

## **Defence of Provocation: A Gendered and Limited Concession to Human Frailty?**

The partial defence of provocation in the law of homicide has been one of the most controversial doctrines within Criminal Law. Initially being one of common law, this defence is given a statutory footing in Hong Kong since 1963. Under Section 4 of the Homicide Ordinance, an individual who is provoked into losing his or her self-control, later and whilst still in that state, commits an act with an intention to kill or to cause grievous bodily harm, causing the death of the deceased, may be acquitted of murder and be convicted of the lesser offence of manslaughter instead.

To successfully plead this partial defence of provocation to murder, the test is “two-fold” for the jury as affirmed by Lord Diplock in *R v Phillips*.<sup>1</sup> The first question is subjective and one of fact that whether “the defendant [was] provoked into losing his or her self-control”.<sup>2</sup> The provocative conduct may be acts or words or both, and it must be shown that consequently the defendant suffered from a ‘sudden and temporary loss of self-control’ at the time of killing.<sup>3</sup> The next question is then an objective opinion that whether “a reasonable man [would] have reacted to the same provocation in the same way as the defendant did”.<sup>4</sup>

The requirement of “sudden and temporary loss of self-control” in the first limb of the defence has been argued as “profoundly gendered” and is based on “notions of male proprietary power and control over spouses”.<sup>5</sup> It has been shown that the defence is mostly invoked by chronically violent men to assert that they were provoked by the suspected or actual infidelity of their spouses, and the defence serves as an excuse for them to kill in the heat of anger.<sup>6</sup> Whereas for women who were subject to long-term risks of death or serious injury in their relationships and who killed their spouses out of fear and despair might encounter difficulties invoking this defence, as time has elapsed between the provocation and their acts of killing. As a result, they would be expected by the law to have regained their self-control, when in fact they might have just felt they were too weak to defend themselves at that particular moment. Hence it has been contended that the defence is reprehensible in a way that it “ignores the context and reality of women’s lives”.<sup>7</sup>

The limitations of the latter limb of the defence has also been the subject of much debate, in particular on who the ‘reasonable person’ should be for the purposes of assessing this defence of provocation. Although being an objective test for the jury, it does not in fact establish an absolute objective standard. In *DPP v Camplin*, it is ruled that characteristics of the defendant can be taken into account “at least to the extent that [they] affect the gravity of the provocation to the defendant”.<sup>8</sup> These include age, sex, ethnicity, religious values, and physical disability.<sup>9</sup>

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<sup>1</sup> [1969] 2 AC 130, at 137.

<sup>2</sup> *ibid.*

<sup>3</sup> Michael Jackson, *Criminal Law in Hong Kong* (5th edn, Hong Kong University Press 2011) 502, 509.

<sup>4</sup> *Phillips* (n 1).

<sup>5</sup> Helen Brown, 'Provocation as a Defence to Murder: To Abolish or to Reform' [1999] 12(1) *The Australian Feminist Law Journal* 137-141; Adrian Howe, “Provoking Comment: The Question of Gender Bias in the Provocation Defence – A Victorian Case Study” in Norma Grieve and Alsa Burns (ed) *Australian Women: Contemporary Feminist Thought*, Melbourne: Oxford University Press, 1994, 231.

<sup>6</sup> Alison Wallace, *Homicide: The Social Reality*, Sydney: NSW Bureau of Crime Statistics and Research, Attorney General’s Department, 1986,99; *Parker v R* (1963) 111 CLR 610.

<sup>7</sup> Jenny Morgan 'Provocation Law and Facts: Dead Women Tell No Tales, Tales are Told About Them' (1997) 21 *Melbourne University Law Review* 23.

<sup>8</sup> [1978] UKHL 2.

<sup>9</sup> Jackson (n 3) 517; *Burke* [1987] *Crim LR* 336.

However, to accept and apply these personal attributes uniformly to a reasonable person means that jurors would be forced inevitably to make speculations and stereotypes on what amounts to a reasonable characteristic of a person from a particular race or religion, or with any other traits. Moreover, the narrower the characteristic is to be interpreted, the more subjective this objective test becomes. The second limb of this defence, therefore, could be asserted as attracting outcomes that are uncertain and unjust.

Criminal law acknowledges that humans lose control of themselves in response to actions of others under certain circumstances, and the defence of provocation has emerged as a partial defence to homicide as “a concession to human frailty”.<sup>10</sup> It is, nonetheless, a contentious defence for it condones the provoked defendant to be less culpable in the eyes of the law and holds the deceased victim partially responsible for his or her own death. Hence albeit it is untroubled to see why a provoked killing is partially excusable, a scrutiny and reform addressing the repercussions in the current local regime is a welcome development.

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<sup>10</sup> R v Curtis (1756) 168 ER 67; Finbarr McAuley, “Anticipating the Past: The Defence of Provocation in Irish Law” [1987] 50 M.L.R. 133.