All England Law Reports/1995/Volume 4 /R v Humphreys - [1995] 4 All ER 1008

R v Humphreys

COURT OF APPEAL, CRIMINAL DIVISION

HIRST LJ, CAZALET AND KAY JJ

29, 30 JUNE, 7 JULY 1995

Criminal law - Murder - Provocation - Self-control of reasonable man - Characteristics of accused - Accused having abnormal characteristics of immaturity and attention seeking by wrist slashing - Whether accused's abnormal characteristics eligible for consideration by jury in determining whether reasonable person having characteristics of accused would have lost self-control - Whether accused's abnormal characteristics inconsistent with or repugnant to concept of reasonable person - Homicide Act 1957, s 3.

Criminal law - Murder - Provocation - Direction to jury - Acts constituting provocation - Whether provocative conduct throughout complex relationship requiring analysis or guidance by judge in directing jury.

In 1985 the appellant, who had had an unhappy childhood and had turned to drugs and prostitution in adolescence, was living with A, a 33-year-old man She was then aged 17. The appellant's relationship with A was tempestuous; he lived in part on her earnings from prostitution, but was jealous and possessive and had beaten her on a number of occasions. One night the appellant cut her wrists out of fear that A, who was drunk, would beat her on his return from an errand and

would force her to have sex with him and possibly others. On his return A taunted the appellant that she had not made a very good job of slashing her wrists, whereupon she stabbed and killed him with a kitchen knife. At her trial for A's murder, the appellant raised a defence of provocation and relied on the history of her relationship with A as a cumulative catalogue of provocative conduct against her, culminating with the jibe as to the inefficiency of her wrist slashing, which was put forward as the trigger which provoked the appellant to lose her self-control. A consultant psychiatrist gave evidence that the appellant was of abnormal mentality, with immature, explosive and attention-seeking traits, the last trait referring to her tendency to slash her wrists. The judge directed the jury that they could not attribute to a reasonable young woman in the appellant's situation any of the seriously abnormal characteristics described in the psychiatric evidence and restricted the jury's attention to events immediately surrounding the killing, thereby precluding them from considering the cumulative effect of the appellant's relationship with A. The appellant was convicted of murder and was subsequently refused leave to appeal. However, in January 1995 the court granted leave on the basis of new grounds of appeal relating to the judge's direction to the jury.

Held - The appeal would be allowed and a verdict of manslaughter substituted for that of murder for the following reasons--

(1) Abnormal immaturity and attention seeking by wrist slashing were characteristics which the jury were entitled to take into account in determining whether, for the purposes of s 3[a] of the Homicide Act 1957, a reasonable person in the accused's situation would have lost his self-control, and were not wholly inconsistent with or repugnant to the general concept of the reasonable person, provided they were permanent characteristics which set the accused apart from the ordinary person in the community and were specifically relevant to the provocative words or actions relied on to consiti-

tute the defence. On the facts, the appellant's attention-seeking behaviour could be regarded as a psychological illness or disorder which was not inconsistent with the concept of the reasonable person and as a permanent condition. It was therefore open to the jury to conclude that the provocative taunt relied on as the trigger inevitably hit directly at that abnormality and was calculated to strike a raw nerve. Accordingly, the judge should have left the appellant's immaturity and attention-seeking behaviour for the jury's deliberation as characteristics eligible for attribution to the reasonable woman, it being for them to decide what, if any, weight should be given to them in all the circumstances (see p 1022 *f* to *j* and p 1024 *d*, post); *DPP v Camplin* [1978] 2 All ER 168, *R v Morhall* [1993] 4 All ER 888 and *R v Dryden* [1995] 4 All ER 987 followed.

[a] Section 3 is set out at p 1015 b, post

(2) In a case where the provocative circumstances comprised a complex history with several distinct and cumulative strands of potentially provocative conduct which had built up over time until the final encounter, the judge ought to give guidance to the jury in the form of a careful analysis of those strands so as to enable them to understand their potential significance. Having regard to the appellant's tempestuous relationship with A over the long term, prior to the events of the night in question, it was clear that the judge should have given such an analysis and that a mere historical recital of the facts, devoid of any analysis or guidance, was insufficient (see p 1023 *j* and p 1024 *c d*, post); *R v Stewart* [1995] 4 All ER 999 followed.

[1995] 4 All ER 1008 at 1010

Notes

For provocation as a defence to a charge of murder, see 11(1) *Halsbury's Laws* (4th edn reissue) paras 438-439, and for cases on the subject, see 14(2) *Digest* (2nd reissue) 33-48, *5260-5409*.

For the Homicide Act 1957, s 3, see 12 *Halsbury's Statutes* (4th edn) (1994 reissue) 280.

Cases referred to in judgment

Bedder v DPP [1954] 2 All ER 801, [1954] 1 WLR 1119, HL.

DPP v Camplin [1978] 2 All ER 168, [1978] AC 705, [1978] 2 WLR 679, HL.

R v Ahluwalia [1992] 4 All ER 889, CA.

R v Dryden [1995] 4 All ER 987, CA.

R v Lesbini [1914] 3 KB 1116, CCA.

R v McGregor [1962] NZLR 1069, NZ CA.

R v Morhall [1993] 4 All ER 888, CA; *rvsd* [1995] 3 All ER 659, [1995] 3 WLR 330, HL.

R v Newell (1980) 71 Cr App R 331, CA.

R v Rossiter [1994] 2 All ER 752, CA.

R v Stewart [1995] 4 All ER 999, CA.

Appeal against conviction

Emma Claire Humphreys appealed with leave of the Court of Appeal granted on 23 January 1995 against her conviction on 26 February 1985 in the Crown Court at Nottingham before Kenneth Jones J and a jury of murder for which she was ordered to be detained during Her Majesty's pleasure. The new grounds of appeal were that the judge had erred (i) in not directing the jury that they could take the seriously abnormal personality of the appellant into account as a characteristic to be attributed to the reasonable person when considering whether that person would have lost her self-control and behaved as the appellant did; and (ii) in restricting the jury's attention to events immediately surrounding the killing. The facts are set out in the judgment of the court.

Helen Grindrod QC and Vera Baird (instructed by R R Sanghvi & Co, Wembley) for the appellant.

John Milmo QC and Adrian Reynolds (instructed by the Crown Prosecution Service, Nottingham) for the Crown.

Cur adv vult

7 July 1995. The following judgment of the court was delivered.

HIRST LJ.

On 4 December 1985, in the Crown Court at Nottingham, before Kenneth Jones J, the appellant, Emma Claire Humphreys, then aged 17, was convicted of the murder of Trevor Armitage (aged 33) on 26 February 1985 and was ordered to be detained during Her Majesty's pleasure.

On 2 January 1986 a notice of appeal was submitted, but leave to appeal was refused by the single judge. Shortly thereafter the applicant signed a form abandoning all proceedings in the Court of Appeal. However, following a renewed application accompanied by new grounds of appeal the full court, on 23 January 1995, treated her abandonment as a nullity, gave her an extension of time of approximately eight and a half years, and granted leave to appeal. This very long

delay before her appeal has become effective is therefore no fault whatsoever either of the court or of the criminal justice system.

The main facts as to the appellant's earlier life, and the events leading up to the killing, were contained in her interview which she confirmed on oath in her brief and unchallenged evidence in court.

She has a very unhappy family background. When she was about five years old her mother and father separated, her mother remarried and the appellant went to live with her and her stepfather in Canada until December 1983. Both her mother and her stepfather were alcoholics. From early adolescence she herself took drugs, drank too much alcohol, and was sexually promiscuous. She returned to England in December 1983 and went to live with her father and his second wife, and subsequently with her grandmother. However, on 30 August 1984, aged 16, she left home and went to work as a prostitute.

Shortly thereafter she was picked up by the victim, Trevor Armitage. He had a predilection for girls much younger than himself, had previous convictions for violence, was a drug addict and was known to the vice squad as somebody who was seen most evenings driving round the vice area.

Trevor Armitage took the appellant to live with him at his house in Turnbury Road, Bulwell. He was jealous and possessive, although he did not object to her continuing to work as a prostitute and, indeed, lived in part on her earnings. Their relationship began as a sexual one, but shortly after they first met he beat her up on a number of occasions and this caused her to lose interest in him.

Over Christmas and the New Year 1984-1985 she appeared before the criminal courts as a result of two incidents and for some weeks she was on remand at Risley, until 21 February 1985, when she was conditionally discharged. While she was away Trevor Armitage took in another young girl.

This miserable history from August 1984 onwards was the prelude to the critical events of 24 to 26 February 1985. Before reciting them, however, it is important to record another very important and unhappy aspect of her personal history, namely that she had a strong tendency to seek attention, exemplified in her case by frequent attempts, dating back to her residence in Canada, to cut her wrists, leaving marks and scars which were plainly visible; these were described by a doctor who examined her shortly after the killing, and who found three recent cuts to her right wrist, fifteen well-healed scars to her right forearm, nine recent cuts running across her left wrist with fresh, dry blood over them, and seven well-healed vertical scars running up her left forearm.

On 24 February 1985 a Mrs Whitehead, who was a witness at the trial, saw the appellant in a bar and described her as very lonely, depressed and desolate. The following day two friends met up with Trevor Armitage and his son Stephen, aged 16, in a bar, where the appellant was also present. They left the bar with the appellant and Trevor Armitage told her that 'we'll be all right for a gang bang tonight'.

The group then went on to another public house and finally to Trevor Armitage's house where he arrived drunk. The appellant went upstairs and turned on the radio. Shortly afterwards Trevor Armitage left to drive his son home.

After they had left she went down to the kitchen and took two knives from a drawer, fearing that there might be trouble when he came back and that he might give her another beating. At this juncture she cut both her wrists with one of the knives.

[1995] 4 All ER 1008 at 1012

When Trevor Armitage returned she was sitting on the landing, listening to music with one of the knives in her hand. He came up and went past her into the bedroom, where he undressed and then came and sat near her on the landing with only his shirt on. She said she got the feeling that he wanted sex while she did not and that she was fearful that he might force himself upon her.

At this critical juncture there occurred the event which was relied upon as triggering her loss of self-control, when Trevor Armitage taunted her that she had not made a very good job of her wrist slashing.

She reached across him as he lay on his back and stabbed him with a blow from one of the knives which penetrated his heart and went through into his liver, in a manner which expert evidence stated required a moderate degree of force.

In her defence the appellant relied on the whole history, from the moment she first met Trevor Armitage, as a cumulative catalogue of provocative conduct against her, culminating with the jibe as to the inefficiency of her wrist cutting which, as already noted, was put forward as the trigger which snapped her self-control.

At the trial the defence called a consultant psychiatrist, Dr Michael Tarsh DM FRC Psych, whose evidence is critical for the purposes of the present appeal.

In his report Dr Tarsh described the appellant as a girl of abnormal mentality with 'immature and explosive and attention-seeking traits', the last trait referring to the tendency to wrist slashing. In the summing up only the last two traits are mentioned when the judge came to summarise Dr Tarsh's oral evidence, but we are satisfied that Dr Tarsh must have identified all three as described in his report, which he is most likely to have reproduced in his evidence-in-chief. The judge proceeded in his summary of Dr Tarsh's evidence as follows:

> 'Well, members of the jury, then you heard the evidence, you will remember, of Dr Tarsh the psychiatrist who told you, having examined her and read all the papers in the case, he had come to the conclusion she suffered from a seriously abnormal personality with explosive traits, attention-seeking features, this tendency to wrist cutting as an attention seeker. She suffered from mildly abnormal mood swings and abnormal impulsiveness and he thought faced with a series of stresses, she was likely to lose her self-control against the background of this ambivalent relationship with Armitage, a mixture of love and loathing, whatever it was, if then, having cut her wrists she was jeered at, he thought that she could explode. That is the evidence, members of the jury, which may help you. It is a matter entirely for you in deciding whether in fact the explanation for what she did was a sudden loss of self-control on her part. In cross-examination he said this: "I think she lost control completely because of interplay of a provocative situation, abnormal personality from considerable unhappiness and alcohol" and he gave us his opinion if the abnormal personality had been taken away, it would not have happened.'

The main defence was one of provocation.

Originally there were three grounds of appeal, one of which, concerning the judge's direction on intent, quickly fell by the wayside.

The other two much more substantial grounds concern provocation. First, Mrs Grindrod QC (on behalf of the appellant) criticised a crucial part of the judge's direction on the 'reasonable man' test, which we are about to quote, as being fundamentally flawed in law. Secondly, she criticised the judge's presentation

to the jury of the facts relied upon cumulatively by the appellant, dating back to the moment of the first meeting with Trevor Armitage.

Having given his direction to the jury on intent, the judge directed the jury as a matter of law that 'provocation consists of things said or things done or is a combination of both, which causes the defendant to lose her self-control at the time of the killing, and which would have caused a reasonable person to lose her self-control and do as the defendant did'.

He then pointed out that this involved three elements, the first two of which are questions of fact. First, consideration of the things said or things done (ie the provocative conduct) and, secondly, consideration as to whether there was a loss of self-control which was caused by that provocation.

He then proceeded to the third element and directed the jury as follows:

> 'Then you pass on to this third element. Would a reasonable person have been provoked and provoked to do what the defendant did? Let me just pause for a moment there, members of the jury, simply to explain why this test forms part of this defence of provocation in our law. It is easily explained because it would be quite wrong for a person of exceptional sensitivity to be able to come before a jury and say, for example, "Well, it drives me mad if someone simply taps me on the shoulder. This person tapped me on the shoulder so I turned round and killed him and I was provoked". Well, in those circumstances it would be monstrous to say that that was not murder and was only manslaughter. And so it is that the law, as it were, grafts onto this defence this test which must be passed, which is called the test of the reasonable person. You have been referred to what s 3 of the Homicide Act 1957 says about this but I am going to refer you to it again. This will be for the last time in this case, but what s 3 of the the Act says is: "... the question whether the provocation"--that is, provocation in the narrow sense--"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". Members of the jury, in one sense, indeed in

> reality, this is a fairly simple and straightforward matter. You are not, in applying this test of the reasonable man, picturing some ideal person presented with an entirely different set of circumstances. You are asking yourselves what would a reasonable person in the situation in which this defendant found herself on this particular night, what would such a reasonable person's reaction have been? Would such a reasonable person have lost her self-control? Now, of course, what you must have in mind there is a person, not unduly excitable or pugnacious, a person having the power of self-control to be expected of an ordinary person of the sex and age of the defendant, in every respect sharing such of the accused's characteristics as you think would affect the gravity of the provocation to her and bearing in mind that the test is not simply would such a person have lost their self-control, but would they have lost their self-control and done as the defendant did? Now, of course, you must realise--and it is obvious to all of us--that this is a case with what must be and what one hopes are exceptional features, exceptional features relating to this young woman, relating to the situation in which she found herself, relating to all the background which brought her to that situation. Now, what is the relevance of all that to this defence of provocation? Of course, first of all you have to decide, as I have

[1995] 4 All ER 1008 at 1014

> explained, the straightforward question of fact, may she have lost her self-control when she plunged that knife into this man, Trevor Armitage? And in deciding that you are looking simply at her and you are taking account of what sort of person she is, in what way her whole personality has developed over the years, perhaps been disrupted, disturbed by circumstances. Bear in mind the evidence of Dr Tarsh and you are asking yourselves, did this human being lose her self-control? So, of course, what background, what information about her personality is relevant to that? When you come to look or to apply the test of the reasonable person, you are as it were, taking out of the picture this defendant but putting back into the picture a reasonable girl, but I stress you are putting that person into this picture--Mr Baker [counsel for the prosecution] used the expression "putting her into the defendant's shoes" and that sums it up. So you have to picture to yourselves a reasonable person who found themselves in this situation, this factual situation, about which you have heard, would you, a reasonable person, or how would a reasonable person have reacted in those circumstances? And, of course, in deciding that, you are not having regard to any particular excitability or pugnacity or liability to explode which may exist in this defendant. That is relevant to whether she in fact lost her self-control but is not a part, obviously, of the reasonable person which you are trying to picture in this situation.'

In this passage the judge clearly followed the classic direction quoted below, which was approved by the House of Lords in *DPP v Camplin* [1978] 2 All ER 168, [1978] AC 705. Consequently Mrs Grindrod does not criticise it in principle, though she does attach great importance to some matters of detail which we will explain in due course and which are relevant only to the second ground of appeal.

The criticism raised in the first ground of appeal focuses upon the subsequent direction to the jury as to the way they should treat Dr Tarsh's evidence in relation to the concept of the reasonable man. This crucial direction, which immediately follows upon the earlier and shorter of the two passages we have just quoted from the summing up, unfortunately was partly missing from the shorthand note, but, with the agreement of both prosecution and defence, it has been reconstructed with the assistance of counsel then defending the appellant, now Judge David Clarke QC. This direction was as follows:

> 'It is for you to decide, taking into account all the evidence, as to what effect that jeering at her over not having made a good job of cutting her wrists might have had on a young woman who had got herself into that situation *but did not have a distorted and explosive personality*.' (Our emphasis.)

It is common ground that the judge was in this passage and, in particular, in the use of the word 'distorted' in the words to which we have added emphasis, explicitly directing the jury as a matter of law not to attribute to the reasonable young woman, in her situation, any of the seriously abnormal characteristics described by Dr Tarsh, including her attention-seeking trait through her tendency to wrist cutting. This followed a ruling to the same effect before Dr Tarsh was called.

The crux of Mrs Grindrod's first submission is that this direction was erroneous in principle, and that it was obligatory on the judge to direct the jury that the first and third traits described by Dr Tarsh (immaturity and most particularly attention seeking) were matters which they were entitled to take into account as

[1995] 4 All ER 1008 at 1015

eligible for attribution to the reasonable man, it being, of course, for the jury to decide what weight, if any, to give to them.

The law of provocation has been developed in a series of cases following the enactment of s 3 of the Homicide Act 1957, which provides:

> '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.'

As frequently emphasised subsequently, this section did not provide any general or fresh definition of provocation, which remains a common law, not a statutory defence. The three changes it did make to the law are summarised in Smith and Hogan *Criminal Law* (7th edn, 1992) pp 357-358 as follows:

> '(i) It made it clear that "things said" alone may be sufficient provocation, if the jury should be of the opinion that they would have provoked a reasonable man ... (ii) It took away the power of the judge to withdraw the defence from the jury on the ground that there was no evidence on which the jury could find that a reasonable man would have been provoked to do as [the defendant] did ... (iii) It took away the power of the judge to dictate to the jury what were the characteristics of the reasonable man.' (See *R v Ahluwalia* [1992] 4 All ER 889 at 894 per Lord Taylor of Gosforth CJ.)

While of course preserving the judge's role to rule whether, as a matter of law, there is in the evidence any material which is capable of amounting to provocation, the primacy of the jury's role in this field is thus firmly established, as stressed by Russell LJ in *R v Rossiter* [1994] 2 All ER 752 at 758 as follows:

> 'The emphasis in that section is very much on the function of the jury as opposed to the judge. We take the law to be that wherever there is material which is capable of amounting to provocation, however tenuous it may be, the jury must be given the privilege of ruling upon it.'

In the leading case of *DPP v Camplin* the House of Lords held that in applying the concept of the reasonable man the jury were entitled to take into account the age of the defendant in determining whether in their opinion he would, in like circumstances, have been provoked to lose his self-control. Lord Diplock, in a passage with which all other members of the appellate committee agreed, laid down the standard direction as follows ([1978] 2 All ER 168 at 175, [1978] AC 705 at 718):

> 'In my opinion a proper direction to a jury on the question left to their exclusive determination by s 3 of the 1957 Act would be on the following lines. The judge should state what the question is, using the very terms of the section. He should then explain to them that the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him, and that the question is not merely whether such a person would in like circumstances be provoked to

> lose his self-control but also would react to the provocation as the accused did.'

As already noted, it is plain that the judge faithfully adopted this direction in his summing up as quoted above.

Lord Diplock had earlier defined the reasonable man as follows ([1978] 2 All ER 168 at 173-174, [1978] AC 705 at 717):

> 'It means an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today.'

Shortly afterwards Lord Diplock said:

> 'But now that the law has been changed so as to permit of words being treated as provocation, even though unaccompanied by any other acts, the gravity of verbal provocation may well depend on the particular characteristics or circumstances of the person to

> whom a taunt or insult is addressed. To taunt a person because of his race, his physical infirmities or some shameful incident in his past may well be considered by the jury to be more offensive to the person addressed, however equable his temperament, if the facts on which the taunt is founded are true than it would be if they were not. It would stultify much of the mitigation of the previous harshness of the common law in ruling out verbal provocation as capable of reducing murder to manslaughter if the jury could not take into consideration all those factors which in their opinion would affect the gravity of taunts and insults when applied to the person to whom they are addressed.'

That passage is of particular importance in the present case.

Similar principles were laid down in the two other main speeches in *Camplin'*s case by Lord Morris of Borth-y-Gest and Lord Simon of Glaisdale.

This standard direction was clearly modelled on the statutory definition in New Zealand, contained in s 169 of the Crimes Act 1961 (New Zealand) as follows:

> '(1) Culpable homicide that would otherwise be murder may be reduced to manslaughter if the person who caused the death did so under provocation.
>
> (2) Anything done or said may be provocation if--(a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and (b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide ...'

This section was considered in detail by the Court of Appeal in New Zealand in *R v McGregor* [1962] NZLR 1069 at 1073-1074, which was referred to with approval by Lord Simon of Glaisdale in *Camplin'*s case [1978] 2 All ER 168 at 182, [1978] AC 705 at 727, and which was also expressly confirmed as an accurate statement of English law by this court in *R v Newell* (1980) 71 Cr App R 331 and *R v Morhall* [1993] 4 All ER 888 (see below).

The judgment of the court was delivered by North J, in the course of which he stated as follows:

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> 'The earlier statutes contemplated "an ordinary person". Now there has been appended this qualification--"an ordinary person but otherwise having the characteristics of the offender". If the phrase "but otherwise" were construed to mean "in other respects" then the test of the power of self-control of an ordinary person would remain unaffected. Upon this interpretation, the section would constitute as provocation anything which in the circumstances of the case would have led to the loss of control of an ordinary person, being one who in other respects (i.e. other than the power of self-control) had his own personal characteristics. Such a construction would make the characteristics of the offender relevant, but not in regard to self-control; the added words would therefore have effected little, for it would still be the reaction of the ordinary person in regard to the exercise of control (which is what matters) that would govern the consideration of the matter as hitherto. This could not have been the intention of the Legislature, for the purpose of adopting the new provision must have been to give some relief from the rigidity of the purely objective test of the reactions of a reasonable man. The Legislature must be regarded as having in contemplation a person with the power of self-control of an ordinary person, but having nevertheless some personal characteristics of his own, which are proper to be taken into account, so that his reaction to provocation is to be judged on the basis whether the provocation was sufficient to bring about loss of self-control in an ordinary person who nevertheless possessed as well the special characteristics of the offender. If the characteristics of the offender are thus to be integrated with the concept of the ordinary man, then the ordinary man test becomes displaced, at any rate in cases where the offender has attributes which can be regarded as sufficiently distinctive to constitute characteristics. No difficulty is occasioned in grasping the objective test of the "ordinary man", and in giving an appropriate direction to a jury thereon. Likewise, no difficulty would be occasioned in the comprehension of a wholly subjective test, and in directing a jury on such a test. The section, however, now requires a fusion of these two discordant notions, and this immediately gives rise to difficulties of the nature which were referred to by Lord Simonds in *Bedder v DPP* ([1954] 2 All ER 801, [1954] 1 WLR 1119). In these circumstances, in order to make the section capable of application, while preserving the ordinary man test, there must be some limitation of the term "the characteristics".' (See [1962] NZLR 1069 at 1080-1081.)

Now comes the most important passage:

> 'The Legislature has given no guide as to what limitations might be imposed, but perforce there must be adopted a construction which will ensure regard being had to the characteristics of the offender without wholly extinguishing the ordinary man. The of-

> fender must be presumed to possess in general the power of self-control of the ordinary man, save insofar as his power of self-control is weakened because of some particular characteristic possessed by him. It is not every trait or disposition of the offender that can be invoked to modify the concept of the ordinary man. The characteristic must be something definite and of sufficient significance to make the offender a different person from the ordinary run of mankind, and have also a sufficient degree of permanence to warrant its being regarded as something constituting part of the individual's character or personality. A disposition to

> be unduly suspicious or to lose one's temper readily will not suffice, nor will a temporary or transitory state of mind such as a mood of depression, excitability or irascibility. These matters are either not of sufficient significance or not of sufficient permanency to be regarded as "characteristics" which would enable the offender to be distinguished from the ordinary man. The "unusually excitable or pugnacious individual" spoken of in *R.* v. *Lesbini* ([1914] 3 KB 1116) is no more entitled to special consideration under the new section than he was when that case was decided. Still less can a self-induced transitory state be relied upon, as where it arises from the consumption of liquor. The word "characteristics" in the context of this section is wide enough to apply not only to physical qualities but also to mental qualities and such more indeterminate attributes as colour, race and creed. It is to be emphasised that of whatever nature the characteristic may be, it must be such that it can fairly be said that the offender is thereby marked off or distinguished from the ordinary man of the community. Moreover, it is to be equally emphasised that there must be some real connection between the nature of the provocation and the particular characteristic of the offender by which it is sought to modify the ordinary man test. The words or conduct must have been exclusively or particularly provocative to the individual because, and only because, of the characteristic. In short, there must be some direct connection between the provocative words or conduct and the characteristic sought to be invoked as warranting some departure from the ordinary man test. Such a connection may be seen readily enough where the offender possesses some unusual physical peculiarity. Though he might in all other respects be an ordinary man, provocative words alluding for example to some infirmity or deformity from which he was suffering might well bring about a loss of self-control. So too, if the colour, race or creed of the offender be relied on as constituting a characteristic, it is to be repeated that the provocative words or conduct must be related to the particular characteristic relied upon. Thus, it would not be sufficient, for instance, for the offender to claim merely that he belongs to an excitable race, or that members of his nationality are accustomed to resort readily to the use of some lethal weapon. Here again, the provocative act or words require to be directed at the particular characteristic before it can be relied upon. Special difficulties, however, arise when it becomes necessary to consider what purely mental peculiarities may be allowed as characteristics. In our opinion it is not enough to constitute a characteristic that the offender should merely in some general way be mentally deficient or weak-minded. To allow this to be said would, as we have earlier indicated, deny any real operation to the reference made in the section to the ordinary man, and it would, moreover, go far towards the admission of a defence of diminished responsibility without any statutory authority in this country to sanction it. There must be something more, such as provocative words or acts directed to a particular phobia from which the offender suffers. Beyond that, we do not think it is advisable that we should attempt to go.' (See [1962] NZLR 1069 at 1081-1082.)

In *R v Newell* this court held that on the facts of the case there was no connection between the nature of the provocation and the characteristic of the appellant relied upon (chronic alcoholism), so that even assuming, without deciding, that chronic alcoholism was a truly relevant characteristic, it had

nothing to do with the words by which it was said that the appellant was provoked.

In *R v Morhall* the characteristic invoked was a self-induced addiction to glue sniffing. Giving the judgment of the court (Lord Taylor of Gosforth CJ, Owen and Blofeld JJ) Lord Taylor CJ referred to the relevant passages in *Camplin* quoted above and then stated ([1993] 4 All ER 888 at 892):

> 'This brings us to the crucial question in this case. What characteristics, if any, would it be inappropriate for the jury to take into account? In *DPP v Camplin* their Lordships gave examples of a number of characteristics which should be considered if the provocation related to them. They included age, sex, race, colour, ethnic origin, physical deformity or infirmity, impotence, some shameful incident in the past, an abscess on the cheek (where the provocation relied on was a blow to the face) or, in a female defendant, the conditions of pregnancy or menstruation. However, it is to be noted that none of these characteristics is inconsistent with the general concept of a reasonable or ordinary person. Even a reasonable person may, in Lord Diplock's example, have something in his past of which he is ashamed and apart from that example, none of those given would be self-induced. Where is the line to be drawn? Clearly *all* characteristics do not qualify for attribution to the hypothetical reasonable man.' (Lord Taylor CJ's emphasis.)

Having quoted *McGregor* and referred to *Newell*, Lord Taylor CJ concluded ([1993] 4 All ER 888 at 893-894):

> 'In the present case the provocation relied on was specifically targeted at the appellant's addiction to glue sniffing. Accordingly, the question is starkly raised as to whether that addiction should have been left to the jury as a characteristic which they could take into account as affecting the gravity of the provocation to the appellant. Mr Worsley [counsel for the appellant] contends that it should because, apart from the self-control of the reasonable man, all characteristics of a defendant relevant to the provocation alleged,

> must be left to the jury. For the Crown, it is submitted that characteristics which are repugnant to the concept of a reasonable man, do not qualify for consideration. Otherwise, some remarkable results would follow. Not only would a defendant, who habitually abuses himself by sniffing glue to the point of addiction, be entitled to have that characteristic taken into account in his favour by the jury; logic would demand similar indulgence towards an alcoholic, or a defendant who had illegally abused heroin, cocaine, or crack to the point of addiction. Similarly, a paedophile, upbraided for molesting children, would be entitled to have his characteristic weighed in his favour on the issue of provocation. Yet none of these addictions or propensities could sensibly be regarded as consistent with the reasonable man. It is to be noted, and we emphasise, that s 3 refers to "a reasonable man", not just to a person with the self-control of a reasonable man. Whilst *DPP v Camplin* decided that the "reasonable man" should be invested with the defendant's characteristics, they surely cannot include characteristics repugnant to the concept of the reasonable man. Quite apart from the incongruity of regarding glue, or drug addiction, or paedophilia, as characteristics of a reasonable man, the problem of getting a jury to understand how possession of any of those characteristics, and being bated [sic] about it, would affect the self-control of a reasonable man who ex hypothesi would not have such a
>
> *[1995] 4 All ER 1008 at 1020*
>
> characteristic, seems to us insuperable. Physical deformity, whether from birth or by accident, colour, race, creed, impotence, homosexuality, are examples, but not an exhaustive list, of characteristics which are clearly consonant with the concept of a reasonable man and therefore, where they exist, they ought to be left to the jury to consider in accordance with Lord Diplock's suggested direction. But the question raised in this case did not arise in *DPP v Camplin* and none of their Lordships considered characteristics inconsistent with a "reasonable man". In our judgment, it must be a matter for the judge as to whether any suggested characteristic is capable of being considered by the jury consistent with the concept of a reasonable man and capable of affecting the gravity of the provocation to the defendant. If he decides the characteristic is so capable, he should leave it to the jury to decide whether it is in fact consistent with the reasonable man and whether, if so, it might have affected the gravity of the provocation to a reasonable man invested with it so as to cause him to lose his self-control and do as this defendant did. In our judgment, however, a self-induced addiction to glue sniffing brought on by voluntary and persistent abuse of solvents is wholly inconsistent with the concept of a reasonable man. In effect, Mr Worsley's argument would stultify the test. It would result in the so-called reasonable man being a reincarnation of the appellant with his peculiar characteristics whether capable of being possessed by a reasonable man or not and whether acquired by nature or by his own abuse.'

Finally, in *R v Dryden* [1995] 4 All ER 987 the court had to consider a case where the appellant had shot and killed a local authority planning officer following a planning dispute concerning buildings erected on his land. The crucial question at issue was whether the appellant's eccentricity and highly abnormal obsessional personality, as described in the medical evidence, were eligible characteristics.

Giving the judgment of the court (Lord Taylor CJ, Macpherson and Steel JJ) Lord Taylor CJ quoted from the summing up, in which the trial judge stated 'You may think that a reasonable man is not exceptionally excitable or exceptionally eccentric--or indeed eccentric at all--or obsessed'. Lord Taylor CJ then addressed the appellant's argument (at 996-997):

> 'Mr Chadwin [counsel for the appellant] submits that, by using those words, the judge not only failed to put forward eccentricity and obsession as characteristics which the jury ought to take into account; she excluded them from their consideration. He submits that they were characteristics which the judge ought to have referred specifically to the jury. It is fair to say of the judge that, as has been conceded by counsel, she was not invited to mention any particular characteristics. Nevertheless, it is submitted that having regard to the authorities, in particular the passage quoted from *Camplin* ([1978] 2 All ER 168 at 175, [1978] AC 705 at 718), she ought to have left those characteristics to be considered. What characteristics are appropriate for the jury to consider has been a vexed question since *Camplin*. If one adds all the characteristics of the appellant to the notional reasonable man, there is a danger that the reasonable man becomes reincarnated as the appellant. However, the point in *Camplin* which was emphasised not only by Lord Diplock but also by Lord Simon of Glaisdale was that the purpose of taking the reasonable man was to have a yardstick to measure the loss of self-control that will be permitted to found a defence of provocation.'
>
> *[1995] 4 All ER 1008 at 1021*

He then quoted from Lord Simon of Glaisdale's speech in *Camplin* and continued (at 997):

> 'Accordingly, the House of Lords were clearly indicating that apart from the standard of self-control which is to be attributable to the reasonable man, other characteristics of the appellant should be taken into account in considering whether a reasonable man may have reacted in the way that the appellant did. But it has been said that not all such characteristics are to be taken into account.'

He then quoted from *McGregor* and *Newell* and concluded (at 998):

> 'Applying it to the present case, Mr Milford [counsel for the prosecution] submits that the obsessiveness and the vulnerability of the appellant upon which Mr Chadwin relies are to be equated with the conditions of being mentally deficient or weak-minded to

> which reference was made in that latter passage in *McGregor*. Mr Chadwin says, however, that here one has somebody who was clearly marked off from the rest of the community; he was a man who was obsessive about particular things, and especially about the dispute over his land, which was central to his whole way of life, and he was, as one of the doctors indicated, vulnerable in regard to that matter. Mr Chadwin therefore submits that this was a characteristic which was permanent. It was something which marked off this appellant and distinguished him from the ordinary man of the community, and it was a factor which was specifically relevant to what happened in this case. It was in regard to his obsession with his property and this dispute that the conduct of bringing the excavator to the scene was "the last straw" in the build-up of stress upon the appellant.'

Then a crucial passage (at 998):

> 'We have come to the conclusion that this was a characteristic--the obsessiveness on the part of the appellant and his eccentric character--which ought to have been left to the jury for their consideration. We consider that they were features of his character or personality which fell into the category of mental characteristics and which ought to have been specifically left to the jury. Accordingly, we come to the conclusion that the passage which Mr Chadwin criticises is flawed in that respect.'

Relying on these authorities, Mrs Grindrod, while accepting that the 'explosive' trait would not in itself qualify as an eligible characteristic (since it connoted no more than that the appellant lacked normal powers of self-control), submitted that the other two abnormal characteristics, namely attention seeking through wrist slashing and immaturity, were eligible characteristics, particularly in the light of *Dryden*, where she said the relevant mental characteristics were closely comparable. In her argument she stressed the attention-seeking trait, but she submitted that immaturity was also relevant, particularly in the light of *Camplin.*

It followed, she argued, that the judge's direction to ignore all three of these characteristics was fundamentally flawed.

For the Crown, Mr Milmo QC supported the judge's direction and submitted that both the characteristics relied upon by Mrs Grindrod were, on a correct application of the law, ineligible and not properly to be attributed to the reasonable man or woman.

The crux of his argument was that any characteristic is ineligible for attribution to the reasonable man or woman if it is wholly inconsistent with or repugnant to the general concept of an ordinary reasonable person--an approach which he submitted was fully in line with the reasoning of this court in *Morhall*. It followed, he contended, that attention seeking by wrist cutting, which was the abnormality principally relied upon by Mrs Grindrod, was ineligible, seeing that it should be regarded as wholly inconsistent with or repugnant to such a concept.

Mr Milmo realistically recognised that *Dryden* presented formidable difficulties to his submission. But he argued that *Dryden* could not stand with *R v Morhall* since the abnormal characteristics relied upon in the former should also have been regarded as repugnant and wholly inconsistent with the concept of the reasonable and ordinary person. He therefore boldly suggested that in this case we should overthrow *Dryden* as having been decided per incuriam and follow *Morhall*, which, he suggested, may have been overlooked by the court in *Dryden.*

Alternatively, he invited us to distinguish *Dryden* on the footing that in the present case one of the three characteristics (explosiveness) was plainly ineligible.

We say at once that we are unable to accede to this last invitation. Although accepting as we do that explosiveness, in isolation, is ineligible, that in no way affects the eligibility of the other two characteristics, if they could properly be relied upon and left to the jury.

So far as the *Dryden* case is concerned, we think it inconceivable that *Morhall* could have been overlooked, since barely seven months separated the two decisions and in both cases the court was presided over by the Lord Taylor of Gosforth CJ. Nor do we accept that the characteristics relied upon in *Dryden* are repugnant to or wholly inconsistent with the

concept of the reasonable man or woman, or comparable with self-induced glue sniffing, which would seem to fall outside the *McGregor* test on a number of counts, not least because it may be regarded as 'a self-induced transitory state'.

Mr Milmo accepted and, indeed, suggested that, for example, dyslexia and anorexia would qualify as eligible characteristics. We think there is much force in Mrs Grindrod's submission in her reply that the appellant's tendency to attention seeking by wrist slashing is closely comparable to the latter and like the latter can, in truth, be regarded as a psychological illness or disorder which is in no way repugnant to or wholly inconsistent with the concept of the reasonable person. It is also a permanent condition which, as Dr Tarsh stated, was abnormal and therefore set the appellant apart.

Furthermore, it was clearly open to the jury to conclude that the provocative taunt relied upon as the trigger inevitably hit directly at this very abnormality and was calculated to strike a very raw nerve.

Immaturity is clearly in no way repugnant; indeed, it suggests that the appellant was unduly young for her comparatively young age and thus brings the case, on this ground, into close comparison with *Camplin.*

We therefore consider that the judge should have left for the jury's deliberation these two relevant characteristics as eligible for attribution to the reasonable woman, it being for them to decide what, if any, weight should be given to them in all the circumstances. This is in full conformity with the requirement of s 3 of the 1957 Act, that it is for the jury and not the judge to determine this issue.

On this ground alone the appeal succeeds.

We now turn to Mrs Grindrod's second ground of appeal which is directed to the detail of the judge's summing up in the long passage quoted above and

concentrates on the proper approach to the first two elements, ie the question whether the appellant was in fact provoked so as momentarily to lose her power of self-control.

Mrs Grindrod submitted as follows.

(i) That the judge restricted the jury's attention to events immediately surrounding the killing and shut out from their purview the cumulative effect of the earlier build-up from the moment the appellant first met Trevor Armitage. In support of this proposition she relies particularly on the use of the phrase 'provoking words' (in contrast to deeds) in the third paragraph of the above passage, and she further submits that the references to the background would be interpreted by the jury as connoting not the whole background but only the events earlier that evening.

(ii) That the judge erred in failing to analyse to the jury the various strands of provocation at the successive stages, starting with the appellant's first meeting with Trevor Armitage and culminating with the killing. In support of this argument she relied on *R v Stewart* [1995] 4 All ER 999, a decision of this court (Stuart-Smith LJ, Kay and Dyson JJ), where Stuart-Smith LJ, giving the judgment of the court, stated (at 1007):

> 'In our judgment, where the judge must, as a matter of law, leave the issue of provocation to the jury, he should indicate to them, unless it is obvious, what evidence might support the conclusion that the appellant lost his self-control. This is particularly important where counsel has not raised the issue at all. In many cases it may be obvious, for example if there has been a fight and a defence of self-defence is rejected by the jury, or if there is evidence of a row or violence and the defence is nevertheless one of accident, however improbable that may be. If this guidance is not given, the jury will find it difficult to answer the two questions posed, namely did the accused lose his self-control as a result of things done or said and, more particularly, whether a reasonable man would have been so provoked by such things. In the present case the judge did not give any such assistance to the jury; he merely gave the direction which we have cited as to the law and then rehearsed the evidence of the various witnesses, including of course that of the appellant.'

Mrs Grindrod recognised that in the present case the defence did raise the issue of provocation, but she submitted, in our judgment rightly, that the same principle applies here also.

If the first criticism stood alone we would be unable to accede to it, since we do not think that on a fair reading of the relevant passage as a whole the judge was shutting out of the jury's consideration the earlier stages of the relationship between the appellant and Trevor Armitage, all of which he described historically.

However, we do think there is great force and substance in the second criticism. Mr Milmo submits that this is a case where the provocative circumstances were obvious and that therefore there was no need for the judge to go through the *Stewart* exercise.

We disagree and do not think that on the facts of this case a mere historical recital, devoid of any analysis or guidance, was sufficient.

This tempestuous relationship was a complex story with several distinct and cumulative strands of potentially provocative conduct building up until the final encounter.

[1995] 4 All ER 1008 at 1024

Over the long term there was the continuing cruelty, represented by the beatings and the continued encouragement of prostitution and by the breakdown of the sexual relationship.

On the first part of the night in question there was the threatened 'gang bang' and the drunkenness. Immediately before the killing, quite apart from the wounding verbal taunt, there was his appearance in an undressed state, posing a threat of sex which she did not want and which he must have known she did not want, thus demonstrating potentially provocative conduct immediately beforehand, not only by words but also by deeds.

Finally, of course, there is the taunt itself, which was put forward as the crucial trigger which caused the appellant's self-control to snap.

In the light of *Stewart*, we consider that guidance, in the form of a careful analysis of these strands, should have been given by the judge so that the jury could clearly understand their potential significance. It is common ground that no such guidance was given, and in these circumstances we uphold this ground of appeal also.

This has been a high profile case and the judge has come in for a considerable degree of public criticism. We would like to say in conclusion that although we have held that in these two respects he was in error, the basis of our decision rests substantially on cases decided since 1985 and we can well understand the way in which the judge directed the jury on the material then available to him.

For all the above reasons this appeal will be allowed and we shall substitute a verdict of manslaughter for that of murder.

Appeal allowed.

N P Metcalfe Esq Barrister.