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Manslaughter Adultery as Provocation

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MANSLAUGHTER ADULTERY AS PROVOCATION

The sight of adultery as sufficient provocation to reduce an offense which would otherwise be murder to manslaughter is a precept which the law has long recognized.[1] Although the exact womb from which it sprang is a matter of speculation, the theory behind its inception is readily apparent. The reason for mitigating a homicide on the basis of provocation is that man's nature is such when sufficiently aroused by heat of passion, that his mind is deaf to the voice of reason.[2] The sight of adultery upon the part of one's spouse, is such an act as will arouse great passion, therefore the common law judges in their wisdom recognized that the passion aroused was sufficient to reduce an intentional homicide to manslaughter. Historically there were two requirements which had to accompany the killing. They were (1) there had to be ocular inspection of the act,[3] and (2) the mortal blow must have been struck in the first transport of passion.[4]

Portions of the historical view are still with us. In order to determine what additions or subtractions have been made, the general precepts laid down above will be examined individually

First, let us examine the use of the word adultery It is perhaps best defined as illegal sexual intercourse between two persons, at least one of whom is married. The use of the word is one of limitation as it restricts the invocation of the doctrine of provocation to the spouse[5] of the party caught in the act. The

[1] HALE, PLEAS OF THE CROWN 486 (1778).

1 RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 513-514 (3d ed. 1843)

[3] Pearson's Case, 2 Lewin 216, 168 Eng. Rep. 1133 (1835).

[4] FOSTER, CROWN LAW 296 (2d ed. 1791)

In Daniels v. State, 162 Ga. 366, 133 S.E. 866 (1926) it was held that the same standard of conduct is required of a wife as is required of a husband where a slaying growing out of the sight of adultery is concerned. As this is the only case found where the wife was the slayer, there is a necessary implication that a single standard would be applied in all cases of an adulterous killing. There is room for doubt, however, due to the double standard applied in certain similar cases. For example, in Kentucky a husband can obtain a divorce by proof of either adultery or lewd lascivious conduct on the part of his wife; [KY. R.S. (1946) 403.020 (4) (c)]; while the wife must prove that the husband has lived openly and notoriously with another woman. [Booth v Booth, 12 Ky L. Rep. 988 (1891)]. It seems only just, however, that in criminal actions, a single standard should be applied.

word is perhaps too confining for there are other situations which are similar in nature to the sight of adultery and which arouse such passion that they might justify an extension of the rule. For example, a father catches a person in an unnatural sex act with his son[6] or daughter or a brother finds his sister in the act of fornication.[7] The passion aroused by such a sight would certainly be great. As the passion is equal to that aroused by the sight of adultery, the law should place each in the same class. Therefore, if the sight of adultery is sufficient provocation, the sight of acts such as these certainly should be sufficient to reduce a killing which would otherwise be murder to manslaughter. The step which logically follows is the abandonment of the term adultery and the substitution for it of the phrase "the sight of illicit intercourse being practiced by or upon a spouse or a female relative of close kin or unnatural acts being practiced by or upon one of close kin." The term close kin would be limited to wife, husband, sister, brother and child.

As was noted above, the first qualification placed upon the rule was that the killer had to have "ocular inspection" of the act. Although the exact connotation to be placed upon this phrase is not certain, it strongly implies that the defendant must have actually seen the parties engaging in the act. This does not appear to be a reasonable qualification and it is the opinion of this writer that such is not the rule today In the case of *Cox* v *State*,[8] the defendant knocked on the door of the deceased's house. He heard the bed springs screeching and upon being admitted to the room found the deceased in his underclothes and his wife hiding in the next room. Under the "ocular inspection" rule he would have been convicted of murder for killing the deceased because he had not actually *seen* the parties in the act although there was no doubt in his mind that they had just been engaging in intercourse. Great heat of passion was quite naturally aroused in the defendant and he killed the man.

[6] *See* Regina v Fisher, 8 Car. and P 182, 173 Eng. Rep. 452 (1837).

See Teague v. State, 67 Tex. Crim. Rep. 41, — 148 S.W 1063, 1064-1065 (1912)

100 Tex. Crim. Rep. 402, 273 S.W 580 (1925) The unusual instruction indicating that the offense might have been justifiable is based on TEXAS PENAL CODE, art. 1220 (Vernon 1936) which makes justifiable the killing by a husband who catches the parties in the act of adultery.

It seems illogical to conclude that the defendant should be guilty of murder in such a case simply because there was a door between him and the act, in spite of the fact that reasonable men could draw but one inference from the circumstances. The fallaciousness of such a conclusion is readily apparent and it is believed that the requirement of "ocular inspection" defeats the purpose of the rule, that is, to mitigate on the grounds of heat of passion. Therefore, it is submitted that the only logical test, provided the other requirements are met, is that the defendant find the parties under such circumstances as would lead to no other conclusion than that the parties had just engaged, or were preparing to engage, in the act.[9]

The final common law requirement that the mortal blow must be struck in the first transport of passion is still alive today. Although this phrase as such is not often used, the courts hold that the killing must be *immediate* and before the heat of passion has subsided.[10] The word "immediate" adds very little to the phrase "in the first transport of passion" and it is believed that neither term is clear. It is therefore suggested that whenever the word "immediate" is given in an instruction to a jury, it should be pointed out that the heat of passion in an ordinary man, as the law visualizes such a person, cools relatively quickly, and therefore, it is up to the jury to distinguish between the word "immediately" and the word "presently" in arriving at whether or not the passion of the particular defendant should have cooled. The test then would be if the defendant killed *immediately,* the killing could well be manslaughter. If, however, it occurred *presently,* or if the defendant's passion had actually cooled, it would be murder as the ingredient of malice would be added to the intentional killing. This distinction will certainly not solve the problem but it is believed that this will aid the jury in determining whether or not the defendant's act was done under the smart of heat of passion.

As heat of passion denotes an emotional state of a man's mind and provocation refers to those acts which arouse the mind to such a state, it is readily discernible that the sight of every adultery will not be sufficient to reduce the offense. There are

[9] *See* State v Pratt, 1 Houst. Cr. Cas. 249, 265-266 (Del. 1867). Excellent instruction on reasonable circumstances.

[10] *See* Crowder v State, 208 Ala. 697, — 93 So. 338, 340 (1922)

at least two types of cases where such a sight will not mitigate. They are (1) where the defendant has consented to the act,[11] and (2) where the defendant has a preconceived plan to entrap the parties in the act combined with an intent to kill.[12] In these instances, the element of suddenness is eliminated and the defendant has had time to coolly calculate the heinousness of the offense. Any killing that may occur under the above conditions savors of revenge and hence is malicious. For this reason such a killing is deemed murder. It should be added that mere suspicion[13] or even the wife's admission[14] of past acts, even though the mental anguish may be great,[15] is not sufficient, since this would violate the cardinal principle that words alone are not deemed legal provocation.[16]

In defending one charged with the killing of another caught in the act of adultery, the skillful practitioner has available one of four alternatives in preparing his case. First, he can have his client plead guilty and throw himself upon the mercy of the court. In practically every case this ends in a quick trip to the death house unless there happens to be a statute making the offense justifiable.[17] The second alternative is that of self defense. This type of defense is common in the entrapment cases. The typical situation is where the defendant catches the parties in the act, as he knew he would, and then contends that the deceased attacked him and that he killed only to protect his life.[18] This defense is relatively weak for the defendant had too obvious a motive to kill for the jury to place much credence in any story that he may tell. Moreover, in such cases it is hard to overcome the natural presumption that the defendant was the aggressor. However, it is used in quite a number of cases because an ac-

[11] *See* State v. Holme, 54 Mo. 153, 165 (1873)

[12] People v Gingell, 211 Cal. 532, 296 Pac. 70 (1931) State v Agnesi, 92 N.J.L. (7 Gummere) 53, 104 Atl. 299 (1918) State v Imundi, 45 R.I. 318, 121 Atl. 215 (1923).

[13] State v. John, 30 N.C. (8 Ire. Law) 330 (1848)

[14] Humphreys v. State, 175 Ga. 705, 165 S.E. 733 (1932) State v. Herring, 118 S.C. 386, 110 S.E. 668 (1922)

[15] Howell v Commonwealth, 218 Ky 734, 292 S.W 329 (1927)

[16] Richardson v. State, 123 Miss. 232, 85 So. 186 (1920) State v Benson, 183 N.C. 795, 111 S.E. 869 (1922)

[17] 6 GEORGIA CODE sec. 75 (Park 1914) see annotations for cases; 5 UTAH CODE, tit. 103 sec. 28–10 (1943) see annotations for cases; TEXAS PENAL CODE, art. 1220 (Vernon 1936)

[18] State v Agnesi, 92 N.J.L. (7 Gummere) 53, 104 Atl. 299 (1918).

quittal will follow in the event the jury does believe the story. The third alternative is based on the technical definition of provocation. The case is built around the premise that the defendant caught the parties in the act and was so blinded by his passion that he became deaf to the voice of reason.[19] This defense is very effective as the average juror has a natural aversion for the despoiler of the home and a great sympathy for the wronged spouse. Although this line of defense will usually save the defendant from capital punishment, it is used as a last resort due to the fact that in most states it only mitigates the offense to manslaughter. The fourth alternative is definitely the most picturesque. The defense here is based on temporary insanity.[20] The defendant testifies that he remembers seeing the parties in the act, everything went blank and the next thing he remembers is waking up several hours later in jail. This defense, often referred to as the "unwritten law," is not too effective for the modern juror is too realistic to believe that a man goes insane for an hour or so during his whole lifetime and that the insanity occurs at the only time it could possibly have been of any advantage to him.

As the existence of provocation in the law of homicide has not shown a tendency to fade, the sight of adultery remains as sufficient provocation to reduce an intentional killing to manslaughter. As such, it is a strongly entrenched form of defense. It must be admitted that such a sight does ordinarily create great passion due to the deep possessiveness that man feels for his mate. As it does create such a great passion, the killing that follows could not be said to be malicious. Therefore, it is logically classified as a provoked homicide.

Unquestionably, however, such a sight should not be held to *justify* the offense, as it is in a number of states.[21] Also, it is believed that there should be a strong movement to eliminate such defenses as the "unwritten law" and that the offense should be placed on a realistic plane. The reason the law should be more exacting in such cases is that home ties are not as close today as they were when the doctrine was conceived. This is

[19] State v Lee, 6 W W Harr. 11, 171 Atl. 195 (Del. Ct. Oyer and Ter. 1933)

[20] *See* Commonwealth v. Whitler, 2 Brewst. 388, 393 (Pa. 1868), State v Pratt, 1 Houst. Cr. Cas. 249, 269 (Del. 1867)

[21] See note 17 *supra.*

conclusively proved by the extreme advance in divorce rates in recent years. It logically follows that as the marriage bonds grow increasingly loose, the sight of adultery will become more frequent and hence while the passion aroused by such a sight will in a majority of cases be sufficient to mitigate the offense, extrinsic facts should be carefully weighed to determine whether the passion of the particular defendant was *actually* aroused. This will eliminate the blind application of the rule to every case, but will allow it in those cases where the defendant was actually overcome by his heat of passion.

It is believed that all that is required today, realistically speaking, is for a husband or wife to catch the parties in the act of adultery or to catch them in such circumstances as would lead a reasonable man to believe that the parties had just engaged, or were preparing to engage, in the act and to kill immediately provided there has been no consent or preconceived plan to entrap with the intent to kill. Liberal construction has resulted in too loose an application of the rule. While the rule remains fundamentally sound, it should be cautiously and conservatively applied in order that its purpose may be achieved under modern, changing social conditions.

It is further submitted that the word "adultery" is perhaps too confining as the sight of unnatural sex acts being committed upon a son or daughter or fornication upon a daughter or sister arouse a passion which is on a par with that of the sight of adultery Within the limits as defined above and with this last extension, it is believed that the leniency of the law in the cases under discussion should give way to the increased need for severe punishment of persons committing homicide. Too many other legal remedies[22] are available to the wronged party to continue to perpetuate a loose application of a doctrine which does not strenuously discourage the taking of a human life. It should be borne in mind that one cannot make one's spouse virtuous by killing, and when the flame of life is once snuffed out, nothing but eternity can restore it.

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[22] Divorce, alienation of affection and prosecution for adultery, to name a few