CASE NOTE AND COMMENT

Criminal Law—Provocation as a complete defence to a charge of manslaughter—A note.

This note purports to be nothing more than a collection of cases decided in the Supreme Courts of Queensland and the Territory of Papua and New Guinea in which the question of provocation as a complete defence to manslaughter has been discussed.

Queensland

The first known case of an acquittal for manslaughter on the basis of provocation was in a case tried by the draftsman of the Code* himself, Sir Samuel Griffith, in May, 1901: *R.* v. *Coupland*[1] In May, 1905 Cooper, C. J., directed an acquittal on a charge of manslaughter on the basis of provocation in *R.* v. *Smeltzer*[2] In November, 1911 Real, J., allowed the defence in *R.* v. *Foxcroft*[3] and criticized Section 269 of the Criminal Code as being absurd in that it required a man to guide his anger with judgement.

Although there had not been any properly reported decision on the question of provocation as being a complete defence to manslaughter, Stanley, J., felt confident enough to say in 1952 in *R.* v. *Sabri Isa*:[4]

> "Provocation in terms of s. 269 had been successfully raised as a defence to many manslaughter charges by 1911—see the article in 1911, Vol. v, Q.J.P. 129—and has been raised often enough since. To adopt any other view of the language of s. 268 means in effect that the section has never been properly administered in Queensland; and that the scope and usefulness of the section should be restricted to such an extent that its application almost disappears."

At page 305 of the same case O'Hagen, A. J. appears to approve the three cases referred to above.

Philp, J., who was a member of the Queensland Supreme Court Bench from 1935 till his death in 1965, expressed his disapproval of the defence on two occasions. In *Reg.* v. *Martyr*[5] he said at page 414:

> "By s. 291 it is unlawful to kill unless such killing is authorised justified or excused by law.
>
> I stress the word 'killing' because an accused escapes liability for manslaughter only if the killing be authorised justified or excused. The mere fact that the blow or other act causing death was authorised justified or excused is no defence to manslaughter.
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> Thus by s. 269 of the Code a person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault. The assault is justified but if death be caused by the assault the mere fact that the

* *Editorial Note*: The Queensland Criminal Code was adopted into the Territories of Papua and New Guinea at different dates and has been subject to varying amendments since but the provisions discussed herein are identical in each jurisdiction.

1 Referred to by Stanley, J. in *R.* v. *Sabri Isa* 1952 St.R.Qd. 269 at 288.

2 *Ibid.*, and see also (1911) 5 Q.J.P. 129.

3 *Ibid.*, and see also (1911) 5 Q.J.P. 130.

4 1952 St.R.Qd. 269 at 289.

5 1962 Qd. R. 398.

assault was justified is immaterial to the question whether the killing was justified or excused '

In *Reg* v *Johnston,*[6] when he was Acting Chief Justice of Queensland, he reiterated this view when he said

> Certainly so far as manslaughter is concerned s 269 affords no exculpation since s 291 provides that 'All killing is unlawful unless such killing is authorised or justified or excused by law ' The fact that the assault which led to the death was excused because it was provoked is immaterial '[7]

The foregoing cases were considered by Hart, J in *Reg* v *Sleep*[8] where the accused was charged with the manslaughter of his wife The facts of the case were that Sleep had an argument with his wife The evidence suggested that he struck her on at least two occasions Once because he was very angry with her and once to prevent her from threatening him with a beer bottle There was also evidence that Mrs Sleep had an accidental fall which caused her death after she had been struck by her husband

Before the trial judge summed up for the jury, counsel for the defence submitted, *inter alia,* that the defence of provocation was open to the accused on this charge

His Honour took the view that provocation as defined in the Code could be a complete defence to a charge of manslaughter He then summed up for the jury on the basis that this defence and those provided by ss 270 and 271 of the Code had to be excluded beyond reasonable doubt before a conviction could be recorded

I think the following is a reasonable summary of his Honour's reasons for coming to his decision

(a) The act of assault is excused if it occurs under circumstances of provocation as described in s 268 of the Code The term 'assault" used in s 269 means "the act of assault" and not the "offence of assault ' as described in ss 246, 335 and 340

(b) Sections 269, 270 and 271 can properly be read in such a way as to draw from them the conclusion that if a death does ensue from an act of assault the defence is still available provided the force used in the act of assault was not intended to cause, and was not such as was likely to cause, death, or grievous bodily harm

(c) There is a rule of law to the effect that where a statute is of a penal nature, it should be construed in favour of the subject *Reg* v *Danes and Taylor*[9]

In those reasons Hart, J does not deal with Philp, J 's view that, because of s 291, where a killing occurs it is immaterial whether the act which caused the killing was excused, but that the killing itself must be authorized, justified or excused by law However, his Honour does seem to deal with that matter at page 52 of the Report I suggest that the essence of his Honour's reasoning can be set out in the following manner if the accused strikes a blow and that is all he does, and if that blow kills the deceased, then, if s 269 provocation excuses the striking of the blow, it follows that the accused is excused from criminal responsibility for the consequences of the blow regardless of whether or not the blow results in a killing The similarity between his Honour's reasoning and the opinion of Smithers, J in *Reg* v *Nanti santjaba*[10] discussed below is worth noting

Territory of Papua and New Guinea

The defence has been mentioned in at least four judgements of Territory judges and has been the basis of an acquittal in at least one case, however, it has not yet been the subject of a reported judgement in this jurisdiction

It seems that the first judicial discussion of the defence was that by Minogue, J in *Reg* v *Miawet* [11] In that case his Honour preferred to follow Smithers, J in *Reg* v

6 1964 Qd R 1
7 *Id* at 5
8 1966 Qd R 47
9 1965 Qd R 338, esp at 339 and 351
10 1963 P & N G L R 148
11 Unreported Roneoed Judgement number 281 trial at Lae, 1st, 2nd and 3rd April, 1963

Tulu[12] rather than the Full Court of the Supreme Court of Queensland in *Reg.* v. *Martyr (supra)* and acquitted the accused of a charge of manslaughter on the basis of the defence of accident[13] and then of the alternative verdict of unlawful assault on the basis of provocation as set out in ss. 268 and 269 of the Code.

His Honour then continued:

> "In the light of what I have said, it is unnecessary for me to decide whether Section 269 of itself affords a complete defence to an accused charged with manslaughter. It may be that though the assault is justified under that section if death be caused by the assault the mere fact that the assault was justified is immaterial to the question whether the killing was justified or excused. See *R.* v. *Martyr (supra)* per Philp, J. at p. 414. On the other hand the proper view may well be that if the assault is justified no criminal responsibility can attach to the consequences of that assault. The question is an important one and needs more detailed argument than was able to be devoted to it in this case. Accordingly I do not propose to consider this defence further but prefer to await the benefit of further and fuller argument if and when the appropriate case calls for for it."[14]

Again, in *Reg.* v. *Iawe Mama,*[15] a case dealing with provocation as a defence to wilful murder, his Honour said of provocation as a defence to manslaughter that he felt it a question that he "would wish to reserve for consideration till such a case (of manslaughter) arises".[16]

Smithers, J., however, gave his views on this defence in *Reg.* v. *Nantisantjaba (supra).* In that case his Honour convicted the accused of wilful murder; thus his remarks on the defence of provocation are only *obiter dicta.*

In that case Nantisantjaba killed his wife Onkonbe when he became angry with her soon after she had provoked him by cutting down a quantity of corn in one of his gardens. His Honour found that provocation had been negatived. He gave two reasons; firstly, the element of suddenness was lacking, and, secondly, he found that the provocation offered to Nantisantjaba was not such as to deprive the ordinary native of his area of his power of self-control. His Honour took a broad view of the way ss. 268 and 269 ought to be interpreted. He seems to have been of the view that provocation as defined in s. 269 is available as a defence to offences "in the commission of which an assault may be committed and that it is not restricted just to offences in which assault is an expressed element".[17] (Minogue, J. explained and agreed with that view in *Reg.* v. *Iawe Mama.*[18])

That was his Honour's first reason for disagreeing with Philp, J.'s views on the defence which are quoted above. His second reason was that Philp, J.'s opinion failed to pay sufficient regard to the elements of the offence. His Honour said:[19]

> "The offence of unlawful killing (manslaughter) requires not only a death but that it should be proved that the accused directly or indirectly caused the death by some means or other. If in respect of the means, for instance, an assault, by which the death was caused the accused is declared by law to be free of criminal responsibility, then it is difficult to see how he can be criminally responsible for causing the death."

For these reasons his Honour concluded: "It appears to me therefore that s. 269 can provide a defence to manslaughter and other crimes of violence in the course of which an assault is committed."[20]

The defence was raised before Ollerenshaw, J. in the case of *Reg.* v. *Panuvo-Inapero.*[21] In that case the accused, a one-armed man, saw the deceased stealing his

12 1963 P. & N.G L.R. 136.
13 *Reg.* v. *Miawet, supra,* n. 10, at 13 and 14.
14 *Ibid.*
15 1965-66 P. & N.G.L.R. 96.
16 *Id.* at 101.
17 1963 P. & N.G.L.R. 148 at 151.
18 *Supra,* n. 14, at 100.
19 1963 P. & N.G.L.R. 151.
20 *Ibid.*
21 Unreported. Trial at Goroka 5th July, 1966. The report of this case is based on notes made by Defence Counsel.

bicycle. He raced after the deceased, caught him and struck with his fist in the stomach and then kicked him twice on the buttocks. The deceased died soon after of the effects of a ruptured spleen. The accused was indicted for unlawful killing (manslaughter).

His Honour, in an oral judgement, said that he considered that in a proper case provocation could be a complete defence to manslaughter, but that in this case the accused had not lost his self-control. He therefore convicted the accused and sentenced him to six months' imprisonment without hard labour.

In *Reg.* v. *Anton Komalko*[22] Clarkson, J. acquitted the accused of manslaughter on the basis of provocation. In that case the accused's wife Elizabeth was inside their house and began nagging the accused who was sitting outside. Elizabeth kept making remarks about a councillor's wife who was the accused's full sister. These remarks made the accused angry and he went inside the house and hit his wife with a palm frond. The accused's half brother Singaman went into the house to stop the argument, but when Elizabeth renewed her remarks the accused flared again. He pushed Singaman out of the house and then picked up his wife and thrust her through the door. Unfortunately she tripped on the 15-inch high threshold and fell head first onto the hard packed earth outside the door. She died soon after as a result of her fall.

Singaman in cross-examination gave evidence that Elizabeth's remarks to her husband contained the clear suggestion that he wanted to have intercourse with his sister, the councillor's wife, and that this was a serious insult which would make a man of the area (near Dreikikir Patrol Post, East Sepik District) very angry.

Without calling upon counsel for the defence to address him his Honour held, agreeing with Smithers, J. in *Reg.* v. *Nantisantjaba (supra),* that provocation can be a complete defence to a charge of manslaughter. He held further that there was evidence of provocation of the nature described in s. 268 and that the Crown had not negatived that defence. Thus his Honour acquitted the accused.

From the above case it would seem that the defence of provocation to a charge of manslaughter has come to take its place unheralded in the criminal law of the Territory, even if this is not so in Queensland.

Philp, J.'s objections to the defence have not been approved of by the Territory's judges. His Honour's view that the only relevant question in manslaughter is whether or not the killing is authorized, justified or excused by law has not been accepted nor has his second objection to the defence, namely that provocation as set out in s. 268 of the Criminal Code is restricted to offences in which assault is an expressed element.[23] I have dealt with Smithers J. and Minogue, J.'s comments on this point and their opinions receive support from Ollerenshaw, J. in *Reg.* v. *Zariai-Gavene.*[24]

A final point to note is that this defence often arises in cases in which the defence of accident, but for the restrictions placed on its use by the majority of the High Court of Australia in *Mamote-Kulang* v. *The Queen,*[25] arises. For that reason this defence may gain greater currency in the future.

Nicholas O'Neill*

Rasile Sam & Ors. v. *Reg.,* High Court of the Western Pacific, 1st July, 1970

This was an appeal from a decision of a Magistrate's Court and was heard by the Chief Justice, sitting at Honiara, B.S.I.P.

The facts were that a man called Pergolo was accused of having committed customary incest with a girl who was a member of the same line as himself. He was ordered by the local Chief to pay compensation of one pig and one "red money",

22 Unreported. Trial at Maprik 14th February, 1969. The report of this case is based on notes made by Defence Counsel.

23 *R.* v. *Johnston* (1964) Qd. R. 1 at 4 and 5.

24 1963 P. & N.G.L.R. 203 at 209 and 210.

25 (1963-64) 111 C.L.R. 62.

* LL.B. (Melbourne), barrister and solicitor of Supreme Court of the Territory of Papua and New Guinea.

which he refused to do. The Native Court then ordered Pergolo to appear before it but he ran off into the bush with the girl concerned. They were subsequently found by the Court Clerk who told Pergolo to come to the Court. He still failed to do so and disappeared again. The members of the Native Court then located him but he refused to return to his village to attend a meeting of the Court. Acting on the advice of the Court Clerk the Court members cornered Pergolo and removed his artificial leg. Pergolo later informed the police and a charge of assault was brought against the Court Clerk and the members of the Court.

Under B.S.I.P. law a Chief has no power to order compensation, but may only negotiate and try to achieve a settlement. The Magistrate's Court therefore found that the Native Court officials had exceeded their jurisdiction in trying to enforce the Chief's order. The Court also found that they had exceeded their authority in removing Pergolo's artificial leg and thereby forcing him physically to attend Court.

Native Courts in B.S.I.P. do not issue forms of summons: the defendant is merely notified that he should attend "in accordance with the custom prevailing in the area of the court" (*Native Courts Ordinance,* Ch. 33 of the Laws of the British Solomon Islands Protectorate, s. 20). Failure to so attend is punishable as an offence under the same section. The Magistrate also found, therefore, that the removal of the leg was outside any customary procedure and indicated that the Native Court should have brought the matter before the Magistrate's Court following Pergolo's refusal to come to Court when asked.

The Magistrate then fined the Court Clerk and the Court President $5 each and the other members of the Court $2 each. From this decision the Native Court officials appealed to the Chief Justice who, in quashing the sentences and substituting an unconditional discharge under s. 38 of the Penal Code, stated that the officials "had acted with the best of motives".

David G. M. Keating