[1980–87 Gib LR 281]

SERRA v. R.

COURT OF APPEAL (Spry, P., Brett and Blair-Kerr, JJ.A.): February 27th, 1985

Criminal Law—provocation—cumulative provocation—successive acts of provocation of different sort may negative cooling-off period—not to be excluded because all did not emanate from victim, provided contributed to loss of self-control

Criminal Law—provocation—loss of self-control—may be shown by inference as well as direct evidence—jury may reject accused's express denial of loss of self-control if not credible

The appellant was charged in the Supreme Court with murder.

The deceased worked for the appellant's brother and after having been reprimanded by him for being drunk at work, the deceased stabbed him. He was rushed into intensive care and the appellant, on hearing of the attack, immediately went to the hospital only to be told that he would be unable to see his brother. The appellant, distressed by this, went to a local bar where he became involved in a violent fight with the deceased's brother. After being separated from each other by onlookers, the appellant ran after the deceased and stabbed him to death.

At his trial in the Supreme Court for murder, the appellant pleaded provocation and the Chief Justice, in directing the jury, related the issue of provocation to the fight between the appellant and the deceased's brother. He stated that, when considering the defence of provocation, the jury could "bear in mind" that in the 30 minutes before the appellant stabbed the deceased, he had heard that his brother had been stabbed by him. He did not, however, specifically direct the jury to consider the stabbing of the appellant's brother or the scene at the hospital as events contributing to the provocation. The appellant was convicted of murder.

On appeal, he submitted that (a) the Chief Justice had not adequately directed the jury on the possibility that the stabbing had been carried out as a result of provocation; (b) it was insufficient that the Chief Justice had told the jury to "bear in mind" that in the previous 30 minutes the appellant had heard that the deceased had stabbed his brother, but should instead have emphasized to the jury that this, as well as his distress at the hospital, were events capable of contributing to provocation, since the various events which had taken place over the course of the day amounted to one single act of provocation.

The Crown submitted in reply that (a) the directions given by the judge on the nature of provocation were sufficient; (b) the appellant had had ample cooling-off time between his visit to the hospital and the fight in the bar and the earlier events of the day could therefore not be taken into account when considering whether the appellant had a defence of provocation; and (c) the appellant himself had stated in evidence that, before he stabbed the deceased, he had not been angry or liable to lose self-control but was simply in a state of worry.

Held, allowing the appeal:

(1) The appellant's conviction would be quashed and one of manslaughter substituted. The Chief Justice had erred in not directing the jury that the stabbing of the defendant's brother and the stress caused to the appellant at the hospital could have contributed to the provocation. Had the jury been given the opportunity to consider this evidence, a different verdict might well have been given. Although the jury had been directed to "bear in mind" that the appellant had recently heard that his brother had been stabbed by the deceased, this was an ambiguous statement which could not be said to have invited the jury to consider the earlier stabbing and other events as contributing to the provocation (paras. 8–9; para. 11).

(2) The various events which had taken place on the day of the stabbing amounted to a single act of provocation. It was irrelevant that the deceased himself had not been involved in the fight with the appellant, as acts which could amount to provocation were not to be excluded simply because they did not emanate from the victim. Further, the appellant's evidence to the effect that he had calmed down in the period between leaving hospital and stabbing the deceased was inconclusive. A jury could reject an accused's express denial of loss of self-control if the nature of the main defence would account for the falsehood. In these circumstances, loss of self-control could be shown by inference rather than by direct evidence (para. 8; para. 10; para. 12).

Cases cited:

(1) *Lee Chun-Chuen* v. *R.*, [1963] A.C. 220; [1962] 3 W.L.R. 1461; [1963] 1 All E.R. 73; (1962), 106 Sol. Jo. 1008, *dicta* of Lord Devlin applied.

(2) *R.* v. *Davies*, [1975] Q.B. 691; [1975] 2 W.L.R. 586; [1975] 1 All E.R. 890; (1974), 60 Cr. App. R. 253; [1975] Crim. L.R. 231; (1975), 119 Sol. Jo. 202, considered.

(3) *R.* v. *Harrington* (1866), 10 Cox, C.C. 370, distinguished.

Legislation construed:

Criminal Offences Ordinance (Laws of Gibraltar, *cap.* 37), s.8: "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 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."

A.V. Stagnetto, Q.C. for the appellant;
K.W. Harris, Senior Crown Counsel, for the Crown.

1 **SPRY, P.,** delivering the judgment of the court: On February 20th, 1985, we allowed this appeal, quashed the conviction of murder and substituted a conviction of manslaughter. We now give our reasons.

2 The facts out of which the appeal arises are briefly as follows. On August 5th, 1983, Juan Serra, the general manager of Pegasus Stevedoring Ltd., reprimanded an employee, Joseph (alias Tito) Duo, for drunkenness. The latter responded by stabbing Juan Serra in the stomach. Juan Serra was rushed to hospital.

3 The news of the assault spread quickly. Edward Serra, the appellant, a brother of Juan, heard of it from a third brother, Mario, who was about to go to the hospital. Edward, at Mario's request, took Mario's wife and children to their home and then went to the hospital. He was not allowed to see his brother Juan and probably heard that Juan was in the Intensive Care Unit. In fact, Juan was not seriously injured but the medical authorities, wisely, were taking no chances. Edward, however, assumed the worst and he appears to have been in a highly emotional state, although the evidence is conflicting.

4 Edward and Mario Serra then returned to a camp on the beach where they were living. Lunch was just being served, but Edward said that he could not eat and went to a nearby bar called the 007 for a beer. Meanwhile, Tito Duo and his brother John had already arrived at the 007 bar and were sitting at a table near the door. What happened when Edward Serra arrived is not clear. He may have assaulted Tito Duo and it was suggested, but denied, that he may have inflicted a small stab wound in his back. Certainly within a very short time, John Duo and Edward Serra were on the floor, fighting savagely. In the course of this fight, John Duo pressed two fingers into Edward Serra's eyes and also bit his arm. This undoubtedly caused severe, if temporary, pain.

5 The two men were separated by onlookers and thereafter the people in the bar drifted onto a verandah, except for Edward Serra and the owner of the bar. Edward had picked up a chair but it had been taken from him and now the owner of the bar admonished him not to do anything foolish and so ruin his life. In spite of this, Edward Serra drew a small penknife from his pocket, ran out onto the verandah and stabbed Tito Duo. According to his own version, he stabbed Tito Duo first in the back and then in front, on

the left side of the upper chest. According to John Duo, the stab in the back had been inflicted earlier. Tito Duo was rushed to hospital but it was too late to save his life.

6 Edward Serra was arraigned on a charge of murder and was convicted. The main ground of appeal against that conviction was that the learned Chief Justice had not directed the jury adequately on the possibility that the killing had been carried out under provocation. The Chief Justice, early in his summing-up, gave the jury a summary of the law of provocation with which no fault can be found and at a later stage, rightly impressed on them that the onus of proof remained on the prosecution.

7 The Chief Justice related the issue of provocation entirely to the fight in the 007 bar and the injury which Edward Serra had suffered to his eyes. Mr. Stagnetto, who appeared for Edward Serra, submitted that this amounted to a misdirection because the Chief Justice should also have directed the jury to consider that the earlier events, the stabbing of Juan Serra and the scene at the hospital, could amount to provocation. He submitted that these events should be looked at together as constituting a single incident.

8 There is no doubt that, as a matter of law, provocation may be found in one or more acts and that successive acts may have a cumulative effect as provocation. The Chief Justice did say, when dealing with the fight in the 007 bar as provocation, that, "in this connection you can, in my view, bear in mind that the defendant had heard in the previous 30 minutes that his brother had been stabbed by Tito."

9 This was a somewhat ambiguous statement in its context and may have referred to the possibility that Edward Serra was looking for revenge. Be that as it may, it was certainly not inviting the jury to consider the earlier stabbing as provocation and the Chief Justice twice specified the fight in the 007. Before the Homicide Act 1957 was enacted, or where Gibraltar is concerned, the Homicide Ordinance 1958 (now consolidated in the Criminal Offences Ordinance (*cap.* 37)), an assault on a close relative could amount to provocation but only if it was witnessed by the accused person (*R.* v. *Harrington* (3)).

10 We think that as provocation is now a statutory defence, the qualification is no longer valid. We find some support for this in the reasoning in the case of *R.* v. *Davies* (2). That case is also authority for saying that the pain caused by John Duo is capable of being regarded as provocation for the assault on Tito Duo. If this is correct, we have two incidents separated at most by an interval of 45 minutes. Mr. Harris, who appeared for the Crown, argued that that period provided ample cooling-off time and he argued, relying on Edward Serra's own evidence, that he had in fact calmed down. With respect, we cannot agree that this is conclusive. From the time Edward Serra heard that his brother had been stabbed, to the time

when he in turn stabbed Tito Duo, he was on the move, driving to the camp site, then to the hospital, then back to the camp site and immediately to the 007 bar. There is evidence, if the jury believed it, that Edward Serra was in a highly excited state at the hospital and when he arrived back at the camp site, he was too disturbed to eat lunch. In any case, even if there had been some cooling, the emotion may have been revived when he entered the bar, saw the Duo brothers and got involved in a fight in which he suffered painful injuries.

11 We are not, of course, concerned with the question of whether there was or was not provocation: that is the exclusive province of the jury, but if there was evidence on which a jury might have found provocation, and the Chief Justice withdrew the question from the jury, then the defendant was deprived of a chance of escaping the grave charge. If there is evidence, it is not for the judge to assess, but the jury.

12 One aspect of the case which occasioned us some worry was that, as Mr. Harris pointed out, the evidence that most tended to negative provocation was that of Edward Serra himself. He persisted in his denial that he had been angry and described his condition as one of worry. There was a somewhat similar situation in the case of *Lee Chun-Chuen* v. *R.* (1) and there the Privy Council said ([1963] A.C. at 233):

> ". . . [L]oss 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 express 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."

13 There were other grounds of appeal but we do not think it necessary to deal with them.

Appeal allowed.
