APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 78
HCA/2017/000035/XC

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

NICO DONNELLY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: J Scott, QC, Sol Adv; Considine, Sol Adv; Faculty Services Limited
Respondent: Lord Advocate, QC, AD; Crown Agent

9 November 2017

Background

[1] The appellant was convicted of murdering Jamie Johnstone by repeatedly striking him with a knife. At trial he had lodged a notice of self-defence of another, Cameron Ferguson, on the basis that he had acted under "reasonable apprehension that the deceased was about to attack Cameron Ferguson with a bottle". This self-defence was not presented

to explain the actual use of the knife, merely to explain the reason for its presentation. It was not therefore a special defence of self-defence at all, in relation to the charge facing the accused. The defence position was that the knife had been produced and presented in apprehension that the deceased was going to attack Ferguson, but that the killing was accidental. The incident was captured on CCTV footage. The deceased was walking towards a block of flats outside which the appellant and Ferguson were standing. He had been to purchase alcohol and was returning to his girlfriend's flat. The appellant, Ferguson, and a group of their friends, who had all consumed significant quantities of both drugs and alcohol, were gathered in an area near the entrance to the block. The appellant was seen to follow the deceased. The deceased was then seen face to face in conversation with Ferguson. The deceased was carrying a bottle, which was held by the neck in his left hand, down at his side. There was no closing of the gap between the deceased and Ferguson. The appellant was seen to approach from the side. The deceased, becoming aware of him, turned, but did not step towards him. What happened thereafter occurred very quickly. Detailed and repeated viewing of the CCTV showed the appellant's arm coming down from the area of the deceased's chest. The deceased's left arm, holding the bottle, only moved upwards to any extent after this apparent contact. The deceased then stepped back, shook Ferguson's hand, collapsed and died. Only the appellant made contact with the deceased's chest.

[2] A 14 year old witness said the appellant moved towards the deceased and made the first move in some shoving between them. This was not seen on CCTV. After the incident the appellant and Ferguson ran away and drove off. In the car Ferguson said "what the fuck was that all about?" The appellant replied "I thought he was going to hit you with a bottle." The deceased suffered two stab wounds to his chest. One of these penetrated to about 2.5 cm. The other penetrated 2.8 cm into the heart, and rapidly proved fatal.

[3] The appellant gave evidence that the deceased had shouted and sworn at Ferguson, saying that he was going to put a bottle over his head. He was looking really angry and Ferguson was backing off. The appellant took out his knife to make it visible and, according to him, deter any attack. He said that the deceased turned to him and swung for him, the appellant, with the bottle. Having been struck with the bottle, he put his hands out to ward off the blow and the knife must have struck the deceased. The appellant did not explain how this happened twice. Ferguson (who had also been indicted, but against whom the charges were withdrawn towards the conclusion of the Crown case) gave a similar account of the deceased swinging towards the appellant with a bottle. The CCTV contradicted this account, but on the basis of the evidence the trial judge allowed the issue of provocation towards the appellant go to the jury.

[4] The trial judge, at the conclusion of the evidence, asked whether the self-defence was to be amended, in light of the evidence and mindful of the case of *Hughes* v *HM Advocate* 2009 JC 201. Senior counsel confirmed that it was not and that the self-defence continued to be relied on only to explain the presentation, but not the use, of the knife. He confirmed that the defence to the stabbing was not self-defence of another but accident.

Grounds of appeal

[5] There are two grounds of appeal. The first ground relates to alleged inadequate directions on self-defence in defence of another. The submissions rested on the written case and argument with no oral submissions being directed to this ground. It was accepted that the directions given by the trial judge were correct, and that the only elements of such a defence were properly identified. Given that the actual defence was one of accident rather

than self-defence of another, the directions given by the trial judge were perfectly adequate. On one view, it was generous to give these directions.

[6] The second ground related to the question of provocation. The trial judge addressed the potential for provocation to arise should the jury conclude that the appellant had been assaulted by the deceased. However, it is maintained that he should have gone further and directed the jury that provocation could also arise in relation to the acts of the deceased towards a third party, namely Ferguson. The trial judge directed that "provocation can arise only in certain circumstances – broadly where the accused has been the subject of a physical attack." In his report the trial judge said:

> "No case law is cited in support of the second ground of appeal which may envisage an innovation on the scope of provocation beyond that which is generally recognised in contemporary common law for example *Drury* v *HM Advocate* 2001 SLT 1013, Opinion of the Lord Justice General (Rodger) at paragraph 25 (subject to the exception on the discovery of infidelity)."

The trial judge then quoted from that passage:

> "In matters of homicide Scots law admits the plea of provocation only within certain bounds which are considerably narrower than those within which it operates in English law. In Scots law it applied only where the accused had been assaulted and there has been substantial provocation."

Submissions for the appellant

[7] The solicitor advocate for the appellant submitted that there were clear exceptions to the general rule stated by the trial judge. *Drury* was such a case involving the discovery of sexual infidelity.

[8] It was submitted that as the law stands,

> "the sexual infidelity of a partner, who can consent to a sexual encounter, can amount to provocation, but discovering sexual abuse of a child or an attack on a child who cannot consent, would not. The law cannot be correct in recognising one circumstance but not the other."

The written submission for the appellant had suggested that there was a gap in the law in this respect. The Jury Manual, whilst recognising the infidelity exception, otherwise provided sample directions on provocation only in relation to the accused being attacked physically, and makes no reference to provocation which arose as a result of acts of the deceased towards a third party (during the hearing this was referred to as "third party provocation" – we shall continue to use that term as a convenient shorthand).

[9] In England and Wales, the former partial defence of provocation had been replaced by a new partial defence of loss of control, under the Coroners and Justice Act 2009, which has three elements: a loss of control; a qualifying trigger; and a requirement that a reasonable person of the sex and age of the accused, possessed of normal tolerance and self-restraint, might, in the same circumstances, have reacted in the way the accused had done. If successful, such partial defence would result in a conviction for manslaughter rather than murder. A "qualifying trigger" includes loss of self-control attributable to the fear of serious violence towards another identified person. The written case and argument for the appellant submitted that the approach adopted in this statutory provision was "an obvious extension of self-defence. It has long been accepted in Scotland that self-defence extends to third parties, so it is difficult to see why provocation would not so extend." It has often been noted that the facts relied upon to support self-defence often contain a strong element of provocation and that the "lesser plea may succeed where the greater fails" (*Copolo (McIntosh)* v *HMA* 2017 SLT 45, para 29 and cases there cited).

[10] Although in the written case and argument this submission was presented as requiring an extension of the current law, at the hearing of the appeal the solicitor advocate for the appellant submitted, on the basis of research referred to in the Crown's written

submissions, that it appeared that third party provocation had been recognised in Scotland, and that no question arose of extending the law. In the cases shown up by the research there was at the least a tacit acceptance that provocation could arise from actions towards a third party. The cases were:

(a) *James McGhie,* Jan 17, 1791, referred to in Hume *Commentaries, i.246* and Alison, *Principles, p93;*

(b) *William Goldie, 13 July 1804,* Hume, *Commentaries, i.248;*

(c) *Gray* v *HMA* 1994 JC 105, especially at p115 H-I*;*

(d) *Pollock* v *HMA* 1998 SLT 880, especially at 884A-E*;* and

(e) *Anderson* v *HMA* 2010 SCCR 270.

[11] These cases suggested that third party provocation had been acknowledged in Scotland, at least to some extent. It was recognised that this approach did not fit with the comments in *Drury* referred to by the trial judge but that case had principally been concerned with the infidelity exception.

[12] Assuming the submission to be correct, this was a case in which a suitable direction should have been given to the jury. The appellant gave no evidence of loss of control, but that is something which could be inferred from the circumstances, including the two stab wounds. There was no actual violence towards Ferguson, but there were threats of violence in what the deceased said. A reasonably based apprehension of violence is, or should be sufficient to enable the plea to be advanced.

The authorities

[13] It is helpful at this stage to set out the detail of the cases referred to in argument. *Drury,* the case referred to by the trial judge, was a full bench decision in which the issue related to provocation of the kind provided for by the infidelity exception, rather than that

of provocation by violence. However, it is clear that the nature and existence of the exception was discussed in the context of the law on provocation generally, and that relating to homicide. On the question of provocation by violence, the court noted that the scope of this was more restricted in Scotland than in England. This was the context of the passage at paragraph 25 of the Lord Justice General's opinion quoted by the trial judge, suggesting that provocation in Scots law in relation to homicide applies "only where the accused had been assaulted and there has been substantial provocation".

[14] The Lord Justice General considered the extent to which the infidelity exception had widened since the days of Hume, and added (paragraph 26):

> "nevertheless this type of case remains an exception to the general rule that provocation arises only when the deceased assaulted the accused in a substantial fashion."

This approach was echoed in the opinion of Lord Nimmo Smith at paragraph 5:

> "Provocation in our law is divided into two categories. The first is physical violence against the accused, which may result in the state of mind described in the passage in *McDonald* …"

[15] Of the cases relied on in support of the existence of third party provocation, the first is that of *James McGhie*, where, according to Hume, the panel was convicted of the alternative charge of culpable homicide having "rested his defence on the provocation and alarm of violent assault, made by the man on his father in his presence, by throwing him to the ground, and severely beating him in that situation." There is no further discussion of the case. The case of *McGhie* is also referred to by Alison (page 93) who states that:

> "The provocation proved was, that the deceased had made a violent assault upon the pannel's father in his presence, by throwing him on the ground, and severely beating him in that situation. This would have made the homicide justifiable, if done with a fist or a stick, but the use of a lethal weapon, after the deceased had been thrown on

> the ground, and the plea of defence of his father was at an end, rendered it culpable in a high degree."

[16] A further case referred to by Hume is that of *William Goldie,* tried for murder of a fellow soldier by stabbing. According to Hume, some dispute had taken place in an alehouse between Shaw and Goldie's wife. Shaw called the woman a whore which led to blows being exchanged without material injury. Shaw left the house but the woman followed him and laid hold of him by the arm. Shaw gave her a blow with the hand, making her reel backward, then went off along the lane. Goldie ran after him and having overtaken him, instantly inflicted a mortal wound with his bayonet. Goldie was convicted of culpable homicide, a result about which Hume was highly critical.

[17] Turning to the more modern cases, the first is *Gray* v *HM Advocate* 1994 JC 105. In that case the appellant William Gray, with others, had been tried for the murder of Neil Cairney, on the basis of a concerted attack. William Gray and James O'Rourke were convicted of murder; Steven Donohoe and Terence Donohoe were convicted of culpable homicide. The evidence suggested a history of hostility and violence between two rival gangs, one led by the deceased and one by William Gray. There was evidence of numerous violent altercations between these groups some of which featured on the indictment. On the night of the murder, Cairney went to Gray's house armed with a baseball bat and a chain. He broke the windows of some cars in the driveway. Gray's common law wife came out of the house followed by five men who were charged with the murder. Gray's wife removed the baseball bat from Cairney who then stood on the pavement outside the garden gate swinging the chain at the five men who were standing in the garden, throwing missiles and otherwise trying to attack Cairney. There was evidence that at this point Steven Donohoe

was hit and knocked down by a blow from the chain. The trial judge directed the jury that the only basis for a culpable homicide verdict was provocation. In his report he said:

> "The only possible basis for the jury's decision that it was appropriate to convict the two Donohoes of culpable homicide was on the basis that they considered that Steven Donohoe was struck by Cairney with the chain, and that this immediately caused the two brothers to lose control of themselves."

[18] In the Opinion of the Appeal Court, recording the submission, it is noted:

> "The provocation was said to have been that Terence Donohoe and Steven Donohoe had realised that the windows of their car had been broken and that the deceased at one stage had been standing on the pavement swinging a chain at the other men. There was evidence that Steven Donohoe had been hit and knocked down by a blow from the chain. According to the appellant Terence Donohoe, when his brother Steven was knocked down, he assisted Steven to a car, and the two brothers then left the scene and were never involved in a fight on the street at all."

There was however evidence pointing to their involvement in the attack on the deceased.

The court disposed of the appeal under reference to authorities which:

> "established that in determining whether two or more accused were guilty of culpable homicide or murder, the jury were entitled to consider and assess the degree of recklessness displayed by each accused separately, and if need be to discriminate between the two."

The court added that:

> "In the present case it was open to the jury to determine whether in the case of Terence Donohoe and Steven Donohoe the *mens rea* for murder was absent because of the element of provocation. Counsel before us appeared not to be certain as to whether any counsel in the case had raised the issue of provocation, but if there was material before the jury to support a plea of provocation, it was not disputed that the trial judge was fully justified in giving the jury directions on the matter. In particular if the jury accepted evidence that Steven Donohoe was hit and knocked down by a blow from the chain wielded by the deceased, and that Terence Donohoe had gone to his brother's assistance, the jury would be entitled to hold that Terence and Steven Donohoe had been acting under provocation when they took part in the later attack upon the deceased."(page 115).

[19] *Pollock* v *HM Advocate* 1988 SLT 880 was a case in which an accused, charged with murder, advanced a special defence of self-defence in that he was defending his girlfriend, P, who claimed that the deceased had tried to rape her. An eye witness said he did not see the deceased do anything, but the accused stated that he had seen the deceased's hand over P's mouth. He believed the deceased to be in the habit of carrying a knife. A struggle ensued, during which, according to the accused, the deceased had struck P on the jaw, at which the accused had snapped and flown at the deceased, knocking him to the floor where he repeatedly jumped and stamped on his head. The accused said he was seeking to protect P from a further attack and was also concerned that the deceased might draw his knife. He had no real recollection of what happened, having lost all control. The deceased had 70 recent injuries and died from blunt force trauma to the head and abdomen. The trial judge withdrew self-defence from the jury's consideration but allowed them to decide whether the accused had acted under provocation. The basis of that is not explained in the report. The court concluded that the trial judge had been correct to withdraw self-defence on the basis that it was:

> "absolutely clear that the appellant killed the deceased by attacking him with an intensity and savagery which went far beyond any measures reasonably required to protect the safety of himself or P."

[20] Finally, in the case of *Anderson* v *HM Advocate* 2010 SCCR 270, the deceased had gone to "sort out" the appellant and, in particular, his brother. A fight using fists and feet broke out between the brother and the deceased. When it appeared that the brother was coming out worse in the encounter the appellant went to his home nearby and returned armed with a kitchen knife. There was then a confrontation between the appellant and a friend of the deceased at which point the fight between the brother and the deceased came to an end. The

deceased was standing up. The appellant stepped aside from his verbal confrontation with the friend, stabbed the deceased once in the abdomen and killed him. There was a special defence that the appellant had been defending himself, his brother and his mother. The trial judge left the plea of self-defence to the jury but withdrew provocation.

Submissions for the Crown

[21] The position adopted by the Crown was that, in light of these cases:

> "It would be going too far to say that, regardless of how compelling the circumstances may be, violence directed against a third party in the presence of the accused can never amount to provocation such as to support the conclusion that the accused is guilty of culpable homicide rather than murder."

The Lord Advocate submitted that it was possible to conceive of hard cases, of which this was not one, where it would be going too far to say violence on a third party could not give rise to provocation. Coming upon someone attacking one's child, for example, might be a situation where a binary choice of convicting of murder or acquitting would not be doing full justice to the situation.

[22] The Lord Advocate referred to the tract of authority referred to in the Crown's written submissions, and referred to above, in which violence against third parties had resulted in culpable homicide by reason of third party provocation, or in which tacit recognition appeared to have been given to such a possibility. He noted that under reference to *McGhie* and *Gray*, the 3rd Edition of *Gordon's Criminal Law*, Vol. 2, para 25.21 endorsed the availability of the plea in such circumstances, stating

> "The rule that A may plead provocation where he has killed B under the provocation of the latter's attack on C, can be explained by the analogy with the similar rule that A may kill B in order to save C's life."

[23] The Crown submissions recognised that in *Drury* the Lord Justice General repeatedly stated the proposition that the first condition for the doctrine, the infidelity exception aside, was that the accused had been assaulted. However, third party provocation was not before the court in that case. Paragraph 25 of the Lord Justice General's opinion, quoted by the trial judge, arose in the context of comparing the position with the English law, where even a slight blow or jostling would have sufficed for the plea. It was concerned with the degree of violence, not the person at whom it was directed.

[24] Hume's treatment of the issue (*Commentaries, i.247)* does not exclude the possibility of third party provocation:

> "To have a good plea of extenuation, the panel must have been, at the time of the killing, in the situation of an assaulted and a grossly injured person: one who was in a manner constrained to strike by the violence he was suffering at the moment."

By analogy, the person provoked by violence towards a third party would be someone in the situation of an assaulted and a grossly injured person. Hume cites *McGhie*, without adverse comment. That case suggests that violence towards third parties would suffice for the plea of provocation, at least where that third party was in a close relationship with the accused. Alison also refers to *McGhie* without adverse comment with the explanation that "the use of a lethal weapon, after the deceased had been thrown on the ground, and the plea of defence of his father was at an end, rendered it culpable in a high degree". (*Principles* page 93.)

[25] The statement in Macdonald, *Criminal Law,* (5th Edition, pages 93 to 94), taken as an authoritative statement of the law, is "being agitated and excited, and alarmed by violence, I lost control over myself, and took life, when my presence of mind had left me, and without

thought of what I was doing". That too does not exclude the plea regarding violence to another, although it is not discussed there.

[26] The Lord Advocate recognised that in none of the five cases referred to had the issue been sharply addressed. Given the paucity of treatment of the issue, it would be open to the court to state that the position was as stated in *Drury* and that our law did not recognise third party provocation. In each case where the issue appears to have been tacitly recognised, the violent behaviour had been offered to someone with a close familial relationship with the accused. It may be that this has been the extent to which a doctrine of third party provocation has been recognised. It is understood that as a matter of policy this is an area in which lines have to be drawn. It has been observed that it may be inadvisable to attempt an all-embracing definition designed to cover all the situations in which a plea of provocation may be advanced – *Thomson* v *HM Advocate* 1986 SLT 281 at 284 *per* Lord Ross and 286 *per* Lord Hunter.

[27] It was a matter of policy that the plea of provocation must be kept in reasonable bounds (see *Meikle* v *HM Advocate* 2014 SLT 1067, para 17). In the present case, the trial judge was not obliged to direct even on provocation in the terms he did since the issue did not arise. For the plea to be confined within proper bounds in the context of third party provocation, at least the following requirements would have to be met:-

(i) an assault on a third party which constituted "substantial provocation of the accused";

(ii) immediate loss of control; and

(iii) a response which was not disproportionate.

[28] In the circumstances of the present case it was submitted that such a plea could never have succeeded. There was no assault on Ferguson that would have been capable of amounting to substantial provocation. In any event, even if the jury were entitled to consider "substantial provocation" there was no evidence of loss of control; and the violence used by the appellant was disproportionate.

Analysis and decision

[29] We did not find much assistance in the consideration of the legislative change brought about in England and Wales following the Law Commission Report on partial defences in murder. The new statutory defence was entirely different from the former English law on provocation. Interestingly, although the new defence can apply where the defendant reacted to fear of serious violence towards another, as recommended by the Law Commission, the Law Commission's suggestion appears to have been made on the basis that this would operate when there was "a close personal connection between the defendant and the person directly involved" such that the defendant may have a feeling of suffering jointly from the wrongdoing. (Law Commission Report para 3.73). We see that the Explanatory Note to the legislation gives the example of fear of violence towards a child or other relative of the defendant of an extremely grave character such as to cause a justifiable sense of being wronged. Our attention was not drawn to any English authorities showing how this issue had been approached in the courts in that country. Nor is it clear that third party provocation had previously been recognised in that jurisdiction. In any event that former law was one which operated in a substantially different way from the way in which the plea had operated in Scotland.

[30] Provocation is entirely different from self-defence; it is not just self-defence "light". It is true, as has been said elsewhere, that a defence of self-defence may often carry with it elements which would constitute provocation, and that in this sense the two can overlap but they remain quite distinct.

[31] Self-defence is a substantive defence resulting in acquittal; provocation is a plea based on a concession to human infirmity made as a matter of policy and having only a mitigatory effect (*Crawford* v *HM Advocate* 1950 JC 67). In relation to homicide, "provocation has always operated as an excuse, and never a justification." (*Drury, per* Lord Rodger, para 16*).* Whilst elements of the pleas may overlap, provocation does not arise from the self-defence and it would seem to be a fallacy, or at least a somewhat simplistic approach, to entwine the two pleas in this way and argue that provocation should, by analogy, be available where the accused claims to have acted in defence of a third party. The written case and argument, where it is submitted that to allow the plea of provocation to apply in the circumstances argued for would be "an obvious extension of self-defence" and that "it has long been accepted in Scotland that self-defence extends to third parties so it is difficult to see why provocation would not so extend", appears somewhat to fall into this area. For that reason too, the analogy referred to in Gordon, noted at paragraph 22 above, may not be apt.

[32] The essential difference between self-defence and provocation is that self-defence supplies a justification for the way an accused acted whereas provocation may provide an excuse. In the situation of provocation there is a justified reaction of anger which excuses the violence perpetrated by the accused. Loss of control is central to provocation whereas self-defence involves a deliberate act to ward off an attack. Observations have been made elsewhere about the extent to which early cases sometimes appeared to confuse the issues of

self-defence and provocation. Certainly, many early cases are unclear as to the basis upon which a verdict of culpable homicide was returned, as opposed to murder. That is a factor which requires to be borne in mind when considering the scant details available in the cases of *McGhie* and *Goldie*.

[33] The need to recognise the distinction between the plea of provocation and the defence of self-defence was emphasised in the case of *Fenning* v *HM Advocate* 1985 SCCR 219. Giving the Opinion of the Court, Lord Cameron said (page 223):

> "As was pointed out by Lord Justice General Cooper in the case of *Crawford* v *HM Advocate* a very clear distinction must be drawn between the two, the one being a 'special defence' and the other a plea – in essence a plea in mitigation not of sentence, but of a degree of the accused's guilt. I refer to, without repeating, the passage in Lord Cooper's judgment quoted by the Advocate Depute. ……. The issue of self-defence and the issue of 'provocation' are not only entirely different in substance and effect, but their solution is dependent upon quite distinct and distinguishable factual circumstances, and are not matters of concurrent consideration."

It has been suggested that this "tendency to confuse self-defence and provocation …. may make reference to some authorities prior to *Crawford* a rather uncertain guide" (*Thomson* v *HM Advocate* 1986 SLT 281, *per* Lord Hunter, p 285D).

[34] The high point of the argument in favour of recognition of third party provocation rests in *McGhie* and *Gray*, to which we shall come. The remaining cases do indeed seem to be a very "uncertain guide" on the issue. Hume mentions the case of *Goldie* only to criticise it. It seems clear that he treated it as an indulgent extension of the doctrine of provocation to circumstances where the law, properly applied, would not have entertained it. We are satisfied that it would be impossible for us to draw any satisfactory principle from it.

[35] The issue in *Pollock* related not to provocation but to the withdrawal of the self-defence. The question of provocation did not arise for discussion in the appeal. The court

made no comment on the basis upon which provocation might have been found. *Crawford* was referred to for the proposition that it was a "strong step" to withdraw a case of self-defence from a jury, but no authorities were cited on the issue of provocation. In our view, little can be taken from the circumstances of that case.

[36] In *Anderson*, the appeal seems to have proceeded on the basis that (a) provocation had to remain open where only one wound had been inflicted and (b) when the appellant had returned with the knife there was still scope for him to have been provoked by the actings of the deceased and the deceased's friend. The basis for that appears to have been the suggestion that when returning with the knife he had been "involved in a verbal confrontation with the James Graham who was brandishing a meat cleaver". In agreeing that the judge had been correct to withhold provocation from the jury the court appears to have treated the case not as one of provocation arising from actions towards another party but as one where the alleged provocation contained no violence. In paragraph 18 the court said "in a case such as the present when it is claimed that the accused was subject to verbal abuse, but was not physically assaulted, provocation could only arise" in certain circumstances, which are then enumerated. The suggestion that verbal abuse alone might constitute provocation in a case of homicide appears to have been an aberration and is quite clearly not the law- see for example *Drury*, para 25; *Elsherkisi*, paragraph 17; *Meikle* v *HM Advocate* 2014 SLT 1062 paragraph 17.

[37] *McGhie* is certainly the high point of the argument, having been cited without disapproval by Hume as an example of "homicide on great provocation". Alison, however, although referring to provocation seems to treat the case as an example of what is referred to by the editor of Gordon: Criminal Law (3rd Edition, vol 2, para 25.13) as "unjustified self-defence in mitigation", thus perhaps contributing to the confusion referred to in *Crawford.*

This seems akin to the comment in *Hillan* v *HMA* 1937 JC 37, where the Lord Justice Clerk (Aitchison) said that self-defence could be "a complete justification for what the panel has done, or it may reduce the quality of the crime, as, for example, from murder to culpable homicide". As has been pointed out (*Drury, para 16, J-K;* Gordon, 25.13 footnote 3), whilst the latter may have been accurate at the time in respect of assault, it was not the case in respect of homicide. In the absence of further discussion by Hume, it may be that *McGhie* is also a somewhat uncertain guide on the issue.

[38] In *Gray* there were two grounds of appeal. The first, which occupied a good deal of the report, related to jury conduct. The second was whether it had been open to the jury to discriminate between co-accused on the basis of the recklessness displayed or the degree of their involvement. It was in that context that the issue of provocation arose. It was conceded that if there was evidence that Stephen Donohoe had been hit by the chain, and Terence Donohoe had gone to his aid, the jury would be entitled to hold that they had been acting under provocation when they took part in the subsequent attack on the deceased. This concession was noted by the court (p115 G-I), which went on to say that, having regard to the summary of evidence in the trial judge's report,

> "it certainly appears that there was a basis in the evidence for the jury holding that the Donohoes had been acting under provocation ... at the very least, the jury were entitled to have a reasonable doubt about the degree of involvement of the two Donohoes…".

No authorities were cited on the issue of provocation, there was no discussion of the principles, and the court's decision on the second ground of appeal occupied only half a page.

[39] Accordingly, as the Lord Advocate pointed out, none of these cases is one in which the issue of principle underlying the present appeal was central to the determination, or

even the subject of considered discussion. As against these, there is the case of *Drury*, a full bench case in which the law of provocation was examined with care. Of course, the central issue in the case related to the infidelity exception, and whether a direction in equivalence had been appropriate. However, the Lord Justice General (Rodger) stated (para 8) that the issue which arose was comparatively narrow, it could not:

> "be resolved without looking into wider aspects of the doctrine of provocation and, more generally into the law of murder and culpable homicide."

He added that:

> "... Hume's account helps to fit provocation into the overall scheme of our law on murder and culpable homicide. One cannot help feeling that some at least of the difficulties of the subject have arisen because provocation has sometimes tended to be treated as an isolated topic rather than in its proper place within that wider context."

[40] The court thus went on to consider the law of provocation in detail, and in that wider context, with a detailed examination of Hume's treatment of the issue, as well as that given by Alison and Macdonald. It is not immediately obvious that the court should disregard the apparently bald statement that the general rule applies "only where the deceased assaulted the accused in a substantial fashion" (para 26) and the other statements referred to at paragraphs 13 and 14 above, made in a case in which the issue of provocation in general was considered at length and in context, in favour of apparently tacit approval in cases where the matter of provocation had not arisen for discussion. We recognise that it is possible that the apparently clear statements in *Drury*, especially para 25, and that in *Elsherkisi* v *HM Advocate* 2011 SCCR 735, paragraph 17, where Lord Hardie giving the Opinion of the Court said:

> "Where an accused is charged with murder, apart from cases involving discovery of sexual infidelity where infidelity is to be expected, provocation can only arise where the accused has been subjected to violence."

may be read in context as primarily relating to the degree of provocation which may support the plea, as opposed to the person who is provoked, although the relevant sentence reads (emphasis added) that provocation in homicide only applies "where the accused has been assaulted and there has been substantial provocation". Equally, however, provocation, unlike self- defence, is a concession to human frailty which, for policy reasons, has been kept under strict control. To the extent that it is a concession to human frailty, it may perhaps be seen as having an element personal to the provoked individual, which can be universally recognised as applying in a situation which requires more than ordinary strength of mind and command of temper to withstand, and in which any ordinary person may lose his self-control. The reasons for the existence, and continuation, of the infidelity exception may withstand very little scrutiny in the twenty-first century, and it must be highly questionable whether the modern interpretation that it is based on the fact of a relationship in which fidelity is expected was really the basis upon which the exception was based, but the modern interpretation would accord with the notion of provocation as a personal plea. In all the cases relied on for supporting a tacit approval of third party provocation, the person assaulted stood in a very close relation to the individual who reacted. If the doctrine applies in our law, it may be that it is restricted to such cases, although we recognise that there may be difficulty then in defining its limits. That, of course, may be an argument against the existence of such an extension to a concession given in circumstances which are kept strictly limited so that the concession does not allow revenge or a free for all. Difficult questions might arise in relation to what behaviour towards a third party might suffice to cause "substantial provocation of the accused" in the ordinary course, and how this it to be measured, particularly in assault cases where provocation by words may suffice.

[41] One of the difficulties which we have found in addressing the wider issues in the context of the present case is that we agree entirely with the Lord Advocate that this is not a case in which any plea of third party provocation, assuming its availability, could ever have succeeded. There was no assault by the deceased on Ferguson, nor even any threatening gesture towards him, and the highest the case amounted to was an allegation that verbal threats had been made. It is abundantly clear on the authorities (Hume i.247; *Drury; Elsherkisis*) that such conduct would not be sufficient foundation for a plea of provocation in homicide. The case of *Anderson*, as we have noted, requires to be viewed as an aberration. There was no evidence of any loss of control on the part of the appellant and his actions could never meet the test of proportionality.

[42] In *Thomson* v *HM Advocate* 1986 SLT 281 the court considered trends in the development of the law on provocation, but thought it

> "inadvisable to attempt an all embracing definition designed to cover all the situations in which provocation may be advanced to palliate guilt of a crime, since in an area of law in respect of which social attitudes may develop and change, possibly to a substantial extent the imposition of now and rigid rules may subsequently be regretted". (Lord Hunter, p285 E-F).

He added that "there may be disadvantages, and even grave danger, in allowing the door to defences of provocation to be opened too wide." We consider that the inadvisability of attempting an all-embracing definition, and the disadvantages, and indeed potential dangers of doing so, are exacerbated when the issue arises in a context in which the plea contended for could never hope to operate. We would echo the words of the Lord Justice Clerk (Ross) in *Thomson* (p284G) that is not:

> "necessary or desirable to attempt to define comprehensively all the circumstances to which a plea of provocation may prevail to the effect of reducing murder to culpable homicide. All that requires to be considered is whether the facts of the present case were sufficient to entitle the jury to consider provocation."

[43] On the facts of the present case, the plea in terms raised in the grounds of appeal could never have succeeded and the appeal must be refused.

Appeal against sentence

[44] It was submitted that the punishment part of 20 years was excessive, taking account of all of the circumstances of the incident. Whilst the appellant has relevant previous convictions, he had expressed remorse. The incident was not premeditated and it lacked many of the aggravating features set out in *HM Advocate* v *Boyle*, 2010 JC 66.

[45] The plea in mitigation provided to the trial judge was a limited one: counsel referred to the fact that the crime was not pre-meditated, that the fatal incident had occurred in an instant, that the evidence disclosed that the appellant had been taking drugs and had had little sleep, and that the appellant had expressed remorse and explained his sense of guilt in evidence. In fixing the punishment part at 20 years, the trial judge noted that the appellant had stabbed a complete stranger twice in the centre of the chest, using moderate force since they had damaged bone, penetrating the sternum and entering the heart. The trial judge recognised that the appellant had expressed remorse for his actions, but this could not outweigh the aggravating factors. The appellant had the knife with him prior to the start of the incident, and had taken it outside with him. His previous convictions for violence included aggravated assault to severe injury, permanent impairment and permanent disfigurement for which he was sentenced to 27 months' detention in 2010; assault to severe injury and permanent disfigurement using a knife, for which he was sentenced to 27 months' detention in 2011; and assault to severe injury using a sharp object in 2014 for which he was sentenced to 30 months' detention.

[46] In *Boyle* (para 16) the court said

> "We agree that at the present time knife crime is a scourge in the Scottish community and that the court should be acting, and be seen to be acting, in a way which discourages the carrying of sharp weapons, the use of which may lead to needless deaths. Sentences which may cause individuals to think more carefully before arming themselves and which reflect public concern at such killings are appropriate. Other than in exceptional circumstances we would expect punishment parts in cases of that kind to be at least 16 years, and they might be significantly longer depending on the circumstances"

[47] In circumstances where an appellant, with a bad record of violence including prior use of a knife or similar object, stabbed the deceased twice in the centre of the chest with a knife which he had taken with him, it cannot be said that the punishment part imposed by the trial judge was excessive.