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Criminal Law--Homicide--Manslaughter--Provocation

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CRIMINAL LAW—HOMICIDE—MANSLAUGHTER—PROVOCATION.—

The deceased, while talking with the accused, told him that he, (the deceased), had had sexual intercourse with the accused's wife and that "he was going to take her on further." The court in a dictum said that here there was no provocation, in the eye of the law, to reduce the crime of murder to manslaughter. *State v. Cline*, 130 S. E. 91 (W. Va. 1925).

What is such a provocation? "The provocation must be of such a character as would naturally or reasonably arouse the passion of an ordinary man beyond the power of self-control." 29 C. J. § 118, p. 1132, and cases there cited. It seems that the specific question which the facts of this case present has never been discussed before by the Supreme Court of West Virginia. The court, in basing the dictum on the old rule that "mere words, however insulting or opprobrious, is not enough to purge the crime of malice and reduce it to manslaughter," cites *State v. White*, 81 W. Va. 516, and *State v. Murphy*, 89 W. Va. 413. It is submitted that these cases are not decisive of the question here presented because the facts were in the former case that the deceased cursed the accused, while in the latter case *State v. Crawford*, 66 W. Va. 114, is cited, the facts there being that the deceased called the accused vile names. It may be that the court in declaring the general rule in those cases cited did not contemplate such words as were used in this case. There is an additional peculiarity in this case that here there was a communication by the deceased to the accused of the adulterous relations of the deceased with the wife of the accused. The court also bases its dictum upon this: that the knowledge of the deceased's sexual intercourse with the wife of the accused can not, as a matter of law, be a provocation unless the accused obtained his knowledge by seeing the act or seeing the deceased and the wife of the accused "together under such circumstances reasonably leading him to believe that they are or have been" engaged in such act. It has been held that there may be a provocation to reduce murder to manslaughter in the following instances: where someone told the accused that his daughter had been ravished by the deceased, *State v. Grugin*, 147 Mo. 39; where someone told the accused of his wife's sexual intercourse with the deceased, *Richardson v. State*, 70 Ga. 825; *Mahen v. People*, 10 Mich. 212; and where the wife of the accused told him of the deceased's sexual intercourse with her, *Haley v. State*, 123 Miss. 87; *Rex v. Rothwell*, 12 Cox, Cr. Cas. 145. It appears therefore that in each of these cases "mere words"

were held to be a provocation; and also that knowledge of the deceased's sexual intercourse with the deceased's wife was held to be a provocation even though the accused did not obtain the knowledge by seeing the act of sexual intercourse or any circumstances relating to such act. It would seem that knowledge of such act should be held to be a provocation that could reduce murder to manslaughter no matter whether that knowledge is obtained by seeing or hearing, for the effect of the knowledge would surely be the same in either case. It is the law that touching a person under such circumstances as reasonably to arouse the passions of an ordinary man is such provocation, 29 C. J. § 120, p. 1137, and such a touching may consist of tweaking the nose, filliping on the forehead, or spitting in the face, *State v. Grugin, supra*, citing, KELLY, CRIMINAL LAW, § 518. By analogy therefore it would follow that the circumstances of this case would be at least as likely to arouse that "hot blood" which reduces murder to manslaughter as tweaking the nose, filliping on the forehead, or spitting in the face. Hence, it is submitted that this case is one where the circumstances were such as would naturally or reasonably arouse the passions of an ordinary man beyond his power of self-control, and therefore it should be held, upon principle, that in a situation like this there is sufficient provocation to reduce the crime of murder to manslaughter.

—C. M. C.

EVIDENCE—CONTRACTS—CUSTOM AND USAGES—CONTRADICTION OF STATUTORY DEFINITION BY TRADE USAGE OR SPECIAL CONTRACT.—Chapter 59, § 27 Barnes, West Virginia Code, 1923, provides that "A ton shall contain two thousand pounds." P orally contracted to mine coal for D for a certain price per ton, nothing being said as to the weight of a ton. P mined coal for some time and then notified D of a change in price and stated that the price would be so much per gross ton. P continued to mine coal for D and D paid P on gross ton basis of 2,240 pounds. P contends that he was employed on a net ton basis of 2,000 pounds, and brought an action for the balance of the account. D offers evidence to prove custom among mines to mine coal on gross ton basis of 2,240 pounds. Judgment for P as to balance of account before notice of change in price (it being held that the coal mined after notice of change of rate to a certain price per gross ton was done under a special contract). *Held*, in absence of special contract, statutory definition controls and no evidence of custom will be admitted to