[COURT OF CRIMINAL APPEAL]

1951 *Present :* **Nagalingam S.P.J. (President), Gunasekera J., Pulle J., Swan J., and de Silva J.**

K. D. J. PERERA, Appellant, *and* THE KING, Respondent

APPLICATION 85 OF 1951

S. C. 16—M. C. Badulla, 11,357

Provocation—Charge of murder—Plea of grave and sudden provocation—Mode of resentment—Must it bear reasonable relationship to the provocation ?—Penal Code, s. 294, Exception 1, and s. 297—Court of Criminal Appeal—Meaning of expression " Full Court "—Court of Criminal Appeal Ordinance, s. 2.

Held (by the majority of the Court), that where the plea of grave and sudden provocation is taken under Exception 1 to section 294 of the Penal Code, there is no room under our law for taking into consideration the mode of resentment, or rather the violently disproportionate mode of resentment, in determining the question whether the provocation given was either grave and sudden or whether there was or was not loss of self-control.

Rex v. Naide (1951) 53 N. L. R. 207 overruled.

Held further, that where the Court of Criminal Appeal is constituted of a number of Judges which is more than the minimum quorum that is necessary to constitute the Court, a Full Court would be constituted, provided the Judges assemble for the purpose of reviewing or reconsidering a previous decision of the Court. A Court of five Judges can, therefore, overrule a decision of a Court of three Judges.

APPLICATION for leave to appeal against a conviction in a trial before the Supreme Court.

This case was reserved for adjudication by a Bench of five Judges owing to a difference of opinion among the three Judges, before whom it had been argued previously, in regard to the correctness of the decision in *Rex v. Naide (1951) 53 N. L. R. 207.*

Colvin R. de Silva, with *K. C. de Silva*, *V. S. A. Pullenayagam*, and *R. S. Wanasundera*, for the appellant.—The question that arises in this appeal is a matter of construction of exception 1 to section 294 of the Penal Code. It is wrong to construe our Penal Code by inquiring into the principles of English law. The correct course is to examine the language of the statute itself and to ascertain its proper meaning uninfluenced by any consideration derived from the previous state of the law or of the English law upon which it may be founded—*Mt. Ramanandi Kuer v. Mt. Kalawati Kuer* [1].

In our law, in no circumstances can exception 1 to section 294 be available if the offender cannot show that he committed the act whilst deprived of the power of self-control. The offender himself, and not the " reasonable man ", must have lost the power of self-control. Further, the provocation which deprived the offender of his power of self-control must be " grave and sudden ". Here an objective test is applied and the Courts bring in the concept of the " reasonable man ". The accused,

[1] *(1928) A. I. R. (P. C.) 2 at p. 4.*

for example, cannot say that he was a particularly excitable man. See *Lesbini's Case* [1] and the case of *Welsh* [2]. The test of proportionality between the nature of the resentment and the nature of the provocation is not recognized in our law. Viscount Simon's dicta in *Mancini's Case* [3] and *Holmes' Case* [4] are therefore inapplicable in the context of our Code. In terms of our law there is nothing in section 294 which introduces the requirement that, as a result of the provocation, the offender had no intention to do the act. One cannot look at the extent of the act to determine the question of the gravity of the provocation. In determining the question of gravity one must look, not at the offender, but at the " reasonable man ". Once the offender has lost his power of self-control one no longer requires the concept of the " reasonable man ". The test in *Lesbini's Case* (*supra*) is self-contained.

R. R. Crossette-Thambiah, K.C., Solicitor-General, with *H. A. Wijemarne* and *N. T. D. Kanakaratne*, Crown Counsel, for the Crown.—One Court of Criminal Appeal cannot overrule the decision of another Court of Criminal Appeal unless it is a " Full Court ". With regard to the principle of *stare decisis* see *Young v. Bristol Aeroplane Co., Ltd.*[5] and the case of *John William Taylor* [6].

In Ceylon the expression " Full Court " means all the permanent Judges except the Judge who heard the case. See sections 2 (1) and 2 (4) of the Court of Criminal Appeal Ordinance. *Rabot v. de Silva* [7]; *Jane Nona v. Leo* [8]; *Attorney-General v. Karunaratne* [9]; section 51 of the Courts Ordinance. In the circumstances, the decision in *R. v. Naide* (*1951*) *53 N. L. R. 207* cannot be overruled by this Court as at present constituted.

The real question in this appeal is whether the verdict of the jury should be upheld or not. When one surveys the evidence as a whole it is clear that there is no evidence of grave and sudden provocation. The accused cannot say that the person whom he killed was giving him provocation. It is the function of the Judge to decide whether there is sufficient evidence of provocation to go to the jury. The jury must decide whether there is evidence that a reasonable man would be provoked and whether that provocation came from the deceased.

Exception 1 to section 294 embodies the principles of English Law. In both systems (1) the accused must be gravely and suddenly provoked, (2) the accused must be deprived of his self-control, and (3) the provocation must be given by the deceased. In both systems the test is the test of a " reasonable man "—*Blackstone's Commentaries*, Vol. 4, pp. 211, 215, 216; *Gour's Penal Code*, 1925 ed., Vol. I, pp. 157, 1398, 1399. With regard to the subjective and objective tests of criminality, see *Gour* Vol. I, p. 168. For a summing-up on the essence of provocation see *R. v. Duffy* [10]. If the trial Judge told the jury that the mode of retaliation should be taken into account in testing the gravity of provocation it was because that was one of the tests adopted by a reasonable man. It was only an expression of view on a question of fact and not

[1] *(1914) 3 K. B. 1116.*
[2] *(1869) 11 Cox 336.*
[3] *(1942) A. C. 1.*
[4] *((1946) A. C. 588.*
[5] *(1944) 2 A. E. R. 293.*
[6] *(1950) 34 C. A. R. 138, at p. 142.*
[7] *(1907) 10 N. L. R. 140, at p. 146.*
[8] *(1923) 25 N. L. R. 241, at p. 245.*
[9] *(1935) 37 N. L. R. 57.*
[10] *(1949) 1 A. E. R. 932.*

a direction on a question of law. With regard to the effect of provocation see *Kenny; Outlines of Criminal Law*, 1944 ed., p. 135. With regard to the question whether the mode of retaliation has any bearing on the question whether the provocation was trivial see *Stephen's Digest of Criminal Law*, 1904 ed., p. 188; *Mancini's Case* (*supra*); *Lesbini's Case* (*supra*); and (1946) 48 Cr. L. J. 838 at p. 841. To determine whether the accused acted in revenge or under provocation the jury can consider all the circumstances. Therefore, the mode of retaliation has a bearing as that is a fact, among other facts, that may be taken into account. See *Queen Empress v. Mohan* [1]; *The King v. Kirigoris* [2], *Gours' Penal Code*, p. 996.

Colvin R. de Silva, at the request of Court, replied.—In this particular case the misdirection is of such a nature that it is impossible to say that the jury, if properly directed, would have come to the same conclusion. The proviso to section 5 (1) of the Court of Criminal Appeal Ordinance is therefore inapplicable.

In the past a Court of Criminal Appeal consisting of five Judges have dissented from decisions of a Court of Criminal Appeal consisting of three Judges—*Rex v. Jinadasa* [3]; *The King v. Velaiden* [4]; *The King v. Dingo* [5].

For English practice see *R. v. Victor George Ettridge* [6]; *R. v. G. Baskerville* [7]; *R. v. John William Taylor* [8]; and *The King v. Charles Leslie Norman* [9].

With regard to the duty of the jury on questions of fact see section 245 (*c*) of the Criminal Procedure Code. [Counsel also cited the *Case of Hussein* [10].]

Cur. adv. vult.

November 29, 1951. NAGALINGAM S.P.J.—

Appellant in this case was convicted of the murder of a woman named Kumarihamy and was sentenced to death. His appeal came in the ordinary course before a Bench of three Judges but as there was a difference of opinion in respect of the point of law argued which was identical with that considered in the case of *Rex v. Naide* [11] which was itself the subject of dissenting judgments and as the majority of the Court thought that the case of *Rex v. Naide* [11] was wrongly decided, the argument was adjourned for its resumption before a fuller Bench, and on the orders of My Lord the Chief Justice the appeal has now been argued before a Bench of five Judges. The question whether the Bench as constituted is a Full Bench or not has been canvassed by the learned Solicitor-General; we shall advert to this point after dealing with the main question that arises on this appeal.

The question that arises is whether certain passages in the summing up contain a misdirection of such a character as to vitiate the conviction. It has been said that in dealing with the exception relating to grave

[1] *(1886) I. L. R. Allahabad 622.*
[2] *(1947) 48 N. L. R. 407.*
[3] *(1950) 51 N. L. R. 529.*
[4] *(1947) 48 N. L. R. 409.*
[5] *(1948) 50 N. L. R. 193.*
[6] *(1909) 2 C. A. R. 62.*
[7] *(1916) 12 C. A. R. 81.*
[8] *(1950) 34 C. A. R. 138.*
[9] *(1924) 2 K. B. 315.*
[10] *(1939) A. I. R. Lahore 471.*
[11] *Appeal 58 of 195with application 84 of 1951 C.C A. Minutes 10-10-51 [See 53 N.L.R. 29 —Ed.]*

and sudden provocation the directions given by the learned trial Judge to the Jury set out the law in terms much wider than those warranted by the language of exception 1 to section 294 of the Penal Code. It is conceded, as Counsel for the defence was bound to do, that there are other passages in the charge to the Jury which lay down the law quite correctly and in consonance with the principles underlying the exception referred to. But it has been contended that towards the close of the summing-up the learned Judge rather pointedly referred to certain aspects which he thought were proper to be considered by the Jury in arriving at a decision as to whether there was sudden and grave provocation or not but which would have tended to lead the Jury astray in their deliberations.

Before I set out the passage complained of, it would be well to make a very brief survey of the facts as presented to the Jury insofar as they are material for a proper understanding of the point of law discussed. The case for the prosecution in essence was that the prisoner deliberately aimed at and shot and killed the deceased woman who was the wife of a neighbour of his with a gun. There was evidence that there was enmity between the family of the deceased woman and that of the prisoner over a period. The defence story, stated very compendiously, was that the members of the deceased woman's family consisting of herself, her husband and two sons aged seventeen and eighteen, pelted stones at the house of the appellant; thereupon the appellant, who was the owner of a licensed shot gun, with a view to scaring away the aggressors discharged it from the verandah of his house into the air; but far from taking any notice of the firing of the gun, the aggressors intensified the stone throwing, accompanying their action with filthy abuse directed towards him. The prisoner says that at that stage he was suddenly provoked and that he did not know thereafter what happened to him; his surmise was that he had probably lost control over himself and did not remember what happened thereafter.

On these facts the defence set up a plea based on sudden and grave provocation with a view to reduce the offence of murder to one of culpable homicide not amounting to murder. It was in regard to the considerations that should be taken into account for the purpose of determining whether there was grave provocation given to the prisoner that the learned Judge, after dealing quite fully and properly with various matters, delivered himself of the passage following, to which exception is taken:—

> "Then, gentlemen, you must also ask yourselves whether the manner in which he showed his resentment of the provocation was violently disproportionate to the kind of provocation which you think was probably given.
>
> You see I can merely indicate to you certain general principles of law which are applicable to this matter, but it is for you as the judges of fact, to decide for yourselves whether there probably was provocation and, if so, what was the nature of that provocation, and then you must ask yourselves whether the kind of provocation actually given was the kind of provocation which you as reasonable men would regard as sufficiently grave to mitigate the actual killing of the woman

by firing at her with a gun. I cannot help you very much on this matter, gentlemen, on the facts because you are the judges of fact. You have heard two versions and you must ask yourselves, having considered all the versions, what probably did happen, and whether there was probably provocation at all. For instance, if a little boy mischievously throws a few stones at a house, I think you will perhaps, as the judges of fact, take the view that to shoot that boy dead would be entirely out of proportion to the kind of provocation given; but you must decide what probably happened and then ask yourselves whether the mode of resentment was violently disproportionate or not to the kind of provocation. "

It will be noticed that both at the beginning and end of this passage the learned trial Judge expressly directs the Jury to consider whether the retaliation was not altogether of an outrageous nature in comparison with the provocation the prisoner may have received. Can it be said that one reading this passage or hearing this passage read would not gain the impression that what was emphasized was that where the mode of resentment was so totally disproportionate to the provocation given the benefit of the plea that the prisoner had acted under sudden and grave provocation would not be available to him?

The learned Solicitor-General, however, urged that what the learned Judge intended to convey by the passage and what the passage does convey was to ask the Jury to consider whether the violently disproportionate resentment did not indicate that the accused far from having lost was in possession of his powers of self-control when he retaliated, and alternatively, whether they did not think that the gross disparity between the retaliation adopted by the prisoner and the provocation that may have been given to him disclosed a spirit of revenge rather than a lack of self-control. There are no express words in the passage to support either of the interpretations placed by the learned Solicitor-General nor can any such connotations even be gathered from the language used, if one construes the passage according to the natural and ordinary meaning of the words employed therein. It cannot, however, be too strongly emphasized that the import of a passage such as this has to be ascertained by the ordinary effect it would have on the minds of the Jurors who hear the words spoken, and that only once, and not by reference to a laboured gloss that may be placed on it by refinements thought out with assiduity by highly developed minds. We are unanimously of the view that the passage clearly and in unmistakable terms invited the Jury to discount the plea of sudden and grave provocation if they thought that the mode of retaliation was so disproportionately outrageous compared with the provocation that may have been given.

The next question is whether this is a proper direction under our law. The learned Judge would appear to have adopted the language of the Lord Chancellor. Viscount Simon, in *Mancini's case* [1], where the noble Lord, adverting to this aspect of the law of provocation under the English Law, said:

" In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter. "

[1] *(1942) A. C. 1.*

That this is the English Law there cannot be the slightest doubt, proceeding, as it does, from the highest judicial tribunal in the realm. That a direction to the Jury on these lines would be essential for constituting a proper and adequate charge to an English Jury cannot be doubted, for the Lord Chief Justice of England, Lord Goddard, in *Duffy's case* [1] expressly approved the charge in that case which contained the following instruction:—

> " Secondly, in considering whether provocation has or has not been made out, you must consider the *retaliation in provocation*—that is to say, whether the mode of resentment bears some proper and reasonable relationship to the sort of provocation that has been given. *Fists might be answered with fists but not with a deadly weapon, and that is a factor you have to bear in mind when you are considering the question of provocation.*"

The principle that under the English Law the mode of resentment should be considered in regard to the provocation given for the purpose of ascertaining whether the offence that was committed was one of murder or manslaughter is very old, and Viscount Simon's language quoted above can be traced to Foster's *Crown Law* [2]:—

> " In fact the mode of resentment must be in reasonable proportion to the provocation to render the offence manslaughter. "

The reasoning adopted by English lawyers for holding that an offence that would otherwise be murder is reduced to manslaughter where provocation is given to the slayer is set out in the summing-up of Keating J. in the *case of Welsh* [3]:

> " Whenever one person kills another intentionally he does it with malice aforethought. In point of law the intention signifies the malice. It is for him to shew that it was not so by shewing sufficient provocation which only reduces the crime to manslaughter *because it tends to negative malice.* "

How provocation negatives malice is explained by the Lord Chancellor, Viscount Simon, in *Holmes' case* [4]:

> " 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. Consequently, where the provocation *inspires an actual intention to kill* such as Holmes admitted in the present case, or to inflict bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies. "

To appreciate the full significance of this statement of the law, one should realise what it was that Holmes admitted and to which the Lord Chancellor makes reference. The admission is to be found in the answer given by Holmes to the question put in cross-examination to him, " When you put your hands round that woman's neck and gave pressure through your fingers *you intended to end your wife's life, did you* ? " The answer was, " Yes ".

[1] *(1949) 1 A. E. R. 933.*
[2] *Page 292.*
[3] *(1869) 11 Cox 336.*
[4] *(1946) A. C. 588.*

The principle underlying the English Law, therefore, is clear and unambiguous that the provocation given must be such as to deprive the accused person of his self-control to such an extent that he causes death *without forming or having an intention to kill.* It is then and then only that the offence is one of manslaughter and not of murder. But on the other hand, if it is established or clear from the evidence that though *provocation of howsoever grievous a kind may have been offered,* nevertheless, if it could be shewn that the accused caused the death with an intention to kill, the offence is one of murder and not manslaughter. This is one of the fundamental differences between our Law and that of England, and we shall advert to it more fully presently.

Although the expression " the offence of murder is reduced to manslaughter " is used in English judgments, its use there is in a sense different from that in which we use the expression under our Law that the offence of murder is reduced to culpable homicide not amounting to murder. Under English Law, the two offences are distinct in the sense that the essential elements necessary to constitute them are different; in the case of murder, there must be an intention to kill; in the case of manslaughter, no such intention can exist. Under our law, however an intention to kill is an essential element in both the offences of murder and culpable homicide not amounting to murder.

The basis, therefore, on which the English Law proceeds to hold that in a case where provocation may have been given the use of a deadly weapon such as a knife in reprisal and the consequent killing would not constitute anything less than murder would appear to proceed on the ground that though the person provoked may have lost his self-control he would not have been incapable of having or forming an intention to kill; and where a deadly weapon was used in resenting, say, a blow with the fist, the use of the deadly weapon was proof positive that the accused person had not lost his power of self-control so as to deprive him of forming an intention to kill, and in fact the use of a deadly weapon itself was the best proof that there was a definite and deliberate intention to kill.

Another view is suggested by the following passage from the judgment of the Lord Chancellor, Viscount Simon, in *Mancini's case* (*supra*) where, it would be remembered, the person who was killed, namely, Distelman, struck the accused, Mancini, with his hand or fist and the accused pulled out a dagger and stabbed Distelman fatally:

> " . . . . the only knife used in the struggle was the appellant's dagger, and this followed Distelman's coming at him and aiming a blow with his hand or fist. Such action by Distelman would not constitute provocation of a kind which could *extenuate* the sudden introduction and use of a lethal weapon like this dagger, *and there was therefore . . . . no adequate material to raise the issue of provocation.* "

Stress should be laid on the word " extenuate " in this passage, for this is the key which opens the door revealing the existence under English Law of another basis for holding that where the mode of resentment is out of all proportion to the provocation, the plea of provocation is not established, and that is that the question of resentment having to be

reasonable in comparison with the provocation given is an independent element in regard to the law of provocation and not one that could properly be correlated to the loss of self-control. The Lord Chancellor may have formulated this principle for the reason that it is impossible to deny that a violent retaliation may be the surest indication of the very grave nature of provocation received by the assailant. " The more self-control is lost—and therefore the more exception 1 applies to the case—the more likely are numerous injuries to be inflicted. " (*Per* Young C.J. in the *case of Hussein* [1].)

It has, however, been said at the bar that the violent mode of retaliation may in certain circumstances show the very opposite of a lack of self-control. It is rather difficult to subscribe to this proposition. The retention of self-control cannot be deduced solely either from the deadly nature of the weapon used or from the brutal nature of the attack made by the incensed assailant; but if either or both these factors be accompanied by circumstances disclosing that the assailant had time to cool after receiving the provocation and before he launched out the attack or that after receiving the provocation he had deliberately selected or acquired a lethal weapon, such an inference may be possible.

Under the English Law, therefore, if one were guided by the pronouncement of Viscount Simon in the House of Lords in *Mancini's case* (*supra*) contained in the second of the citations from that judgment, the position is inescapable that the dictum that the mode of resentment must be in a reasonable proportion to the provocation engrafts an additional element to that law in regard to the plea of provocation, and that the plea would fail where retaliation is out of proportion to the provocation given ; the underlying principle being that an average Englishman is expected to control his passion and not let himself give way to excesses. It is on this view of the matter that it has been laid down in English Law that mere words, however insulting and irritating, are never regarded as gross enough to found a plea of provocation. " As a general rule of law, no provocation of words will reduce the crime of murder to that of manslaughter "—*per* Blackburn J. in *Rothwell's case* [2]. See also the cases of *Holmes* (*supra*) and *Lesbini* [3].

Our law, however, in regard to the matters so far considered is quite different. In the case of *King v. Coomarasamy* [4], on a case stated under section 355 of the Criminal Procedure Code, a Bench of three Judges held that mere abuse unaccompanied by any physical violence would be sufficient provocation to reduce the offence of murder to culpable homicide not amounting to murder. This case was followed in *King v. Kirigoris* [5] which came up before this Court in 1947. That was a case where the provocation relied upon consisted only of words of abuse; the trial Judge told the Jury to consider whether the act of killing was not of " an outrageous nature and beyond all proportion to the provocation, " and this Court held that:

> " the charge is subject to this criticism, namely, that it may have led the Jury to believe that mere abuse or insult by words or gestures may never be regarded as sufficient provocation to support the plea of grave and sudden provocation. This is not the law of Ceylon. "

[1] *(1939) A. I. R. Lahore 471.*
[2] *12 Cox 145.*
[3] *(1914) 3 K. B.1116.*
[4] *(1940) 41 N. L. R. 289.*
[5] *(1947) 48 N.L.R. 407.*

This case would also appear to be the first in our reports where an attempt was made to guide a Jury in its deliberations in respect of a plea of provocation along channels as in the present case. It is true that this Court did not express its disapproval of such a course but on the contrary would tacitly appear to have adopted it. But neither did it expressly decide the point; for as set out earlier, it disposed of the appeal on the ground that the charge may have amounted to a direction that words alone would not be sufficient to constitute grave provocation.

Under our law, what has to be established by a prisoner who claims the benefit of exception 1 to section 294 of the Penal Code is: (1) that he was given provocation, (2) that the provocation was sudden, (3) that the provocation was grave, (4) that as a result of the provocation given he lost his powers of self-control, (5) that whilst deprived of the power of self-control he committed the act that resulted in the death of the victim. Our law recognizes further, as stated earlier, that although the prisoner may have lost his powers of self-control he need not be bereft of an intention to kill, and this is clear from the wording of section 294 and that of exception 1. If we deal with the class of cases where under the section intention is one of the essential elements of the offence of murder, it will be seen that in regard to that class there is nothing in the exception to denote that that intention to kill should be modified or removed before the exception could be applied. What is more, section 297 of the Code expressly contemplates the case where culpable homicide not amounting to murder may be committed *with the intention of causing death*.

This, as stated earlier, is a fundamental difference between the law of England and the law of Ceylon; so that if the mode of retaliation is to be taken into consideration as under the English Law for the purpose of negativing malice, which is the intention to kill, the application of such a principle to the determination of the question whether under our law the offence is one of murder or culpable homicide not amounting to murder would be indefensible for, as pointed out in our law, in both the offences of culpable homicide not amounting to murder and murder, an intention to kill very often is an essential element. If, on the other hand, one adopts the later view of Viscount Simon and holds that a violent mode of resentment cannot be regarded as an *extenuation* of the offence of murder, that is a consideration foreign to us, as such an idea is totally absent and altogether unexpressed in the language of the exception.

There are other differences between our law and the law of England in respect of the offences of culpable homicide not amounting to murder and manslaughter, but it is unnecessary to pursue them for the purpose of this case. It is sufficient, however, to observe that the differences noticed are sufficiently marked and so clearly divergent that the indiscriminate application in every detail of the principles underlying the one system of law to the other would result inevitably in a miscarriage of justice.

That the differences have been deliberately introduced because of the differences in the temperament, nature and habits of the two peoples

there can be little doubt. People of this country are generally unable to exercise the same degree of control over themselves as Englishmen would appear to be able to do. It is a common experience of Judges in this country who preside at Assizes to have cases before them time and again of prisoners who have committed killing by knives carried on their persons while under a sense of provocation given by a blow with hands or even words of abuse. The learned Solicitor-General conceded that if we uphold the passage in the charge to the Jury complained of as embodying a correct principle under our law sentences of death would have to be passed more often not only in these cases but the field in which sentences of death would have to be passed would be widened; he, of course, added that such a result cannot be permitted to have the slightest influence in ascertaining the law; with this last observation we emphatically agree. But, of course, if the law be such, it certainly would be a matter for the Legislature to step in and prevent, if it thinks proper, death sentences from being passed more frequently. Fortunately, however, there is no need for the Legislature to concern itself with any amendment of the law, for we are satisfied that the cases of *King v. Coomarasamy* and *King v. Kirigoris* (*supra*) lay down the law precisely and in consonance with the principles underlying the provisions of the Penal Code.

Bearing in mind, therefore, that under our law neither the presence of an intention to kill would preclude the formulation of a successful plea based on grave and sudden provocation nor that words by themselves would not be sufficient to cause provocation, let us proceed to an analysis of each of the requisites necessary under our law to be proved by a prisoner who claims the benefit of exception 1.

In the first place, it would be necessary to ascertain what is meant by provocation. Provocation, according to the dictionary, would be any annoyance of irritation, and for our purpose it must be defined as anything that ruffles the temper of a man or incites passion or anger in him or causes a disturbance of the equanimity of his mind. It may be caused by any method which would produce any one of the above results—by mere words which may not amount to abuse or by words of abuse, by a blow with hands or stick or club or by a pelting of stones or by any other more serious method of doing personal violence.

The next requisite is that the provocation must be such as to bring it within the category termed sudden, that is to say, that there should be a close proximation in time between the acts of provocation and of retaliation—which is a question of fact. This element is of importance in reaching a decision as to whether the time that elapsed between the giving of provocation and the committing of the retaliatory act was such as to have afforded and did in fact afford the assailant an opportunity of regaining his normal composure, in other words, whether there had been a " cooling " of his temper.

The third element is that the provocation should be grave. That is the element with which we are concerned particularly in this case. Provocation would be grave where an ordinary or average man of the class to which this accused belongs would feel annoyed or irritated by

the provocation given to the extent that he would, smarting under the provocation given, resent the act of provocation or retaliate it. It is entirely dependent upon the act of the provoker and cannot be said to be based upon the nature or mode of resentment adopted by the person provoked in giving expression to his resentment. That this is so will be clearly appreciated if one took an illustration. Take, for instance, the case of one Muslim putting a piece of hog's flesh on a plate off which another Muslim was dining. Could it be said that if the diner retaliated by mauling the provoker with hands the provocation would be regarded as grave but if the retaliation took the shape of stabbing and killing the provoker with a dagger which the person provoked had on his person, the provocation would not be regarded as grave but only as venial? The lack of reasoning underlying the determination of the gravity of provocation by reference to the nature or mode of the retaliatory act becomes manifest; if one went further, and if in the former case, assuming that the person provoked got hold of the provoker with hands and dashed him on the ground and killed him, would the provocation yet be grave? Is the answer to depend upon a view as to whether the act of killing was or was not out of proportion to the provocation given? If this be the proper method of approach to solve the question, then, if the view be taken that the act of retaliation was grossly out of all proportion to the act of provocation, the offence would have to be murder, while if the contrary view to be taken the offence would only be culpable homicide not amounting to murder. Here, it would be noticed that the element of gravity of provocation is completely ignored and the act of provocation is weighed against the actual act of retaliation in order to decide the issue.

The exception does not countenance the application of such a test. It would have been simple enough, if the Legislature was so minded, to have very effectively stated that where the mode of resentment is shown to be out of all proportion to the provocative act, the benefit of the plea should not be available, and added it to the existing provisos to the exception as an additional one. In truth and in fact the grave and sudden provocation given cannot be weighed against the retaliatory act but can and must only be taken into consideration to determine whether it would in the opinion of the Jury have been sufficient to cause the ordinary man of the class to which the accused belongs to lose his temper. The gravity and suddenness of provocation has no other bearing or relevancy under our law in regard to this exception.

If the answer to the question posited as to whether the provocation would have been grave and sudden in the case of the average man referred to be in the affirmative, then the presence of the next factor must be considered, and that is the fourth requisite, namely, whether as a result of the grave and sudden provocation given the person provoked was deprived of his power of self-control. It has to be stressed that the exception itself expressly refers to the offender being deprived of his power of self-control, and in view of this express reference to the offender, it would be altogether unwarrantable to hold, as contended for by the learned Solicitor-General, that one must first determine in this instance too whether the average man under contemplation would

himself have been deprived of his power of self-control as a result of the provocation given before determining whether the offender himself did in fact lose his power of self-control. We are of opinion that once the conclusion is reached that the provocation, taking the case of the given average man, was grave and sudden, the next question that need receive the attention of the Jury is whether the prisoner himself, as a result of the provocation received, did lose his power of self-control, it being immaterial whether the " average man " would or would not have lost his power of self-control.

The final element which has to be established under our law in claiming the benefit of the exception is that the prisoner did cause the death whilst he was in that condition which has been described as a state of deprivation of the power of self-control. As remarked earlier, the fury with which the retaliation may be accompanied or the brutality of the retaliatory act or the deadly nature of the weapon used may all be pointers enabling one to conclude that the prisoner had completely lost mastery over himself, or in other words, that he had no powers of self-control left; but that is not to say that he had not an intention to kill.

It will thus be noticed that there is no room under our law for taking consideration of the mode of resentment, or rather the violently disproportionate mode of resentment, in determining the question whether the provocation given was either grave and sudden or whether there has or has not been loss of self-control.

The majority of us, that is to say, all but one of us, are therefore of the view that the invitation to the Jury to approach their task of determining whether the provocation was sudden and grave by reference to the test whether the mode of retaliation was violently disproportionate to the kind of provocation given cannot be justified under our law and would have tended to direct the Jury to apply their minds to false issues in the case, thereby resulting in serious prejudice to the prisoner.

The majority of us are also of the view that the appeal against the conviction should be allowed. We therefore set aside the conviction but in terms of section 5 (2) of the Court of Criminal Appeal Ordinance order a new trial.

There remains for disposal the question whether the Bench as now constituted is a Full Bench, and if so, what are its powers, and in particular whether it has the right to overrule a previous decision of the Court of Criminal Appeal.

The learned Solicitor-General contended that the term " Full Bench " can only be applied to a Bench of all the Judges comprising the Court and further urged that a Bench consisting of a smaller number would be bound by a previous decision of the Court though that decision may have been pronounced by a Bench of three Judges. He called attention to section 2 (1) of the Court of Criminal Appeal Ordinance which expressly constitutes the Chief Justice and all the Puisne Justices as Judges of the Court of Criminal Appeal, and proceeded to suggest that unless all the nine Judges who constitute the full complement of the Supreme Court sat to hear the appeal, the Bench could not be deemed to be a

Full Bench. In view of the provision in sub-section 4 of the same section that a Judge who presided at the trial should not sit at the hearing of the appeal, the learned Solicitor-General modified his contention and was content to submit that all the Judges save the Judge who tried the case should take part before it could be said that a Full Bench was constituted. The reasoning underlying this concession is that the Judge who presided at the trial is not qualified to be a member of the Court of Criminal Appeal where that Court is summoned to hear the appeal from a verdict passed at a trial presided over by him.

There is no reason why a similar reasoning should not be permitted to operate in regard to every other disqualification which renders it impractical or improper for a Judge of the Court of Criminal Appeal to take part in the hearing of an appeal. If this reasoning be allowed to operate, as indeed it must be, a Judge in whose name the indictment runs cannot possibly take part at the hearing of the appeal. Apart from the five Judges who constitute the present Bench and the present Chief Justice [illegible] was Attorney-General at the time of presentment of the indictment and in whose name the indictment runs and the Judge who presided at the trial of the case there is only one other Puisne Judge now functioning in an acting capacity in the Supreme Court. The question whether an acting Judge of the Supreme Court could preside in the Court of Criminal Appeal appears to have been ruled in the negative by the Privy Council in the case of *Butler* [1], so that all the available Judges exclusive of those disqualified have sat at the hearing of this appeal; and if the meaning to be attached to the term " Full Bench " is to be construed in this manner, the present Bench is a Full Bench. But we do not think that any such construction should form the basis of our decision on this point.

In England the Court of Criminal Appeal is composed of the Lord Chief Justice and the nineteen Judges of the King's Bench Division, making a total of twenty Judges. But even so, a Bench of five Judges has been referred to as a Full Bench, even as Benches of seven and thirteen Judges have been similarly referred to. The case of *Benjamin Myro Smith* came first before the Court of Criminal Appeal consisting of a Bench of three Judges, when the Lord Chief Justice reserved a point of law that arose in that case for argument before a " Full Court " [2]; the appeal was in fact thereafter argued before a Bench of five Judges [3]. In contrast to this is the case of *Charles Leslie Norman* [4] in which the appeal first of all came before a Bench of three Judges, was thereafter adjourned for hearing before a Bench of five Judges and later was reargued before a Bench of thirteen Judges. In fact in 1941, *Mancini's case* (*supra*) is stated by Viscount Simon in his judgment to have gone up to the House of Lords from a decision of a Full Bench of the Court of Criminal Appeal consisting of five Judges. It will thus be seen that though in 1924 no less than thirteen Judges heard an appeal, even as late as 1941, to a Bench of five Judges of the Court of Criminal Appeal the appelation of Full Bench was applied by the highest judicial authority.

[1] *(1939) 3 A. E. R. 12.*
[2] *14 C. A. R. 74.*
[3] *Ibid. 81.*
[4] *L. R. (1924) 2 K. B. 315.*

Quite recently the case of *John William Taylor* [1] was heard in appeal by a Bench of seven Judges and the Court was described as a Full Court by the Lord Chief Justice himself. There is an interesting observation in that case as regards what should be deemed to be a Full Court. The Lord Chief Justice said:

> " A Court of Appeal usually considers itself bound by its own decisions or by decisions of a Court of co-ordinate jurisdiction. For instance, the Court of Appeal in civil matters considers itself bound by its own decisions or by the decisions of the Exchequer Chamber, and as is well known, the House of Lords also always considers itself bound by its own decisions. In civil matters it is essential in order to preserve the rule of *stare decisis* that that should be so but this Court has to deal with the liberty of the subject, and if this Court found on reconsideration that *in the opinion of a Full Court assembled for that purpose* the law had been either misapplied or misunderstood and that as a result a man had been deprived of his liberty, it would be its bounden duty to reconsider the case with a view to determining whether he had been properly convicted."

The Lord Chief Justice thereafter proceeded to hold that the case of *Treanor* [2] was wrongly decided.

The principle to be gathered, therefore, would appear to be that where a Bench is constituted of any number of Judges but more than the minimum quorum that is necessary to constitute the Court, a Full Court would be constituted, provided the Judges assembled for the purpose of reviewing or reconsidering a previous decision of the Court. This view has been adopted by this Court as would be apparent from an examination of the *carsus curiae*. In 1947 a Bench of five Judges of the Court which heard the case of *Velaiden* [3] expressly overruled the decision of this Court in the case of *Punchibanda* [4]. The case of *Jinadasa* [5] was heard in 1950 before a Bench of five Judges of this Court, and that Bench expressly dissented from the judgment in *Haramanis'* Case [6] which was decided in 1944.

We are therefore of the view that the persent constitution of the Bench constitutes it a Full Bench. A Full Bench of the Court of Criminal Appeal is not bound by a previous decision of the Court delivered by a Bench that cannot be regarded as a Full Bench and has power to disapprove, dissent from or overrule such a previous decision. The majority of us are of opinion that the case of *Rex v. Naide* (*supra*) was wrongly decided and overrule the majority decision in that case.

Retrial ordered.

[The following judgment in *Rex v. Naide*, referred to above, was delivered on the 10th October, 1951:—]

[1] *(1950) 34 C. A. R. 138.*
[2] *(1939) 27 C. A. R. 35.*
[3] *(1947) 48 N. L. R. 409.*
[4] *(1947) 48 N. L. R. 313.*
[5] *(1950) 51 N. L. R. 529.*
[6] *(1944) 46 N. L. R. 532.*