[2011] UKPC 15
Privy Council Appeal No 0093 of 2009

JUDGMENT

Tabeel Lewis (Appellant) *v* The State (Respondent)

From the Court of Appeal of Trinidad and Tobago

before

Lord Rodger
Lord Brown
Lord Kerr
Lord Clarke
Lord Dyson

JUDGMENT DELIVERED BY
LORD BROWN
ON

15 June 2011

Heard on 10 March 2011

Appellant	*Respondent*
Owen Davies QC Maya Sikand (Instructed by Simons Muirhead & Burton)	Howard Stevens (Instructed by Charles Russell LLP)

LORD BROWN:

1. On 5 November 2003 the appellant killed Dayah Ramsook in her own home at Siparia, Trinidad. He had gone there to break off a sexual relationship that had been going on between them in secret for nearly a year. He was aged 18 (of previous good character), she 63, both Jehovah's Witnesses who had met through their local church.

2. The injuries the appellant inflicted on the deceased that morning were severe indeed and indicative of very considerable violence. The left side of the hyoid bone was broken, resulting from severe manual pressure to the neck. There was bleeding, bruising and fluid accumulation over the top of the brain (causing congestion and swelling of the brain) inside the skull, an injury caused by the application of severe blunt force. The deceased was found hog-tied (her wrists and lower forearms bound together behind her back with cord which was then tied around her ankles so that, with her knees flexed, her ankles were drawn up towards her wrists behind her), with a gag (a sock with a tie inside it) stuffed deep into her mouth. In the opinion of the forensic pathologist, she "died as a result of asphyxiation or a lack of air or oxygen due to gagging, strangulation and hog-tying," the blunt force injury to the head being "a significant additional contributory factor to death".

3. On 29 March 2006, following a nine-day trial before Mohammed J and a jury at the San Fernando Assizes, the appellant was convicted of murder and sentenced to death – the mandatory sentence for murder in Trinidad and Tobago. On 10 May 2007 the Court of Appeal of Trinidad and Tobago (Warner, John and Mendonca JJA) dismissed the appellant's appeal against conviction. The basis of that appeal was that the judge had insufficiently explained to the jury that they were free to disagree between themselves as to the verdict. No such argument is pursued here. Rather the sole ground of appeal before the Board is that the trial judge should have left to the jury the partial defence of provocation (as, indeed, defending counsel asked him to do). That is the argument for which the Board, following an oral hearing on 11 October 2010, granted special leave to appeal (leaving over until the substantive hearing of the appeal the appellant's related application to adduce fresh evidence respectively from a clinical psychologist and a forensic psychiatrist).

4. The case against the appellant at trial was based primarily upon the evidence of a witness who saw him leaving the deceased's premises in her car on the morning of 5 November 2003, evidence from a number of other witnesses of his possession and use of the deceased's car that day, the forensic pathologist's evidence, and oral and written statements made by the appellant to the police. The appellant did not deny the killing. His defence was rather that he did not intend to kill (or, indeed, to cause the deceased any serious bodily injury) and was therefore guilty of manslaughter but

not murder. The essence of the defence of provocation which Mr Owen Davies QC for the appellant contends should have been left to the jury was that the defendant was provoked into losing his self-control and violently assaulting the deceased by her conduct (words and actions) in reaction to being told that their relationship was to end, conduct which (whether intentionally or not) threatened to expose this secret relationship to his great distress and embarrassment.

5. The appellant was arrested two days after the killing. He was informed of the investigation into the deceased's death and the theft of the car, told he was a suspect and cautioned. He replied:

> "Is only the car ah take, the keys in meh pocket."

6. Taken to the police station and cautioned again, the appellant replied:

> "Sir, around 4 am on Wednesday, 5th November 2003, I went to Dayah's house and I hide in a room under her house. I went to meet Dayah because we have a relationship. I hide in the room because the dogs were making noise and I did not want anyone to know I came to see her. Around 8.30 am she came downstairs into the room and when she saw me she screamed. I put my hands over her mouth to quiet her and a brown sock I had in my pocket I pushed into her mouth. We both fell to the ground and she became silent. I then tied her up with some string that I had given her some time ago. I then saw her car keys on the counter in that room. I started her car and went driving about. I parked the car in the bushes at the dam at Alta Garcie Trace."

Later that same day the appellant made a written statement which included the following:

> ". . . around 4 am on Wednesday 5th November, 2003 I went to Dayah Ramsook's home . . . I am accustomed to going to her home around that time because we have a relationship and I does not want my parents to know that I does leave home to go to her and both of us agree that the family, that is both of us families shouldn't know about our relationship . . ."

The statement then described, consistently with the appellant's earlier oral statement although elaborating the description of his assault upon the deceased, what had occurred.

7. The appellant gave sworn evidence at the trial. The judge's summing up of his evidence to the jury included the following:

> "The evidence of the accused was that sometime after this [the deceased's surprise on seeing the appellant and his grabbing her around the mouth to prevent her from screaming], the accused told the deceased about his intention to break off their relationship that very morning, and the deceased then started to cry. The accused told the deceased that the relationship could not continue and that her crying would not change his mind because the relationship had to stop. The deceased then got upset. She told the accused that he could not do people that, and that he could not just come into people's lives and leave just like that, and she accused him of being unfair to her by wanting to end the relationship. At that time the accused said that the brother of the deceased, Dipnarine Ramsook, who lived next door, was cleaning his yard. The deceased then started to talk hard and 'all kind of thing'. After that, the deceased and the accused started to struggle because he wanted to keep the deceased quiet. During the course of the struggle, the deceased bit him on his hand. The accused did not want the attention of Dipnarine Ramsook to be drawn because that would have had the effect of exposing the secret relationship."

8. The single most relevant answer given by the appellant in evidence to explain why he had been struggling with the deceased was this:

> "Because she was talking hard and thing, and her brother was right there, I didn't want it to be exposed but like she wanted that, but I didn't want that, sir."

So much for the evidence.

9. The question of provocation arose for the first time after the close of the evidence at the "*Ensor* hearing" (routinely held before counsel's speeches to discuss the relevant factual issues and the legal directions to be given). It was raised initially by the judge himself (transcript p1012) who said that, if it were said to arise, he would want defence counsel (Mr Gray) "to identify the evidence suggestive of loss of self-control on the part of the accused. Because on the face of it, there appears to be none, all right." During the *Ensor* hearing the judge asked Mr Gray more than once what was the evidence from which it could be inferred that the defendant had lost his self-control, a question which Mr Gray kept answering (almost as if at cross-purposes) by reference to the deceased's implied threat to reveal the existence of their relationship. At p1027 of the transcript, however, appears this:

"Mr Gray: I understand my Lord's position in terms of there being direct evidence that, 'Listen, I wanted to keep this thing quiet. This lady was making an effort to reveal this thing, and I couldn't get another opportunity to keep her quiet, and I just lose it in trying to keep her quiet.' There is no direct evidence of that.

The Court: Well, I appreciate your point that an accused doesn't have to say it in so many words, that 'I lost it', or 'I saw red', or 'I lost my self-control', but there must be some evidence capable of being identified which is capable of supporting such an inference that there was a loss of self-control. And you are saying that that evidence, when one looks at the unfolding of events . . . , it can be inferred.

Mr Gray: Can be inferred."

10. The judge's ruling on provocation appears finally at p1057 of the transcript:

"With respect to provocation, I have considered this carefully, and I have looked at the evidence and I have looked at the authorities and, in my respectful view, no triable issue of provocation arises on the evidence. And I have looked at the case of *Acott*, in particular, and I do not see any evidence of any specific act or words of provocation resulting in a loss of self-control on the part of the accused. I think, in the circumstances, it would then be speculative to leave the defence of provocation to the jury. So I would not be leaving that defence to the jury."

11. The defence of provocation, it should here be noted, is identical in Trinidad and Tobago under section 4B of the Offences Against the Person Act, Chap 11:08 to that in England and Wales under section 3 of the Homicide Act 1957 (until the abolition of that defence and its replacement by the defence of loss of control with effect from 4 October 2010 pursuant to sections 54-56 of the Coroners and Justice Act 2009), namely:

"Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

12. With regard to the various issues raised before us, all the relevant authorities on provocation, and more particularly on whether the defence should be left to the jury and, if not left when it should have been, the consequences, are either English or Privy Council cases. They include the decision of the House of Lords in *R v Acott* [1997] 1 WLR 306 where, in the single reasoned speech, Lord Steyn said this, at pp 312-313:

> "Section 3 is only applicable 'if there is evidence . . . that the person charged was provoked (whether by things done or things said or both together) to lose his self-control.' A loss of self-control caused by fear, panic, sheer bad temper or circumstances (eg a slowdown of traffic due to snow) would not be enough. There must be some evidence tending to show that the killing might have been an uncontrolled reaction to provoking conduct rather than an act of revenge. Moreover, although there is no longer a rule of proportionality as between provocation and retaliation, the concept of proportionality is nevertheless still an important factual element in the objective inquiry. It necessarily requires of the jury an assessment of the seriousness of the provocation. It follows that there can only be an issue of provocation to be considered by the jury if the judge considers that there is some evidence of a specific act or words of provocation resulting in a loss of self-control. It does not matter from what source that evidence emerges or whether it is relied on at trial by the defendant or not. If there is such evidence, the judge must leave the issue to the jury. If there is no such evidence, but merely the speculative possibility that there had been an act of provocation, it is wrong for the judge to direct the jury to consider provocation. In such a case there is simply no triable issue of provocation."

13. A little later (at p313) Lord Steyn rejected counsel's invitation to "state what would be sufficient evidence of provocation to justify a trial judge in leaving the issue of provocation for the jury to consider" and said:

> "What is sufficient evidence in this particular context is not a question of law. Where the line is to be drawn depends on a judgment involving logic and common sense, the assessment of matters of degree and an intense focus on the circumstances of a particular case. It is unwise to generalise on such matters: it is a subject best left to the good sense of trial judges. For the same reason it is not useful to compare the facts of decided cases on provocation with one another."

14. Mr Howard Stevens for the respondent state submits, first, that the judge's ruling shows him to have decided that there was no sufficient evidence here either of the defendant being provoked by anything done or said by the deceased, or of his

losing self-control; and, secondly, that that was a perfectly proper judgment open to the judge on the evidence. As for whether the deceased said or did anything that could properly be regarded as provoking conduct, the respondent says that the defence could point to no evidence here of "a specific act or words of provocation" within Lord Steyn's formulation, still less to it being in any true sense provocative rather than merely causative. As for loss of control, Mr Stevens submits that the evidence suggests rather a series of deliberate and calculated steps taken to silence the deceased than panic, loss of self-control and a frenzied attack.

15. This is a difficult area of the law and these questions do not lend themselves to clear-cut answers. Although it is perhaps surprising that the deceased's entirely understandable reaction to the appellant's unexpected presence and announcement that morning could be regarded as capable in law of amounting to provocation, it seems in fact likely that it was indeed that which caused the appellant to act as he did and inflict upon the deceased this series of injuries. The Board think it unhelpful in these cases to try to separate out the evidence of provocation from that of loss of self-control. Realistically these are two closely connected aspects of the same (first) limb of the provocation defence. As Lord Nicholls of Birkenhead said in giving the majority judgment of the Board in *Attorney General for Jersey v Holley*, Appeal [2005] UKPC 23; [2005] 2 AC 580, para 5:

> ". . . section 3 envisages that the defence of provocation has two ingredients. The first ingredient, known as the subjective or factual ingredient, is that the defendant was provoked into losing his self-control. This concept is not without its own difficulties, but it is not necessary to pursue them on this occasion. Suffice to say, in deciding whether this ingredient exists in a particular case all evidence which is probative is admissible. This includes evidence of any mental or other abnormality making it more or less likely that the defendant lost his self-control."

In the next paragraph Lord Nicholls discussed the second ingredient of the defence, "the objective or evaluative ingredient", which in turn, he said, has two elements:

> "The first element calls for an assessment of the gravity of the provocation. The second element calls for application of an external standard of self-control: 'whether the provocation was enough to make a reasonable man do as he did.'"

16. The point that the first limb of the defence is properly to be considered as a whole was made too by May LJ giving the judgment of the Court of Appeal in *R v van Dongen (Anthony Gerrard)* [2005] EWCA Crim 1728; [2005] 2 Cr App R 632.

Having identified the various elements of the defence – including the need for evidence on which the jury could find that the defendant (1) was provoked and (2) lost his self-control – he observed: "The first two are usually in the authorities combined as a single composite" (para 35). It is convenient at this point to note para 36 as well:

> "If there is evidence on which a jury could find that the accused was provoked to lose his self-control, the issue of provocation must be left to the jury even if, in the opinion of the trial judge, no reasonable jury could possibly conclude on the evidence that a reasonable person would have done as the defendant did and thus that on the evidence a verdict of manslaughter would be perverse – see *R v Gilbert* [1978] 66 Crim App R 237. This is the plain meaning of the statutory provision."

Finally, before leaving v*an Dongen* for the moment, appears this important perception at para 42:

> "We are more troubled by the difficulty for judges in deciding in borderline cases whether particular conduct is to be regarded as *provoking* conduct. The difficulty derives from the fact that section 3 of the 1957 Act requires the objective element of provocation to be left to the jury. Yet provocation or provocative conduct should, it is to be supposed, have some attribute which makes the conduct provocative. We are concerned with provocative conduct, not mere causative conduct. Yet a judgment, that particular specific conduct was causative but cannot properly be called provocation, risks straying into an evaluation of the objective element which statute has left to the jury. To decline to make the judgment would mean, as the judge in the present case thought, that judges would be obliged to give a provocation direction in all, or nearly all, murder cases in which there is a defence of self-defence and more than speculative evidence that the defendant may have lost his self-control because of things done or said or both."

17. In the light of these authorities it appears to the Board less than clear that there was not evidence here on which the jury could have found the appellant provoked into losing his self-control. This was not, of course, a self-defence case (raising the spectre troubling May LJ in the last sentence of para 42 in *van Dongen*). The evidence after all did suggest that the appellant was terrified of his relationship with the deceased becoming known and that he regarded her behaviour as threatening just that. And it suggested too that in his desperation to prevent this he panicked and lost his self-control. Even though some of the hallmarks of a frenzied attack may have been missing, he inflicted upon the deceased a series of violent injuries and, in whatever order they were inflicted, it is impossible to see the manner of his attack as logical.

18. Nor was it fatal to the defendant's case that he purported to recollect and describe in some detail the course of the "struggle" with the deceased and said nothing as to his having in fact panicked and lost his self-control. So much was clearly established by the opinion of the Board in *Lee Chun-Chuen v The Queen* [1963] AC 220 which recognised the dilemma faced by an accused running (as was this appellant) other defences which could only be weakened by the admission of a loss of self-control and observed (p233):

> ". . . loss of self-control can be shown by inference instead of by direct evidence. The facts can speak for themselves and, if they suggest a possible loss of self-control, a jury would be entitled to disregard even an expressed denial of loss of temper, especially when the nature of the main defence would account for the falsehood. An accused is not to be convicted because he has lied."

19. The Board would at this point note one other sentence from May LJ's admirable judgment in *van Dongen* (at para 44): "In borderline cases such as this it [namely a direction to the jury on provocation] is the prudent course for judges to take, especially if the defence ask for a provocation direction to be given."

20. All that said, however, the Board has finally concluded here that the judge here was in fact entitled not to leave this defence to the jury. That he considered the question with the utmost care cannot be doubted. He himself (not defending counsel) originally raised the question and it was prominent amongst those discussed over the following 45 pages of transcript. It seems plain from the passage in the argument set out at para 9 above that he correctly recognised that evidence of loss of self-control can be inferred. And in their Lordships opinion it seems likely from the terms of his eventual ruling (para 10 above) that he correctly recognised also that the two elements of the subjective limb of the defence are best considered "as a single composite".

21. Lord Steyn's statement in *Acott* (see para 13 above), that what is sufficient evidence is not a question of law and is "best left to the good sense of trial judges", by no means stands alone. Vice President Rose LJ in *R v Miao* [2003] EWCA Crim 3486, upholding the trial judge's decision there not to leave provocation to the jury – despite prosecuting counsel's support for the defence's invitation that he should do so, a decision described (para 21) as "courageous [but] also correct" – said (para 19): "A trial judge is, in many cases, better placed than this Court to assess the quality and effect of the evidence which has been placed before the jury."

22. Although Mr Davies seeks to pray in aid the facts of *Miao's* case – in some respects markedly similar to those of the present case albeit involving substantially less violence than here – the comparison really cannot assist. Again to cite Lord Steyn

in *Acott*: "it is not useful to compare the facts of decided cases on provocation with one another".

23. It follows from all this that, but for consideration of the fresh evidence application, the Board would have been disposed to dismiss this appeal. We have concluded, however, that the fresh evidence cannot be ignored – although, as we shall shortly explain, it is impossible for their Lordships to assess its ultimate value and accordingly it will be necessary to remit the matter for consideration by the Court of Appeal. The evidence consists of detailed reports following interviews with the appellant prepared respectively by Dr Tim Green, a chartered clinical psychologist, dated 30 August 2008, and Professor Nigel Eastman, a consultant forensic psychiatrist, dated 9 September 2009. It is unnecessary for present purposes to describe these reports in any detail. The following single brief excerpts from each will suffice:

Dr Green at para 6.13: "I believe that Mr Lewis committed the homicide in reaction to an anxious state in which he feared for his reputation. I believe that he has a vulnerable self-esteem that he sought to protect at all costs and acted in a state of panic when this was threatened by the deceased's statement that she would publicly expose their affair."

Professor Eastman at pp18-19: "Specifically, if the court had accepted that the victim had threatened to expose to others knowledge of the sexual relationship that the appellant had been having with her then, given his particular personality characteristics, and his extreme need for 'privacy', such a threat would have been much more significant to him, and potentially much more "wounding" than it would have been to someone without his personality characteristics. Put another way, his self-esteem, and also need for 'privacy', was so extreme that a threat to "expose" to others the knowledge that he, as an 18 year old young man, had been having a sexual relationship with a woman in her 60s, would have been 'intolerable' to a level far beyond that which might have been experienced by someone without his mental characteristics."

24. Rather puzzlingly, counsel for the appellant prior to the appeal hearing appeared to discount the possible value of this evidence on the question whether (whatever may have been the position at trial) a viable defence of provocation can now be seen to have existed here. The reason why we have no alternative but to remit the matter for consideration by the Court of Appeal is because in these circumstances the respondent has not yet had a proper opportunity to test this fresh evidence or challenge its admissibility or, indeed, adduce contrary evidence of its own.

25. The potential relevance of the evidence, however, appears to the Board unmistakeable: it is necessary only to repeat Lord Nicholls' observation in *Holley* (see para 15 above) that oral evidence probative of the defendant being provoked into losing his self-control is admissible: "This includes evidence of any mental or other abnormality making it more or less likely that the defendant lost his self-control." It will be for the Court of Appeal to consider whether, in the light of the fresh evidence (if held admissible), it now appears that there was a case on provocation which was fit for consideration by the jury.

26. One final matter requires brief mention: the application of the proviso. For the reasons suggested by May LJ in *van Dongen* (at para 36, cited at para 16 above), this presents particular difficulties in the context of a provocation defence – although in the event the proviso there was applied and the murder conviction upheld. Lord Bingham of Cornhill's opinion on behalf of the Board in *Franco v The Queen* [2001] UKPC 38 should also be noted in this regard.

27. In their Lordships' view, however, no question now arises here as to the application of the proviso. It does not arise because, as indicated, but for the fresh evidence the Board would have dismissed the appeal in any event without needing to consider the proviso.

28. By way of final comment the Board would note that, whatever difficulties may arise in England and Wales from the introduction last October of the new defence of loss of control in place of provocation, at least there will be fewer problems of the kind discussed above. The courts in Trinidad and Tobago however, must soldier on. It will now be for the Court of Appeal there to consider the question of provocation in the present case. We have no alternative but to remit the matter to them.