

HUTTON *v.* THE QUEEN

1986. Court of Criminal Appeal: Green C.J., Cox and Underwood JJ.

August 21, 22, 1985, March 12, 1986.

Criminal Law — Particular Offences — Offences against the person — Homicide — Murder — Alternative verdict of manslaughter on charge of murder — Provocation — What constitutes provocation — Insult — Criminal Code, s.160(3).*

[Aust. Dig., Criminal Law [88]]

H was living with Mrs. B and her two children and Mrs. B had agreed to marry H when she was divorced from B. R, who appeared to H a mere acquaintance of Mrs. B, came to stay. After some days Mrs. B ordered H out of the house and to return the car used to move his possessions within the hour. On his return he found R and Mrs. B in circumstances manifesting a sexual relationship between them. Mrs. B laughed at him. He picked up his rifle which was still in the house and shot the pair. Charged with murder, he pleaded provocation (*Criminal Code*, s.160). The trial judge held that Mrs. B's insult was not capable of constituting provocation in either case. H appealed.

Held, that—

- (a) Underwood J. *dissentiente*, in the circumstances, the insult was capable of being "sufficient to deprive an ordinary person of the power of self-control";
- (b) provocation may be given in some cases by a person other than the party killed; and
- (c) Underwood J. *dissentiente*, the trial judge's ruling was wrong and the question of provocation must go to the jury in a new trial.

Quaere, to what extent does the case of a concubine or paramour differ from that of a wife.

**Criminal Code*, 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.

(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.

APPEAL AGAINST CONVICTION.

Shane William Hutton was convicted at Launceston Criminal Sittings before Cosgrove J. on 15 April 1985 on a charge of murder contrary to the *Criminal Code*, s.158, and appealed against his conviction.

The following facts, which the jury might on the evidence have found, are taken from the judgment of Green C.J. The appellant and the deceased Boyd, who was a married woman with two children, had been living and sleeping together for about nine months before 14 September 1984. Apart from normal arguments there were no problems with the relationship. The relationship developed to the point that they had agreed to marry when the deceased's divorce, which the appellant knew to be imminent, was completed. The deceased Reid, who was a friend of Mrs. Boyd, came to Tasmania in early September 1984 and visited the house on a number of occasions between then and 14 September. He stayed the night on some occasions, including the night of 13 September. The appellant got on "really well" with Reid and had no suspicion that he and Mrs. Boyd might have been romantically involved with each other. Mrs. Boyd was expecting a child of which the appellant was the father, but shortly before 14 September Mrs. Boyd had a miscarriage.

On 14 September 1984 the appellant got up at about 7.45 a.m. He brought breakfast in bed to Mrs. Boyd and to the younger of her two children. During the morning he read, played with the children, went shopping, visited Mrs. Boyd's mother and then went shooting with Reid. Upon their return the appellant left the rifle which they had been using leaning against a chair in the lounge room.

Some time after their return to the house late in the afternoon Mrs. Boyd suddenly, unexpectedly and for no apparent reason, came into the lounge room and told the appellant to pack his bags and to leave the house and not come back. In the course of the ensuing argument Mrs. Boyd struck the appellant a hard blow on the neck with a piece of wood. Reid was not involved in the altercation and at that stage the appellant did not suspect that he was a party to what was happening or that he and Mrs. Boyd were more than friends. The appellant packed and left the house in a car jointly owned by the appellant and Mrs. Boyd. As he was leaving Mrs. Boyd told him that if he did not return the car within an hour she would call the police. He visited Mrs. Boyd's cousin and an hotel to find accommodation.

At about 8 or 8.30 p.m., prompted by Mrs. Boyd's threat to call the police, the appellant drove back to the house in order to return the car to her. He walked in the back door and upon entering the lounge room found Mrs. Boyd and Reid lying on the floor. Their arms were around each other and they were cuddling. Suddenly the appellant realised that their relationship was sexual and that they had

"got their heads together" in order to get him out of the way. At that moment Mrs. Boyd rolled away from Reid and laughed at the appellant in a sarcastic and scornful manner. The appellant lost control of himself, picked up the rifle and shot them both.

The judge declined to direct the jury as to provocation pursuant to the *Criminal Code*, s.160(3), and the appellant was convicted of murder. He subsequently appealed on the grounds, *inter alia*, that the judge erred in law in holding that there was no evidence of provocation under the *Criminal Code*, s.160(3), by misdirecting himself as to the test of what kind of conduct could constitute provocation, and in failing to direct the jury to consider provocation to reduce murder to manslaughter.

T. J. Ellis for the appellant.

A. R. Jacobs and *M. E. O'Farrell* for the Crown.

Ellis. It is clear that s.160 posits an objective test, to be determined on a view of the evidence most favourable to the accused. There was no "wrongful act", but there was an "insult" within the meaning of that section, that insult being Mrs. Boyd's laughing at the appellant in a sarcastic and scornful way upon being discovered compromised with Reid, in circumstances where the appellant would realise that he had been deceived as to Mrs. Boyd's reasons for terminating her relationship with him and would reasonably apprehend that she had taken Reid as her lover either before or immediately after requiring the appellant to leave. The absence of insulting words does not detract from the appellant's case (*Bedelph v. The Queen* 1980 Tas. R. 23, *Reg. v. Lyden* [1962] Tas.S.R. 1, at p.4) but rather strengthens it, as it leaves the insulted person to apprehend that the worst and most personally wounding insults and epithets are embraced in and intended to be conveyed by the laughter. The insult is without limit. By comparison, an insult such as "you have a big nose" is limited and only capable of being perceived as such. If it is accepted that the conduct of Boyd was an insult, and if it is also accepted that it was all the more grave and provocative by its very being inarticulate, then that consideration of the proportionality of the reaction to the insult is also satisfied. In any event that proportionality is only a factor, albeit an important factor. Unless there is no possibility that a jury would not find proportionality, the question should be decided by the jury, not the judge. On one view, it can be said that no insult should be sufficient so to deprive the ordinary man of the power of self-control that he kills; however the *Criminal Code* leaves open an "insult" as capable of constituting provocation, and therefore unless the insult relied on was clearly of a trifling character and the test of proportionality could not conceivably be satisfied, the jury, not the judge, should determine if the test is satisfied. *Packett v. The King* (1937) 58 C.L.R. 190, at p. 220. The *Criminal Code* should be interpreted in accordance with its natural

meaning not influenced by the presumption that it was not intended to change the common law. *Bank of England v. Vagliano Brothers* [1891] A.C. 107. Section 160(1) of itself would give no warrant to read in "offered by the deceased" at the end of the subsection. In *Jeffrey v. The Queen* 1982 Tas. R. 199 it is implicit in the judgments of the court that not *all* the provocation needed to have come from the deceased. It is a small step from that proposition, and one which is dictated by logic, to say that *none* need come from the deceased. The reverse holds true at common law, that the provocation need not be offered by the deceased to the accused. *Reg. v. Terry* [1964] V.R. 248, and *Reg. v. Davies* [1975] 1 All E.R. 890, [1975] Q.B. 691, and *Reg. v. Porritt* (1961) 45 Cr. App. R. 348 also would lead in logic to the conclusion that the provocation need not be offered by the deceased to the accused, before it is open in relation to that killing. The judge appeared to view as determinative a test of community expectations or values in considering whether the evidence did in law show conduct amounting to provocation. This appears to be an echo of his Honour's judgment in *Jeffrey v. The Queen* 1982 Tas. R. 199, at p.232. The community values are for the jury, and his Honour erred in law in importing a jury function to his role. Although his Honour also adverted to the proper test later, he clearly regarded the "community" test as determinative of the legal question. The test for the appellate court is that referred to by Dixon C.J., in *Parker v. The Queen* (1963) 111 C.L.R. 610, at p.616:

"Perhaps it may be said that the question is to be considered just as if the jury had decided in favour of the prisoner and, by some freak of procedure, the question arose whether that decision could be sustained."

Jacobs. We substantially agree with the appellant that the alleged provocation can only be looked at in the light of the word "insult" and not as a "wrongful act". The law on provocation has been very exhaustively canvassed in this jurisdiction in recent years: *Jeffrey v. The Queen* 1982 Tas. R. 199; *Hall v. The Queen* Serial No. 85/1968; *Askeland v. The Queen* Serial No. 59/1983; *Smith v. The Queen* Serial No. 51/1984; *Bedelph v. The Queen* 1980 Tas. R. 23; *Reg. v. Woods* Serial No. 6/1980. Some mainland authorities are: *R. v. Scott* (1909) 11 W.A.L.R. 52; *Reg. v. Tsigos* [1964-5] N.S.W.R. 1607; *Reg. v. Guerin* [1967] 1 N.S.W.R. 255. It is clear from the authorities that the judge has an independent duty to assess as a question of law, whether the alleged provocation is sufficient to warrant leaving the issue of provocation to the jury. Here the judge properly exercised that function and did not misdirect himself as to the type of conduct that would constitute provocation. The authorities show that the alleged provocation is minor and does not even approach the threshold required before the issue can lawfully be left to a jury. The killing in this case consisted of each of two people being shot with a weapon

that had to be brought from another room, by a shot to the back of the head and each in the area of the eye, and all four shots being at extremely close range.

Ellis in reply.

Cur. adv. vult.

MARCH 12.

GREEN C.J.: This is an appeal against the appellant's conviction upon two counts of murder. There was evidence upon which it would have been open to the jury to be satisfied that on 14 September 1984 the appellant killed Rodney John Reid and Lesley Joan Boyd by shooting them with intention of killing them. At the conclusion of the evidence, but before counsel addressed the jury, the learned trial judge rejected a submission by counsel for the appellant that the jury should be instructed that it was open to them to return a verdict of manslaughter pursuant to the *Criminal Code*, s.160. One of the grounds of this appeal is that learned trial judge's ruling was wrong.

[His Honour set forth the material parts of that section and continued:]

The trial judge's ruling was made pursuant to s.160(3) and I turn to consider the nature of the function which that subsection requires a trial judge to perform. The characterisation of the question as a matter of law has the effect of allocating responsibility for its determination to the trial judge and the nature of the function which he is required to perform can be inferred from the rationale of the provision advanced by Dixon J. in *Packer v. The King* (1937) 58 C.L.R. 191 when he said at pp. 217, 218:

"... the reason why the question whether any matter alleged is capable of constituting provocation is made a matter of law lies in the main in the necessity of applying an overriding or controlling standard for the mitigation allowed by law ... the court is entrusted with the duty of ruling whether the matter relied upon is capable of depriving an ordinary man of his self-control."

In *Parker v. The Queen* (1963) 111 C.L.R. 610, at p.660, Windeyer J. expressed the view that the *Criminal Code*, s.160(3), was a statutory expression of the "general rule" of the common law that—

"if there is any evidence on which a jury, acting reasonably could find the issue of provocation in favour of the accused the question must be left to them to decide as a question of fact; but if there is no such evidence the judge ought not to leave the question to them"

and adopted Dixon J's explanation of the rule as being applicable to both the common law and the *Code*.

Some of the main considerations which are relevant to the discharge of a trial judge's obligations under s.160(3) are as follows:

1. The trial judge is not concerned with determining as a tribunal of fact whether he is satisfied that the matter alleged would have deprived an ordinary person of the power of self-control — he is only required to rule as a matter of law whether the evidence is such that it is capable of satisfying the minimum condition or controlling standard referred to by Dixon J.

2. The criteria for determining the question of whether any matter is capable of constituting provocation are not immutable, but may change over time in sympathy with changes in the standards which prevail in our society: see *Parker v. The Queen* (*supra*, per Dixon C.J. at pp. 627, 628 and Windeyer J. at pp. 653, 654).

3. “A judge who takes the issue” (of provocation) “away from the jury assumes the very gravest responsibility”. Per Evatt J. in *Packett v. The King* (*supra*, at p.220). That opinion was accepted by this Court in *Smith v. The Queen* Serial No. 51/1984. On the other hand, trial judges must not be so circumspect in the way in which they exercise the duty imposed by s.160(3) that they render it ineffective.

4. The expression “matter alleged” in s.160(3) does not mean that the trial judge is obliged to confine his attention to matter which has been expressly advanced in the evidence or by counsel as constituting provocation. See the judgment of Clark J. in *Packett v. The King* (1937) 33 Tas.L.R. 18 with which, apart from one immaterial matter, Evatt J. in *Packett v. The King* (1937) 58 C.L.R. 191 expressed his entire agreement. At p.44 Clark J. held that the effect of the amendment of s.160(3) by the addition of the words “but the question whether any matter is or is not capable of constituting provocation is a matter of law” was to restore the law as laid down in *Thorpe v. The King* (1925) 18 Cr.App. R. 189 in which it had been held, at p.191, that if there is sufficient evidence of provocation —

“Then it is the duty of the judge to leave the question to the jury, notwithstanding that it has not been raised by the defence, and is inconsistent with the defence which is raised.”

See also *Hall v. The Queen* Serial No. 85/1968 and *Pemble v. The Queen* (1971) 124 C.L.R. 107. I appreciate that in *Packett v. The King* (*supra*) Dixon J. referred at p.218 to “any interpretation of the prisoner’s story which a jury might reasonably adopt”, but I think that that statement must be read in the light of the fact that in that case the only evidence of what happened came from the prisoner and that his Honour was not purporting to lay down a rule that a trial judge should confine himself to a consideration of the version advanced by the accused.

5. It is well settled that in discharging his duty under s.160(3) the trial judge must consider the evidence from the point of view most favourable to the accused. In doing so he must also bear in mind that

a jury is not obliged to accept or reject a particular class of evidence, or the evidence of a particular witness, *in toto*, but may accept some parts and reject other parts and he must also bear in mind that a jury is entitled to draw inferences. It follows that before withdrawing provocation from the jury a trial judge must be satisfied that there is no permutation of the findings and inferences which it would be open to the jury to make which could lead to a conclusion that there was matter capable of constituting provocation.

6. Although past events may not be relied upon as constituting provocation the history of the relationship between the accused and the victim is capable of being material in determining the significance and gravity of the act or insult relied upon as constituting provocation; see *Hall v. The Queen (supra)*. In my view, the evidence in this case was capable of supporting the following findings.

[His Honour set out his findings substantially as set forth above, and continued:]

Those are not the only findings which were open on the evidence, nor are they necessarily the findings which I would make myself if I were a tribunal of fact. But they are findings about the events of that day which were open on the evidence.

The learned trial judge accepted and before this Court the Crown accepted, rightly in my view, that in the circumstances Mrs. Boyd's scornful laughter was capable of being regarded as an insult for the purposes of s.160. The question is whether it was capable of being regarded as an insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control.

It could be inferred from the evidence that the appellant regarded his relationship with Mrs. Boyd and her children as stable and secure and that it was as emotionally important to him as it would have been had they in fact been married. It would have been open to the jury to find that the unexpected discovery of Mrs. Boyd in a sexually compromising situation was as psychologically traumatic to the appellant as a husband's discovery of his wife in a situation suggesting adultery would have been and that, of course, has long been held to be capable of constituting provocation. To the shock of that discovery must be added the demeaning and disturbing effects of his realisation that his relationship with Mrs. Boyd and the children had been abruptly ended and his not unreasonable belief that for some period whilst the appellant had been deluding himself that he, Mrs. Boyd and the children had been leading a normal and happy domestic life together, she and Reid had in fact been deceiving him and planning to get rid of him and that not only did Mrs. Boyd have no regard for him, she was so indifferent to his feelings that she was prepared to deliberately exacerbate his distress by scornfully laughing at him. Once again I

emphasise that those were not the only inferences which could have been drawn from the evidence, but they were inferences which it would have been open to the jury to have drawn:

In my opinion, in the circumstances of this case the insult was capable of being held to be of such a nature as to be sufficient to deprive an ordinary person in the appellant's situation of the power of self-control and I therefore hold that the matter revealed by the evidence was capable of constituting provocation in respect of the killing of Mrs. Boyd.

I have come to the same conclusion in respect of the killing of Reid. The *Criminal Code* does not provide that provocation may only be given by the deceased and it is not open to the Court to read into the words used in s.160 such a substantial limitation upon its operation. That section is concerned with the nature of the provocation and its effect upon the accused and the ordinary person, not with the source of that provocation. However, that is not to say that the source of the provocation is irrelevant. The fact that the person killed was a stranger who was not a party to the conduct constituting the provocation would be material as to the determination of the question of whether or not an act or insult was capable of constituting provocation. In this case however Reid was a participant in the episode which gave rise to the insult and it was his presence and actions which gave colour and significance to that insult. It would have been open to the jury to find that the act of shooting Reid was part of the same act or series of acts which resulted in the shooting of Mrs. Boyd and that both killings were committed as a result of a single episode during which the appellant was deprived of the power of self-control.

I do not need to consider the other grounds of appeal.

In my opinion the appeal in respect of both counts should be allowed, both convictions should be quashed and a new trial ordered.

Cox J.: The appellant was convicted on two counts of murder. The victims were a Mrs. Boyd, a woman with whom until the fatal day he had been living in a *de facto* relationship of husband and wife for apparently nine months, and one Rodney Reid, a man introduced into the household by Mrs. Boyd about ten days before their deaths. The appellant complains that the learned trial judge wrongly declined to leave the issue of provocation to the jury on either count.

At the trial there was evidence that on 14 September 1984 the appellant and Reid had been shooting with a rifle which the appellant had borrowed. After their return the rifle was left in the lounge room of the home occupied by the appellant and Mrs. Boyd and her two children. Reid was a friend of Mrs. Boyd and came to her home after arriving from Sydney about ten days earlier. He had stayed there a few nights, then stayed with his mother and the night before the fatalities had again slept the night in the house occupied by the

appellant and Mrs. Boyd. The appellant understood them to be good friends but had no reason to suppose them romantically attached to each other.

According to the appellant's evidence, a little after 7 p.m. Mrs. Boyd came into the lounge room from the kitchen where she had been preparing tea and without warning ordered the appellant to pack his bags and leave. When he argued with her she picked up a piece of wood and hit him on the side of the neck. Shortly thereafter he left the house in Mrs. Boyd's car taking all his belongings with him and went to a hotel where he unsuccessfully sought accommodation and spent some time drinking. Thereafter he returned to the house leaving the car a short distance from it. He walked in the back door of the house and through into the lounge room where he saw Mrs. Boyd and Reid on the floor "cuddling up to each other". In his sworn evidence he said that he threw some keys at Mrs. Boyd and that she rolled away and started laughing at him in a sarcastic and scornful manner. Before she moved, the couple on the floor had been lying in each other's arms. When she laughed at him he felt numb and felt a loss of control. He recalled seeing the rifle but did not know what he then did. His next recollection was of going through a nearby park. Other evidence clearly established that the two victims were shot by bullets from the rifle in the lounge room. It was not seriously contested that he was the person who discharged it and that he did so at close range shortly after finding them alone in the lounge room.

An unsigned record of interview, the accuracy of which was contested, was admitted into evidence and contained admissions that the appellant had decided to shoot them both after seeing them lying together on the floor, because "they had got their heads together to get me out of the way" and that he had just picked up the rifle and shot them both — Reid once and Mrs. Boyd twice. Asked if he had intended to kill them both he allegedly replied, "Yes, they both did the dirty on me so I decided to get them both".

The appellant did not contend that the conduct of the victims or either of them constituted a wrongful act within the meaning of the *Criminal Code*, s.160, but argued that Mrs. Boyd's scornful laugh in the circumstances in which it was uttered did constitute an insult. This was not disputed by counsel for the Crown. The learned trial judge however took the view that no "reasonable jury could reasonably find that the insults or conduct in its proper background putting it at its highest proffered by the deceased to the accused would be sufficient to deprive an ordinary person of the power of self-control" to such an extent as to kill.

At common law, homicide by a husband of his wife or her paramour found in the act of committing adultery was sufficient to reduce what would otherwise be murder to manslaughter. In *Parker*

v. The Queen (1963) 111 C.L.R. 610, at pp.653,654, Windeyer J. examining the history of the doctrine of provocation in order to properly construe a New South Wales proviso that the act causing death should be done "without intent to take life" said:

"As a result of early cases in which the question of murder or manslaughter was submitted to the ruling of the judges, two rules became established concerning particular forms of conduct which would or would not suffice. At one end of the scale stood the case of a husband suddenly discovering his wife actually in the act of adultery. If he thereupon immediately killed her or her paramour, it was not murder but manslaughter. It was so held in 1671 in *R. v. Maddy* ((1671) 1 Ventris 158 [86 E.R. 118]) and ever since this has been taken to be a rule of law. It is ordinarily said to depend upon the doctrine of provocation. But it may be that it has an older derivation; for in many parts of Europe in ancient times a husband finding a man in adultery with his wife might lawfully kill him on the spot: see *Blackstone, Commentaries Book IV*, p.191; *Puffendorf Book II*, chap.5, 15.

"At the other end of the scale stood pronouncements that reproaches, however grievous, and insulting words or gestures, however offensive, would not count as provocation if they were unaccompanied by any assault or blow. A blow might be answered by a blow causing death; and that would be manslaughter. But mere words, not being menaces, would not suffice to justify or explain a blow, if death ensued, that would be murder. Perhaps the rule that words alone would not suffice was not always quite strict. The early writers drew a distinction between homicide upon a grave provocation and homicide upon a slight provocation. A slight provocation would not excuse the use of a deadly weapon manifesting an intention to kill; but if the man provoked 'had given the other a box on the ear, or had struck him with a stick or other weapon not likely to kill and had unluckily and against his intention killed, it had been but manslaughter': *Foster, Discourse on Homicide*, 3rd ed. (1792), p.291. But it was only in exceptional cases, if at all, that mere words would count, even as slight provocation. And this is perhaps still the common law rule: see *Holmes' Case* ([1946] A.C. 588).

"Between the two extremes of the common law — killing an adulterer taken in the act, which was always but manslaughter, and killing provoked by mere words which was nearly always, if not always, murder — are many rulings of the judges concerning provocation on particular facts. Many of them show how different in weight and character are the things that matter in one age from those which matter in another."

Under s.160 there is no automatic reduction of the crime of murder to manslaughter by virtue of the accused finding his wife in the act of committing adultery but it could scarcely be argued that such circumstances would not as a matter of law require a judge to put the issue of provocation to the jury. Section 160 also differs from the common law in that words (or gestures) alone, if constituting an insult, may be sufficient to raise the defence of provocation. The last sentence of the passage I have quoted from Windeyer J. is also important as recognizing that changing community values may render conduct not considered sufficient to raise the defence in one age sufficient in another to deprive an ordinary person of the power of self-control.

In *Reg. v. Lyden* [1962] Tas.S.R. 1 Gibson J. directed the jury that the defence of provocation was open to the accused who had lived with the deceased for several years in a *de facto* relationship of husband and wife and who had fatally shot her after suddenly discovering her having or about to have intercourse with another man. His Honour expressed grave doubt whether the act which was observed by the accused from a distance was capable of amounting to an insult within the meaning of s.160 for he thought that "an insult in this section of the *Criminal Code* probably means an insult consciously offered by one person to another, but not something which is not intended to be seen or observed." However, Gibson J. held that inasmuch as the *Maintenance Act* 1921, for the purposes of maintenance of wives and children, provided that "any woman with whom any man is proved to have cohabited for a period of twelve months immediately prior to the commission of the act of which she complains . . . shall be deemed to be the wife of such man" and that intercourse between one such party and a third party should be treated as adultery and might found an order for maintenance, such intercourse outside the *de facto* union was a "wrongful act" within the meaning of s.160 capable of constituting provocation.*

The learned editor of *Russell on Crime*, 12th edn., p.529, commenting on the common law position says:

"Differing views have been expressed in the courts from time to time as to the effect in law of a confession, a suspicion, or an expectation of adultery, but the difficulties which these varying judicial dicta have raised, seem now, so far as concerns the criminal law to be administered in England and Wales, to have been disposed of by the *Homicide Act*, 1957. What must be noted here is that it never seems to have been necessary to decide in any case tried in England exactly what set of facts might be covered by the expression 'finding in the act of adultery'. The point has, however, arisen in an African case, *Chacha s/o*

*As to the situation under the *Maintenance Act* 1967, see *Reg. v. Carroll* 1984 Tas.R. (N.C.) 15. F.D.C.S.

Wamburu v. R. (1953) Court of Appeal for Eastern Africa) and it was held not to be necessary that the wife and the adulterer should be caught during the actual period of intercourse; but if they are found together in circumstances from which immediately recent intercourse is and can safely and correctly be inferred, they may be found in the act of adultery within the meaning of the rule."

In the case of *Reg. v. Kelly* (1848) 2 Car. & K. 814 Rolfe B. said in the course of his summing up to the jury:

"To take away the life of a woman, even your own wife, because you suspect that she has been engaged in some illicit intrigue, would be murder."

The facts of the case however indicated only that the deceased woman had asked the prisoner for money and had then gone to a canteen where the prisoner observed her drinking with another man. In the case of *R. v. Greening* [1913] 3 K.B. 846, Bray J. delivering the judgment of the Court of Criminal Appeal observed that evidence of the deceased who had cohabited with the prisoner for about eight weeks prior to her death visiting a house of ill fame and being found by the prisoner intoxicated in the company of the proprietress of the establishment "did not amount to anything like a sudden discovery that the deceased woman was having or even intended to have connection with another man" (at pp.849-850). I think it can be said that if a man discovers his wife with another man in circumstances from which he can and does reasonably and correctly infer that immediately recent adultery has occurred or that but for the discovery it is about to take place that would be sufficient to place the issue of provocation before the jury. For present purposes although the evidence placed before this court was somewhat equivocal and incomplete I am prepared to assume that there was evidence sufficient to raise the arguable possibility that the appellant reasonably and correctly inferred that the two deceased had immediately recently engaged in sexual intercourse or were about to do so. It accordingly would follow, in my opinion, that had the appellant and Mrs. Boyd been lawfully married or had they cohabited for a period of one year or more such a discovery by the appellant would have required the jury to consider the defence of provocation.

The editor of *Russell on Crime* goes on to observe, 12th edn., at p.530, that:

"This particular instance of provocation was, by the great majority of opinion, confined to the case of lawfully wedded spouses. But a dictum of Channell J. in *R. v. Palmer* (1913) 2 K.B. 29, 'But here the relation of the parties was not that of husband and wife, nor was it a case of unmarried persons living together as husband and wife' suggested that the discovery of the woman in the act of fornication (or her confession of it) could equally provide the

defence of provocation whether the parties were lawfully married or merely living together as husband and wife."

In *R. v. Greening* (*supra*, at p.849) Bray J. said of this dictum:

"The last few words of that passage suggest a loophole. But Channell J. did not directly say that the circumstances would amount to provocation in the case of unmarried persons living together. He left that case open. In my view the law which has been applied in the case of husband and wife has no application to the case of a man and woman living together. It is a gross offence against a husband that his wife should commit adultery, but there is no such offence against a man if a woman not his wife, although he may be living with her, chooses to commit such an act. In the latter case the man has no such right to control the woman as a husband has to control his wife. A husband may legally complain if his wife frequents a house of ill fame. A man has no such right in the case of a woman not his wife. The two cases are entirely different. Only the sudden discovery of the gravest possible offence which a wife can commit against her husband has given rise to this particular case of provocation."

At common law the controversy is not resolved and in the United Kingdom the provisions of the *Homicide Act* 1957 make the point somewhat academic.

In *Parker v. The Queen* (1963) 111 C.L.R. 610, at p.627, Dixon C.J. said:

"... it had long been recognized that a homicide might be 'reduced,' that is extenuated, to manslaughter if it was the result of a provocation which the law would accept as sufficient extenuation to warrant the crime being treated as manslaughter. *East's Pleas of the Crown* (1803) vol. 1, p. 238 after enumerating a number of examples says: 'In all the instances above enumerated the party killing is supposed to have taken all advantages in the heat of blood over the person slain; but to have received such a provocation as the law presumes might in human frailty heat the blood to a proportionable degree of resentment, and keep it boiling to the moment of the fact; so that the party may rather be considered as having acted under a temporary suspension of reason, than from any deliberate malicious motive'."

Of course, as Crisp J. said in *Hall v. The Queen* Serial No. 85/1968, at p.8:

"The doctrine was not evolved to feed resentment or excuse revenge no matter how grievous the initial wrong. Though 'the law condescends to human frailty, it will not indulge human ferocity' (*R. v. Kirkham* (1837) 8 Car. & P. 115)".

Nonetheless the common law did presume that the discovery by a husband of his wife in the act of adultery was such a provocation as might in human frailty rob an ordinary man of his power of self-control. It would be strange that an act so hurtful to a spouse or to a person who has cohabited with the deceased for more than twelve months as sexual intercourse with another person can raise the issue of provocation but cannot do so if the accused is not married to the deceased or has not cohabited with her for that length of time. Nevertheless, s.160 requires that the provocative conduct must be a "wrongful act or insult" and hurtful though such conduct as intercourse with another person may be to a person living in a well established *de facto* marital relationship, I have been unable to discover any authority which supports the view that it would amount to a wrongful act within the meaning of that section if the relationship has not yet endured for a full year.

The present case does not however depend solely on any wrongful act of the deceased. The appellant relies upon conduct which the Crown, rightly in my view, accepts as amounting to an insult. It is not every insult which can give rise to the defence of provocation but an insult of the kind alleged is calculated to be as hurtful as, or more so than, the act which immediately preceded it. The accused had been the deceased woman's *de facto* partner for the previous nine months and there was evidence that he was the father of a child she was expecting but which she lost by miscarriage earlier that same week and that she had undertaken to marry him when her imminent divorce was finalized. In my view the jury might reasonably infer that her sarcastic laughter in the circumstances in which she was found by him was intended by her and perceived by him as an indication that she was quite indifferent to the hurt her behaviour was likely to cause him. As such it was capable of being regarded as an insult of a very grave kind and one likely to inflict even greater distress than the act of suspected intercourse itself would inflict because consciously done to hurt the accused.

In these circumstances it is my opinion that an ordinary man might "in human frailty" lose his power of self-control. I am not suggesting that any casual or short relationship might be availed of to support a defence of provocation if in jealousy a disappointed lover unlawfully kills his partner. In the circumstances of this case however there is evidence that the relationship was of such a kind that the accused might reasonably have expected fidelity from the deceased and evidence that suddenly finding his expectations dashed, he had insult added to that injury when her conduct was contemptuously thrown in his face. In my view the insult her scornful laugh constituted in that context was in law capable of being regarded as sufficient to deprive an ordinary person of the power of self-control.

In my respectful view the issue of provocation should have been left to the jury in respect of the count alleging the murder of Mrs. Boyd. However, the question arises whether they should have been instructed to consider it in relation to the count alleging the murder of Reid. It is not clear from the attenuated appeal books made available to this court which of the deceased was shot first but it seems to be accepted that one was shot almost immediately after the other. The question arises because the deceased Reid offered no insult to the appellant nor was his conduct a "wrongful act" against the appellant because the latter was not married to Mrs. Boyd nor had they lived together in excess of twelve months.

Section 160 itself does not suggest that the unlawful act or insult must emanate from the victim. The full rigors of the law being relaxed in merciful recognition of the loss of self-control which the frailty of human nature may not be able to prevent because of provocation, it would seem logical that if the loss of control is due to provocation the accused should not be deprived of any mitigation of his crime because the provocation was offered by another. The culpability of the accused for homicide is not reduced because of any lack of worth in the victim but because the offender has lost his power of self-control as the result of conduct which is sufficient to deprive an ordinary person of the power of self-control and he has acted upon it on the sudden and before there has been time for his passion to cool. In that weakened state the law regards him as having a lesser degree of responsibility. I see no reason in principle therefore why the fact that Mrs. Boyd was the only one to offer him an insult should deprive the appellant of the defence. In determining whether the conduct alleged to constitute provocation is capable in law of amounting to provocation, this court has previously emphasized that the proportion of the fatal act to the provocation is a matter to be considered in determining whether the provocation was such as would lead an ordinary man in the accused's circumstances to so lose his control as to do an act of the kind and degree as the act by which the accused killed the deceased (see *Smith v. The Queen* 1984 Tas. R. 146, at p.154, citing Barwick C.J.'s judgment in *Johnson v. The Queen* (1977) 136 C.L.R. 619, at p.635; *Hall v. The Queen* Serial No. 85/1968; *Jeffrey v. The Queen* 1982 Tas. R. 199, at p.214, where Nettlefold J. expressed the concept in these terms:

"... that question of proportion is a relevant evidentiary issue going to the critical and ultimate question whether the fatal act should be explained as caused by provocation or whether it should be regarded as referable to a state of mind formed before the allegedly provocative conduct occurred or formed subsequent but independently of it.")

Wherefore the accused responding to provocation from one person proceeds to exterminate everyone else in the near vicinity it

is not hard to imagine a judge withdrawing the issue of provocation in respect of the murder of an innocent bystander on the basis that such a response far exceeded what an ordinary person in the accused's circumstances might be led to do. However, in the circumstances of this case, the shooting of the man he believed was Mrs. Boyd's paramour was not in my view so disproportionate a response that no ordinary man could be regarded as having been led by Mrs. Boyd's provocation to so lose his control as to act in that way and to shoot both of them.

In my opinion the appeal should be allowed on this ground, the conviction on both counts quashed and a retrial ordered.

UNDERWOOD J.: The appellant was convicted of murdering Rodney John Reid and Lesley Jean Boyd.

From that conviction he has appealed to this Court [and insofar as may be necessary, sought leave to appeal] upon grounds that can be compendiously stated as follows:

- "1. The Learned Trial judge erred in law in holding that there was no evidence of any matter capable of constituting provocation and,
- "2. The Learned Trial Judge erred in failing to exclude from the evidence an unsigned record of interview between the appellant and police officers."

[His Honour set forth the *Criminal Code*, s.160(1)-(3), and continued:]

The provisions of subs. (3) impose a duty upon a trial judge to determine as a matter of law whether there is any matter capable in law of amounting to provocation. This question falls to be determined upon "that version of the facts that is most favourable to the [accused's] case" — *Hall v. The Queen*, Serial No. 85/1968, per Crisp J. at p.7, or as expressed by Dixon J. in *Packett v. The King* (1937) 58 C.L.R. 190, at p.218:

"Upon any interpretation of the prisoner's story which a jury might reasonably adopt."

In determining the question of law posed by the *Criminal Code*, s.160(3), a trial judge is required to do more than consider whether there is any material fit to be left to the jury upon the question of provocation as is the case in the United Kingdom since the passage of the *Homicide Act* 1957. See, for example, *D.P.P. v. Camplin* [1978] A.C. 705.

In *Jeffrey v. The Queen* 1982 Tas.R.199 approved in *Askeland v. The Queen* Serial No. 59/1983 this Court held that the *Criminal Code*, s.160(3), requires a trial judge to exercise his own judgment upon evidence which the jury might reasonably adopt and determine if there is material which is capable of constituting provocation.

As Dixon J. [as he then was] said in *Packett v. The King* (1937) 58 C.L.R. 190, at p.217:

"At common law the test of provocation is not whether the occurrence is sufficient to deprive the particular individual in question of his self-control, having regard to his nature and idiosyncrasies, but whether it would suffice to deprive a reasonable man in his situation of self-control (*R. v. Lesbini*). This standard is embodied in the language of the Code and the Court is entrusted with the duty of ruling whether the matter relied upon is capable of depriving an ordinary man of his self-control."

The duty imposed upon a judge is to draw upon his experience and knowledge and postulate the reaction of an ordinary person to determine whether such person might have lost his self-control and acted as the accused did. The determination of this question is quite different from that involved in ascertaining if there is any evidence fit to be left for the consideration of the jury.

[His Honour set forth the facts in a form most favourable to the appellant and continued:]

Upon those facts the following questions arose for the determination of the learned trial judge:

1. Whether in the circumstances the scornful laugh by Boyd was capable of constituting an insult and if yes, whether it was capable of constituting an insult, the nature of which was sufficient to deprive an ordinary person of the power of self-control to the extent that he might commit acts similar in nature to those committed by the accused and which would, but for the provisions of s.160(1) amount to the crime of murder?
2. If "yes" to question (1) whether provocation by Boyd was capable in law of reducing the crime of murder of Reid to manslaughter?

The learned trial judge ruled against the appellant upon the first question in the following terms:

"I think this argument can be disposed of with one observation. What sort of community would this be if conduct of this nature was sufficient to deprive an ordinary person of the power of self-control to such an extent as to kill? I do not believe this community has reached this stage, and therefore I do not believe any reasonable jury could reasonably find that the insults or conduct, in its proper background, putting it at its highest, proffered by the deceased to the accused would be sufficient to deprive an ordinary person of the power of self-control so meant. The provocation will not go to the jury. There is no ground for manslaughter, it is murder or nothing as I see it. Unless there is some other proposition relating to manslaughter?"

As Crawford J. pointed out in *Bedelph v. The Queen* 1980 Tas.R. 23, at p.40:

“... 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 ...”

Looked at in isolation conduct relied upon as provocation may be colourless but when viewed in the context of other conduct take on a more emotive and provocative hue. In this case the conduct relied upon by the appellant is not the scornful laugh *per se* but the utterance of the scornful laugh by Boyd in the circumstances in which she was at the time and in the light of the relationship that had hitherto existed between her and the appellant. Assuming a view of the evidence most favourable to the accused a reasonable jury might infer that although the appellant and Boyd had lived together as man and wife for nine months and marriage had been agreed upon, Boyd expelled the appellant from the home with the express purpose neither disclosed to, nor suspected by, the appellant of taking up a sexual liaison with Reid. It was open to the jury to find that when the appellant came upon Boyd and Reid they were about to or had recently engaged in sexual intimacy and the scornful laugh suddenly and unexpectedly disclosed to the appellant that he had been deliberately deceived and expelled by Boyd to enable her to enter into a sexual relationship with Reid. In my view the scornful laugh in those circumstances is capable of amounting to an insult.

The more difficult question is whether, as a matter of law, such conduct was an insult *sufficient* to deprive an ordinary man of self-control and provoke him to commit an act or acts similar in nature to those committed by the appellant and which would, but for the provisions of s.160(1), amount to the crime of murder. A determination of this question involves an objective test which, in essence, amounts to ascertaining what reaction might be expected from an ordinary man to the alleged insult. This does not mean what the ordinary man *would* do in response to the alleged insult but whether the alleged insult had the capacity to cause ordinary human nature to lose the power of self-control and act in the same manner as the accused with the requisite intent to result in the commission of a crime which would, but for the “defence” of provocation, amount to the crime of murder. See *Moffa v. The Queen* (1977) 138 C.L.R. 601; *Johnson v. The Queen* (1976) 136 C.L.R. 619.

In ruling that the alleged insult did not in law amount to provocation, the learned trial judge obviously directed his mind to the question of proportionality. He said, “What kind of community would this be if conduct of this nature was sufficient to deprive an ordinary person of the power of self-control *to such an extent as to kill*”

(Emphasis mine). In *Hall v. The Queen* Serial No. 85/1968 all the members of this Court were of the view that although s.160 contains no specific reference to the relationship between the wrongful act or insult and the mode of retaliation, this factor was relevant to a determination of the question of law made necessary by s.160(2).

In the joint judgment of Taylor and Owen JJ. in *Parker v. The Queen* (1962) 111 C.L.R. 610 reference was made to the relevance of the relationship between the insult and the retaliation. At p.641 their Honours said:

“... the question is not whether there was some loss of the power of self-control, but whether the loss of self-control was of such extent and degree as to provide an explanation for or, to constitute, in some measure, an excuse for the acts causing death. And, of course, the provocation must have been of such a character as was calculated to deprive an ordinary person of the power of self-control to that extent.”

A rational view of the retaliation namely, taking up the gun and firing the fatal shots, is completely out of proportion to the insult offered namely, the scornful laugh uttered in the circumstances I have referred to. In my view Boyd's conduct might have provoked the ordinary man to commit some act of violence to her person, but it was not conduct capable of provoking the ordinary man to act in the way in which the appellant acted. The discharge of the gun at close range was entirely disproportionate to the insult offered. It could not be said that the magnitude of the insult was such that it had the capacity to provoke an ordinary man to retaliate with conduct similar to that of the appellant. The learned trial judge was correct in ruling that as a matter of law there was no matter alleged capable of constituting provocation.

As a result of the conclusion I have reached upon the first question of law raised upon this appeal it is unnecessary for me to consider whether provocation offered by Boyd was capable of reducing the crime of murder of Reid to manslaughter. In early times at common law when words alone could not constitute provocation there appears to be some authority for the proposition that provocation offered to a spouse or close relative of the accused could operate to reduce the crime of murder to manslaughter. See Kenny's *Outlines of Criminal Law*, 19th edn., p.180; *Russell on Crime*, 12th edn., p.531, and cases therein cited. However in *Reg. v. Davies* [1975] Q.B. 691 Lord Widgery, delivering the judgment of the Court, concluded that, at common law prior to the enactment of the *Homicide Act* 1957, provocation was restricted to acts done by the victim. His Lordship referred to the *Homicide Act* 1957, s.3, which altered the common law so as to enable mere words to constitute provocation. He then cited *Reg. v. Brown* [1972] 2 Q.B. 229 as authority for the additional change effected by the *Homicide Act* 1957, s.3, that the question of loss of control and reasonable

retaliation had become one question for the jury to determine namely, whether a reasonable man would do as the defendant did. His Lordship concluded that the changes made to the common law by the U.K. Act were so extensive as to require the Court to embark upon a construction of the section upon the basis that it provided a new test for the law of provocation and concluded, at p.701:

“...whatever the position of common law, the situation since 1957 has been that acts or words otherwise to be treated as provocative for present purposes are not to be excluded from such consideration merely because they emanate from someone other than the victim.”

It is likely that in reaching that conclusion his Lordship placed some reliance upon the concluding words of the *Homicide Act* 1957, s.3, which require the jury to “take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.”

Unlike the *Codes* of Queensland and Western Australia the Tasmanian *Code* remains silent upon this question but the language of s.160 is sufficiently wide to permit the same interpretation to given it, as was given the *Homicide Act* 1957,s.3, by the Court of Appeal in *Reg. v. Davies (supra)*.

For the purposes of the present inquiry the provisions of the Canadian *Criminal Code*, s.203, can be regarded as similar to the provisions of the Tasmanian *Code*, s.160. In *R. v. Manchuk* [1937] 3 D.L.R. 343 a majority of the Ontario Court of Appeal held that under the Canadian *Code* provocation emanating from a person other than the victim could operate to reduce the crime of murder to manslaughter. At p.347 Middleton J.A. said:

“The question is largely one of the method of approach to the problem: . . . the Court is not to look at the matter from standpoint of the victim. It is not to test between the slayer and the slain. It is not that the provocation by the slain in any degree justifies his death; it is rather that there was provocation whether coming from the slain man or from another which to some extent mitigated the offence.”

That decision was approved by the Supreme Court of Canada in *R. v. Manchuk* [1937] 4 D.L.R. 737 but in so doing the judgment of the Court made it clear that if the accused knew that the victim was not in any way concerned in the provocation then the defence of provocation was not open to him. This approach was subsequently adopted in *R. v. Jackson* [1941] 2 D.L.R. 119.

It is pertinent to refer to the guiding principle to be applied to matters of statutory interpretation. It is set out in the dictum of Lord Herschell in *Bank of England v. Vagliano Bros.* [1891] A.C. 107, at p.144:

"I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."

See also, *Robinson v. Canadian Pacific Railway Company* [1892] A.C. 481; *Brennan v. The King* (1936) 55 C.L.R. 253, and *Vallance v. The Queen* (1961) 108 C.L.R. 56. This principle was applied by Lord Widgery when construing the *Homicide Act* 1957, s.3, in *Reg. v. Davies* [1975] Q.B. 691.

Section 160(1) provides that culpable homicide amounting to murder may be reduced to manslaughter "if the person who causes death does so in the heat of passion caused by sudden provocation". Those words refer to the actions and state of mind of the accused person without reference to the relationship between the victim and the accused. It is to be noted that subs. (2) commences with the words, "Any wrongful act or insult . . .". A construction of the provisions of that subsection which confines provocation only to that offered by the victim is contrary to the ordinary meaning of the words. Further, the reference to "any person" in subs. (4) lends support to the argument that on a proper construction of the whole of the provisions of s.160 it is clear that Parliament intended that the matter be approached from the point of view of the accused and did not intend to confine provocation to that emanating from the victim.

Accordingly, in the circumstances of this case if there had been a matter capable of amounting to provocation the question of provocation should have been left for the jury with respect to the murder of both Boyd and Reid.

In view of the decision of the majority of the court that the learned judge erred in failing to leave the issue of provocation to the jury and that the appeal should be allowed it is unnecessary and undesirable that I consider the other ground of appeal.

Appeal allowed. Convictions quashed. New trial ordered.

Attorneys for the appellant: *Clarke & Gee.*

A.G.M.