1924. *Present :* Bertram C.J., De Sampayo J., and Garvin A.J.

THE KING *v.* PUNCHIRALA.

9—P. C. Panwila, 8,455.

Murder—Culpable homicide—Provocation—Grave—Can take into consideration the intoxication of the accused in considering the question of the gravity of the provocation ?—Penal Code, s. 294.

In considering the question whether a person charged with murder committed the act complained of whilst deprived of the power of self-control by grave provocation the Court or jury may take into account the intoxication of the person receiving it.

"This principle should be applied with caution. It must be borne in mind that, in the first place, there must be 'provocation' of some kind. Provocation is, in my opinion, something which a reasonable man is entitled to resent. In the second place, there must be definite evidence on which the jury would be justified in finding that the accused's faculties were in fact impaired by intoxication. In the third place, although the term is a relative one, nevertheless the provocation must still be grave. It must have some element of gravity. The merest idle word or gesture, even though it does deprive the drunkard of self-control, is not sufficient."

The word "grave" in this connection is not an absolute but a relative term.

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THIS matter was reserved for argument before a Bench of three Judges by Bertram C.J. by the following order :—

On May 29, 1924, at the Kandy sessions, one Menikgedere Punchirala was convicted of culpable homicide not amounting to murder, and sentenced to eight years' rigorous imprisonment. There was some evidence which would justify a jury in finding that he committed the crime in a state of drunkenness. He was proved to have killed a man called Kiri Banda by striking him on the head with a club. The blow fractured the jaw and the base of the skull, and death followed within a very short time. Immediately before the blow was delivered there was a short altercation between the two parties. Punchirala said: "Are you a chandiya?" The other replied: "Are you a worse chandiya, son of a whore?" The two parties may be described as belonging to opposite factions in the village, and this encounter was the result of enmity generated some days previously, which had continued to smoulder, and which broke out again on the day of the crime. The accused was an older man than Kiri Banda, and of somewhat superior station in the village. I told the jury that if both parties had been sober, the expression used by the deceased could not, in the circumstances, reasonably be considered "grave provocation" within the meaning of the Penal Code, but that if they were satisfied that the accused was in a state of drunkenness, they were entitled to take this circumstance into account in considering whether the provocation was "grave" to him, and whether the crime, in fact, was committed because he was "deprived of the power of self-control" by that provocation.

There are no authorities on the subject available in Kandy, except text books. *Gour, 2nd ed., p. 517*, says, on the authority of some Indian cases :—

> When the question is whether the act was premeditated, or done only from sudden heat and impulse, the fact of the party being intoxicated could not be overlooked.

He further adds—

> This is also the accepted view in England, and it is commendable to reason.

On page 511 he quotes Coleridge J. in *R. v. Monkhouse*[1] as saying it was not enough that a man was excited or rendered more irritable "unless the intoxication was such as to prevent his restraining himself from committing the act in question." Ratanlal in *The Law of Crimes, 4th ed., p. 416*, says, with reference to voluntary drunkenness, on the authority of an Indian case :—

> It may also be considered in estimating the probable effect on the mind of the accused of the words or actions of others, and in determining whether provocation given was grave and sudden.

As I think it is desirable that this question should be further discussed with the aid of reference to the original authorities, and as the general question of the effect of drunkenness upon criminal liability has recently been reserved for consideration, I have thought fit to reserve for consideration in conjunction with that general question the connected question whether the direction given in this case was right, or if not, what should be the form of the direction in future cases.

ANTON BERTRAM.
Chief Justice.

[1] *(1849) 4 Cox C. C. 55.*

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Akbar, S.-G. (with him *Barber, C.C.*, and *Dias, C.C.*), for the Crown.—All the authorities support the view taken by the Chief Justice.

Counsel referred to *Russell on Crimes, bk. 1, p. 13*; and to the following cases :—*R. v. Pearson*,[1] *R. v. Thomas*,[2] *R. v. Marshall*,[3] *R. v. Monkhouse*,[4] and *R. v. Gamlen*.[5]

These cases were referred to in *R. v. Beard*,[6] but the observations of Lord Birkenhead therein are *obiter* so far as the present question is concerned.

The writers of the Indian text books are of the same opinion : *Gour, vol. I., p. 517 ; Mayne 489 ; Ratanlal 460.*

[BERTRAM C.J.—What is grave provocation ?]

It is a question of fact. See explanation to exception 1 of section 294.

Speldewinde, who appeared as *amicus curiæ* for the prisoner, cited *Halsbury, vol. 9, p. 581 ; Stroud's Mens Rea 102.*

The condition of the mind of the accused at the time of the provocation must be taken into account. *The Empress v. Khogayi*.[7]

The physical condition of the accused may also be taken into account. *R. v. Hopkins*.[8]

June 4, 1924. BERTRAM C.J.—

The question referred for the consideration of the Court is one of great importance. It was referred in order that the authorities might be fully considered. Notwithstanding the statements of the Indian text writers, it is found upon investigation that there is no specific authority dealing with the point reserved either in the English or in the Indian reports.

The specific point we have to consider is, whether in weighing the question of the gravity of provocation the jury is entitled to take into consideration the intoxication of the person receiving it. The words of our enactment are as follows :—

> Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident (*s. 294, exc. 1*).

Four separate questions are involved in this enactment :—

(*a*) Was there provocation ?
(*b*) Was that provocation sudden ?
(*c*) Was it grave ?
(*d*) Did the accused in fact commit the crime because he was deprived of self-control by the provocation ?

[1] (*1835*) *2 Lewin's C. C. 144.*
[2] (*1837*) *7 C. & P. 817.*
[3] (*1830*) *1 Lewin's C. C. 76.*
[4] (*1849*) *4 Cox C. C. 55.*
[5] (*1858*) *1 F. & F. 90.*
[6] (*1920*) *89 L. J. K. B. 437.*
[7] (*1879*) *I. L. R. 2 Mad. 122.*
[8] (*1865*) *10 Cox 229.*

It is clear that it was the intention of this enactment to give effect to the principles of the English law. The English law on this question requires two essentia's :—

1. The provocation must be of a certain degree. It must (except in one single possible case, namely, that of an avowal of adultery: *R. v. Rothwell*[1]) at least involve a blow; but a blow itself is not sufficient. It must be a blow of some seriousness, or a blow aggravated by words or gestures : *per* Pollock C.S. in *R. v. Sherwood*.[2]
2. The accused must have in fact acted under the impulse of the provocation. If he acted under pre-conceived malice, or owing to brutality of temperament, provocation is no excuse. In English law provocation is material, not as under our law, because it is conceived of as mitigating the offence, but because it is conceived of as negativing that legal malice which is an essential ingredient of murder.

There are thus two separate and distinct questions of fact. There are undoubtedly English decisions which lay down that the drunkenness of the accused may be material to the question of provocation, but they all without exception deal with the second question, namely, whether the accused in fact acted under the impulse of the provocation. They do not deal with the first question, namely, whether the degree of the provocation received was sufficient in law. The principal case is *R. v. Thomas*.[3] Jervis C.J. says as follows :—

> So drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober.

See also *per* Park J. in *R. v. Pearson*[4] :—

> So drunkenness may be taken into consideration to explain the probability of a party's intention in the case of violence committed on sudden provocation.

The judgment of Coleridge J. in *R. v. Monkhouses*[5] does not in my opinion deal with the question of provocation at all, and Lord Birkenhead's criticism of a phrase in that judgment in *Director of Public Prosecutions v. Beard*[6] does not in my opinion affect the question we are considering.

[1] *(1871) 12 Cox C. C. 145. C. & K. 556.*
[2] *(1837) 7 C. & P. 817.*
[4] *(1835) 2 Lewin's C. C. 145.*
[5] *(1849) 4 Cox C. C. 55.*
[6] *(1920) A. C. 498.*

The English cases therefore do not help us. Nor is there any definite light to be derived on this specific question from any Indian case. The Court, however, is indebted to Mr. Speldewinde for one Indian authority which has an important indirect bearing on the subject. It is the case of *The Empress v. Khogayi*.[1] It was there laid down that in determining whether the provocation was of a character to deprive the offender of his self-control, it was "admissible to take into account the condition of mind in which the offender was at the time of the provocation." In that case certain shepherds with their flocks had invaded the field of the first accused who was engaged with the second accused in strengthening the bund. It appears from the judgment that one of the invading shepherds not only committed trespass, but assaulted and abused the cultivators. The cultivators retaliated by beating and abusing the shepherds. The father of one of the shepherds came on the scene. At that moment the first accused was "already justly enraged by the conduct of his son." The father had taken no part in the trespass and assault and the other aggravating circumstances. He seized hold of his son and asked why the cultivators were beating him, and himself proceeded to abuse the cultivators. Incensed by this abuse the first accused struck the father on the head with a heavy stick that was in his hands and killed him. The Court observed: "In the present case the abusive language used was of the foulest kind, and was addressed to a man already justly enraged by the conduct of deceased's son. In the circumstances we think that the provocation was sufficient to deprive him of his self-control."

It is agreed by everybody that in considering whether the provocation is "grave" the Court may take into consideration the status of the accused and the mentality incident to persons of his class of life. It appears also to be agreed that it would be right that the Court should take into consideration any peculiar susceptibility naturally incident to the offender's race or religion. The case just cited lays down that the Court may take into account the justly enraged condition of the person who received what might otherwise be deemed insufficient provocation. It seems impossible to deny the reasonableness of this. If a man receives comparatively slight provocation at a time when he has been the victim of a series of slights and insults of themselves sufficient to strain his self-control to breaking point, it seems impossible to deny that the Court should take this condition of mind into account. Is it possible to draw any logical distinction between such a state of mind created by the wrongful acts of others and a susceptibility induced by voluntary intoxication? I think that we may well hestitate to do so.

[1] *(1879) I. L. R. 2 Mad. 122.*

All the text writers who have considered the subject affirm the proposition that drunkenness may be taken into account in estimating the gravity of the provocation, and although their remarks appear to be based upon an insufficient examination of the authorities they cite, such a consensus of opinion in *favorem vitæ* cannot lightly be ignored. It is reinforced by another expression of opinion cited to us by Mr. Speldewinde. See *Stroud's Mens Rea 102* :—

> First, where an act of violence, with which a prisoner is charged, has ensued upon some provocation or aggression of such a kind that, if sufficient in point of degree, it would suffice to relieve or modify his responsibility for the act in question, the fact that he was drunk may be taken into consideration by the jury; so that circumstances which would have given rise neither to a valid excuse of self-defence nor to a successful plea of provocation in the case of a sober man may avail in defence of a drunken man to justify his act, or (in the case of homicide) to reduce the crime from murder to manslaughter.

It appears, therefore, that we should hold that the word "grave" is not an absolute but a relative term, and that in determining whether in any particular case the provocation received was grave, the Court or jury may take into account the intoxication of the person receiving it. But, in my own opinion, this principle should be applied with caution. It must be borne in mind that, in the first place, there must be "provocation" of some kind. Provocation is, in my opinion, something which a reasonable man is entitled to resent. In the second place, there must be definite evidence on which the jury would be justified in finding that the accused's faculties were in fact impaired by intoxication. In the third place, although the term is a relative one, nevertheless the provocation must still be grave. It must have some element of gravity. The merest idle word or gesture, even though it does in fact deprive the drunkard of self-control, is not sufficient. In the present case there is no question that the provocation contained an element of gravity. Common as abuse of the kind in question is, it is nevertheless justly resented. See the case of *Queen Empress v. Suleem Sheik.*[1]

In this same connection I would draw attention to the case of *Queen Empress v. Ramji.*[2] In that case the accused was a confirmed ganja smoker, and his vicious habit had induced "an intensified state of mental irritability which rendered him unable to resist the temptation to resent with brutal violence the slightest disrespect or opposition to his wishes." His wife in speaking to him used the second person singular instead of the second person plural, and

[1] *1 W. R. 23.*

[2] *(1890) 14 B. 564.*

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objected to go to another village when he proposed a change of home on account of their poverty. Incensed by this he killed her. The Court held " that there was no such sudden and grave provocation here as to make the offence less than murder." Birdwood J. points out that the accused's state of mind so far as it was altered from its normal state was due to his vicious habit, but does not expressly rule that the state of mind so induced cannot be considered at all. He proceeds: " though the act of which he has been convicted was, in one sense, unpremeditated, it was still a vindictive act done to avenge a fancied slight." Jardine J. says : " I think it is probable that his vices had induced a very irritable and unreasonable habit of mind, and I concur with the Sessions Judge in finding that he killed the woman on provocation which is very common in all countries—I mean the use of rather disrespectful words to him, these words not amounting to abuse." He referred to the case of *Rex v. Carroll*,[1] where Park J. said : " There is no doubt that the prisoner was in a great fury ; but the question at law is, was there sufficient provocation to excite it ?" " I do not think" added Jardine J., " there was anything of the sort."

This case illustrates the principle that even though the criminal act of the accused may be in fact caused by provocation, the Court, even allowing for his condition, must determine whether the provocation was in fact grave.

In my opinion the direction given to the jury was correct, and the judgment and sentence should be confirmed.

DE SAMPAYO J.—I agree.

GARVIN A.J.—I agree.

Judgment and sentence confirmed.

[1] *7 C. & P. 145.*