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*Apr. 26, 27
*May 24

HER MAJESTY THE QUEEN .....APPELLANT;

AND

ANNUNZIATO TRIPODI .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Murder—Defence of provocation—Appeal by Crown—Whether evidence to support defence of provocation—Element of suddenness required in provocation—Criminal Code, s. 261.

The respondent had emigrated to Canada from Italy. His wife and children had remained behind. In correspondence received from friends and relatives abroad, he was advised that his wife had been unfaithful while he was in Canada and had suffered an abortion. Subsequently, he arranged for his wife and children to come to Canada, where he strangled his wife a few days after her arrival. The theory of the Crown was that he had brought his wife to Canada with the intent to kill her when she got here. This was supported by a letter written by him to his brothers and by statements, admitted in evidence, given

by him to the police. The respondent pleaded that he was provoked by her admission to him that she had been guilty of infidelities while he was in Canada.

He was convicted of murder and the Court of Appeal ordered a new trial. The Crown obtained leave to appeal to this Court on the ground, *inter alia*, that the Court of Appeal erred in holding that there was any evidence to support the defence of provocation.

Held (Kerwin C.J., Estey, Cartwright and Abbott JJ. dissenting): that the appeal should be allowed and the conviction restored.

Per Taschereau, Rand and Fauteux JJ.: What s. 261 of the *Criminal Code* provides for is "sudden provocation", and it must be acted upon by the accused "on the sudden and before there has been time for his passion to cool". "Suddenness" must characterize both the insult and the act of retaliation. The expression "sudden provocation" means that the wrongful act or insult must strike upon a mind unprepared for it, that it must make an unexpected impact that takes the understanding by surprise and sets the passion aflame. There was nothing of that in the case at bar. What was said between the accused and the victim could not, in the circumstances, amount to "sudden provocation". The words furnished not the provocation but the release of his pent-up determination to carry out what he had deliberately decided upon, as he put it, to avenge his family honour.

Per Kellock and Locke JJ.: If, upon becoming aware of his wife's adultery, a husband determines to kill her, he may rely upon provocation only if he acts "on the sudden" before there has been time for his passion to cool. Consequently, the suggestion that if such an intention, once formed, was given up but was renewed upon subsequent mention of the previous information may be relied upon as "sudden provocation", cannot be accepted. There is then no element of "suddenness" as expressly required by s. 261 of the *Code*. In the case at bar, there is no question but that the accused already knew and had for some time known what was involved in the statement made by his wife to him immediately before the tragedy.

Per Kerwin C.J., Estey, Cartwright and Abbott JJ. (dissenting): The jury were not properly instructed with regard to an alternative defence, disclosed in the evidence, to the effect that even if the accused had once intended to kill his wife upon her coming to Canada, he had thereafter forgiven her and that, therefore, at all relevant times he had no intention of killing her.

The trial judge did not, also, make it sufficiently clear to the jury that if, in respect of provocation, they entertained a reasonable doubt, the accused should be given the benefit of it.

APPEAL from the judgment of the Court of Appeal for Ontario (1), setting aside the conviction of the appellant for murder and ordering a new trial.

C. P. Hope, Q.C. for the appellant.

C. L. Dubin, Q.C. and *J. Agro* for the respondent.

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The judgment of Kerwin C.J., Estey, Cartwright and Abbott JJ. (dissenting) was delivered by:—

ESTEY J.:—Upon the respondent's appeal from his conviction for murder a new trial was directed. The Crown appeals to this Court and, as I am in respectful agreement with the learned judges of the Court of Appeal for Ontario (1) that a new trial must be had, only a brief outline of the facts will be given.

The respondent was married in Italy. In 1952 he came to Canada, leaving his wife and two infant children in Italy. At St. Catharines he obtained employment and each month sent back to Italy sums of money varying from $35 to $50. In correspondence received from certain of his friends and relatives residing in Italy he was advised that his wife had been unfaithful to him and had, in a hospital, suffered an abortion. He, however, arranged for his wife and children to come to Canada and they arrived at Halifax in July, 1954, where he met them. They at once proceeded to St. Catharines, arriving there in the forenoon of July 27 and going immediately to the home of his brother with whom he had been living. After lunch, at the home of his brother, he and his wife went upstairs. He admits that he asked her to go, and for the purpose of marital relations, and, while she did not refuse, her attitude was rather cold toward him and she said "I cannot have any more children" and in reply to his question asking the reason she explained that "she was in hospital and had an abortion." Because of this admission on the part of his wife he says he lost his self-control and, as her body indicates, he seized her by the neck and strangled her. When he realized she was dead he went downstairs, intimated to his sister-in-law what he had done, hired a taxi and proceeded to the police station, where he informed the police of what he had done and was placed in custody.

There can be no doubt, upon the evidence, but that the accused had committed culpable homicide and the real issue turned upon whether he had suffered such provocation as would reduce his offence from murder to manslaughter.

Counsel for the Crown contended that the words attributed to the deceased by the respondent, which he deposed caused him to lose his self-control, did not amount,

(1) 110 C.C.C. 330; [1955] O.R. 144.

in law, to provocation for the reason that these words repeated only what he already had been told and which, upon the evidence, he at least at one time believed. The *Code,* in s. 261(2), defines provocation as "any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control." It was not contested that if the words attributed to the deceased conveyed the information for the first time that they would provide evidence from which a jury might find provocation. It will be noted that the Code does not provide that the words used must convey something theretofore unknown to the accused, nor, as a matter of principle, can it be said that repetition might not constitute provocation. If Parliament had so intended, it would no doubt have used apt words to that effect. In both *Rex* v. *Krawchuk* (1) and *Taylor* v. *The King* (2), the accused had knowledge of the relationship existing between his wife and another man. It is true that the words in each of these cases were spoken at the time of a new or fresh wrongful act. In this case, however, it must be acknowledged that it is one thing to hear from friends and relatives and quite another matter to have the admission made by the wife herself. More particularly would that be so with respect to one in the position of the accused who deposed that, notwithstanding what he had heard, he continued to forward funds for the support of his wife and children, had decided to forgive, purchase a house and make a new home. As he stated: "I was going to forget about all what happened in Italy, and start a new life here," and again to his wife on the train: "This is a new country, a new land, and we are to start a new life." It, however, cannot be doubted but that the fact that nothing new was expressed would be taken into consideration by the jury in determining whether an ordinary person would thereby be deprived of the power of self-control and, if so, it would also be material in considering the further question whether or not the accused was actually "deprived of the power of self-control by the provocation which he received."

At the trial it was the contention of the Crown that the accused had brought his wife out from Italy with the intention of taking her life and that he had, on July 27, carried out that intention and was consequently guilty of murder.

(1) (1941) 75 C.C.C. 219. (2) [1947] S.C.R. 462.

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The main contention on behalf of the respondent was that he had never believed that his wife had been unfaithful; that he at all times loved her and never intended to kill her and did so entirely because of her admission upon the day in question. While, therefore, apparently not pressed at the trial, it has been submitted on behalf of the respondent, both in the Court of Appeal and in this Court, that there was evidence which supported an alternative defence to the effect that even if the respondent had, as late as July 18 (when in a letter to his brothers and sister-in-law he expressed such an intention), intended to murder his wife upon her coming to Canada, that he had thereafter forgiven her and decided to buy a house and make a home for his wife and family in this country; that, therefore, at all relevant times he had no intention of killing his wife. The record discloses evidence which, if believed, would support such a defence. I am, therefore, in agreement with the learned judges of the Court of Appeal that it was incumbent upon the trial judge to instruct the jury with regard thereto in a manner that they would appreciate the relevant law and the evidence in relation thereto. The language of Sir Lyman Duff is appropriate:

> The able and experienced judge who presided at the trial properly directed the attention of the jury to the defence as it was put before them by counsel for the prisoner; and, having done this, he did not ask them to apply their minds to the further issue we have just defined. It was the prisoner's right, however, notwithstanding the course of his counsel at the trial, to have the jury instructed upon this feature of the case. We think, therefore, that there must be a new trial. *MacAskill* v. *The King* (1).

The learned judges in the Court of Appeal directed a new trial, not only on the foregoing ground, but also on the ground that the learned trial judge had failed to charge the jury that they might believe all or any part, or disbelieve all or any part, of the evidence of a witness, including the accused. This instruction would appear to be particularly important in this case where the oral testimony given by the accused was, in material respects, in conflict with the letter to his brothers and sister-in-law and to his statement made to the police.

I am also in respectful agreement with the learned judges in the Court of Appeal in their conclusion that the learned trial judge, while instructing the jury in general terms with

(1) [1931] S.C.R. 330 at 335.

respect to reasonable doubt, did not make it sufficiently clear that if, in respect to provocation, they entertained a reasonable doubt, the accused should be given the benefit thereof. This conclusion is supported by the observations of Viscount Sankey:

> When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted. *Woolmington* v. *The Director of Public Prosecutions* (1).

The appeal should be dismissed.

The judgment of Taschereau, Rand and Fauteux JJ. was delivered by:—

RAND J.:—I confine myself to a brief statement of the reasons for which I think the appeal of the Attorney General should prevail.

The only ground urged by Mr. Dubin which calls for consideration relates to provocation. What s. 261 of the *Code* provides for is "sudden provocation", and it must be acted upon by the accused "on the sudden and before there has been time for his passion to cool". "Suddenness" must characterize both the insult and the act of retaliation. The question here is whether there was any evidence on which the jury, acting judicially, could find the existence of "sudden provocation".

I take that expression to mean that the wrongful act or insult must strike upon a mind unprepared for it, that it must make an unexpected impact that takes the understanding by surprise and sets the passions aflame. What was there of that here?

On the evidence furnished by the accused himself, in his testimony, in letters written three days before leaving St. Catharines to meet his family arriving at Halifax, in statements made to the police immediately following the death of his wife, and from the words spoken to his sister-in-law as he came downstairs, "What I had to do is done", it is indisputable that for months he had been burning within over the news of his wife's conduct received from Italy. But

(1) [1935] A.C. 462 at 482.

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it is argued that in the prospect of rejoining his family the past was put behind him and that he met his wife with open arms and in a happy and reconciled spirit; and I will assume that that is a true description of his state of mind at the time.

But he found his wife cold. To questions put to her on the train, she suggested that they might separate, and he put no more. Within one hour of her arrival at the home of his brother-in-law where his family were to have their temporary home, she was a corpse by noiseless strangling at his hands. What she told him in the bedroom, and all that can be claimed to be provocative, was that she could not have more children because of an operation for abortion. What he had so fully foretold in his letters of July 18 had, nine days later, come to pass.

He had learned of the operation from the information received months before and it was one of the thoughts he had lived with during the period of waiting. I have no hesitation in holding that what was said could not, in the circumstances, amount to "sudden provocation". The words furnished not the provocation but the release of his pent up determination to carry out what he had deliberately decided upon, as he put it, to avenge his family honour.

It may be that such a code is recognized in Bagaladi as a mitigation of the law's severest sanction, but it has no place in the law of this country. Any abatement of the consequences of such an act can here come only from the executive. I cannot imagine any encroachment on the inviolability of the individual more dangerous than that such a palliation should be countenanced by the courts.

I would allow the appeal and restore the judgment at the trial.

The judgment of Kellock and Locke JJ. was delivered by:—

KELLOCK J.:—S. 261 of the *Criminal Code* is as follows:

Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

2. Any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

3. Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact: Provided that no one shall be held to give provocation to another by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

It would seem plain that if what is relied upon as constituting provocation is an act, the question as to whether or not there is any evidence of a "wrongful" act is one of law for the court. It is equally a question of law as to whether or not, in any given case, there is any evidence of "insult"; *Taylor* v. *The King* (1).

Provided the act or insult be wrongful, it must, to constitute provocation, be (*a*) such as would cause an ordinary person to be deprived of self-control, and (*b*) to have produced abrupt reaction on the part of the offender without time for deliberation; s-s. (2). Whether the particular act or insult amounts to provocation and whether the offender was, in fact, deprived of self-control by it are, by s-s. (3), to be considered questions of fact.

Moreover, the question as to whether the provocation was "sudden", as provided by s-s. (1), must be established by evidence, and the question as to whether or not there is any evidence of sudden provocation is also a question of law.

According to the Oxford Dictionary, to which I had occasion to refer in *Taylor* v. *The King, supra,* at 475, an insult is defined, inter alia, as

injuriously contemptuous speech or behaviour; scornful utterance or action intended to wound self-respect; an affront; indignity.

The case at bar requires consideration first as to what was the insult, if any, involved in what the deceased said to the appellant, as related by him, immediately prior to the killing, and whether there was anything "sudden" about the statement so made.

It has long been considered that circumstances more wounding or more calculated to cause the loss of self-control cannot be imagined than the discovery by a husband of his wife in the act of adultery. Accordingly, sudden discovery of the fact constitutes sufficient provocation either at common law or under the *Criminal Code.* Once a husband has

(1) [1947] S.C.R. 462 at 472, 480-1.

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become aware, however, subsequent mention by a wife to him of the same act, although it may cause a reassertion of anger on the part of the husband, cannot constitute legal provocation unless, for example, there be something new in the nature of a taunt as in *Taylor's* case.

Whether the husband becomes aware of the fact of adultery by his own discovery, by his wife's confession or by other information, can make no difference from this standpoint. The "insult" is received upon discovery of the fact. It is therefore not possible to regard a confession on the part of a wife as a new indignity or affront if the husband already knows of the occurrence which is the subject of the confession.

If, upon becoming aware of the fact, the husband determines to kill his wife, he may rely upon provocation in reduction of his crime from murder to manslaughter only if he acts "on the sudden" before there has been time for his passion to cool. The suggestion that if such an intention, once formed, was given up but was renewed upon subsequent mention of the previous information may be relied upon as "sudden" provocation, is a contention which, as I view the provisions of s. 261, I cannot accept. It lacks the element of "suddenness" which the section expressly requires. The English cases on the subject are, in my opinion, applicable under the law as laid down in the section.

In *Regina* v. *Rothwell* (1), Blackburn J., in summing up to the jury, instructed them as to the law then prevailing in England that as a general rule no provocation by words only will reduce murder to manslaughter but that this is not an invariable rule and that if a husband *suddenly* hearing from his wife that she had committed adultery and were thereupon to kill his wife, this might be manslaughter "he having had no idea of such a thing before". The decision of the Court of Criminal Appeal in *Palmer's* case (2) illuminates the point further. In that case, at p. 210, Channell J., stated the reason for the exception to the rule in England that the nature of such words renders the confession equivalent "to the discovery of the act". It is perfectly plain that there can be no more than one "discovery" of the same act.

(1) 12 Cox C.C. 145.

(2) (1913) 8 Cr. App. R. 207.

In *R.* v. *Leonard Holmes* (1), the appellant had killed his wife partly by hitting her with a hammer and eventually by strangling her immediately after her confession that she had been untrue to him. In a statement he admitted having previously had suspicions of her. Wrottesley J., in the Court of Criminal Appeal, said at p. 525:

> It is not therefore surprising to find that one form of provocation which would reduce what would be murder to manslaughter is the *sudden discovery* by a husband of his wife in the act of adultery;

On the following page the learned judge, after referring to the decisions which establish that a sudden confession by a wife of adultery constitutes an exception to the general rule that provocation by words alone is not sufficient in England, continued at p. 526:

> The appellant in the case before us was not informed of something of which he had no idea before hand . . . To hold that a killing in these circumstances could fall within the exception of the general rule that no words are sufficient provocation would be to extend the exception in two directions: first, to a case where the husband, himself unfaithful, had—and for some time had had—an idea that his wife had been unfaithful; and secondly. . . .

which is irrelevant for present purposes as are the words I have omitted from the above quotation relating to the manner by which death was produced.

In the case at bar there is no question but that the respondent already knew and had for some time known what was involved in the statement made by his wife to him immediately before the tragedy.

In the letter left by the respondent on July 18, 1954, for his brothers and sister-in-law, he states:

> I am leaving this note; naturally you know by now what happened in Italy and *I know it too* . . . I knew more than you but I could not show it . . . I don't know what to do, that dishonest mother wanted her children to be orphans. She thought that I did not know anything and would not have the courage to kill the bad woman.

In a postscript addressed to one brother he said:

> Open your eyes because I cannot see anything myself, I am going to die to cancel my dishonour and the dishonour of my family . . . I got the most dishonest woman on earth.

Again, in his statement to the police of July 29, he said:

> . . . I didn't show any feeling or I didn't let people understand that I knew what was happening over there . . . and I didn't want them to

(1) [1946] 1 All E.R. 524.

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write to Bagaladi (where his wife resided) and tell them that *I knew everything* and I didn't write over there explaining how much I knew thinking that my wife wouldn't come here.

As the Court of Appeal has said,

> . . . the remainder or statement of the wife . . . in reality would appear to mean no more than the appellant already knew or believed to be so.

In these circumstances, there was, in my opinion, no evidence of sudden provocation within the meaning of s. 261.

I would allow the appeal and restore the conviction.

Appeal allowed and conviction restored.

Solicitor for the appellant: *W. C. Bowman.*

Solicitor for the respondent: *C. L. Dubin.*

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*PRESENT: Taschereau, Rand, Kellock, Fauteux and Abbott JJ.