fails to achieve the objective and transparent certainty required of the criminal law by the principles basic to human rights".

There is a strong hint that the issues raised by this case and the series of related decisions cannot simply be wished away as the House seems to hope. They are too fundamental for that.

A.T.H. SMITH

PROVOCATION: MUDDYING THE WATERS

IN *Smith* [2000] 3 W.L.R. 654 the House of Lords by a bare majority affirmed the decision of the Court of Appeal (noted at (1999) 58 C.L.J. 7) and in doing so resolved a long-standing dispute as to which characteristics of the defendant are relevant when determining whether the reasonable person would have lost self-control and killed the victim (the objective test of provocation). Two distinct lines of authority had developed. First, a group of House of Lords and Privy Council cases had recognised that a characteristic would only be relevant where it affected the gravity of the provocation. Secondly, a line of Court of Appeal cases had recognised a wider test, whereby a characteristic would also be relevant if it affected the defendant's ability to exercise self-control. The House of Lords has now confirmed the latter test. Consequently, in *Smith* itself the defendant's severe depression was relevant because it made him less able to exercise self-control.

The main argument for rejecting the gravity of provocation test was that it contradicted the statutory definition of provocation in the Homicide Act 1957, section 3 of which states that "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." Since the provision emphasises that the jury can take into account "everything", it was not considered appropriate for the judge to direct that the jury should only be concerned with characteristics which relate to the gravity of the provocation. But, if this argument is taken to its logical conclusion, it means that the jury could take into account all characteristics of the defendant, which would undermine the objective test completely. For that reason the majority recognised that the judge should advise the jury that there are certain characteristics which should be disregarded. The majority identified some of these characteristics, but did not identify any clear rationale for doing so. Such characteristics include jealousy, tendency to violent rages and tantrums. Presumably these are excluded because they would undermine the

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rationale of the objective standard of self-control completely. But if this is correct, why was the defendant's depression considered to be relevant? Perhaps this can be justified on the basis that the depression could be diagnosed by medical experts, whilst the other characteristics are simply emotional traits which are too vague and are incompatible with ordinary standards of self-control. If this test founded on definable characteristics is adopted it follows that, for example, battered woman syndrome would be relevant because it is a condition which is medically recognised. Although obsessive personality has previously been treated as relevant (*Dryden* [1995] 4 All E.R. 987), Lord Hoffmann in *Smith* considered that it was incompatible with the objective test and so should be excluded, although he did not provide any rationale for doing so.

The majority further held that the value of the image of the reasonable man has been compromised and is now misleading, as is reflected by *Morhall* [1996] 1 A.C. 90 where the jury were asked to consider whether the reasonable person who was endowed with the unreasonable characteristic of being addicted to solvent would have killed. Consequently, the majority held that the judge should no longer refer to the notion of the reasonable person when directing the jury and should instead refer to, as Lord Hoffmann put it, "a characteristic of the accused ... which affected the degree of control society could reasonably have expected of [the accused] and which it would be unjust not to take into account". This rejection of the notion of the reasonable person is hard to justify for a number of reasons. First, the reasonable man is specifically referred to in section 3 of the Homicide Act 1957, which surely must mean that any judge who uses such language could not be misdirecting the jury. Secondly, the reasonable person standard is found in other areas of the criminal law, such as duress, so why should it be rejected here? Finally, the reasonable person is a useful peg on to which the relevant characteristics of the defendant can be hung. Surely jurors would find it easier to consider what the reasonable person would have done, rather than what society reasonably expects and whether it would be just to take the characteristic into account.

The decision in *Smith* is open to two objections. First, the replacement of the gravity of provocation test with emphasis instead being placed on the effect of the characteristic on the ability to exercise self-control means that the objective test of provocation is being watered down so that it is no longer a standard of self-control. Rather, this test now exists simply to weed out those defendants who are excessively pugnacious or excitable. Virtually any other characteristic which affects the ability to exercise control

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will be taken into account. It follows that, as the objective test is qualified to share more of the defendant's characteristics, it will become easier for defendants to plead the provocation defence successfully. This could be considered to be an unacceptable expansion of the defence. It does not, however, follow that the objective test is now irrelevant, for the jury is still required to consider whether it was reasonable for the defendant to have lost his or her self-control, although, with the emphasis on the peculiar characteristics of the defendant, it is more likely that the jury will consider that the loss of self-control was reasonable.

The second objection arises from the fact that in *Smith* the defence of diminished responsibility had failed, presumably because the defendant's depression was considered not to be severe enough to constitute an abnormality of mind. But the success of the provocation defence makes it appear that the depression was being brought to the jury's attention through the back door, so avoiding the burden of proof being placed on the defendant for purposes of establishing diminished responsibility. If a mental disorder does not satisfy the test of diminished responsibility, is it really appropriate then to treat such conditions as relevant for provocation? This was one of the main reasons why the minority considered that the defendant's depression should not be treated as a relevant characteristic.

Even though the effect of *Smith* is to water down the objective test and apparently to compromise the defence of diminished responsibility, it does have one advantage, namely to increase the opportunity for the judiciary to avoid imposing the mandatory life sentence. If *Smith* is judged on this basis alone, then surely the majority reached the right decision. The provocation defence is justified as a concession to human frailty and this concession should be available to a killer suffering from a severe depressive illness who lacks the self-control of ordinary people. Even after *Smith*, certain aspects of the defence of provocation remain unsatisfactory, especially the identification of the reason why certain characteristics are considered to be relevant and others are excluded. But, because the approach of the majority expands the route for escaping from the unfortunate effects of the mandatory life sentence, the decision, although unprincipled, does secure appropriate results.

GRAHAM VIRGO

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