PROVOCATION AND THE LESSER OFFENCES

R. v. Laga [1969] N.Z.L.R. 417

The ruling of Woodhouse J. in *R.* v. *Laga* [1969] N.Z.L.R. 417 reveals a profound disagreement in New Zealand over the question of whether or not provocation is available as a defence to a person charged with attempted murder. Aligning himself with the traditional approach, the learned judge held that provocation could not be considered by a jury in any crime other than murder. A judge may and should consider such evidence in determining sentence. Taking a strikingly different view in *R.* v. *Smith* [1964] N.Z.L.R. 834 and again in *R.* v. *McKee*,[1] Wilson J. directed the jury to take provocation into account for the purposes of conviction of attempted murder, but to ignore it in connection with the alternative lesser counts. Clearly, there is a divergence of opinion which merits examination.

No facts are given in the report of *Laga's* case, but it is noted in the course of the ruling that, had the charge been one of murder, there was evidence that would have enabled the jury to decide that the act of the accused was done under provocation within the meaning of section 169 of the Crimes Act 1961. Counsel for the accused contended that the issue should be put to the jury for the broad reason that provocation, where it does operate, negatives the intention of the accused, and this must be the case whether the victim dies or not; a simple plea of lack of *mens rea*. This submission was based on the dictum of Viscount Simon in *Holmes* v. *D.P.P.* [1946] A.C. 588 where he asserted at 598 that:

> the whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill, is negatived.

Reliance was also placed on two decisions of the Supreme Court of Victoria, *R.* v. *Newman* [1948] V.L.R. 61 and *R.* v. *Spartels* [1953] V.L.R. 194, which, accepting as they do that Viscount Simon accurately stated the law, conclude that provocation must therefore be available to a person charged with wounding with intent to kill. This may on rare occasions be true as a question of fact, but as Woodhouse J. points out, that conclusion can no longer be accepted in the light of the Privy Council decision in *A.G. for Ceylon* v. *Perera* [1953] A.C. 200. Lord Goddard there says at 206 that

> The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation.

This point was accepted by the Supreme Court of Victoria itself in *R.* v. *Falla* [1964] V.R. 78, another decision concerning wounding with

1. Unreported: summing-up delivered 23 July 1968.

intent to kill. His Honour thus concluded that this argument for the accused must be rejected.

It is submitted with respect that this conclusion is unexceptionable, but that it leaves a significant part of the problem unexplored; that is, the question whether provocation may be pleaded to reduce a charge of attempted murder to some lesser offence notwithstanding that intention has been established. This is somewhat surprising in that *R.* v. *Smith* [1964] N.Z.L.R. 834 was relied upon by counsel, and there, it is at least implicit that Wilson J. at page 834 has considered this aspect.

> The accused is charged with attempting to murder Mrs. Smith. If, then, the evidence establishes that he intended to kill her by unlawful means, but, in the circumstances, that killing (if carried out) would not have been murder but would have been manslaughter, then he cannot in law be guilty of attempted murder. He would be guilty of some other offence, no doubt, but not the offence with which he is charged. . . .

The passage bears repetition in full because it summarises the approach to the interpretation of the Crimes Act 1961 which Wilson J. has adopted. Broadly, he treats attempted murder as a composite offence, nowhere separately defined as a substantive offence in the Act itself.[2] One must therefore look first to the sections of the Act which define murder, and subsequently apply the section relating to attempts. Section 169[3] cannot for these purposes be ignored, notwithstanding that it is phrased in the negative. In dealing with the statute in *Laga's* case, Woodhouse J. states at page 418 "as a matter of construction I think it impossible to extend by implication the plain words of section 169 (1). The subsection refers to murder alone." This suggests both that provocation cannot be pleaded unless the victim dies, and that the plea is not available because there is no reference to attempted murder as such. With respect, if there is any extension of the section at all, it is not so much by implication but by the operation of section 72, which would render any reference to the attempt in section 169 (1) redundant. The first inquiry must logically be directed towards ascertaining what is, or is not murder, and this is so whether the victim dies or not. In effect then, the approach in *Smith's* case depends on the significance which Wilson J. attaches to the word "murder". He makes this point in *R.* v. *McKee* (supra n. 1) in which he directed the jury:

> If you are satisfied that a person having ordinary self-control would have been overcome with a sudden passion and stabbed Mrs. Thomas as he did, then of course, had she died, it would not have been murder, it would have been manslaughter and you may not find him guilty of attempted murder because what he attempted was not murder at all.

2. The only reference to attempted murder in the Act is contained in s. 173 which merely prescribes the maximum penalty.
3. Section 169 states that "Culpable homicide that would otherwise be murder may be reduced to manslaughter if the person who caused the death did so under provocation".

Although this precise point has apparently never been considered in England, there has been a reluctance to extend the operation of the doctrine of provocation to any of the lesser offences, and there are at least two cases in which there are dicta to this effect.[4] As is pointed out in *Laga's* case, it is not necessary that the mitigating effects should be extended beyond murder for the purposes of conviction, because none of the lesser offences carry the "fixed and inevitable" penalty as in the case of murder. If the "fixed and inevitable" criterion is to be abandoned, there is no reason why the mitigating effects should not be extended indefinitely through the whole range of lesser offences. This would be undesirable, although not perhaps as serious as is sometimes thought, since "on sentence for a lesser crime . . . provocation of the type outlined in s. 169 would always be considered carefully by the judge".[5] If the approach of Wilson J. were to be adopted generally, the doctrine need be extended no further than attempted murder. True, that interpretation does ignore the historical rationale of the doctrine, but that has itself lost some of its weight since the abolition of the death penalty, the "fixed and inevitable" penalty around which the doctrine was originally formulated.[6] Perhaps the strongest argument which can be advanced in support of the approach is its logical consistency; it is extremely difficult to see how a person can be convicted of an attempt to commit a specific crime when he would not be guilty of the full crime even if he had accomplished everything which he had set out to do.

One of the most frequently mooted objections to this point of view is that, whereas in the context of murder, it is clear that the lesser alternative offence is always manslaughter, the alternative to attempted murder may be any one of a number of lesser offences. Counsel for the defence in *Laga's* case argued that the accused could still be convicted under section 188,[7] the most serious of the lesser counts.[8] However, as the learned judge points out at page 418, "that argument could have no application in the case of a deliberate attempt to kill where the victim escaped physical injury entirely, as for example with the use of a firearm", and the submission was rejected. What is significant about this is not so much that the accused will escape a conviction entirely (as the learned judge seems to suggest), but that the range of discretion in considering sentence is thereby curtailed. Even in the situation in the passage just quoted, the accused could still

4. See *Holmes* v. *D.P.P.* [1946] A.C. 588 and *R.* v. *Cunningham* [1959] 1 Q.B. 288.
5. *R.* v. *Laga* [1969] N.Z.L.R. 417 at 417.
6. This is by no means to suggest that the rationale no longer has any force at all, or to deny the importance of the fact that the person convicted of murder is still liable to a mandatory sentence of life imprisonment. It is significant, however, that the normal "life sentence" in New Zealand is in fact an average of only 12 years. See *Crime in New Zealand*, the Justice Department, (1968), p. 25.
7. Wounding with intent to cause grievous bodily harm.
8. In fact, the sentence for wounding with intent to cause grievous bodily harm is the same as that for attempted murder: fourteen years.

be convicted of an offence against section 198,[9] or even attempted wounding. In the latter case, the penalty to which a convicted person is liable is half of the maximum penalty to which he would have been liable had he committed the full offence.[10] For this reason alone, it is important that the matter be resolved.[11]

There are other difficulties which militate against the acceptance of Wilson J.'s point of view. The learned author of Adams *Criminal Law and Practice in New Zealand* Supp. (1966), 42-43 considers that section 169 can apply only where the victim dies since the section refers only to "culpable homicide" which "consists in the killing of any person". Arguing from the standpoint adopted in *Smith's* case, it could be pointed out that both sections 168 and 169 also refer only to "culpable homicide", and there can be little doubt that it is to them that reference must be made in determining what constitutes murder for the purposes of attempted murder. Be that as it may, it would appear that there is a blanket prohibition against extending the operation of provocation beyond murder, and the presumption that a statute does not alter the common law unless it evinces a clear intention to do so is relevant in this context, and weighs heavily in favour of the more liberal approach.[12]

Whatever the correct position may be, the whole question is one which merits consideration by the Court of Appeal at the earliest possible opportunity. At the conclusion of his direction in *Smith's* case at page 837 Wilson J. told the jury:

> I have spent a long time on this aspect because it is difficult and I have done that notwithstanding that it was not raised by the accused's counsel, not because I think he should have raised it, but because it is my duty to point out to you any possible defence which may even be remotely open on the evidence.

The present conflict must make that duty a particularly difficult one.

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9. Discharging firearm or doing dangerous act with intent, which also carries a maximum penalty of 14 years.
10. Section 311 has this effect.
11. For a fuller examination of the practical difficulties, see Brown "Murderous Intent and the Lesser Offences", [1965] N.Z.L.J. 537. See also the problem in the light of s. 20 which deals with matters of common law, justification and excuse. M. J. Trebilcock, "Scope of the Defence of Provocation in New Zealand Law", [1963] N.Z.L.J. 619.
12. e.g. *Leach* v. *R.* [1912] A.C. 305.