"other stuff"; and some other conversation about how much money there really had been. The Court can see no reason to doubt that the jury had ample material before them, entirely admissible evidentiary material, on which they could reasonably convict each of these two appellants. The summing-up was impeccable and was perfectly satisfactory on all the essential matters. In truth, at the trial learned counsel then appearing for these appellants wholly abandoned any objections such as they originally did make to the admissibility of the evidence of these conversations. Each of these appeals is dismissed.

Appeals dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellants); *Foster, Wells, and Coggins,* Aldershot (for the Crown).

Reported by N. P. METCALFE, ESQ., *Barrister-at-Law.*

(New Zealand Law Reports, 1962, page 1069)

Court of Appeal. Wellington. 11, 12 April; 6 August 1962. Gresson, P.; North, J.; Cleary, J.

THE QUEEN *v.* McGREGOR

Criminal Law—Murder—Provocation—Whether Element of Time Still of Importance—Whether Still to be Considered Relationship of Provocation to Killing—Whether Provocation Must be Act of Person Killed—Form of Direction to Jury—Crimes Act 1961, s. 169.

Section 169 of the Crimes Act 1961 does not abrogate the rule always emphasised in the common law that a defence of provocation to a charge of murder can only avail when the homicide has been committed in hot blood and while the accused is still in the throes of passion. The deprivation of self-control implies a sudden transition to a state, necessarily temporary, during which the power of self-control is absent. The time element is therefore still of importance.

Attorney-General for Ceylon v. *Perera* [1953] A.C. 200 referred to.

The jury is also required to consider whether the killing bears any proper or reasonable relationship to the sort of provocation said to have been given by the person killed and the act of provocation relied upon must, to be effective as a defence, be the act of the person killed and not of some other person.

Observations on the correct interpretation of s. 169 of the Crimes Act 1961 and on the direction to be given to the jury when the defence of provocation is raised to a charge of murder.

APPEAL against conviction for murder on the ground of misdirection.

The appellant was convicted at Auckland on 22 February 1962 of the murder of one Wallace Bernard Whiteford on 9 January 1962. The circumstances were these: The appellant – a married man aged 28 years – and Whiteford were neighbours who in recent months had quarrelled, largely over relatively trivial matters concerning the boundary between the two properties. Each on occasion had acted in a way likely to cause the other some irritation. It was also said

that Whiteford had on one occasion used a rude word to the appellant's wife, and on occasions had "wolf-"whistled" her when she appeared in shorts. On the other hand, the appellant's father, who was the previous owner of the house and had known Whiteford for some years, seems to have held aloof from the quarrel, and had remained on neighbourly terms with Whiteford. On 9 January 1962 the appellant spent a considerable period of the afternoon in a hotel at Papatoetoe drinking with friends; one of whom, Neville-White, drove him home and was invited to stay for tea. The appellant was to some extent under the influence of liquor when he arrived home, but was in good humour. However, when his father arrived home shortly afterwards, and on being questioned, acknowledged that he had joined Whiteford in a glass of beer, the appellant became very angry and accused him of acting disloyally in associating with Whiteford. His father resented this and said he was not involved in the quarrel and he was entitled to live his own life. The appellant and his father normally were on very good terms, and before long the appellant quietened down and apologised for the way he had spoken. However, not very long afterwards, the appellant became very upset and apparently experienced something in the nature of an emotional crisis. He commenced to sob and suddenly shouted to his father: "Go over there and "get the bastard and bring him over here so that we "can have it out." His father replied: "Not tonight, "Jack, some other time." The appellant's wife then intervened and encouraged her husband to go to his bedroom and lie down, which he did for a time. Later he came out of the bedroom and passed swiftly through the kitchen where his wife, his father, and Neville-White were seated, leaving the house by the kitchen door. He was observed by one or more of them to be carrying a rifle, and his wife immediately ran after him begging him to come back. By mischance it so happened that at this time, Whiteford, who was having a meal with his wife, was asked by her to go and get some ice cream from their deep-freeze in a nearby shed. This he proceeded to do, carrying a plate and a spoon with him. Shortly after he emerged from the house he was seen by the appellant, who raised his rifle to his shoulder and a shot was fired which entered Whiteford's chest killing him almost immediately. According to Neville-White, whom the Judge described as a reluctant witness for the prosecution, the appellant, as he passed through the kitchen, had said: "I'll blow the barstard's "brains out." According to another neighbour, Mrs Buckley, who was in her garden, the appellant, as he raised his rifle to his shoulder, called out: "I'll get "you, you bastard," or words to that effect. There was ample evidence called by the prosecution to raise a *prima facie* case of murder.

One of the defences offered at the trial was that the charge of murder should be reduced to manslaughter on the ground that the appellant had acted under provocation, and the case is reported on this point only.

Finlay, for the appellant:

The defences raised were, (1) accident; (2) provocation; (3) automatism.

(1) The defence of accident rested on the dispute in the evidence as to the words used by the appellant.

(2) As to provocation, s. 169 of the Crimes Act 1961 has the effect that the time element is no longer a factor to be regarded, and the relationship doctrine between the provocation and the consequential act is now excluded. The former statute enacted the common law (save as to provocation by words): *1 Russell on Crime,* 11th ed. 577, 578. The cornerstone of the common law was reproduced in the old section, but has been dropped from the new section.

There was uncertainty in the past as to whether provocation can co-exist with an intention to kill formed before the provocation was given: *Kwaku Mensah* v. *The King* [1946] A.C. 83; *R.* v. *Hopper* [1915] 2 K.B. 431; *Holmes* v. *Director of Public Prosecutions* [1946] A.C. 588; [1946] 2 All E.R. 124; *1 Russell on Crime,* 11th ed. 584.

As to "precedent malice", I rely on *R.* v. *Hopper* (*supra*), *Attorney-General for Ceylon* v. *Perera* [1953] A.C. 200, referred to in *1 Russell on Crime,* 11th ed. 535.

The objective test was essential under the previous law. An "ordinary man" must have been deprived of self-control. Even then there was a need of a subjective element of some kind because the accused must himself have been provoked. Relative relationship was also a requirement of the old law: *Holmes* v. *Director of Public Prosecutions* (*supra*).

As to doubts and uncertainties in the old law see *1 Russell on Crime,* 11th ed. 595 as to objective test; and ibid, 606, 611 in regard to relationship doctrine: *Bedder* v. *Director of Public Prosecutions* [1954] 1 W.L.R. 1119; [1954] 2 All E.R. 801.

I have been speaking of "doubts" and "uncertainties" but they should more correctly be called anomalous or unfair results under the old law which Parliament sought to remove.

Under s. 169 any words or deeds emanating from any source may qualify as provocation: they are not limited to words or deeds of the victim. There is now really only one test, but it is twofold in character—(1) was it sufficient to measure up to the stated standards? (2) Did it in fact deprive the accused of his self-control?

As to (1), s. 169 (2) (a) uses the words "In the "circumstances of the case". Power of self-control might be diminished by drunkenness, tiredness, and by various other matters and heightened by other factors. An entirely objective test must therefore allow of many variations. The words "In the circumstances of the "case" must be read along with the later words "the "characteristics of the offender". The combined phrases include all circumstances special to the offender, whether temporary or permanent, and whether natural or acquired.

There must be some limit to "characteristics" otherwise the test would be wholly subjective. I would draw the line only at irascibility.

As to s. 169 (2) (b), the concluding words are new. Under the old section provocation and the extent thereof determined whether or not the offender had lost his self-control, and whether it had caused him to commit the act of killing. Under the new section the questions are—(1) were the acts provocative of the loss of self-control? (2) If so, was the accused thereby induced to commit the act by reason of the loss of self-control?

Finally, the section is a code in itself, and the whole law has been written in, without reference to earlier authorities.

Solicitor-General Wild Q.C., for the respondent:

1. As to the time element, two requirements had to be satisfied before provocation could succeed under the old law: (1) The accused must have killed "in the "heat of passion": (2) He had to act "on the sudden": s. 184 (2).

The first requirement involves the loss of self-control: that remains in s. 169—"power of self-control". The second requirement was that reaction must be immediate. If a man brooded over a period of time until his self-control snapped, the provocation would not satisfy the terms of s. 184: *R.* v. *Duffy* [1949] 1 All E.R. 932.

The 1908 Act provided for the flaring temperament, but not for the brooding temperament. One who controlled himself for a period and whose self-control then broke could not get the benefit of the section. The new section provides for the brooding temperament as well as for hot temper. An illustration of the former is given in [1959] Crim. L.R. 697, on "The reasonable "Samoan". But slow-burning anger is not necessarily confined to Samoans, and that is the reason for dropping the requirement that the act must be sudden.

2. The fact that s. 169 does not expressly refer to the time element does not preclude a Judge from drawing such attention to the time element as may be appropriate in the circumstances of the case. It is properly a matter for the jury in weighing provocation, and may be put to them as warranted by the evidence as one of the circumstances of the case. But it is not to be elevated into a proposition of law.

Although express reference is omitted there are three new features which import the element of time—(a) subs. (1)—"under provocation"—while provocation still operative; (b) "In the circumstances of the case"—time is a circumstance; (c) "Induced" in subs. (2)—there must be causation between the provocation and homicide.

3. As to the requirement of a proper relationship between the provocation and the retaliation: *R.* v. *Noel* [1960] N.Z.L.R. 212, 218, 219; which is borne out by *Kenny's Outline of Criminal Law,* 17th ed. 157. The requirement still exists in England since the Homicide Act 1957: *R.* v. *Adams* (1961) 12 C.L. Note 318, although there is no reference to the relationship in the

statutory meaning of homicide in the Homicide Act Act 1957. See also (1954) 17 M.L.R. 459, 460.

The act of having to go and get a weapon has always been regarded as material: *R.* v. *Hayward* (1833) 6 Car. & P. 157, 159; 172 E.R. 1188, 1189; *R.* v. *Hall* (1928) 21 Cr. App. R. 48.

Speight, in support:

The reason for the change since *Bedder's* case (*supra*) and criticisms thereof are given by—*Glanville Williams* in [1954] Crim. L.R. 740, 747.

To remedy this situation, the Act postulates a hybrid man, but there is still retained the objective test with certain subjective elements. Self-control is the ability of the mind to control the emotions, and regard must therefore be had to the power of self-control of the ordinary person, disregarding any abnormality of mind: *Mancini* v. *Director of Public Prosecutions* [1942] A.C. 1, 9; [1941] 3 All E.R. 272; *Hall Williams* (1954) 17 M.L.R. 457.

If the Legislature had desired to adopt the subjective test entirely, it would have said so. The word "characteristics" means (by way of illustration) creed, colour, race, and physical characteristics. The act of provocation must be directed to such a "characteristic".

Alternatively, none of the characteristics relied on by the appellant are "characteristics of the offender". They are all transient states, applicable at the moment, but not "characteristics".

Finlay, in reply:

The purpose and effect of the section is not confined to a rectification of *Bedder's* case (*supra*). Once suddenness is no longer required there is no end of the remoteness of possible provocation.

As to relationship, my objection is that this was not left to the jury as a question of fact.

As to subjectiveness, the Crown in effect says the objective test has worked well in practice and that the subjective element required to be considered by the statute should be kept restricted to a minimum, really for administrative reasons. If the limit is to go beyond the reasonable man, where would it stop?

Cur. adv. vult.

The judgment of the Court was delivered by

NORTH, J. [after stating the facts as above]: Three defences were offered to the charge of murder; first, that the rifle was accidentally discharged. This defence rested wholly on the evidence given by the appellant's wife. She said that just before the shooting occurred she had overtaken her husband and had endeavoured to detain him by clutching his left arm; that her action had caused him to swing round, and just then the rifle went off. Her evidence in this respect was in sharp contrast to the accounts given by three witnesses called by the Crown who claimed to have seen the shooting. Secondly, that the shooting had occurred when the appellant was in a state of automatism. Nothing requires to be said about this defence, for no complaint was made with reference to the direction of the learned Judge. Thirdly that the charge of murder should be reduced to manslaughter on the ground that the appellant had acted under provocation. So far as this defence is concerned it requires to be mentioned that it was not contended that the appellant had been in contact with Whiteford on the day of the killing, nor that the invitation extended to the appellant's father was given for the purpose of annoying the appellant. It was accepted that the invitation had "triggered off" the emotional crisis which led to the killing.

The substantial grounds of appeal were two in number: (1) that the learned Judge failed properly and adequately to put before the jury the facts they should consider in deciding whether the discharge of the rifle was intentional or accidental: (2) that in a number of detailed respects, the direction of the learned Judge on the principles of law relating to the new definition of provocation contained in s. 169 of the Crimes Act 1961 was wrong and misleading. It is desirable that we should also record that the notice of appeal complained of three isolated passages in the summing up which it was said could have misled the jury. At the hearing, however, Mr Finlay frankly conceded that, standing alone, none of these matters, whether considered separately or together, were of sufficient importance to lead to a quashing of the conviction. He merely expressed the hope that if the case stood in balance these additional matters might be taken into account. We think it right to say at once that having considered each of the passages in question, in our opinion, none of them were of any moment and when the direction is read as a whole we think that there is not the slightest risk that the jury were misled by anything the Judge said.

[Their Honours then dealt with the first ground of appeal and continued]: In our opinion, then, the first ground of appeal fails.

The second, and indeed, the principal ground of appeal related to the defence of provocation. The crime was committed only nine days after the Crimes Act 1961 came into force, replacing the Crimes Act 1908. Thus it became necessary for the learned trial Judge unaided by previous decisions, to interpret the new definition of the circumstances in which provocation might be raised as a defence to a charge of murder. This is contained in s. 169 which reads:

(1) Culpable homicide that would otherwise be murder may be reduced to manslaughter if the person who caused the death did so under provocation.

(2) Anything done or said may be provocation if—

(a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and

(b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.

(3) Whether there is any evidence of provocation is a question of law.

(4) Whether, if there is evidence of provocation, the pro-ocation was sufficient as aforesaid, and whether it did in fact :prive the offender of the power of self-control and thereby duced him to commit the act of homicide, are questions fact.

(5) No one shall be held to give provocation to another by wfully exercising any power conferred by law, or by doing ıything which the offender incited him to do in order to ovide the offender with an excuse for killing or doing bodily ırm to any person.

(6) This section shall apply in any case where the pro-ocation was given by the person killed, and also in any .se where the offender, under provocation given by one erson, by accident or mistake killed another person.

(7) The fact that by virtue of this section one party to a omicide has not been or is not liable to be convicted of urder shall not affect the question whether the homicide nounted to murder in the case of any other party to it.

Comparing the provisions of the new section with s. 34 of the Crimes Act 1908, it will be noticed not nly that there are differences in language and arrange-ıent, but that a new test for determining the sufficiency f the provocation is prescribed. Subsection (1) no onger speaks of persons who cause the death of nother "in the heat of passion caused by sudden provocation" but of persons who do so "under provocation". Nor does subs. (2) in terms require ıat the offender should act "on the sudden and before there has been time for his passion to cool". Instead ıbs (2) (b) merely makes it a requirement that the rovocation did in fact deprive the offender of the ower of self-control and thereby induced him to com-ıit the act of homicide. A good deal of the argument e heard from Mr Finlay for the appellant turned on ıe omission of the words to which we have just eferred. Mr Finlay's broad submission was that "the cornerstone of the common law had been dropped from the new section with the consequence that the tests, which juries in the past have been directed to apply in their deliberations, have been swept away, and that now there is really only one test, though twofold in character, namely, was the provocation sufficient to measure up to certain standards, and did it, in fact, deprive the accused of his self control?" In is submission the learned trial Judge misdirected the ıry in three main respects: (1) as to the time element ı provocation: (a) in telling the jury that it was still ecessary that the acts or words which constituted the lleged provocation must induce a lack or absence of elf-control that was sudden and temporary in character, nd (b) in telling them that the time element was still nportant and by implication a necessary ingredient, nd that the acts or words complained of could only e regarded as constituting provocation in law if they ccurred immediately before the killing: (2) as to the elationship between the act of provocation and the act ausing death: in telling the jury that they should con-der whether the mode of resentment bore some proper nd reasonable relationship to the sort of provocation ıat had been given: (3) as to the true meaning of s. 69: in failing to instruct the jury correctly as to the ıeaning of the requirement that the provocation must e sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control.

Before considering these submissions it is, we think, necessary to refer to the history of the development of the common law relating to provocation and to the course of events in England which led to the adoption of the new test to be found in s. 169. Provocation does not render an unlawful homicide excusable or justifiable. If established, it reduces the crime from murder to manslaughter. In this respect it differs from self-defence, which, if established, provides a complete answer to the charge of murder; this distinction, however, has not always been clearly recognised. Provocation, as distinct from chance-medley, emerged during the 17th century as a ground for differentiating manslaughter from murder. As society progressed it came to be recognised that manslaughter would be the proper verdict where the circumstances disclosed that the accused had acted under serious provocation and when passion for the time being had dethroned his reason. Hale in his *Pleas of the Crown,* written in the 17th century but not published until 1736, was the first writer to elaborate on the topic of provocation, and in *R.* v. *Mawgridge* (1706) Kelyng 119; 84 E.R. 1107, Holt, C.J., considered the law on the matter as it was then. Speaking of this judgment, Sir James Fitzjames Stephen said in *3 History of the Criminal Law* 71, that the former view had been superseded

> By the broader and deeper view that the moral character of homicide must be judged principally by the extent to which the circumstances of the case show, on the one hand, brutal ferocity, whether called into action suddenly or otherwise, or on the other, inability to control natural anger excited by a serious cause.

The learned editor of the 11th edition of *Russell on Crime,* in discussing the history of provocation in relation to murder, states that from the examples discussed by *Hale* it would appear that what was prominent in the law in his day was that an intentional homicide would be reduced from murder to manslaughter if the prisoner had really acted in a passion and if it was clear that the killing was done with sudden heat and was not premeditated in cold blood. Throughout the development of the doctrine it was emphasised both in the cases and by the institutional writers that there must be a close relationship in point of time between the provocative act and the retaliatory act, and more often than not the word "sudden" was used to describe this relationship.

For a time the Judges treated provocation as a matter of law and it was not until the 19th century that a definite rule was established that the question was one for the jury to decide as a matter of fact. When this rule began to be recognised, in the early part of the 19th century, juries were directed to apply what would seem to be largely a subjective test. Nevertheless, the nature of the provocation, the time element, the weapon used, and the presence or absence of brutality, were put forward as matters of great importance for the consideration of the jury as may be

seen from the directions given in such cases as *R.* v. *Lynch* (1832) 5 Car. & P. 324; 172 E.R. 995; *R.* v. *Hayward* (1833) 6 Car. & P. 157; 172 E.R. 1188 and *R.* v. *Thomas* (1837) 7 Car. & P. 817; 173 E.R. 356. Later it was recognised that juries might fail to give sufficient consideration to the necessity that the acts of provocation should be grave and weighty; that they were required to consider whether the acts relied on would have been sufficient to deprive a "reasonable man" of his power of self-control; and only if they did reach that standard should the crime be reduced from murder to manslaughter. *R.* v. *Welsh* (1869) 11 Cox 336 is usually regarded as having established this objective test.

By the time our Criminal Code Act 1893 was enacted, the principle that the provocation must be of such a nature as to be sufficient to deprive a reasonable man of the power of self-control was firmly established as part of the common law of England. Therefore, this test was incorporated into s. 165 of the Criminal Code Act 1893, and later into s. 184 of the Crimes Act 1908, save that those responsible for the legislation apparently preferred to speak of an "ordinary person" rather than of a "reasonable man". For the sake of completeness it should perhaps be added that the section made one alteration to the common law by providing that an insult without a blow could be sufficient to constitute provocation in law.

All attempts to persuade English Courts to modify the full rigour of the "reasonable man" test have failed. Thus, in *R.* v. *Lesbini* [1914] 3 K.B. 1116, the Court of Criminal Appeal refused to accept an argument that provocation should be judged on the mental ability of the prisoner rather than on the effect of the provocation on the mind of a "reasonable man". When in 1942 the House of Lords in *Mancini's* case [1942] A.C. 1; [1941] 3 All E.R. 272 expressly approved *R.* v. *Lesbini* (*supra*) that door was finally shut. Next, in *R.* v. *McCarthy* [1954] 2 Q.B. 105; [1954] 2 All E.R. 262 the contention that drunkenness which might lead a person to attack another in a manner which no reasonably sober man would do was likewise rejected by the Court of Criminal Appeal, Lord Goddard saying: "We see no distinction between a person who "by temperament is unusually excitable or pugnacious "and one who is temporarly made excitable or "pugnacious by self-induced intoxication. It may be that "an excitable, pugnacious, or intoxicated person may "be more easily provoked than a man of quiet or "phlegmatic disposition, but the former cannot rely on "his excitable state of mind if the violence used is "beyond that which a reasonable or, as we may perhaps "say, an average person would use to repel an act "which can in law be regarded as provocation. No "court has ever given, nor do we think ever can give, "a definition of what constitutes a reasonable or an "average man. That must be left to the collective good "sense of the jury and what, no doubt, would govern "their opinion would be the nature of the retaliation "used by the provoked person" (ibid., 112; 265).

Finally, and perhaps the most controversial case of all was *Bedder's* case [1954] 1 W.L.R. 1119; (1954) 2 All E.R. 801. This was the case of a sexually impotent person who killed a prostitute who jeered, hit, and kicked him when he attempted in vain to have intercourse with her. All the Lords concurred in the judgment delivered by Lord Simonds, L.C., who expressed his concurrence with what was said in *R.* v. *McCarthy* (*supra*). He rejected the argument that in considering the reaction of the hypothetical reasonable man to the acts of provocation the jury should not only place him in the circumstances in which the accused was placed, but also invest him with the personal physical peculiarities of the accused. He said: "For that "proposition I know of no authority; nor can I see any "reason in it. It would be plainly illogical not to "recognise an unusually excitable or pugnacious "temperament in the accused as a matter to be taken "into account but yet to recognise for that purpose "some unusual physical characteristic, be it impotence "or another. Moreover the proposed distinction appears "to me to ignore the fundamental fact that the temper "of a man which leads him to react in such and such "a way to provocation is, or may be itself conditioned "by some physical defect. It is too subtle a refinement "for my mind or, I think, for that of a jury to grasp that "the temper may be ignored but the physical defect "taken into account . . . It was urged on your Lordships "that the hypothetical reasonable man must be con-"fronted with all the same circumstances as the accused, "and that this could not be fairly done unless he was "also invested with the peculiar characteristics of the "accused. But this makes nonsense of the test. Its "purpose is to invite the jury to consider the act of "the accused by reference to a certain standard or "norm of conduct and with this object the 'reasonable' "or the 'average' or the 'normal' man is invoked. If "the reasonable man is then deprived in whole or in "part of his reason, or the normal man endowed with "abnormal characteristics, the test ceases to have any "value. This is precisely the consideration which led "this House in *Mancini's* case to say that an unusually "excitable or pugnacious person is not entitled to rely "on provocation which would not have led an ordinary "person to act as he did. In my opinion, then, the "Court of Criminal Appeal was right in approving the "direction given to the jury by the learned Judge and "this appeal must fail" (ibid., 1123, 803).

This last door of escape having been firmly shut, and the common law of England on the subject of the defence of provocation having been finally laid down by the House of Lords, it is not surprising that when the Royal Commission on Capital Punishment was constituted in 1949 the opportunity was taken to make representations that the present scope of legally recognised provocation should be enlarged. It was suggested that in considering whether there existed sufficient provocation the sole test should be whether the accused was in fact deprived of self-control and the jury should not be required to consider the reactions

of a "reasonable man". However, the Commission did not recommend any change in the law, expressing the opinion that the adoption of the proposal was likely to offend a fundamental principle of the criminal law that it should be based on a generally accepted standard of conduct applicable to all citizens alike; that idiosyncracies of individual temperament or mentality that might make a man more easily provoked or more violent in his response to provocation ought not therefore to affect his liability to conviction. At the same time the Commission said that it felt sympathy with the view which prompted the proposal and added that it had no doubt that if the criterion of the reasonable man was strictly applied it would be too harsh in its operation.

Following upon the presentation of the report of the Royal Commission, the Homicide Act 1957, *37 Halsbury's Statutes of England*, 2nd. ed. 172 was enacted. Section 3 of that Act reads thus:

> 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.

It will be observed that, when for the first time the common law defence of provocation was made the subject of a statutory provision, no attempt was made to introduce into the section the words which appeared in our own Acts of 1893 and 1908 and which have been omitted from s. 169 of the present Act. It was left for the common law to supply the rules and principles which had been evolved over the years as guides in determining whether the person charged was so provoked as to lose his self-control.

With this review of the history of the matter, we pass on to consider the provisions of s. 169 of our own statute. Notwithstanding the observations of their Lordships in *Bedder's* case (*supra*), to the effect that it was well-nigh impossible to invest a reasonable man with the peculiar characteristics of the accused without making nonsense of the test, it is apparent, even from a cursory examination of the new section, that those who were entrusted with the drafting and approving of the provisions of the Crimes Act 1961 have attempted that task. Therefore it is plainly the duty of this Court to endeavour to see that their efforts are not rendered unavailing notwithstanding the manifold difficulties that arise in defining what is meant by the somewhat vague words "the characteristics of the offender".

Turning to the first ground of appeal relied on by Mr Finlay it may be said at once that in our opinion there is no validity in his submission that the changed language of s. 169 has resulted in what he described as the "corner stone of the common law in relation to "provocation being dropped". But for the fact that he was able to point to the more detailed provisions of the earlier section, clearly there would have been no justification for concluding, merely as a matter of construction, that the language of the new section required the Court to hold that the common law rules for ascertaining whether an offender had acted under provocation were no longer applicable, any more than it could be said that the English section has that effect. The omission from the new section of references to "heat of passion", "sudden provocation", and "before "there has been time for his passion to cool", do not abrogate the rule always emphasised in the common law that a defence of provocation can only avail when the homicide has been committed in hot blood and while the accused is still in the throes of passion. It was said in the judgment of the Privy Council in *Attorney-General for Ceylon* v. *Perera* [1953] A.C. 200, 207 that "in the opinion of their Lordships it is quite wrong "to say that because the code does not in so many "words say that the retaliation must bear some relation "to the provocation, it is true to say that the contrary "is the case". In the same way, it cannot be said that the omission from the new section of the references to suddenness and the heat of passion means in any way that these matter have become irrelevant. The argument for the *appellant* gives insufficient weight to the fact that s. 169 provides that before murder may be reduced to manslaughter the killing must have taken place "under provocation" and while the offender has been deprived of the power of self-control. The trial Judge must instruct the jury what is meant by these words. The deprivation of self-control implies a sudden transition to a state, necessarily temporary, during which the power of self-control is absent. In the nature of things it would not be possible for the Judge to direct the jury on this topic without explaining that it is of the essence of the defence of provocation that the acts or words of the dead man have caused the accused a sudden and temporary loss of self-control, rendering him so subject to passion as to make him for the moment not master of his mind. Without some such direction the jury would be left with the impression that circumstances which merely predisposed to a violent act or caused a person to become extremely angry would be enough. Reasons may readily be suggested which would account for the omission from the new section of the references to suddenness and the like. It was said in *The Attorney-General of Ceylon* v. *Perera* (*supra*) that the word "sudden" is a relative term, and having regard to what was said by this Court in *R.* v. *Noel* [1960] N.Z.L.R. 212, on a closely related topic it may have been thought preferable to deal with provocation in general terms and so ensure that none of the common law guides for determining whether provocation had been established was elevated into a matter of law. The Solicitor-General advanced another reason. He submitted that in applying this relative term to the circumstances of any particular case it may have been thought desirable to ensure that juries might properly allow for the fact that reaction periods may vary with different persons. It is unnecessary, and perhaps undesirable, that we should

express any concluded opinion on this submission, though we would point out that if he be right caution would be called for at this point because the longer the lapse of time the greater the probability that the accused acted from feelings of vengeance and not while still suffering from a loss of self-control. But whatever the reasons may have been for the omission of the words we have referred to, we agree with the Solicitor-General that the language of the new section itself clearly recognises the importance of the time element as the offender must act while still "under provocation".

In our opinion, then, the learned trial Judge was fully entitled to tell the jury, as he did, that it was of the essence of provocation that it should cause a sudden and temporary loss of self-control rendering the accused so subject to passion as to make him for the moment not master of his mind. This being so it necessarily followed that the Judge was quite right in telling the jury that the time element was of importance. We agree that it would have been wrong if he had told the jury that as a matter of law it was necessary that the provocation should occur immediately before the killing, but contrary to the way Mr Finlay's submission was framed, the Judge said no such thing. He said: "Now the difficulty with regard to provocation in this "case, putting aside the problem of construction, seems "to me to be this: that there is no direct contact be-"tween Whiteford and McGregor immediately prior to "the shooting at all. It would be a very different case in "this connection for example, if the evidence showed "that there had been a blazing row . . . and that the "men had then started to fight and so on and insults "had been exchanged and then the shooting takes place. "But what appears to have—if one can use the ex-"pression—triggered off this crisis seems to be that "McGregor Senior had accepted an invitation to go "across to Whiteford and have a beer with him and "that because of the feud between the families, this was "bitterly resented by McGregor the accused. You will "appreciate, Mr Foreman and gentlemen, that in the "examples I have given you the retaliatory action by "the accused has always followed swiftly in point of "time upon the insult or the offensive action by the "deceased and looked at realistically and applying your "common sense as 12 practical men can you see here "anything reasonably related in time to the final "incident which could fairly be regarded as "provocation?"

In our opinion this put the matter perfectly fairly and properly.

Mr Finlay's second ground of appeal may be dealt with quite shortly. We see no reason to question the direction given by the Judge that the jury should consider whether the mode of resentment—namely the killing—bore any proper or reasonable relationship to the sort of provocation which Whiteford was said to have given to the appellant. This is in conformity with what was decided by this Court in *R.* v. *Noel* (*supra*) where it was pointed out that the notion of the relationship between the provocation and the retaliation was long ago recognised in the common law. For much the same reasons as have been referred to in dealing with the relevance of the time element, despite the omission of any express reference thereto in the section, we think the absence of any reference to the relationship of the provocative and retaliatory acts is immaterial.

This being the view we take it seems to us necessarily to follow that Mr Finlay is placed in some difficulty in supporting the appellant's third ground of appeal. The acts and words of Whiteford which are relied on as providing a basis for the defence of provocation are in no way related in point of time to the killing, and whatever meaning is to be given to the words "but "otherwise having the characteristics of the offender" it is plain that appellant though do doubt angered by Whiteford's conduct and words, did not, in the course of these unneighbourly disputes, lose his power of self-control. On each occasion he was able to restrain any temptation he may have experienced to injure Whiteford. In these circumstances we think there was no foundation for the contention that the appellant caused the death of Whiteford under provocation. In truth, what happened was that in his somewhat alcoholic condition he got matters out of perspective, quarrelled with his father, and then became very angry and emotional about past wrongs, and after an interval, went out and shot Whiteford. Unless Mr Finlay can point to some other provision in s. 169 which helps him, it would seem to us that there was no evidence of provocation to go to the jury, though we fully understand the learned Judge's reluctance in so ruling, faced as he was with a new section which had not yet been the subject of judicial interpretation. Mr Finlay endeavoured to meet this difficulty by submitting that the deeds or words referred to in s. 169 (2) could emanate from any source, and there was nothing in the section limiting them to the deeds and words of the victim. When his attention was drawn to the provisions of subs. (6) he submitted that the language of this subsection was ambiguous. We cannot agree. In our opinion the subsection makes quite plain what in any event is inherent in the use of the word "provocation", namely that the law shows a measure of indulgence to a person who kills another who has provoked him. It may well be that earlier happenings between the appellant and Whiteford could be taken into account in determining whether a subsequent comparatively trivial act of provocation on the part of Whiteford could cause slumbering fires of passion to burst into flame, but in the present case Whiteford did or said nothing to arouse the passion of the appellant and all that can really be said is that the circumstances surrounding his father's visit to Whiteford induced in him a sudden passion of anger which clearly is not enough: *R.* v. *Duffy* [1949] 1 All E.R. 932.

If we are right in the view we have expressed, that there was no evidence of provocation, then it is no longer material whether the learned trial Judge correctly instructed the jury with reference to the test they were required to apply in determining whether the evidence

was sufficient to constitute provocation and whether it did in fact deprive the appellant of the power of self-control, and thereby induced him to commit the act of homicide. But, as it is of some importance that trial Judges should know the view of this Court when it becomes necessary for them to instruct juries on the defence of provocation in murder cases, we think that as we have had the advantage of hearing a full argument from counsel, we should go on and indicate the way we interpret this very difficult section.

The earlier statutes contemplated "an ordinary "person". Now there has been appended this qualification—"an ordinary person but otherwise hav-"ing the characteristics of the offender". If the phrase "but otherwise" were construed to mean "in other "respects" then the test of the power of self-control of an ordinary person would remain unaffected. Upon this interpretation the section would constitute as provocation anything which in the circumstances of the case would have led to the loss of control of an ordinary person, being one who in other respects (i.e., other than the power of self-control) had his own personal characteristics. Such a construction would make the characteristics of the offender relevant, but not in regard to self-control; the added words would therefore have affected little, for it would still be the reaction of the ordinary person in regard to the exercise of control (which is what matters) that would govern the consideration of the matter as hitherto. This could not have been the intention of the Legislature, for the purpose of adopting the new provision must have been to give some relief from the rigidity of the purely objective test of the reactions of a reasonable man. The Legislature must be regarded as having in contemplation a person with the power of self-control of an ordinary person, but having nevertheless some personal characteristics of his own, which are proper to be taken into account, so that his reaction to provocation is to be judged on the basis whether the provocation was sufficient to bring about loss of self-control in an ordinary person who nevertheless possessed as well the special characteristics of the offender.

If the characteristics of the offender are thus to be integrated with the concept of the ordinary man, then the ordinary man test becomes displaced, at any rate in cases where the offender has attributes which can be regarded as sufficiency distinctive to constitute characteristics. No difficulty is occasioned in grasping the objective test of the "ordinary man", and in giving an appropriate direction to a jury thereon. Likewise, no difficulty would be occasioned in the comprehension of a wholly subjective test, and in directing a jury on such a test. The section, however, now requires a fusion of these two discordant notions, and this immediately gives rise to difficulties of the nature which were referred to by Lord Simonds in *Bedder's* case (*supra*). In these circumstances, in order to make the section capable of application, while preserving the ordinary man test, there must be some limitation of the term "the characteristics".

The Legislature has given no guide as to what limitations might be imposed, but perforce there must be adopted a construction which will ensure regard being had to the characteristics of the offender without wholly extinguishing the ordinary man. The offender must be presumed to possess in general the power of self-control of the ordinary man, save insofar as his power of self-control is weakened because of some particular characteristic possessed by him. It is not every trait or disposition of the offender that can be invoked to modify the concept of the ordinary man. The characteristic must be something definite and of sufficient significance to make the offender a different person from the ordinary run of mankind, and have also a sufficient degree of permanence to warrant its being regarded as something constituting part of the individual's character or personality. A disposition to be unduly suspicious or to lose one's temper readily will not suffice, nor will a temporary or transitory state of mind such as a mood of depression, excitability, or irascibility. These matters are either not of sufficient significance or not of sufficient permanency to be regarded as "characteristics" which would enable the offender to be distinguished from the ordinary man. The "unusually excitable or pugnacious individual" spoken of in *R.* v. *Lesbini* (*supra*) is no more entitled to special consideration under the new section than he was when that case was decided. Still less can a self-induced transitory state be relied upon, as where it arises from the consumption of liquor. The word "characteristics" in the context of this section is wide enough to apply not only to physical qualities but also to mental qualities and such more indeterminate attributes as colour, race, and creed. It is to be emphasised that of whatever nature the characteristic may be, it must be such that it can fairly be said that the offender is thereby marked off or distinguished from the ordinary man of the community. Moreover, it is to be equally emphasised that there must be some real connection between the nature of the provocation and the particular characteristic of the offender by which it is sought to modify the ordinary man test. The words or conduct must have been exclusively or particularly provocative to the individual because, and only because, of the characteristic. In short, there must be some direct connection between the provocative words or conduct and the characteristic sought to be invoked as warranting some departure from the ordinary man test. Such a connection may be seen readily enough where the offender possesses some unusual physical peculiarity. Though he might in all other respects be an ordinary man, provocative words alluding for example to some infirmity or deformity from which he was suffering might well bring about a loss of self-control. So too, if the colour, race, or creed of the offender be relied on as constituting a characteristic, it is to be repeated that the provocative words or conduct must be related to the particular characteristic relied upon. Thus, it would not be sufficient, for instance, for the offender to claim merely that he belongs to an

excitable race, or that members of his nationality are accustomed to resort readily to the use of some lethal weapon. Here again the provocative act or words require to be directed at the particular characteristic before it can be relied upon.

Special difficulties, however, arise when it becomes necessary to consider what purely mental peculiarities may be allowed as characteristics. In our opinion it is not enough to constitute a characteristic that the offender should merely in some general way be mentally deficient or weak-minded. To allow this to be said would, as we have earlier indicated, deny any real operation to the reference made in the section to the ordinary man, and it would, moreover, go far towards the admission of a defence of diminished responsibility without any statutory authority in this country to sanction it. There must be something more, such as provocative words or acts directed to a particular phobia from which the offender suffers. Beyond that we do not think it is advisable that we should attempt to go.

We have necessarily been obliged to speak on this matter in somewhat general terms in the hope that what has been said may afford some guidance to trial Judges in the application of this section. Although we have referred to a number of the more obvious matters that may or may not be regarded as characteristics, it is manifestly impossible to attempt to be exhaustive, and though it may be said that generally the characteristic must be such as substantially to make him different from the ordinary man and to impair his power of self-control when provoked, cases will no doubt arise where the particular circumstances may give rise to further problems in the application of the section. So far as the present case is concerned none of the matters relied upon by Mr Finlay could be regarded as characteristics which under the section were to be engrafted upon "the ordinary man", and nothing that was said by the learned trial Judge to the jury in dealing for the the first time, as he was required to do, with the new section, really conflicts with the views we have expressed.

One further matter, quite divorced from the topic we have been discussing, was referred to by Mr Finlay. In his submission the Judge should have interpreted s. 169 (2) (b) to mean that the acts or words of provocation could only be looked at for the purpose of considering whether they might, and did, deprive the accused of self-control but not whether they induced him to commit homicide. He submitted that this interpretation was required because of the use of the word "thereby". We cannot agree. The subsection commences with the word "It" which relates to things done or said which are claimed to have amounted to provocation. Clearly the word "deprive" relates back to the provocation and, that being so, it seems to us to follow that the provocation having deprived the offender of the power of self-control must also have been the inducing factor causing the offender to commit the act of homicide.

For the reasons we have given the appeal is dismissed.

Appeal dismissed.

Solicitors for the appellant: *Finlay, Shieff, and Angland* (Auckland).

Solicitor for the respondent: *Crown Solicitor* (Auckland).

(New Zealand Law Reports 1962, page 979*)*

Court of Appeal, Wellington. 13 April, 25 May 1962. Gresson, P.; North, J.; Cleary, J.

THE QUEEN v. WILSON

Criminal Law—Police Offences—"Suspected Person"—Whether Limited to Persons Suspected by Reason of Dishonest Behaviour and Intending to Commit Crime of Dishonesty—Whether Extending to Crimes of Indecency—"Frequenting With Intent"—Whether Necessary That Intent was to Commit Crime in Place Frequented—Police Offences Act 1927, s. 52 (1) (j).

In New Zealand a person frequenting a place with intent to commit a crime of indecency can, if his record or known character shows him to be a person addicted to offences against decency, be classed as a suspected person for the purposes of s. 52 (1) (j) of the Police Offences Act 1927.

Ledwith v. *Roberts* [1937] 1 K.B. 232; [1936] 3 All E.R. 570 and *Ex parte King, Re Blackley* (1938) 38 S.R. (N.S.W.) 483 distinguished.

It is not necessary in order to support a conviction against s. 52 (1) (j) to show that the accused's intent was to commit a crime in the place frequented.

R. v. *Brown* (1852) 17 Q.B. 833; 117 E.R. 1500 and *In re Jones* (1852) 7 Exch. 586; 155 E.R. 1082 referred to.

Devon v. *Police* [1961] N.Z.L.R. 261 over-ruled.

So held by the Court of Appeal (Gresson, P., North, and Cleary, JJ.) dismissing the appellant's appeal against conviction.

CASE STATED for the opinion of the Court of Appeal submitting the following question:

Can an intention to commit an indecent assault on a male constitute a felonious intent within the meaning of s. 52 (1) (j) of the Police Offences Act 1927?

and appeal against conviction on a charge of being deemed to be a rogue and vagabond in that the appellant frequented a public place with felonious intent. The intent alleged was to commit an indecent assault on a male.

M. Robinson, for the appellant: A suspected person must be a person suspected of crimes of dishonesty or dishonesty and violence.

Section 52 (1) (j) of the Police Offences Act 1927 has not altered since the original enactment—s. 4 (12) of the Vagrancy Act 1866: *10 Halsbury's Laws of England,* 3rd ed. 700. [Deals with the corresponding New South Wales section s. 4 (2) (i) of the Vagrancy Act 1902—"being a suspected person or reputed thief".]

The history of the Vagrancy Act is set out in *Ledwith* v. *Roberts* [1937] 1 K.B. 232, 261, 275; [1936] 3 All E.R. 570, 586, 596; *Ex parte King, Re Blackley* (1938) 38 S.R. (N.S.W.) 483, followed in New Zealand in