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THE DEFENSE OF GRAVE AND SUDDEN PROVOCATION : REVISITED

BY ANUSHKA MURUGKAR¹

INTRODUCTION

In recent times, Section 300: exception 1, which converts murder into culpable homicide not amounting to murder; known as the defence of grave and sudden provocation, has come under fire. The first part of this paper deals with criticism of various elements under this section and the second talks about possible recourses that can be taken to avoid these criticisms.

The origin of this defence can be traced to Britain in the late 17th and 18th CE. During this time men personally avenged any insult or dishonour brought to them or their families, by killing the provocateur through instant angry retaliation. Such acts were considered not only honourable but also knightly. Thus, killing as a result of provocation, acting within ‘human frailty’ and angry retaliation, could partially be justified under the defence of grave and sudden provocation. In furtherance to the same principle, partial defence of provocation that mitigated the consequences of murder to culpable homicide was included under the Indian Penal Code.²

In independent India, the case of *K.M Nanavati v State of Maharashtra*³ led to the final interpretational foundation of the defence. The legal concepts laid down were: the subjective elements of ‘loss of control’; act being ‘sudden and grave’; the objective elements of the ‘reasonable person test’ and characteristics of the accused which have to be taken into consideration while analysing the applicability of the defence⁴.

Following this watershed judgement and various other judgements like *R v Ahluwalia*⁵, what initially was a partial justification, after years of misinterpretation, subjectivity etc led to the modern-day version of the defence of provocation. This paper tries to critique various elements of the act.

EVIDENTIARY DILEMMA

The first issue under the objective element that I would like to critique is the ‘evidentiary dilemma’. Although, evidence considered should be based on objective standards, due to faulty

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² C.M.V CLARKSON & KEATING , C.M.V CLARKSON ET AL., CLARKSON AND KEATING CRIMINAL LAW: TEXT AND MATERIALS (6 ed. 2007)..

³ *K.M Nanavati v State of Maharashtra* 1962 AIR 605.

⁴ *Id.*

⁵ *R v Ahluwalia* (1993) 96 Cr. App.R.133.

interpretation, it is done subjectively. For example; In *R v Doughty* case, Judge Stocker held that the defence would apply to a father who killed his 17-day-old baby, who due to its incessant crying ‘did something’ which could have led to provocation⁶. Thus, the judge ‘loosely interpreted the evidence’.⁷ Whereas, in the case of *Acott*, the judges stated that evidence that led to provocation should be ‘beyond reasonable doubt’ and only a ‘strong interpretation of evidence’ should be considered.⁸ This shows how erroneously evidence can be interpreted leading to implicatory problems.

REASONABLE PERSON TEST

The second concept to consider is the reasonable person test. The test entails ‘would a reasonable person in the shoes of the accused, do as he did’. The test due to its inherent vagueness has been advised to be repealed completely as in *Mahmood v State* case⁹. Two problems highlighted by J Wilkie in the *State v Hoyt* was that the two approaches taken by the court to interpret the test are faulty¹⁰. The first approach was that of ‘statistical concept’, which states that the reasonable man does what most people would do under the given circumstances. Since most people would not kill another person, a logical fallacy occurs leading to the test becoming redundant.¹¹ The other approach is that of the ethical concept, according to which a reasonable man would react as the state would expect a person to react but does the state expect a person to kill under certain circumstances?¹² These questions lead to difficulty in the application of the test.

CHARACTERISTICS

Thirdly, characteristics that have to be attributed to the accused, acting as a reasonable man is problematic. This aspect entangles with the subjective element of self-control, which makes the applicability of the test difficult. No matter how broadly the hypothetical reasonable person test tries to cover the characteristics of the accused, some will always be precluded. Thus, using the reasonable man standard will always narrow the scope of applicability. The fact that the test precludes material characteristics was evident in *R v Morhall*, where glue sniffing addiction

⁶ C.M.V CLARKSON & KEATING , C.M.V CLARKSON ET AL., CLARKSON AND KEATING CRIMINAL LAW: TEXT AND MATERIALS (6 ed. 2007).

⁷ *Id.*

⁸ *Id.*

⁹ *Mahmood v State* AIR 1961 All 538.

¹⁰ *State v Hoyt*, 128 N.W.2d 645, 21 Wis. 2d 284 (1964).

¹¹ *Id.*

¹² *Id.*

led to the accused killing the victim but due to the test the addiction of accused was not considered as a material characteristic while analysing the applicability of the defence¹³. Various judges consider various characteristics to be material for example J Diplock stated that only age and sex of the person should be considered¹⁴, whereas in *R v Bedder*, the person's disability was also regarded as a material characteristic¹⁵. Thus, this variable applicability of the characteristic attributed to the accused with regard to the test should be criticised.

GRAVE PROVOCATION

Fourthly, while determining the 'graveness' of provocation only relevant characteristics have to be considered. In India courts have been advised to take education, social standing and emotional background of the accused into consideration while deciding whether the defence exist or not¹⁶. Although these considerations do widen the scope of applicability and include subjectivity in the test, it also leads to its misuse. The misuse of emotional background in *Jammu Majhi versus State of Orissa*¹⁷ should be considered wherein the court held that the accused being an 'Adivasi' was more volatile on slight provocation as compared to the reasonable man who was living in a metro city¹⁸. This itself states that the defence is discriminatory towards a particular section of the society who are supposed to have higher standards of tolerance than the rest. Many judges in cases have thus advised striking down the test completely (*Akhtar v state of U.P*¹⁹).

A criticism of the nature of this defence is the shift from the defence being a partial justification to it becoming partially justificatory, (though the act is unlawful, due to the act being done under certain circumstances are not-not lawful)²⁰, determined by the objective 'reasonable person test' and partially excusable (merely remove the blameworthiness of the accused since the consequences of the act were unknown to the accused)²¹, determined by the subjective 'loss

¹³ *R. v Morhall* [1996] 1 A.C.90.

¹⁴ *D.P.P v Camplin* [1978] A.C.705.

¹⁵ *R. v Bedder* (1954) 38 Cr.App.R.133.

¹⁶ Stanley M. H. Yeo, *Lessons On Provocation From The Indian Penal Code*, 41 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 615–631 (1992), <http://www.jstor.org/stable/760549>.

¹⁷ *Jamu Majhi v. State*, 1989 Cn.L.J. 75.

¹⁸ Stanley M. H. Yeo, *Lessons On Provocation From The Indian Penal Code*, 41 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 615–631 (1992), <http://www.jstor.org/stable/760549>.

¹⁹ *Akhtar v state of U.P* (1999) 6 SCC 60.

²⁰ GEORGE P FLETCHER, *RETHINKING CRIMINAL LAW* (1978).

²¹ *Id.*

of self-control'. This has led to the shift of the emphasis from the 'victim and his provocative act' to the 'defendant and his loss of self-control'²².

Under the element of 'loss of self-control' due to certain circumstances, the accused has lost his sense of analysis with regard to his action. This element exists so as to preclude revenge cases that could otherwise fall within this defence. The courts in cases such as in *R v Serrano*²³ and *Sukka v State of MP*²⁴ have distinguished between loss of self-control and implications of an instinctive reaction helping the implementation of the defence, yet problems relating to its applicability exist. Firstly, the subjective element has an 'immediacy dilemma'. In the Nanavati case it was clear that killing should be 'sudden'²⁵. Thus, the time gap should be enough to let the accused gain self-control and not have formed a desire of revenge. Thus, reactions like 'snapping', 'exploding into anger' etc are used to explain the 'suddenness' of the action²⁶. These kinds of sudden reactions that the law expects the accused to give under this defence are mostly congruent to reactions given by men; since women on the other hand generally give a slow-burn reaction in most cases especially in which cumulative acts of provocation have been involved such as in cases of 'Battered Women'²⁷. Though the courts have tried to expand the definition by equating the slow-burn reaction with the reaction of snapping (*R v Ahluwalia*), implicatory difficulties persist. The courts on various occasions have considered a 'cooling off period'. This period stipulates that the time gap between the provocative act and the provoked act should be negligible to avoid inclusion of revenge cases. This again emphasizes on the 'suddenness' of the act precluding reactions of cumulative provocation as seen in battered women and victims of sexual assault who often react after a time gap. This shows how the defence is 'gendered' and is biased towards men.

All these criticisms lead to battered women not being able to take the defence as they usually give the slow-burn reaction which the court does not recognise. Usually there is a 'cooling off' period between the act of provocation and the consequential act. Also, not only anger but fear or despair are precluded. The courts due to the defences' historical context tend to consider anger as the only provocative emotion as has been seen in a lot of cases such as in the case of

²² *Id.*

²³ *R. v Serrano* (1994) 98 Cr.App.R.43.

²⁴ *Sukka v State of M.P* 1998 CriLJ 3118.

²⁵ C.M.V CLARKSON & KEATING, C.M.V CLARKSON ET AL., CLARKSON AND KEATING CRIMINAL LAW: TEXT AND MATERIALS (6 ed. 2007).

²⁶ *Id.*

²⁷ *Id.*

Muthu v State²⁸ etc. The Court in R v Smith²⁹ tried to tackle the issue but failed. All they could state was “why should anger continue to be a privileged emotion, especially as it is so muddled with self-control”³⁰. The futile efforts of the code to broaden subjective elements so as to include battered women has been unsuccessful largely due to the ‘cooling off period’, ‘slow-burn reaction’ of women and the requirement of ‘loss of self-control’. Due to this they have to rely on the defence of diminished responsibility, self-defence etc. invariably accepting abnormality of mind.

The drafters of the Penal Code had intended a different interpretation that had been applied in the Sri Lankan case of Appuhamy v R³¹, in lieu of the adopted English interpretation of the defence. This superior intended interpretation would have solved the problem created by ‘the reasonable person test’, ‘loss of self-control’ and the immediacy dilemma. Due to years of misinterpretation, it is now next to impossible to go back to this original intended interpretation. Also, abolition of the provision as was done in Australia led to constitutional problems as the courts in Victoria still practice using the interpretation of the abolished provision, making the abolition redundant³². Thus, redrafting some parts of the provision is a much better option. In light of this, a revised provision which aims at eliminating the criticisms mentioned in the previous part of the paper can be as follows:

“Culpable homicide is not amounting to murder if the offender, under extreme mental or emotional disturbance³³; where the defendant did not act under considered desire for revenge³⁴; acted within ordinary temperament, capacity of self-control, tolerance as an ordinary man would have had in the same circumstances³⁵; and the act of the defendant is a consequence of either an immediate justifiable sense of injury or cumulative sense of injury³⁶, causes the death of the person who caused the provocation or the death of any other person by mistake or accident”.

²⁸ Muthu v State, 12 SCALE 795.

²⁹ R v Smith, [2001] 1 A.C.146.

³⁰ *Id.* at 25.

³¹ Appuhamy v R 1952 53 New L.R. 313.

³² K. Fitz-Gibbon & S. Pickering, *Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond*, 52 BRITISH JOURNAL OF CRIMINOLOGY 159–180 (2011), <http://www.jstor.org/stable/44173476>.

³³ American Law Institute, Model Penal Code, Proposed official Draft (1962); Section 210.3.

³⁴ C.M.V CLARKSON & KEATING, C.M.V CLARKSON ET AL., CLARKSON AND KEATING CRIMINAL LAW: TEXT AND MATERIALS (6 ed. 2007).

³⁵ Law Commission (2006), above n 5, Part 9 List of Recommendations, paras 9.16, 9.17.

³⁶ *Id.*

Along with the already existing proviso's and elimination of the explanation under the given section can help at making the section non-discriminatory and fairly applicable.

The phrase '**under extreme mental or emotional disturbance**' taken from American law can be used to eliminate gender bias and takes not only anger but other emotions such as despair and fear into consideration. It further removes the reaction based expectational bias by the law such as the slow burn reaction given by women. This phrase thus broadens the scope of applicability taking diminished responsibility into its pretext as well. Since in India the defence of diminished responsibility does not exist and battered woman syndrome has psychological implications, it also helps in removing the stigma that would have been attached to the defence of diminished responsibility. Finally, by referring to the Hudson's Principal of discursiveness³⁷ (adopted by Australian code) the aforementioned phrase will enable battered women, victims of sexual assault etc to claim this defence.

'Considered desire for revenge' removes the element of the act being sudden and also removes the cooling off period dilemma which was included to preclude plotting of an act. This statement directly aims at precluding revenge cases avoiding the requirement of any such complicated test to ensure the same. Similarly, "acted within ordinary temperament, capacity of self-control, tolerance as an ordinary man would have had in the same circumstance" is to remove the reasonable man test by replacing reasonable with ordinary. This eliminates difficulties with regard to characteristics which had to be considered while taking the accused's circumstances into account.

"The act of the defendant is a consequence of either an immediate justifiable sense of injury or cumulative sense of injury" includes not only cumulative provocation but also answers what qualifies as being grave enough to provoke are. Here the meaning of injury should be with regard to Section 44 of the penal code which states; The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property³⁸.

I intend to keep the rest of the provision as it is, due to the lack of any interpretational problems.

In light of the recent judgement decriminalizing homosexuality under section 377, it is important to discuss the provision of defence of gay panic enshrined in the American Code³⁹.

³⁷ K. Fitz-Gibbon & S. Pickering, *Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond*, 52 BRITISH JOURNAL OF CRIMINOLOGY 159–180 (2011), <http://www.jstor.org/stable/44173476>.

³⁸ CYNTHIA LEE & ANGELA HARRIS, CRIMINAL LAW; CASES AND MATERIALS 341-346 (2 ed.).

³⁹ *Id.*

Under this defence, when a heterosexual person kills a homosexual person in response to non-violent sexual advances by the latter, the former can claim the defence of grave and sudden provocation. This defence is applied in *Schick V State*⁴⁰. If the Indian court relies on such precedents, it could lead to severe consequences like the acceptance of homophobia. Although the judiciary in America has been trying to avoid such decisions, the implication of previous decisions have been deeply entrenched as seen in *Commonwealth V Carr*⁴¹. Hence it is imperative that the courts do not let such precedents apply in India.

CONCLUSION

The journey of the defence of provocation from its ancient meaning to its present meaning has been long. Throughout this journey, the defence has faced multiple misinterpretations and corruptions due to subjectivity and vagueness, leading to the exclusion of those who really needed the defence. I am hopeful that with the proposed changes these impediments to the defence will be resolved.

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⁴⁰ *Id.*

⁴¹ *Id.*