1936 *Present :* **Koch J.***

THE KING *v.* RIDLEY DE SILVA.

*8—P. C. Dandegamuwa.*

*Murder—Plea of grave and sudden provocation—Provocation sought by accused—No intention of making it an excuse for killing—Penal Code, s. 294, exception 1, proviso 1.*

The plea of grave and sudden provocation cannot be availed of by the accused in mitigation of the offence of murder under the first proviso to exception 1 of section 294 of the Penal Code, where the provocation was itself sought by the accused, though not with the intention of making it an excuse for killing or doing harm to the deceased.

THIS was an application to state a case under section 355 (1) of the Criminal Procedure Code.

*Aelian Pereira* (instructed by *K. Kumaraswamy*), in support.

*Cur. adv. vult.*

September 9, 1936. KOCH J.—

Mr. Aelian Pereira, Counsel for the accused who was convicted in the above case of murder on two counts in the indictment in a trial before me and sentenced by me to death, applies under section 355 (1) of the Criminal Procedure Code that I should consider it fitting to reserve and refer for the decision of a Bench of this Court consisting of two or more Judges the following question of law which arose on the trial, and that I should state in a case that question with the special circumstances upon which it arose.

The question is whether the grave and sudden provocation referred to in exception 1 to section 294 of the Penal Code can be availed of by the accused in mitigation of the offence of murder when that provocation was itself sought, though not voluntarily provoked, by the offender as an excuse for killing or doing harm to any person.

The reason for this application would appear to be that I, in summing up the case to the jury on the law, dealt with this point, and, in doing so, charged the jury that the accused was not entitled in law to shelter himself under a plea of provocation, inasmuch as that provocation was itself sought by the accused, though not with the intention of making it an excuse for killing or doing harm to the deceased. This part of the charge to the jury was necessitated by the fact that the defence of the prisoner on count (1) of the indictment was that what caused the shooting of the deceased Ratnayake was not premeditation on his part but provocation that had been given him by Ratnayake immediately before such shooting. This provocation the defence maintained was an indecent

remark that had been made by Ratnayake to the prisoner accompanied by an equally indecent gesture. The prisoner himself, however, admitted in his evidence that what provoked this indecent remark was a charge that he made to Sir Henry de Mel (the employer of both the prisoner and Ratnayake, who were both conductors on Maradanwila Estate on which the murders were committed and of which Sir Henry de Mel was proprietor) that Ratnayake was an "*ali hora*"—a great rogue. This charge was itself admittedly preceded by a remark on the part of the prisoner that, although the deceased Ratnayake was very respectful to Sir Henry in his presence, he thieves behind his back. In this connection it might be stated that the only evidence of Ratnayake having made an indecent remark accompanied by an indecent gesture is the evidence of the prisoner. Every one of the witnesses for the prosecution denied this and maintained that Ratnayake did not utter a word at the interview in question.

On this question of law, as I understood Counsel's argument, it was contended that although the provocation relied on by the prisoner in mitigation of the offence of murder was itself provoked by the offender, the fact that it was so provoked can be availed of by the prisoner unless it was established by the evidence that the initial provocation was given as an excuse for killing the person who gave the prisoner the immediate provocation he pleads. Counsel maintains that this is the position as contemplated in the first proviso to exception 1 to section 294 of the Penal Code. The proviso runs as follows :—

> "That the provocation (referring to the grave and sudden provocation mentioned in exception 1) is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person."

It must be remembered that the whole of this proviso is not punctuated in any manner. On reference to *Gour on The Penal Law of India* (*vol. II. (1928 ed.), p. 1521*) no punctuation appears in the corresponding proviso in the Indian Penal Code of 1860 as reproduced in his work. The same can be said of *Ratanlal on the Law of Crimes,* in which there is a similar reproduction. Our Penal Code of 1883 which was based on the Penal Code of India produces this proviso verbatim also without any punctuation at all. I find, however, that in *Maine's commentary* on the Indian Penal Code which was published in 1890, there are two commas appearing in this proviso, one after the word "sought" and one after the word "provoked". In spite of the appearance of these commas, Maine refers to the case of *Empress v. Abdul Hakim*[1] where the finding of the High Court of India was as follows :—

> "Himself having provoked the action of the gypsies by his illegal and improper procedure the respondent (a public servant who acted beyond the scope of his authority) stands in no better and no worse position than any private person and is not entitled to the superior protection which is thrown around a public servant lawfully acting in the discharge of his duty."

In this case a verdict of guilty of the lesser offence of culpable homicide not amounting to murder was in these circumstances reversed by Straight J. and Pearson J. and a conviction of murder entered.

[1] *3 Allahabad 253.*

The facts in that case clearly showed that the provocation given by the offenders to the gypsies was *not intended as an excuse for killing or doing harm to any of them.* It will therefore be seen that the principle governing this defence of provocation is that such a defence cannot succeed once it has been established that the provocation relied on by the prisoner has itself been sought irrespective of the question whether it was sought as an excuse for killing or doing harm to any person or not.

The above finding can only be justified on the ground that the proviso in question is divisible for practical purposes into two compartments—

(*a*) that the provocation is not sought,

(*b*) that the provocation is not voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

The High Court in dealing with the provocation caused by the prisoner to the gypsies regarded it as rightly coming within the first compartment.

If the provocation therefore can be brought within one or other of these two compartments, the plea of provocation cannot be availed of by the prisoner.

Mr. Pereira argues that the words "as an excuse for killing or doing any harm to any person" qualifies both "that the provocation is not sought" and "that the provocation is not voluntarily provoked". I was unable to agree with this argument and I told him so. He then proceeded to argue that if the words "that the provocation is not sought" are to stand by themselves, the law in doing so meant to only include cases where the prisoner went in search physically of the provocation, and in order to catch up cases such as those of accused persons who suspecting the criminal intimacies of their wives with others took up lethal weapons and following them and finding them in criminal conversation with their paramours killed them. These cases are *Regina v. Mohan*[1] and *Regina v. Lochan*[2]. My reply to this was that the words "that the provocation is not sought" were not framed to catch up those cases but that the *ratio decidendi* of those cases was based on these words.

It is clear that the proviso in question is divisible into two compartments one of which is "that the provocation is not sought" these words standing by themselves and not qualified by any other words that follow. To think differently would be to introduce a most dangerous principle. For example should a person who goes up to another, slaps him and courts a kick in return and thereupon shoots that other dead, be permitted to say that his act of shooting that other under the immediate provocation offered him reduces the offence of murder to one of less degree? If he be permitted to plead the provocation caused him by the kick, should not this plea be discounted by the fact that the treatment he complains of was the necessary result of his own seeking, the *causa causans*?

*Gour at p.* 1552, *section* 3019, *referring* to *this exception states* that it is subject to three provisos, which he says are in entire harmony with the English rule, and the policy underlying them is obvious. The first proviso, to use Gour's own words, "deals with the case where the accused courts provocation or merely uses it as an excuse for assaulting another." The effect of the proviso read with the exception, he says, is that the

[1] *8 Allahabad 622.* [2] *8 Allahabad 635.*

provocation must come to him; he must not go to the provocation. He instances the case reported in *1 Hawk P. C. C. 31*, where A and B having fallen out A said he would not strike but would give B a pot of ale to strike him upon which B did strike and A killed him. It was held to be murder as the provocation given had been courted by the accused. It will be seen that there is no question here of A having courted the provocation *as an excuse* for killing B.

*Ratanlal (1930 ed.) at p. 705* referring to this proviso says "Where the provocation is sought by the accused it cannot furnish any defence against the charge of murder." He too refers to the case cited by Gour and referred to above.

Mr. Pereira has not relied on any decision in support of his contention nor have I been able to discover such a case.

I regret that I have had to deal at such length with the point raised by Counsel but I am compelled to do so as there is no local precedent to guide me. Mr. Pereira has earnestly requested me, apart from the facts of this case, to reserve this point for fuller Bench on the ground that the point is of considerable importance and frequently does arise in our Courts.

I quite agree that the point is of very great importance and of frequent occurrence, but, having after careful consideration, come to a decision on the matter I am not disposed to accede to Counsel's request. It is however open to him, if he so decides, to move the Attorney-General under section 355 (3) of the Criminal Procedure Code that this question of law be referred to a fuller Bench for further consideration.

In the circumstances I see no reason to grant the application.

*Application refused.*