Volume 53
Issue 1 *Dickinson Law Review - Volume 53, 1948-1949*

10-1-1948

Sexual Acts as Provocation

Roy F. Miller Jr.

SEXUAL ACTS AS PROVOCATION IN PENNSYLVANIA

In the year 1874 the Supreme Court of Pennsylvania undertook to hand down a ruling on "what sexual acts are sufficient provocation to reduce a felonious homicide to voluntary manslaughter." There have been many interpretations of that decision, but the most accepted construction is that the term "legally adequate provocation" is only applicable, within this category, to those specific occasions where the homicide results from the apprehension of the wife by the husband or the husband by the wife in the commission of adultry.

In that case, *Lynch* v. *Commonwealth*,[1] a brother had come home to find his sister in a locked room of the house with a man. The circumstances indicated an adulterous purpose on the part of one or both, and the brother took out his penknife, pried open the door, and rushed into the room, stabbing the victim twice while on the bed and once more in the ensuing scuffle on the floor.

The court in its opinion as written by Sterrett, J. said:

> "Assuming all of this to be true, does it amount in law to sufficient cause of provocation to reduce the killing to manslaughter? We are of the opinion that it does not."

Although it is true that the number of instances in which such the question has been raised are few, the fact still remains that this doctrine has been criticized and repudiated by the majority of states which have had opportunity to do so. What will be Pennsylvania's course in the future?

There appears to have been such a palpable lack of discretion in that decision that Dean Trickett was provoked into writing into his *Pennsylvania Criminal Law*[2] a footnote which read:

> "As the ground of the mitigation is the indignation and passion awakened by the offense, and the naturalness and non-maliciousness of them, it is singular that when equal indignation and passion are excited in the mind of brother, father, son. they should be deemed equally venial."

Originally, the common law applied the adultery-provocation doctrine only to the husband,[3] the wife having little more than servant status in the home of that time. But under modern views this has also been extended to the wife if she kills her husband or his mistress under similar circumstances.[4]

---

1 Lynch v. Commonwealth, 77 Pa. 205 (1874).

2 II Trickett PENNSYLVANIA CRIMINAL LAW 863 (1st ed. 1908).

3 Commonwealth v. Whitler, 2 Brewst. 388 (Pa. 1868); Cenister v. State, 46 Tex. Cr. R. 221, 79 S. W. 24 (1904); Patterson v. State, 134 Ga. 264, 67 S. E. 816 (1910).

4 Scott v. State, Tex. Cr. A., 81 S. W. 47 (1904)

The early common law never extended this rule to the other female relatives of the slayer, yet judicial construction today, in the majority of cases has seen fit to bring them within the protection of the doctrine. There are cases on record which extend the mitigating effect of such provocation to condone the passion and rage felt by a father toward one caught in adultery with his daughter;[5] by the brother toward one caught in adultery with his sister;[6] by a son toward one caught in adultery with his mother;[7] by an uncle toward one caught in adultery with his niece-in-law.[8] And an English case has even gone so far as to say that seeing an act of sodomy committed on a minor son is sufficient provocation to reduce the killing of the offending party by the father to manslaughter.[9]

However, it is still the fact that Pennsylvania is one of the small minority which has failed to recognize this doctrine in its modified form. It is not necessarily because cases have not arisen in which such an extension could have been made, but rather a result of the long standing effect of the above cited decision.

But it is improbable that the *Lynch* caes will continue to be the landmark for future court rulings in this state. The question is, when will the change take place?

It is most certainly not difficult to substantiate a modification, for we need only look back to the inception of voluntary manslaughter, and the reason, for there is really only one, which predicated its formation. The crime of voluntary manslaughter branched off from that of murder when men became cognizant of the fact that human personalities, temperaments, minds, and characteristics were not all of the same description; that human lives and relationships were not capable of being judged as one, without working an injustice on segments of society.

To compensate for these differences and as a means of better justifying the punishments which were meted out, the common law gave birth to voluntary manslaughter. The frailty of human nature was its cornerstone, and man's passion its foundation. The courts realized that there is no one who is able to remain passive and unmoved in the face of certain, extreme, personal affronts, and therefore, that it was far from just to subject those who acted under such cause to the same punishment which was imposed upon those who acted out of malice. Therefore, in conjunction with other types of provocation, they included the adultery of the wife as being sufficient cause of passion to mitigate a homicide. The reason given, however, as mentioned earlier, was much different than we know it today.

The change between the old common law and the new, in relation to this, has been, for the most part, a result of the decline of the old feudal customs and the

---

[5] State v. Grugin, 147 Mo. 49, 47 S. W. 1058 (1898); State v. Cooper, 112 La. 281, 36 So. 350 (1904); Patterson v. State, supra.

[6] Young v. State, Tex. Cr. A., 69 S. W. 153 (1902).

[7] State v. Herrell, 97 Mo. 105, 10 S. W. 387 (1889).

[8] Jarvis v. State, 138 Ala. 17, 30 So. 1025 (1903).

[9] Reg v. Fisher, 8 Car. & P. 182 (Eng. 1837). See also, Jones v. State, 51 Ohio 331, 38 N. E. 79 (1894) for Ohio ruling on a comparable problem.

rise of the home life and closer family ties. And, because of this strengthened intra-family bond, it is only natural to assume that passion will be more apt to arise at such indignities. We have reached a point where the rage, anger, and intense hatred aroused upon such cause are incidental to our way of life, and though there are some who will be able to check and guard that passion, are we to impose upon those who are weaker the *title* of a common murderer? Whether father, son, or brother, is their case so far removed from that of husband and wife that their acts against society should not be mitigated? I think not. The vulnerability of the human capacities in these instances should and must be taken into consideration, subject, of course, to the limitations imposed upon the original adultery-provocation doctrine. In such light, there would be no added advantage to the perpetrator of the killing other than that which under the circumstances he deserves. Nor, as it has often been argued, would one having a criminal complex be turned loose upon society if this were done. He has done no more than he and many others would do again and again should such cause present itself. A *reasonable* man would be hard to find under those circumstances.

Likewise, it cannot be argued that such an extension of the rule would act as an escapist mechanism. One who acts in a situation of this nature, being under the influence of an overwhelming passion, is not capable of acting with an awareness of the gravity of his act or the criminal penalty imposed. His inability to censor his actions is, also, an inability to comprehend the impositions of law and society. And are we to punish him for an act which, under a similar relationship, our own hearts and minds may constrain us to do?

The entire proposition has been very ably stated and reiterated in this manner:

> "But where there are a legal right and a natural duty to protect, there an assault on the chastity of a ward will be sufficient provocation to make the hot blood there caused an element which will reduce the grade to manslaughter. . . . . There is no sound reason why a similar allowance should not be made for a father's or a brother's indignation at a sexual outrage attempted on a daughter or a sister. To impose a severer rule would be a departure from the analogies of the law and would bring the court in conflict, not only with the jury, who under such circumstances would never convict of murder, but with the common sense of the community. Supposing the injury to the female's chastity to be avenged in hot blood by a brother a father, or other person having a right to protect the person injured, the offense is but manslaughter."[10]

Roy F. Miller, Jr.

---

10 I Wharton, CRIMINAL LAW §589 (12th ed. 1932).