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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

THE QUEEN

-v-

CHANG HAI ZHANG

_____

Before: Higgins LJ, Girvan LJ and Weatherup J

_____

HIGGINS LJ

[1] At Belfast Crown Court on 5 February 2008 after a trial before Hart J and a jury the appellant was convicted by a majority verdict of 11:1 of the murder of Qu Mei Na-Tina. He now appeals against this conviction with leave of the single judge. The indictment contained three counts – murder, false imprisonment and assisting an offender. On 14 October 2007 the appellant pleaded not guilty to all counts. On 15 January 2008 he was re-arraigned and pleaded not guilty to murder but guilty of manslaughter and guilty of false imprisonment – count 2. Following his conviction of murder he was sentenced to imprisonment for life and it was ordered that he should serve a minimum term of 17 years' imprisonment before he could be considered for release.

[2] The original appeal against conviction of murder was on two grounds -

i. that the trial judge erred in law with regard to his direction to the jury in respect of the definition of the reasonable man when considering the issue of provocation;

ii that the learned trial judge erred in law in admitting forensic evidence relating to a condom found in the bedroom of the house upon which the DNA of the deceased and an unidentified male was found together with evidence relating to unidentified semen on a mattress.

Leave to appeal was granted on the first ground only, on the basis that it was arguable that the learned trial judge had not identified to the jury two

elements in the objective/evaluative ingredient of the test for provocation, namely the assessment of the gravity of the provocation and the application of the external standard of self-control.

[3] At the hearing of the appeal Mr O'Donoghue QC who, with Mr Greene, appeared on behalf of the appellant applied for and was granted leave to amend the grounds of appeal. These now are:-

1. The Learned Trial Judge erred in law in failing to admit expert evidence before the jury of the characteristics of an appropriate reasonable comparator for the application of the second limb (objective test) of the defence of provocation.

2. In directing the Jury on the "objective" test relating to the defence of provocation, the Learned Trial Judge failed to direct the jury adequately or at all on the following matters:

   (a) The importance of assessing the gravity of the provocation alleged, and

   (b) That the reasonable person for the purposes of the "objective" test was the person bearing the same characteristics as the Appellant, namely the reasonable Chinese person bearing the normal characteristics of a Chinese person.

3. The Learned Trial Judge erred in his handling of the forensic evidence and its significance and thereby prejudiced the Defendant's defence that he was provoked.

[4] Qu Mei Na-Tina (known as and hereafter referred to as Tina) was a 22 year old Chinese woman who had been living in Dublin. According to the appellant he met her in Dublin some time before her death, where allegedly she was engaged on a language course. On the night of Monday 31 May 2004 she travelled by bus from Dublin to Belfast. She was met at the Bus Station by another Chinese national, Pan Yang, a co-accused of the appellant, who took her to a house at 93 Skegoneill Avenue, Belfast. On the night of 2 June 2004 the occupant of a neighbouring house in Skegoneill Avenue observed what he took to be a body being loaded into the boot of a Toyota motor vehicle parked in the driveway of 93 Skegoneill Avenue. It was then driven off with two males on board. The police were alerted. A short time later the Toyota motor vehicle was observed by police at Dunhill Service Station At the Service Station the appellant who was accompanied by Pan Yang, was in the process of purchasing petrol in a can. On opening the boot of the vehicle the police found the body of Tina. The appellant later admitted that he intended to burn her body and all her possessions. The only evidence of what happened to Tina between her arrival in Belfast on 31 May 2004 and the discovery of her

body in the boot of the Toyota on 2 June 2004, was the account given by the appellant to the police and in evidence at his trial. Pan Yang pleaded guilty to lesser offences.

[5] The autopsy revealed that Tina had been strangled with a ligature. Her identity was established by comparison of post mortem dental casts with a set of casts that had been taken during her life. A number of bruises were observed on her body. Some of these bruises could have been caused by her clothing having been gripped tightly and others on her right arm could have been caused by her arm being tightly gripped. There were also bruises on her back which were consistent with pressure having been applied to her back whilst she was still alive. A small amount of alcohol was present in the body though this may have been generated as a result of decomposition in the period after her death.

[6] The appellant's account was that he had met Tina in Dublin and that a loving relationship developed between them. He regarded her as his girlfriend and that she came to visit him at weekends. On 31 May 2004 when she arrived at the bus station in Belfast she was collected by Pan Yang who brought her to 93 Skegoneill Avenue. He claimed that she intended to remain with him for a number of days. On the evening of her arrival they had something to eat, then had sexual intercourse and thereafter slept. On the following day 1st June 2004 he went to do some shopping while Tina remained at No 93 Skegoneill Avenue. He returned and they had dinner. Later they watched television and went to bed shortly after 9.00 pm. They had sexual intercourse again and then fell asleep. It would appear that Pan Yang was downstairs throughout. The Appellant claimed that about 1 am on 2 June he woke up needing to go to the toilet. He then remembered that the deceased had requested him to get some curry powder to take back to Dublin. He went to the kitchen, obtained the curry powder and proceeded to put it into her handbag. When doing so and by accident he discovered a list of men's names and telephone numbers inside the handbag. He woke her up and questioned her about the list. Initially she told him it was none of his business. There was a heated argument between them. According to the appellant she admitted that she was a prostitute and that the names were men she had slept with. He denied knowing she was a prostitute before her admission, claiming that they were in a loving relationship. He said that when she came to see him each week that he gave her money in order to support herself whilst she continued her language studies in Dublin. He stated that her admission of prostitution angered him and he decided to punish her by tying her up and did so with the assistance of Pan Yang. He tied both her hands and feet and tied her to the bed. She was five feet four inches in height and weighed eight stone eleven pounds and was much smaller and lighter than the appellant. At some stage he accompanied her, at least once, to the toilet whilst she was still bound. He did not loosen her bonds but took down her trousers to enable her to relieve herself. Afterwards he again tied her to the bed. He went to sleep and when

he awoke around 10 am the next morning she was still bound. At this stage he had calmed down and decided to release her, but not before she said she would not report him to the police if he did release her. She complained that the bonds had caused marks on her body and that this would make her less attractive to her clients. At the mention of her clients he became enraged and felt demeaned. He grabbed some of the rope with which she had been tied. He claimed she dared him to kill her. At this point he lost control and wrapped the rope around her neck and tightened it. He claimed not to remember the act of strangulation. She was face down on the bed when she was killed with her hands tied. It was not his intention to kill her and his plea of guilty to manslaughter was on the ground that he had been provoked. Thus the issue for the jury was whether provocation as a defence was made or whether the appellant was guilty of murder.

[7] The house at 93 Skegoneill Avenue and the Toyota motor vehicle were subjected to forensic examination. Among the items recovered from number 93 was a mattress which was bloodstained. DNA samples from the two bloodstains matched the deceased. A semen stain was identified on the mattress and a DNA sample from it revealed it was from an unidentified male. A white duvet contained a bloodstain which was identified by DNA profiling as from a female other than the deceased. Boxes of condoms, empty condom wrappers and lengths of toilet tissue were recovered in various rooms as well as a tube of KY jelly. A condom wrapper, a condom and two pieces of tissue were also found along with a waterproof mattress protector. No semen was found on the condom but DNA profiling of a sample from inside and outside the condom yielded a mixed profile from the deceased and an unknown male other than the male identified in the staining from the mattress. The forensic scientist stated that this evidence was strongly indicative of sexual relations. The tissue paper contained a small area of staining indicative of seminal staining and a DNA profile of the stain matched the deceased. A bloodstain on a cream duvet cover yielded DNA which matched the deceased. Also recovered were unused condoms. A used condom was found among the personal belongings of the deceased in the car in which her body was found. DNA profiling of this condom matched both the appellant and the deceased. This forensic evidence suggested that the deceased had sexual intercourse in number 93 with the appellant and an unidentified male other than the appellant or Pan Yang. There was also forensic evidence to suggest that at some time Tina had sexual intercourse with another male and that this took place on the bed where she was killed. The appellant claimed this was a second hand bed implying that a bed on which she had had intercourse on some other occasion had been purchased and placed in number 93. The appellant denied that he was aware that she had intercourse with another man or other men in number 93, though he said he would like to know those with whom she did have intercourse. Two pieces of paper with a list of names was also found.

[8] The appellant's case at trial was that he was provoked into losing his self control by Tina's admission that she was in effect a prostitute. Mr O'Donoghue stated that the provocation amounted to the sequence of events in which she put prostitution and her clients over and above her love for him and that this caused him to be overcome with rage and a feeling of stupidity. She dared him to kill him and he lost control. He identified the following sequence -

1. The disclosure that the list of names contained names of persons with whom she had slept, which resulted in her being tied to the bed;

2. Her reference to her clients in the context of her comments that the marks caused when she was tied up would render her less attractive to them, that the lists were important to her and her request that they be returned.

[9] It was contended that it was a factor relevant to whether or not he lost his self control [that is, the objective factor] that the appellant was not only Chinese, but that he had been brought up in China and had therefore acquired the normal characteristics of a person brought up in China. In support of this contention the defence proposed to call Professor Felice Lieh Mak, an Emeritus Professor in the Department of Psychiatry in the University of Hong Kong. The prosecution objected to her evidence. In a written ruling [R v Chang Hai Zhang [2008] NICC 5] delivered on 30 January 2008 the learned trial judge identified two issues raised before him. First, whether the evidence of Professor Mak, contained in two reports, was admissible in evidence and secondly whether she was qualified to give it. The prosecution objected to the admissibility of the evidence on the ground that the jury did not need the assistance of expert evidence to decide how a person is likely to react to the type of admission alleged to have been made by Tina. They relied on the well known passage from the judgment of Lawton LJ in R v Turner. In that case the appellant, on being told by his girlfriend that she had slept with other men while he had been in prison and that the child she was carrying was not his, said his hand had come across a hammer which was down the side of the seat in the car in which they were sitting and that he had hit her with it. In the course of his judgment Lawton LJ said -

> "Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life. It follows that the proposed evidence was not admissible to establish that the appellant was likely to have been provoked."

[10] The learned trial judge commented that there was much in this passage which lent support to the arguments put forward by the prosecution.

However the judge went on to say that as the defence put forward was provocation, the jury might be asked to consider matters which are personal to the defendant and quoted a passage from the speech of Lord Nicholls in A-G for Jersey v Holley [2005] 3 AER 371 where at page 377 paragraph 18 (2005 AC 580 at 592 paragraph 18) he stated -

> "The jury should assess the gravity of the provocation to the defendant. In that respect, as when considering the subjective element ingredient of provocation (did the defendant lose his self-control?), the jury must take the defendant as they find him, 'warts and all'."

The judge then referred to a passage earlier in Lord Nicholls' speech when at page 375 paragraph 11 (page 590 paragraph 11) he referred to the nature of the provocation and its effect on the individual defendant in the following passage –

> "Hence if a homosexual man is taunted for his homosexuality it is for the jury to consider whether a homosexual man having ordinary powers of self-control might, in comparable circumstances, be provoked to lose his self-control and react to the provocation as the defendant did."

Having considered R v Turner the trial judge commented at paragraph 10 of his ruling –

> "[10] There is therefore high authority for admitting evidence which bears on the effect of the alleged provocation upon the defendant. However, is expert evidence on what may have been the effect of provocation admissible? Turner is authority that it is not if the "entire factual situation" is one within the experience of the ordinary jury. But if the cultural background of the defendant is such that expert evidence is necessary to explain to the jury why the effect of the alleged provocation may have resulted in a sudden and temporary loss of self-control on the part of the defendant, then in principle I see no reason why such evidence should not be given."

The judge then went on to consider R v Uddin which concerned the effect on an Indian national of the insult engendered by being hit with a shoe. He then ruled that the evidence of Professor Mak was admissible in these terms -

> "[13] I am satisfied that evidence which may assist the jury to assess the effect of the deceased's words and

> actions upon this defendant who is a Chinese national, who has been brought up in China, who lived there most of his life, who speaks no English, and it seems lived exclusively within the Chinese community in Dublin and Belfast, may be given provided it is relevant."

Having so ruled the learned trial judge then considered whether Professor Mak was qualified to give the evidence contained in the two reports and concluded that she was. At paragraph 14 he concluded –

> "She is an Emeritus Professor in the Department of Psychiatry in the University of Hong Kong, and as a psychiatrist who it appears has practised there I can see no reason why she should not be regarded as having the necessary experience of Chinese culture to address the question of whether the deceased's words and actions could have caused the Chinese man to suddenly and temporarily lose his self-control. I must emphasise that in permitting her to give evidence about the concept of 'face' and it's possible relevance to this issue I am not to be taken as indicating that the jury should accept it, that will be a matter for them. I therefore admit Professor Mak's evidence insofar as it is relevant and Mr Hopley conceded that it would not be relevant as to whether the provocation was enough to make a reasonable man do as the defendant did, that is strangle the deceased. That is because the standard of the sufficiency of the provocation, that is '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. See Lord Nicholls in A-G for Jersey v Holley at [22]."

Grounds 1 and 2

[11] These grounds are inter-related and it is convenient to deal with them together. A typed direction on provocation was provided to the jury. It was submitted that this was deficient in two respects. Firstly, it failed to alert the jury to the need to conduct an assessment of the gravity of the provocation to the defendant. Secondly, the trial judge, in directing the jury, restricted the definition of the 'reasonable person' for the purpose of the second limb of the test, to an ordinary man of the defendant's age with ordinary self control. It was submitted by Mr O'Donoghue that the ruling given by the Learned Trial Judge on the admissibility of the evidence of Professor Mak confined her

evidence to the first element of the defence of provocation only and was in error. Professor Mak's evidence provided the jury with a relevant comparator namely a reasonable Chinese person, who had been brought up in China and who possessed various Chinese (or Eastern) characteristics, all of which were relevant to the second limb of the provocation test. When directing the jury on the second limb (the objective test) the trial judge failed to direct the jury on two matters. Firstly, the importance of assessing the gravity of the provocation alleged. Secondly, that the 'reasonable person' for the purpose of the second limb test was a person bearing the same characteristics as the Appellant, namely the reasonable Chinese person bearing the normal characteristics of a Chinese person brought up as the appellant had been. Mr O'Donoghue took no issue with the directions of the trial judge on the first limb of the provocation test.

[12] At common law provocation reduces murder to manslaughter. Provocation is defined as –

> "Some act or series of acts, done or words spoken by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused to subject to passion as to make him or her for the moment not master of his mind. [per Lord Goddard LCJ in R v Whitfield 63 Cr App R 39 at 42 approving Devlin J in R v Duffy [1949] 1 AER 932]."

At the time of the appellant's trial the circumstances in which provocation could be considered by a jury were governed by section 7 of the Criminal Justice (Northern Ireland) Act 1967, which is in identical terms to Section 3 of the Homicide Act 1957. Section 7 provides -

> "7.- (1) Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or both together) to lose his self-control the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury, and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.
>
> (2) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing

amounted to murder in the case of any other party to it."

[13] In Attorney General for Jersey v Holley [2005] 2 AC 580 Lord Nicholls, giving the majority opinion of the Privy Council Board, said at paragraphs 5 and 6 that the defence of provocation as envisaged in section 7 has two ingredients. The first is whether the defendant was provoked into losing his self-control – often referred to as the first limb or the subjective element or the factual ingredient. For the jury all probative evidence is relevant in determining whether this limb has been made out. For this purpose the jury should take the defendant as they find him 'warts and all'. The second limb is whether the provocation was enough to make a reasonable man do as the defendant did taking into account everything said and done according to the effect it would have on a reasonable man. This is referred to as the objective or evaluative ingredient. This breaks down into two elements. The first calls for an assessment of the gravity of the provocation for the accused. The second calls for the application of an external standard of self-control: 'whether the provocation was enough to make a reasonable man do as he did'.

[14] The definition of 'the reasonable man' in this context has been considered on a number of occasions over the last twenty five years giving rise to conflicting views about the characteristics which the reasonable man should possess. In R v Smith (Morgan) [2001] 1 AC 146 it was held that any characteristic would be relevant if it affected the degree of control which society could reasonably expect of a defendant and which it would be unjust not to take into account. It was said that Smith, a decision of the House of Lords, was in conflict with R v Camplin [1978] AC 705 HL and Luc Thiet Huan v R [1997] QAC 131, a decision of the Privy Council. In AG for Jersey v Holley [2005] 2 AC 580, also a Privy Council decision, the conflict was resolved in favour of R v Camplin and Luc Thiet Huan and the minority opinion in Smith. This left two conflicting authorities, one a House of Lords decision (Smith) and the other a decision of the Privy Council (Holley). Which should be followed? This issue was considered by the Court of Appeal in England and Wales in R v James and Karimi [2006] 2 QB 588 before a five judge court including the Lord Chief Justice and the President. In that case two defendants appealed against convictions for murder on the ground that the jury in each case should have been directed on the issue of provocation in accordance with the decision of the House of Lords and not in accordance with the decision in the Privy Council on which the trial judge based his directions to the jury. It was held that the relevant principle of law was to be found in the decision of the Privy Council and the appeals were dismissed. The Court of Appeal of England and Wales was bound to prefer the decision of the Privy Council over that of the earlier decision of the House of Lords, where the Judicial Committee of the Privy Council, consisting of nine of the Lords of Appeal in Ordinary, had agreed that the majority decision of the Privy Council had clarified definitively the law on a particular issue. The

Court of Appeal in Northern Ireland has previously followed the decision of the House of Lords in Smith (Morgan) - see R v Murphy [2004] N.I.CA 19. This is the first occasion on which it has had to consider the decision of the Privy Council in Holley. Should it follow its earlier decision in Murphy or that of the Privy Council? We consider it is only sensible to adopt the same approach as that taken by the Court of Appeal in England and Wales and follow the decision of the Judicial Committee of the Privy Council in Holley.

[15] In Camplin Lord Diplock at page 771 defined the reasonable man as:

> "… an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today. A crucial factor in the defence of provocation from earliest times has been the relationship between the gravity of provocation and the way in which the accused retaliated, both being judged by the social standards of the day."

Lord Simon said that he was ' a man of ordinary self-control' (page 726).

Later in his opinion Lord Diplock referred to the change in the law through the expansion of the definition of provocation to include 'words spoken'. He described the effect of this change in these terms –

> "But now that the law has been changed so as to permit of words being treated as provocation, even though unaccompanied by any other acts, the gravity of verbal provocation may well depend on the particular characteristics or circumstances of the person to whom a taunt or insult is addressed. To taunt a person because of his race, his physical infirmities or some shameful incident in his past may well be considered by the jury to be more offensive to the person addressed, however equable his temperament, if the facts on which the taunt is founded are true than it would be if they were not. It would stultify much of the mitigation of the previous harshness of the common law in ruling out verbal provocation as capable of reducing murder to manslaughter if the jury could not take into consideration all those factors which in their opinion would affect the gravity of taunts and insults when applied to the person to whom they are addressed."

Thus he clearly associated the characteristics of the defendant with the gravity of the provocation for that defendant. Later at page 718 he outlined what a proper direction to a jury on the question of provocation should comprise -

> "In my opinion a proper direction to a jury on the question left to their exclusive determination by s 3 of the 1957 Act would be on the following lines. The judge should state what the question is, using the very terms of the section. He should then explain to them that the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him, and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also would react to the provocation as the accused did."

[16] In Holley at paragraphs 10 and 11 Lord Nicholls highlighted the approach approved by Lord Diplock. He stated at paragraph 11 that if a homosexual man is taunted about his homosexuality, the jury would have to consider whether a homosexual man having ordinary powers of self-control might, in comparable circumstances, be provoked to lose his self-control and react to the provocation in the same way as the defendant did. He found authority for this proposition in R v Morhall [1995] 3 All ER 659, [1996] AC 90, a case in which the reaction of a glue-sniffer to provocation about his addiction was in issue. Thus in relation to the first of the two elements of the second limb it was held that in assessing the gravity of the provocation for the defendant, the characteristics and circumstances of the defendant could be relevant. However in determining whether the provocation was enough to make a reasonable man do as the defendant did, the standard of self-control by which the conduct of the defendant is to be evaluated is the external standard of a person having and exercising the ordinary powers of self-control to be expected of a person of the defendant's sex and age. Only the characteristics of age and sex are relevant to the second of the two essentials of the second limb.

[17] The substance of the criticism of the learned trial judge's summing-up to the jury is that he did not break down the second limb into the two essentials referred to above. In particular, in relation to the first element it was submitted that the jury should have been directed that they should apply their minds to the gravity of the provocation for this particular appellant with his individual characteristics in mind. Furthermore, in describing the reasonable person the Judge did not direct the jury to have regard, not only to

the sex and age of the defendant, but also the fact that he was Chinese, had been brought up in China and exposed to Chinese culture including an upbringing by an authoritarian father and the acquisition of the normal characteristics of a Chinese person brought up in China and the evidence of Professor Mak about this. Some emphasis was placed on the importance of 'face' in Chinese society about which evidence had been given. While reference was made to other evidence that Professor Mak might have given, the substance of the submission related to the restrictive nature of the judge's ruling and his direction to the jury about the meaning of the 'reasonable man'. It was submitted by Mr Magill who appeared on behalf of the Crown that the judge's ruling was consistent with the authorities and section 7 of the Criminal Justice Act 1966. He submitted that the effect of Mr O'Donoghue's submission would be to "turn the clock back". In relation to the assessment of the gravity of the provocation, he submitted that the inclusion of the word 'enough' in the written direction would have alerted the jury to the need to assess its sufficiency.

[18] In Smith the House of Lords held that any characteristic which affected the degree of control which society could reasonably expect of the defendant should be taken into account, if it would be unjust not to do so. That approach was expressly rejected in Holley on the basis that this was not what Parliament had legislated. Parliament had set the external standard of the reasonable man; whether a reasonable man or ordinary person would have lost their self-control and reacted in the manner in which the appellant reacted to the provocation offered. The uniform standard of the reasonable man is not qualified by any characteristic other than age and gender. Thus nationality, ethnic culture and upbringing are not relevant in assessing the reaction of the reasonable or ordinary man and there was no obligation on the trial judge to direct the jury on those matters.

[19] The learned trial judge provided the jury with a written direction on provocation based on the JSB (NI) Specimen Directions. It was suggested that this written direction was deficient. The direction defined provocation correctly and informed the jury that there were a number of questions which they had to consider. It stated -

> "There are a number of questions you have to consider when deciding whether the defendant was, or may have been, provoked to kill the deceased.
>
> The first question has two parts to it. The first is did the deceased's conduct, that is things she did or said, or both, provoke the defendant, or may they have provoked him? If they did, or may have been done, then you must consider the second, which is did the

> provocation cause the defendant to suddenly and temporarily lose his self control?
>
> When considering whether the defendant was provoked you must take the defendant as you find him, "warts and all". For example, if the defendant was disabled in some way, to call him a cripple might be very much more hurtful than it would be to someone who is not disabled."

The written direction then dealt correctly with the requirement that the loss of self control be sudden and temporary. Later the direction referred to the further question the jury had to ask namely whether what was said or done was enough to make a reasonable person do what the defendant did and gave assistance on the meaning of 'a reasonable person'. It was in these terms -

> "If, however, you accept that the defendant was, or may have been, provoked, and that his loss of self control was, or may have been, sudden and temporary, then you must go on to consider a further question, which is whether everything done and said by the deceased was, or may have been, enough to make a reasonable person do what the defendant did?
>
> A 'reasonable person' means an ordinary man of the defendant's age who is not exceptionally excitable or pugnacious, but is possessed of such powers of self control that everyone is entitled to expect that people will exercise in society as it is today. In other words a reasonable person is a person of ordinary self control.
>
> You should bear in mind that society requires ordinary people to exercise reasonable control over their emotions and their tempers. Your views represent the views of society as to what control over their emotions and tempers is to be expected today of people of ordinary self control.
>
> If you are satisfied beyond reasonable doubt that the provocation was not enough to make a reasonable person do what the defendant did, then you should find him guilty of murder.

> If you consider that the provocation was, or may have been, enough to cause a reasonable person to do what the defendant did, then you should find him not guilty of murder, but guilty of manslaughter".

[20] It is correct that the written direction did not identify the ingredients of the defence of provocation in exactly similar terms to those used by Lord Nicholls in Holley. That is, that the first ingredient was whether the defendant was provoked into losing his self-control (about which no complaint is made) and that the second, whether the provocation was enough to make a reasonable man do as the defendant did taking into account everything said and done according to the effect it would have on a reasonable man, could be broken down into two parts. The first part calling for an assessment of the gravity of the provocation for the defendant and the second requiring the application of an external standard of self-control. However it does inform the jury that they should take the defendant as they find him "warts and all". It provides an example namely, calling a disabled person 'a cripple' would be much more hurtful to him than it would be to a person not disabled. We were referred to the Specimen Direction of the JSB of England and Wales which is in these terms.

> "5. But if you conclude that D was or might have been provoked, in the sense which I have explained, you must then go on to weigh up how serious the provocation was for this defendant. Is there anything about this defendant which may have made what was [said and/or done] affect him more than it might have affected other people? (*Here, identify any matters which may be relevant to the gravity of the provocation to this defendant.*)
>
> 6. Finally, having regard to the actual provocation and to your view of how serious that provocation was for this defendant, you must ask yourselves whether a person having the powers of self-control to be expected of an ordinary, sober person, of D's age and sex (*see Note 2*), would have been provoked to lose his self-control **and** do as this defendant did (*see Note 3*). If you are sure that such a person would not have done so, the prosecution will have disproved provocation, and D is guilty of murder (*see Note 1*). If, however, you conclude that such a person would or might have reacted and done as D did, your verdict would be

> 'Not guilty of murder, but guilty of manslaughter [by reason of provocation]'.

This Specimen Direction does not specifically divide up the second limb though it does tell the jury that they must go on to weigh up how serious the provocation was for the defendant.

[21] During the summing up the trial judge read out the written direction relating to provocation which he had given to the jury. He then took the jury through the salient points of the appellant's many interviews with the police. He summarised the interviews in this way –

> "So he is saying that this reaffirmation by her of her intention to carry on her life as a prostitute in Dublin causes him to kill her essentially in a fit of rage because he takes up the piece of rope from the floor, either knots or takes both ends in his hands, puts the rope round her neck and when he comes to is senses she is dead. So when you look at that ladies and gentlemen some nine hours or thereabout, perhaps more, have passed since he discovered she had been deceiving him. The next morning he has calmed down, he has decided to let her go. Part of his concern …. is that he wants her to give him back the money that he gave her. But then he goes back to this question of prostitution and when she says that she will, only then does he become so angry that he strangles her."

The judge then summarised the appellant's evidence during the trial. He referred to the appellant waking up and thinking he should probably let her go. By this time he was not so angry as he had been. He continued –

> "But as soon as she mentioned the two pieces of paper he was filled with rage. ……Now I will remind you exactly what he said …… [Counsel] Question: Then what did you do? Answer: Then I put the rope round across her neck, then I asked, 'Do you still want those two pieces of paper? Do you still want those people? Then she told me 'Those names on the papers were the most important people to me'. Then she said: 'She need a lot of money, she need money' Then I say: How you dare to tell me all about this. Now you dare to tell me this. Don't you want to live? Then she say:

> Yes, I don't want to live any more. Kill me. Kill me. There you dare, you kill me.' He was asked to repeat this and he said: 'Yes, you kill me. Kill me then, I don't want to live any more anyway. At that moment I was trembling all over my body, it just like all the blood from my body rush up to my brain, I feel my heart was going to explode. Question: And what happened? How else did you feel? Answer: Then when I felt a bit better, then I found Tina was there, motionless."

[22] The judge then turned to deal with the evidence of Prof Mak. He provided the jury with a type document headed 'Expert Evidence' which he read to them. This contains the following passage –

> "What is disputed is her evidence relating to a different question, namely the significance or possible significance, of the deceased's conduct and its possible effect upon the defendant. You have heard her evidence about that because the defendant is Chinese, was brought up there, does not speak English, and seems to have lived within the Chinese community in Dublin and Northern Ireland since he left China some years ago. In those circumstances it may be that the effect upon him of what was done and said by the deceased may have been different to the effect upon a person born and brought up in our society, and it is because of that possible difference that you have heard Professor Mak's evidence. Her evidence is therefore before you as part of the evidence as a whole to assist you with regard to one particular aspect of the evidence only, namely the effect which the deceased's words and actions may have had upon the defendant, and whether they provoked him.
>
> If he was, or may have been, provoked, and if he suffered, or may have suffered, a sudden and temporary loss of self-control, her evidence is not relevant to the next question you then have to consider, namely whether everything done and said by the deceased was, or may have been, enough to make a reasonable person do what the defendant did, that is to strangle her. That is because, as I have already explained to you, that question is solely a

> mater for you and expert evidence has no bearing on that question."

The trial judge then referred in some detail to the factors which Professor Mak suggested were "relevant to the assessment of the affect which the deceased's words and actions may have been on the defendant because of the cultural aspects of Chinese society and, in particular, the concept of 'face'".
He referred to the following –

i. His upbringing as a result of which Chinese people tend to be highly sensitive;
ii. the effect on him of being betrayed by the person he loved;
iii. the concept of face, which he said may be quite different from experiences in other societies; " it is tantamount to throwing down a gauntlet, challenging his manhood;

He concluded this part of his summing up with the following observation –

> "Now ladies and gentlemen, you have to consider whether Professor Mak's evidence about the importance of the concept of 'face' and its relevant to the defendant's reaction, helps you to decide whether or not he was provoked and whether he suddenly and temporarily lost his self-control."

[23] In light of this extensive direction and summary of Professor Mak's evidence the jury can have been in no doubt from the summing-up that, in deciding whether or not the appellant lost his self-control, they had to have regard to the evidence of Professor Mak in assessing the gravity of the alleged provocation for this appellant. The fact that the judge did not specifically divide up the second limb in the manner suggested by Lord Nicholls does not detract from that.

[24] The extension of the defence of provocation to words spoken in the 1967 Act resulted in the particular characteristics or circumstances of the defendant becoming a possible relevant factor in determining the gravity of the provocation. At paragraph 10 of his opinion in Holley Lord Nicholls referred to Lord Diplock in Camplin at 717 stating that the gravity of the provocation could depend on "the particular characteristics or circumstances of the person to whom a taunt or insult is addressed (my emphasis). At paragraph 11 Lord Nicholl gave an example of a homosexual man taunted about his homosexuality and referred to the case of R v Morland in which a glue-sniffer was taunted about his addiction. At paragraph 24 he said that if a defendant was taunted about his intoxicated state that may be a relevant factor in assessing the gravity of the provocation, but intoxication itself would

not be a factor for the jury to take into account when considering whether the defendant (intoxicated) exercised ordinary self-control. In Luc Thiet Thuan Lord Goff said at page 146 that the mental infirmity of the defendant was the subject of taunts that might be taken into account in assessing the gravity of the provocation. He commented –

> "But this is a far cry from the appellant's submission that the mental infirmity of the defendant, impairing his power of self-control, should as such be attributed to the reasonable man for the purposes of the objective test."

In R v Newell [1980] 71 Cr App R 331 the defendant was a chronic alcoholic whose girlfriend had just left him whereupon he and a friend got seriously drunk. At one point the friend made a disparaging remark about the girl whereupon the defendant killed him with an ashtray. His defence was inter alia, provocation. He was convicted of murder. At his appeal the main point was whether the jury should have been directed to take into account his chronic alcoholism for the purposes of provocation. The Court of Appeal determined that they should not. Lord Lane LCJ commented at page 340 that 'It had nothing to do with the words by which it is said he was provoked'. In Smith Lord Hobhouse, who dissented, said that for the purposes of Smith's case Newell was an important case, but on the issue of self-control. It would appear that Lord Diplock envisaged a relationship between the words spoken and characteristics of the defendant in the following lengthy passage from his opinion in Camplin [1978] AC 705 where at page 716H he stated –

> "As I have already pointed out, for the purposes of the law of provocation the 'reasonable man' has never been confined to the adult male. It means an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today. A crucial factor in the defence of provocation from earliest times has been the relationship between the gravity of provocation and the way in which the accused retaliated, both being judged by the social standards of the day. When Hale was writing in the 17th century pulling a man's nose was thought to justify retaliation with a sword; when *Mancini* was decided by this House, a blow with a fist would not justify retaliation with a deadly weapon. But so long as words unaccompanied by violence could not in common law amount to provocation the relevant proportionality between provocation and retaliation

> was primarily one of degrees of violence. Words spoken to the accused before the violence started were not normally to be included in the proportion sum. But now that the law has been changed so as to permit of words being treated as provocation, even though unaccompanied by any other acts, the gravity of verbal provocation may well depend on the particular characteristics or circumstances of the person to whom a taunt or insult is addressed. To taunt a person because of his race, his physical infirmities or some shameful incident in his past may well be considered by the jury to be more offensive to the person addressed, however equable his temperament, if the facts on which the taunt is founded are true than it would be if they were not. It would stultify much of the mitigation of the previous harshness of the common law in ruling out verbal provocation as capable of reducing murder to manslaughter if the jury could not take into consideration all those factors which in their opinion would affect the gravity of taunts and insults when applied to the person to whom they are addressed. So to this extent at any rate the unqualified proposition accepted by this House in *Bedder* that for the purposes of the 'reasonable man' test any unusual physical characteristics of the accused must be ignored requires revision as a result of the passing of the 1957 Act."

[25] What these cases appear to demonstrate is that the courts were looking for some relationship between the provocative remark or taunt (the "words spoken") and some overt characteristic of the defendant, for example, the disabled man being called 'a cripple'. At paragraph 8 above I set out Mr O'Donoghue's summary of the provocation alleged and at paragraphs 21 and 22 the judge's summing-up about the appellant's evidence about what led up to the killing and Professor Mak's evidence about the appellant. The deceased did not taunt or insult him about his Chinese nationality, upbringing or 'face'. There was no such relationship between the alleged comments made by the deceased and any overt characteristic of the defendant, other than the latent facts of his Chinese nationality and upbringing. On one view it might be said that the judge's summing up was favourable to the appellant. As Tina did not taunt or insult him or comment about any specific characteristic that he had, the gravity for him of such provocation as there might have been, would have been no worse than for any other ordinary person. If there should be some relationship between the provocation and the defendant, then in the absence of a taunt, insult or

comment about any characteristic of him, there would have been no need to direct the jury specifically on the effect of the provocation for him other than in general terms. However as we heard no argument on this discrete issue we express no firm conclusion on it. On the assumption that the appellant was entitled to a specific direction from the trial judge on the gravity of the provocation for him, we consider that the jury were given a more than sufficient direction on that issue. In relation to whether the learned trial judge should have directed the jury that they should take into account the evidence of Professor Mak about the Chinese origins and upbringing of the appellant when considering whether an ordinary man of ordinary self-control would have done what the appellant did, we consider the judge was correct that her evidence was not relevant to that issue.

Ground 3. The forensic evidence

[26] It was contended on behalf of the appellant that the learned trial judge directed the jury on the significance of the forensic evidence found at 93 Skegoneill Road in a manner which was unfair, highly prejudicial and unbalanced. An important element of the appellant's case was that he was in a loving relationship with the deceased. Any evidence that undermined that case was critical to the defence. During cross-examination of the appellant the trial judge invited the prosecution, if it was their case that the appellant was aware of the deceased having sex with other men in 93 Skegoneill Road, to put that clearly to the appellant. Prosecution counsel then did so. It was submitted that this enabled the judge when directing the jury about the forensic evidence to attack his case that he did not know she was a prostitute and that he was engaged in a loving relationship with her. In addition the judge exaggerated the impact of the forensic evidence and left the jury that it strongly supported the prosecution case. What he should have done was simply to have summarised the evidence of the forensic scientist without comment.

[27] It was submitted by Mr Magill that it was always the prosecution case that the deceased had sex with at least one other man in 93 Skegoneill Road and the appellant must have known about it. The case was opened to the jury on this basis. In light of the judge's intervention counsel responded and made clear in cross-examination of the appellant what the prosecution case was. It was submitted that thereafter the judge did not direct the jury unfairly. No requisition was made to the trial judge about his direction on this issue.

[28] We have carefully considered this point. The significant features of the forensic examination of the house and the car are set out above at paragraph 7 above. The comments of the judge that there was ample evidence of a good deal of sexual activity and that there was evidence that the appellant was not the only person the deceased had intercourse with were fully justified. These matters would have been fairly evident to the jury. The trial judge was

entitled (as Mr O'Donoghue acknowledged during his submissions) to clarify what the prosecution case was and to ensure that it was put to the appellant for his response. As it was part of the prosecution case, having been referred to by counsel in his opening address to the jury, the judge was entitled to outline to the jury for their consideration the potential significance of this evidence in the overall context of the case. In stating that the evidence "showed" that at least one male was involved in sexual activity the judge was rather stating the obvious. It was for the jury to decide what weight or significance, if any, to attach to this evidence. We do not consider the judge's directions to the jury on the forensic evidence could be said to be unfair, prejudicial or unbalanced.

[29] None of the grounds of appeal advanced has been made out. Crown counsel submitted that the evidence against the appellant was overwhelming. We see no reason to differ from that submission. We have no sense of unease or doubt about this case and are satisfied that the conviction of the appellant for murder was not unsafe.