CASE COMMENTARY

R v JAMES; R v KARIMI, COURT OF APPEAL, (CRIMINAL DIVISION) [2006] 1 ALL ER 759

Rolling back the reasonable man - but how far?

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THE FACTS

Leslie James

Leslie Hall James was convicted, at Nottingham Crown Court on May 1 1979, of the murder of his wife, and sentenced to life imprisonment - a plea of provocation having failed. He had stabbed, punched and suffocated her following an argument. On the morning of the killing he had left work and gone to her home carrying a knife he borrowed from a colleague, he said, in order to cut a cork template. After killing her he went back to work returning again to the house during his lunch hour to change the locks. Later that afternoon he collected his daughter from school. The background to this killing was that Mrs James had left the matrimonial home in December 1978 and formed a relationship with another man (Mr Dutfield). The police had been called on several occasions to disturbances between Dutfield, the appellant and Mrs James.

On March 23 1982, James' appeal to the Court of Appeal was dismissed. On completion of a life sentence, he was released on license and subsequently made an application to the Criminal Cases Review Commission to have his case referred back to the Court of Appeal following the expansion of provocation in the House of Lords ruling in *Smith*[1] (which permitted the admission of psychiatric evidence in an assessment of capacity for self-control). Why would James wish to appeal his conviction having already served his sentence? One can only surmise that he would rather the stigma of a conviction for manslaughter-provocation than the stigma of murder. Furthermore, not only is a conviction for provocation considered less morally blameworthy but on completion of a prison sentence no conditions are

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[1] *R v Smith* (*Morgan*) [2000] 4 All ER 289.

attached, whereas following completion of a sentence for murder an offender is released "on license" which means that at any time he may be recalled to prison if his behaviour "gives cause for concern." "Cause for concern" includes whether the licensee's continued liberty would present a risk to the safety of others or whether the licensee is likely to commit further imprisonable offences; the extent to which the licensee has failed to comply with the conditions of the license or otherwise failed to co-operate with the supervising officer; and whether the licensee is likely to comply with the conditions of the license and agree to supervision if allowed to remain in the community. On September 15 2004, the Criminal Cases Review Commission referred the case back to the Court of Appeal.

Jamal Karimi

Jamal Karimi was convicted at St Alban's Crown Court on July 29 1997, of the murder of his wife's lover, Sirvan Kabadi - a defence of provocation having failed. The background to this case is complex. In 1984, the appellant joined the Communist Freedom Fighting Movement in Kurdistan and in 1986 married Mehri Rezai, a member of the same movement. By 1990 their relationship began to deteriorate. Mehri Rezai came to England in April 1994 and the appellant joined her shortly afterwards. The relationship broke down in February 1996, and the appellant moved out of the family home. Subsequently, the appellant became friendly with a man called Sirvan Kabadi, who also became intimately associated with the appellant's estranged wife. On December 4 1996, Rezai told the appellant that their relationship was over. On December 6, the appellant met with Mr Kabadi, they argued and the defendant killed Mr Kabadi with a knife inflicting numerous stab wounds including cutting the deceased's throat. The appellant immediately admitted the killing to police. The defences advanced at the trial were that his responsibility was diminished because of post-traumatic stress disorder following his experiences in Kurdistan; provocation as the deceased had said to the appellant "Besharef" which means, "you have no honour," and self-defence on the basis that the deceased came at the appellant with a knife. Self-defence was rejected and so the issues for the jury were whether the appellant had been provoked and whether he was suffering from diminished responsibility. The jury, not persuaded by either of these defences, convicted Karimi of murder. Mr Karimi's application for leave to appeal against conviction was refused on 1 May 1998. He placed an application before the Criminal Cases Review Commission on September 4, 1998 and on June 24, 2003 they referred the case to the Court of Appeal. An appeal against conviction was allowed in February 2005[2] and a retrial directed. Between the appeal and the retrial

[2] *R v Karimi* (*Jamal*) [2005] EWCA Crim 369.

Holley[3] intervened. At the retrial, at the Central Criminal Court, on October 4 2005, the judge followed *Holley* (which had been decided on March 15, 16, 17; June 15 2005) in directing the jury as to the law. The appellant was once again convicted of murder. Karimi was sentenced to a life term.

THE COURT OF APPEAL

These two appeals against convictions for murder were heard together before Lord Phillips of Worth Matravers CJ, Sir Igor Judge P, Poole, Bean and Dobbs JJ, on December 19 2005 and January 25 2006, as each turned on the correct interpretation of the second limb of the test for a defence of provocation which is concerned with a defendant's capacity for self-control. Both appellants wished to rely on psychiatric evidence, (following the ruling in *Smith*[4] which allowed consideration of psychiatric evidence even though the evidence was free standing and not related to the characteristic) with respect to their capacity for self-control. The outcome of each appeal depended on whether the Court of Appeal considered, the definitive statement on the capacity for self-control in provocation, the decision of the House of Lords in *Smith* or a subsequent decision of the Privy Council on an appeal from Jersey in *Holley*. As decisions of the Privy Council, taken at their highest, were persuasive it could be reasonably predicted that the ruling in *Smith* would prevail. Indeed, Lord Phillips CJ in the Appeal Court said:

> **"**[20]. Normally the result in A-G for *Jersey v Holley* would have been a foregone conclusion. The majority decision in *R v Smith* (Morgan) would have been followed and the appeal would have been dismissed. The jurisprudence of the Privy Council had established that, where an appeal turned on a point of English law, or law identical to English law, the Privy Council should follow a decision of the House of Lords."[5]

Further, a previous decision of the Privy Council in *Luc*[6] had been eschewed precisely because the doctrine of precedent demanded that decisions of the higher courts were binding. The Court of Appeal reviewed both lines of authorities.

In *Smith*, the House of Lords (Lord Slynn of Hadley, Lord Hoffmann, Lord Clyde, Lord Hobhouse of Woodborough and Lord Millett) by a majority

[3] *A-G for Jersey v Holley* [2005] 3 All ER 371.
[4] Ibid note 1.
[5] *R v James; R v Karimi*, Court of Appeal, (Criminal Division) [2006] 1 All ER 759 para 20.
[6] *Luc Thiet Thuan v R* [1996] 2 All ER 1033.

of three to two, resolved the ambiguity which had arisen in English law regarding whether the gravity of the provocation should be considered of relevance to the characteristics of the reasonable man only, or whether the gravity of the provocation could also be considered of relevance to the question of a defendant's capacity for self-control. The certified question for the House was framed in this way: "Are characteristics other than age and sex, attributable to the reasonable man, for the purpose of section 3 of the Homicide Act 1957, relevant not only to the gravity of the provocation to him but also to the standard of self-control to be expected?" Their Lordships ruled that mental characteristics, which amounted to a mental "affliction", could properly be considered as relevant to the capacity for self-control. Smith was suffering from depression and psychiatric evidence was admitted:

> "…expert witnesses [also] considered his susceptibility to react to provocation. A psychiatrist called by the defence, who had seen Smith in prison less than a fortnight after the offence, said that he was suffering from an abnormality of the mind, namely depression, which could reduce his "threshold for erupting with violence." Another said that he was suffering from clinical depression which made him "more disinhibited", ie less able to control his reactions."[7]

(Their Lordships use of the term "affliction" was deliberate as they wished to preserve some semblance of a distinction between the defence of provocation and that of diminished responsibility, the latter turning on mental abnormality. In the words of Lord Clyde, Smith was suffering from "some affliction which falls short of mental abnormality.") In considering Smith's mental characteristic they relied on that part of Lord Diplock's ruling in *Camplin*[8] in which he held that: "when considering the standard of self-control required to satisfy section 3, there must be attributed to the reasonable man any special characteristics of the defendant." Their Lordships in *Smith* ruled that the capacity for self-control was neither a fixed, nor an immutable standard and could be considered separately and quite independently from any characteristic on which a defendant relied in respect of the first limb of the test (Lord Hobhouse of Woodborough and Lord Millet dissenting).

Moreover, the House of Lords had not only ruled that the standard of self-control was variable but also introduced a moral dimension into the consideration of whether a defendant's capacity for self-control was reduced. Lord Hoffman in his judgment said that a jury should find the defence of

[7] *Smith* note 1, per Lord Hoffman para 3 at 299b.
[8] *DPP v Camplin* [1978] 2 All ER 168.

provocation made out where they thought "**that the circumstances were such as to make the loss of self-control sufficiently excusable** to reduce the gravity of the offence from murder to manslaughter."[9] This part of the judgment created the most concern. Many were not happy with the ruling in *Smith* since it widened the second limb of the test and took the ordinary man of provocation over the line into the territory of the diminished man of diminished responsibility, and, in addition, allowed a jury to find provocation where they considered "that the circumstances were such as to make the loss of self-control sufficiently excusable." There were many who could not wait for an opportunity to voice their objections. Holley provided the opportunity.

In *Holley*, the appellant, the Attorney General for Jersey appealed against the decision of the Court of Appeal of Jersey to substitute a conviction for manslaughter for a conviction for murder in the case of the respondent Holley who was a chronic alcoholic. Holley admitted killing his girlfriend with an axe. The deceased had said to Holley, "You haven't got the guts" Holley struck and killed her. The issue was whether the jury should have been directed that his chronic alcoholism was a matter to be taken into account by the jury when considering whether, having regard to the actual provocation and their view of its gravity, a person having ordinary powers of self-control would have done what he did. The Privy Council (nine Lords of Appeal in Ordinary) allowing the appeal (Lords Bingham, Hoffmann and Carswell dissenting), held that the issue for the jury was whether the provocation was enough to make a reasonable man do as the defendant had done and that a "reasonable man" meant a person of ordinary powers of self-control. The Privy Council ruled that the standard of self-control was uniform and objective and was not to be judged by the self-control which the defendant was able to exercise in the view of the jury. With specific regard to chronic alcoholism the Privy Council said:

> "[24] Their Lordships mention some ancillary points. The first is relevant to the facts in the present case. It concerns application of the principles discussed above in circumstances where the defendant acted under the influence of alcohol or drugs and, therefore, at a time when his level of self-control may have been reduced. If the defendant was taunted on account of his intoxication, that may be a relevant matter for the jury to take into account when assessing the gravity of the taunt to the defendant. But the defendants intoxicated state is not a matter to be taken into account by the jury when considering whether the defendant exercised ordinary self-control. The position is the same, so far as provocation is

[9] *Smith* ibid note 1 at 312h.

> concerned, if the defendant's addiction to alcohol has reached the stage that he is suffering from the disease of alcoholism."[10]

In *James* and *Karimi* it fell to be determined which of these two cases, (*Smith* or *Holley*) representing as they do conflicting strands of judicial opinion, stood as authority for the correct interpretation of the law in respect of the capacity for self-control. The Court of Appeal much to the surprise of counsel for the appellants (because of the constitutional position of the House of Lords and the Privy Council) followed the Privy Council and not the House of Lords. It considered itself able to do so and thereby effectively subvert *Smith* because of the unique composition of the Privy Council. (The Judicial Committee of the Privy Council usually sits with a maximum of five members). Uniquely the Privy Council in *Holley* consisted of nine Lords of Appeal in Ordinary. However, the constitution of the Judicial Committee in *Holley* was no accident. As Lord Phillips of Worth Matravers CJ stated:

> **"**23. The procedure adopted and the comments of members of the Board in Holley suggest that a decision must have been taken by those responsible for the constitution of the Board in Holley … to use the appeal as a vehicle for reconsidering the decision of the House of Lords in Morgan Smith, not just as representing the law of Jersey but as representing the law of England. A decision was taken that the Board hearing the appeal to the Privy Council should consist of nine of the twelve Lords of Appeal in Ordinary. Those sitting were Lord Bingham of Cornhill, the senior Law Lord, Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Baroness Hale of Richmond and Lord Carswell. …24.…the Board divided six/three. The majority concluded that Morgan Smith had been wrongly decided and that the majority in Luc Thiet Thuan had accurately stated the law. The dissentients were Lord Bingham, Lord Hoffmann and Lord Carswell."[11]

As to the correct interpretation of the law, the Court of Appeal in *James* and *Karimi* found the ruling in *Holley* to be correct:

[10] *Holley,* ibid note 3, para 24.
[11] *R v James; R v Karimi* ibid note 5.

> "27 [22] Under the statute the sufficiency of the provocation ('whether the provocation was enough to make a reasonable man do as [the defendant] did') is to be judged by one standard, not a standard which varies from defendant to defendant. Whether the provocative act or words and the defendant's response met the 'ordinary person' standard prescribed by the statute is the question the jury must consider, not the altogether looser question of whether, having regard to all the circumstances, the jury consider the loss of self-control was sufficiently excusable. The statute does not leave each jury free to set whatever standard they consider appropriate in the circumstances by which to judge whether the defendant's conduct is 'excusable'….."[12]

COMMENTARY

The judicial manoeuvres over the past decade have witnessed an expansion both of the first limb, that is the characteristics that can be properly attributed to the reasonable man, and also the second limb with regard to the capacity for self-control. This expansion has benefited battered women whose fear and trauma (battered women syndrome) has been considered a characteristic under the first limb (*Aluwahlia*[13]) and also a characteristic with the potential for having a direct bearing on the capacity for self-control (second limb) (*Thornton No 2*).[14]

The capacity for self-control of the reasonable person of provocation following *Holley* appears to have been rolled back to an objective standard. But it is difficult to see how a person's capacity for self-control can be totally severed from the characteristic(s) of the defendant unless that part of Lord Diplock's speech quoted above on *Camplin* is to be ignored or re-encoded. In a dissenting judgment in *Holley*, Lord Carswell described the majority's approach as "illogical, inexplicable and unjust." He could not see any convincing logical ground for the distinction between response characteristics and control characteristics. He also considered that jurors would find the distinction hard to understand. He said:

[12] *Holley*, ibid note 3, para 27.
[13] *R v Ahluwalia* [1992] 4 All ER 889, per Lord Taylor "However, the endorsement of the New Zealand authority in *R v Newell* shows that characteristics relating to the mental state or personality of an individual can also be taken into account by the jury, providing they have the necessary degree of permanence."
[14] *R v Thornton* (No 2) [1996] 2 All ER 1023.

> "I am rather in wholehearted agreement with the remark of Thomas J in the New Zealand case of *R v Rongonui* [2000] 2 NZLR 385 at 446 that most trial judges had seen - "the glazed look in the jurors" eyes as, immediately after instructing them that it is open to them to have regard to the accused's alleged characteristic in assessing the gravity of the provocation, they are then advised that they must revert to the test of the ordinary person and disregard that characteristic when determining the sufficiency of the accused's loss of self-control."

The problem with *Holley* (and *James* and *Karimi*) is that very little is said about which aspects of any previous rulings remain good law, or to what particular aspects this resiling pertains. If the Law Commission in *Partial Defences to Murder* had identified the problem of provocation post-Smith correctly when stating, " …there is now no clear test for differentiating between a "provoked killing" and a "revenge killing",[15] driving out all flexibility with regard to the capacity for self-control is not the solution. But I am not certain that *Holley* will have that effect.

If *Holley* is confined to its own facts, it is chronic alcoholism that cannot be considered as relevant to reducing a person's capacity for self-control. This is not new, after all, it has always been the case, as expressed by Lord Goff, that "being drunk, or high with drugs or glue – at the relevant time…may not be so taken into account, because that, …is excluded as a matter of policy."[16] The central objection to *Smith* expressed in *Holley*, was to the idea that provocation could be found if "circumstances were such as to make the loss of self-control sufficiently excusable." The objection is understandable. This utterance of Lord Hoffman's was bound to create problems. It is interesting that it was Lord Hoffman, who said so much in support of the predicament of battered women; was critical of the way in which some men assumed a proprietoriality over women – "possessiveness and jealousy should not today be an acceptable reason for loss of self-control,"[17] and also concerned that a line should be held against the complete erosion of the objective element, should then leave this matter to what must be the whim, moral hubris and prejudice of jurors who would be left to interpret this in such a way as to undermine protection for women. Although he did suggest " a direction that characteristics such as jealousy and obsession should be ignored in relation to the objective element."[18]

[15] Law Commission *Partial Defences to Murder,* Consultation Paper, No 173 (London: TSO 2003) p 12, para 1.51.
[16] *R v Morhall* [1995] 3 All ER at 667e-f.
[17] *Smith* ibid note 1 at 309b.
[18] *Smith* ibid note 1 at 309c.

But what is not clear, is just how far the law will roll back. The Privy Council in *Holley* said that the Privy Council in *Luc* had ruled correctly on the interpretation of the law. Did the court in *Holley* mean some of *Luc*, or all of it? There is a sea of difference between those cases where there is absolutely no nexus whatsoever between the characteristic and the capacity for self-control, and cases where there is a clear nexus between the characteristic(s) relied upon and the capacity for self-control. In the latter case surely where such a nexus exists the characteristic(s) can also be considered with regard to the second limb- that is the capacity for self-control? If this is not the case then battered women will face, once again, a precarious situation of pleading provocation and being likely to fail.

Let us be clearly reminded, Lord Taylor CJ had ruled in *Thornton No 2*[19] that the nexus between a characteristic and the capacity for self-control could not be ignored:

> "The severity of such a syndrome and the extent to which it may have affected a particular defendant will no doubt vary and it is for the jury to consider… it may form an important background to whatever triggered the actus reus. A jury may more readily find there was a sudden loss of control triggered by even a minor incident, if the defendant had endured abuse over a period, on the "last straw" basis."[20]

It is also to be noted that Lord Goff in *Luc* left this matter open when he stated:

> "Their Lordships wish to add, as a footnote, that it may be open to a defendant to establish provocation in circumstances in which the act of the deceased, though relatively unprovocative if taken in isolation, was the last of a series of acts which finally provoked the loss of self-control by the defendant and so precipitated his extreme reaction which led to the death of the deceased… Whether such a principle could successfully be invoked in cases such as, for example, the "battered wife syndrome" is a matter upon which their Lordships can in the present case express no opinion, having heard no argument upon it, but must await a case in which the point arises for decision."[21]

[19] Ibid note 14 [1996] 2 All ER 1023.
[20] Ibid note 14 at 1030c.
[21] Ibid note 6 at 1047a-c.

This surely must remain the position post-Holley. So it is open for counsel to re-open this point and the court to rule upon it. We await a case in which the point arises for decision.

Let us remember that whilst the law continues with this debate, some defendants will serve life terms (Karimi). Statistics published by the Home Office[22] show that over the last ten years the proportion of convictions for murder of all homicide convictions has increased steadily from 45 to 54 per cent, whilst for the same period convictions for provocation and no intent manslaughter have fluctuated between 39 and 43 per cent. Diminished responsibility manslaughter expressed as a proportion of all homicide convictions for the same period has declined from 15 to 3 per cent. The increase in murder convictions may be attributable to the real increase in the use of lethal weapons and the fact that public opinion and therefore jurors are getting "tougher on crime." It is suggested that the impact of *Smith* may have resulted in an increase in provocation defences and convictions in those cases where previously provocation might have failed. The decline in diminished responsibility may also be in part the result of the shadow of *Smith* in that psychiatric evidence at least since 2001 was admissible in provocation causing defendants to plead provocation rather than diminished responsibility. This is of course speculation and more detailed analysis is beyond the scope of this case commentary. What is certain however is that following the Court of Appeal in *James* and *Karimi,* provocation as a defence, and/or the number of cases where provocation is successfully pleaded, will decline.

Lord Hailsham, when Lord Chancellor, said of Lord Denning: "The trouble with Tom Denning is he's always re-making the law and we never know where we are."[23] This is as true of the law on provocation, though Lord Denning had no hand in this debate. We have rolled back the law on provocation, but how far? We have certainly rolled back to pre-Smith. But are we in a post-Luc phase? It seems strange that the Privy Council in *Holley*, who, with the opportunity as they saw it to redefine the correct limits of provocation did not go further and expound on precisely what these limits were and precisely how these limits were to be applied, whilst the Court of Appeal with no explanation at all has accepted that factors affecting the capacity for self-control are to be excluded, but that is all we can be certain of. The law will need to roll forward again before it settles.

[22] K Coleman, C Bird and D Povey *Violent Crime Overview, Homicide and Gun Crime* 2004-2005,Supplementary volume to Crime in England and Wales 2004/2005 (London: Home Office 2006) 02/06, Table 2.02.
[23] C Dyer, *Guardian Unlimited,* March 6 1999.