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Norris W. Reigler
University of Kentucky

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INTENTIONAL HOMICIDE—EFFECT OF BATTERY BY DECEASED IN REDUCING OR EXCUSING THE OFFENSE

A homicide intentionally perpetrated without legal justification or excuse is ordinarily murder, unless it appears that the slaying was done in heat of passion engendered by an adequate provocation in the absence of malice conceived beforehand. If it is evident that the killing was done in heat of passion aroused by adequate provocation, the homicide is no more than voluntary manslaughter. It is suggested that the law mitigates the offense under such circumstances in recognition of human frailty and in a spirit of compromise. The matter may be explained from a technical viewpoint in terms of malice, a requisite of murder. It is said that heat of passion and malice are contradictory states of mind incapable of existing together with respect to the same act, so that the presence of passion necessitates the absence of malice. Consequently, homicide committed in heat of passion cannot be murder.

Although the law takes into account the fact that men are apt to act rashly when impassioned, it recognizes no passion which is not aroused by "adequate" provocation. Generally a provocation is adequate if, under the circumstances, it could be expected to excite the passions of a reasonable man beyond control, obscure his reason, and render his mind incapable of cool reflection. The test is for the most part objective, the reaction of the ordinary reasonable man rather than that of the individual being selected as the criterion. Assault and battery is one of the few general types of provocation which, as a matter of law, are deemed capable in certain instances of satisfying the requirement of adequacy as measured by this objective standard.

Whereas it is true that a battery which incites intentional homicide may operate to reduce criminal responsibility under the rules of provocation and heat of passion, it may also excuse the homicide entirely, serving as a basis of self-defense. It is the purpose of the writer to consider the legal sufficiency of batteries of various grades to operate either as a basis of adequate provocation (mitigation) or of self-defense (excuse), as the case may be. Consequently, a cursory examination of the relationship of provocation and self-defense, as they affect homicides committed in response to batteries in general, will perhaps prove helpful.

1 2 BURDICK, LAW OF CRIME (1946) sec. 461.
3 See State v. Ferguson, 2 Hill 282, 284 (S.C. 1835)
4 McHargue v Commonwealth, 231 Ky 82, 21 S.W 2d 115 (1929).
5 Ballard v Commonwealth, 156 Va. 980, 159 S.E. 222 (1931).
6 State v. Borders, 199 S.W 180 (Mo. 1917).
7 State v. Nevares, 36 N.M. 41, 7 P 2d 933 (1932).
Self-defense is a privilege based upon necessity which enables a man to protect himself with force and to kill intentionally, if apparently necessary to protect his life or prevent great bodily harm. A homicide committed under this privilege is excusable, but it must appear that the slayer acted upon a reasonable belief that the peril to him was real and imminent, and that he used no more force than was reasonably necessary to repel the attack. In many jurisdictions he is required to retreat if a reasonable avenue of escape is open, and provided retreat will not increase his peril.

Where this rule prevails, it is incumbent upon the slayer to show that he could not have reasonably retreated if the homicide is to be excusable.

Because self-defense is an absolute bar to criminal responsibility, it behooves a slayer to rest his case upon that ground when possible. As a practical matter, therefore, provocation and passion assume great importance only where, for some reason, self-defense cannot or may not be successfully invoked. This will be the case if the slayer kills after all imminent danger to him has passed, as when his attacker has been rendered harmless, or has abandoned the encounter, or if he used more force than was reasonably necessary for his defense. Failure to retreat may, of course, have like effect, leaving the slayer to depend solely on provocation and heat of passion as a partial defense. Often juries must consider both self-defense and provocation, examining the facts found in the particular case to determine which, if either, is applicable.

It will now be seen how these principles apply to wilful homicide committed in response to batteries involving several degrees of physical force. For purposes of the present discussion batteries may be classified as follows: (1) batteries calculated to produce death or great bodily injury (2) batteries calculated to produce moderate physical injury (3) batteries calculated to produce slight physical effect.

Homicides in response to batteries calculated to produce death or great bodily injury will generally be disposed of under the privilege of self-defense. No serious problem as to the reasonableness of the force employed by the slayer should ordinarily arise, as one is privileged to kill in order to protect himself from imminent peril of death or great bodily harm. Neither should failure to withdraw ordinarily deprive the slayer of his privilege to defend himself by taking life, for it is held that where a deadly weapon is employed in

10 Rice v. State, 20 Ala. App. 102, 101 So. 82 (1924).
12 Oldacre v. State, 196 Ala. 690, 72 So. 303 (1916).
17 Rice v. State, 20 Ala. App. 102, 101 So. 82 (1924).
a felonious attack there is no duty to retreat." In at least one class of cases, however, the law of provocation is highly important to a defendant who has killed in response to this type of battery. If he kills after the immediate peril has passed, the right to self-defense is forfeited, and he may therefore be compelled to seek mitigation of his offense, relying only upon heat of passion and provocation. Illustrative is the case of Scott v. State18 wherein the deceased struck the defendant on the head with a pistol butt, injuring him seriously, and so angering him, that he left to obtain his gun, returned, and killed his attacker. Although the slayer could not claim self-defense for the obvious reason that he was at the time of the homicide in no immediate peril, it was said that the provocation supplied by the blow could be sufficient to reduce the killing to manslaughter. The same result might be expected if the defendant had subdued his attacker and killed him immediately afterward. It is thought that little difficulty arises in such cases as to the adequacy of provocation where the battery is one capable of causing great bodily injury. Because the force applied to the person of the defendant is great, and would naturally import severe shock and pain, it is not unreasonable to suppose that heat of passion sufficient to prevent cool reflection would be aroused thereby in an ordinary reasonable man. Although the courts sometimes say that if a homicide is committed with a deadly weapon the provocation must be great,20 yet it is thought batteries of great force meet this requirement.

Batteries calculated to produce moderate physical injury, as contrasted with those calculated to produce great injury, present a somewhat different problem. Self-defense is less apt to be available to the slayer. The duty to retreat is usually present whereas it is not in the case of batteries committed with deadly weapons and felonious design, and thus the slayer may be excluded from establishing self-defense where it appears he made no reasonable attempt to withdraw. But even if the defendant has retreated to the wall, if he then kills with a deadly weapon, questions as to the reasonableness of the force employed may be decided against him because one may not ordinarily kill under the privilege of self-defense unless death or great bodily injury is apparently threatened.21 It would appear, therefore, that where the homicide is in response to a battery calculated to produce less than great bodily injury, the central issue may well be whether the defendant is guilty of murder or manslaughter.

Batteries calculated to produce moderate physical injury may consist of blows inflicted with fists, heavy sticks, or with any other objects causing considerable impact and pain, but of insufficient force to cause death or great bodily harm. These will suffice to se-

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18 Hays v. State, 225 Ala. 666, 145 So. 134 (1932)
19 49 Tex. Crim. R. 386, 93 S.W. 112 (1905).
20 See State v. Hoyt, 13 Minn. 125, 130 (1868).
21 Amerson v. State, 26 Ga. App. 68, 105 S.E. 378 (1920)
cure for the defendant an instruction on manslaughter, but the finding of the jury should depend upon the outcome of an application of the objective test to the facts of the particular case. The importance of the circumstances extrinsic to the actual battery, but present at the time, cannot be ignored as factors influencing the jury's decision on the adequacy of provocation. It is not alone the force of the blow which should be considered, but the effect which a battery of such force might have been expected to produce in the mind of a reasonable man under conditions present in the particular case. Angry gestures and obscene epithets directed by the deceased toward the slayer, although insufficient provocation in themselves, may when considered in conjunction with the accompanying battery, add substantially to the provocative effect.

Remaining to be considered are those batteries calculated to produce slight physical effect. Homicide committed in response to such trivial bodily contacts will not be excused on the ground of self-defense, for neither death nor great bodily injury imperils the slayer, and the use of deadly force with the intention to kill would appear clearly unreasonable and excessive. The defendant, therefore, may desire to rely heavily upon provocation and heat of passion as the only alternative to a probable conviction of murder. Whether on this ground the slayer will be successful in obtaining mitigation of his offense is in a particular case problematical. It has been said by a noted writer that an assault and battery inflicting insult alone is sufficient, and a modern case has pronounced as dictum that the harmless jostling of a person on a highway, or a mere tweaking of the nose will have like effect.

It may be true, as a practical matter, that in a particular case a trivial battery may constitute adequate provocation, but this is not thought to depend upon a rule of law to the effect that any battery, no matter how slight, is adequate. It is rather the outcome of the fact that where any degree of physical impact appears in the evidence the court may feel obligated to give an instruction on manslaughter, thereby allowing the jury to consider the possibility that adequate provocation and aroused passion incited the homicide. Although the court may charge that a trivial or slight battery is not sufficient to constitute such provocation as the law recognizes, thus taking a stand on the law as an abstract proposition, the jury in applying the facts to the law have opportunity to determine for themselves whether the physical contact taken together with all the other circumstances in the case should be found sufficient provocation. Upon this determination the fate of the defendant will rest. One court has expressed its view of this matter as follows:

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22 Williams v Commonwealth, 80 Ky 313 (1882).
24 State v. Bongard, 330 Mo. 805, —, 51 S.W 84, 89 (1932)
"It is doubtless, in one sense, the province of the Court to define what, in law, will constitute a reasonable or adequate provocation, but not, I think, in ordinary cases, to determine whether the provocation proved in the particular case is sufficient or reasonable. This is essentially a question of fact, and to be decided with reference to the peculiar facts of each particular case. As a general rule, the Court, after informing the jury to what extent the passions must be aroused to render the homicide manslaughter, should inform them that the provocation must be one, the tendency of which would be to produce such a degree of excitement and disturbance in the minds of ordinary men.

Thus it appears, under present law, that the question of whether there is provocation in a case disclosing some degree of physical impact is to a great extent one for the jury who, in the exercise of their judgment, might find a mere trivial battery an adequate provocation in a particular case.

It may be contended that where the evidence conclusively discloses that the battery was one producing no more than slight physical effect, the courts should exclude consideration of a verdict of manslaughter from the jury, directing that the defendant be found guilty of murder or acquitted. Words alone, no matter what provocative effect they may have on a slayer in a particular case, do not justify a manslaughter instruction. It is thought the application of a similar rule to trivial batteries would work like hardship in that several remedies are available to one unlawfully subjected to a slight battery. All force apparently necessary to repel the intrusion short of taking life may be employed within the privilege of self-defense. When the incident has passed the party in fault may be punished under the criminal law for assault and battery, and resort may be had to a tort action for damages. In view of these facts one may argue that it is contrary to the interests of society in the preservation of life and the maintenance of public peace, as well as an unnecessary concession to the depravity manifest in a minority of men, to allow a slayer who has killed in response to slight force a clear chance to avoid a conviction of murder. With this view the writer is inclined to concur.

Norris W Reigler

27 State v. Garrell, 171 Mo. 489, 71 S.W. 1045 (1903), State v. Spivey, 132 N.C. 989, 43 S.E. 475 (1903).