CASE NOTES

STINGEL v. THE QUEEN[1]

INTRODUCTION

Calls for the replacement of the ordinary person test in the law of provocation with a subjective standard have not been heeded by the High Court of Australia. When *Stingel v. The Queen* came before the High Court, one of the grounds of appeal concerned the objective-subjective test under s. 160 of the Criminal Code Act 1924 (Tas.). In its formulation of the test, the Court was not prepared to forsake the principles of equality and individual responsibility embodied in the objective standard by recognizing that people of different ages, sexes, races, religions and backgrounds react differently to different situations. Instead, the Court reached a compromise by distinguishing between the gravity of the provocation and the necessary loss of self-control. In relation to the former, the ordinary person is to be endowed with the attributes of the accused. With respect to the latter, however, the objective standard is to be retained and the powers of self-control of the ordinary person alone remain relevant. In this review of the decision, it is argued that, by its very nature as a compromise, the distinction is an unsatisfactory one. It is to be hoped that it is only a matter of time before the High Court concedes that a purely subjective standard is the only fair and workable solution to the problems presented by the doctrine of provocation.

THE FACTS AND THE ISSUES

In the early hours of the morning of 5 June 1988, Stingel encountered the deceased and A engaged in sexual activity in a parked car. A was Stingel's former girlfriend, with whom he remained infatuated. He claimed to have felt protective towards A and to have been convinced that she was being sexually exploited by the deceased. The deceased told Stingel to leave in abusive language. Stingel stated that 'I was all worked up and feeling funny. It was like I was in a rage, almost to the stage where I felt dazed'.[2] He obtained a butcher's knife from his own car, returned to the couple's car and stabbed the deceased.

The trial judge ruled that the matters relied upon by the appellant were not capable of constituting provocation under s. 160 of the Tasmanian Criminal Code and removed provocation from the jury. That ruling was upheld by the Court of Criminal Appeal, dismissing an appeal from a conviction of murder and was appealed to the High Court.

Although the joint judgment of the Court dismissing the appeal was primarily concerned with the interpretation of s. 160, which codifies the law on provocation in Tasmania, observations of general importance applicable to common law principles were made. Section 160 provides:

(1) 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, and which, in fact, deprives the offender of the power of self-control, is provocation, if the offender acts upon it before there has been time for his passion to cool.

(3) Whether the conditions required by sub-section (2) were or were not present in the particular case is a question of fact, and the question whether any matter alleged is, or is not, capable of constituting provocation is a matter of law.

[1] 171 C.L.R. 312. The judgment was *per curiam*: Mason C.J., Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

[2] *Ibid.* 320.

The High Court dealt with three aspects of s. 160. First, the Court interpreted the phrase 'wrongful act or insult' in s. 160(1). Second, the court considered the function of the trial judge under s. 160(3). Third, the court examined the content of the test embodied in s. 160(2): the requirement that the wrongful act or insult be 'of such a nature as to be sufficient to deprive an ordinary person of the power of self-control'. It is the Court's formulation of this objective or 'ordinary person' test on which this case-note will focus.

WRONGFUL ACT OR INSULT

In interpreting s. 160(2), the High Court considered whether the use of the term 'insult' harked back to the old common law rule that mere words without action did not afford sufficient provocation to reduce murder to manslaughter.[3] This issue, however, is not a new one and the court merely endorsed the view that has been taken by the Tasmanian Supreme Court,[4] and in most other jurisdictions,[5] that the word 'insult' can 'denote an insulting word or gesture which is neither accompanied by nor in the context of physical violence or the conveyance of information'.[6]

On the question as to whether the adjective 'wrongful' in s. 160(2) qualifies 'insult' as well as 'act', the court found that the authorities were not as consistent as those concerning the scope of the word 'insult'. In particular, judgments dealing with the composite phrase 'wrongful act or insult' occurring in the Queensland and Western Australian Codes[7] appear to conflict with the view taken in the Tasmanian cases that 'wrongful' does not qualify 'insult'.[8] In this appeal the High Court was of the opinion that both grammatically and contextually it was incorrect to qualify the word 'insult' with the adjective 'wrongful'.[9]

It follows from this analysis that in the present case there was no need to establish that the words of the deceased, 'Piss off you cunt', were 'wrongful' in order to satisfy the requirements of s. 160(2). It was sufficient that the words amounted to an 'insult' in a general sense.

THE FUNCTION OF THE TRIAL JUDGE

The task of the trial judge pursuant to s. 160(3) is to decide the preliminary question of law whether there is material in evidence 'capable of constituting provocation'. The Court warned against the tendency for trial judges to enter the factual realm of the jury, the function of which is to consider whether there is a reasonable doubt that the killing was unprovoked. Without reading too much into the judgment, it could also be suggested that, in cases where it is sought to rely on a defence of provocation, the issue as to the existence of provocation should be left to the jury as a matter of course.

THE ORDINARY PERSON TEST

The ordinary person test was introduced to the law of provocation in the Draft Code prepared by the Criminal Code Bill Commission of 1879 for submission to the British Parliament and made its first appearance in the common law in 1869.[10] It was not seen again in the cases until 1913, when it was confirmed that the test of provocation is in a sense objective as well as subjective.[11] It has been established that, where the defence is raised, juries have to consider two questions:

(1) Was the accused so deprived of his self-control by the action of the victim that he acted as he did? (The subjective test)

3 *Holmes v. D.P.P.* [1946] A.C. 588, 599.
4 *Bedelph v. R.* [1980] Tas. R. 23.
5 For example, *R. v. Withers* (1925) 25 S.R. (N.S.W.) 382; *R. v. Camplin* [1978] A.C. 705; *Moffa v. R.* (1977) 138 C.L.R. 601.
6 *Stingel, supra* n. 1, 322.
7 *R. v. Scott* (1909) 11 W.A.R. 52; *R. v. Stevens* [1989] 2 Qd. R. 386.
8 *Bedelph v. R.* [1980] Tas. R. 23; *Hutton v. R.* [1986] Tas. R. 24.
9 *Stingel, supra* n. 1, 323.
10 R. v. Welsh (1869) 11 Cox C.C. 336, 338.
11 *R. v. Alexander* (1913) 9 Cr. App. R. 139; *R. v. Lesbini* [1914] 3 K.B. 1116.

(2) Was the provocation enough to make a reasonable person do as the defendant did? (The objective test).[12]

The formulation of this two-pronged test in s. 160(2) of the Tasmanian Code can be traced back to s. 176 of the Draft Code. In the present case, the High Court confirmed that the requirement that the wrongful act or insult be of 'such a nature as to be sufficient to deprive an ordinary person of the power of self-control' was an objective threshold test and that if satisfied, the loss of self-control on the part of the accused was then to be subjectively tested.[13]

The rationale underlying the objective test is said to be the maintenance of a uniform standard against which all accused persons are measured.[14] Since its inception, however, it has been accepted that to impose an unvarying and artificial standard would be to ignore the human infirmity from which the defence of provocation evolved. The courts have struggled in reconciling these competing philosophies. Initially, the problem was approached by identifying those traits of the accused which would not be attributed to the ordinary person. For example, in the first half of this century it was decided that an exceptionally irritable, excitable or pugnacious person,[15] an intoxicated person[16] and an impotent person[17] did not possess the type of human frailty which could be allowed to the ordinary person.

This reconciliation process took on a new dimension in the case of *D.P.P. v. Camplin*,[18] in which the House of Lords acknowledged that there are two conceptually distinct components of the ordinary person test, namely 'the standard of self-control that might be expected and the susceptibility to the provocative act or insult'.[19] The effect of the leading judgment of Lord Diplock is said to be that the standard of self-control is adjustable only for the age and sex of the accused. In assessing the gravity of the provocation, however, the ordinary person may be endowed with any relevant characteristics of the defendant.[20]

In the late 1970s and early 1980s the *Camplin* doctrine of provocation was applied by the Australian courts in a number of jurisdictions.[21] In *Stingel* the High Court continues the distinction between the two aspects of the ordinary person test and allows for the accused's age, sex, race, physical features, personal attributes and relationships, past history and mental stability to be taken into account in assessing the content, implications and gravity of the provocative conduct. None of these characteristics are relevant, however, in determining the degree of self-control required in the circumstances.[22]

The Court does identify two exceptions to this objective rule. The first is adopted from the judgment of Gibbs J. in *Moffa v. R.*:[23] that the power of self-control of the ordinary person will be affected by 'contemporary conditions and attitudes, for what might be provocative in one age might be regarded with comparative equanimity in another, and a greater measure of self-control is expected as society develops'.[24]

The test is subject to a second qualification in allowing the age of accused to be attributed to the ordinary person. *McHale v. Watson*[25] is cited by the Court as authority for the proposition that age is

12 Victoria, Law Reform Commission, *Provocation and Diminished Responsibility as Defences to Murder*, Report No. 12, (1982) para. 1.30(a).
13 *Stingel, supra* n. 1, 324.
14 *R. v. Hill* [1986] 1 S.C.R. 313, 342.
15 *Mancini v. D.P.P.* [1942] A.C. 1, 9.
16 *R. v. McCarthy* [1954] 2 Q.B. 105, 112.
17 *Bedder v. D.P.P.* [1954] 2 All E.R. 801, 804.
18 [1978] A.C. 705. The House of Lords had earlier rejected the two-component test in *Bedder v. D.P.P.* [1954] 2 All E.R. 201. It is unclear when the two arms were conceptualized. The first modern writer to have separated clearly the two arms seems to have been Ashworth, A.J., in 'The Doctrine of Provocation' (1976) 35 *Cambridge Law Journal* 292. He in turn drew on Aristotle for the concepts.
19 Quigley, T., 'Provocation and the Ordinary Person: *R. v. Hill*' (1986) 51 *Saskatchewan Law Review* 280, 283.
20 *Ibid.* 284.
21 For example, *The Queen v. Dutton* (1979) 21 S.A.S.R. 356; *Bedelph v. R.* [1980] Tas. R. 23; *Jeffrey v. R.* (1982) 7 A. Crim. R. 55; *The Queen v. Romano* (1984) 36 S.A.S.R. 283; *R. v. Hill* (1986) 25 C.C.C. (3d) 322.
22 *Supra* n. 1, 332.
23 (1977) 138 C.L.R. 601.
24 *Ibid.* 617.
25 (1966) 115 C.L.R. 199.

an 'aspect of ordinariness'.[26] The policy underlying this reasoning appears to be that 'it would be unduly harsh to require of an immature accused the minimum standard of self-control possessed by the ordinary adult'.[27] The High Court clearly rejects the suggestion in *Camplin*[28] that the ordinary person should be invested with the sex as well as the age of the particular accused. In distinguishing between these two traits, the Court drew support from Wilson J.'s dissenting judgment in the Canadian case of *R. v. Hill*,[29] in which the inclusion of gender as affecting the ordinary person was criticized as being sexist.[30]

In addition to its discussion of the limited purposes for which the characteristics of the accused person are to be attributed to the ordinary person, the High Court makes a number of other points in relation to the objective test posed by s. 160(2). The conclusions of the Court in relation to the Tasmanian provisions can again be applied to the common law. In accordance with the view of the Victorian Full Court, as enunciated in *R. v. Enright*[31] and followed by the High Court in *Johnson v. R.*,[32] the High Court opined that it is preferable to instruct the jury to consider the 'ordinary' person as distinct from the 'reasonable' or the 'average' person.[33] This distinction has the effect of preventing the jury from supposing that they should consider how a 'reasoning' person, rather than how a person acting in hot blood under provocation, might behave. In conformity with common law principles, the Court also made it clear that the phrase 'to be sufficient to' in s. 160(2) should be construed as meaning 'could' or 'might' and not as 'would' deprive the ordinary person of the power of self-control.[34]

A question on which s. 160 of the Tasmanian Code is silent is the extent of the necessary loss of self-control, that is, the requisite relationship between the provocative act(s) and the fatal act(s). Despite the absence of legislative direction, however, it has now been established that the provocation must be capable of causing an ordinary person to retaliate to the degree, method and continuance of violence which produces death. This approach was adopted by the High Court in *Parker v. R.*,[35] in *Johnson*[36] and again in *Stingel*.[37] Although not specifically discussed by the Court, it has been stated in earlier decisions that there is no onus on the accused to establish this element of proportionality as a separate matter in addition to the others set out in the legislation.[38]

CRITICISMS OF THE COURT'S DECISION

The High Court's preservation of the distinction between the gravity of the provocation and the power of self-control for the purposes of deciding the attributes of the accused with which the ordinary person is to be endowed is contrary to earlier pronouncements by the Court, to developments in other jurisdictions and to recommendations by Law Reform Commissions.

In 1977, in *Moffa v. R.*,[39] the High Court held that a jury should be instructed that with respect to loss of self-control the ordinary person was to be invested with the ethnicity and religious beliefs of the accused. Murphy J. strongly criticized the appropriateness of the objective test in a heterogenous society where 'behaviour is influenced by age, sex, ethnic origin, climatic and other living conditions, biorhythms, education, occupation and above all, individual differences'.[40] In *R. v. Dincer*[41] the Victorian Supreme Court took a similar approach where the accused was a Turk and a conservative Muslim. Lush J. ruled that these characteristics, which were described as permanent

26 *Ibid.* 213-4.
27 *Stingel, supra* n. 1, 329.
28 [1978] A.C. 705, 718.
29 (1986) 25 C.C.C. (3d) 322.
30 *Ibid.* 351.
31 [1961] V.R. 663, 669.
32 (1976) 136 C.L.R. 619.
33 *Stingel, supra* n. 1, 328.
34 *Ibid.* 329.
35 (1963) 111 C.L.R. 610, 641.
36 *Supra* n. 32, 637-38.
37 *Supra* n. 1, 325.
38 *Supra* n. 32, 641 (*per* Barwick C.J.).
39 (1977) 138 C.L.R. 601.
40 *Ibid.* 626.
41 [1983] 1 V.R. 460.

rather than transitory, may properly be taken into consideration for the purposes of the ordinary person test.[42] In 1989 the Victorian Supreme Court continued its attack on the objective test describing it as 'anachronistic' and inappropriate in light of the 'modern developments in the study of psychology and psychiatry and the realization of the rooted differences in the reaction of peoples of different ethnic origins'.[43] It is interesting to note that, in a series of judgments of Kriewaldt J. of the Supreme Court of the Northern Territory of Australia, it has been held that the standard of self-control required by members of the Pitjintjara tribe is different from that required of the white citizens in the Territory.[44] Law Reform Commissions in New Zealand,[45] and South Australia[46] have responded to these judicial statements and recommended the abrogation of the objective standard.

It is uncertain why, in the face of mounting criticism, the High Court has chosen to retain the objective test as first formulated in *R. v. Camplin*.[47] It has been contended that the distinction between power of self-control and the gravity of the provocation, on which this formulation is premised, represents a judicial compromise between the recognition of individual differences and the maintenance of an objective standard which society demands of its members.[48] This position, however, suffers from the common defects of compromise. First, the distinction is an artificial one, as it would appear impossible in practice to distinguish between the impact of an insult and the ability of a person to withstand it. Second, an attempt to evaluate an individual's personal reasons for his or her loss of self-control in terms of the capacity of self-control by a hypothetical ordinary person seems to be lacking both in fairness and in logic. Third, the test, as advocated by the High Court, may pose problems of interpretation and application by a jury. It could be seen as unreasonable to ask a jury to decide whether a person's reaction is either indicative of the pertinence of the provocation or indicative of her or his loss of self-control in relation to that issue. Even if a jury is able to draw this fine distinction, the idea that the ordinary person suddenly changes character depending on which aspect of the objective test is in issue is inevitably confusing and, not surprisingly, has been referred to as 'conceptual gymnastics'.[49] Both in principle and in practice, therefore, it is preferable that provocation be assessed solely by subjective standards. The objective standard required by society, however, has to be acknowledged. The most appropriate means of doing so is in the question of sentencing.[50]

CONCLUSION

Despite the fact that the joint judgment of the High Court in this case is written with close reference to the provisions of s. 160 of the Tasmanian Code, it is still a clear indication of the Court's current position on the common law of provocation. From this perspective it appears that the Court has adopted a conservative, if not backward, approach to reform in this controversial area of the criminal law. It remains to be seen in the future whether the Court will bow to academic and judicial pressure for the demise of the ordinary person test and the introduction of a flexible standard which satisfies the needs of a pluralistic and changing society.

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42 *Ibid.* 466.
43 *R. v. Voukelatos* [1990] V.R. 1, 6 (*per* Murphy J.).
44 Howard, C., 'What Colour is the Reasonable Man?' [1961] *Criminal Law Review* 41, 46.
45 New Zealand, Criminal Law Reform Committee, *Report on Culpable Homicide* (1976) para. 16.
46 South Australia Criminal Law and Penal Methods Reform Committee, *Substantive Criminal Law* (Fourth Report) (1977) para. 11.6.
47 [1978] A.C. 705.
48 Yeo, S. M. H., 'Recent Australian Pronouncements on the Ordinary Person Test in Provocation and Automatism' (1991) *Criminal Law Quarterly* 280, 288.
49 Goode, M. 'The Abolition of Provocation' in Yeo, S. M. H. (ed.), *Partial Excuses to Murder* (1990) 37, 48.
50 *R. v. Voukelatos* [1990] V.R. 1, 20 (*per* Murphy J.).

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