criminal Code*, s. 16. That being so, and there being no other evidence (expert or otherwise) to found any applicability of s. 13 — i.e. that the act of the accused was not a voluntary and intentional one, (i.e. “sane automatism”), it was proper not to invite the jury to consider whether the appellant might not have been criminally responsible by virtue of s. 13.

There are two grounds of appeal concerning provocation under the *Criminal Code*, s. 160:

“2. THAT the Trial Judge misdirected the Jury in relation to the issue of provocation in that he did not direct the Jury to apply the test of an ordinary 16 year old female with the general type of background of the Appellant.

“8. THAT the Trial Judge was wrong in law in failing to put to the Jury that they were entitled to take into account conversation between the deceased and the Appellant prior to the stabbing as constituting provocation.”

Counsel for the appellant submitted that the jury should have been told that the standard was that of a sixteen-year old female possessing ordinary controls but having the general background of instability and depression possessed by the appellant. The learned trial judge ruled that he would not so direct the jury but that he would direct them that, in considering the *Criminal Code*, s. 160, they were to consider the “ordinary person” referred to in subs. (2) as an “ordinary sixteen-year old girl”, going on to say “that means one not unduly excitable or pugnacious, and possessing the powers of self control that a jury could expect an ordinary sixteen-year old girl to have in society as it is today”. He declined to add “having the experiential background of” the appellant. In his direction to the jury the judge said:

“Now, ‘ordinary person’ here in this context means an ordinary sixteen-year old girl. Because this is what the accused is. That is to say, you wouldn’t expect an ordinary sixteen-year old girl, I suppose — it’s a question of fact — to have the same degree of self control as, say a Capuchin monk, or a fifty-year old policeman, or any one of a number of other persons different in kind and character from the accused, you see. So in this context,

it means an ordinary sixteen-year old girl. It means, to expand that phrase 'ordinary person' a little more, it means an ordinary sixteen-year old girl who is not exceptionally excitable, or pugnacious, but one who is possessed of such powers of self control as would ordinarily be expected of an ordinary sixteen-year old girl — not an exceptionally excitable or pugnacious sixteen-year old girl, but an ordinary sixteen-year old girl. So it has to be, then, an insult of such a nature as to be enough to, sufficient to, deprive an ordinary sixteen-year old girl, not exceptionally excitable or pugnacious, of the power of self control. Again, the expression 'power of self control' is important. Any of us can lose our self control and lose our temper and do things that the next moment we might be ashamed of, we'd lost our self control. If we'd been a bit stronger and not so weak or infirm, we wouldn't have lost our self control. We haven't lost the power of self control, but we've lost self control. But here, it must be sufficient to deprive an ordinary person of the power of self control, so that he loses the power to control himself. . . . One factor which is material for you to consider if you do come to consider this question of provocation — is the degree to which the reaction of the accused in using the knife in that way was proportionate to the insult offered. . . . Obviously if somebody calls you a blazing idiot and you lose your power of self control at this insult and shoot the person dead, well I suppose any sensible onlooker would say your reaction was absolutely and totally out of proportion to the nature of the insult offered. That is a mere general illustration of the principle. So it is not a controlling matter, but it is material to consider, whether the reaction was — or the degree to which the reaction was, proportionate to the nature of the insult offered, if you think it was an insult. You may think it was not an insult at all, you might think in the circumstances it was a fairly well justified statement of fact. I don't know. As I say, it is all for you to say whether it was an insult of the kind referred to in that provision of the law, and whether the other provisions relating to provocation apply. And what you have to consider is whether the provocation was sufficient to cause an ordinary sixteen-year-old girl to lose the power of self control, and to react in the way that the accused did, on the assumption that she deliberately stabbed the fatal blow, and that apart from provocation it would constitute murder."

His Honour had provided each of the jury with copies of the *Criminal Code*, s. 160(1), (2). At the conclusion of his direction to the jury his Honour invited submissions from counsel and his Honour at the request of counsel for the appellant further directed the jury saying:

"The issue of provocation depends upon the effect on the accused of those words 'Get out, Sal, you're no good', but, in considering what the effect would be or may have been upon the accused, then you would certainly take into account the whole of the context of what had happened in the flat, leading up to the time that those words were spoken."

The appellant's counsel then remarked, referring to the judge's direction to the jury:

"Your Honour quoted all of the context of what was said in the flat by reference to Ruve's evidence . . . with the exception of the answers appearing on page 66."

(Ruve Bishop was the neighbour who gave evidence of the conversation between the appellant and the deceased.)

His Honour said:

"I will deal with that now",

and, speaking to the jury, said:

"I will start at the bottom of page 65, just to remind you of this part. It is in cross-examination by Mr. Slicer, 'And then I think you said this morning you heard words to the effect of "I feel secure here for the first time in my life?"' A. 'I heard words to that effect, yes.' 'Said by whom?' 'Sally.' 'Did she say anything else beyond that?' 'Yes, she did make further comments.'

"Q. 'If I move out the fucking cops will pick me up?' A. 'Yes.' This appears to be quotations from a statement made by Miss Bishop to the police. And then another quotation from that statement. Quote 'I've always had to learn the hard way?' — that's the question. A. 'Yes.' Quote 'I've got nowhere else to go?' A. 'Yes.' 'I'm not so and so moving out.' A. 'Yes.' 'For the first time in my life I feel in control of my life.' A. 'Yes.' Quote again, 'I know I've got into trouble, but if I had to go I'd be back in trouble again.' A. 'Yes.' Q. 'Now that's the totality of that second part of the row that you heard, or discussion, it wasn't said in one sentence, was it?' A. 'No, no, not at all'. That is, as I recall, the import of what was being said, but it went on for quite a while, and obviously many more sentences than that were used, that's the sense of what was being said and nothing more than that.' 'Now, you said she didn't make that statement in one — there'd be a part of it said, then you'd hear the murmur of a reply, then another part said, then a murmur of a reply and so on?' A. 'That's true to a certain point, but at one stage though, Sally did give quite a long dissertation along the lines that are contained in that paragraph.' 'Yes, but there may have been pauses for Romana's reply to sections of it?' A. 'To parts of it, yes'"

At the request of the appellant's counsel, his Honour read to the jury part of the evidence of the appellant:

"This is about being told before that she was no good. 'What was it about those words that you found upsetting or distressful?' 'I don't know.' 'You don't know, you've been called that before, told that you were no good, before?' A. 'Yes.' Q. 'And it hadn't worried you when other people had said it?' A. 'Not always.' Q. 'Why did it worry you when Romana said it?' A. 'Because I didn't think it — it just didn't sound right coming from Romana.' 'It didn't what?' 'It just didn't sound right — sorry — It just didn't sound like Romana to say something like that.' 'Well, you said that she had said nothing hurtful, or which had caused you any distress in the preceding hour?' A. 'Nothing like that, no.' 'Well, nothing at all that caused you to feel hurt or upset?' 'No.' 'That was the only thing then apart from the expression "You bitch" which was used a little later that caused you to feel any upset that night, is that what you're saying?' A. 'Well, there might have been a few other things.' 'But you can't tell us what they were?' 'I can't remember them no . . . ' 'Do you remember being asked what you felt when Romana said to you "You're no good, Sal, get out"?' A. 'Yes.' 'You were asked why you felt something and you said because it didn't seem like Romana would say that?' A. 'Yes.' " "Do you remember that?" 'Yes.' 'Is that so?' 'Yes.' 'Who did it seem like when you were told that you were no good?' A. 'My mother.' 'Do you remember feeling that then?' A. 'Pardon?' 'Did it remind you of any one then, when she said, "You're no good, Sal"?' A. 'Yes.' 'Who?' 'My mother.' So there is a reference there to the doctor's evidence about the rejection from Romana, triggering off some reaction relating to her mother's rejection of her, and so forth."

In her evidence, the appellant said that she did not know how she felt or thought when she heard the deceased say "You're no good Sal" or "Get out Sal you're no good". The deceased had not said that to her but other people had said it. She said she had felt "rotten" when other people had said she was no good. She said that the other people could have been right. Her boy-friend had said it to her and she felt hurt coming from him. When he had said it she had not felt like hurting him in return. It had not worried her when her mother had said the same thing to her. Earlier during the same conversation the deceased had commented "you have been drinking again". She was asked if she was resentful and she said "No". The deceased also said, "You always go round telling everyone when I get into trouble," but she was not angry when she said so, although she was resentful of it and shouted, although she also said that she could not remember whether she had shouted. She denied that she was "pretty agitated" when she was first talking to the deceased that night and said that she

was calm. She thought that there had been an argument about the dog. She denied what Ruve Bishop claimed to have overheard from the neighbouring flat, a statement by the appellant to the deceased that she, the deceased, had paid for the dog and that she should look after it for a while, and she said that what was said between herself and the deceased that night was "all an argument". She could have said to the deceased that she was not moving out and that she had "found this place", that, if she moved out, the "cops" would pick her up, that she had always had to learn the hard way, that she had nowhere else to go and that she was not moving out and that for the first time in her life she felt in control of her life, but she did not recall saying those things. She said that she was not annoyed when she brought the carving knife, cheese and bread-board into the bed sitting room, although the argument was going on, and that, when the deceased said "You're no good, Sal, get out", she stabbed her. She was not really angry or disappointed but said that statement to her was worse than anything else that the deceased had said in the preceding hour. When she was asked, "Why was it worse?" she replied twice, "because it was" and then, "I don't know". She said that it worried her because it just did not sound right coming from the deceased, and that in the preceding hour the deceased had said nothing to cause her to feel hurt or upset; but then she said, "There might have been a few other things" but she could not remember them. She said that, before she stabbed the deceased a second time, the deceased called her "a bitch" but that that had not made her angry. The deceased had called her a bitch before and that had not upset her. She said that she could not remember whether she was angry when she stabbed the deceased the second time.

Miss Bishop, in evidence, said that she could understand much more of what the accused was saying than what the deceased was saying; but she could hear the murmuring of the deceased's voice and was aware that she was replying to some of the comments of the accused. She said that many of the comments made by the accused were in a loud voice. Towards the end of the conversation she heard the accused say to the deceased not to try to take the knife out of her hand and, a matter of seconds later, she heard a small bang as if something had been knocked over. She then heard the accused saying that the next time it would be the deceased's face. From this, it might be inferred that she had then caused either one of the minor cuts or even possibly one of the major wounds. After a short pause, she then heard a very loud "bang, crash" and she believed that she then heard a noise somewhat like "perhaps a grunt or a gasp". After a short pause she heard the accused saying, "This would never have happened, Romana, if you hadn't gone round telling everyone what I did." She said that on occasions she could hear the deceased's voice

slightly raised but quite frequently it was "obscured" by the appellant's shouting.

During the evidence of Dr. Burges-Watson, reports by the Child Welfare Department on the appellant were put in evidence. They showed that she had come to the notice of the Department in 1974, that her mother had been in poor health and recovering from a nervous breakdown and could not cope with the behaviour of the appellant and her sister, that apparently she had become pregnant at the age of fourteen years, that she had refused to return home to live, that she had been charged with being beyond the control of her parents, that she had been taken into the care of the Department, that she had been placed in a Receiving Home, that she had been declared a ward of the State, that she had been sent to a girls' training centre but had absconded, that she had returned home to live but absconded again, that she had been placed in other hostels or places, that she had been charged with trespassing and stealing from her parents' home, that she had been in trouble with the police concerning other offences, that generally she had been rejected by her parents and that she did not reside in any one place for long. Dr. Burges-Watson gave evidence of some other matters which he had ascertained: that the appellant had twice been admitted to the Royal Hobart Hospital as a result of having taken too many drugs, that she had been drunk frequently and "experimented with sex and drugs", that she had had a "steady boy-friend" but that relationship had broken up after fourteen months and that the accused had on the day of the crime read an article in a newspaper on the "loneliest boy in the State" which the witness related to the appellant's feelings of guilt and worthlessness and the appellant's feeling that her mother wanted her locked away, and, on one occasion, in prison. The day before the crime the appellant had watched a television programme in which a girl was stabbed by another girl and on that same day she had made an attempt at a reconciliation with her boy-friend but that attempt had failed.

I proceed to consider ground 2. The *Criminal Code*, [His Honour set forth the *Criminal Code*, s. 160, and continued]:

The *Criminal Code* was "intended to replace the common law, and its language should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. It is not the proper course to begin by finding how the law stood before the Code, and then to see if the Code will bear an interpretation which will leave the law unaltered (Cf. per Lord Herschell, *Bank of England v. Vagliano Brothers* [1891] A.C. 107, at pp. 144, 145. *Brennan v. The King* (1936) 55 C.L.R. 253, per Dixon and Evatt JJ. at p. 263.

"This passage does not mean that it is never necessary to resort to the common law for the purpose of aiding in the construction

of the Code — it may be justifiable to turn back to the common law where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning, or on some such special ground: see *Robinson v. Canadian Pacific Railway Co.*, [1892] A.C. 481, at p. 487, cited in *R. v. Scarth*, 1945, St. R. Qd. 38, at p. 44. If the Code is to be thought of as ‘written on a palimpsest, with the old writing still discernible behind’ (to use the expressive metaphor of Windeyer J. in *Vallance v. The Queen* (1961) 108 C.L.R. 56, at p. 76), it should be remembered that the first duty of the interpreter of its provisions is to look at the current text rather than at the old writing which has been erased; if the former is clear, the latter is of no relevance.”

Per Gibbs J. (with whose reasons Mason J. agreed) in *Stuart v. The Queen* (1974) 48 A.L.J.R. 517, at p. 521. At common law, an insult (offered merely by words) was not provocation which might reduce murder to manslaughter. Although there may have been an exception to the general rule mentioned in *Holmes v. D.P.P.* [1946] A.C. 588, at p. 600 (“in no case could words alone, save in circumstances of a most extreme and exceptional character, so reduce the crime”), the mention of the exception appears to be *obiter dictum*. Lord Diplock in *Reg. v. Camplin* [1978] A.C. 705, at p. 715, qualifies this exception by using the word “perhaps”.

McMillan J., who dissented, said in *R. v. Scott* (1909) 11 W.A.R. 52, at p. 60, of a section in the West Australian *Criminal Code*, similar to the Tasmanian s. 160:

“In my opinion the term ‘insult’ has not acquired any well known legal meaning, but it is a word which the Legislature intended to use in its ordinary signification . . .”

and, at p. 61:

“... I can see no reason myself why the word ‘insult’ should not cover a verbal insult.”

On the other hand, Burnside J. at p. 68 said:

“I do not think that mere words spoken regardless of their nature or anything else can ever be held to amount to insult. Insult, to my mind, is closely allied to an act in the context of this Statute, and cannot arise merely from words.”

He was influenced by the use of the word “done” in the West Australian *Code* — “A wrongful act or insult . . . when *done*”, a word which does not occur in s. 160(2) of the Tasmanian *Code*. He added:

“There is no reference in the section to any ‘offer’ of insult.” (See p. 68.)

Incidentally, although it is not necessary to come to a decision now as to the effect of s. 160(4) upon provocation by insult, it may be that

that subsection relates to acts but not to insults, because insults are not usually "done" — (the subsection uses "doing" and "do") and because in most cases there is a legal right to insult another by words in private but not in a public place, and not in the presence of a third person, and it is not likely that the legislature intended to make provocation by insult depend on the existence or non-existence of this circumstance. Parker C.J. dealt with the matter by holding that the words used by the deceased were not evidence of an insult; (see pp. 56, 57) meaning, I think, that they were not insulting words.

In the report of *R. v. Jackson* [1918] N.Z.L.R. 363, decided when the *Crimes Act* 1908 of New Zealand as it related to provocation was similar to the Tasmanian s. 160, the evidence of "the wrongful act or insult" is not set out, except that there was no "blow" but there was evidence of what might be found to be a threat or insult (or both) (p. 365). It is significant, however, that Chapman J. (at p. 365) did direct the jury that "In order to understand the nature of the act relied on as provocation the family history may be properly considered".

The remarks of Gibson J. in *Reg. v. Lyden* [1962] Tas.S.R. 1, at p. 4, relating to "insult" in s. 160, do not assist on this point. His Honour said that an "insult . . . probably means an insult consciously offered by one person to another". It is unnecessary in the present case to express any opinion as to the correctness of this dictum.

There are no other cases (of which I am aware) which go to whether "insult" in s. 160 may consist of words alone.

In my opinion, the inclusion of the word "insult" in s. 160 as an alternative to an unlawful act as a means of provocation should lead to a conclusion that an "insult" means an insult offered by any means, by words, signs, acts, or any other means (if it is possible that an insult can be offered otherwise than by words, signs, or acts). It is unnecessary and undesirable to attempt to formulate a precise definition of the word as it is used in s. 160. As the court in *Thurley v. Hayes* (1920) 27 C.L.R. 548, at pp. 549 and 550, said of the word "insulting", as it was used in the Tasmanian *Police Act* 1905:

"No person shall, in any public place, or within the hearing of any person passing therein . . . IV. Use any threatening, abusive, or insulting words or behaviour with intent or calculated to provoke a breach of the peace, or whereby a breach of the peace may be occasioned."

...

"'Insulting' is a very large term, and in a statement of this kind is generally understood to be a word not cramped within narrow limits. In the *Oxford Dictionary* under the word 'insult', we find it means in a transitive sense 'to assail with offensively dishonouring or contemptuous speech or action; to treat with scornful abuse or offensive disrespect; to offer indignity to; to

affront, outrage'. We find in the same dictionary: 'Hence, "insulted", treated with contemptuous abuse, outraged'."

Moreover, to amount to "provocation" for the purpose of s. 160, the insult must be "of such a nature as to be sufficient to deprive an ordinary person of the power of self-control" (subs.(2)) as to do what the particular accused did, in that the retaliation must bear a reasonable relation to the provocation: *Hall v. The Queen* (Unreported, C.C.A., 30th August 1968).

It follows that in order to decide whether there has been an insult of sufficient gravity and effect, "ordinary person" must be interpreted as meaning, in the words of Lord Diplock in *Reg. v. Camplin* (*supra*, at p. 718) (a decision which considered the effect of a statutory alteration of the common law by providing that words alone could provide provocation) "a person having the power of self control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as . . . would affect the gravity of the provocation to him; and that the question is not merely whether such a person would in the like circumstances be provoked to lose his self control but also whether he would react to the provocation as the accused did". The "characteristics" may be not only physical characteristics. The insult might be offered in a foreign language known to both the deceased and the accused, but an ordinary Australian might not know that what was said was an insult or be able to judge its sufficiency for the purpose of the law relating to provocation. The insult might be one offered by signs or acts which constitute a grave insult and understood as such by the deceased and the accused by reason of their previous experience but meaning nothing to the ordinary Australian, unless explained to him. A gesture might be a grave insult in the minds of the deceased and the accused, but meaningless to an ordinary person. The words might be found to be an insult, and the gravity of the insult might be determined, only by a knowledge of the past experience of the accused. To be told one is "no good" might mean nothing to a person who has led a blameless life, but more to a person who has had a blameworthy past but has made an effort to reform.

There is, in this case, what might be seen to some as a dilemma. It might be thought that, if the accused generally had the power of self-control of an ordinary girl of her age, she would not have had her experiences or been rejected by her mother, and possibly others. But this dilemma must be resolved by considering the relevant time when the existence of the power of self-control of the ordinary girl is to be considered, and that it is at the time of the killing. In this case, the appellant's background of socially unacceptable behaviour and of rejection must be regarded as "characteristics" of the ordinary girl, but this notional ordinary girl is to be considered at the time of the

killing as having the power of self control of an ordinary girl. In my opinion the trial judge did not direct the jury as to the characteristics which the jury were to attribute to the ordinary girl.

However, counsel for the respondent submitted that, whatever this court's view of the law with respect to provocation was, on the evidence s. 160 should not have been left to the jury. The question whether any matter alleged is, or is not, capable of constituting provocation is a matter of law: s. 160(3). Where an appellate court considers whether provocation should have been left to the jury by the trial judge, it should do so on the basis of evidence most favourable to the accused: *Hall v. The Queen* (Unreported, C.C.A., 30th August 1968). If on any reasonable view of the evidence provocation might properly be considered by the jury, it is the trial judge's duty to present it to the jury whether raised by the defence or not: *Hall v. The Queen* (*supra*). In considering the matter it must be borne in mind that the onus of proof is upon the prosecution to prove that the culpable homicide which would otherwise have been murder had not been provoked in the full sense of s. 160.

There was nothing in the evidence which was capable of amounting to provocation within the meaning of s. 160. There was nothing in the words left to the jury as capable of amounting to provocation or in any of the words said to have been used earlier which could amount to an insult of such a nature as to be sufficient to deprive an ordinary female of sixteen years, with the history of the accused, but, at the time of the killing, not exceptionally excitable or pugnacious, and then possessed of such powers of self control as everyone is entitled to expect that such females will exercise in society as it is today, of her power of self control so as to retaliate with a knife and stab the deceased in such a way as to cause the fatal wound.

As to ground 8, it is unnecessary to deal with this ground separately in view of my conclusion as to ground 2. If I am wrong as to that, the trial judge's direction that, in considering what the effect of the words "Get out, you're no good" may have been on the appellant, the jury was to take into account the whole of the context of what had happened in the flat was sufficient. There has been no miscarriage of justice in respect of grounds 2 and 8.

There are two remaining grounds of appeal to be dealt with. [His Honour set out grounds 4 and 5, and continued]:

As to ground 4, it is sufficient to say that it was fairly open to the jury not to accept essential facts upon which the psychiatrist based his opinions.

As to the finding of manslaughter mentioned in ground 5, as I have held, the learned trial judge should not have left the matter of provocation to the jury, in which case there would have been no grounds for a verdict of manslaughter.

I would give leave to appeal where leave was necessary, but I would dismiss the appeal.

EVERETT J. Having had the opportunity to consider in draft form the judgments of the Chief Justice and Crawford J., I am content to record my complete concurrence with the conclusions each has reached and my general agreement with the reasons which each has expressed. I also agree with the orders proposed.

Leave to appeal granted.

Appeal dismissed.

Attorney for the appellant: The Australian Legal Aid Service.

F.D.C.S.