



LJMU Research Online

Clough, A

The judge's role where provocation is evident but not discussed

<http://researchonline.ljmu.ac.uk/id/eprint/5091/>

Article

Citation (please note it is advisable to refer to the publisher's version if you intend to cite from this work)

Clough, A (2016) The judge's role where provocation is evident but not discussed. Journal of Criminal Law, 75 (5). pp. 350-354. ISSN 0022-0183

LJMU has developed **LJMU Research Online** for users to access the research output of the University more effectively. Copyright © and Moral Rights for the papers on this site are retained by the individual authors and/or other copyright owners. Users may download and/or print one copy of any article(s) in LJMU Research Online to facilitate their private study or for non-commercial research. You may not engage in further distribution of the material or use it for any profit-making activities or any commercial gain.

The version presented here may differ from the published version or from the version of the record. Please see the repository URL above for details on accessing the published version and note that access may require a subscription.

For more information please contact researchonline@ljmu.ac.uk

<http://researchonline.ljmu.ac.uk/>

Journal of Criminal Law

2011

Case Comment

The judge's role where provocation is evident but not discussed

Amanda Clough

Subject: Criminal law. **Other related subjects:** Criminal evidence

Keywords: Domestic violence; Jury directions; Loss of control; Manslaughter; Murder; Provocation

Legislation: [Coroners and Justice Act 2009](#) s.54

Case: [R. v Scamp \(Kirsty\) \[2010\] EWCA Crim 2259 \(CA \(Crim Div\)\)](#)

***J. Crim. L. 350** Keywords Provocation; Loss of self-control; Judge's direction; Objective standard; Defence not raised

The defendant was 19 when she fatally stabbed her partner. She alleged the victim had been violent towards her during an argument, and had also deprecated her parents and referred to her in a derogatory manner when speaking on the telephone with a female friend earlier that evening. There was some evidence of the victim being violent towards the defendant on previous occasions, including police involvement, although witnesses gave evidence that there was violence by both parties, and it was the defendant who was in control of the relationship. ***J. Crim. L. 351** Evidence was also given by the deceased's previous partner that he had been violent towards her and at one point, when he had cornered her; she too threatened him with a knife.

The prosecution argued that the defendant had stabbed the deceased out of jealousy after finding him speaking to a female friend on the telephone. The defendant claimed she stabbed the victim in self-defence after he had tried to strangle her and thrown her against a wall. She claimed that she did not remember stabbing the victim, but on realising what had happened, she immediately called for help. There was some physical evidence that she had been injured, including marks to the neck consistent with her testimony, and the victim had nail marks to his face and neck.

No defence of provocation was advanced, although the judge did give some instruction on the matter to the jury, including written directions, advising them that they must consider whether the defendant lost her self-control as a result of the comments the deceased made. There was no specific reference to considering the violence, past or present, merely that the jury should consider things said and done immediately before the killing and the nature and history of the relationship.

The defendant was convicted of murder, and appealed alleging that the judge had informed the jury to consider only two narrow aspects of the evidence that was capable of amounting to provocation, and had failed to give adequate directions to the jury on the meaning of provocation and when it should apply.

HELD, ALLOWING THE APPEAL AND SUBSTITUTING A VERDICT OF MANSLAUGHTER, although the defence was not advanced by the defendant, there was evidence that raised the possible defence and the judge had a duty to introduce it, referring to the relevant evidence when directing the jury. As counsel refrained from commenting on provocation, the members of the jury had assistance from no other source; therefore they had only the judge's submission to base their decision on. The judge should have pointed out to the jury the relevance of the defendant's history, namely that she grew up in a culture of domestic violence, which may have been relevant to the gravity of the provocation, and that the issue of cumulative provocation should have been dealt with. With the judge giving such a narrow interpretation of the evidence, the jury may have thought the provocation defence had no strong support, leading them to reject the plea.

COMMENTARY

Under s. 3 of the Homicide Act 1957, the judge had a duty to leave the issue of provocation to the jury as long as there was evidence of it, no matter how trivial it may have been. This was confirmed in *R v Rossiter* [1994] 2 All ER 752, where Russell LJ referred to the jury being allowed to rule on provocation if there is any material capable of amounting to it, 'however tenuous it may be'. Certainly, this leaves scope for a perverse verdict by the jury. Not only was there a duty to leave the issue of provocation to the jury but, understandably, the judge was also obliged to indicate what evidence might support the defence, unless it is ***J. Crim. L. 352** obvious (see *R v Stewart* [1995] 4 All ER 999). The Coroners and Justice Act 2009 changes this doctrine, now putting the decision as to whether or not to leave the issue to the jury into the judge's hands (Coroners and Justice Act 2009, s. 54(6)). It is a matter of law, and therefore for the judge alone to decide, whether sufficient evidence has been presented to leave the partial defence of loss of control to the jury, rather than being obliged to address the matter where there is little prospect of it succeeding. In a sense this reverts the law to the position before the 1957 Act, where the judge was able to withdraw provocation if he thought the objective element was not satisfied, and possibly gives a safeguard against verdicts which most would consider to be lacking in fairness, logic and justice. The judge confronted his duty by suggesting the possibility of a verdict of manslaughter on grounds of provocation, even though the idea had not been introduced by counsel, but this needs to be accompanied by clear directions to the jury including which evidence is relevant. The defendant relied upon self-defence, and so it is unlikely counsel would also have introduced the idea of a partial defence to the jury, favouring an acquittal over conviction of a lesser offence, and knowing that it is likely the judge would direct the jury on the matter anyway. This may be a convenience no longer afforded now that the judge can decide whether to leave the issue of loss of control to the jury (Coroners and Justice Act 2009, s. 54(6)); it may be that counsel establishing grounds for the defence is counsel's solitary chance to convince the judge that sufficient evidence is present for such a direction. Coupling this lack of clarity with the omission by counsel to introduce the idea, information for the jury was lacking, hence the jury's subsequent dismissal of the defence.

The issue of the relevance of the defendant's personal history is certainly noteworthy. Having grown up in an environment where domestic violence was frequent, this may have altered the defendant's perception of it, and therefore the gravity of the provocation. It has

been well established that any such characteristics of the defendant which affect the severity of the provocative conduct may be attributed to the reasonable person when assessing the objective standard of the provocation test. This was the case in *R v Humphreys* [1995] 4 All ER 1008, where an appeal succeeded on the basis that her abnormal immaturity and attention-seeking traits should have been attributed to the reasonable person. It is on the issue of powers of self-control that characteristics other than sex and age must be ignored, as discussed in *R v Camplin* [1978] AC 705. This was reaffirmed in *Attorney-General for Jersey v Holley* [2005] UKPC 23; [2005] 3 All ER 371, where the Privy Council's decision was that a uniform approach should be taken towards the objective string to the provocation bow. In this case, that would certainly include the jury considering their 'reasonable person' as a 19-year-old girl who grew up in a culture of domestic violence in regard to the gravity of the provocation, but not having regard to any effect it may have had on her powers of self-control. This principle has also been retained by s. 54 of the Coroners and Justice Act 2009, although it is worth mentioning that under the new law, the word 'characteristics' has ***J. Crim. L. 353** been substituted for 'circumstances', which may suggest an externalising of factors to be included rather than mere character traits.

Merit was also given to the argument that the judge should have advised the jury that they may consider the effects of cumulative provocation on the defendant. This is a term most readily associated with 'battered woman' cases, where a defendant kills her abuser after years of suffering and a build up of several provocative incidents (see *R v Ahluwalia* [1992] 4 All ER 889 and *R v Thornton(No. 2)* [1996] 2 All ER 1023). The concern in such cases is often over any time lapse between the last provocative incident and the fatal incident, but the courts have, in the last two decades at least, been willing to accept that the subjective element can still be satisfied even when the reaction is delayed, as in *Ahluwalia*. This element is satisfied as long as there is a loss of self-control at the time of the fatal incident, and not merely an impairment of judgment (*R v Ibrams* (1984) 74 Cr App R 154) or a loss of self-restraint (*R v Cocker* [1989] Crim LR 740). There was previously a restriction to this loss of self-control, namely that it must be 'sudden', founded in the case of *R v Duffy* [1949] 1 All ER 932, which had a large role to play in the lapse of time dilemma, but this has been removed by the 2009 Act and is no longer a factor to be considered (s. 54(2)). In the present case, during the most recent event, there was an altercation, combined with violent conduct, which lasted for a few minutes. The judge made clear to the jury that there was evidence of provocative conduct, although he did not refer to it in its entirety. The evidence of provocative conduct is in fact plentiful, and would have likely satisfied the conditions of the 2009 Act, at ss 54-56, which provides a partial defence replacing provocation where the defendant has lost self-control due one of two qualifying triggers; a fear of serious violence or due to circumstances of an extremely grave character which resulted in a justifiable sense of being wronged. What is more, like the case of *Humphreys*, it may well have satisfied both qualifying triggers, with a situation amounting to both a fear of violence and provocative acts of an extremely serious nature.

The most thought-provoking aspect of this case is the issue of the deceased's previous partner giving evidence as to her experiences. She suffered from multiple sclerosis and was in a wheelchair. The deceased had cornered her, and on trying to escape she grabbed a knife and threatened him with it, although the incident ended with her dropping the knife and breaking down in tears. On appeal, it was submitted that the jury should have been

reminded of these facts, having regard in particular to the detail that she too had picked up a knife when so provoked by the deceased. In fact, on this issue, the judge had said in his summing-up that the jury should not judge her reaction against another's and use this comparison to set up a yardstick to measure how the defendant herself should have acted in the situation. This statement alone seems to be the judge suggesting that the evidence of another person acting in a very similar manner does not have relevance when assessing if a reasonable person would have acted in the same way as the defendant. This argument was also deemed to have no substance by Laws LJ in the present appeal. This seems somewhat strange; we strive **J. Crim. L. 354* to understand how best to put forward the concept of the reasonable person in the context of this partial defence, but are not willing to use evidence suggesting that another person in these circumstances reacted in a similar manner. Granted the deceased's previous partner did not carry through her threats, but her instinct was the same and her reaction to provocative conduct was the same--to pick up a knife. It may be arguable that these two women might not sit comfortably next to each other when we are building the 'ordinary' person, but if there were enough evidence present that the defendant had in fact lost her self-control, and there is proof that another woman reacted in a similar manner to threats and provocative conduct by the deceased, surely it could be suggested to the jury as establishing that the defendant did in fact act as any other reasonable person in her position might have? The judge asked the jury not to use this as a yardstick to measure the defendant's actions against, but that is exactly what the law is asking by having an objective standard in place; the defendant's actions are to be measured against the actions a reasonable person might have taken. Granted the deceased's previous partner is just one other person, and it is to be questioned whether she can be taken as an ordinary reasonable person, but she is the closest model likely to be found in assessing how someone else might have reacted in the given situation. It is interesting to compare the objective test applied in this case to that applied in India as regards provocation, where it is only necessary that the ordinary person would have lost his or her self-control, not that he or she would have done so and acted as the defendant did also (see Stanley Yeo's article, 'Lessons on Provocation from the Indian Penal Code' (1992) 41(3) ICLQ 615). It is incredibly difficult to ask something reasonable of someone deprived of the powers of self-control. Section 54(1)(c) of the 2009 Act uses the word 'might' when considering how someone else in the same situation would have acted. This appears to be a much looser term than that used in s. 3 of the Homicide Act 1957, and this 'might/would' distinction is hopefully a step in the right direction when it comes to assessing the actions of a person, once self-control has been lost.

Amanda Clough

J. Crim. L. 2011, 75(5), 350-354