[2014] UKPC 3
Privy Council Appeal No 0048 of 2012

JUDGMENT

Richard Anthony Daniel (Appellant) *v* The State (Respondent)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Kerr
Lord Reed
Lord Hughes
Lord Toulson
Lord Hodge

JUDGMENT DELIVERED BY

Lord Hughes

ON

13 February 2014

Heard on 13 and 14 November 2013

Appellant	*Respondent*
Tim Owen QC Raj Desai (Instructed by Simons Muirhead and Burton)	Peter Knox QC Tom Poole (Instructed by Charles Russell LLP)

LORD HUGHES:

1. The appellant was convicted of murder. Provocation was not canvassed before the jury in his trial. Nor was the trial judge invited on his behalf to leave the issue of provocation to the jury and she did not do so. He appealed on the grounds that provocation ought nevertheless to have been left to the jury. The Court of Appeal upheld his conviction, holding that provocation was not available to him either (i) because he had himself induced the provocative behaviour and/or (ii) because this was a killing made murder by the "felony/murder" rule of constructive malice which applies in Trinidad and Tobago, in which provocation was held to have no place.

2. The State case against the appellant was that he had embarked upon a robbery at gunpoint, intending to make off with the victim's car, and had shot his victim dead. The evidence fell into three parts. There was eye-witness evidence of the robber confronting the deceased and demanding the car keys. The eye-witnesses described next hearing two gunshots and, on looking back, seeing the robber standing over the deceased. Then there were two more gunshots. The second part of the evidence identified the appellant as the robber. It did not come from the eye-witnesses but from a woman who saw a man of the description given by the eye-witnesses escaping in a taxi, and who identified the appellant at a parade. The third part of the evidence was of oral and written statements under caution made by the appellant when arrested the next day. In those statements he admitted that he had been sent to rob the deceased, and had been provided with a gun for the purpose. He said that when he asked for the car keys, the deceased had thrown a beer bottle at him and hit him in the face, causing a cut under one eye. The gun had fallen out of his hand, he said, and there had ensued a struggle for it between the two men. During this the deceased had kicked him in the groin. And, said the appellant, "I end up firing two shots with the gun and the man let go my hand." Similarly, the appellant told the police in interview "I really didn't go to shoot the man but he tried to take away the gun." A cut under the appellant's eye was seen on arrest. The deceased had three gunshot wounds, one to his lower leg and two to the abdomen. If there had been a fourth shot, it had missed.

3. At his trial the appellant repudiated the statements under caution. He did not give evidence, but his case as advanced through cross examination and argument was that he had not been present and that the confessions had been improperly extracted from him by the police, who had also caused the cut under his eye.

Relevant law in Trinidad and Tobago.

4. For many years prior to 1979 the law of murder in Trinidad and Tobago had followed the pre-1957 law of England and Wales. This meant that murder could be committed by (a) killing with an intention to kill, (b) killing with an intention to cause grievous bodily harm (*R v Vickers* [1957] 2 QB 664) or (c) killing in the course or furtherance of a violent felony (*Director of Public Prosecutions v Beard* [1920] AC 479, 493). The first two forms of intent are conveniently described as "murderous intent". The last form of murder was known as "constructive malice".

5. For England and Wales, the Homicide Act 1957 ("the 1957 Act") abolished the rule of constructive malice. Secondly, it introduced the new concept of diminished responsibility as a partial defence. Thirdly, it altered the substantive common law of provocation to provide that words alone were capable of constituting provocative behaviour. In relation to provocation, the 1957 Act made its changes via section 3, which modified the existing common law rather than providing a definition of provocation ab initio. Section 3 has since been superseded in England and Wales by the Coroners and Justice Act 2009, but, as will be seen, a section in identical terms continues to apply in Trinidad and Tobago.

6. None of these changes made by the 1957 Act for England and Wales applied at that stage to Trinidad and Tobago. Accordingly the rule of constructive malice continued to apply there.

7. The classification of offences into felonies and misdemeanours was abolished in England and Wales in 1967 by the Criminal Law Act of that year. The same classification was likewise abolished in Trinidad and Tobago by the Law Revision (Miscellaneous Amendments) (No 1) Act 1979 and the Criminal Law Act 1979, it would seem without anyone appreciating that a side effect of so doing was to remove the baseline for the rule of constructive malice.

8. Next, Trinidad adopted the changes made in England by the Homicide Act 1957 except for the abolition of the rule of constructive malice. The Offences against the Person Act 1985 amended the earlier Offences against the Person Act 1925 (i) by inserting a new section 4A which introduced the concept of diminished responsibility, in terms essentially identical to those of the English Homicide Act 1957, section 2, and (ii) by inserting, for provocation, a new section 4B which was in identical terms to section 3 of the English statute. That section provides:

> "4B. 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."

9. In *Moses v The State* [1997] AC 53, the Board drew attention to the previously unnoticed fact that the abolition of the classification of offences into felonies and misdemeanours had removed the necessary baseline for murder based on constructive malice. Within a year the legislature of Trinidad and Tobago had re-introduced the rule, by means of a new section 2A inserted into the Criminal Law Act 1979 by the Criminal Law (Amendment) Act 1997:

> "2A. (1) Where a person embarks upon the commission of an arrestable offence involving violence and someone is killed in the course or furtherance of that offence (or any other arrestable offence involving violence), he and all other persons engaged in the course or furtherance of the commission of that arrestable offence (or any other arrestable offence involving violence) are liable to be
> convicted of murder even if the killing was done without intent to kill or to cause grievous bodily harm.
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> (2) For the purpose of subsection (1), a killing done in the course or for the purpose of -
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> (a) resisting a member of the security forces acting in the execution of his duties or of a person assisting a member so acting;
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> (b) resisting or avoiding or preventing a lawful arrest; or
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> (c) effecting or assisting an escape or rescue from legal custody,
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> shall be treated as a killing in the course or furtherance of an arrestable offence involving violence.
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> (3) In subsection (2), 'member of the security forces' means a member of-
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> (a) the Police Service;
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> (b) the Prison Service;
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> (c) the Fire Service;
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> (d) the Defence Force;
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> (e) the Supplemental Police established under the Supplemental Police Act."

10. It follows that in Trinidad and Tobago the law of murder is now in the form it had in England and Wales prior to the changes made by the Coroners and Justice Act 2009, save for the retention of a form of constructive malice, as newly expressed in section 2A, viz murder committed in the course or furtherance of a violent arrestable offence as there defined.

11. It is trite law that at common law provocation has for decades involved a two stage enquiry. First, may the accused have killed when he had lost control of himself as a result of provocative behaviour by someone else? That is an enquiry about this accused on this occasion; it is sometimes described as a subjective enquiry. Second, if yes, might a reasonable person possessed of the ordinary powers of self-control to be expected of someone of his age and sex have reacted to the provocation as the accused did? This is an objective test for the jury and is the means by which the partial defence is limited to those for whose actions there is a limited, but reasonable, excuse. In the past difficult questions have arisen over the qualities to be attributed to the hypothetical reasonable person; those do not arise in this case and are in any event largely answered by the decision of the Board in *Attorney General for Jersey v Holley* [2005] 2 AC 580. In some parts of the common law world, codification of the criminal law has significantly modified one or other of the two core elements of provocation, which fact may need to be remembered when one is considering decisions from other jurisdictions, but for the present the conventional two-stage enquiry is the one with which the Board is concerned.

The present case; loss of control.

12. The defence case was that the appellant was not the man responsible for the shooting, and the State case was that this was murder in the course or furtherance of robbery at gun point. At the conclusion of the evidence, the State nevertheless submitted that the judge ought to leave the case to the jury on the alternative bases of (i) shooting with murderous intent or (ii) killing in the course or furtherance of a violent arrestable offence, namely robbery. The reason for that may have been that the appellant was contesting the statements under caution but that there were, quite apart from that evidence, the eye-witness descriptions of the appellant standing over the recumbent victim, already felled and bleeding from the leg, and firing two more shots into his body. Mr Knox QC submitted to the Board that counsel for the State had been in error in seeking to have the case left to the jury on any basis other than killing in the course of violent robbery. But whether or not that criticism is justified does not matter. The request of the judge was made by the State and the judge acceded to it. The case was left to the jury on alternative bases and one cannot tell from the verdict of guilty of murder which basis was found to be correct. Indeed it is not impossible that some members of the jury were satisfied of one basis and others of the other, or for that matter some of both – in either event it was murder.

13. It is unsurprising that the defence did not advance provocation as part of its case at trial, since the accused's case was that he was not the assailant. Nevertheless, if the issue arose on the evidence, the judge would have been in error in not leaving it to the jury at least in relation to murder with murderous intent. It would have been for the State to prove that the partial defence did not apply. There is no sign that the judge ever applied her mind to this question, and no one suggested that she should. In the Board's clear view, the issue simply did not arise. Before the issue of provocation can be left to the jury there has to be evidence on which the jury might properly find that the accused killed when he had lost control of himself as a result of provocation. In the present case there was some evidence (if the jury accepted the statements under caution) that the deceased threw a bottle at the accused and had kicked him in the groin in the subsequent struggle for the gun. Although it came only from the out of court statements under caution, not endorsed by any evidence from the accused, this was material from which the jury might have concluded that there may have been provocative conduct. But there was no evidence at all that the appellant had lost control of himself. Rather, the evidence was that he had not. He himself, when admitting in his statements under caution that he was the robber, did not begin to suggest that he had lost his self-control. His written statement under caution read, in its material parts:

> "….I see a tall Indian man standing up in front of a white Honda Civic car and I told him 'Good afternoon sir, throw the keys.' The man reply and told me if that is all I want. I start to hear the engine in [an accomplice's] car revving and when I look back the man…had a Stag bottle in his hand, pelt the bottle at me and hit me on the right side of my face, and the gun I had fell out of my hand. The man try to reach for the gun and when he reach the gun he end up kicking me in my groin. I end up fighting the man until I get the gun from the man and I end up firing two shots with the gun. The man let go my hand. I then started to run…"

Of course, what the defendant himself says in such a case is not the end of the enquiry. In some cases it may be likely that the jury may reject his own account. That was not obviously so here, but still the responsibility of the judge is to look at all the evidence, not simply that of the defendant, and to ask himself whether, taking it at its most favourable to the defendant, the jury might conclude that he had lost control of himself. But here, the eye-witness evidence likewise did not begin to suggest loss of control. On the contrary, it described a robber who confronted his victim with collected apparent politeness, who knocked him down with a shot to the leg, who then after a pause stood over him and executed him with further shots to the body, and who then coolly paused by the car to dispose of a plastic bag he had been carrying, put on a cap (perhaps to alter his appearance), and ran or walked quickly away. None of that affords any evidence of loss of control. Neither anger nor struggling for the gun after being temporarily dispossessed of it is the same thing as losing self-control. Anger may be accompanied by a loss of control, and in some circumstances it may be evidence from which loss of

control may be inferred. In other circumstances it may indicate the reverse, namely a considered, controlled, retaliation which, as Devlin J pointed out as long ago as *R v Duffy* [1949] 1 All ER 932, is positively inconsistent with the loss of control inherent in provocation. In the present case there was not even any real evidence of anger, but certainly none of lost self-control.

14. The Court of Appeal rejected the availability of provocation on grounds of law to which the Board will come. It therefore did not have to analyse the factual evidence bearing on loss of control and it did not do so. It did, however, say, without any such analysis, that in its view there was evidence of loss of self-control to be left to the jury. The terms employed were at para 76:

> "There is evidence that the appellant went beyond what was necessary to effect the robbery, shooting the deceased more than once at a time when he no longer posed a threat."

It does not at all follow from the fact that the appellant shot the unfortunate deceased when the latter was on the ground, and more than once, that when he did so he had, or might have, lost his self-control. If one shot by way of execution is no evidence of loss of control, it can hardly be said that making sure with a second shot provides such evidence. Still less does loss of control follow from the fact that shooting the deceased was not necessary to effect the robbery; sadly that, by itself, indicates no more than complete lack of respect for life.

15. The court cited a number of cases which it took the view "constrained" it to hold that there was evidence of loss of self-control. On inspection, these cases all depended on their facts and on the issues under debate in each of them. Neither separately nor together did they oblige the conclusion that there was evidence of loss of control in the present case. *Bullard v The Queen* [1957] AC 635 was a case where there was clear evidence of possible provocation because the defendant asserted that the deceased had taken him by the throat with one hand and cuffed him with the other. The case was not concerned with any assessment of evidence of loss of control; the issues were (a) whether the trial judge had been correct to direct the jury that provocation did not arise unless the defendant asserted that he had been provoked (plainly he was not) and (b) whether the Court of Appeal had been correct to hold that once self defence was rejected provocation would necessarily have been rejected also (clearly that did not follow). *R v Baillie* [1995] 2 Cr App R 31 was an English case in which the evidence of loss of control was that the defendant had reacted to learning of a threat made against his teenage son by someone who was, moreover, responsible for supplying the boy with drugs, by equipping himself with a shotgun and a razor and driving precipitately to the house of the man who had thus wronged his family. The issues in the appeal were whether the trial judge had been correct to treat the provocation as limited to what occurred in the ensuing confrontation (she was not) and whether she was right to assume

the function of deciding for herself that any loss of control must have evaporated by the time the defendant killed the drug dealer in that confrontation (it was unsurprisingly held that that was a jury question). In *Wayne Lewis v The State* (unreported extempore judgment of the Court of Appeal for Trinidad and Tobago No 37 of 2001) the defendant was alleged to have sought out a man who owed him money and had been avoiding paying him for several days. He was said to have approached him armed with a gun and, when told by the deceased that he had "done talking" to him, had shot him dead. Both counsel had urged the judge to leave provocation but the judge had refused, taking the view that there was no evidence of loss of control. It may be that the court could see that there was something in the evidence to justify the view that the jury might find loss of control, and it is to be observed that both counsel thought that the issue was raised. However, to the extent that the Court of Appeal suggested that evidence of anger was by itself enough to provide evidence of loss of control, the Board agrees that it may do but not that it inevitably will, for the reasons given above. In *Burnett v The State of Trinidad and Tobago* [2009] UKPC 42 a policeman on security duty at a carnival had shot two patrons in the chest at close range, one of whom had died as a result. There was disputed evidence as to whether there had been no more than an element of horseplay or, as the accused asserted, an attack on him by several people armed with knives. The trial judge declined to leave provocation on the grounds that the accused's own case was that he had responded in a considered manner to a lethal attack, and without any loss of control. The Board held that the judge erred in principle in confining himself to the account of the accused. It was necessary to consider the position if the jury rejected his account of a considered reaction but accepted some part of the provocative conduct alleged. In that event the very fact of shooting provided, on the facts of that case, evidence on which the jury might find loss of control because it tended to betoken an uncontrolled reaction in a trained armed policeman. The Board, at para 22, described the possibility of a finding of provocation and loss of control as "reasonable, as opposed to merely…speculative."

16. In the present case, the Board's conclusion that there was no evidence of loss of control to leave to the jury is enough to dispose of the appeal against conviction. Since, however, full argument was addressed to the two grounds of law on which the Court of Appeal dismissed the appeal, they should be addressed.

"Self-induced provocation"

17. The Court of Appeal derived from *Edwards v The Queen* [1973] AC 648 a rule of law that a defendant who himself induced the conduct asserted as provocation could not rely upon it unless the victim's response went beyond what was reasonable, predictable and proportionate. In the present case the alleged actions of the deceased could not, it held, be said to have gone beyond a wholly predictable and proportionate response to being robbed at gunpoint by the appellant. Hence it concluded that provocation was not available to the appellant and should not, for that reason, have been left to the jury.

18. *Edwards* had been having an affair with a married woman. He followed her husband from Western Australia to Hong Kong and confronted him in his hotel room. The outcome of the confrontation was that the husband was killed by some 27 stab wounds to head, chest, arms and legs, whilst the defendant had cuts to his fingers, one arm and one leg. Whilst the Crown case was that the defendant and the now divorcing wife had agreed to kill the husband in order to secure a large insurance payment, the defendant's account was that he had pursued the husband with a view to blackmailing him over allegedly deviant practices, because he was aggrieved at the level of the wife's divorce settlement. He had then, he said, unexpectedly been sworn at by his intended victim and attacked with a knife. That had caused him, he said, to wrest the knife from the husband and, in a "white-hot passion", to inflict on him the many wounds found. The arguably defensive wounds to the defendant's own fingers were capable, on one view, of providing some support for this account.

19. The law in Hong Kong, which the Board was considering in *Edwards*, contained a provision identical to section 3 of the 1957 Act in England and Wales, and thus to section 4B as now applies in Trinidad and Tobago (set out at para 8 above). One question was whether provocation arose if the defendant's account was not rejected. The judge had withdrawn provocation from the jury on the grounds that since the defendant was, on this hypothesis, blackmailing the deceased, "it ill befits him to say…that he was provoked." By the time the case reached the Board, the Court of Appeal had held that direction to be wrong, and the Board agreed. The only live question for the Board was the operation of the proviso (no miscarriage of justice), and the Board held that the case was not clear enough, either on self defence or provocation, to apply it.

20. However, in the course of giving the opinion of the Board, Lord Pearson said this at p 658E.

> "No authority has been cited with regard to what may be called 'self-induced provocation'. On principle it seems reasonable to say that—
>
> (1) a blackmailer cannot rely on the predictable results of his own blackmailing conduct as constituting provocation sufficient to reduce his killing of the victim from murder to manslaughter, and the predictable results may include a considerable degree of hostile reaction by the person sought to be blackmailed, for instance vituperative words and even some hostile action such as blows with a fist;
> (2) but if the hostile reaction by the person sought to be blackmailed goes to extreme lengths it might constitute sufficient provocation even for the blackmailer;

> (3) there would in many cases be a question of degree to be decided by the jury.
>
> In the present case, if the appellant's version of the facts be assumed to be correct, Dr. Coombe, the person sought to be blackmailed, did go to extreme lengths, in that he made a violent attack on the appellant with a knife, inflicting painful wounds and putting the appellant's life in danger.
>
> There was evidence of provocation and it was fit for consideration by the jury: *Parker v. The Queen* [1964] AC 1369, 1392. ”

21. The Court of Appeal found further support for its postulated rule of law as to self-induced provocation in two decisions from Canada and one from Australia.

22. The first Canadian case was *Salamon v The Queen* (1959) 17 DLR (2d) 685, decided before *Edwards*. The defendant had challenged a woman with failing to meet him earlier as asked. He demanded that she remove her skirt and shoes, which he had apparently bought for her. When she did not, he forcibly removed them himself. There ensued a fight between them in which each threw dishes at the other. The woman’s husband intervened, stopped the fight, and suggested that she should go to the washroom to clean herself up. She did so, but the defendant followed her in, having armed himself with a gun. He called her an extremely rude name. She replied in kind. Then he shot her. The Supreme Court of Canada held that he had clearly held the initiative throughout whilst she had done no more than retaliate in kind to his attack and abuse. It held that provocation, in the sense employed in Canada, did not arise.

23. In the second Canadian decision, *R v Louison* (1975) 26 CCC (2d) 266, the defendant was alleged to have hi-jacked a taxi, robbed its driver of his wallet, and locked him in the boot. On one account which he had given, he had, after being in a collision with another car, opened the boot in response to the driver’s shouting. The driver had thereupon, he said, struck him with a hammer. He had taken up the hammer and killed the driver by repeated blows to the head. The Court of Appeal for Saskatchewan similarly held that the defendant had retained the initiative throughout, indeed more so than in *Salamon*. It cited, inter alia, *Edwards*, in support of its conclusion that provocation did not arise for the consideration of the jury. It used the expression “self induced provocation.”

24. In both these Canadian cases, the law of provocation in question differed significantly from the law in the present case. Section 203 of the Criminal Code, renumbered 215 by the time of *Louison* and now 232, but still in the same terms, requires the act relied on as provocation to be wrongful and specifically provides that nothing which the deceased had a legal right to do could be regarded as provocation.

Secondly, it stipulates that provocation is available if but only if the defendant lost his self-control "on the sudden" as well as acting "before there was time for his passion to cool". Thirdly, it specifically excludes from provocative behaviour anything which the accused incited with a view to providing himself with an excuse for violence. Fourthly, the objective stage of the test is not expressed in terms of whether a reasonable man might have acted as the defendant did, but simply as whether the provocation was sufficient to deprive an ordinary person of the power of self-control. In *Salamon* the court held that there was no evidence that the defendant had reacted on the sudden. In *Louison*, the driver's attempt to escape from the boot and use of the hammer to do so would seem to have been lawful self defence.

25. The Australian case was *Allwood* (1975) 18 A Crim R 120, in the Court of Appeal of Victoria. The law in question was common law without statutory addition. The defendant's partner had left him for a man whom he had taken in as a lodger, taking their child with her, and had refused his entreaties to her to return to him. He went to the house where she was now living with the other man, armed with a rifle. It may have been his intention to shoot himself if a further attempt to persuade her to return failed. She did refuse to return. He shot both her (fatally) and himself (he recovered). The suggested provocation was that, when he asked why she had left, she said "for sex", arguably implying that his performance was wanting, and that when he disbelieved her assertion that she had only had intercourse with the other man on very limited occasions before leaving, calling her "a lying bitch", she had responded scornfully "prove it", arguably taunting him with her untruthfulness. The court resolved the appeal on other grounds, but it agreed that provocation was properly withdrawn from the jury on the grounds set out in *Edwards*, viz that it was self-induced because the defendant had engineered the confrontation. Crockett J, with whom the other judges expressly agreed, held that the suggested provocation had plainly been induced by the defendant and added, "Only if the hostile reaction goes beyond the reasonably predictable can provocation that is itself provoked be fit for consideration by a jury." Much the same proposition appears in the unreported judgment of the same judge in *R v Borthwick* (18 March 1991).

26. The approach which underlies Lord Pearson's observations in *Edwards*, and the outcomes in at least the two Canadian cases has some appeal to common sense. If the defendant who kills has himself induced by wrongful behaviour a reaction which is then relied upon as provocation, it is very likely that either (a) he did not in fact lose his self-control at all or (b) he did not kill as a result of losing self-control or (c) the case fails the objective second stage "reasonable man" test of provocation. The situation has something in common with the law of self defence. There, the defendant who has been the aggressor throughout cannot rely on self defence merely because at one stage in the fight which he has engineered he is getting the worst of the struggle. It is only when the roles have effectively been reversed, because the original victim has gone so disproportionately far beyond defending himself that he has himself become an unjustified assailant, and where the original aggressor is not now voluntarily fighting, that the latter can be heard to say that he is now justified in defending himself: see the

helpful analysis of Lord Hope, then Lord Justice General, in the Scottish case of *Burns v HM Advocate* 1995 SLT 1090, 1093H, applied in England in *R v Keane* [2010] EWCA Crim 2514. The question of importance, however, is whether, in a provocation case, there is an identifiable rule of law which altogether excludes consideration of the partial defence, or whether there is, more simply, a general approach to be applied in a fact-sensitive manner to the issues (a) whether the defendant had killed as a result of losing control and (b) whether a reasonable man might, in the circumstances, have acted as the defendant did.

27. The Board was helpfully referred to argument based upon the historical development of provocation. This, although of no little interest, does not resolve the question whether there does or does not exist a rule such as suggested by the Court of Appeal in the present case. The law of provocation underwent a long and not always consistent journey from its origins in a sixteenth century concept of honourable gentlemanly response to insult to the twentieth century two-stage enquiry incorporating an objective reasonable man test: see for example Professor Horder's *Provocation and Responsibility* (Clarendon Press 1992). The reasonable man test may possibly have lain behind earlier formulations but was distinctly enunciated comparatively late. What is clear is that by at least the time of Stephen J in the late nineteenth century, and probably two centuries earlier, it was generally recognised that lawful conduct could not be considered as provocation justifying reduction in the offence from murder to manslaughter: see his *Digest of the Criminal Law* (1877) at article 224(g). That rule, which is mirrored in the Canadian legislation (see para 24 above) and seems to have been extant in England if not universally applied until the 1957 Act, meant that a self-defensive reaction by the deceased to an assault by the defendant would be excluded from consideration in any event, and this masked any question whether there existed a separate rule of "self-induced" provocation. Moreover, as provocation developed, it did so by way of quite specific judge-made rules as to its extent: see for example *R v Mawgridge* (1706) Kel 119, 84 ER 1107. It is clear that one purpose of the Homicide Act 1957 was to remove judge-made embellishments to the by then understood objective limb of the test for provocation, which a rule altogether forbidding "self-induced" provocation would represent. *Edwards*, in 1972, appears to be the first judicial reference to the concept, and Lord Pearson recorded that there existed no earlier authority.

28. It is by no means clear that Lord Pearson meant, in *Edwards*, to lay down any rule of law. He began what he said by adverting to the fact that there was no authority. His propositions are couched in cautious terms: "On principle it seems reasonable to say…" He was no doubt conscious that his remarks were obiter, because the Board approved the Court of Appeal decision that, on the facts of that case, provocation did arise and should have been left to the jury, and the only issue was the application of the proviso. Assuming, however, that he did have in mind a general principle of law, it is clear that a fact-sensitive judgment is involved. His formulation contemplates that provocative behaviour which the accused has himself induced cannot be relied upon only where it is the predictable result of what he has himself done. Whether it is the

predictable (ie, it would seem, foreseeable) result of what the defendant did, or whether it went beyond that, is itself a question of fact in each case. That, if it is an open question, is one which must be resolved by the jury. Lord Pearson at p 658, was at pains to say that "there would in many cases be a question of degree to be decided by the jury." To pursue the analogy with self defence, it will in that context normally be a question for the jury, suitably guided by the judge's direction, whether the conduct of the original victim has been so disproportionate as to reverse the roles.

29. Whilst *Edwards* was applied in both *Louison* in Canada and *Allwood* in Victoria, it has not more generally been adopted as a rule of law. In England, the Court of Appeal (Criminal Division) declined to follow it in *R v Johnson* [1989] 1 WLR 740. There, the defendant had been involved in a commonplace bar-room dispute. He had, it seems, behaved aggressively towards others and thus arguably started the trouble. Eventually he produced a knife and stabbed one of the others. There was evidence, which the jury might not have rejected, that before he did so, he had been called a "white nigger", had been followed when he was leaving the bar and distancing himself from the dispute, had had beer poured over him, and had then been pinned against the wall held by the throat whilst a woman punched his head and pulled his hair. It was scarcely surprising that, at p 744, the court held that:

> "The jury would…have to consider all the circumstances of the incident, including all the relevant behaviour of the defendant, in deciding (a) whether he was in fact provoked and (b) whether the provocation was enough to make a reasonable man do what the defendant did."

But in dealing with *Edwards* the court held, after pointing out that the legislation there in question was the same as section 3 of the Homicide Act 1957, that:

> "In view of the express wording of section 3, as interpreted in *R v Camplin* [1978] AC 705which was decided after *Edwards v The Queen* [1973] AC 648, we find it impossible to accept that the mere fact that a defendant caused a reaction in others, which in turn led him to lose his self-control, should result in the issue of provocation being kept outside a jury's consideration. Section 3 clearly provides that the question is whether things done or said or both provoked the defendant to lose his self-control. If there is any evidence that it may have done, the issue must be left to the jury."

30. Similarly, the Court of Appeal in Victoria returned in *R v Yasso* [2004] VSCA 127, 148 A Crim R 369 to *Allwood* and *Borthwick*. The point was not crucial to the decision because the court held that the judge had erred in not taking the evidence at its most favourable to the defendant for the purposes of deciding whether provocation arose. But there was an extensive discussion of the question of "self-induced" provocation and, whilst leaving the point technically open, the court expressly declined to endorse Crockett J's propositions. Similar doubts had been expressed by the same court in *R v Thorpe* [1999] 1 VR 326, para 35. In *Yasso* the court referred to discussion of the point by both the Victorian Law Reform Commission and the corresponding body in New South Wales, which had ventilated differing views. Subsequently Victoria altogether abolished the partial defence of provocation. In New South Wales, the partial defence is extant, albeit in a statutory form which is not exactly the same as that under consideration in the present case, but the Law Reform Commission recommended that there should not be any amendment such as always to exclude "self-induced provocation". That, it advised, would be to introduce a test of reasonable foresight which would be an additional and unnecessary complication, and would arguably run counter to the gravamen of the defence as "an excuse for loss of self-control": *Report 83* (1997), para 2.110. No such amendment has been made.

31. The Board is satisfied that there is no room for any general rule of law that provocation cannot arise because the accused himself generated the provocative conduct in issue. *Edwards* should not be taken as justifying the withdrawal of the issue of provocation on that ground. Subject to the proper role of the judge (as to which see below) the issues are for the jury. It is very doubtful that it will be wise to use the expression "self-induced provocation" in directing the jury, lest it convey the impression that some rule of law exists. The jury should, however, ordinarily be directed that, if it finds conduct by the accused which generates the provocative behaviour in question, that conduct will be directly relevant to both the subjective and the objective limbs of provocation. As to the first, it will go to both (a) the question whether the accused killed as a result of the provocative behaviour relied upon and (b) whether he lost self-control as a result of the provocative behaviour relied upon. Generally, the more he generates the reaction of the deceased, the less likely it will be that he has lost control and killed as a result of it. He might of course have been out of control of himself from the outset, but that is not loss of control as a result of the provocative behaviour of the deceased. There can, however, be cases in which the provocative behaviour, although prompted by the act of the accused, has caused him to lose control of himself and to kill. As to the second limb, it will go to whether the provocative behaviour was enough to make a reasonable man in his position do as he did. Generally, the more he has himself generated the provocative behaviour, the less likely it will be that a reasonable man would have killed in consequence of it. There can, however, be cases in which the jury may judge that the provocative behaviour may have induced a similar reaction in a reasonable man, notwithstanding the origins of the dispute between the accused and the deceased. On both limbs of the test of provocation, the extent to which the provocative behaviour relied upon was or was not a predictable result of what the accused did, ie how far it was to be expected, is itself a jury question and clearly a

relevant factor, which the jury should take into account along with all the other circumstances of the killing.

32. Both the court in *Yasso* and the NSW Law Reform Commission distinguished a subset of "self-induced" provocation, namely where the accused had formed in advance an intention either to kill or to do grievous bodily harm and had then set about inducing a reaction in the deceased in order to provide himself with an excuse for the violence he contemplated. That, it may be remembered, is the case expressly excluded from provocation in the Canadian legislation: see para 24 above. An early English example is *Mason's Case* (1756) Foster 132, 168 ER 66, where the defendant lost a fight in a tavern, went away and returned carrying a concealed knife. He then challenged his adversary to a second fight and, when the adversary responded, pulled out the knife and stabbed him. This kind of planned creation of an excuse for violence is a particularly clear example of the general proposition set out above. In the view of the Board, if such are the established facts, it will no doubt follow that the accused did not lose his self-control as a result of the provocative behaviour in question, as well as that a reasonable man would not have acted as he did. Of course, whether those are or are not the facts will as often as not be a matter of dispute, and if it is, that dispute must be resolved by the jury.

33. Since the hearing before the Board in the present case, the decision of the Supreme Court of Canada in *Cairney v The Queen* [2013] SCC 55 has become available. Although the Canadian legislation is, as noted above, different from that in the present case, the court's conclusion is significant. After examining cases which included both *Salamon* and *Louison*, as well as *Edwards*, it held that:

> "Self-induced provocation…is not a special category of the defence of provocation. The fact that the accused initiated or invited the provocation is simply a contextual factor in determining whether the subjective and objective elements of the defence are met."

In the context of the Canadian legislation, an assertion of self-induced provocation is relevant to the objective test whether an ordinary person would have lost his self-control as well as to the subjective requirements for actual loss of control and for the killing to be "on the sudden". This decision was not of course available to the Court of Appeal, but its approach is, mutatis mutandis, entirely consistent with the Board's conclusions as here set out.

The "felony/murder rule" and provocation.

34. Like the Court of Appeal the Board will refer to what is now the rule for killing in the course of violent arrestable offences (section 2A of the Criminal Law Act 1979 for Trinidad and Tobago) by the convenient shorthand of its old name, the "felony/murder rule".

35. The Court of Appeal concluded that where there was murder constituted by this rule of law, provocation could not arise. As explained in para 12 above, even if correct this could not provide the answer to the appeal against conviction, because it is impossible to know whether the jury regarded this as such a murder or as one based on proven murderous intention. Provocation, if it had arisen, was undoubtedly relevant to the latter form of murder and an omission to leave it to the jury would then have been fatal to the conviction. It is because provocation did not arise in the absence of evidence of loss of control that this conviction is not unsafe. It follows that it is not necessary, in order to decide this case, to resolve the felony/murder question. However, the Court of Appeal dealt with this question at some length and the Board has heard detailed argument on the topic.

36. Statutory felony/murder rules in one form or another are part of the law of murder in several common law jurisdictions. Such rules apply, for example, in all the Australian states except the Capital Territory, and in Canada. Some versions of the rule are more severe than others. In England and Wales there were early statements of the common law rule, including Stephen's, in terms which suggested that it applied to any death occurring in the course of any felony. But by the time of the abolition of the rule by the Homicide Act 1957, it is likely that it was confined to deaths resulting from acts of violence and only in the case of felonies involving violence. That is how it was stated in DPP v *Beard* [1920] AC 479, 493, that was the conclusion of the Royal Commission on Capital Punishment (1953) whose report led to the 1957 Act: *Cmd 8932,* para 86, and that is how it was described, shortly after abolition, in *R v Vickers* [1957] 2 QB 664, 670. The rule in Trinidad and Tobago is in one sense similar, because the arrestable offence must be one involving violence, but in another respect it is somewhat wider, because it separately includes not only resistance to arrest by a constable in the execution of his duty, as it always did in England, but also resistance to a citizen's lawful arrest. In some jurisdictions, the rule extends to all acts causing death if done in the course of any crime involving a defined threshold of gravity. In yet others, it applies to any act done in the prosecution of an unlawful purpose which is of such a nature as to be likely to endanger human life. It is plain that these various legislative choices represent considered responses to differing local conditions and, whether or not combined with the availability of the death penalty, they must be respected as such. The Board so held in *Khan v State of Trinidad and Tobago* [2005] 1 AC 374.

37. The common feature of all these versions of a felony/murder rule is that if a death occurs in the prescribed circumstances it is automatically murder, and irrespective of the intention of the defendant. There is no need to prove an intention either to kill or to do grievous bodily harm. The operation of the rule is conveniently illustrated by a number of cases. In *R v Betts and Ridley* (1930) 22 Cr App R 148, it applied to two robbers who waylaid a courier en route to the bank. Because the robbery necessarily involved some element of violence or force, both the defendant who struck him and the defendant who was waiting around the corner to achieve the getaway were guilty of murder once the blow to his head caused his death, however it did so and whatever the intention of either man had been. In *R v Stone* (1937) 53 TLR 1046 it applied to a man who, like the defendant in *Beard*, killed a woman in the course of rape, since that offence necessarily involved some violence. The court distinguished the case of a consensual attempt to stimulate an abortion, which would involve risk to life but no violence. In *R v Jarmain* [1946] KB 74 a defendant pointed a loaded gun at the cashier in the course of robbery. When the cashier was shot it was held to be murder whether or not he was truthful in claiming that he had not deliberately pulled the trigger and that the gun had gone off accidentally. The Board reached an identical conclusion on more or less identical facts on an appeal from Trinidad and Tobago in *Gransaul and Ferreira v The Queen* [1979] UKPC 14 (unreported) 9 April 1979.

38. In the present case, the Court of Appeal held that provocation could not arise in relation to murder by way of the felony/murder rule. It did so for three reasons:

> i) because that had been the decision in its own earlier case of *Ramserran v R* (1970) 17 WIR 411; Crim App No 32 of 1970, which decision would have been known to the legislature when re-enacting the felony/murder rule in 1997, so that the exclusion of provocation is implicit in the new statutory provision;
>
> ii) because it followed from its conclusion that "self-induced" provocation could not be relied upon; and
>
> iii) because provocation is simply inconsistent with a rule which converts any death in the course of a violent crime automatically into murder.

The Board's conclusion is that the first two of these do not provide the answer to the question; the answer depends on the third.

39. *Ramserran* certainly raised facts similar to those of the present case. On one possible version of what occurred, the defendant was one of two men, each armed with guns, who robbed another. The victim attempted to take hold of the defendant's gun. The defendant thereupon struck the victim violently on the head with the butt of his gun, causing a fractured skull from which he died. At trial, the defence was alibi. The

trial judge, dealing with the possibility that the alibi might be rejected, left provocation to the jury of his own motion. It was common ground that the provocation direction was faulty because it omitted reference to the burden of proof lying upon the State. The Court of Appeal, whilst accepting that this criticism was valid, nevertheless held that provocation did not arise at all. It did so for two reasons. The first was that the effort of the deceased to foil the armed aggression against him was clearly a lawful act and could not for that reason be regarded as provocation. The court expressed itself strongly, saying at p 416E that:

> "where at the time of inflicting the injuries causing death the appellant was obviously engaged in the offence of armed robbery we are of the view that by no stretch of the imagination can it be said that there was any evidence fit to go to the jury on the question of provocation, and we think that it would be reducing the law to an absolute farce if we were to hold otherwise."

It then went on to add, immediately afterwards:

> "There is another question of law that arises here….It is still the law in this country that if someone kills another as a result of an act done in the course or furtherance of a felony involving violence the offence committed is murder and no question of manslaughter arises….This is another aspect of the matter which illustrates the absurdity of holding or suggesting that an attempt to disarm a robber amounts to provocation of the robber which would have the effect of reducing the killing of the person robbed from murder to manslaughter."

40. It must be remembered that at this stage, before the adoption in 1985 of section 4B, the law was in the English pre-1957 state in which a lawful act was not regarded as capable of being provocation and, moreover there was no arguable statutory inhibition upon the judge withdrawing provocation simply because the evidence did not pass the threshold of the objective test. Given the differing reasons advanced for the dismissal of the appeal, it is not easy to see *Ramserran* as a sufficiently clear statement of the law to justify the conclusion that the exclusion of provocation from a felony/murder case is implicit in the legislation.

41. It follows from the Board's conclusions, set out at paras 17-33 above, that since there is no general rule altogether preventing reliance on "self-induced" provocation

which the defendant has himself generated, no exclusion of provocation from felony/murder cases can be derived from the existence of such a rule.

42. The separate partial defence of diminished responsibility is not in issue before the Board and does not fall for decision. But it may well be that there is no reason why that separate partial defence should not apply to felony/murder, for it is concerned with mitigating the level of conviction, and thus the penalty and especially any mandatory penalty, when the defendant who has killed was suffering at the time from an abnormality of mind which substantially reduced his responsibility for his actions. That partial defence is concerned with an internal mental disability, not with his actions, and there seems no occasion for it to be affected by a rule converting particular actions in particular circumstances into murder. When however it comes to provocation, the question which matters is whether there is any scope for such a concept, reducing murder to manslaughter, if the case is one in which the felony/murder rule converts any death in the course or furtherance of a violent crime into murder, irrespective of the means by which, and the circumstances in which, it was caused.

43. In summarising its conclusion that there is no such scope, the Court of Appeal put it in this way at para 96:

> "Since the intention to kill or cause grievous bodily harm is not a necessary ingredient of the crime known as felony/murder, it is irrelevant whether the accused was provoked so as to form [such an intent]."

The Court of Appeal should not be taken to mean that provocation operates, in a non felony/murder case, to negate murderous intent. Plainly it does not. On the contrary, it arises for consideration only if and when murderous intent has been proved; if such intent is not proved, the case will be one of manslaughter at most in any event, for want of the intent. But what the Court of Appeal undoubtedly had in mind was the contrast between murder by murderous intent and murder by felony/murder. That can be seen from its citation of the High Court of Australia's judgment in *Wilson v The Queen* [1992] HCA 31; (1992) 174 CLR 313. There it was alleged that the appellant and another had killed the victim in the course of robbing him, having caused fatal brain damage either by striking his head or by his head being banged on the ground. The appellant had asserted that shortly beforehand the victim had pushed him, tried to kiss him and shouldered him. The trial judge had left provocation to the jury, of which the High Court (Mason CJ, Toohey, Gaudron and McHugh JJ) said at pp 318-319:

> "the trial judge also left to the jury provocation as a possible basis for manslaughter. But, as King CJ pointed out:

> ‘(T)here was no suggestion of an intent to cause death or grievous bodily harm and as the only available basis of a verdict of murder was felony murder, provocation could have played no part in the jury's deliberations.’ ”

In other words, the reference to absence of intent is simply to the basis on which the case was put, namely as felony/murder, by contrast to murder based on murderous intent. The High Court, like the Court of Appeal of New South Wales, clearly thought that provocation could not be relevant to a felony/murder case.

44. Provocation was not addressed by the courts in any of the three English felony/murder cases cited at para 37 above. In two of them it could not have arisen. But in *Stone* it did arise. The defendant soldier met a girl he had known before being posted abroad. At trial he admitted going with her to the secluded place where she was afterwards found, strangled with her scarf. He asserted that she had called him a name and struck him twice. Thereupon, he said, he had lost control of himself and grabbed at her scarf. The direction to the jury is not recorded but the jury later asked this direct question: “If as a result of intention to commit rape a girl is killed, although there was no intention to kill her, is the man guilty of murder?” The Lord Chief Justice, trying the case, had answered simply “Yes undoubtedly”. That direction was upheld by the Court of Criminal Appeal without calling upon the Crown. It plainly did not occur to any of the judges that the answer to the question should have referred to the partial defence of provocation. Nor did it occur to counsel for the appellant, whose argument was the different one, firmly rejected, that constructive malice required that the act causing death be one which is foreseeably likely to do grievous bodily harm. Nor have counsel’s researches uncovered any case in which the application of provocation in a felony/murder case has been apparent.

45. The concept of provocation is one of partial excuse. It has aptly been described as a concession to human frailty or infirmity. Whilst on facts such as those of *Betts and Ridley*, *Jarmain* or *Wilson* it may be difficult to see any occasion for such a concession to a defendant embarked upon a violent crime who kills in the course of it, there might be other situations in which it is possible to contemplate provocative behaviour notwithstanding such a crime. One situation is that of the defendant whose attack on the victim was, from the outset, provoked by antecedent insults or abuse by the victim, but the felony/murder rule would not then apply because such an attack would not be an antecedent violent arrestable offence, which is plainly what is required by section 2A. A second situation might be that of a defendant who undertakes a comparatively minor mobile phone robbery in the street by punching another. He would be committing an arrestable offence involving violence within that section. If his victim then taunted him mercilessly with painful ancient but false allegations of molesting children, and the defendant thereupon knocked him down, causing him to sustain a fatal skull fracture by striking the hard pavement, the question might arise whether the defendant could

advance provocation as a defence to a charge of murder based on the felony/murder rule.

46. A similar situation might arise in the context of self defence. If in the example just given the victim were to mount a counter-attack with a knife putting the defendant in peril of his life, and the latter were then to knock him down as postulated, the question might arise whether the defendant was or was not entitled to rely on self defence. That question was addressed in the New South Wales case of *R v Burke* [1983] 2 NSWLR 93. Burke and an accomplice had gone, armed with a loaded rifle, to the home of the victim to rob him. The victim came to the door, and struggled with Burke in an effort to disarm him, in the course of which Burke's gun was discharged, killing the victim. The defendant's case was that he believed the victim to be armed and that he was defending himself. The trial judge left only felony/murder to the jury, declining to leave also murderous intent. It was contended on appeal that that had the effect of removing the possibility of acquittal on the basis of self defence. The Court of Appeal of New South Wales rejected the contention that the judge was obliged to leave an additional possible basis for murder in order to enable the defendant to plead self defence. The court's judgment included the following at p 104:

> "If the mental state of the accused is irrelevant there is, so it seems to me, considerable conceptual difficulty in relating the issue of self defence (and other matters affecting criminal responsibility such as provocation) to the doctrine of felony murder…in order to raise self-defence the appellant is required to put significant distance between the original aggressive act on his own part, in this case the armed robbery, and the subsequent act causing death, in this case the firing of the rifle. If the firing of the rifle occurred as part and parcel of the armed robbery, the appellant cannot rely upon it as an act done in self-defence. If on the other hand the firing of the rifle occurred after the acts constituting an armed robbery had come to an end, that is to say after the aggressor had broken off his attack, then it cannot be said to have occurred during or even immediately after the crime punishable by penal servitude for life upon which the Crown relies for the purpose of the felony murder rule. Accordingly, in the latter event the appellant would be entitled to an acquittal on the charge of murder, not because he has succeeded on self-defence, but because the Crown has not proved felony murder as alleged. To speak of self-defence in these circumstances is to raise a false issue."

This analysis is consistent with that of Lord Hope, adverted to above at para 26, and provides the answer to the possible cases in which self defence, or provocation, may arise where felony/murder is charged. In order to constitute felony/murder, the death must have been caused in the course or furtherance of the antecedent crime of violence.

If the stage has been arrived at when the roles have been reversed by disproportionate response of the erstwhile victim to the extent that he has become the aggressor and the original assailant kills in reaction to attack, such killing will no longer be in the course or furtherance of the antecedent crime of violence. The same will apply if the original violent crime is overtaken by independent acts of provocation, in response to which the defendant loses control and kills. Conversely, if the killing is in the course or furtherance of the antecedent crime of violence, there is no scope for the application of either the justification of self defence or the partial excuse of provocation. That may have the consequence that a defendant who is being lawfully arrested but has in fact done nothing wrong cannot rely on the error of the arresting officer as provocation, but that follows from the statutory provision; such a person must suffer the arrest and demonstrate afterwards that it was mistaken and if, instead of so doing, he kills the officer, the statute makes that murder. When the rule of felony/murder is engaged, death caused in the course or furtherance of the crime of violence is murder, without more. If causing the death by accidental discharge of the gun is murder, as in *Jarmain* and *Gransaul and Ferreira*, it would be wholly inconsistent for the deliberate shooting of the victim to be capable of being reduced to manslaughter by provocation, so long as the defendant continues to act in the course or furtherance of the violent crime.

47. For these reasons the Board concludes both on authority and principle that there is no scope for the concept of provocation if only felony/murder is before the jury.

The role of the judge in provocation cases

48. The general rule for the conduct of a criminal trial is that questions of law are for the judge and questions of fact are for the jury. Whether there is evidence on a particular issue which requires the consideration of the jury is itself a question of law. It is on the basis of this practice that a judge will direct a verdict of not guilty if satisfied that there is no evidence on which a jury, properly directed, could convict. The same "gatekeeping" function is performed by the judge in relation to specific issues in a case which does require the jury to decide on guilt. Such issues may be manifold. Simple examples include whether self defence arises on a charge of violence, whether there is a proper evidential basis for the Crown to rely on an unlawful act, as distinct from gross negligence, on a charge of manslaughter, or whether in a murder case there is an evidential basis only for liability as a principal or also as a secondary party, and if so of which kind. This role of the judge is an important aspect of the common law criminal trial; it is part of the necessity to confine the trial to issues which genuinely arise.

49. Where provocation is in question, there is no doubt that the judge must perform this essential function in relation to the first stage of the test, namely whether there is

evidence on which a jury, properly directed, could conclude (i) that there was provocative behaviour and (ii) that the defendant was in fact provoked by it to lose his self-control and kill in consequence: see for example *R v Acott* [1997] 1 WLR 306 per Lord Steyn:

> "If in the opinion of the judge, even on a view most favourable to the accused, there is insufficient material for a jury to find that it is a reasonable possibility that there was specific provoking conduct resulting in a loss of self-control there is simply no issue of provocation to be considered by the jury: *Lee Chun-Chuen v The Queen* [1963] AC 220, 229 per Lord Devlin."

50. However, a part of the speech of Lord Diplock in *DPP v Camplin* [1978] AC 705 has been generally taken in England and elsewhere to mean that this otherwise ubiquitous approach to the division of functions between judge and jury does not apply to the second, objective, stage of the test for provocation. After setting out section 3 of the Homicide Act 1957 (identical, as has been explained, to section 4B of the Trinidad and Tobago statute here in question – see para 8 above), Lord Diplock said at p 716C:

> "My Lords, this section was intended to mitigate in some degree the harshness of the common law of provocation as it had been developed by recent decisions in this House. It recognises and retains the dual test: the provocation must not only have caused the accused to lose his self-control but must also be such as might cause a reasonable man to react to it as the accused did. Nevertheless it brings about two important changes in the law. The first is: it abolishes all previous rules of law as to what can or cannot amount to provocation and in particular the rule of law that, save in the two exceptional cases I have mentioned, words unaccompanied by violence could not do so. Secondly it makes it clear that if there was any evidence that the accused himself at the time of the act which caused the death in fact lost his self-control in consequence of some provocation however slight it might appear to the judge, he was bound to leave to the jury the question, which is one of opinion not of law: whether a reasonable man might have reacted to that provocation as the accused did."

Lord Diplock had made a very similar observation several years earlier in the Privy Council case of *Phillips v The Queen* [1968] UKPC 24, [1969] 2 AC 130.

51. In neither of these two cases did the issue of the judge's role in relation to the second, objective, stage of the provocation question arise. In both cases the second

stage provocation question had been left to the jury; the issue was the quite separate one of whether the trial judges' directions were correct. In *Phillips* the Board held that the judge had correctly directed the jury to consider not only whether the provocative behaviour would have induced a reasonable man to lose his self-control, but also whether it would have induced such a man to do as the defendant did; the defendant's appeal was dismissed. In *Camplin* the House of Lords held that the judge had been wrong to direct the jury to assess the objective second stage question by reference to an adult when the defendant was a boy of 15. The speeches of their Lordships treated what Lord Diplock identified as the second change made by the 1957 Act as supporting the conclusion that the judge had been wrong. But it is clear that they would have held him wrong in any event, on the grounds that the objective second stage question requires (in assessing the gravity of the provocative behaviour) consideration of relevant characteristics of this particular defendant and (in assessing the reasonableness of the reaction) consideration of the powers of self-control to be expected of an ordinary person of the age and sex of the defendant, not those of an adult.

52. Lord Diplock's dictum has nevertheless faithfully been treated in England and Wales, and elsewhere in jurisdictions sharing an equivalent of section 3 of the Homicide Act 1957, as requiring the judge to leave provocation to the jury even when it is abundantly clear that no jury, properly directed, could begin to find that the provocative behaviour in question could have induced in a reasonable person the reaction exhibited by the defendant. In subsequent years, this rule was recognised as unsatisfactory, particularly when coupled with the undoubted principle that if provocation might, taking the evidence at its most favourable to the defendant, arise, it is incumbent on the judge to leave the issue to the jury even if it does not represent the defendant's case. In 2003, the English Law Commission summed up the position as follows in its consultation paper, *Partial Defences to Murder* (*CP No 173*) at para 4.172:

> "It is confusing to juries that in a case in which the defendant's reaction of killing was not remotely a reasonable thing to do, and the defendant does not seek to argue that it was, the judge nevertheless leaves the issue of provocation to them."

After extensive consultation, the Commission in due course recommended express statutory abolition of this *Camplin* rule: see *Law Com No 304* at para 5.11. It has since disappeared in England and Wales with the enactment in the Coroners and Justice Act 2009 of a newly structured partial defence of loss of control which contains in section 54(6) the rule that the issue arises only if in the opinion of the judge there is evidence on which a jury, properly directed, could reasonably conclude that the defence might apply.

53. A striking illustration of the unsatisfactory effect of the rule, as described by the Law Commission, is afforded by *R v Doughty* (1986) 83 Cr App R 319. The defendant father had killed his 17-day-old baby by kneeling on him and crushing and fracturing his skull. His account was that the baby had been crying and restless for some hours and that he must have covered his head with cushions, and then must have knelt on them, in order to try to quieten him. The real issue was thus intent, but counsel asked the judge to leave provocation. The judge declined to do so, on the grounds that the crying and restlessness of a tiny baby could not amount to provocation. The Court of Appeal held that he had been wrong. Once there was some evidence on which the jury could have found that he might have lost control, the second objective question had to be left to the jury. The court held that neither it nor a trial judge had any choice about this. It expressed the expectation that the common sense of juries could be relied upon not to return a perverse verdict.

54. It is no doubt true that juries can be relied upon to return sensible verdicts, and it is also true that the judge will no doubt in an appropriate case explain that provocation is being left to the jury to consider because, in law, only it can pronounce upon it. But it remains deeply confusing for a jury to be invited to consider a question which appears to have only one answer and the practice based upon *Camplin* undoubtedly has the potential to expand and complicate trials. In *Fox v The Queen (No 1)* [2001] UKPC 41 Lord Hoffman described this application of section 3 of the 1957 Act as meaning that Parliament had, in effect, given the jury an express right to return a perverse verdict of manslaughter. In that case, the defendant, a powerful body-building champion, had visited his girlfriend, with whom he was in dispute, and found her with her mother. He had shot both women dead. His defence was that they, not he, had had the gun and that it had gone off by accident when he tried to wrest it away from them. He added that the older woman had spoken slightingly of him and had spat at or pushed him. The jury, by convicting, must have rejected the defence of accident. On appeal, it was contended that the judge ought to have left provocation. Because the case had been heard in St Christopher and Nevis, where there was no equivalent of section 3 of the 1957 Act, this contention failed. The judge had rightly withdrawn the issue. Only a perverse verdict could have found manslaughter in such circumstances. Lord Hoffman remarked that if the case had occurred in England and Wales the judge would have been obliged to leave provocation to the jury. He would not, he said, at para 17, have been entitled to withdraw it "on the ground that no reasonable jury could have considered that a reasonable man would have responded to an insult and a push from a woman by taking out a gun and shooting her and her daughter dead."

55. As *Fox* illustrates, the *Camplin* practice does not apply in common law jurisdictions where there is no equivalent of section 3 of the Homicide Act 1957. In such places, the ordinary rule as to the function of the judge to determine whether an issue is or is not raised by the evidence, prevails. *Yasso* (above, see para 30) treated it as axiomatic in New South Wales that although a judge would be naturally cautious in withdrawing the issue, it was not in every case where provocation was raised "however distant from the realities of human response" that the judge was obliged to leave it to

the jury (p 375). The High Court of Australia recognised the same practice in *Van den Hoek v The Queen* (1986) 161 CLR 158, 169 in stating the trial judge's duty as being to leave the issue to the jury if there is material on which the jury, acting reasonably, could find manslaughter as a result of provocation; see also *Stingel v The Queen* [1990] HCA 61, paras 30 and 36; 171 CLR 312, 333, 336-337. The Canadian practice appears to be similar in requiring the judge to leave provocation only where there is "an air of reality" to the issue: see for example *Cairney*, referred to at para 33 above.

56. In the view of the Board, the objections to the *Camplin* practice, as it has solidified over the years, are well founded. It is of great importance that judges respect the clear principle that the question whether the second, objective, part of the provocation test is met is one for the jury. It is necessary to re-state and to emphasise the rule that provocation must be left even if it is not the defendant's primary case if, taking the evidence at its most favourable to him and remembering that the onus of proof is on the State to rebut it, manslaughter by reason of provocation is a conclusion to which the jury might reasonably come. It behoves every trial judge to be very cautious about withdrawing the issue from the jury. He clearly cannot do so simply because he would himself decide the issue against the defendant, nor even if he regards the answer as obvious. But in a case where no jury, properly directed, could possibly find the test met, it is in the interests of fair trial and of coherent law that an issue which does not properly arise ought not to be inserted into the jury's deliberations. *Doughty* is one illustration of a situation where no jury could reasonably conclude that a reasonable person in the defendant's position would intentionally do as he did because the baby cried; the jury needed to concentrate on the live issue of intent. *R v Dryden* [1995] 4 All ER 987 is another, oft cited. There the defendant had, after obstinately refusing to remove a building erected in contravention of planning laws, shot dead the bailiff who came, on ample notice, to enforce the law. It was taken as axiomatic that if there had been loss of control the issue of provocation would have had to be left to the jury. *Fox* (ante para 54) is a stronger case. The present case, if there had been evidence of loss of control and if only murder by murderous intent had been in question, is, like *Ramserran* (see para 39 above), a yet clearer one; no jury could properly conclude that the defendant's shooting the victim dead was a reaction such as a reasonable man might have exhibited in response to being temporarily frustrated in the process of armed robbery.

57. Is the *Camplin* rule a necessary consequence of the statutory language? On one view, there is a contrast between the first limb of section 3, dealing with whether there is evidence of provocation operating on the defendant (the first subjective part of the test) and the second, dealing with the objective stage of the test. There is no doubt that the section is intended to ensure that the objective stage of the test is a jury question. But that was because before 1957 there had grown up a number of judge-made rules confining the jury on the objective question. Two were that killing in response to words alone could never be a reasonable reaction and that nor could killing in response to a lawful act. But to insist that the issue, if it arises, must be decided by the jury without judge-made rules tells one nothing about whether the judge can or cannot exercise his

normal role of deciding the question of law whether the issue does arise. True it is that the statute makes no reference to the judge's role, but that role was then and is now so well established in all aspects of a criminal trial that specific reference to it is not to be expected. The words of section 3 establish clearly that the objective stage of the test of provocation is a jury question. It does not seem to the Board that they necessarily carry the additional implication placed upon them in *Camplin* that the judge's normal role of determining when an issue arises on the evidence is excluded. It is satisfied that it was not the intention of Parliament to legitimise a perverse verdict. The Board is very conscious that this conclusion involves departing from a long-settled practice which has been regarded at every level as mandatory ever since *Camplin*. But if the basis for it was unsatisfactory and uncertain and it has given rise to real difficulties, it is not too late to alter it, in those jurisdictions, such as Trinidad and Tobago, where section 3 of the Homicide Act 1957 or an equivalent provision continues to apply.

58. For these reasons the Board concludes that provocation is no exception to the usual principle that it is for the judge to determine whether, taking the evidence at its most favourable to the defendant, an issue arises. Careful regard must be had by trial judges to the necessity that if <u>any</u> jury could properly find provocation, the issue must be left, whatever the judge thinks about what the outcome ought to be.

Conclusions

59. Accordingly, the Board's conclusions are:

i) there was no evidence of loss of control fit to go the jury and thus provocation did not arise: paras 12 to 16 above;

ii) there is no absolute rule of law that "self-induced" provocation cannot be relied upon although the fact that the defendant has induced the provocative behaviour is directly relevant to both subjective and objective stages of the test for provocation: paras 17 to 33 above;

iii) there is no scope for the application of provocation to cases where the only basis on which conviction is sought is via the felony/murder rule: paras 34 to 47 above;

iv) provocation presents no exception to the general rule that it is for the judge to rule, in event of dispute, whether the issue arises; the obiter observation to the contrary in *Camplin* should no longer be followed; the trial judge must scrupulously observe the principle that provocation, if it arises, is for the jury

whatever his views about it, but if no jury could properly find manslaughter on grounds of provocation he is entitled to withdraw the issue: paras 48 to 58 above.

Sentence

60. The defendant was sentenced to the mandatory death penalty. It was common ground before the Board that this sentence cannot stand. As explained in *Miguel v State of Trinidad and Tobago* [2011] UKPC 14, [2012] 1 AC 361, a mandatory death penalty constitutes cruel and unusual punishment and is accordingly inconsistent with sections 4(a) and 5(2)(b) of the Constitution of the Republic of Trinidad and Tobago. Although the validity of a mandatory death penalty is nevertheless preserved as an "existing law" by section 6 of the Constitution for murder by intent to kill or to do grievous bodily harm contrary to section 4 of the Offences Against the Person Act 1925, murder contrary to section 2A of the 1979 Act (the "felony/murder rule") is not an existing law and the mandatory penalty is not so saved. Since in this case it cannot be known what was the basis of conviction, a mandatory death sentence is unconstitutional, as it was in *Miguel*, and must be quashed. Moreover, as is also correctly accepted on behalf of the State, since the defendant has now been in custody under sentence of death for more than five years without any question of abuse of process or frivolous resort to time-wasting procedures, no death sentence can constitutionally be imposed upon him: see *Pratt v Attorney General for Jamaica* [1992] 2 AC 1.

Disposal

61. In those circumstances, the appeal against conviction must be dismissed. The appeal against sentence must be allowed. The sentence of death must be quashed. The case must be remitted to the Court of Appeal for the imposition of the appropriate sentence. The defendant must remain in custody meanwhile.