

INTERPRETATION OF GRAVE AND SUDDEN PROVOCATION IN MALAYSIA

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Abstract

Provocation as a defence to murder is recognised under Exception 1 to section 300 of the Penal Code. One of the conditions that has to be met for a successful provocation is that the provocation must have been grave and sudden. Since murder is regarded as one of the most violent crimes, the requirements of graveness and suddenness are crucial to prevent the defence of provocation from being abused. These two requirements are cumulative, whereby if any of these elements is lacking, the defence will fail. However, a cautious reading of this Exception shows some ambiguity in the interpretation of the terms grave and sudden. This ambiguity has resulted in several interpretations by the courts. This paper aims to analyse the court's approach towards the interpretation of these words. The paper consists of a detailed critical analysis of the Penal Code, case law and scholarly writing related to this area. The paper concludes that there still exists some ambiguity in the interpretation of grave and sudden provocation. This leaves the interpretive task solely to the court, thus resulting in a possible risk to the accused who relies on this line of defence.

Keywords: *Provocation, defence, grave, sudden, murder, culpable homicide*

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1. Introduction

The Malaysian position on the defence of provocation against murder can be found in Exception 1 to section 300 of the Penal Code. Under the Exception, this defence is considered as a partial defence, which means it does not absolve a person's criminal responsibility absolutely but merely reduce his liability. Hence, where it can be proven that the death is committed on provocation in pursuant to the Exception, the killing would not amount to murder but merely culpable homicide. Provocation is considered as a partial defence due to the understanding that the accused has failed to manage his anger and restrain himself from committing murder (Morris & Blom-Cooper, 2011). The word provocation is not statutorily defined by the Penal Code. The Oxford Dictionary (2017) defines provocation as "action or speech that makes someone angry, especially deliberately". This definition infers that the anger is intended to be caused by a provoking person to another person either by his words or action. Murder is regarded as one of the most violent crimes (Flowers, 2013) because a person's life has been permanently taken away by forceful means and upon the offender having been found guilty, he will be sentenced to death. Parrilo (2008) defined violent crime as "a crime involving force or the threat of force against a person or persons". The criminal severity of murder demands a meticulous scrutiny on using provocation as a defence. This is so in order to prevent the accused from abusing and using it as an easy means of evading

criminal liability of murder. In view of this, for the defence of provocation to succeed, the law sets out several conditions for the application of the defence, including that the provocation must have been grave and sudden. While the provision clearly requires the provocation to be grave and sudden, there still exists some ambiguity in the interpretation of the terms grave and sudden. This paper aims to analyse the court's approach towards the interpretation of these words. This research adopts a qualitative approach to analyse the Penal Code, case law, text books and scholarly writing related to this area. The first part of the paper discusses the offences of murder and culpable homicide. The second part explains the conditions necessary for a successful plea of the defence of provocation. The third part focusses on the issues related to the interpretation of grave and sudden. The fourth part concludes the paper and presents a set of recommendations, thus affording clarity to the existing provision and better protection for the accused persons.

2. Offences of Murder and Culpable Homicide

Before delving into the minutiae of the conditions of provocation, it is first important to be familiar with the terms murder and culpable homicide and their differences in order to appreciate the contours of the discourse. Section 299 of the Penal Code describes the term culpable homicide as:

Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

This definition signifies that the offence of culpable homicide is committed when an accused person intentionally causes death of another person or he intentionally causes bodily injury which is likely to cause death or he knows his act is likely to result in death. However, this section shall be read together with the definition of murder as set forth under section 300 of the Penal Code which states as follows:

Except in the cases hereinafter excepted, culpable homicide is murder—

- (a) if the act by which the death is caused is done with the intention of causing death;
- (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
- (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
- (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

A closer look at these two provisions indicates that culpable homicide is murder if it falls under the scope of section 300 of the Penal Code. Conversely, what is not covered by this section will fall under the general scope of section 299 of the Penal Code. In general, both sections have the same *actus reus* of causing the death of another person. The main difference between these two offences lies in their *mens rea* (Ferguson & McDiarmid, 2014). Murder is viewed as a subset of culpable homicide (Bhatia, 2010) but culpable homicide may not necessarily be murder. Offences of murder and culpable homicide consist of two *mens rea* which are intention and knowledge. Although intentional killing, in light of section 299 of the Penal Code falls under the definition of culpable homicide, it must be construed as murder because it falls under the definition of section 300 of the Penal Code as well. Intentional killing is considered as murder on the basis that such killing is accompanied by a high degree of blameworthy state of mind (Yeo, 2011). However, in the absence of intention to kill, culpable homicide does amount to murder if the accused has knowledge that his act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.

Culpable homicide not amounting to murder is viewed as a less serious offence than murder (Kok, Cheang & Tee, 1994) because the latter is punishable by death penalty, whereas for the former, it carries the maximum penalty of either imprisonment for a term not exceeding thirty years and shall be liable to fine¹, or for a term not exceeding ten years or fine or both². Generally, if any of the situations enumerated in section 300 of the Penal Code is met, then murder has been committed. However, it should be noted that the application of this section is still subject to several exceptions including Exception 1 to section 300 of the Penal code, to the effect that the killing will not amount to murder but merely culpable homicide.

3. Conditions Necessary for a Successful Plea of the Defence of Provocation

The defence of provocation is expressly stated in Exception 1 to section 300 of the Penal Code, which comprises a main provision together with three provisos and an explanation with several illustrations. For the sake of clarity, the text is reproduced in full as follows:

Exception 1—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:

- (a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;
- (b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;
- (c) that the provocation is not given by anything done in the lawful exercise of the right of private defence

¹ Section 304 (a) of the Penal Code.

² *Ibid.*, section 304 (b).

Based on the above provision, for a plea of the defence of provocation to succeed, several conditions have to be met. First, the provocation must be grave and sudden (this condition will be discussed in detail in the following part). Second, such provocation has deprived the offender of his self-control. This condition focusses more on the impact of the provocation on the offender's state of mind. If the offender stays calm in the face of provocation and after a few hours he retaliates by killing the provoker, he may not successfully rely on this defence. Third, provocation is not sought or voluntarily provoked by the offender. In other words, the offender should not do or say something that can irritate the deceased, in the hope that the latter would resort to provocation in return, so as to justify the former's act. This condition was succinctly explained in *Chong Teng v Public Prosecutor* [1960] 1 LNS 14 where the court in this case rejected the defence of provocation pleaded by the accused on the basis that the accused was the one who went to the market with the intention of fighting with the deceased who had taken away the accused's wife. The court was of the view that the provocation from the deceased (if it was offered) was not sudden, but the provocation was somehow expected to be offered from the deceased to the accused because of their strained relationship prior to the incident. Fourth, provocation is not given by anything done in obedience to the law or by a public servant in the lawful exercise of the powers. Fifth, the provocation is not given by anything done in the lawful exercise of the right of private defence.

4. The Provocation Must Have Been Grave and Sudden

Since murder is regarded as one of the most violent crimes, the ground for the defence of provocation in such a case must be robust so as to prevent any evasion of criminal liability. As the requirement of graveness and suddenness in the plea of the defence of provocation are cumulative, the defence will fail if any one of them is lacking. Thus, for the defence of provocation to succeed, the law prescribes it must be accompanied by the elements of graveness and suddenness. These two words are not statutorily defined by the Penal Code. According to Oxford Dictionary (2017), the term grave is defined as "serious". It means the provocation must be serious thus causing the other person to become angry. The word sudden means "occurring or done quickly and unexpectedly". The provision does not mention the emotional effects suffered by the accused as a result of the provocation. Normally, it would be either anger or fear (Renke, 2010). The defence of grave and sudden provocation involves two tests. The first one is a subjective test. It means that the court will evaluate all facts and circumstances of each case in deciding whether or not the accused was provoked as to lose his self-control (Allen, 2015). This is succinctly described in Explanation to Exception 1 to section 300 of the Penal Code, which reads "Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact". Having passed the first test, the defence will not automatically be granted. In other words, it is not sufficient to prove that the accused was provoked into losing his self-control. The defence must also satisfy the next test which is whether a reasonable man would have been provoked as to lose his self-control and reacted to the provocation as the accused did? (Loughnan, 2012). If the answer is in the negative, then the defence will fail. In determining what are the criteria should be attributed to the reasonable man, reference can be made to the case of *Lorensus Tukan v PP* [1988] 1 CLJ (Rep) 162 where the Supreme Court, said "The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control". When these two tests along with other conditions as set forth in paragraph 3 are met, only then the plea of provocation can succeed.

Although the courts can undoubtedly exercise their interpretive power, without clear wording of the provision, such interpretation may risk the accused who relies on this defence. The interpretation of these two terms, grave and sudden, is ambiguous. This interpretive ambiguity requires proper consideration and attention. First, how to determine grave provocation? Second, whether or not cumulative provocation is legally recognised under Exception 1 to section 300 of the Penal Code. Third, whether or not the term sudden precludes the defence of provocation in the presence of past provocative events that caused the accused's anger.

4.1.1 The Determination of Grave Provocation

In general, provocation can be caused either by words or conduct (Rosen, 1999). In almost all murder cases involving the defence of provocation, it was caused by the former rather than later (Siti Zubaidah Ismail, 2001). Not all provocative words can amount to grave provocation. Some of them merely trivial ones. Trivial provocation is not capable of depriving the power of self-control. Therefore, murder in response to a trivial provocation or no provocation at all does not reduce it to culpable homicide because the response to it is more likely to be motivated by hatred and revenge rather than acting in pursuance of a loss of self-control. This was described by Horder (1992) "Where provocations are trivial, on the other hand, they will be taken merely to have been the setting within which defendants displayed their bad character or malice in killing the victims". Therefore, as a safeguard measure, trivial provocation will be disregarded (Berman, & Farrell, 2010). The best case to illustrate this point can be seen in *Chian Swee Ong v Public Prosecutor* [2010] 5 CLJ where the appellant expressed his love towards the deceased who in turn rejected and mocked him. Angered by the response, the appellant killed the deceased. The appellant later raised the defence of provocation but was however rejected. The court explained its reasons for rejecting the defence as follows:

Just because the deceased had refused the appellant's confession of love for her, that would not amount to any provocation. In his despair, the appellant had turned to intense anger which led him to kill the deceased. There was no provocation as envisaged in Exception 1 to s. 300 of the Penal Code.

However, the question may arise as to what sort of provocative words that can constitute grave provocation. Whether mere annoying words such as you are lazy, you are prostitute, you are poor, I don't like you or I hate you are sufficient to fulfil the requirement of grave provocation? Taking the words at face value, they do not appear to be capable of constituting grave provocation. However, the answer is not always as straight forward on the basis that it involves consideration of various factors. For examples when the words are referred to parents, uttered in a raised and rough voice and preceded by an immediate severe provocative event, then the alleged words need to be examined carefully by the court before making decision. For example, A raped B's wife and immediately after the event, A said to B that his wife is a prostitute in a very humiliating manner, then the decision might be different than the earlier one because the alleged provocative words have to be closely scrutinised in the whole context. An understanding of the courts' views on this matter is crucial in analysing the court's approach towards the defence. For the purpose of this paper, I will delve into three cases as follows that discussed this issue:

1. *Kuan Ted Fatt v Public Prosecutor* [1985] CLJ (Rep) 174

2. *Che Omar Mohd Akhir v Public Prosecutor* [2007] 1 LNS 37
3. *Public Prosecutor v Surbir Gole* [2017] 2 CLJ 621

The above cases were chosen because of their comparability and the ways in which the courts had deliberated on issues related to provocation. Furthermore, all of them were decided by the apex court of this country and the judges in these respective cases had delivered detailed judgments explaining the conditions for the defence of provocation. The cases either have been referred to or followed by a number of subsequent cases. The last one in the list is the recent case, thus best illustrating the court's most recent approach towards the defence of provocation.

First, is the case of *Kuan Ted Fatt* in which the appellant was charged with murder under section 302 of the Penal Code and was subsequently convicted. A few days before the murder, the deceased raped the appellant's mistress. On the date of the incident, the appellant sought an explanation from the deceased on why he raped his mistress. The deceased replied "If I had raped your wife, so what?". On hearing such reply, the appellant lost his control and killed the deceased. The appellant pleaded in his defence that he killed the deceased on grave and sudden provocation pursuant to Exception 1 of section 300 of the Penal Code. However, the defence of provocation was not successful even though such words had angered the appellant. In this case, such determination was decided by the assessors and affirmed by the judge. Although such words had offended the appellant, the court was reluctant to hold that such words were gravely provocative. Hence, this case has set a high threshold for determining the term grave provocation, to the effect that the defence might only be considered if the words uttered are worse than those in this case. Since the first test which is the subjective one failed, then the objective test requires no further elaboration.

Second, is the case of *Che Omar Mohd Akhir*, in which the Federal Court affirmed the decision of the High Court that found the appellant guilty for the murder of his second wife (deceased). The facts of the case were that the deceased left her matrimonial house in Kuala Lumpur and flew back to Sarawak together with their daughter. Upon realising that both of them were not in Kuala Lumpur, the appellant flew to Sarawak in his effort to search for the deceased. Then, the appellant went to the deceased's mother's stall where he found the deceased and a man named Awang Jamaluddin. In his evidence, he sought explanations from his wife as to why she treated him badly, as follows:

I asked her why she treated me like this. She answered that it was her own business: "I can do what I like - why do you want to know about it." I asked her again why she had not returned home for a week and where she was staying. She answered me loudly saying that where she was and with whom she was staying with were her own business and why should I know about it. I asked her again why she did not return to the house as it was our child's birthday. She answered that whether she wanted to return home or not was her own business and she also said she was not free. I pointed at Awang and asked her, "Who is that man?" She answered, "He is my man - why do you want to know?" I told her "How about me?" She replied "That's your business, you can go wherever you want!" I asked her again who was the man seated next to her. She replied: "He is my man - why you want to know - you can go back and don't come again".

The appellant further stated that the deceased talked loudly and rudely to him until he could not bear to hear the answers and the way the deceased replied. Angered by the response, the appellant took a knife and stabbed the deceased several times. The court held that the defence of grave and sudden provocation in the present case was disallowed on the grounds that the words uttered by the deceased would not have prompted a reasonable man placed in similar situation to become as provoked as to lose his self-control and kill her. Despite the fact that the court acknowledged the words uttered by the deceased had angered the appellant, the court went on questioning whether or not such words were enough to make him lose his self-control. Applying the reasonable man test, the court was of the view that the reasonable person would not have been so provoked as to lose his self-control and acted differently by resorting to peaceful means. Hence, the court rejected the defence raised.

Third, is the Federal Court's case of *Surbir Gole* in which the conviction was reduced from murder to culpable homicide on the grounds of grave and sudden provocation. The accused was the employee of the deceased. The accused alleged that he had been mentally abused by the deceased for a long period of time. The sequence of events was as follows:

- a. the accused was ill-treated and mentally tortured by the deceased over a significant period of time;
- b. the accused was denied leave and had to work from 7am-9pm. In addition, he also had his pay cut for biscuits cooked by him which were spoiled;
- c. the accused's relationship with the deceased was exacerbated by almost-daily verbal abuses and mental tortures. The deceased constantly uttered the words "mad, crazy, stupid, cow and bastards";
- d. on the date of the incident, the deceased again verbally abused the accused by saying "ibu yang mana satukah melahirkan anak seperti kamu?". The accused was really hurt by these words because at that time his mother was sick and prior to this, his request to visit his mother was rejected by the deceased. Consequently, he snapped and killed the deceased.

Looking at the last provocative words uttered by the deceased "ibu yang mana satukah melahirkan anak seperti kamu?" the author opines that the words were not provocatively worse than the speech uttered by the deceased in *Kuan Ted Fatt*, "If I had raped your wife, so what?". This was agreed by the Federal Court itself in these following words "We wish to reiterate, however, that provocation to an accused person that is ordinarily and by itself not grave may be grave enough to fall within Exception 1 to s. 300". Thus, considering the last words alone, they appeared not gravely provocative by itself, but after weighing all circumstances before and during that provocation, the court was of the view that a reasonable man, belonging to the same class of society as the accused, placed under similar circumstance in which the accused was placed would be so provoked as to lose his self-control. For that reason, the defence of provocation raised was allowed.

Based on the cases discussed above, the plea of provocation is not easily accepted by the court because it has to pass several conditions particularly the provocation must have been grave. If it involves slight provocation like in *Chian Swee Ong* where the confession of love was rejected and mocked then the plea of provocation is likely to fail. Besides, even if the words

uttered might have appeared provocative at face value but it does not necessarily mean the court will think the same. This can be seen in *Kuan Ted Fatt*, despite the use of abusive words in the disparaging remarks thrown at the appellant's wife, the court was reluctant to hold such words as gravely provocative. The same interpretation was also agreed in the subsequent case of *Che Omar Mohd Akhir*, where the court, in delivering the judgment, explicitly made reference to the case of *Kuan Ted Fatt* as follows:

See also *Kuan Ted Fatt*, supra. In that case, the defence of grave and sudden provocation was not successful even though the words uttered by the deceased to the accused "If I had raped your wife, so what?" seemed to be more gravely provocative as compared to the words uttered in the instant case.

It is important to note also that the last words uttered by the deceased in *Surbir Gole* might be deemed as less provocative as compared to the words uttered by the deceased in *Kuan Ted Fatt*. The court, however, held those words in *Surbir Gole* as gravely provocative. This was due to the court weighing the gravity of the provocative words in light of other factors. These factors include the sequence of the events leading to the crime and the accused's reaction after the killing. It is mindful to note that the language of Exception 1 to section 300 of the Penal Code is broad, indicating the possibility of words alone without accompanying by any serious provocative event to constitute grave provocation. Practically, however, the courts are unlikely to hold mere words alone to constitute grave provocation. In other words, provocation must be more than just the provocative words and have to be accompanied by some other factors to substantiate the plea of provocation as was decided in *Surbir Gole*. Importantly, the court in this case was satisfied that any reasonable man placed in the situation of the accused would have acted as he did. This is because even if the court decided that the accused was provoked into losing his self-control, the defence would still fail if the court was of the view that a reasonable man standing in the shoes of the accused would have not been provoked or reacted differently from what the accused did as was held in *Che Omar Mohd Akhir*.

4.1.2 Legal Status of Cumulative Provocation under Exception 1 to Section 300 of the Penal Code

Cumulative provocation can be defined as "a series of acts or words over a period of time which culminate in the sudden and temporary loss of self-control by the accused" (Allen, 2015). He further elaborated that the provocation is not confined to the last provocation, but also includes an accumulation of past events that drove the accused to lose self-control and kill the deceased. The term cumulative provocation is not new in Malaysian Courts. For instance, in *Rikky Purba v Public Prosecutor* [2014] 3 CLJ 607, the Court of Appeal acknowledged the concept of cumulative provocation in the following words "Now, the concept of cumulative provocation has been recognized by Indian and Malaysian Courts". This approach was adopted by the Court of Appeal in *Surbir Gole* but subsequently disagreed by the Federal Court of the same case. Having said that, the Federal Court still accepted the defence of provocation not based on cumulative provocation but on grave and sudden provocation.

Based on the Federal Court's cases of *Che Omar Mohd Akhir* and *Surbir Gole*, it is clear that the defence of cumulative provocation does not fall within the ambit of Exception 1 to section 300 of the Penal Code. This was reaffirmed in *Surbir Gole* where the Federal Court had this to say:

We believe that Che Omar's case has made the legal position clear with regard to cumulative provocation of the nature described in para. 34 above. We ought to be reminded that the defence of "cumulative provocation" does not exist in our criminal law, and therefore we are not persuaded that it is a permissible defence to s. 300 of the Penal Code. Only the defence of grave and sudden provocation is specifically provided for in Exception 1 to s. 300 in the Penal Code. We are not inclined to agree to any departure from the established law.

However, it should be noted that, although the case of *Surbir Gole* explicitly agreed with the approach taken in *Che Omar Mohd Akhir*, in reaching its decision, the court did not confine its evaluation based on the facts that happened on the day of the murder itself. The court had, instead, taken into account several considerations. One of them was the circumstances before the day of the killing that resulted in the provocation. This can be seen clearly in the following judgment:

We wish to reiterate, however, that provocation to an accused person that is ordinarily and by itself not grave may be grave enough to fall within Exception 1 to s. 300 when, after all the circumstances of the case before and during that provocation are taken into consideration, it can be concluded that "a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be as provoked as to lose his self-control".

In determining the circumstances in *Surbir Gole*'s, the court did not confine its evaluation to only the deceased's immediate conduct before the killing, but rather a number of past events that had stirred the accused's anger, as reported in paragraphs 41 to 42:

[41] As mentioned above, in his evidence, the accused testified that he had been constantly mistreated by the deceased by the use of harsh and abusive words.

[42] A few days before the date of the incident, according to the accused, the abusive words became worse.

When the court took into account the history of the deceased's abuse towards the accused, this implied that the defence of cumulative provocation was accepted in determining the existence of grave provocation. In conclusion, although both cases principally disapproved of the defence of cumulative provocation, the court's consideration of the past events in *Surbir Gole* suggested otherwise.

4.1.3 The Impact of the requirement of Sudden to Past Provocative Events

Sudden provocation means that the grave provocation is given quickly and unexpectedly by the provoking person. Conversely, expected provocation is not considered as sudden. In other words, there must be no element of premeditation. If the accused had planned in advance to receive provocation in order to justify the killing, then such provocation may be regarded as pre-planned act. In the case that the accused had endured a string of anger-provoking events in the past, the final provocation that led to the killing may not be deemed as sudden. It may be argued as such because there is a history of past events, thereby, subsequent provocation might have been expected. This point was elaborated in the case of *Shafaqat Ali Ghulam Nabi v Public Prosecutor* [2014] 1 LNS 1551. In this case, the accused was charged with the murder of his employer (deceased) and subsequently convicted. The accused claimed that the deceased had insulted Islam. Prior to the killing, there were recurring incidents of the deceased mocking Islam and labelling Islam as a militant religion supporting terrorism. The accused raised the defence of provocation as a defence to murder but was rejected. On the point of suddenness, the Court of Appeal agreed with the findings of the trial court as follows:

The other requirement that the provocation should be "sudden" certainly does not apply in this case as the accused had been simmering in anger for a long period of time before the incident. He had ample opportunity to venture away from the situation or avoid further confrontation with the deceased if he had, for instance left the employment. By remaining on the farm the accused was clearly plotting revenge against the deceased.

This case seems to suggest that where there were verbal abuse or threats in the past, the accused should avoid encountering subsequent provocation. Failing which, the killing may be presumed as a desire of revenge rather than on grave and sudden provocation. However, such interpretation was apparently not applied in the case of *Surbir Gole*, where the defence of grave and sudden provocation was accepted despite the fact that there were few occasions where the deceased had verbally abused the accused and the accused still continued working with the deceased. This may cause uncertainty in the interpretation of this defence in the context of employer and employee relationship. It is worthy to note that the conviction of the accused in *Shafaqat Ali Ghulam Nabi* was affirmed by the Federal Court. Hence, lower courts may choose either of these approaches in interpreting the term grave provocation, depending on the facts and circumstances of each case. Besides, when cases involving the defence of provocation are appealed to the Federal Court, then it is not bound by its earlier precedents. This can be seen in *Oie Hee Koi v Public Prosecutor* [1996] 2 MLJ 183 where the Federal Court dissented from its earlier decision on the same issue in *Lee Hoo Boon v Public Prosecutor* [1966] 2 MLJ 167 (Wan Arfah Hamzah & Ramy Bulan, 2005). In reaching the decision, the court delivered the following judgment:

In arriving at this decision, we are not unaware that it runs counter to the previous decision of this court. Nevertheless, we do so without qualms. As Sir Carleton Allen says at p. 245 of *Law in the Making* (6th edn) 'the case of *Gideon Nkambule v R*' makes it clear that in criminal matters at least, where life and liberty are at stake, the Privy Council will not hesitate to reject even a recent decision of its own, if it is satisfied that all relevant considerations and historical circumstances were not before the court in the earlier case.

5. Conclusion and Recommendation

In a nutshell, the defence of provocation provides a partial protection for an accused whose self-control has been undermined as a result of the provocation initiated by a deceased person. The defence of grave and sudden provocation is expressly stated in Exception 1 to section 300 of the Penal Code. There is, however, some ambiguity in the interpretation of the terms grave and sudden in the Exception as mentioned in paragraph 4. In view of the foregoing discussions, it is timely to review and amend the scope of the words grave and sudden as prescribed in Explanation 1 to section 300 of the Penal code. The following recommendations are suggested to ensure that the right of the accused person who relies on this defence will be better protected.

First, it should be clarified whether or not verbal provocation alone is justifiably accepted to constitute grave provocation. Without a clarification on this issue, the court is unlikely to hold verbal provocation alone without being accompanied by a serious provocative event to constitute grave provocation, as explained in the cases above in paragraph 4.1.1.

Second, the issue of cumulative provocation should be explained under the Penal Code. Although the case of *Surbir Gole* explicitly agreed with the approach taken in *Che Omar Mohd Akhir*, the court in the former case did not confine its evaluation based on the facts solely on the date of the incident, but also consider the circumstances before that provocation, including the past provocative events between the accused and the deceased. This approach bears a resemblance to the concept of cumulative provocation.

Third, the term sudden must be properly defined, so as to determine whether the accused, who has been previously abused in the past, can still rely on this defence. Without a proper definition, the interpretation of this term is subject to the court, which could be a disadvantage for the accused. As was decided in *Shafaqat Ali Ghulam Nabi*, where there were verbal abuse or threats in the past, the accused should have avoided any subsequent provocation. Failure to do so may imply that the murder committed by the accused was a desire for revenge, rather than caused by grave and sudden provocation.

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