

16th Annual National Prosecutors' Conference
10 October 2015, Dublin Castle Conference Centre

Provocation; still a graveyard for trial Judges¹

Brendan Grehan SC, Law Library

Introduction

1. A series of recent appellate decisions overturning murder convictions have once again underlined provocation's pole position as the greatest pitfall for judges directing juries in murder trials. The Court of Appeal has even gone so far in one judgment as to suggest that when it arises, a trial judge might be wise to run what they intend to say to the jury past the lawyers first. While the focus of the recent case law has been in the main on the defence's interrelationship with intent, one recent judgment, delivered by Supreme Court Judge, Mr Justice Donal O'Donnell sitting in the Court of Criminal Appeal is critical if not doubtful of the continued legitimacy of the entire defence itself as now conceived in this jurisdiction. It is this judgment which will be addressed first providing as it does a critical analysis of the current state of the law here and a legitimate view that the time for its reform is long overdue. Given that the defence is an entirely judicial creation, the Supreme Court could, if the opportunity were to arise restate the nature and parameters of this common law defence. That would be something entirely different from creating law. But even if it were to decide that it could not do so, it might just spur our legislators into action.

Should it be a Defence at all?

2. In a 2011 decision entitled *The People (DPP) v. David Curran*, O'Donnell J as a prelude to his criticism of the defence reviewed provocation's genesis in the following terms:-

*"Provocation is unusual in that it operates only to reduce murder to manslaughter. In any other offence matters alleged to amount to provocation operate only as an element going to sentence. The roots of the defence lie therefore in the history of the mandatory death penalty and as a consequence, a desire to distinguish between different homicides. One such homicide was where the victim had in some sense provoked the fatal attack. The historical origins of the defence are important. As Lord Hoffman put it in the House of Lords decision in *R. v. Smith (Morgan)* [2001] 1 A.C. 146, at p. 159, the doctrine:-*

¹ Paper by Brendan Grehan SC, research by Seoirse Ó Dúnláing BL.

*"... comes from a world of Restoration gallantry in which gentlemen habitually carried lethal weapons, acted in accordance with a code of honour which required insult to be personally avenged by instant angry retaliation ... (t)o show anger 'in hot blood' for a proper reason ... was not merely permissible but the badge of a man of honour."*²

3. Gradually a number of boundaries grew to circumscribe the partial defence. In the 17th and 18th centuries the common law witnessed the emergence of four distinct categories of provocation as the earlier cases relied on individual Judges establishing what counted as sufficient provocation by alluding to well established categories of untoward conduct³:-

- i) A grossly insulting assault;
- ii) Seeing a friend attacked;
- iii) Seeing an Englishman unlawfully deprived of liberty;
- iv) Catching someone in the act of adultery with one's wife.⁴

The law thereafter evolved in England to become somewhat more principled based with a predominantly objective or reasonable man test to be applied⁵ whereas in Ireland, subjectivity has reigned supreme from its initial declaration by the Court of Criminal Appeal in the *MacEoin* case in 1978⁶.

O'Donnell J. opined that it was increasingly clear to him that the move to *"a wholly subjective approach in relation to the defence of provocation was, unless carefully defined and applied, particularly capable of creating a dangerously loose formulation liable to extend the law's indulgence to conduct that should deserve censure rather than excuse"*⁷.

4. On the 29th July 2015 the Court of Criminal Appeal delivered judgment in *The People (DPP) v. Kieran Lynch*⁸ and O'Donnell J who was again presiding returned to his earlier criticism with even more gusto. He was typically direct and forthright in his analysis of the defence and the problems it has raised:-

"Provocation is a notoriously difficult concept, and its continued place in the criminal law has been doubted. See for example, The People (Director of Public Prosecutions) v.

² *The People (DPP) v. Curran* [2011]3 IR 785, at p. 792.

³ *R v. Mawridge* (1706) Kel 119.

⁴ In *R v. Fisher* (1837) 8 Car & P 182 it was held that the defence might be available to a father who had witnessed his son being sodomised and this would fall within an extension of this 4th category.

⁵ *R v. Welsh* (1869) 11 Cox 336; *R v. Duffy* [1949] 1 All ER 932; *R v. Bedder* [1954] 2 All ER 801

R v. Camplin [1978] 1 All ER 1236; s.3 Homicide Act, 1957.

⁶ *The People (DPP) v. MacEoin* [1978] IR 27.

⁷ *The People (DPP) v. Curran* [2011]3 IR 785, at p. 796.

⁸ *The People (DPP) v. Kieran Lynch* [2015] IECCA 6.

*Curran [2011] 3 I.R. 785 ("Curran"). Furthermore, the fact that Irish law treats the test as entirely subjective, and one moreover which must be negated by the prosecution once the point is raised, makes the analysis of a defence of provocation particularly difficult for a jury. It may be possible to make a verbal and conceptual distinction between a murderous rage (which is not provocation) and an instantaneous and complete loss of control (which might be) but it appears more difficult to distinguish them in fact, particularly to a point beyond a reasonable doubt."*⁹

5. Having questioned its continued role in the modern criminal law, he went on to highlight how the various difficulties previously identified by the Court of Criminal Appeal, the Law Reform Commission and learned academic authors, McAuley and McCutcheon¹⁰ had effectively been ignored by the Legislature. While he was at pains to stress that the judgment in *Lynch* could only address the law as it stood in relation to the defence of provocation, it was clear what the views of the Court were:-

"It is dispiriting to observe that the difficulties in the Irish law related to provocation have been identified on a number of occasions since at least the decisionin Davis without legislative response...It may not be sufficiently appreciated just how significant these difficulties are. Because of the single sanction on conviction for murder, historically the death penalty, now a life sentence, accused persons had little incentive to plead guilty and raise matters in mitigation since it could result in no reduction of sentence. The single sanction also gave rise to defences peculiar to the law relating to murder which had the effect of reducing murder to manslaughter, such as excessive force, self-defence, and provocation, and which appear in one way designed to address, at an earlier point in the process, an instinctive desire to distinguish between different types of homicide.

Once it is appreciated that a defence of provocation can be raised with little more than a statement as to loss of control (or indeed evidence suggesting it) and that then the prosecution must prove beyond a reasonable doubt, that the accused was not acting under provocation, and furthermore that this is a subjective test, then the point is reached where the defence of provocation becomes potentially available in almost any hot-blooded killing. But at its heart, provocation is, as the Law Reform Commission has observed, a defence of only partial excuse. It expresses a societal view that some conduct, if not fully excusable, is in some sense at least partially understandable so as to reduce, but not wholly remove, the culpability of the accused. That judgment was, as a matter of history, necessarily related to the conduct of the victim. But if provocation as a defence to murder is taken to its logical extreme, then it may however be employed in respect of conduct which society might find deeply offensive, and indeed truly inexcusable. It also adds insult to injury for a family of a victim if a successful raising of provocation suggests

⁹ Ibid, at p.7.

¹⁰ McCauley & McCutcheon, Criminal Liability.

that somehow he or she is to blame for their own death, when in truth the verdict may only mean that a jury was not satisfied beyond reasonable doubt that the accused had not responded completely inappropriately but genuinely to something, perhaps anything, emanating from the accused.

If it is society's judgment that murder should be reserved for only those killings which can be described as deliberate, cold and calculating, and that manslaughter or some similar crime is an appropriate label for all other killings even if carried out intentionally, then that should be made clear by appropriate legislative decision and without the fiction that the victim's conduct was somehow relevant, responsible or indeed culpable. On the other hand, if as most countries have judged, the intentional killing of another person, even if the intention is formed almost instantaneously, is a matter which is properly defined as murder then the breadth of the defence of provocation should be addressed, analysed and defined in such a way as to capture those cases where it is considered a lesser verdict is or may be appropriate. These are matters for broader debate, and if thought appropriate, reform. For the moment however, this Court must deal with the law as it stands..."¹¹

6. It would appear that the judgment is also critical of what many see as an element of double counting for an accused who succeeds in a defence of provocation. Not only is there the acquittal of murder on the back of transferring the blame for one's actions onto the victim but also because it was really the victim's fault all along, a greatly discounted sentence usually ensues for the resulting manslaughter verdict. Perhaps the inherent unfairness which results could be dealt with more appropriately if instead of the murder/manslaughter divide, we had graduated verdicts such as Murder 1, 2 or 3 with matching graduated sentences. This is clearly a matter that would require the intervention of the Legislature.
7. In his charge to the jury in that case, the late great Mr Justice Paul Carney, the most experienced and eminent trial Judge that this country has ever had, told the jury that provocation was a '*graveyard for Judges*'. Words based on hard experience but also strangely still prophetic to this day despite or maybe because of the growing corpus of jurisprudence on the issue. Directing juries on the law relating to provocation is a complicated process for the trial judge and it is littered with pitfalls. As it is currently understood, it requires some subtlety, insight and probably in addition a good deal of foresight as well in order to render the direction on the subject appeal proof.
8. The assistance of counsel on both sides (as is their duty) can be of undoubted benefit in achieving this end and perhaps trial Judges have in the past not always make the best use of this resource. Prosecution counsel in particular have an onerous responsibility in

¹¹ Ibid, at p.16.

this context. Indeed this was illustrated in *Lynch* where it was the concerns of prosecution counsel at trial that the jury be properly charged on provocation that featured in the appeal¹². It is clear that a failure by the defence to make requisitions in respect of a defective charge does not necessarily mean that the prosecution will always be able to rely on *Cronin*¹³ in each and every case to defeat subsequent arguments raised in an appeal.

9. While some judges such as O'Donnell J (and Hardiman J in *Davis*) have used their judgments to voice criticism of the defence, others have chosen not to comment beyond the issue before the Court. In *The People (DPP) v. Hussain*¹⁴, the applicant was convicted of murder having suggested that the deceased and his estranged wife were having an affair and as a result of this he lost self control. He was also charged with causing serious harm to his estranged wife. During the course of his charge, the trial Judge directed the jury along the lines of an objective standard at a number of junctures before concluding in his initial charge that *'if the prosecution has proved to your satisfaction beyond a reasonable doubt that the force used was unreasonable and excessive, having regard to the provocation, then the defence of provocation fails.'*¹⁵ Although he later sought to correct this misstatement at a number of points, the Court of Criminal Appeal in its judgment delivered on the 28th of July, 2014 felt that this did not remedy the initial problem and directed a retrial, Clarke J. stating that:-

"As already noted there is no doubt but that the initial charge by the trial judge to the jury mis-stated the law on provocation insofar as the charge told the jury that the test was what a reasonable man would do in response to the provocation in question. The Court is not persuaded that the recharge remedied the problem which arose from that charge. As already noted the trial judge used the phrase "would consider reasonable" when referring to the approach which the jury should adopt in assessing Mr. Hussain's actions. Given the earlier statement on this issue by the trial judge in his charge to the jury, the continued use of the term "reasonable" (even though, on this occasion, referring to what Mr. Hussain might have considered reasonable rather than what an objective third party might have so considered) left a real risk that the jury would not have properly understood the true legal position. That such was the case is, perhaps, emphasised by the fact that the foreman returned to the issue in the question to the trial judge to which reference has already been made.

¹² This approach of the prosecution is for good reason. Prosecutions must be conducted in accordance with utmost fairness and is the duty of prosecution counsel to ensure the correct law is given to and applied by the jury. Failure to do so may also mean prosecution counsel and solicitor may find themselves before the Court of Appeal arguing over and seeking to stand over charges and directions, in which there clearly were defects, which were left unchallenged and could have been rectified at first instance.

¹³ *The People (DPP) v. Cronin* [2003] 3 IR 377.

¹⁴ *The People (DPP) v. Hussain* [2014] IECCA 26.

¹⁵ *Ibid*, at page 5.

In the answer given by the trial judge to the foreman's question, it is stated that proportionality is a matter for the mind of the accused man rather than the mind of a juror. But, in the Court's view, this answer does not go far enough in making it clear that the question is not even as to what the accused might have considered proportionate but rather whether the accused in fact suffered a total loss of control. The lack of clarity on this point is particularly important in the light of the previous confusion about the issue.

*The Court is, therefore, left with a very real concern that the initial misdirection to the jury was not adequately corrected by either or both of the recharges and the answer to the foreman's question.*¹⁶

10. Clarke J. expressed no view on the test itself and did not address the criticism contained in the Law Reform Commission Report or the *obiter* comments of Hardiman J, in the earlier *Davis* case. Rather Clarke J. reaffirmed the position as understood post *MacEoin* and *Kelly*¹⁷, holding that there was no dispute before him but that the legal position was that the test was a subjective one.
11. One of O'Donnell J's concern in the more recent *Lynch* decision stemmed from his assertion that the defence can be raised with little more than a statement asserting loss of control (or evidence suggesting it) although *Davis* had suggested that the threshold for a Judge to permit the defence was not quite so low. He also appears critical of the fact that the prosecution has to negate the defence once it is raised, as well as the subjective nature of the test. Because of these factors, he suggests that it means that the defence of provocation is potentially available in almost any hot blooded killing. In addition for the reasons identified in *Davis*, it would be possible to raise provocation out of conduct that society might find deeply offensive or inexcusable.
12. The reality is that there is a low evidential threshold required to raise the defence and given the jurisprudence, it is a brave judge or prosecutor that would go against it if any evidence at all exists no matter how tenuous. It could be argued that there should not be any threshold and the very act of a Judge stating that he or she is permitting it to go to the jury is giving the defence a status that is not merited. Why should it not be like any other defence where you do not require a trial judge's permission to raise it? If it is untenable a jury will see through it. Perhaps it would be better to have an issues discussion before closing speeches so that it is clear what defences are being contended for by the defence who effectively can elect what it is they intend to rely upon or not. As regards defences, surely anything suggested by the general evidence should be possible and permissible. Arguably otherwise, there is a discrimination against the less articulate or less well advised accused who does not have the wit or guile to pop out the magic formula "I lost control" or some such formulation of words when interviewed by the

¹⁶ *Ibid*, at page 8.

¹⁷ *The People (DPP) v. Kelly* [2000] 2 IR 1.

Gardaí. Fanciful suggestions of provocation by counsel will not be enough and if the defence does not engage with the evidence in the case, a jury is very unlikely to pay any heed to such an argument.

A Subjective Defence

13. In terms of the test to be applied there is no dispute now as to what the law on provocation is here. Arguably we have the most liberal interpretation of the defence in the common law world. Its subjective nature here was first identified in *MacEoin* albeit in somewhat contradictory language. The confusion that resulted from the references to objective tests and proportionality was subsequently cleared up and the defence is now the subject of a model direction contained in the judgment of Barrington J in *Kelly*¹⁸. This direction is relied on by most Central Criminal Court judges and is considered bulletproof provided you do not stray from the path proscribed. The problems usually arise when other issues also arise in the trial which they almost invariably do. It is not unusual (but perhaps a little unwise) for every conceivable defence to be relied on by an accused in the same trial. There certainly have been instances in recent years where provocation, diminished responsibility, self defence-full and partial as well as lack of intent have all been run simultaneously. But as in other areas of life, putting forward many diverse, disparate and mutually incompatible explanations for one's conduct is likely to result in all being rejected by the jury. Nonetheless, the trial judge has to issue detailed directions on all points raised without diminishing any. While multiple defences being run at the same time may not be common, the question of intent or self defence will often feature alongside provocation. The recent decisions of the Court of Appeal deal in particular with the confusion that can arise when the defence of provocation becomes confused with the directions to be given on the *mens rea* or intent for murder.

Intention versus Provocation

14. Juries are informed at length by all parties in any murder trial of the provisions of section 4 of the Criminal Justice Act, 1964. Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury, whether the person actually killed or not. A jury, once they have found that the prosecution have proved to the requisite standard that the accused person killed the deceased unlawfully, then has to address their minds to whether the prosecution have similarly established that the accused intended to kill or cause serious injury. So far so good.

15. However confusion can arise if the defence have raised provocation resulting in a total loss of self control as a defence, something that sound like the opposite of intent. Does

¹⁸ *The People (DPP) v. Kelly* [2000] 2 IR 1.

it mean that if the prosecution have established necessary intent, then provocation as a 'defence' has failed?

16. While *MacEoin* is the authority for the creation of the subjective test here, the issue at appeal in that case was a direction given to the jury that in order for provocation to succeed as a defence, it must have been such as to render the accused incapable of forming an intention to kill or cause serious injury which direction was held to be wrong¹⁹. Despite this, the relationship between intent as a proof and the defence of provocation has been a reason for many appeals since. *The People (Director of Public Prosecutions) v. Bambrick*²⁰ confirmed the position that these two issues were separate concepts. A person who successfully raised the defence of provocation had, *ex hypothesi*, the requisite intent to commit murder as was pointed out by O'Donnell J in *Curran* in 2011.
17. In *The People (DPP) v. Lynch*²¹, O'Donnell J., as noted above, took the opportunity to voice his criticism of the defence of provocation in general, following on from his comments in *Curran*. The principal issue in *Lynch* concerned a series of questions asked by the foreman of the jury to the Judge on whether the state had to prove intent or lack of provocation 'or both'. Lynch was an alcoholic who was brought to hospital after nearly drowning. Against medical advice he discharged himself and on his return home he began heavily drinking with his partner, who was similarly an alcoholic. When his partner was found dead in her bed, the accused denied any involvement but later admitted to Gardaí that he had beaten her with the leg of a chair after a drunken and physical argument in which he said he lost his temper. Following a question from the foreman of the jury on whether they could 'bring in a verdict with proof of intent without the disproof of provocation', the Trial Judge informed the jury that the defence were arguing that the correct verdict should be one of manslaughter for two reasons: 'one provocation. And secondly they say statutory intent has not been proved'. The Judge outlined the presumption created in Section 4 (2) of the Criminal Law Act, 1964 and indicated that while there may be circumstances in which the presumption could be rebutted, 'for the life of me, I can't think of any.' He went on to tell the jury they could bring in a verdict with proof of intent alone.
18. There then followed an exchange between the trial Judge and counsel for the prosecution who was concerned that the jury should have been informed that a person can intend to kill or cause serious injury yet still can rely on provocation as a limited defence. Provocation was a distinct issue to that of intention and does not involve the rebutting intention. The trial Judge took the view that the jury was not minded towards

¹⁹ It could be argued that the creation of the subjective test in *MacEoin* was therefore *obiter*.

²⁰ *The People (Director of Public Prosecutions) v. Bambrick* [1999] 2 ILRM 71.

²¹ *Op Cit*.

provocation and indicated as much. After some discussion he informed the jury that an accused can have an intention to kill or cause serious injury but still rely on the defence of provocation. However there then occurred a further exchange:-

“Foremen: So we need both to get — to bring in a verdict?”

Judge: No. One or the other.

Foreman: One or the other?

Judge: Yes. Do you want to retire again?

Foreman: Please. For a short while.

Judge: One or the other. Or you could have both.

Foreman: One or the other. Or both.

Judge: Or both.”

19. In quashing the verdict O'Donnell J observed:-

"Even taking this at its lowest point, there is an inescapable possibility that the jury were asking about whether they needed both (proof beyond reasonable doubt of intention to kill or cause serious injury, and disproof of provocation) before returning a verdict of guilty on the murder charge. If this was on their minds, then the response made by the judge was unintentionally but clearly incorrect. There is therefore, at a minimum, an inescapable possibility that the jury were and remained confused as to a central feature of this case."

20. *The People (DPP) v. Cahoon*²², was a judgment delivered by the Court of Appeal on the 4th of March, 2015. The accused had been in a relationship with the deceased. At trial he testified that during an angry exchange with her, she said some words which provoked him following which he 'lost it' and grabbed her by the throat.

21. Following an exchange with counsel for the accused, where counsel argued that the jury should be told that they must first be satisfied that intent was present before going on to consider provocation, the trial Judge then informed the jury:-

"As I said to you, ladies and gentlemen, the position is one whereby the State have to if they're to secure a conviction for murder, they must establish (1) an unlawful killing and then they must upgrade, if I might use that expression, manslaughter from that level of an unlawful killing, to murder by showing that the accused man intended to kill or to cause serious injury. So, that is the position and if you're satisfied, ladies and gentlemen, that that is the position, that there wasn't that in the normal course of events, what happened was such that there would have been an intention to kill or cause serious injury, but having regard to provocation or loss of self control, no such intent was there,

²² *The People (DPP) v. Cahoon* [2015] IECA 45

because what provocation presupposes is that you don't have a rationalising mind. You're somebody who doesn't know what he's doing, doesn't realise what he's doing, he's just completely out of control. He's not master of his own mind at the time the events happen. And, as I say, it's for the State to negative that and the State say to you that they have negated it when you look to the entirety of the events and the circumstances of what happened."

22. Ryan P. noted that there was no error with the trial Judge's initial charge but that these further comments to the jury wrongly linked the two issues by stating that provocation prevented a person from forming the necessary murderous intent. Ryan P. felt that taken as a whole the charge was in error and the Court of Appeal quashed the conviction, ordering a retrial. Ryan P. said:-

"Provocation consists of a sudden, temporary and complete loss of control such that the person is not "master of his mind." The appellant in this case emphasises the distinction between the formation or existence of murderous intent and the issue of provocation. The point he makes is that the absence of an intention to kill or cause serious injury defeats a charge of murder and leaves only manslaughter. But there can be an intention, which would or could be inferred from the conduct of the accused by way of inference, that a person intends the natural and probable consequences of his actions or it could be that the person, in the view of the jury, had express as opposed to implied murderous intent. Such a mental state is not incompatible with provocation. If the intention is absent for whatever reason, the case is not one of murder but of manslaughter. But provocation arises as an issue when the case would otherwise be murder, that is, in the presence of intention to kill or cause serious injury whether deduced by way of inference from actions or found to have existed in some more express manner."

23. *The People (DPP) v. Zhao Zhen Dong*²³, another decision of the Court of Appeal delivered on the 26th of June, 2015 similarly concerned the confusion between intent and provocation. An argument ensued in a shop between the accused and the deceased over payment for a phone call. The deceased left the premises and ended up on the ground outside. While on the ground, he received a number of kicks from the accused, including kicks to the head area. The accused raised the defence of provocation but was convicted of murder. The appeal effectively centred on a complaint that the jury was not told expressly and explicitly that the defence of provocation was still available even in a situation where there was an intention to kill or to cause serious harm. Birmingham J. held as follows:-

"...the issue of the interaction of the requisite intent for murder and the defence of provocation was never really spelled out for the jury. In particular it was never made

²³ *The People (DPP) v. Zhao Zhen Dong* [2015] IECA 189

clear to them that it was not necessary that the circumstances which had or might have provoked the defendant had done so in a manner which meant that he did not intend to kill or cause serious harm. Equally, it was never made clear to the jury that it is precisely in cases where there is indeed an intention to kill or cause serious harm that the issue of the defence of provocation arises for consideration."

Points Let Lie at Trial

24. In *Lynch* and *Zhao*, the argument raised by the prosecution on appeal was that no requisitions had been sought by the defence upon the defect in the Judge's charge. This was very much in reliance on the principles set down in *The People (DPP) v. Cronin*²⁴. But as Birmingham J. observed in *Zhao*, the absence of requisitions has never really been regarded as an absolute bar to a point being raised on appeal:-

"The real relevance of the absence of requisitions is that it provides an indication that a point now sought to be raised on appeal and now said to be important did not strike those engaged in the trial as being of significance."

25. *Lynch* provides a very interesting discussion of this issue. O'Donnell J. felt that *Cronin* could be distinguished on the facts before him. The point was raised at trial, albeit not by the defence and it was irrelevant who raised it. In addition there was no tactical advantage for the defence in not raising the point at trial. This did not mean that an explanation would not have to be forthcoming about why it was not raised. In the instant case O'Donnell J. was somewhat critical of the fact that no real reason was proffered apart from that there was a degree of confusion in the court and the matter was dealt with quite speedily. Notwithstanding this criticism, in circumstances where the Court was satisfied that there had been a clear misdirection, it felt that to refuse the appeal on the basis of *Cronin* would be to reduce *Cronin* to a principal designed solely to ensure efficiency of appeals.

26. In *Hussain*²⁵, Clarke J. said that where the issue of a misdirection on provocation had not been raised at trial, an appeal court must clearly, therefore, be entitled to take into account and place significant weight on any absence of requisition to the trial judge in assessing whether, on an overall basis, the jury were given appropriate directions on the law. There was however a jurisdiction to allow an appeal on a point not raised at trial:-

"The Court must, of course, take into account the fact that this is not a point which was left entirely untouched at the trial. The problem with the judge's original charge was clearly identified and a recharge sought. It seems to this Court that, perhaps, somewhat

²⁴ *The People (DPP) v. Cronin* [2003] 3 IR 377

²⁵ *Op. Cit.*

less weight needs to be attached to a failure to persist in a point once raised in comparison with a point not raised at all, although, it must be said, there is a clear duty on counsel to persist with any point which they consider has not been adequately dealt with by a trial judge in the absence of a clear ruling by the trial judge to the effect that there will not be a recharge on the point in question.

*The Court also takes into account the fact that provocation was the central issue in this case. It was the principal issue to which the jury would have been required to direct their minds in considering whether to find the accused guilty or not guilty. A failure to correctly charge the jury on that central issue creates a much greater risk of injustice than an error in respect of a peripheral aspect of the case."*²⁶

27. Thus it would appear that should an issue arise in future concerning a misdirection on provocation or otherwise, the Court of Appeal will consider whether the issue to be aired was ventilated in some form. It does not have to come from the defence. If not raised the Court can and will consider the reason for the issue not being raised at trial. If it was as a result of a tactical decision, then the point is unlikely to be entertained. If not the Court will take into account the reason why it was not raised at trial and whether a fundamental unfairness to the accused occurred. *Bourke*²⁷ is such a case where the Court of Criminal Appeal was of the view that the failure to requisition on the provocation direction was purely tactical.

Conclusion

28. The Law Reform Commission has recommended a draft legislative provision effectively bringing in a modified objective standard to apply where provocation is raised.²⁸ This would incorporate into Irish Law what was envisaged in English case of *R v. Camplin*²⁹. There would therefore be a two staged objective and subjective test meaning the jury would have to consider if the conduct complained would cause in the circumstances of the case an ordinary person to lose self control and then whether it actually caused the accused to do so. There would then be allowance for the jury to consider the characteristics of an accused.³⁰ Helpfully for the prosecution and something that concerned O'Donnell J in his judgments, there is a further clause stating that provocation is negated if the conduct of the accused is not proportionate to the alleged provocative conduct or words. Somewhat predicting the difficulties that arose in *Lynch* and *Zhao*, it states that there is no rule of law that provocation is negated if the act causing the

²⁶ Ibid, at p.9.

²⁷ *The People (DPP) v. Bourke* [2014] IECCA 2.

²⁸ LRC CP 27-2003, at page 143.

²⁹ *R v. Camplin* [1978] 1 All ER 1236.

³⁰ These characteristics do not include mental disorder, intoxication or temperament for the purposes of determining the power of self control exhibited by an accused person.

death did not occur immediately (allowing for provocation over a period of time) or that the act causing death was done with the intention to kill or cause serious injury.

29. There is a strong argument that a number of difficulties with the current state of the law would remain even if an objective test was adopted. Indeed the legislative provision proposed by the Law Reform Commission attempts to strike a fair balance between the objective and subjective tests. The biggest difficulty though with the defence as presently understood and as appears from the recent appeals courts judgments stems from the complexities that arise in the trial Judge's charge on the issue.
30. Unless the Supreme Court restates this defence or until the Legislature gets around to acting on it or on a broader revision of the pure murder/manslaughter dichotomy of verdicts and sentences, the subjective test and its application as enunciated in *Kelly* will remain the law. It is probably best to finish by noting the tentative observations made by Birmingham J, in *Zhao*:-

"The Court would add one final observation and does so in a very tentative manner indeed. In a complex area of the law, and undoubtedly provocation is such an area, it is understandable that judges would look to the possibility of reading extracts from authoritative decisions of the superior courts. A number of very experienced trial judges have followed this practice over many years. However, this Court would express some doubts as to whether that is necessarily the most effective method of communicating to the jury what the real issues are in a particular case. It is entirely a matter within the trial judge's discretion, but there may be something to be said for judges, in cases of complexity, giving an outline in advance of what he or she intends to say in the charge, thus offering an opportunity for comment and observations by counsel."

31. Whether trial Judges will want to follow this suggestion tentative as it remains to be seen. It would appear that the tried and trusted and therefore safest route for any trial Judge is to faithfully quote Barrington J in the *Kelly* decision and enlist the assistance if not agreement of counsel only in identifying the words or acts which could constitute the provocation offered and what the particular temperament, character and circumstances of the accused in the case being tried are.
32. Whether provocation will continue to be the graveyard it always has been or settles down into something more prosaic will depend on a number of factors. The imagination and ingenuity of counsel; the willingness of the appellate courts including the Supreme Court to entertain calls for its retrenchment or indeed its further expansion; or finally the possibility of it clawing its way to the top of the legislative agenda, and then the Legislature actually getting it right.