AN CHÚIRT UACHTARACH

THE SUPREME COURT

Clarke CJ
MacMenamin J
Dunne J
Charleton J
O'Malley J

Supreme Court appeal number: S:AP:IE:2019:000150
[2020] IESC 000
Court of Appeal record number 2017/266
[2019] IECA 148
Central Criminal Court bill number: CCC 2019 no 0009

Between

The People (DPP)

Prosecutor/Respondent

- and -

Alan McNamara

Accused/Appellant

JUDGMENT OF MR JUSTICE PETER CHARLETON DELIVERED ON FRIDAY 26TH JUNE 2020

1. This judgment analyses provocation, the partial defence applicable only to a charge of murder which reduces an intentional homicide from murder to manslaughter in consequence of a person temporarily loosing self-control in response to provocative actions or words. The accused, Alan McNamara, a member of the Caballeros Motorcycle Club, on 31 July 2018 at the Central Criminal Court, was found guilty by a jury of the murder, on 20 June 2015, of

Andrew O'Donoghue at the Road Tramps Motorcycle Club premises near the village of Murroe in County Limerick. McDermott J, the presiding judge, imposed the mandatory sentence of life imprisonment. Earlier, on the close of all the evidence, having heard legal argument, McDermott J declined to leave the defence of provocation open to the jury. The other defence raised was that of self-defence, which he ruled the jury could consider. That defence was rejected. The Court of Appeal upheld the trial judge's decision to rule out provocation in a judgment of 28 May 2019; Birmingham P, Edwards and Kennedy JJ, [2019] IECA 148. The principles underpinning a judicial refusal to allow a jury to consider the defence of provocation also requires the clarification of the elements making up that defence. Hence, the elements of provocation as a defence and when provocation should be withdrawn from the jury are the issues on the appeal.

2. By determination of 19 November 2019, this Court allowed an appeal from the decision of the Court of Appeal under Article 34.5 of the Constitution and settled the following questions as ones of general public importance:

(i) Does the defence of provocation require that the provoking action or words come from the ultimate victim?

(ii) To what extent can background circumstances found or inform the defence of provocation;

(iii) Should or does the proper construction of the defence of provocation contain any objective element either as to reaction or as to mode of response or as to time of response;

(iv) What role, if any, does the trial judge have in excluding the defence of provocation from the jury?

3. Here, the consideration is not just as to objective and subjective elements in the defence of provocation but the acceptability of assessing the liability of those who invoke the plea on the basis of their intoxicated or drugged selves and the social acceptability of warped notions of honour, criminal betrayal or unacceptable ideological norms as being capable of constituting a defence in criminal law.

The circumstances

4. On the day prior to this homicide, Friday 19 June 2015, the accused and his wife went out and had an evening drink at a public house in Doon, County Limerick. On leaving, they were accosted by three members of the Road Tramps Motorcycle Club, who ripped off and stole the accused's sleeveless jacket with its Caballeros insignia, or flag. His wife tried to prevent the assault but was violently restrained. The assailants, Seamus Duggan, Raymond Neilon and James McCormack, gave evidence at the trial. Shortly beforehand, they had pleaded guilty to robbery at Limerick Circuit Criminal Court. The evidence at the murder trial was to the effect that this attack on the accused and his wife was a deliberate act of provocation. In summing up the case to the jury, McDermott J stated that '"it clearly emerged that the taking of the jacket was an insult to the person and to its club, including its president."

5. On returning to their home, according to the evidence of Mary McNamara, a car pulled up outside with others from the Road Tramps club in it, Kevin Ryan, Bob McInerney and Dermot McKenna. She testified that they were armed with various weapons including what was thought to be a firearm. Before the court of trial, evidence was centred on the threatening nature of this appearance and on the shouted threats: "we're going to kill ye and burn your house down." Present in the house with the couple were a nine-year-old son, who had been in the front garden, a grown-up daughter and her boyfriend. From the evidence, it also emerged that there had been tension between the rival groups and their respective members; a turf dispute that Limerick city was Caballeros "territory" while Murroe and the surrounding villages of Doon, Cappawhite and Cappamore were somehow claimed by the Road Tramps as theirs. The Road Tramps clubhouse was located in Mountfune, two kilometres outside of Murroe and about one kilometre from the family home of the accused. It was therefore situated in, what this damaging thinking regarded as, disputed territory. According to the accused's statements to the gardaí, that same evening other members of the Caballeros club, including Robert Barrett, the president, and David O'Dea, an ordinary member, visited his home in order to discuss the incident at the pub and its aftermath.

6. On the following day, Saturday 20 June 2015, David O'Dea was driving through the village of Doon with two passengers, Robert Barrett and Robert Cusack. The latter is the accused's stepson and was a probationary member of the Caballeros club. On the outskirts of Doon, these three men encountered the car of Seamus Duggan, one of the Road Tramps assailants from the public house. They gave chase. His car was followed at high speed for 23 km and information about this pursuit was relayed by mobile phone to the accused. One such phone call from

Robert Cusack to the accused at 14:41 lasted about five minutes. On his behalf, in submissions on this appeal, it is asserted that it is clear from what he said to gardaí, and the evidence of his wife, that he was in great fear following the assault on himself and his wife and the serious threats that were made at his home. He had, he claimed, slept very badly that night. He continued to be concerned the next day and on any reasonable assessment he remained agitated following the robbery of his club insignia and the threats made to him at his home. He only became aware of his stepson's involvement when he received a phone call from him that he and two other men were pursuing a member of the Road Tramp's Club.

7. Seamus Duggan, realising that he could not shake off his pursuer, phoned Jim McInerney who advised him to drive towards the Road Tramps clubhouse for safety. Jim McInerney was not at the clubhouse but drove there in order to open the gates. On the way he picked up Andrew O'Donoghue, the young man who became the ultimate victim. Derek Geary also went to the clubhouse, or was already present. The clubhouse is a converted two-storey farmhouse with a secure enclosure separated from the public road by a high wall with double steel gates somewhat set back from the roadway. The accused, then at home, armed himself with a loaded sawn-off shotgun and drove in that direction. He claimed to gardaí to have believed that the life of his stepson was in danger from the Road Tramps. He did not, he said, want his stepson to be involved, but as events transpired, he feared for his stepson's safety and it was this fear that caused him to drive towards the Road Tramps premises, fearful, as he claimed to be, of the members. When he reached the club, he said he did not know where his stepson was exactly at that point in time. Arriving at the Road Tramps premises, before either the pursed or pursuing vehicles, he saw two men at the gate. One was Andrew O'Donoghue, who was holding a blue bar, which, according to the accused, he believed to be a firearm. On being shown the bar later while in Garda custody, he claimed to have thought it was a gun because he was short-sighted. He stopped his jeep and, as he was getting out, accidentally discharged one of the sawn-off shotgun's two cartridges. It was suggested on appeal that this accidental discharge confirmed the stressed state that he claimed to have been in. He then ran towards the gate, raised the weapon and fired, hitting the victim Andrew O'Donoghue at close range in the head. The victim's right hand was leaning on the gate. This was captured on CCTV and was shown in evidence. According to the evidence of Derek Geary, just as the pursuing car arrived, the accused was heard to shout to another male outside the gates "I got one of them." The case put by his counsel to witnesses was that he had shouted "I think I got one of them."

8. He then attempted to reload the gun, but the evidence suggests some difficulty with the mechanism or some kind of fumbling over the cartridges. This delay enabled the Road Tramps club members to close and secure the steel gates. He then left the scene. The young victim, Andrew O'Donoghue, was brought to Limerick Regional Hospital and died later that day. These were the basic facts on which the trial judge had to decide if there was material on which the jury might find the defence of provocation or if, instead, the defence ought to be withdrawn as no reasonable jury, properly instructed, could find for the accused on that defence.

Trial judge's ruling

9. At trial, the accused had not testified. The defence case had relied on statements made by him while in Garda custody. Those statements expressed regret at the death of the victim and sorrow at the distress caused to his family. Two potential defences were sought to be adduced in evidence: those of self-defence based, it was claimed, on the accused's fear for the safety of his stepson; and that the action in shooting the victim resulted from provocation. The elements of these defences were argued in front of the trial judge in the absence of the jury. McDermott J allowed self-defence to go to the jury. He, however, ruled that there was no evidence of provocation fit to be considered by the jury, stating:

> In relation to provocation, it seems to me that the essential elements of what is regarded as the defence of provocation, the sudden unforeseen loss of possession or self-control, is a central feature of the defence in the context of the raising of a defence. I don't see that evidence at all in the case, even on the materials set out, there doesn't seem to be an act of provocation directed towards the accused at the time and I do not regard the facts of the preceding evening as sufficiently proximate in time to constitute a basis upon which the issue of provocation could go to the jury. It's outside the ambit of the case law which exists in relation to provocation and it seems to me, given that these events occurred at approximately 2.40 in the afternoon, that the matters which had concluded sometime around 9 and 10 pm the previous evening, could not be a sufficient basis upon which to advance a provocation defence in relation to the accused's attendance at the premises and the discharge of a firearm and particularly having regard to the fact that his encounter with the deceased does not appear to have any elements of or indeed either of the other two present. It does not appear to have any of the elements of provocation that has been referred to in the case law sufficient to justify

the Court in leaving it to the jury to consider it as a defence. So, I'll refuse that application.

Ruling of the Court of Appeal

10. On appeal to the Court of Appeal two issues were raised. One related to the fact that an old friend of a juror had married a member of one of the motorcycle clubs some years previously and hence was an acquaintance. The trial judge dealt with the issue by separating out the juror and by asking each remaining juror had there been any communication by that juror about the motorcycle club member to them. All answers were negative and the trial proceeded. The second issue was the refusal of McDermott J to leave provocation for the consideration of the jury as a partial defence. Counsel for the accused asserted that he had been provoked and that the essentially subjective nature of provocation in Irish law meant that it did not matter what might be alleged to be a provocative action, nor when an accused had reacted to the provocation, nor the means used to reply to it. Whether this was or was not proportional to the original insult was contended not to matter. Since the test was, it was argued, entirely subjective, all of these should be considered from inside the accused's own mind. Furthermore, counsel contended, provocation by a person from a group could, under the subjective test, be responded to by the accused against other members of that group.

11. In a concise judgment, the Court of Appeal upheld the trial judge's ruling on provocation that there was insufficient evidence to be left to the jury to raise that defence:

> 17. The authorities are clear that the threshold for having the partial defence of provocation be considered by the jury is not a high one. However, low as the threshold is, in the Court's view, it has not been reached, or indeed, approached in the present case. Undoubtedly, what happened in Doon and at Mr. McNamara's home the previous evening was quite unacceptable, but it cannot provide any justification for what occurred the following afternoon when a loaded sawn-off shotgun was brought to the Road Tramps Clubhouse and then discharged at close range. While Mr. McNamara's actions were arguably fuelled by emotions running high, it does not follow that he was provoked into doing so in a legal sense and thereby entitled to rely on the defence of provocation in the absence of a sudden response.

18. Permitting the jury to consider the partial defence of provocation would have represented a dramatic expansion of the traditional law on provocation. Such an expansion would be quite unjustified. The Court is in no doubt that the trial Judge was correct in refusing to let the issue of provocation be considered. Accordingly, this ground of appeal is not upheld either.

12. While similar arguments to those advanced to the Court of Appeal have been argued before this Court, considerable additional detail has been argued as to the history of the defence of provocation, its purpose and the potential limits to the scope of its application.

History of provocation as a defence

13. It is relevant both to the origin of the defence, its development, the decisions in this jurisdiction and the claim that any alteration to the existing law is outside the scope of judicial authority, that provocation was a defence made by judges and that over the centuries it has been adapted to new social mores or societal change at several junctures. For centuries up to 1922, judges had recognised that an accused killing under severe provocation from the victim was not guilty of murder but that his or her culpability should be reduced to manslaughter; JM Kaye, Early History of Murder and Manslaughter (1987) 83 LQR 365. Of its essence, the law demands lawful conduct and behaviour which respects the human right of others to life and which does not excuse or think less seriously of a savage reprisal to trivial insult. In early origin, because of the then prevalent malice aforethought doctrine, the provocation defence was directed to partially excusing homicides that were ostensibly spontaneous, that is not planned, and which, in addition, occurred in circumstances where it could be understood that what the victim had done to the accused by way of provocation might have tipped a person into an uncontrollable state. The applicability of the provocation defence was, and is, a question of law and has nothing to do with judicial discretion. But, once a threshold of provocative conduct is passed, with evidence realistically suggesting the possible existence of defence in accordance with its definition, and sudden retaliatory conduct results, it becomes a question of fact for the jury; *R v Lynch* (1832) 5 C&P 324, 172 ER 995; *R v Hayward* (1833) 6 C&P 157, 172 ER 1188; *R v Thomas* (1837) 7 C&P 817, 173 ER 356; and see Russell on Crime (London, 12th edition, 1964) chapter 29. Provocation as a defence was never about excusing rage or bad temper. Rather, it lessened culpability as a concession to human frailty in the face of severely provocative conduct by the deceased. It did not, and does not apply, where the person assaulted survives, however badly disabled, and has no place in the law on attempted murder. As with every defence, the elements of provocation are

settled to provide a just result. The rational for the test and the balance that it has to strike, in order to remain just, was expressed by Coleridge J in *R v Kirkham* (1837) 8 C&P 115, 119, 173 ER 422, 424: "Though the law condescends to human frailty, it will not indulge human ferocity. It considers man to be a rational being and requires that he should exercise a reasonable control over his passions." To the end of limiting the defence to where a reduction in culpability would be justified, in the historic development of the common law there were piecemeal rules as to whether provocation was available as a defence where words alone were used or where the action that was argued to be provocation was merely a tort or a breach of contract. As has so often occurred in the common law, these individual rulings by various judges, considered in the context of the doctrine of precedent, ultimately cohered into a general statement as to the limits of the defence. The 1922 common law inherited by the State under Article 50.1 of the Constitution required a provocative act to be, firstly, such as to send a reasonable person out of control, secondly, that such person's form of resentment be proportionate to the insult, thirdly, that the accused's plea of provocation be genuine, and, lastly, that the homicidal attack be directed against the provoker, not against any other person. These principles are expressed in Archbold's Criminal Pleading, Evidence and Practice in Criminal Cases (26th edition, London, 1922, Roome and Ross editors) at page 881:

> If a man kills another suddenly, without any, or, indeed, without a considerable provocation, the law implies malice, and the homicide is murder … but if the provocation were great, and such as must have greatly excited him, the killing is manslaughter only. … The test to be applied is whether the provocation was sufficient to deprive a reasonable man of his self-control, not whether it was sufficient to deprive of his self-control the particular person charged; e.g., a person afflicted with want of mental balance or defective self-control. … In considering, however, whether the killing upon provocation amounts to murder or manslaughter, the instrument with which the homicide was effected must also be taken into consideration; for if it were effected with a deadly weapon, the provocation must be great indeed to extenuate the offence to manslaughter; if with a weapon or other means not likely or intended to produce death, a less degree of provocation will be sufficient; in fact, the mode of resentment must bear a reasonable proportion to the provocation, to reduce the offence to manslaughter.

14. Since *R v Welsh* (1869) 11 Cox 336, it was required that the "amount of provocation" be such "as would be excited in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion." As time went on and as experience accrued as to how the defence worked, the reasonable man or person test was criticised as lacking consideration of those of lower intelligence, of differing age groups, of those with particular personal health issues, of those of different sex, and of those who were pregnant and of those who had suffered long from physical abuse. In *Bedder v DPP* [1954] 2 All ER, the teenager accused was, he claimed, taunted by a prostitute on account of his impotence while attempting to engage in sexual activity with her and he also said that she had hit him. The House of Lords held that he was not to be judged in terms of his response as the person he was but rather that the reaction of a reasonable and mature man without his sexual performance issues was to be substituted into his place and the applicability of the defence judged according to how that hypothetical individual would have reacted. This was much criticised. A modern form of that criticism was expressed in the context of increasing divergence of cultural norms by Murphy J of the Australian High Court in *Moffa v R* (1977) 138 CLR 601, who at paragraph 11 of his judgment urged the complete dissolution of any requirement that the actions of the accused be judged against the conduct of a reasonable man. All of his comments were obiter. The appeal centred on the sufficiency of the provocation by the mere use of words, a confession of adultery. There the conviction of an accused was overturned. He had said that his late wife had taunted him with her sexual infidelities with every man in the neighbourhood, as he claimed her to have said, and she had thrown a phone towards him. The majority did not take the same view of entirely removing any element of objectivity from the test for provocation as expressed by him:

> The objective test is not suitable even for a superficially homogeneous society, and the more heterogeneous our society becomes, the more inappropriate the test is. Behaviour is influenced by age, sex, ethnic origin, climatic and other living conditions, biorhythms, education, occupation and, above all, individual differences. It is impossible to construct a model of a reasonable or ordinary South Australian for the purpose of assessing emotional flashpoint, loss of self-control and capacity to kill under particular circumstances. In the Northern Territory Supreme Court, Kriewaldt J refused to apply the test to a tribal aborigine and used the standard of the accused's tribe (see Colin Howard, "What Colour is the 'Reasonable Man'?" (1961) Criminal Law Review, p 41). The Judicial Committee of the Privy Council stated in *Kwaku Mensah v The King* (1946) AC 83, at p 93 that the

test for provocation was that of "the ordinary West African villager" and that "on just such questions...the knowledge and commonsense of a local jury are invaluable" (see also Rankin (1966) 60 QJPR 128). The same considerations apply to cultural sub-groups such as migrants. The objective test should not be modified by establishing different standards for different groups in society. This would result in unequal treatment. (at p 626)

15. None of this is at all easy to grasp or to explain particularly in circumstances where the formulation of the test of provocation is one constructed by lawyers for application by a jury. As was commented by O'Donnell J in *The People (DPP) v Curran* [2011] 3 IR 785:

> 8. The main, if not the sole, issue in this trial was whether the accused was entitled to the defence of provocation. It appears that prior to the landmark decision in *People (DPP) v. MacEoin* [1978] 1 I.R. 27, provocation had not been the subject of any reported case in this jurisdiction. Since that date however, the issue has given rise to a significant number of decisions of this Court. See, for example, DPP v. Kehoe [1992] I.L.R.M. 481, *DPP v. Mullane* (Unreported, Court of Criminal Appeal, 11th March, 1997), *DPP .v Noonan*[1998] 2 I.R. 439, *DPP v. Bambrick* [1999] 2 I.L.R.M. 71, *DPP v. Kelly* [2000] 2 I.R. 1, *DPP v. McDonagh* [2001] 3 I.R. 201, *DPP v. Davis* [2001] 1 I.R. 146, *DPP v. Doyle* (Unreported, Court of Criminal Appeal, 22nd March, 2002) [2002] 3 J.I.C. 2204 and *DPP v. Byrne*[2003] IECCA 47/00 (Unreported, Ex tempore, Court of Criminal Appeal, 24th February, 2003) [2003] 2 J.I.C. 2406. The issue has also been discussed in textbooks including Charleton, Offences Against the Person (Dublin; 1992), Charleton, McDermott and Bolger, Criminal Law (Dublin; 1999), and McAuley and McCutcheon's Criminal Liability: A Grammar (Dublin; 2000). In addition, the defence has been the subject of detailed consideration by the Law Reform Commission in its recent Report on Defences in Criminal Law, LRC95-2009 (Dublin; 2009) following the Consultation Paper on Homicide: The Plea of Provocation, LRCCP27-2003 (Dublin; 2003). As was observed by Keane, C.J. in *DPP v. Byrne*, "...the law [on provocation] has got into a state of affairs which, one can only say, is not that easy for a lay person to follow: some lawyers have difficulty in following it too...".

Development of the test

16. Where the defence of provocation has survived as a defence at all, it is because of the concession that while people are not entitled to go out of control and kill others, sometimes, as was stated in *R v Shiers* (2003) 6 VR 174 [25] by the

Victorian Court of Criminal Appeal, genuine situations can arise. Hence: "the defence of provocation is based on acceptance that situations can arise where, in consequence of the perceived provocative behaviour of another, even a person of ordinary firmness of mind and emotional self-control might lose that control and commit the otherwise extraordinary act of killing the person responsible." While criticism of the objective test as expressed in other passages in the *Moffa* judgment strongly influenced the course of Irish law, it did not divert the common law in other countries. Judges in other countries were not tempted into such a complete and utter upturning of the existing law, entirely reversing the elements of the defence as to requiring self-restraint and proper conduct so as to leave any judgment to the enraged mind of the accused, and nor were legislatures. Furthermore, statutory forms of the defence, which in the main resulted from deep consideration by national law reform bodies, showed an awareness that if everything were to be considered from inside the accused's mind, in other words, completely subjectively, and in a context where the victim could not speak since she or he would necessarily be dead, the law would tend towards injustice at the opposite polarity to requiring strict reasonable person objectivity. Some workable compromise was thus sought, as otherwise the defence would be removed altogether. The common law in England, in judging provocation as a defence, changed away from placing a reasonable and rational man into the position of the accused in *R v Camplin* [1978] AC 705. Again, the accused was a teenager. He had been sexually assaulted and anally raped by an older man whose head he then split open with a heavy form of frying pan. Objectivity was not entirely abandoned. The test as to who might lose self-control morphed into a modified reasonable person test by ascribing to that individual the age, physical characteristics of a fixed kind and circumstances of the accused. In the context of duress, the modified objective standard has been applied to that defence by this Court in *The People (DPP) v Gleeson* [2018] IESC 53.

17. In handing down the judgment in *The People (DPP) v MacEoin* [1978] IR 27 two weeks later, the decision to overturn the conviction and order a retrial had been given without reasons, just before the decision in *Camplin*. There, the Court of Criminal Appeal were not, as far as can be told, aware of the earlier modification in *Camplin*. On the reading sometimes given to that judgment, the law changed radically and utterly rejected any objective element to the defence. Certainly, the decision relies heavily on obiter comments in the judgment of Murphy J in *Moffa*, but not in the context that the analysis in that case was directed: what could and what could not in law be provocation. A confession of adultery without more, as the prosecution contended, words alone was found to never reduce

murder to manslaughter, but the decision was not directed to any analysis of the place of subjectivity in the loss of self-control upon provocation. This decision in *MacEoin*, as the submissions on both sides indicate, has been followed by trial courts and on appeal but not by the Supreme Court which had not, before this appeal, had an opportunity to consider the elements of the common law defence as they apply in this jurisdiction. Even still, on any reading of the *MacEoin* decision, a traditional restatement was made that provocation involved the sudden and complete loss of self-control and furthermore gave a key role to the trial judge. That role could hardly be said to exist at all if all elements of the defence of provocation were entirely at large and to be adjudicated by no objective standard but instead considered on the sole basis of what the accused thought and emoted and was apparently driven to in consequence of whatever the accused claimed to have been the provocation put before him or her by the person killed. Two matters can be forgotten in this. Firstly, *MacEoin* changed the law radically away from its common law boundaries. Secondly, the provocation offered to the accused in that case was physical, repeated and severe, and stands in contrast to subsequent cases where men took the lives of women in circumstances where there has been no evidence apart from that of the accused and where whatever insult is alleged to excuse their conduct partially has been verbal and, in contrast to that case, trivial.

18. The accused in *MacEoin* case had been found guilty of the murder of a male acquaintance. He admitted that he had struck the deceased with a hammer and the only issue the jury had to decide was whether he was thereby guilty of murder or manslaughter. The accused had met the victim whilst both were serving a sentence of imprisonment in Mountjoy Jail. At the time of the incident they were both residing in the same flat. The effect of alcohol consumption was not dealt with in the judgment of the Court of Criminal Appeal. The accused had had up to twenty pints of stout during the day and when he finally returned to the flat, he found the deceased sitting at a table talking to himself and with a bottle of wine before him. The accused made up a makeshift bed for himself, there being only one bed in the flat, and retired to be woken, on his account, by the deceased coming towards the bed shouting: "You are going" and "You are going now". When the accused sat up in the bed, the deceased produced a hammer from behind his back and hit the accused on the head with it. The hammer fell on the floor and after a struggle the accused got it and the deceased started to punch him. In evidence the accused said that he was terrified because the deceased looked dangerous. According to him "I simmered over and I completely lost control of myself." He hit the deceased on the head with the hammer and the deceased fell on the floor. The accused then stooped

down and in a rage used the hammer to hit the deceased a number of blows on the head, which he estimated as being from three to six. On appeal, the accused argued that it was incorrect to state that the provocation relied on had to be such that it would provoke a reasonable man and that, in addition, it actually provoked the accused. The accused asked the court to abandon any objectivity in the existing test. The court was asked to declare that the law in this jurisdiction is that if what was relied on as provocation actually provoked the accused, the prosecution had to prove beyond reasonable doubt that it did not cause him to lose self-control, whether it would have provoked a reasonable man or not. The Court agreed with this far-reaching proposition. Kenny J firstly, at p 34, set out the academic criticism of the rigidly applied and unmodifiable reasonable person test:

> The application of the objective test to provocation has been severely criticised in many text-books of high repute and by eminent writers on criminal law. In the standard text-book on criminal law (Smith and Hogan) the authors submit the test to a devastating analysis and suggest that it should be abolished and a purely subjective criterion applied - see the second edition of that work at pp 213-215. The same approach is adopted in Russell on Crime (12th ed, Ch 29) and by Professor Glanville Williams in an article entitled "Provocation and the Reasonable Man" in the 1954 volume of the Criminal Law Review.

19. Academic criticism was by the time of that judgment completely irrelevant. Authors of articles and textbook writers had serious difficulties with substituting a middle-aged man for a teenager in assessing an accused's reactions but there was no preponderance of academic argument in favour of removing social standards entirely or of radically modifying the defence so that it became one to be considered from the sole consideration of what the accused's own emotion suggested should happen. The judgment, having criticised objectivity, then had to deal with proportion: the question of whether a person would have reacted with deadly consequence in the light of the provocation offered. This was to be looked at entirely from the point of view of how the accused would see the insult:

> In the opinion of this Court the objective test in cases of provocation should be declared to be no longer part of our law. If the accused raises the defence that he was provoked and establishes that and nothing more, we do not mean that the prosecution must prove beyond reasonable doubt that he was not provoked. The nature of the provocation may not justify the force used judged by the accused's state of mind. But the inquiry to be made by

the judge first and then by the jury must centre not on the reasonable man but on the accused and his reaction to the conduct or words which are said to be provocative.

20. There remained, nonetheless, some objective filtering mechanism whereby the judge could withdraw unworthy cases from the consideration of the jury. Only cases which genuinely could be viewed as potentially ones which fitted within what still remains a legal definition of a criminal law defence. That passage, at p 34, preserves objective compliance with the elements of the defence as the basis for ensuring that cases outside of the definitional elements do not reach the consideration of the jury:

> When the defence of provocation is raised, we think that the trial judge at the close of the evidence should rule on whether there is any evidence of provocation which, having regard to the accused's temperament, character and circumstances, might have caused him to lose control of himself at the time of the wrongful act and whether the provocation bears a reasonable relation to the amount of force used by the accused. If there is evidence on which the jury could reach a decision favourable to the accused on this issue, the trial judge should allow the defence to be considered by the jury and should tell them that, before they find the accused guilty of murder, the prosecution must establish beyond reasonable doubt that the accused was not provoked to such an extent that, having regard to his temperament, character and circumstances, he lost control of himself at the time of the wrongful act. Then the jury should be told that they must consider whether the acts or words, or both, of provocation found by them to have occurred, when related to the accused, bear a reasonable relation to the amount of force he used. If the prosecution prove beyond reasonable doubt that the force used was unreasonable and excessive having regard to the provocation, the defence of provocation fails.

21. This appeal has centred on the actions of McDermott J in withdrawing provocation from the consideration of the jury. Yet, that is what *MacEoin* mandates and does so in order that judicial control be maintained over circumstances which could not fairly be regarded as raising the defence of provocation. Here, the accused's argument on this appeal is that no objective element remains within the definitional elements of the defence of provocation. Further, it is asserted that provocation is now a defence which cannot be defined in any way to include any objective element since, the contention goes, all objective elements were removed in *MacEoin* and that this was confirmed in subsequent decisions. Yet, it is clear that there are limitations. Otherwise, no

judge would ever be entitled to withdraw a case from a jury once provocation was mentioned and the element of genuineness must be grounded in socially understandable circumstances of provocation and resentment because otherwise criminal gang members would be foremost in producing the defence where slights or betrayals generated murders. The time element would, on the accused's argument, also be gone since a claim of loss of self-control might be made days after the provocative conduce. Who would there be to say that this was not acceptable if everything was to be judged from inside the accused's own perceptions and reactions? As was commented about the defence in *The People (DPP) v Davis* [2001] 1 IR 146 by Hardiman J at 159-160:

> We think that it may, perhaps, require restatement. First that the defence is in the nature of a concession. Second, that concession is based on policy considerations which may change from time to time. These considerations may dictate that the defence should be circumscribed or even denied in cases where it would allow to promote moral outrage. Messrs McAuley and McCutcheon in Criminal Liability (Dublin, 2000) give an illustration of the difficulty which can arise where a defence of provocation is based on characteristics of the accused which are socially or morally repugnant, at p 877:
>
> "An illustration is the case of the defendant who holds white supremacist beliefs and who genuinely believes that it is the greatest insult for a black person to speak to a white person unless spoken to first. On being spoken to by a black person he becomes enraged and kills while in the throes of his bigoted passion. Tested subjectively he has been provoked but there is no reason why the law's compassion should be extended to him, given that his beliefs are not merely unreasonable but are morally repugnant. The strictly subjectivist terms in which Irish law has expressed the defence lend themselves to allowing the plea to the racist, yet it is safe to assume that the Courts did not have cases of this type in mind when they set about reformulating the law."

A similar and perhaps Equally topical example might be a person prone to uncontrollable reactions to any challenge to him when he is driving a car. There is, it seems to us, a minimal degree of self-control which each member of society is entitled to expect from his or her fellow members: without such a threshold, social life would be impossible. It appears to this Court that the development of "road rage" and of cognate types of socially repugnant violent reaction, with an incidence sufficiently great to have attracted a special name, emphasises factors

which were perhaps not so common at the time of *MacEoin*. This however will be for another Court to address authoritatively.

22. Yet, the scope of any restatement of the law is said on behalf of the accused to be outside the authority of the Court and a trespass onto the sphere of the legislature.

Law making and decision making

23. Plainly, the elements of this defence must be considered. *MacEoin* represented a radical change in the law. Trenchant criticism of its application occurs in several judgments. Of these, the judgment of O'Donnell J in The *People (DPP) v Curran* exemplifies the difficulties which the law, founded on a 1922 test but suddenly severely modified in *MacEoin*, poses:

> 19 In that context, the move to a wholly subjective approach, as set out in the judgment in *MacEoin*, was initially seen as an enlightened development in accordance with the best academic analyses. However, it has become increasingly clear that the formulation of the defence in wholly subjective terms is, 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. The application of a wholly subjective approach creates more difficulty in this area than the application of the familiar subjective test in the ascertainment of mens rea. The jury's inquiry takes place against the structure created by s.2 of the Criminal Justice Act 1964, that a person is presumed to intend the natural probable consequences of his action. This creates a starting point, and indeed a tool for analysis that allows the jury to address the assertions of the subjective belief of the accused, against the objective evidence of his or her conduct, albeit by the standard of beyond reasonable doubt. However, since intent is not an issue in provocation, there is no similar presumption, or analytical structure. A jury is left with the asserted evidence on behalf of the accused, and an instruction that a prosecution must negative the existence of such alleged provocation, beyond any reasonable doubt. When it is recognised, that in many cases (and in this respect the present case is somewhat unusual) there will be only two participants in the incident, one of whom is by definition by the time of the trial, dead, the difficulties posed for a jury are real and obvious. The increased incidence of a provocation defence being raised in murder trials, is suggestive more of an expansion of the scope of

the defence, rather than a surprising resurgence of the values and behaviour of "Restoration gallantry". There is a clear and pressing need for a comprehensive review of this area, and its interaction with other areas of the law of homicide, and at a minimum, a statutory regulation of the scope of the defence of provocation

24. On behalf of the accused, it has been proposed that since in other countries the provocation defence has been either abolished or severely modified from its common law state, the Court is prevented by the separation of powers architecture that underlies the Constitution from analysing or restating the defence in any other manner than has been set out in *MacEoin* and the cases apparently following that decision. In this regard, the submissions on behalf of the accused state:

29. It is submitted that, in any event, any amendment of the law is beyond the scope of this appeal and is a matter for the legislature. In *People (DPP) v Curran*, the Court of Criminal Appeal confirmed that the test for provocation was wholly subjective. While the Court pointed to the need for reform, O'Donnell J clearly stated that legislative action was necessary:

"There is a clear and pressing need for comprehensive review of this area, and its interaction with other areas of the law of homicide, and at a minimum, a statutory regulation of the scope of the defence… In the meantime, the existing law must be applied."

30. That legislative intervention is required appears to be the view of the Law Reform Commission which, in 2003, suggested a draft formulation of a statutory provision which could replace the common law test for provocation. It should be noted that in the United Kingdom, legislative action has been taken in respect of the defence of provocation. The defence was abolished by the introduction of the Coroners and Justice Act and ss 54 and 55 of CJA 2009 create a new defence of loss of control.

31. It is submitted that if there is to be a change in the law in relation to these matter, it is best brought about by the legislature who will have an opportunity to debate the public aspects of the matter in light of the recommendations made by the Law Reform Commission.

25. It is correct that the Law Reform Commission reported on the defence of provocation and, with customary scholarship, produced recommendations as to the direction that the law might should take if reformed; LRC CP 27-2003. What stands in contrast to the state of the academic understanding of the law at the

time of *MacEoin* are the various texts cited from academic authors. None of these propose that the *MacEoin* decision represents a coherent statement of the common law, or constitutes a reform of the common law that brings a just element into the defence that would otherwise be lacking. Furthermore, there has been no common law jurisdiction or legislature which regarded it as appropriate to set a test of provocation on the basis of the law being assessed from the accused's own mind. All have included objective or circumstantial elements. Paragraph 4.37 of the Law Reform Commission's analysis, called in aid on behalf of the accused here, is not without criticism of both the origin of the turn which the law had taken in *MacEoin* and of the state of uncertainty where the administration of justice in the duty of trial judges to explain the defence to juries, had been left:

> This chapter reviewed the effects of the *MacEoin* decision on the Irish law of provocation. In that case, the Court of Criminal Appeal departed from the traditional common law approach to the plea and laid down a new subjective standard purged of the concept of the "reasonable man". Subsequent decisions have struggled with the meaning of the *MacEoin* judgment. In particular, difficulties have arisen regarding the status of the traditional requirement that an accused's response should be proportionate to the provocation. Some normative features of the traditional test of provocation – such as the requirement of a sudden and complete loss of self-control – nevertheless appear to have survived the *MacEoin* revolution. However, given the subjective nature of the test, the charge that it is virtually impossible for the prosecution to rebut evidence of provocation once the plea has been raised seems justified. As will be seen from the comparative survey in the next chapter, Ireland would appear to be alone among common law jurisdictions in having saddled itself with this dispensation.

26. As between any usurpation of the "sole and exclusive" law-making power of the Oireachtas, as declared by Article 15.1 of the Constitution and the judicial duty of declaring what the law is, there is gulf that should not be crossed. Of its nature law-making is the identification of a wrong within society which legislation may address and the construction of principles of those to whom a law is to be addressed, through what methodologies, whether administrative or by the creation of offences, and the setting of definitional elements that carefully circumscribe application of liability only in particular circumstances, including some situations and actions and excluding others. Where penal sanction is in issue, the legislature will approach the definition of offences either to ensure the

proper regulation of society by strict or absolute liability offences. The latter enables a defence of due care, or where human rights abuses are in question, as they are in sexual violence, murder, theft and destructive substance abuse, the approach is to first of all isolate the abuse of human rights and to define the external and mental circumstances in which a stated penal sanction may be applied through the judicial exercise of sentencing. Of its nature, the law thus legislated for is either new or is existing law that requires revision or restatement and revision. In the sphere of criminal law, where the vast bulk of the principles applied daily by the courts derive from the common law and from statutes which are founded on common law principles, the Oireachtas is empowered to, and has the duty to, change, revise, innovate and to exercise the ultimate supervisory function entrusted by society to our elected representatives to move our society towards "true social order" as the purpose of the Constitution states in its Preamble. The sphere of judicial decision making is different, though inspired in part by the shrewd, though inspirational, aims of the Preamble to the Constitution and to which continued judicial reference have consistently treated as much more than mere rhetoric.

27. Limits are easily demonstrated. Judges do not legislate. Nor do judges add sections or take away sections from legislation but interpret so as to avoid absurd results, where there was ambiguity, was part of the common law and has been expanded into a wider power by s 5 of the Interpretation Act 2005. Litigation and legal argument are about what the law is and not what the law might ideally become; that is the task of legislators. The courts do not infringe the principle that revenue statutes carry no equity. Hence, in *McGrath v McDermott* [1988] IR 258, this Court declined to read into legislation any principle of fiscal nullity; it was for the legislature to define the limitations of tax avoidance and the analysis of the underlying reality of fiscal schemes with no business purpose other than tax saving. Consequently, and in the aftermath of that decision, the legislature introduced s 811 of the Taxes Consolidation Act 1997; see *McNamee v Revenue Commissioners* [2016] IESC 23. Nor is it the task of the courts to advance ostensibly worthwhile and apparently attractive social reform in the guise of deciding litigation. In *L v L* [1992] 2 IR 77 the issue was whether Article 41.2.2º could be used as a vehicle for advancing the existing equitable share of spouses in the family home even where no identifiable financial contribution had been made by her to purchase or mortgage. Finlay CJ, at 107 reversing High Court decision introducing joint ownership, concluded that this would not be permissible:

I conclude that to the identify this right in the circumstances ... is not to develop any known principle of the common law, but is rather to identify a brand new right and to secure it to the plaintiff. Unless that is something clearly and unambiguously warranted by the Constitution or made necessary for the protection of either a specified or unspecified right under it, it must constitute legislation and be usurpation by the courts of the function of the legislature.

28. Henchy J in *Hynes-O'Sullivan v O'Driscoll* [1988] IR 436 at 450 considered an argued-for change in defamation law through the invention of a new form of privilege. He rejected the proposition that finding and applying new defences to libel that were then unknown to the law was the task of judges, stating that:

the suggested radical change in the hitherto accepted law [of qualified privilege] should more properly be effected by statute. The public policy which a new formulation of the law would represent should more properly be found by the Law Reform Commission or by those others who are in a position to take a broad perspective as distinct from what is discernible in the tunnelled vision imposed by the facts of a single case.

29. Similar points can be made in relation to *R v An tArd Chláraitheoir* [2014] IESC 60, [2014] 3 IR 533 which concerned the definition of 'mother'. Similarly, *Attorney General v Paperlink Ltd,* [1984] ILRM 373 involved a reshaping of the exclusive privilege of An Post to carry mail and parcels throughout Ireland in favour of an open competition policy not found in existing legislation, a proposition which Costello J felt the courts incompetent to engage in and which was beyond the scope of judicial authority. At 389 he said that:

to carry out the inquiry which the defendants ask me to perform and, thereafter, make a determination on an alternative to the existing postal service, would amount to an unwarranted and unconstitutional interference with the powers of government exclusively conferred on the Executive and the Oireachtas.

30. Even in the field of common law which often throws up categories of applicability that seem capable of expansion, such as hearsay or warnings in respect of potentially infirm testimony, unless an underlying rational can be identified from existing precedents with clarity and applied to a new situation, the law cannot be expanded because expansion would mean change. This has been seen in the case of nullity of marriage where the existing common law grounds could not embrace failure to cause pregnancy or be expanded to allow dissolution because of emotional instability; *MM v PM* [1986] ILRM 515, *UF v JC* [1991] 2 IR 330.

Perhaps the case law demonstrates that a workable test is that which asks if law is being clarified or is being amended. Incremental changes to the common law through experience remain possible, since this is a tradition inherited under Article 50 of the Constitution, but only by drawing on what already exists and using fundamental principles to carefully etch applicability on to a new situation. While the limits may be a matter for debate, what is outside of any dispute for this or any other case is that judges must clarify where the law stands. Where there is genuine debate, the limits of the law and its elements have to be stated for the benefit of litigants and every such declaration assists legal certainty and the conduct of future cases. That is not a legislative function in the context of litigation: in fact, any such intervention would undermine judicial independence.

At issue here

31. Transparently, the common law is what is at issue here, in particular the limits of any change introduced by a case, the *MacEoin* decision. The elements of the defence of provocation are disputed and have been in a continual state of flux requiring clarification. In Ireland, provocation is an entirely judicially defined defence which derives from common law principles which, of the nature of the common law, require refinement and restatement. If the common law were set in stone, then clearly the decision in *MacEoin* would not in itself have been possible. On any assessment of this decision, the legislature retains final authority and can codify the law, as recommended by the Law Reform Commission, or as is seen to be now appropriate. The elements of the law have continually been under academic and judicial consideration. That dispute is not confined to Ireland but has found expression, prior to codification, in England, in Canada and in the various Australian jurisdictions. Furthermore, it has been the subject of academic debate which has not at all tended in the direction of the decision relied on by this accused as requiring a completely subjective assessment of what he did from his point of view alone. It cannot be that provocation exists as a defence which is so wide as to offend the administration of justice by it potentially excusing revenge, cold-blooded killing, thought-out vengeance, gangland retribution, the generation of reaction for the purpose of dispatching a targeted victim, inducing disputes with minorities for the purpose of terrifying them through the homicide of one of their number, undermining the security of women, or enabling murder to cease to be the crime of ultimate obloquy through partially excusing it by calling an intentional killing using disproportionate force in response to a trivial insult, manslaughter. In so many cases, the fury evoked by what the accused said was provocative conduct or words, took place in the context, as in *MacEoin* and *The People (DPP) v Kelly*

[2000] 2 IR 1, of serious alcohol consumption. An entirely subjective test more than risks undermining the strict rules limiting the applicability of any defence of intoxication to cases where due to drink or drugs the accused lacked the specific intent to kill; see *The People (DPP) v Eadon* [2019] IESC 98. Repeatedly, in argument before this court on behalf of the accused, it was said that provocation rarely succeeds. There is no information proffered to support that bare proposition. Besides, it is not the point. The law must be clear and not depend on random decisions or the assessment of particular outcomes. Furthermore, its clarity should reflect what is just and not what offends against any rational appraisal of the reality of human conduct.

Limitations on subjectivity

32. More than any other defence in criminal law, where the common law prevails, provocation has been subject to continual development. Furthermore, its applicability and limits have been redefined in several criminal codes. None of these have opted for an entirely subjective test and where a modified objective test or a circumstance-based assessment have been chosen, research has not indicated any convincing criticism. In New Zealand, with the enactment of the Sentencing Act 2002, life imprisonment for murder was no longer mandatory if the sentencing judge finds that such a sentence would be "manifestly unjust" under s 81. Parliament then moved to pass the Crimes (Provocation Repeal) Amendment Act 2009 abolishing sections 169 and 170 from the Crimes Act. Hence, provocation would no longer be a jury question but might be an exceptional circumstance whereby, on a judicial analysis, it might become manifestly unjust to impose the mandatory sentence of life imprisonment. What led to this radical change? According to the New Zealand Law Commission, in their report The Partial Defence of Provocation of September 2007, judicial interpretations of what is sufficient to constitute provocation were often contradictory and too confusing to be of assistance to judges and juries. The Law Commission also found that the interpretations were of little assistance to persons who are mentally impaired, because the standard usually used to decide whether a person was provoked is how a person with ordinary self-control would have responded in the situation. In Australia, most states have abolished or severely restricted the applicability of the defence. This most controversial of the criminal defences has been abolished in Tasmania, Victoria and Western Australia, and has been reformed in the other states with only South Australia retaining the common law and there in the context of an unmodified reasonable person standard as to how the accused reacts to insult or other provocation; Fairall and Barrett, Criminal Defences in Australia (5th edition, 2017, Sydney) 11.3. From a Canadian perspective, while context is taken into consideration, s

232 of the Criminal Code requires: (1) a wrongful act or insult that is not provided by the accused or the result of a victim exercising legal rights; (2) sudden response whereby the accused must act "in the heat of passion caused by sudden provocation" and; (3) a wrongful act or insult "of such a nature as to be sufficient to deprive an ordinary person of the power of self-control." With the Zero Tolerance of Barbaric Cultural Practices Act 2015, the provocative action became required to be an indictable offence and also punishable by at least five years imprisonment. Professor Kent Roche, Criminal Law (Toronto, 2018, 7th edition) at p 444, highlights the confused and open-to-argument nature of the aspect whereby a partial excuse is enabled by sudden loss of self-control where there has been provocation but points to the need to limit the application of the defence:

> Its origins lay in traditions of mitigating violent responses to marital infidelities and other affronts to (honour) and it contains archaic phrases about excusing a person who acts in the heat of passion. Some argue that it should be abolished as a defence because it allows deadly rage and violence, often directed against women and sexual minorities, to be treated less seriously than other intentional killings. The Supreme Court has, however, indicated that the provocation defence should accord with contemporary norms and reject sexist and homophobic beliefs and "inappropriate conceptualizations of 'honour'." [*R v Tran* 2010 SCC 58, 21-22] Others argue that the provocation defence reflects the special significance of murder and the fact that murder, unlike manslaughter, carries a fixed penalty. Still others argue that the defence of provocation should apply to all crimes, not only murder. And some question why provocation privileges emotions such as rage in response to acts or insults, but not other emotions such as compassion and despair that may also prompt killings that while intentional may not merit mandatory life imprisonment.

33. In a submission to this Court, which stands in marked contrast to these formulations of the law, counsel for the accused assert that all aspects of provocation as a defence in criminal law are entirely to be judged from the perspective of the accused at the time he or she killed the victim. Thus, it is argued:

> In applying the subjective test, the jury must assess the actions of the accused taking account of his character, temperament and circumstances. This is the appropriate assessment of a person's actions where a death is caused. When an action is carried out where there is a loss of self-control,

objectivity or how the reasonable man would have reacted are not the appropriate way on deciding on culpability.

34. Further, even as to when the accused reacts or as to how he or she reacts in response to the alleged provocation, whether it be trivial or serious, it is claimed, on behalf of the accused, that any attempt on behalf of the Director of Public Prosecutions to assert that there is any element of objectivity in assessing the response of the accused to the victim, his response to that ostensible provocation and when that occurs is to be looked at from the individual temperament and character of the accused in the state that he or she might be in when killing the victim:

> The subjective test in a defence of provocation recognises that there are times when an unlawful killing is committed by a person who is usually rational and reasonable. The defence of provocation is not open in cases of pre-meditation or retaliation. Objectivity or an objective test is not appropriate where a usually rational person suddenly loses control and kills. To assess an unlawful killing where provocation arises on an objective basis ignores human weakness and frailty that forms part of all human beings who are all completely different as regards their temperament, character and circumstances. The mind of the accused where provocation is claimed should not be assessed post facto on a "reasonable man" calculation. It is inherent to the defence of provocation that the accused did not act reasonably or rationally, which the defence of provocation recognises. The modified subjective/objective test proposed by the [prosecution] is confusing and unnecessary. It would require a trial judge to direct the jury to have regard to subjective factors when considering loss of control and to disregard those factors when considering the requisite standard of self-control. Furthermore, it is the Appellant's submission that this test contains an internal and unworkable contradiction.

35. Yet, even as a word, provocation requires to be defined and any such definition is, since it is a legal definition, required to be of universal application. If, as the accused has asserted, provocation is entirely in the realm of what the accused thought or felt, what has always buttressed the law in the form of objective requirements for conduct would entirely be removed. That would neither equate with the common law tradition nor would it be just. In this jurisdiction, considerable disquiet has been engendered by provocation being equated with rage and with the circumstances of drunken violence whereby a trivial insult does not call for restraint but evokes a subjectively justified response of homicidal viciousness. Certainly, a provoked response must be sudden but is this

also to be judged subjectively, as has been argued on this appeal, without any regard to the limitations which the defence traditionally enshrined? To have such a limitation would be objective since from an entirely subjective viewpoint it might be that on thinking about an insult hours later, of even on waking up in bed and sitting bolt upright, a person might give way to rage and seek out and confront the provoker. Objectivity of analysis is, however, called for on the state of even the most extreme interpretation of the law and in *The People (DPP) v Kelly* [2006] IECCA 2 the Court reiterated that provocation must involve a sudden and complete loss of control:

> The loss of self-control must be total and the reaction must come suddenly and before there has been time for passion to cool. The reaction cannot be tinged by calculation and it must be genuine in the sense that the accused did not deliberately set up the situation, which he now invokes as provocation. To justify the plea of provocation there must be a sudden unforeseen onset of passion which, for the moment, totally deprives the accused of his self-control.

36. Here, as in many cases, the accused did not give evidence and he is not to be faulted for that. While statements in custody admitting to killing the accused are admissible in evidence, assertions of that kind are not tested by cross-examination, nor made on oath. The jury can act on such evidence, provided they are made aware of such infirmities by the trial judge, who must have a role in assessing if any aspect of the claims of the accused properly raises the defence. Similarly, the availability of the defence is judged not on the basis of the accused merely saying so in testimony or in a police interview but on the basis of the objective existence of facts which conform to components of the defence. The existence of facts establishing the applicability of any aspect of the law is what legal certainty is all about. Hence, in *The People (DPP) v Davis* [2001] 1 IR 146, delivering the judgment of the Court of Criminal Appeal, Hardiman J emphasised that an accused bears an evidential burden to raise the defence and that more than mere assertion is needed:

> We entirely accept that the burden on the defendant is not a heavy one but it necessarily involves being able to point to evidence of some sort suggesting the presence of all the elements of provocation… the burden which rests with the accused is to produce or indicate evidence suggesting the presence of the various elements of the defence. This can be produced either through direct evidence or by inference on the evidence as a whole, but before leaving the issue to a jury the judge must satisfy himself that an

issue of substance, as distinct from a contrived issue, or a vague possibility, has been raised.

37. The law also distinguishes, as did the judgment of Hardiman J in that case, between failing to control a rage but, instead of self-restraint, giving way to vicious impulse, an objective fault, and a genuine complete loss of control immediately consequent on severe provocation whereby the accused could not desist, or help himself or herself, from intentionally killing the victim. In *The People (DPP) v Curran* [2011] 3 IR 785 [39], the Court of Criminal Appeal again emphasised the social duty of self-control and the availability of provocation as a defence only where there was evidence going beyond giving in to rage and which objectively came into the realm of the kind of conduct by the deceased which could have tipped the accused into total loss of self-control. O'Donnell J stated:

> The decision of this court in *The People (Director of Public Prosecutions) v. Davis* [2001] 1 IR 146 is very important therefore in providing guidance to courts that the structure for the defence is maintained. It emphasises that it is only those cases where provocation as properly defined is genuinely being raised that should be permitted to go to the jury. The court also laid emphasis on ensuring that all the elements of the defence, and in particular those features which distinguish true provocation form mere uncontrolled rage, are maintained. As the judgment pointed out, at p.158, provocation will involve focusing 'inter alia on the distinction between vexation, temper, rage or cognate emotions and provocation in its technical sense.' A condition of being 'vexed' or even 'in a rage' does not remotely approach evidence suggesting the 'total loss of self-control which alone can palliate a fatal assault.

38. Apart from any argument for the application to this case of an entirely subjective approach, which on these authorities is not warranted, enabling drunken conduct to be partially excused, since provocation involves an intentional killing which intoxication as a defence does not excuse, the need to avoid unacceptable cultural fury in the context of honour killings, and the completely unacceptable excuse for rage in the modern era of confessions of adultery or inappropriate same-sex erotic propositions, a continued recital of a multitude of cases does little in fixing the parameters of the defence. In so many cases, a plea has been raised that the accused reacted because of a homosexual proposition put by the deceased, what was once called in England 'the guardsman's defence'. How can that be culturally acceptable in the light of the tolerance demanded by the Constitution? In others, of which the Keith Kelly case is an example, what is sought to be excused is the ending of the life of a young woman because of

something allegedly said by her in the context of a potential or actual sexual encounter. Where the justice could be in meeting mere insult with lethal violence would escape any ordinary member of the community, yet this may be what an entirely subjective test leaves open. Furthermore, women should be as entitled as men not only to say no to sexual propositions but to leave those to whom they were apparently committed and to move on to seek happiness elsewhere without that being trapped in a situation where violence could even partially excuse homicide. It is not acceptable. Situations may be upsetting but the law defines for the entire community when a criminal defence to murder may apply. Upset is not the total and complete loss of self-control. Men should not be excused, even partially, for killing women because of walking in on an estranged wife while she entertained a new lover, as in *R v Tran* [2010] SCC 58, or because of an insult in the context of a lonely post-discotheque encounter where the victim's voice is silenced by the accused's own actions, as in *Kelly*. See also Fairall and Barrett, Criminal Defences in Australia (5th edition, Sydney, 2017) 11.54. Nor has it ever been asserted that a subjective test might turn a gangland revenge killing into homicide because of broken drug deals or other forms of betrayals. Cultural norms traditional to societies where women are confined to domestic roles and where marriage is constricted in freedom to those chosen by families, could never justify removing murder from killings which are called, wrongly, honour killings, because a young lady has broken such norms and exercised her freedom to express her preferences outside those imposed strictures. As even mainstream society has changed so, less and less, could it ever be even partially acceptable to kill consequent on simply failing to restrain violent emotions when a lover wants to move on or has found someone else. These are situations that may happen to anyone and resort to an excuse of being provoked would be as unacceptable here as in a deadly response to a homosexual person. In *R v Yasso* (2006) 6 VR 329 at 243-4, Coldrey J expressed the need to consider the defence within the bounds of acceptable conduct and the duty of all men in traumatic emotional situations to not take their angry or disappointed feelings out on women:

> In our modern society people frequently leave relationships and form new ones. Whilst this behaviour may cause a former partner to feel hurt, disappointment and anger, there is nothing abnormal about it. What is abnormal is the reaction to this conduct in a small percentage of instances where that former partner (almost inevitably a male) loses self-control and perpetrates fatal violence with an intention to kill or to cause serious bodily injury. In my view, this will rarely, if ever, be a response which might be induced in an ordinary person in the twenty-first century. Significant

additional provocative factors would normally be required before the ordinary person test could be met.

39. Objective elements have never been entirely abandoned in this jurisdiction from the application of the defence of provocation. Otherwise, how could it be that in *MacEoin* reference is made both to the mode of resentment to provocation, as in killing a girl because of an insult during a sexual encounter, and the expressed need that only cases which fit the definition should be left for the consideration of the jury. As a defence, provocation has always required that the turmoil in the accused's mind be genuine and not contrived. That has to be judged on the basis of societal standards as without such standards, there is nothing for the jury to apply. It is common sense that even the most staid person of strong personal standards of morality may be provoked into using bad language. It is also common sense that a hot-tempered person who has used violence throughout a lifetime may respond violently to a trivial insult or take matters to the level of lethal violence. This is not acceptable. All are required by the limits on the defence of provocation to exercise control over themselves and all are to be judged on the basis of their sober, and not intoxicated or drugged, selves. The law makes allowance for complete loss of self-control but not for drunken rage. Here, the prosecution has argued for a three stage test for the defence of provocation; but the proposal on analysis is not to be found in the common law developments that have taken place in any other country. The prosecution proposal is that the defence of provocation should remain, firstly, a complete loss of self-control in consequence of what the victim did such that the accused could not prevent himself or herself from killing the deceased intentionally; secondly, that this loss of self-control is to be adjudicated entirely from the subjective viewpoint of the individual accused, as in *MacEoin*; and that, finally, that the mode of resentment, how the accused reacts to the provocation should render the defence inoperable if it exceeds what is reasonable. Immediately a difficulty arises both in logic and in the realm of how that might work in experience. If there is no objective element in the second part, in accepting that the accused must first completely loose self-control as a matter of genuine fact, how could it possible to fairly say that if the second part of the proposed test is entirely objective that somehow it is unreasonable for the accused, judged objectively, to have picked up a knife as opposed to have punched the victim or merely used bad language? Hence, the prosecution submission must be rejected.

40. There, nonetheless, has to be a common and sensible standard which takes into account the variability of people as to age or sex or pregnancy and state of health or capability in physical or mental terms. Equally, social norms must now

exclude violent responses to ordinary stresses such as a lover moving on or to phobic reaction to the right of people to choose their own lifestyle or path. Provocation is a defence which has always been limited by objective elements and by the need for the account of loss of self-control to be genuine and not contrived or bogus or set up to enable murder. There must be a sudden, and not a considered or planned, loss of self-control. That deprivation of self-control must be total to the degree that it is not merely a loss of temper but such a complete overwhelming of constraint, in consequence of what was done or said, that the accused cannot help intending to inflict death or serious injury, and cannot at all prevent himself or herself inflicting such deadly violence. That rage must not be fuelled by intoxication on drink or drugs. Loss of self-control must be in response to a serious provocation, not a mere insult, by the victim. The provocative act, by action or gross insult, is required to be outside the bounds of any ordinary interaction acceptable in our society. The defence does not apply to warped notions of honour and the proper sexual conduct of males or females, or mere hurt to male pride, or to gang vengeance, or to situations where sober people sharing the same fixed characteristics as the accused, where relevant, as to age, or mental infirmity, or sex, or pregnancy, or ethnic origin, would be able to exercise self-restraint in the same background circumstances as apply to that accused. The loss of self-control must genuinely cause the lethal violence. If any of those features is absent, the defence is not applicable.

Mode of retaliation

41. The early common law required that the mode of retaliation be such as to conform to the grossness of the action or insult or both which caused the accused to temporarily lose control to the degree that he killed the victim. This was part of the objective test, and might remain part of a modified objective test, since the question was could an ordinary person be so provoked to be driven through transport of passion and loss of self-control to the degree and method and continuance of violence which produced the death; *Holmes v DPP* [1946] AC 588. Under the subjective test, according to the submissions on behalf of this accused, this is to be looked at from entirely inside the accused's mind. Yet, as a person losing self-control is not thinking or reacting rationally, this makes little sense. The Director of Public Prosecutions, in submissions on this appeal argues, nonetheless, that the objective element to the defence of provocation occurs when assessing how much force was used. In all other jurisdictions, it is used simply in assessing credibility. This also fails to account for the fact that in picking up a knife or, as in *MacEoin*, when replying with a hammer to an attack with a hammer, the accused is not acting in accordance

with rational calculation but in consequence of such loss of self-control as the law requires to be total.

42. Here, in this particular case, the original assault outside the pub was a manhandling and a deep insult to the pride of the accused and the dignity of his wife. No one was hurt, certainly not badly, but pride was much injured. Then much time passed. The accused armed himself the next day with a lethal sawn-off shotgun. He then went to where members of the rival motorcycle club might be found. He killed an unarmed and uninvolved man. Even if he was armed, he merely had a bar and on all accounts was holding it and not wielding it in any aggressive way; the accused approached him and not the other way around.

43. It should be remembered that in every murder case, the prosecution is required to prove the key subjective element: in doing what he or she did to kill the victim, did the accused intend to kill or to cause serious injury? That subjective element is not changed or compromised by objective elements in the provocation defence since provocation only applies where the accused is proven by the prosecution to have killed the victim while intending to kill or cause serious injury to him or her. What is at issue in the provocation defence is what the accused did in response to what the deceased person is alleged to have done to him or her in the context of any relevant background. All assertions of a state of mind are to be considered by a jury against what is claimed to justify having such a state of mind, whether that is a belief or a claim of right. Similarly, while intention or recklessness could be said to be capable of being discerned only by looking inside an accused person's head at the time of the commission of the offence in question, it is a commonplace that intention or recklessness may be inferred from the circumstances proven. But there is no rule of law that such an inference must be made in certain circumstances, such as that of assistance to an armed gang, one of whom kills a person resisting a robbery. It is from circumstances that an inference may, not must, be made and it is as against the background of real events that any claimed loss of control must be considered by a jury with shrewdness and common sense. People can be provoked but there are degrees of provocation and there are degrees of reaction. In ordinary people who are not intoxicated or drugged, people assess what is done as against what provocation was allegedly offered by the deceased. What the accused did, and his claimed mental state must be judged against that background. Such total loss of self-control to the degree of an intentional use of fatal violence must be genuine.

Third party

44. Provocation is not a defence which encompasses revenge. Under the rule of law, the designated authorities of the criminal law are there to supply justice through investigation upon report by those wronged and by affording any person accused a trial in due course of law. That rule of law does not encompass retribution on groups and nor could any just system of law. Leaving aside delay and the sufficiency of any provocative action, the victim of this deadly gun attack was, in effect, merely a bystander. How could it be justified in the context of the provocation defence, for instance, if on the night that the accused's colours were robbed from him by three different people, he had turned and attacked the deceased at the clubhouse or even if he had been shot within the pub? What had the deceased done to him? Nothing. Any sense that simply because there are gangs or groups, friendly or criminal, or genuine or illusory, devoted to good works or to sport, or to charity, or to pursuing ill-will, cannot matter and could never be an acceptable application of any defence of provocation. In submissions on the appeal, counsel for the accused argue that the provocation defence, in its subjective nature is a complete answer to killing the victim as he is to be regarded as more than a bystander.

In the circumstances of this case, it is submitted that the deceased should not be classified as an uninvolved by-stander. [Alan McNamara] was attacked and threatened the previous evening by members of the Road Tramps club. His family and home were threatened by other members of the same club. [He] lived close to the Road Tramps club and felt threatened by its members. In fear that his son was in danger, [he] drove to the Road Tramps club and on passing the gates, he saw two members of the same club whom he believed to be holding firearms. At that stage, he did not know who the eventual deceased was but he viewed him as an involved member of the Road Tramps club. The defence of provocation, by its nature, involves loss of control. It involves loss of rationality and reasonableness. It involves no meditation or consideration of the situation. The killing occurs in a situation of loss of control. The subjective test in Ireland means that more emphasis is placed on the moral culpability of the accused than the blameworthiness of the ultimate victim. The deceased does not need to be the source of the provocation since the authorities appear to allow for a situation where the accused makes a mistake as to the victim [*People (DPP) v Delaney* [2010] IECCA] or, as occurred in [Alan McNamara]'s case, the deceased was implicated in a 'group provocation'. It is clear from the facts in [our] case that the deceased was at the relevant time acting in concert with others from the Road Tramps*[; R v Kenney* [1983] 2 VR 470, *R v Davies* [1975] QB 691]. The subjective test fits

entirely with this approach since the focus is on the accused rather than the ultimate victim.

45. Perhaps the law requiring the retaliation to be against the provoker could be argued on behalf of the accused to be outdated in the sense that it ascribes part of the fault in the homicide to the victim. Nonetheless, the state of the law enables only limited exceptions to the principle that the accused must kill the person who provoked him or her. In Queensland, provocation may succeed where the accused wrongly believes that the deceased has committed the provocative action; s 24 Criminal Code. This, however, requires the mistake to be on reasonable grounds to be successful. In general, mistake in criminal law must be both genuine and reasonable and the context from the point of view of the accused must be such that on his or her subjective view the action taken would be lawful.

46. In general, misdirected provocation does not accord with the law. If the accused kills someone who did not provoke him or her, the defence does not lie in any context where the accused says that he or she was provoked by another individual. Subject to particular and limited exceptions, the law is that provocation must emanate from the deceased; Fairall and Barrett, Criminal Defences in Australia (7th edition, 2017, Sydney). But there are exceptions, such as people acting in concert. It could happen that a gang of people attack an individual or attempt to rape someone he or she loves, in which case the provocative action of attempted rape could be ascribed to all actively participating parties through keeping off his or her efforts at rescue or encouraging the perpetration of the crime. There was no active provocation by this deceased who was nowhere near the scene of the robbery from the accused on the prior night. The example given of an active crime as a joint provocation could not apply to a motorcycle club where the victim was not the person to rob the deceased or ever acted in concert with the accused's assailants. In addition, those closely connected in action, or physically proximate may reasonably cause in the mind of the accused to ascribe provocative conduct by one to be attributed to the other. It might also be that transferred malice, whereby an intention to kill A but striking B is murder, might be reversed so that accidentally striking an unconnected party might enable the defence.

47. This is none of these exceptions. In so far as the accused claimed that the coloured bar held by the deceased was, he thought, a gun, this has been dealt with in the context of self-defence and the jury rejected that account.

Passage of time

48. Perhaps up to fourteen hours passed, or certainly a night where the accused could have slept or thought himself into lawful action, between the confrontation and the homicide. That could be reduced somewhat by the visit of the car to the accused's home with a weapon displayed, but there is, demonstrated on these facts, no air of reality about the defence of provocation. Historically, retaliation had to be sudden. This, while not sudden, could perhaps be considered in the light of the background. The longest passage of time, it seems, where the defence succeeded, in *R v R* (1981) 28 SASR 321, was about 20 minutes. There a background of domestic abuse led the wife to kill her husband while he slept about twenty minutes after the last provocative context but against a background of much suffering. Nothing in the statement of the provocation defence by this Court excludes relevant background, such as domestic abuse of women, or denies that against a background of continual actions which tortured the accused, an action by the deceased that would otherwise not be provocation may become so when judged within a relevant and sensible appreciation of the context. But, on behalf of the accused, it is argued that the passage of time, the self-arming with a lethal weapon and the seeking out a place where the provoker may be, here in a state of agitation, cannot be defeated since the test for the defence is entirely subjective. Hence it is submitted:

> When the defence of provocation is raised or advanced on behalf of an accused person in a murder trial, the facts of the case become paramount. The subjective test in simple terms requires:
>
> (a) Some act or acts of provocation, in most cases, towards the accused.
>
> (b) That the provocation causes the accused to lose control at the time of the wrongful act.
>
> (c) That having regard to the accused's temperament, character and circumstances, the provocation might have caused him to lose control of himself at the time of the wrongful act.
>
> These are all separate matters to be assessed by a jury giving due regard to the subjective test as outlined to them by the trial judge. As regards the passage of time, the notion of immediacy exists to exclude the possibility of deliberation, design and retaliation. The wrongful action by the accused must have been done when he had lost control and acted automatically or impulsively at a time when there was a temporary suspension of reason. The requirement for immediacy is a tool, therefore, which assists the jury in deciding

> whether the accused was in fact suffering from a loss of control at the time of the wrongful act. The subjective test is central to the jury's decision in this regard as it allows the jury to assess the accused's reaction from his perspective and taking into account his temperament, character and circumstances. As set out in … submissions, the authorities clearly show the relevance of background information and do not exclude the possibility of a delayed reaction. Furthermore, the Court will have noted that the High Court of Australia has pointed to 'fear' and 'panic' [*Van Den Hoek v R* (1986) 161 CLR 158, 168] as amongst the emotions which can cause the sudden loss of control. In any event … the provocation began on the evening prior to the shooting and continued up to and including the moments just before the deceased was shot. Where the provocation defence is raised and the trial judge has found some evidence of provocation to exist, the question of 'passage of time' is ultimately a matter to be decided upon by a jury using the subjective test. The trial judge usurped the function of the jury in making a factual decision as to when the last act (in a series of acts) of provocation occurred and whether the provocation was sufficiently proximate to the wrongful act.

49. Does even an entirely subjective test mean that any time may pass? It cannot be that the defence has become so divorced from its original iteration that a person can sleep on, whether he or she slept or not or perhaps only fitfully, and then take such a considered action as driving to a place with a gun. It must be accepted that provocative incidents insufficient in themselves to trigger violent responses, such as domestic abuse, may magnify over repetition and may cause such a foundation of circumstance that possibly may trigger a loss of self-control that is delayed and results in an explosion of violent, but incapable of being controlled, emotion; *R v R* (1981) 4 A Crim R 127, 178. Further experience is always a likelihood for the courts. This means that no entirely prescriptive rule may be laid down. But there is also a sense in which delay may bring about a situation where it would be contrary to the duty of a jury to judge facts fairly should they find for an accused on provocation. A case where there has been such delay that the defence could not be fairly found must result in the defence being withdrawn from the jury by the trial judge.

Role of the trial judge

50. In *MacEoin* it was accepted that the trial judge may withdraw provocation from the jury where there is insufficient evidence to support the defence. This is a

matter of judicial assessment of the state of the law and the available facts and it has nothing to do with discretion. Can that analysis be consistent with the entirely subjective test argued for on behalf of the accused in the sense that the accused can perhaps react in any way once provoked? According to the submissions on behalf of the accused, it cannot:

> If this Court decides to accept the [prosecution]'s proposals and adopts a modified test … the jury in his case should have been permitted to consider the defence of provocation. There was evidence of provocation (as well as evidence that the [accused] was panicked and fearful for his and his families lives) in response to which a person with normal powers of self-control would have responded similarly. [O]nce there is 'any evidence at all' of this, the trial judge must allow the defence to go to the jury. Thereafter, the extent to which [Alan McNamara] would have acted similarly to a person with ordinary powers of self-control is entirely within the province of the jury. As such, even were a modified test applied, the jury should have been entitled to consider the defence of provocation in this case. It is submitted that the role of the trial judge is to decide, having heard all of the evidence and perhaps counsel's submissions, whether the accused has raised the defence of provocation. The evidence may come from both the prosecution and defence case. He must then simply ask himself whether, from the evidence or submissions, there is evidence of an act of provocation and whether there is evidence that the accused, at some point, lost control and killed. The trial judge must make this assessment by applying the subjective test and viewing the matter from the perspective of the accused. However … this issue sets a low threshold for allowing the defence of provocation to go to the jury. The trial judge has a minimal role in deciding upon the question of provocation and is confined to a consideration as to whether there is any evidence at all which is fit to be considered by the jury. It is then for the jury to decide whether, having regard to this particular accused's character, temperament and circumstances, that the evidence of provocation in the case can allow them to find the accused guilty of manslaughter and not murder. It is submitted that juries can be trusted and do apply the subjective test in cases where provocation is raised in a manner that is fair to the accused and to the particular facts of each case.

51. Provocation is a defence, despite being an intentional homicide where intent to kill or cause serious injury must be proven, because of the removal of ordinary restraints in consequence of what happened to, or was said to, the accused,

considered in the proper context. Once the accused asserts a lack of self-control, can the defence not exist independent even of a provocative action by the deceased and the passage of a night, where the accused says he did not sleep, but must have had plenty of time for his will to reassert itself? If that is so, the trial judge here should have left the defence to the jury. On the other hand, there are many cases justifying withdrawal. In the Australian form of the modified objective test, that role was upheld by the High Court of Australia in *Stingle v R* (1990) 171 CLR 312 so as to justify withdrawing a provocation defence from the jury. There, the teenaged accused had come across his former girlfriend in a car engaged in a sexual action with another young man. On being cursed at, he went away and fetched a butcher's knife from his own car and stabbed the new lover to death. The High Court emphasised that there is an "objective and uniform standard of the minimum powers of self-control which must be observed before one enters the area in which provocation can reduce what would otherwise be murder to manslaughter."

52. The Canadian approach is that all criminal defences must have an "air of reality" about them before being left to the consideration of a jury; *R v Cairney* 2013 SCC 55, R v Pappas 2013 SCC 56 and see Roach, Criminal Law (5th edition, 2018, Toronto) 446. The Australian approach, as in *MacEoin*, requires the judge to decide whether on the version of events most favourable to the accused, the jury might fail to be satisfied beyond a reasonable doubt that the killing was unprovoked. In this context, the burden of proof is on the accused to produce evidence, or to point out evidence on the prosecution case, whereby as a matter of reality a jury would continue to act judicially by finding that the prosecution had failed to negative whatever evidence might be so adduced. But the evidence must be such as to be capable in law of amounting to provocation. That is a judicial decision. If the jury would be acting perversely in finding provocation, the judge cannot leave the defence for their consideration. That is what happened in this case and the judgment of McDermott J in that regard was properly made.

Instructing the jury

53. The burden of proof in the defences generally is that which is generally. That burden was explained in the context of the justificatory defence of the lawful use of force by Walsh J in *The People (AG) v Quinn* [1965] IR 366 at 382. The accused carries the burden of adducing a sufficiency of evidence to enable the defence to be considered by the jury; *The People (DPP) v Gleeson* [2018] IESC 53, [18-20]. There must be sufficient evidence whereby the jury could rationally hold on that defence for the accused. Lengthy repetitions of evidence by the trial

judge help do not help a jury. The jury will have heard the prosecution and defence cases put before them as an argument by counsel on each side. A reference to the essential elements of each side's evidence, or view of it by way of counsel's argument, suffices. To go further is to risk confusion. Nor does it help to have to explain subjectivity or objectivity at length.

54. To consider the defence of provocation, the jury must first be satisfied that the accused killed the victim and that in doing so he or she intended to kill the victim or to cause to the victim serious injury; s 4 Criminal Justice Act 1964. That is a subjective element that the prosecution must prove to establish murder. Provocation may reduce murder to manslaughter but only where that intention to kill or cause serious injury to the deceased has been proven.

55. For the defence of provocation to apply, the jury must be satisfied that the prosecution have not rebutted such evidence as the jury considers raises a reasonable doubt in their mind that the accused may have been acting under provocation in killing the victim. All elements of the defence of provocation must be present to reduce an intentional killing of the victim from murder to manslaughter.

56. For provocation, there must be a sudden, and not a considered or planned, loss of self-control. That must be a total loss of all control to the degree that it is not merely losing your temper but, instead, is such a complete overwhelming of ordinary self-restraint, in the face of what was done or said, that the accused cannot help intending to inflict death or serious injury, and could not stop himself or herself inflicting this deadly violence.

57. That total loss of self-control in consequence of provocation cannot be because of intoxication on drink or drugs. The accused's actions are to be considered as if he or she was not acting under the influence of drink or drugs when the accused killed the victim.

58. Loss of self-control must be in response to a genuinely serious provocation, not a mere insult, by the victim. The provocative act, by action or gross insult, is required to be outside the bounds of any ordinary interaction acceptable in our society. The defence does not apply to warped notions of honour or to any unacceptable ideas as to the proper romantic or sexual conduct of males or females; nor hurt to male pride; nor to gang vengeance.

59. The defence of provocation does not apply in situations where ordinary people, sharing, if relevant, the same fixed characteristics as the accused, as to age, or sex, or pregnancy, or mental infirmity, or ethnic origin, or state of health, would

be able to exercise self-restraint in the same background circumstances as apply to that accused. People can be provoked, but juries should always remember that there are degrees of provocation and there are also degrees of reaction to being provoked. What the accused did, and that accused's claimed mental state, must be judged against that background. Such total loss of self-control to the degree of an intentional use of fatal violence must be genuine. Thus, a jury will reject the defence if it is regarded as fabricated.

This appeal

60. There was no foundation of fact on which a jury could ever find for the accused on the basis of provocation. What happened the night before the killing of the victim might have been such that had the accused retaliated when he and his wife were assaulted outside the bar, supposing that the victim had taken part, which he did not, and supposing he had the means of lethal force spontaneously to hand, a jury might have considered the defence of provocation in that context. Whether the jury would have found provocation or not is a different matter. Where, as here, an accused has time to restrain emotion and to seek lawful means of redress, such as making a complaint of a criminal wrong to the authorities, there is no basis for leaving provocation as a defence to the jury. It would also be contrary to any proper analysis of the level of provocation in this case to consider that any ordinary person in this context and of the same age, sex and without mental infirmity, being of general intelligence, could lose control to the degree of shooting someone in the face with a sawn-off shotgun. In addition to the time factor, the attack occurring on the next day, the victim was disconnected from the attack and was merely a member of the same group as the original assailants.

61. On the basis of the reasoning in this judgment, the decision of the Court of Appeal, affirming the ruling of McDermott J as trial judge in withdrawing provocation from the consideration of the jury, should therefore be affirmed on the basis of a lack of reality to the applicability of the defence of provocation in the circumstances of this case.