

NOTES

Provocation and the Involuntary Act

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Section 203 of the Criminal Code provides that murder may be reduced to manslaughter where the accused acted in the heat of passion as a result of a wrongful act or insult sufficient to deprive an ordinary person of the power of self-control, the accused himself having been deprived of that power. In order for the accused successfully to invoke this defence, he must have acted upon the provocation on the sudden and before there was time for his passion to cool.

Furthermore, it has been held that lack of intention is not an element in the application of the defence of provocation,¹ and that those cases of intentional killing reduced from murder to manslaughter owing to provocation come under the category of voluntary manslaughter.²

Now, what does the Criminal Code mean when it refers to the ordinary person (as well as the accused) being "deprive(d) . . . of the power of self-control" ? What significance ought we to attach

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¹ *Taylor v. The King* (1947) 89 C.C.C. 209 at p. 224.

Woolmington v. D.P.P. [1935] A.C. 462 at p. 482.

Rez v. Barbour (1939) 1 C.C.C. 1.

R. v. Giannotti (1956) 23 C.R. 259.

R. v. Mawrgridge 1706 (Kel.) 114.

R. v. Hall (1928) 21 Cr. App. R. 48 at p. 54.

R. v. Hayward (1833) 6 Car. and P. 157 at p. 159.

R. v. Hopper [1915] 2 K.B. 431.

Mancini v. D.P.P. [1942] A.C. 1.

Kwaku Mensah v. The King [1946] 1 A.C. 83.

Russell on Crime, 11th ed., 1958, V. 1, p. 581.

Contra:

R. v. Welsh (1869) 11 Cox C.C. 336 at pp. 337-338.

Viscount Simon in *Holmes v. D.P.P.* [1946] 2 All E.R. 124 at 127.

R. v. Cunningham [1958] 3 All E.R. 711.

² *Russell on Crime*, 11th ed., 1958, V. 1, p. 622.

Kenny's Outline of Criminal Law, 18th ed., 1962, p. 165 & 167.

to these words, and to what conclusions, if any, are we driven, by any given interpretation ?

It has been suggested that the expression connotes the rendering of the accused so subject to passion as to cause him or her for the moment to lose "*dominion over (his) mind.*"³ Or, again, that the provocation referred to in S. 203 so affects the accused that he is *not* "at the critical moment the *master of his own understanding*".⁴

It is a cardinal principle of criminal law that "the act must be imputable to the accused person, in other words, that his act must have been voluntary".⁵ In fact, Holmes argues that "the reason for requiring an act is that an act implies a choice, and that it is felt to be impolitic and unjust to make a man answerable for harm, unless he might have chosen otherwise".⁶

To offer an illustration of this principle, it has been suggested that:

"...in the case of certain diseases, a person suffering from the disease *may be deprived of the control of his actions.*"⁷ A man in the throes of an epileptic fit does not know what he is doing. If a friend bends over to assist him, and in the midst of the fit the epileptic grips that friend by the throat, not knowing what he is doing, and in so doing throttles the friend and causes his death, no offence has been committed against the criminal law; because the actions of an epileptic are automatic and unconscious, and his will or consciousness is not applied to what he is doing. "*He is not in conscious control of his actions.*"⁸⁹

Now in the above case, the *causa causans* of the act is the disease. Because the disease causes a person to be "deprived of the control of his actions" the individual is not held responsible for the ensuing

³ Emphasis added. Charge to jury delivered by Devlin, J. approved by Lord Goddard in *R. v. Duffy* [1949] 1 All E.R. 932.

⁴ Emphasis added. Duff C.J.C. in *R. v. Manchuk* 69 C.C.C. 172; [1937] 4 D.L.R. 437; 1938 S.C.R. 18; quoting Tindal, C.J. in *Hayward's Case*, 6 Car and P. 157 at 159; 172 E.R. 1188; adopted by the Court of Criminal Appeals in *Hall's Case* (1928) 21 Cr. App. R. 48, at p. 54.

⁵ *Russell on Crime*, 11th ed., 1958, V. 1, p. 41; see also: *Halsbury's Laws of England*, 3rd ed., V. 10, p. 272, no. 505; *Kenny's Outline of Criminal Law*, 18th ed., 1962, p. 27.

⁶ Holmes, *The Common Law*, p. 54.

⁷ Emphasis added.

⁸ Emphasis added.

⁹ Barry, J. in *R. v. Charlson* [1955] 1 All E.R. 859.

act.¹⁰ In the case of provocation the *causa causans* of the act is a wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control. As well, the accused is himself deprived of the power of self-control. Yet, in this case, the law holds the individual responsible for the ensuing act and convicts him of manslaughter. It is suggested that such an approach is highly inconsistent.¹¹

Again, what is the reasoning to be attributed to the following statement:

"If there be an actual forcing of a man, as if A, by force takes the arm of B and the weapon in his hand, and therewith stabs C whereof he dies, this is murder in A but B is not guilty."¹²

It is submitted that B is found not guilty because he was deprived of the power of control over his own actions. His act was involuntary. He could not have chosen otherwise and, as such, is acquitted. It is to be noted that in this case the *causa causans* of the deprivation of self-control is physical coercion.

Now, an accused who successfully invokes section 203 has equally been deprived of the power of self-control; yet, he is convicted of manslaughter. Could it be that the law recognizes deprivation of self-control as an absolute defence in cases where the *causa causans* of such deprivation is physical coercion but not in cases where the cause is a wrongful act or insult? If so, what is the rationale for such a distinction? Both causes are outside the accused's sphere of control and, as such, it is submitted that their particular form ought not to be a deciding factor in the determination of guilt or innocence.

Moreover, it has been held that "a person cannot be made criminally responsible for an act or omission unless it was done or omitted in circumstances where there was some other course open

¹⁰ Unless, of course, the individual, aware of his condition, takes the risk and puts himself in a position where an epileptic attack could bring about serious consequences; e.g. by driving a motor vehicle knowing oneself to be susceptible to epileptic seizures.

¹¹ "Our law only punishes for overt acts done by responsible moral agents" — *Fain v. Commonwealth* (1879) 78 Ky. 183; 39 Am. Rep. 213 referred to by R. S. Mackay, *Cases and Materials on Criminal Law*, at p. 16. Quære: Can an individual who has been deprived of the power of self-control (through no fault of his own) be considered a responsible moral agent? It is suggested that he cannot.

¹² Hale, *Pleas of the Crown*, V. 1, p. 434.

to him. If this condition is absent, any act or omission must be involuntary or unconscious".¹³

"They key to this reasoning lies in the notion that a person who has acted (or omitted to act) in a situation where there was no possibility of doing otherwise cannot be said... to have acted voluntarily."¹⁴

Now, an accused who successfully invokes S. 203 is, by definition, deemed to have been deprived of the power of self-control at the time of the act. He is considered not to have been master of his mind nor of his own understanding at the critical moment. How then, could an individual in such a state still possess the faculty to choose between alternative courses of action? While the intention to commit the act may have been formed instantaneously, its formation must have been totally beyond the control of the accused — he could not have chosen otherwise.¹⁵ Yet, the accused is found guilty of voluntary manslaughter, in virtue of section 203.

Moreover, Laidlaw, J. has suggested that:

"One of the objects of the criminal law is to maintain a standard of behaviour necessary for the welfare of the community. It is intended to accomplish that object by appropriate penalties imposed on guilty persons."¹⁶

Let us analyze this statement in the light of our present law of provocation. It is significant to note, first, that in so far as the provocation is sufficient to deprive *both* the accused *and* the ordinary person of the power of self-control, the accused who successfully invokes S. 203 has, in fact, not fallen below the standard of behaviour to be expected of the ordinary person. In fact, the accused acts as a direct result of such deprivation. Now, should we be intent upon punishing an individual who has acted as a result of an externally induced condition to which even the ordinary person would have been susceptible? Surely, the answer must be emphatically, no.

¹³ Supreme Court of New Zealand in *Kilbride v. Lake* [1962] N.Z.L.R. 590, at p. 593. See also: *Salmond on Jurisprudence*, 11th ed., p. 401. *Hart & Honoré, Causation in the Law*, p. 292 et seq. *Halsbury's Laws of England*, 3rd ed., V. 10, p. 272.

¹⁴ P.B.A. Sim, *The Involuntary Actus Reus* (1962) 25 M.L.R. 743.

¹⁵ More explicitly, whereas the state of the accused's mind directed his actions toward a specific object and that, as such, an intent may be said to have been formed, it is submitted that this state of mind could not have been varied by a conscious and deliberate choice on the part of the accused.

¹⁶ Laidlaw, J. (dissenting, on other grounds) in *R. v. Jones* 115 C.C.C. 273, at p. 277.

And yet, the law is prepared to find the accused guilty of manslaughter.

In summary then, an accused who successfully invokes the defence of provocation is deemed to have been deprived of the power of self-control at the time of the act. Such deprivation is consistent with the reaction to be expected of the ordinary person. Also, the law already recognizes the defence of deprivation of self-control in a number of analogous circumstances. Moreover, at the critical moment, the accused lacks the capacity to choose between alternative courses of action; he no longer remains master of his own understanding and, as such, his act is involuntary.

For these reasons (and in so far as the foregoing interpretation of the expression "deprive(d) . . . of the power of self-control" in S. 203 is a correct one)¹⁷ it is submitted that the law of provocation as it now stands is inconsistent with the fundamental tenets of criminal law. As such, it is suggested that section 203 should be amended so that an accused who successfully invokes the defence of provocation will be acquitted, his act being involuntary.¹⁸

¹⁷ It is to be noted that the Code offers no guide to interpretation and the jurisprudence, with the exceptions noted *supra*, has failed to touch upon the problem.

¹⁸ The writer realizes the possibility of extending this argument to embrace the submission that provocation ought to be an absolute defence to *all* criminal prosecutions. This, however, would have to be the subject matter of another paper.