"CHANCE MEDLEY" AND THE MALAYAN PENAL CODES

It is not incautious to generalize from an examination of reported Malayan decisions, it appears that the accommodating defence of "sudden fight"[1] as the circumstance of culpable homicide (Exception 4 to section 300 of the Penal Codes) is resorted to with curious infrequency.

By comparison with the plea in justification of private defence[2] and the palliative defences listed as the first, second and third Exceptions to section 300[3] (which reduce murder to culpable homicide not amounting to murder), the Exception is an accommodating one, whether it is set up alone or as an alternative to those defences.

A discussion of the application of Exception 4 becomes relevant in the light of two recent decisions of the Singapore Court of Criminal Appeal. The first of these, in point of interest, is *Soh Cheow Hor* v. *Regina.*[4]

The facts were that during a fight, apparently started by the deceased who was a more heavily built man than the appellant, the latter drew a knife and inflicted a fatal abdominal wound on the deceased. The appellant was convicted of murder. The trial Judge in his direction to the jury (at p. 132 of the record) stated the requirements of the defence of "sudden fight" in these words:

"There are four elements to be considered, . . . First, the fight must be sudden; secondly, there must be an absence of premeditation — it will not do if a man has

1. Exception 4 — Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.
2. Sections 96-100, 102, 103, 105, 106.
3. Respectively, provocation, excess of lawful power in exercise of the right of private defence and excess by public servant (or his aide) of powers conferred by law. The first five Exceptions to Section 300 preserve the exact wording of the Indian Penal Code. It is unlikely that the fourth and fifth Exceptions contemplate similar situations: see Ratanlal *Law of Crimes* (19th Edn.), at p. 746. The Singapore Penal Code has a sixth Exception which, apart from its use of 'voluntarily' (see s.39), is similar in effect to the offence of Infanticide defined in S.309A, (which requires the act or omission to be 'wilful': for the probable meaning of 'wilful' see *R.* v. *Senior* [1899] 1 Q.B. 283, 290; *R.* v. *Ryan* (1914) 24 Cox C.C. 135, 137). The wording of section 309A in the Federation of Malaya Penal Code differs slightly from that of the Singapore provision. A further amendment, the adoption of the English statutory defence of 'Diminished Responsibility' is now before the Singapore legislature, and is likely to form a seventh Exception to s.300. This latter, if it becomes law, could, like the first three Exceptions provide an alternative plea to Exception 4.
4. (1960) 26 M.L.J. 254.

time to think over what he should do and then kill the person with whom he has been fighting; thirdly, no undue advantage must be taken by the accused; fourthly, the accused must not have acted in a cruel or unusual manner." [5]

As to the burden of proof he stated,

"I must warn you that you can only arrive at that verdict (culpable homicide not amounting to murder) if you are satisfied that the accused used a knife to stab the deceased."[6]

In setting aside the conviction for murder and substituting one for culpable homicide not amounting to murder, the Court of Criminal Appeal *(per* Rose C.J.) stated,

"... it appears now to be the accepted rule that when an accused person endeavours to bring himself within one of the exceptions (to section 300), it is sufficient for his purpose that a reasonable doubt is raised in the minds of the jury as to whether or not the necessary factors exist. If as a result of the evidence of the whole case, taken and considered together, the jury find themselves in genuine doubt as to whether or not the case falls into one of the exceptions, then their verdict on the point must be in favour of the accused."[7]

These pronouncements by the trial Judge (on the substantive ingredients of Exception 4) and by the Chief Justice as to the standard of proof, indicate the indebtedness of the exception to the old common law defence of "chance medley"[8] out of which the doctrine of provocation was probably born: (which latter defence has in modern times most uncharitably swallowed up its progenitor).

The absorption of "chance medley" by provocation is perhaps best understood in historical terms. Homicides *se defendendo* and *per infortunium* were, until the eighteenth century treated, for purposes of punishment, on an equal footing. Whilst the former gained recognition as a justifiable act, the latter remained until the early nineteenth century merely an "excusable" one, on conviction for which no corporal penalty was imposed, though the presence of culpability, however slight, was

5. restated *ibid*., 254.
6. *ibid*., 254.
7. *ibid*., 254, 255.
8. Where the killing was the result of a quarrel or a fight, it was excusable though not justifiable if the killer had not begun but had participated in the fight, or, if having begun it, he did his best to decline any further struggle and withdrew, but, being still pursued, killed his adversary in order to avoid being killed or maimed himself.

   This is a summarised version of the definition afforded by Lord Goddard C.J. in *R.* v. *Semini* [1949] 1 All E.R. 233; [1949] 1 K.B. 405; 65 T.L.R. 91; 33 Cr. App. Rep. 51, C.C.A. Punishment and forfeiture for homicides in self-defence or by misfortune were finally abolished by section 7 of the Offences Against the Person Act (1861) which replaced and re-enacted section 10 of the Offences Against the Person Act (1828). However it appears that special verdicts for justifiable and excusable homicide had fallen into disuse when Foster was writing *(circa.* 1760), and that judges were accepting general verdicts of acquittal in cases of killing *per infortunium* and *se defendendo.*

signified by the forfeiture of the accused's possessions and by the exaction of deodand.[9]

By the first half of the sixteenth century the practice had evolved whereby one who had killed in necessary and reasonable self-defence was permitted to go free.[10] However, at that time (and during the two succeeding centuries) killings "upon some sudden affray" were prevalent[11] and were acknowledged to be a major danger to the preservation of communal order. The very nature of these killings denied the accused the shelter of self-defence, though the custom of wearing side-arms, combined with the heat of anger engendered by the affray, commended them to the courts as a less morally reprehensible form of homicide than that which was long-premeditated and carried out in cold blood.

In 1949 Lord Goddard C.J., drawing on the old Crown law authorities, was able to describe these crimes in the following terms :

" Where the killing was the outcome of a quarrel or fight it was excusable, though not justifiable, if the killer had not begun but had taken part in the fight, or if having begun it, but being closely pressed, killed his antagonist to avoid himself being maimed."[12]

Such a killing was picturesquely termed *"chaud melee"* (which became corrupted into the anglicized "chance medley").[13]

The moral guilt of the accused in such cases was seen to approximate to his culpability where he had caused death by misadventure (though not with such a degree of negligence as to constitute manslaughter). Consequently the two offences were brought together under the heading of "chance medley" and "punished" by forfeiture of property and exaction of the deodand.

Until the early eighteenth century juries were still required to bring in special verdicts for both justifiable and "excusable" homicide. But

9. Deodands were abolished in 1846 (9 and 10 Vict. c. 62).

10. At about this time the practice of returning acquittals was adopted by the courts (see Ames, *"Law and Morals"* (1908-9) Harv. L.R., p. 97), thus avoiding forfeiture. But Hale saw fit to remind his readers that the "proper course" in these cases was for the jury to find the facts specially *"et* sic *per infortunium vel se defendendo* . . . and the jury is only to find the fact and leave the judgment thereupon to the Court." *P.C.* i 471.

    The Bar and also some Judges (see, *e.g.*, Port J. in 26 Hen. 8, 5 pl. 24 (1534)) experienced difficulty in disguising their aversion for the formal conviction in cases of self-defence and the requirement of the issue of a "pardon of course" with its concomitant disadvantages.

11. For some examples see the Calendar of Patent Rolls 1554-5 (Phil. and Mary), especially the cases of *Glynn* at p. 228, *Todd* at p. 425 and *Rees Lloyd* at p. 500.

12. In *R.* v. *Semini* [1949] 1 All E.R. 233 at p. 234.

13. Or Chaunce Medley.

later, a sense of realism prevailed, and for both homicide *se defendendo* and *per infortunium* general verdicts of acquittal were returned.[14]

Thus ended the unsatisfactory "marriage of convenience" between homicide by misadventure and the pure *"chaud melee"* (the killing in a sudden affray): — the former being no longer punishable, and the latter being left to the controversial fate which will be discussed later in this article.

The Emergence of Provocation as a Palliative Offence.

In the sixteenth and seventeenth centuries drunken brawls were a common feature of English social life, as were altercations to settle so-called "breaches of honour".[15] The wearing of weapons determined that the likely outcome of such affrays would be death or maiming. Those who undertook to conserve the peace were (by modern standards) unorganised and inadequately versed in the forensic skills of criminal detection — particularly where death was inflicted in the confusion of a *mêlée.* Faced with unreliable evidence the Courts were unwilling to convict of the capital offence those who killed in such circumstances. Policy decreed that, in the absence of evidence of a "predisposed" malice the accused should be "excused" his crime.

Coke, unlike modern jurists,[16] viewed "malice aforethought," an essential element in the common law definition of murder, as a calculated intention to kill in the formation of which the accused had opportunity for deliberating on the likely consequences of his action.

Such a heinous predisposition was plainly absent from the mind of one who killed in the heat of a "chance medley." It was also absent from

14. Foster, *Crown Law, Discourse of Homicide* (1762) as adverted to by Stephen, *History of the Criminal Law of England,* Vol. III at pp. 76, 77.

15. See, *e.g.*, the collection of seventeenth century cases entitled *Depositions from York Castle* (Ed. Raine 1860), a publication by the Surtees Society, Volume 40.

In the Preface the editor states (at p. xiv): "How often do we find gentlemen of the highest consideration drinking and stabbing one another in a country pot house . . ." See also cases quoted at pp. 178, 187 and 210.

Foster *Dis. Hom.*, II, pp. 297-8 also speaks of this tendency. Note his comments on the social pressures leading up to the passing into law of 1 Jac. 1. c. 8 "The Statute of Stabbing."

16. "Malice aforethought" has, in modern times, degenerated into little more than a term of art (see Stephen's answer to Question 2110, Minutes of Evidence of the Royal Commission on Capital Punishment, 1866). The courts will now accept a bare intention to kill or to effect grievous bodily harm as indicating the presence of "malice aforethought." The most rapidly formed intention (as in the mind of a man who kills whilst deprived of his self-control) is now sufficient. In fact, since the judgment of the House of Lords in *D.P.P.* v. *Smith* [1960] 3 W.L.R. 546 it is no longer helpful for the accused's case to show that he did not contemplate causing grievous bodily harm when the Court decides that a reasonable person would have contemplated that result. For the full impact of this case on English criminal law see the article by Dr. Glanville Williams in Vol. 23 M.L.R., p. 605 *et seq.*, (1960).

the killing on sudden provocation unconnected with an affray (so long as the "provocation" was deemed serious enough to deprive the accused of his self-control). In these different shades of "malice" lurked the likely origin of the doctrine of provocation.[17] In the want of evidence of predisposed malice the killing was not murder: nor could it amount to a justifiable killing because the accused was blameworthy to a degree inversely proportionate to the gravity of the provocation. Rarely in cases of simple provocation (outside the confusion of the brawl; involving in most cases more than two participants) was there encountered the comparable difficulties of proof that beset "chance medley." Thus killing as a spontaneous response to adequate provocation was hooked on to the accommodating peg of the crime of manslaughter (which for purposes of reprehensibility and punishment was set roughly between "excusable homicide" and murder).

The Demise of "Chance Medley"

"Chance medley" fell into disuse during the eighteenth century. It was allegedly[18] abolished by section 10 of the Offences Against the Person Act, 1828 (re-enacted by section 7 of the Offences Against the Persons Act, 1861, by which forfeiture was expressly abolished in cases of killing without felony). An attempt, however, was made to revive the old doctrine by counsel for the accused in *R.* v. *Mancini* (1941),[19] and it was given a public dusting by Macnaughton J. in his charge to the jury in that case. The learned Judge referred to the defence in these words :

" If in the whole of the circumstances, as far as you know them, and having regard to the character of the people there [a night-club of questionable reputation], and the sort of conduct which was going on in such a place, you think that the blow may have been struck without any premeditation and in the excitement of the disturbance ... it seems to me you might be justified in returning the verdict of manslaughter."[20]

Mancini was nevertheless found guilty of murder, a conviction which was upheld in the Court of Criminal Appeal. In dismissing his further appeal to the House of Lords, Viscount Simon L.C. adverted to the trial Judge's direction in the following passage :

"It seems probable that [Macnaughton J.] was not referring to the defence of provocation but rather had in mind the excuse which in the old books went by the name of chance medley (see, *e.g.*, Blackstone Book IV, p. 184) . . ."[21]

Without either acknowledging or repudiating the existence of that defence, he went on to say :

17. See: Coke, *Inst.* 3, 50; *Royley's Case* (1612) 79 E.R. 254; *Anon* 12 Co. Rep. 87, 77 E.R. 1364; *R.* v. *Maddy* (1672) 1 Ventris 158; *R.* v. *Shaw* (1834) 6 C. & P. 372; *R.* v. *Thomas* (1837) 7 C. & P. 817 *(per* Park J. at pp. 818-9).
18. See Lord Goddard CJ. in *R.* v. *Semini* [1949] 1 All E.R. 233 at pp. 235-6.
19. At a trial before Macnaughton J. in July 1941 at the Central Criminal Court.
20. Quoted in *Mancini* v. *D.P.P.* [1941] 3 All E.R. 272 at p. 278.
21. *ibid.*

"... but however the defence may be classified, the verdict should not, in my opinion, be upset on the ground of the above extract from the Judge's charge." [22]

The fate of "chance medley" was, however, finally sealed by the Court of Criminal Appeal in *R.* v. *Semini* (1948).[23] It was expressly pleaded in a case which, had the facts occurred in the seventeenth century, would almost certainly have come within the scope of the doctrine.

Semini was walking with a woman friend when one of three men loitering nearby directed an opprobrious remark at the woman. The appellant knocked down one of the men, whom the deceased then incited to retaliate. The appellant shook off the efforts by some bystanders to restrain him, drew a knife, and with the words "I'll get the two of them," exceeded his self-set terms of reference by killing the deceased and wounding both his companions.

Counsel for Semini contended before the Court of Criminal Appeal that the doctrine relating to provocation [24] had no automatic application to "chance medley" which was a separate offence in which it was irrelevant who, in the course of the quarrel, had struck the first blow.

In disallowing the appeal, the Court *(per* Lord Goddard C.J.) made it clear that "chance medley" had been a dead letter since the abolition of forfeiture for non-felonious killings, and that its attempted resurrection was based on a misconception of its pre-nineteenth century function. At that period successful recourse to the doctrine had exempted the accused from all corporal punishment, whereas according to the thesis of Macnaughton J. in *Mancini* and of counsel in the instant case, it merely reduced murder to manslaughter, itself a punishable crime. With characteristic crispness the Lord Chief Justice disposed of these views:

" In truth this is not what was ever meant by the expression 'death by chance medley'."[25]

He went on to indicate the modern law attitude to killings effected in circumstances which would have qualified for treatment as "excusable homicides" prior to the abolition of that category :

"*Holmes* v. *D.P.P.* affirming the decision of this court, lays down rules on the subject which are authoritative and are to be followed by all Courts when the question of provocation becomes an issue in relation to killing as the outcome of a quarrel or a fight."[26]

22. *ibid.*

23. [1949] 1 All E.R. 233.

24. Which, prior to s.3 of the English Homicide Act 1957, were extremely rigorous. In spite of s.3 the doctrine still retains an objective basis.

25. [1949] 1 All E.R. 233 at p. 234.

26. *ibid*., at p. 236.

In short, the modern position in English law was approximated to that of the straightforward case of provocation, *viz.* a 'provocation' received in the course of a brawl or affray should be judged according to the same standards as ordinarily apply when provocation is pleaded.[27]

This marks off another area of the law of homicide where Malayan law is more indulgent towards the accused than its English counterpart.[28]

Exception 4 in action

Before passing on to the second decision of the Singapore Court of Criminal Appeal[29] and an examination of the substantive requirements of the "sudden quarrel," one question has to be answered: Why is it necessary to preserve Exception 4 to section 300 when high English authority has condemned its common law equivalent as being anomalous?

To this there are probably two answers. First, it is possible that the governments of India, the Federation of Malaya and Singapore would be reluctant to deprive themselves of a means of bringing to trial a thug who strikes a fatal blow in an affray, merely because it is difficult to gather the evidence necessary for his conviction for murder.[30] Second, and this is particularly true of the application to some states of the Indian Penal Code, there is a tendency to interpret the "grave" and "sudden" requirements of provocation under Exception 1 according to restrictive objective criteria imported directly from the common law.[31] In view of this it may be considered useful to preserve Exception 4 as a "safety net" for cases where the legal ingredients of Exception 1 are not met, but where it may be embarrassing on moral grounds to justify a conviction for murder.

However, both these arguments testify to the desirability of retaining the defence as a convenient method of circumventing evidentiary

27. Prior to 1957 see *Holmes* v. *D.P.P.* [1946] A.C. 588. For the subsequent law see 5 and 6 Eliz. 2, c.11, s.3.

28. For the other main areas see Setalvad, *The Common Law in India* at pp. 142-155 (pp. 154, 155 should be read with 5 and 6 Eliz. 2, c.11, s.3 in mind).

29. See footnote 37 *post.*

30. Malayan newspaper reports still indicate that public apathy constitutes the main barrier to bringing the participants in these *melees* to justice. The London police experienced a similarly frustrating task at the time of the vicious rash of affrays in Soho (mid-1950s). These scarred the reputation of the London public for police co-operation as much as they did the bodies of Messrs. Comer, Dimes and their colleagues.

31. See, *e.g.*, Panigrahi J. in *Ulla* [1950] A.I.R. Orissa 261 at pp. 263-4; *Dinabandhu Ooriya* [1930] A.I.R. Cal. 199. See also the opinion of the Judicial Committee in *A.G. of Ceylon* v. *Kumaraisinghege Don John Perera* [1953] 2 W.L.R. 238, which has recently been adopted by the Federation of Malaya Court of Appeal in *Loo Geok Hong* v. *P.P.* (F.M. Criminal Appeal No. 18 of 1960). But *cf.* the Madras High Court decision in *Kota Potharaju* [1931] A.I.R. Mad. 25, which treats the question according to subjective criteria; a tendency discernible in subsequent Allahabad and Bombay decisions.

difficulties of comparatively recent development rather than to the reason why "sudden quarrel" was originally drafted into Exception 4 of the Indian and Malayan Codes.

The framers of the Indian Penal Code incorporated the doctrine at a time when it was still generally regarded (probably erroneously[32]) as a valid common law defence.[33] And for perhaps no better reason than that it appeared in the Indian statute, it was automatically adopted as part of the Malayan law of homicide.

Apart from the additional requirement that death should be caused in a sudden quarrel or fight[34] Exception 4 provides a wider defence to murder than provocation in the following respects :

(i) it would appear that the "heat of passion" generated by the sudden quarrel need not, for the operation of Exception 4, have been inspired by "provocative" conduct such as would cause a reasonable person to lose his self-control;[35]

(ii) provided the occasion is sudden and there is an absence of pre-existing malice, the cause of the quarrel (for purposes of Exception 4) is irrelevant as is the question of who "drew first" or struck the initial blow.[36] What might be branded and (therefore excluded the accused from Exception 1) as a "sought after" or "voluntarily provoked" killing could be brought within Exception 4 if the accused man,

32. See Lord Goddard's reasons in *Semini* [1949] 1 All E.R. 233 at pp. 235-6.

33. This, despite the infrequency with which it was invoked after the crystallization of the doctrine of provocation and the disappearance of the custom of wearing side-arms.

34. Although it can be argued that most cases involving Exception 1 relate to "sudden fights", Exception 4 more readily envisages the case of "mutual provocation" which would be absent, for instance, in the obvious case of provocation where the accused straightaway kills the deceased whom he observes committing adultery with his wife.

35. For example in the Indian case of *Chamru* A.I.R. 1954 S.C. 652, where the accused and the deceased were prompted by mutual abuse to leave their houses and meet outside. There they struggled together until the accused hit the deceased a fatal blow with a *lathi.* The circumstances were not such as to bring the accused's actions within Exception 1 for it is doubtful whether the reasonable man would have reacted to verbal abuse in the way that the accused did. On the other hand there was a fight entered into without premeditation by either party in the heat of passion on a sudden quarrel. The *lathi* blow, could not be regarded as evidence of causing death in a cruel or unusual manner though it might perhaps be argued that the accused was at an advantage over his adversary in entering the struggle armed (deceased being apparently unarmed). However, there is ample authority for stating that no "undue" advantage is achieved where the accused picks up a weapon which is to hand.

See, e.g., *Mahanarayan* A.I.R. 1946 All. 19, 47 Cr. L.J. 469; *Ghose* 7 W.C. 106; *Jakat Singh* 28 Cr. L.J. 87; *Feroze* A.I.R. 1925 Lah. 633, 27 Cr. L.J. 26; *Hans Raj* 47 Cr. L.J. 234.

This would seem to indulge the "heat of passion" rather than the fact of advantage over an unarmed adversary.

36. *cf.* 1 East *P.C.* 241. 'Drew first' may be interpreted in a figurative as well as a literal sense: see the Explanation to Exception 4.

having (without premeditation) instigated the quarrel, forbears from attacking his adversary until the latter is on an equal footing with him.

Death which is inflicted in a "cruel or unusual manner" is for both exceptions regarded as evidence of a revengeful purpose or of a predisposed malice and would not qualify for their palliative application.

The second decision of the Singapore Court of Criminal Appeal which is relevant to this discussion is that of *Chan Tong* v. *Regina.*[37] The facts of this case were that the appellant, an ice-seller, had aroused the indignation of his neighbours by administering corporal punishment to his daughter whom he had detected stealing part of his day's earnings. The evening after this incident he was subjected to abuse by the same neighbours and challenged by the deceased to fight her husband. The appellant went outside and alleged that he was set about and beaten, and in order to defend himself he struck the deceased a fatal blow with his hand.

Rose C.J., in allowing the appeal and substituting a verdict of culpable homicide not amounting to murder for one of murder, was prepared to admit evidence that some "physical aggression" had been directed at the appellant, and that, combined with the verbal abuse, could have amounted to material "which would entitle the jury, had they so wished, to bring in a verdict of culpable homicide not amounting to murder on the ground of provocation."[38]

Apart from provocation the appellant's case had rested on self-defence or alternatively excessive exercise of that right (Exception 3). No where does the report refer to an attempt to bring the case within Exception 4. As the learned Chief Justice suggested in his judgment it is not unlikely that the jury would have rejected the defence of provocation had it been put to them. It is submitted that on the facts as reported there would have been less excuse for the jury's rejection of Exception 4. This submission is backed by the following reasons. First, it would be difficult to argue that the killing was premeditated in the sense of being a pre-determined killing upon consideration and not "a sudden killing under the momentary excitement and impulse of passion upon 'provocation' given at the time or so recently before as not to allow time for reflection."[39] It is clear from the Indian authorities that a fight *per se* is insufficient to bring the case within Exception 4: as

37. (1960) 26 M.L.J. 250.

38. ibid., 251.

39. Raju, *Penal Code* at p. 881. See *Nga Ba* A.I.R. 1933 Ran. 142. For cases where the Exception was excluded because of evidence of "express malice" see *Jagat* 28 Cr. L.J. 87, 99 I.C. 119, 27 P.L.R. 6; *Kirpal Singh* 52 Cr. L.J. 1517, 53 P.L.R. 284, A.I.R. 1951 Punj. 137.

in "chance medley" it must be a sudden fight.[40] It is not indispensable to the definition of a "fight" that weapons were used, or that only the blows of the accused landed.[41]

The appellant in *Chan Tong* could not be justifiably accused of taking undue advantage[42] of the deceased if his allegations of being himself assaulted and of only retaliating with manual blows, are accepted as raising a reasonable (if only hypothetical) possibility of veracity in the jury's mind.

Nor is it likely that any court would regard a manual blow struck in the heat and confusion of a *mêlée* as constituting a cruel or unusual method of inflicting death.

It is clear that, as a palliative defence to a charge of murder, Exception 4 has a broader effect than any one of the first three Exceptions: provocation and excessive exercise of otherwise lawful powers. It is also less exacting in the satisfaction of its substantive requirements than justifiable private defence. And yet in Malaya "sudden fight" represents a largely unchartered province of the law of culpable homicide.

This circumstance should invite exploration, not incuriosity.

B. J. BROWN. *

40. *Rohimuddin* (1879) I.L.R. 5 Cal. 31.

41. *Atma Singh* A.I.R. 1955 Punj. 191, 57 P.L.R. 437, 1955 Cr. L.J. 1283.

42. An illustration of "undue advantage" is where the killing took place after the deceased had turned and fled from the accused. *Nga Nyi* A.I.R. 1937 Ran. 2, 38 Cr. L.J. 321.

* Assistant Lecturer in Law in the University of Malaya in Singapore.