PROVOCATION

The decision of the English Court of Criminal Appeal in *R.* v. *Cunningham* [1959] 2 W.L.R. 63, [1958] 3 All E.R. 711, raises three points worthy of comment. The first is the perpetuation by Lord Parker C.J. of two long-standing fallacies in the English law of provocation. The second is the extent to which the accused may go in attacking the character or prosecution witnesses without putting his own character in issue. The third is whether a verbal invitation to indulge in homosexual activities would be regarded as lawful provocation under section 3 of the Homicide Act, 1957.

At his trial at the Worcester Quarter Sessions for malicious wounding, Cunningham alleged that a man, Truman, invited him to participate in homosexual behaviour. Thereupon Cunningham lost his self-control and hit Truman with a cane he had with him, inflicting facial wounds.

The Deputy Chairman warned Cunningham's counsel of the dangers of attacking Truman's character but counsel insisted that such an attack was necessary to establish the defence of provocation. In consequence the accused's previous convictions were revealed, he was convicted and received a sentence of five years' imprisonment.

The appeals against conviction and sentence were dismissed on the ground that although some types of provocation can reduce murder to manslaughter, provocation could not be a defence to other crimes, but was of relevance only in assessing punishment. Lord Parker C.J., in his judgment, ([1959] 2 W.L.R. 65) stated that the nature of the crime of malicious wounding could not be altered by evidence of provocation, however grave.

There is no quarrel with the learned Lord Chief Justice's conclusion, but rather with the argument by which it was reached, which discloses some notable discrepancies.

Lord Parker relied on the judgment of Viscount Simon L.C. in *Holmes* v. *D.P.P.* [1946] A.C. 588, 598, [1946] 2 All E.R. 124, 115 L.J.K.B. 417, 175 L.T. 327, 62 T.L.R. 466, 90 Sol. Jo. 441, which defines the scope of provocation in these words:

> " The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived."

This demonstrates a complete misconception of the subjective requirement of the defence, for the essence of provocation is the loss of self-control, not a negation of intention. If provocation does in fact have the effect of nullifying malice it is difficult to see how Cunningham's offence could have amounted to *malicious* wounding, lacking as it would, the *mens rea* requisite to that offence.

Coke's definition (3 Inst. 50, 55) of provocation as an intentional killing done in hot blood describes its true function. The contrary view to that expressed by Lord Simon was taken in *A.G. of Ceylon* v. *Don Juan Perera* [1953] A.C. 200, [1953] 2 W.L.R. 238, 97 Sol. Jo. 78, 54 N.L.R. 265.

Continuing to quote the learned Lord Chancellor's dictum, ([1946] A.C. 601), Lord Parker said: "In the case of lesser crimes, provocation does not alter the nature of the offence at all: but it is allowed for in the sentence."

The Victorian case of *R.* v. *Newman* [1958] V.L.R. 61, [1948] 1 A.L.R. 109, raises a serious doubt as to whether this is so. There the charge was one of wounding with intent to murder. It is submitted that in such a case the jury could find the accused guilty of the wounding but need not be satisfied that he intended to murder his victim. In other words, because of the presence of lawful provocation he might have wounded with intent to commit manslaughter. In deciding whether the provocation is sufficient to bring about the substitution of the lesser offence, it is necessary to speculate as to the likely verdict had death in fact been caused. This hypothesis was considered in the early nineteenth century case of *Curvan* (1826) 1 Mood. 131, 168 E.R. 1213, where the accused had wounded in resistance to an illegal arrest. The judges' opinion was against a verdict of murder if death had ensued. At the worst, Curvan's crime could only have been that of feloniously cutting.

Lord Parker commented ([1959] 2 W.L.R. 65) *obiter* that even had provocation been admitted as a defence to a charge of malicious wounding the imputation against Truman's character would still have had the effect of putting the accused's character in issue. Prior to this dictum, it seemed, following *R.* v. *Turner* [1944] K.B. 463, [1944] 1 All E.R. 599, 114 LJ.K.B. 45, 171 L.T. 246, 60 T.L.R. 332, 30 Cr. App. Rep. 9, that the accused was not deemed to put his character in issue where his attack upon the character of a prosecution witness was incidental to denial of one of the essential elements of the crime charged (and which had to be proved by the Crown). If Lord Parker's view is to be regarded as law the defence will labour under an intolerable disadvantage in all cases where a plea of "not guilty" is entered, for even a simple denial of the veracity of a prosecution witness carries with it the innuendo that that witness is a liar, or at least, of unsound judgment, and to that extent, attacks character. Application of this doctrine could lead to the situation where the accused dare not suggest that a prosecution witness struck the first blow, for this would be to assert that he was of a pugnacious disposition, opening the door to the prosecution's giving evidence of the accused's previous convictions for assault with its obvious concomitant prejudicial effect on the minds of a jury. Clearly, the line must be drawn somewhere but it is submitted that it should be drawn short of the point where evidence of relevant facts in issue necessarily reflects upon the characters of the participants. Section 3 of the Homicide Act, 1957, provides that:

> " Where on a charge of murder there is evidence on which a jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything done and said according to the effect which, in their opinion, it would have on a reasonable man."

The old authorities refused to admit "mere words" as lawful provocation. However, in modern times it is not difficult to imagine circumstances where words (e.g. a sudden confession of adultery to an unsuspecting spouse, or persistent "twitting" by opprobrious language) may be more likely to cause a loss of self-control than a straight-forward assault.

Section 3 preserves (and perhaps widens) the "loophole" left by Viscount Simon in *Holmes* in respect of words which "in exceptional circumstances" may be lawful provocation.

In *Cunningham,* that defence was rightly excluded, but Lord Parker felt it his duty to comment ([1959] 2 W.L.R. 65) that even had provocation been an appropriate defence the alleged homosexual invitation would not have amounted to sufficient verbal provocation to bring it within section 3 of the Act.

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