

Loss of Control and Sexual Infidelity,

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Under ss.54-56 of the Coroners and Justice Act 2009, the defence of provocation was abolished (wef Monday 4thOctober 2010) and it was replaced by a new partial defence to murder involving loss of control. The loss of control defence is partial because if successful the defendant will be convicted of manslaughter thus giving the judge discretion as to sentence. Under the revised law, the partial defence to murder of loss of control requires a loss of self-control which leads to the killing (s.54) and for which there is a “qualifying trigger” (s.55). In respect of the qualifying triggers, s.55 states that these exist where either “the defendant’s (D) loss of self-control was attributable to D’s fear of serious violence from the victim against D” or another person (s.55 (3)) - this is the fear trigger. Or was attributable “to a thing or things done or said (or both)” which “constituted circumstances of an extremely grave character” and “caused D to have a justifiable sense of being seriously wronged” (s.55(4))- this is the anger trigger. The loss of control is subject to an objective test, which stipulates that it *might* have been such as would have been experienced by a “person of the defendant’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D” (s.54(1)(c)). The “circumstances of D”, refers to, “all of D’s circumstances other than those whose only relevance to D’s conduct is that they bear on D’s general capacity for tolerance or self-restraint” (s.54(3)). When considering the anger trigger the 2009 Act states that “[t]he fact that a thing done or said constituted sexual infidelity is to be disregarded” (s. 55(6) (c)). This part of the 2009 Act is controversial as it removes the loss of control defence from the classic example of a husband killing his wife after finding her *in flagrante delicto* with another man.

The Court of Appeal was called upon to interpret section 55(6) (c) in *Clinton* [2012] EWCA Crim 2. In *Clinton* Jon-Jacques Clinton (the appellant) and Dawn Clinton (the victim) were married in 2001 (they had two school aged children) but by 2010 the relationship was breaking down and the victim went to live with her parents. The appellant was desperate for his marriage to work, and eventually become “obsessional” about it. He contemplated suicide and looked at suicide websites. The appellant mentioned to a mutual friend in an e-mail his suspicions that his wife was having an affair. Eventually the appellant confronted her about

the affair saying he had seen her facebook page which indicated she was separated and open to offers. The victim responded that she had had sex with five different men which followed her facebook entry of wanting to have sex which was posted on their daughter's birthday. The victim sniggered and looked at the suicide site that the appellant had minimised on his computer and said "you haven't got the fucking bollocks". And then she became very angry saying that she'd done her bit with the children. She said "I didn't fucking sign up for this. You have them. You look after them". The appellant lost control and killed his wife. At a plea and case management hearing the appellant pleaded guilty to manslaughter, but not guilty to murder. Although responsible for his wife's death, either on the basis of "loss of control" or "diminished responsibility", he was not guilty of murder. The prosecution would not accept that plea and the case proceeded to a trial for murder.

The defence of loss of control can only have been raised at a trial if the trial judge is of the view that the evidence relied upon would satisfy a "properly directed" jury that the defence might reasonably apply (s.54(6)). In *Clinton* the trial judge ruled that there was no evidence that the loss of self-control necessary for the defence was due to one of the qualifying triggers identified in the 2009 Act. She was required "specifically" to disregard anything said or done that constituted sexual infidelity. The remarks allegedly made by the wife, when challenged about her infidelity, to the effect that she had intercourse with five men were to be ignored. Removing that element of that evidence, what was left was the evidence that when the victim saw that appellant had visited a suicide site on the internet, she commented that he had "not the balls to commit suicide" and that she also said, so far as the future was concerned, that he could have the children who were then currently living with him at their home. The judge observed that she could not see that the circumstances were of an extremely grave character or that they would cause the appellant to have a justifiable sense of being seriously wronged. On this issue no sufficient evidence had been adduced. She could not find that a jury properly directed could reasonably conclude that the defence might apply as there was no anger trigger. In due course she proceeded to her summing up, leaving diminished responsibility for the consideration of the jury. The jury convicted the appellant of murder and he appealed against his conviction.

The Court of Appeal allowed the appeal and ordered a retrial. The Lord Chief Justice Lord Judge interpreted the 2009 Act in particular s 55(6) (c). Lord Judge points out that s 55(6) (c) is unequivocal that loss of control caused by sexual infidelity cannot, on its own, qualify as

the anger trigger. This means that the classic case of a loss of control killing caused by finding a partner *in flagrante delicto* cannot be a qualifying trigger for the purposes of the loss of control defence. This is the clear effect of the legislation. This seems harsh in comparison to the previous law of provocation which did allow for *in flagrante delicto* in itself to be the basis of the defence. However, Lord Judge goes on to state “[i]n our judgment, where sexual infidelity is integral to and forms an essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls within the ambit of subsections 55(3) and (4), the prohibition in section 55(6) (c) does not operate to exclude it” at [39].

Lord Judge gives an example of what he means by context: a “defendant returns home unexpectedly and finds her spouse or partner having consensual sexual intercourse with her sister (or indeed with anyone else), and entirely reasonably, but vehemently, complains about what has suddenly confronted her. The response by the unfaithful spouse or partner, and/or his or her new sexual companion, is to justify what he had been doing, by shouting and screaming, mercilessly taunting and deliberately using hurtful language which implies that she, not he, is responsible for his infidelity. The taunts and distressing words, which do not themselves constitute sexual infidelity, would fall to be considered as a possible qualifying trigger. The idea that, in the search for a qualifying trigger, the context in which such words are used should be ignored represents an artificiality which the administration of criminal justice should do without” at [23]. This must be right as it alleviates the harshness of s 55 (6) (c) and it means the evidence in *Clinton* should be sufficient to raise an issue as to the loss of control defence as a jury, properly directed, might reasonably conclude that the partial defence is made out with the loss of control being triggered by the anger trigger. Thus at the appellant’s retrial the jury should be able to consider the remarks allegedly made by the wife, when challenged about her infidelity, to the effect that she had intercourse with five men together with the comments above suicide and leaving the children with the appellant.

But Lord Judge goes further than this by also stating in respect of the objective test “[t]he exclusion in section 55(6) (c) is limited to the assessment of the qualifying trigger. In relation to the third component, that is the way in which the defendant has reacted and lost control, “the circumstances” are not constrained or limited. Indeed, section 54(3) expressly provides that reference to the defendant’s circumstances extends to “all” of the circumstances except those bearing on his general capacity for tolerance and self-restraint. When the third

component of the defence is examined it emerges that, notwithstanding section 55(6) (c), account may, and in an appropriate case, should be taken of sexual infidelity” at [31]. This will make the jury’s task rather difficult because sexual infidelity will have to be ignored when considering the anger trigger but, assuming there are other provoking circumstances that amount to circumstances of an extremely grave character that caused the defendant to have a justifiable sense of being seriously wronged, it can be taken into account when applying the objective test as all the circumstances are relevant except those bearing on his general capacity for tolerance and self-restraint which is the objective yardstick or standard against which the defendant’s conduct is judged. If an ordinary person might have reacted in the same or similar way to the defendant then he is excused of murder and convicted of manslaughter.

Clinton is a just decision which alleviates the harshness of s 55(6) (c) although the law has become even more complex for judges and juries alike. Lord Judge’s interpretation gives a narrow meaning to sexual infidelity by limiting it to *in flagrante delicto*. This narrow interpretation given in *Clinton* is to be welcome as it applies some common sense to a provision that should not have been enacted. This is because the law should surely allow sexual infidelity to be sufficient for the anger trigger. S 55(6) (c) is a bad law. Lord Judge seems to agree as throughout the judgment he evinces distaste for the sexual infidelity exclusion noting that “sexual infidelity has the potential to create a highly emotional situation or to exacerbate a fraught situation, and to produce a completely unpredictable, and sometimes violent response” at [16].

