



PENAL CODE DEFENCES: LESSONS FROM SRI LANKA

—Stanley Yeo*

Abstract This article discusses a selection of cases from Sri Lanka that have dealt with certain defences under the Indian Penal Code. The defences that will be covered are private defence, consent and necessity, automatism and insanity, intoxication, provocation, and sudden fight. An analysis of cases sheds light on problems in these defence provisions. Practitioners and students of criminal law in India and elsewhere would benefit significantly from studying the solutions to these problems developed by the Sri Lankan courts. Where these solutions are inadequate, the author suggests alternative solutions including legislative reform.

India has much in common with Sri Lanka, India's southern neighbour. This commonality extends beyond social, cultural and religious dimensions to the laws and legal systems that both nations inherited from the British colonial administration over two centuries. This article is concerned with one of these laws, namely, the Indian Penal Code (IPC), which was first enacted in India and then enacted in Ceylon (hereinafter called 'Sri Lanka') in 1883.¹ Since the provisions of the Sri Lankan Code are identical to the IPC, Sri Lankan courts have developed a healthy practice of referring to Indian cases and commentaries to clarify the law in times of doubt.² However, the reverse has not or has very rarely happened.³ This is most unfortunate since there have been many Sri Lankan cases where courts have interpreted and applied IPC provisions in ways which could be highly instructive to their Indian counterparts.

* Professorial Fellow, Faculty of Law, National University of Singapore. Email: lawyeos@nus.edu.sg The author gratefully acknowledges the support of a Research Project Grant from the Centre for Asian Legal Studies at the Faculty of Law, National University of Singapore.

¹ For a brief description of the history and sources of criminal law in Sri Lanka, *See* G.L. PEIRIS, *GENERAL PRINCIPLES OF CRIMINAL LIABILITY IN CEYLON. A COMPARATIVE ANALYSIS*, CHAPTER 1 (1972, Lake House Investments Ltd).

² Examples are found in some of the cases discussed in this article. For other examples, *See* *Dingiri Banda v. Attorney General*, (1986) 2 Sri LR 356; *Dayaratne v. Republic of Sri Lanka*, (1990) 2 Sri LR 226; *Inoka Gallage v. Kamal Addararachchi*, (2002) 1 Sri LR 307.

³ **The author is unaware of any Indian case which has cited a Sri Lankan decision.**

This article discusses a small selection of such cases and is confined to the area of defences – what the IPC describes as General Exceptions in Part IV of the Code and Special Exceptions accompanying Section 300 (the provision on murder) of the Code. Given the limitations of a journal article, the discussion will be confined to specific components of the defences considered by the cases and will not cover the whole area of law on those defences.⁴

As might be expected of any critical analysis, the ensuing discussion of the Sri Lankan cases will not necessarily always agree with the decisions. When this happens, an attempt will be made to offer a better approach or solution to the issue under consideration. Such academic discourse of real life cases has an important role to play in clarifying or improving the law, and paving the way for law reform. The defences that will be covered here are (1) private defence; (2) consent and necessity; (3) automatism and insanity; (4) intoxication; (5) provocation; and (6) sudden fight.

I. PRIVATE DEFENCE

The General Exception of private defence is provided for in considerable detail over 11 sections of the IPC.⁵ There is also the Special Exception to murder of exceeding private defence, which is provided for under Exception 2 to Section 300 of the IPC. We will consider an aspect each of the general and special exception of private defence.

A. Right of private defence against a thief under the General Exception

A problem of statutory interpretation arises in relation to the right of private defence of property against theft. Section 105(2) of the IPC provides that such a right continues until the offender has effected his or her retreat with the property, or until the assistance of the public authorities is obtained, or until the property has been recovered. If the thief has escaped with the property, can the person whose property has been taken subsequently exercise the right of private defence to recover the property? This question was answered in the affirmative by the Sri Lankan Supreme Court in *Tissera v. Edwin*.⁶ The court reached this finding by interpreting the clause ‘until the assistance of the public authorities is obtained’ in s 105(2) to mean ‘till the thief has been arrested’.⁷ It is submitted that this interpretation unduly extends the right of defence of property of the owner against a thief. Once the police have been notified of the theft, the owner of the

⁴ For a comprehensive discussion of these defences in Sri Lanka see W.C. Chan, M. Hor, McBride, N. Morgan, J. Niriella and S. Yeo, *CRIMINAL LAW IN SRI LANKA* (LexisNexis) (forthcoming).

⁵ Namely, ss 96 – 106. They are ss 89 – 99 of the Sri Lankan Penal Code.

⁶ See *Tissera v. Edwin*, (1929) 30 NLR 408.

⁷ See *Tissera v. Edwin*, (1929) 30 NLR 408. Section 105(2) is s 98(2) in the Sri Lankan Penal Code.

stolen property should, at most, inform them of the whereabouts of the thief so that the police can effect an arrest. Permitting the owner to use force against the thief to retrieve his or her property in these circumstances not only increases the risk of breaching the peace but runs counter to Section 99(3) of the IPC.⁸

As far as Indian cases go, the generous allowance afforded by *Tissera* to owners of stolen property to retrieve their property from a thief was replicated by the Nagpur High Court in *Jarha Chamar v. Surit Ram*.⁹ The court gave the illustration of *A* who had run away with *B*'s watch. The court held that if *B* sees *A* the next day wearing the stolen watch, *B* may use necessary force to recover his watch from *A*. However, it is submitted that the contrary view pronounced in *Amar Singh v. State of Rajasthan*¹⁰ is to be preferred. The Rajasthan High Court there ruled that the right of *B* to recover his property ends with *A* having effected his retreat with the property. While this view is likely to benefit thieves in certain circumstances, the court attached greater concern to the likelihood of serious disorder caused by empowering an owner of stolen property to use violence even after the thief has successfully effected his or her retreat.¹¹ This same reason has previously been given for not following the ruling in *Tissera* that empowered the owner of stolen property to use force against a thief even after the owner had reported the theft to the police.

Another significant issue raised in *Tissera* was the manner in which courts should determine whether the force used to apprehend a thief was necessary or excessive. In that case, *D* was the watcher of a coconut estate that had been the subject of frequent thefts of coconuts. *D* lay in wait for the thief and around midnight, he saw *V* creeping through the wire fence and taking some coconuts. When *D* challenged him, *V* ran away whereupon *D* shot him below the knee. As *D* approached him, *V* threw a coconut at him and tried to escape but succumbed when *D* hit him with the gun causing hurt. In deciding that the force used was necessary in the circumstances, the court referred to *Gour's Indian Penal Law* in support of the view that:

“(What) the court has to consider is not the weapon used, but the injury actually inflicted...(The) injuries inflicted here were non-grievous, and the fact that they were caused with a gun does not take away the right the accused had of causing hurt to the complainant to prevent him from taking away the nuts ...”¹²

⁸ The sub-section reads: ‘There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.’

⁹ See *Jarha Chamar v. Surit Ram*, 1907 SCC OnLine MP 3 : (1907) 3 Nag LR 177.

¹⁰ See *Amar Singh v. State of Rajasthan*, 1967 SCC OnLine Raj 5 : 1968 Cri LJ 79. See also *Mir Dad v. Crown*, 1925 SCC OnLine Lah 317 : AIR 1926 Lah 74; *State v. Sidhnath Rai*, 1958 SCC OnLine All 96 : AIR 1959 All 233.

¹¹ See *Amar Singh v. State of Rajasthan*, 1967 SCC OnLine Raj 5 : 1968 Cri LJ 79 at 81-82 per Tyagi, J.

¹² See *Tissera v. Edwin*, (1929) 30 NLR 408 at 410 per Akbar, J.

Here we see a good example of the judicial willingness in Sri Lanka to rely on Indian sources in decision-making.

B. ‘Good faith’ in exceeding private defence

As its name suggests, the partial defence to murder of ‘exceeding private defence’ is integrally connected with the general¹³ plea of private defence. Exception 2 to Section 300 of the IPC describes the partial defence as follows:

Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without an intention of doing more harm than is necessary for the purpose of such defence.

(a) *Illustration*

Z attempts to horse-whip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A, believing in good faith that he can by no other means prevent himself from being horse-whipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Some controversy surrounds the meaning to be given to ‘in good faith’ appearing in Exception 2. There is case authority which regards the clause ‘in the exercise in good faith of the right of private defence’ in Exception 2 as being concerned with the accused’s defensive action of killing.¹⁴ Under this view, for the Exception to succeed, the accused must have believed in good faith that the killing was necessary. Since the IPC defines ‘in good faith’ as connoting the doing of or believing in something with ‘due care and attention’,¹⁵ it follows that the accused must have honestly and reasonably believed the killing to be necessary for the purpose of defence.¹⁶

¹³ The adjective ‘general’ is used here to convey two things: first that the plea is of general application to all offences and, second, the effect of successfully pleading it is a complete acquittal.

¹⁴ See *Mammun v. Emperor*, 1916 SCC OnLine Lah 205 : AIR 1917 Lah 347; See *Jaipal Kunbi v. Emperor*, 1922 SCC OnLine MP 183 : AIR 1922 Nag 141.

¹⁵ Section 52: ‘Nothing is said to be done or believed ‘in good faith’ which is done or believed without due care and attention.’

¹⁶ Another suggested way of stating this is that the accused must not have been reckless in the force applied in private defence: See *Sabal Singh v. State of Rajasthan*, (1978) 4 SCC 448 : AIR 1978 SC 1538 at 1541. While the concept of recklessness affords a possible interpretation of ‘good faith’ under the Exception, its obvious difficulty is that it is nowhere used or defined in the Penal Code: see K.L. Koh, C. Clarkson and N. Morgan, *Criminal Law in Singapore and Malaysia: Text and Materials* MALAYAN LAW JOURNAL, 455–456 (1989).

However, the linking of the expression ‘in good faith’ with the defensive action taken by the accused can be heavily criticised. If an accused must have ‘with due care and attention’ (i.e. reasonably) believed the harm inflicted by him or her to be necessary in the circumstances, it seems tautological for the Exception to go on to require that the accused’s defensive action must have been done ‘without any intention of doing more harm than is necessary for the purpose of such defence’. Simply put, how can a person who reasonably believes the harm inflicted by him or her to be necessary at the same instance intend to do more harm than he or she considers necessary? The same may also be said of the other element of ‘without premeditation’ required by the Exception. It is difficult to envisage how a person could harbour a precedent malice against his or her assailant and yet be held to have inflicted only that amount of harm which he or she reasonably believed to be necessary by way of private defence. Another criticism is that requiring the accused to have reasonably believed that his or her defensive action was necessary runs counter to the underlying rationale of Exception 2. Surely an accused who honestly albeit unreasonably believed in the necessity of killing his or her assailant should be allowed to escape conviction of the most heinous crime in the IPC. Although such a person may have been culpable in applying excessive force, the law should require the culpability to be mitigated by the fact that the force was in response to an offence committed by the deceased against the accused.

To give effect to the view that Exception 2 will succeed where the accused honestly believed that the killing was necessary in private defence, the courts have had to considerably dilute the expression ‘in good faith’. A good example of this may be found in the Sri Lankan Court of Appeal’s decision in *Anura Shantha v. Attorney General*.¹⁷ The relevant passage in the judgment situates the Exception within the context of the general plea of private defence, and deserves to be reproduced in full. It reads:

- (1) “Where the accused acts in the exercise of his right of private defence, whether of persons or of property, and restricts himself to the legitimate limits of that right, any harm caused to the aggressor, including infliction of death, does not involve the accused in criminal liability at all. He is entitled to a complete exculpatory plea.
- (2) Where the right of private defence could properly have been availed of, but the accused, in killing the deceased, exceeds that right in good faith, without premeditation and without any intention of doing more harm than necessary for the purpose of self-defence, the accused is neither convicted of murder nor released from liability altogether. In such a case the appropriate verdict is a lesser verdict of culpable homicide not amounting to murder.

¹⁷ *Anura Shantha v. Attorney General*, (1999) 1 Sri LR 299. Exception 2 to s 300 of the IPC is Exception 2 to s 294 of the Sri Lankan Penal Code.

- (3) If the accused exceeds the right of private defence not *bona fide* but with premeditation and with deliberate intention of inflicting more harm than is necessary for the purpose of self-defence, liability for murder may be imposed if the victim's death is brought about.¹⁸

The dilution we are considering occurs in the third proposition where the Court of Appeal has replaced 'in good faith' with '*bona fide*'.¹⁹

The following statement by the Rangoon High Court in *Po Mye v. R* has gone further to identify the problem created by having 'in good faith' in the Exception:

"The question here must be whether the offender acted honestly, or whether he used the opportunity to pursue a private grudge and to inflict injuries which he intended to inflict regardless of his right. [Exception 2] punishes a criminal act in excess of the right of private defence, and it is impossible to regard 'due care and attention' [i.e. the definition of 'in good faith' under s 52 of the Code] in the sense which is usually ascribed to it as an element in such criminality."²⁰

This interpretation of the expression 'in good faith' in Exception 2 is to be commended for removing the requirement of reasonableness from the accused's belief concerning the need to kill his or her assailant.

However, this interpretation too suffers from a number of defects. One is that it fails to answer the criticism of tautology. If the Exception already requires, by virtue of the expression 'in good faith', the honest belief by the accused that the act of killing was necessary, why does it also require that the accused acted 'without intention of doing more harm than is necessary' for the purpose of private defence? Furthermore, there is uneasiness in giving to the expression 'in good faith' a meaning clearly inconsistent with that which the IPC gives to it. It is one thing to temper an objective standard with subjectivity, as has been done in relation to Section 99(4) by the qualification that the harm inflicted by the accused should not be weighed on golden scales.²¹ It is quite another thing to replace an objective measurement such as 'in good faith' with the completely subjective concept of 'honestly'.

¹⁸ Anura Shantha v. Attorney General, (1999) 1 Sri LR 299 *per* De Silva, J.

¹⁹ For another Sri Lankan case example, *See* R. v. Brampy Appuhamy, (1963) 65 NLR 361 where the trial judge directed the jury that Exception 2 succeeded if they found that *D*, an estate watchman, had fired at thieves 'wrongly thinking, but no doubt *bona fide*, that he was entitled to fire at them'.

²⁰ *See* Po Mye v. R., 1939 SCC OnLine Rang 29: AIR 1940 Rang 129 at 132 *per* Roberts, C.J. Burma (now Myanmar) has a code which is identical to the IPC.

²¹ *See* Jai Dev v. State of Punjab, AIR 1963 SC 612 at 617.

To avoid this problem, it is submitted that the word ‘exercise’ appearing in Exception 2 should be given the meaning of ‘invoke’ so that the opening words of the provision will in effect read: ‘Culpable homicide is not murder if the offender, in invoking in good faith the right of private defence ...’. Viewing the word ‘exercise’ in this manner makes it understood in terms of *summoning* or relying upon the right of private defence as opposed to *acting* out that right. Under this interpretation, the purpose of the expression ‘in good faith’ is to require the existence of circumstances that avail the accused of the right of private defence. These circumstances are the pre-conditions of that right, namely, of being the subject of an offence and of not having time to have recourse to the protection of the public authorities.²²

Use of ‘in good faith’ in the above manner finds some support in the ruling of the Lahore High Court in *Lal v. Emperor* that, to attract the application of the Exception, ‘it is necessary that the person causing the harm must have done so in the *bona fide* exercise of the right of private defence’.²³

Regrettably, the illustration accompanying Exception 2 constitutes a major obstacle to dealing with the expression ‘in good faith’ in the way suggested. It is observed that the illustration unambiguously applies the expression ‘in good faith’ to A’s infliction of harm upon Z. This automatically compels the same expression appearing in the Exception itself to be read in a like fashion.

In recognising the important role illustrations serve in interpreting the substantive provisions of the IPC, the courts have quite correctly been reluctant to reject them on the ground of repugnancy to the provisions themselves.²⁴ Yet, they do envisage an illustration being rejected provided that ‘a very special case’ existed and rejection of the illustration amounted to ‘the very last resort of construction’.²⁵ It is submitted that the illustration accompanying Exception 2 is such a special case and should be rejected by courts for being repugnant to the substantive provision. In Singapore, the solution to this anomaly has been the removal of the illustration altogether by legislative amendment.²⁶ While this is an acceptable solution, both the interpretation and practical application of the Exception will be better served by amending the illustration so as to bring it into line with the doctrine of exceeding private defence. The illustration could read:

²² These pre-conditions are required by s 97 and s 99(3) respectively of the IPC. The Singapore Court of Appeal case of *Tan Chor Jin v. Public Prosecutor*, (2008) 4 SLR(R) 306 at [46] adopted this classification of the elements of private defence into pre-conditions and conditions, which had been proposed by S. YEO, N. MORGAN AND W.C. CHAN, *CRIMINAL LAW IN MALAYSIA AND SINGAPORE (2nd Rev ed., 2015)* at paras [20.6] – [20.13].

²³ See *Lal v. Emperor*, 1946 Cri LJ 809 at 811. See also *State of Assam v. Inush Ali*, 1981 SCC OnLine Gau 54 : 1982 Cri LJ 1044 at 1046 where ‘in good faith’ appearing in Exception 2 was equated with ‘committing an act without pretence’.

²⁴ See *Mohd. Syedol Ariffin v. Yeoh Ooi Gark*, 1916 SCC OnLine PC 52 : (1916) 2 AC 575 at 581; See *Ram Lal v. Emperor*, 1927 SCC OnLine Oudh 163 : AIR 1928 Oudh 15 at 17.

²⁵ See *Mohd. Syedol Ariffin v. Yeoh Ooi Gark*, 1916 SCC OnLine PC 52 : AIR 1916 PC 242 at 244.

²⁶ By virtue of the Penal Code (Amendment) Act 2007 (Singapore).

Z attempts to horse-whip A, not in such a manner as to cause grievous hurt to A. A, in the exercise of the right of private defence, draws out a pistol. Z persists in the assault. A, honestly believing that he can by no means prevent himself from being horse-whipped, shoots Z dead. A has committed only culpable homicide not amounting to murder.²⁷

II. CONSENT AND NECESSITY

The defences of consent²⁸ and necessity²⁹ are often evoked in cases involving medical procedures that cause harm or incur a risk of causing harm to the patient. This is to be expected given that in many situations, medical practitioners would, as part of their legal and professional duties, have obtained the consent of their patients before performing a medical procedure needed to cure the patient. Furthermore, it is common for many of these medical procedures to cause harm or create a risk of harm to the patient.

Such a situation occurred in the Sri Lankan case of *R. v. DDW Waidyasekera*.³⁰ The accused, a doctor, was charged with causing the death of a woman by an act done with intent to cause a miscarriage under Section 314 of the IPC.³¹ At the trial, the accused claimed that he had induced the deceased to abort and had performed an operation to evacuate her uterus to prevent her dying of haemorrhage. In his direction to the jury, the Judicial Commissioner said:

“Learned Counsel for the defence ... stated that it was the conscientious opinion of the accused that he had to evacuate the uterus to save the life of the woman. You have to consider carefully whether the circumstances arising from the performance of the operation alone would save the life of the mother. If there were such circumstances, the law allows the sacrifice of one rudimentary life to save another comparatively more valuable. That is the stated point of the law which is availed of in accord of common sense.”³²

The jury handed down a guilty verdict that showed that they did not accept the accused’s version of the facts for if they did, they would have acquitted him in accordance with the Judicial Commissioner’s direction.

²⁷ This illustration is based on that accompanying Exception 2 (reproduced on p 4 above) but without the term ‘in good faith’ appearing there.

²⁸ The defence is provided for under ss 87 – 89 of the IPC. These are ss 80 – 82 of the Sri Lankan Penal Code.

²⁹ The defence is provided for under s 81 of the IPC. It is s 74 of the Sri Lankan Penal Code.

³⁰ *R. v. D.D.W. Waidyasekera*, (1955) 57 NLR 202.

³¹ This is s 305 of the Sri Lankan Penal Code.

³² See *R. v. D.D.W. Waidyasekera*, (1955) 57 NLR 202 at 207.

The accused appealed on the ground that the Judicial Commissioner had misdirected the jury on various issues pertaining to the accused's defence. The Court of Appeal dismissed the appeal upon finding that those directions were not unfavourable to him. However, the court said that it would have been preferable for the Judicial Commissioner to have expressed the defence in terms of the relevant General Exception in the IPC.

The Court of Appeal then proceeded to hold that the accused's case fell within the General Exception under Section 88 of the IPC.³³ The Court held -

... (It is) required the appellant to show that the deceased expressly or impliedly gave her consent to suffer the harm caused or to take the risk of that harm – in the present case death. While the Jury might have held on the evidence adduced by the defence that the deceased consented to be treated medically and surgically by the appellant, there was in our opinion scarcely any evidence to justify a finding that she consented to suffer or to take the risk of the harm which was actually caused to her [i.e. her death].³⁴

The Court thus held that the accused could not successfully rely on the Section 88 defence.

The Court of Appeal's deliberations on the appropriate defence for the accused in *Waidyasekera* is far from satisfactory. As a preliminary matter, the court entirely overlooked Section 91 of the IPC,³⁵ which states that the defence of consent under Section 88 does not extend to offences involving acts that are independent of any harm caused to the consenting party. This Section emphasises the point that the defence of consent serves to protect the individual autonomy and freedom of choice of a person to be harmed. Within this framework, Section 91 states that if the act committed by the accused is regarded by law as an offence independently of the harm caused, the doer will not be protected by the consent given. Causing a miscarriage under Section 314 of the IPC is a clear example of an offence where the defence of consent is excluded by virtue of Section 91. This is confirmed by the illustration accompanying Section 91.³⁶ However, the illustration expressly provides for an exception in the form of the words 'unless [the miscarriage was] caused in good faith for the purpose of saving the life of

³³ This is Section 81 of the Sri Lankan Penal Code.

³⁴ See *R. v. D.D.W. Waidyasekera*, (1955) 57 NLR 202 at 210 *per* Basnayake ACJ and agreed to by the other two judges.

³⁵ This is s 84 of the Sri Lankan Penal Code.

³⁶ The illustration reads: 'Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore it is not an offence "by reason of such harm" and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.'

the woman'. In light of this, the Court of Appeal in *Waidyasekera* should have initially determined whether the accused had induced the miscarriage in order to save the mother's life before engaging with the defence of consent under Section 88. Only when this was established would it have been proper to consider whether the requirements of the defence were satisfied. Based on the jury's finding of guilt, despite the Judicial Commissioner's direction on the question of saving the deceased's life, it is very likely that the defence would have been denied to the accused by virtue of the exclusion under Section 91. Consequently, it was superfluous for the Court of Appeal to consider whether the deceased had consented to the operation or to the type of harm risked by it.

The Court of Appeal's handling of the Section 88 defence may be criticised on another score. The opening words of Section 88, namely, '*nothing, which is not intended to cause death*' means that the defence is available to a person who intentionally causes harm *short of death* and the injured person had consented to suffering such harm or taking the risk of such harm occurring. The court was therefore wrong, in the passage reproduced earlier,³⁷ to interpret the provision as covering a case where the deceased had consented to suffering or taking the risk of *death*.

A final criticism of the Court of Appeal's decision in *Waidyasekera* is its failure to consider the General Exception under Section 81 of the IPC (i.e. necessity).³⁸ Based on the evidence described by the court and the lengthy passages from the Judicial Commissioner's summing up, it is submitted that this defence (and not the defence of consent) should have been the one for the jury to consider. The portion of the Judicial Commissioner's reproduced earlier clearly shows his view - that the accused might be exculpated of the charge against him if he had performed the operation in order to save the life of the woman. Hence, the basis for exculpation was not on the woman's consent but on the need to take preventative action to save her life.

The general lesson ensuing from this discussion is that there may be some circumstances involving harm caused as a result of medical procedures where necessity is the appropriate defence, and not consent. As such, the courts should not be too quick to convict an accused because the defence of consent, for some reason or other, could not be relied upon. Take, for example, a medical practitioner who performs a life-endangering operation on a patient who had only consented to harm or a risk of harm short of death (as permitted by Section 88). If the patient dies, the medical practitioner would be unable to successfully plead the defence of consent. However, had the practitioner performed the operation 'without any criminal intention to cause harm, and in good faith for the purpose

³⁷ See the main text accompanying note 34 above.

³⁸ This is s 74 of the Sri Lankan Penal Code. Section 92 of the IPC (s 85 of the Sri Lankan Penal Code) did not apply as it operates only where the accused was unable to obtain the consent of the victim, whereas in this case, he could.

of preventing or avoiding' the patient's death, he or she might be deserving of exculpation on the basis of the defence of necessity.³⁹

III. AUTOMATISM AND INSANITY

The term 'automatism' and the concept it denotes do not appear anywhere in the IPC because of their relatively recent origin. It is understandable that the Code drafters failed to anticipate or provide for such a defence. However, since the notion of 'voluntariness', which underpins the concept of 'automatism' is so basic to questions of criminal responsibility that it must in the IPC in some form or other. Since there is no specific provision, innovative judicial interpretations of Code provisions are needed to achieve this objective instead.

In the absence of an IPC definition, automatism may be said to refer to a state of defective capacity to control one's conduct in which a person performs unwilling acts. Drawing from jurisdictions in which courts have recognised automatism, it may be caused by concussion,⁴⁰ somnambulism,⁴¹ acute stress,⁴² some forms of epilepsy,⁴³ other neurological⁴⁴ or physical⁴⁵ ailments, or by pure accident.⁴⁶ Automatism is related to the requirement of voluntariness - a fundamental requirement of criminal responsibility. In the words of the Sri Lankan Court of Appeal in *Gamini v. Attorney General*, "the plea of automatism ... is, in effect, a plea that the act in question was involuntary".⁴⁷ As such, it will be an answer to all charges, including offences of strict liability.⁴⁸

³⁹ For a discussion of the availability of the s 81 defence to homicide cases, See Peiris, above note 1, pp 244 – 246; Yeo, Morgan and Chan, above note 22, at paras [23.26] – [[23.29].

⁴⁰ For example, See *Abdul Razak Bin Dalek v. Public Prosecutor*, 2010 SCC OnLine MYFC 32 : (2010) 4 MLJ 725; See *R. v. Stripp*, (1978) 69 Cr App R 318.

⁴¹ For example, See *R. v. Burgess*, (1991) 2 QB 92; See *R. v. Parks*, (1992) 75 CCC (3d) 287; See *Jiminez v. R.*, (1992) 173 CLR 572.

⁴² For example, See *R. v. Falconer*, (1990) 171 CLR 30; See *R. v. Rabey*, (1977) 37 CCC (2d) 461; See *Ericsson v. Police*, (1993) 10 CRNZ 110.

⁴³ For example, See *Gamini v. Attorney General*, (1999) 1 Sri LR 321; See *Sinnasamy v. Public Prosecutor*, (1956) 22 MLJ 36; See *Bratty v. Attorney General for Northern Ireland*, 1963 AC 386 : (1961) 3 WLR 965; See *R. v. Cottle*, 1958 NZLR 999; See *R. v. Sullivan*, 1984 AC 156 : (1983) 3 WLR 123.

⁴⁴ For example, See *Police v. Bannin*, (1991) 2 NZLR 237 : (1991) 7 CRNZ 55 (Klein-Levin syndrome); See *R. v. Hughes*, (1989) 42 A Crim R 270 (myotonia).

⁴⁵ For example, See *Public Prosecutor v. Kenneth Fook Mun Lee (No. 1)*, (2002) 2 MLJ 563 (hypoglycaemia); See *R. v. Hennessy*, (1989) 1 WLR 287 : (1989) 2 All ER 9 (diabetes); See *R. v. Charlson*, (1955) 1 WLR 317 : (1955) 1 All ER 859 : (1955) 39 Cr App R 37 (cerebral tumour); See *R. v. Kemp*, (1957) 1 QB 399 : (1956) 3 WLR 724 (arteriosclerosis); See *R. v. Hall*, (1988) 36 A Crim R 368 (swelling of the brain-cerebral oedema); See *Burnskey v. Police*, (1992) 8 CRNZ 582 (brain injury at birth).

⁴⁶ This form of accident differs from the defence of accident under s 80 of the IPC.

⁴⁷ *Gamini v. Attorney General*, (1999) 1 Sri LR 321 at 325.

⁴⁸ See *Public Prosecutor v. Yong Heng Yew*, (1996) 3 SLR(R) 22. See further M. Sornarajah, *Defences to Strict Liability Offences in Singapore and Malaysia* (1985) 27 MALAYA LAW REVIEW 1 at 18–20. Like Sri Lanka, Malaysia and Singapore have penal codes which have been borrowed from the IPC.

A. Automatism, voluntariness and ‘acts’

While the Code drafters used the word ‘act’ frequently, they left it undefined. Perhaps, they did so because they believed that its meaning was obvious to everyone, as indicated in the following comment in *Gour’s Penal Law of India*:

The word ‘act’...must be construed in the light of common sense... ‘Act’ is nowhere defined. It... cannot, in the ordinary language be restricted to every separate willed movement of a human being; for when courts speak of an act of shooting or stabbing, it means the action taken as a whole and not the numerous movements involved.⁴⁹

We note that the equation of the term ‘act’ with willed conduct is the essence of voluntariness. In the same vein, the Sri Lankan Court of Appeal in *Gamini* said that in all criminal proceedings where the *actus reus* of the crime charged comprised of human conduct, ‘the prosecution was under a duty to establish against the accused the doing of a voluntary, conscious and willed act’.⁵⁰ This description is correct, except for its inclusion of ‘consciousness’. Sometimes, people may have been quite unaware of what they were doing. But on other occasions, persons acting in an automatistic state may be conscious of what they are doing and intend the consequences of their actions while lacking any mental capacity whatsoever to restrain themselves. Regarded in this way, a state of unconsciousness or impaired consciousness may point to an accused’s inability to control their conduct, but such a state is not essential for automatism to exist. This was the stance taken by the Law Commission for England and Wales; whose draft Criminal Code provides that:

A person is not guilty of an offence if – (a) he acts in a state of automatism, that is, his act ... (ii) occurs while he is in a condition (whether of sleep, unconsciousness, impaired consciousness or otherwise) depriving him of effective control of his act ...⁵¹

B. Automatism and unsoundness of mind

The Code’s drafters’ failure to clearly articulate the concepts of voluntariness and automatism has created difficulties with the interpretation of certain IPC

⁴⁹ K.D. GOUR, *GOUR’S PENAL LAW OF INDIA*, Vol 1 (Law Publishers, 11th Ed, 2000), p 259 and drawn from the Bombay High Court case of *Emperor v. Bhogilal Chimanlal Nanavati*, 1931 SCC OnLine Bom 69 : AIR 1931 Bom 409 at para 5.

⁵⁰ *Gamini v. Attorney General*, (1999) 1 Sri LR 321 at 327.

⁵¹ Law Commission for England and Wales, *A Criminal Code for England and Wales* (Law Com No 177) (HMSO, 1989), draft Code, cl 33(1). This definition of automatism is consistent with the House of Lords’ case of *Bratty v. Attorney General for Northern Ireland*, 1963 AC 386 at 409 : (1961) 3 WLR 965.

provisions. Foremost among these provisions is the defence of unsoundness of mind under Section 84⁵² that reads:

Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

Since automatism involves a volitional defect, caution is required when relating it to the defence under Section 84 since that defence, as presently worded, is confined to cognitive defects. The defence is so described because it concerns itself only with defects of understanding. This is evident in the requirement that the accused must be ‘incapable of knowing’. That Section 84 does not appear to deal with a volitional defect is suggested by the requirement in the provision that something was ‘done’ by the accused. Like the word ‘act’, common sense infers that a person who had ‘done’ something means that he or she had engaged in willed human movement. Put in another way, Section 84 assumes that the accused’s conduct was voluntary in that he or she exercised control over the act. However, the Section exculpates an accused who, on account of unsoundness of mind, is incapable of knowing the *nature* of the act, that is, both the act *and* its consequences. For instance, an accused person may be so unsound in mind that he believes he is breaking a twig when he is really breaking a person’s finger.⁵³ The accused’s conduct would clearly have been voluntary in that his act of breaking the finger was willed and accompanied by an intention to do the act. However, the accused was so mentally deranged that he was incapable of knowing that it was a person’s finger he was breaking and the harmful consequences to the victim of doing so.

Given our understanding of the true nature of automatism, its role in relation to Section 84 is not to establish that the accused was ‘incapable of knowing’ the nature of the act. Rather, it is to deny that the accused’s bodily movement was an ‘act’ in the first place. On its face, Section 84 does not lend itself to accommodating this role since the provision is cast in terms of the accused doing something (inferring voluntariness), but not having the capacity to know (inferring a cognitive defect).

What then of a case where the accused was alleged to have committed an offence while in an automatistic state caused by unsoundness of mind? One possible outcome may be that such a person cannot rely on Section 84 and will be convicted and punished as opposed to receiving the special verdict and the

⁵² This is s 77 of the Sri Lankan Penal Code.

⁵³ Adapted from the illustration given by Dixon J in the Australian case of *R. v. Porter*, (1933) 55 CLR 182 at 188 of the meaning of ‘not knowing the nature of the act’ contained in the *M’Naghten* Rules. The Rules govern the common law defence of insanity in Australia and England.

clinical treatment that comes with it.⁵⁴ This is grossly unjust because it ignores the plight of an accused whose mental malfunctioning is arguably much more severe than one who had engaged in voluntary conduct but with a cognitive misunderstanding of the act performed and its consequences. Another outcome may be to regard the accused as not having committed an ‘act’ so that the prosecution had failed to establish the physical element of the crime charged. The result would be an unqualified acquittal. This would be completely unacceptable to society, especially when the accused clearly needs to be kept under close supervision and be treated by the mental health authorities.

The Sri Lankan Court of Appeal in *Gamini*⁵⁵ opted for the second outcome. The following passage from the judgment deserves to be reproduced in full:

“In discharging its duty to establish against the accused the doing of a voluntary act], [t]he prosecution could ... rely on the presumption of mental capacity, which is a provisional presumption, to establish the voluntary nature of the act. Then, if the accused succeeds in placing a sufficient foundation for a plea of automatism that either the act was committed due to concussion, whilst sleep walking or due to epilepsy, the aforesaid provisional presumption is displaced and the prosecution is required to prove the legal burden and discharge the ultimate burden of proving that the act was voluntary. However, in order to displace the presumption of mental capacity, defence must place a sufficient foundation by evidence from which it may reasonably be inferred that the act was involuntary. ... It must be emphasised that there is no legal burden on the accused to prove his act was involuntary.”⁵⁶

In *Gamini*, the accused had lost consciousness while driving his lorry, resulting in the vehicle going over to the opposite side of the road and crashing into several road users. He was convicted of causing death by a rash or negligent act under Section 304A⁵⁷ of the IPC, and causing hurt rashly or negligently as to endanger human life or personal safety of others under Section 337⁵⁸ of the same Code. He pleaded automatism by tendering evidence that he had suffered an epileptic fit at the time of the incident. The Court of Appeal quashed the accused’s conviction on the ground that the prosecution had not discharged its ultimate burden that the accused’s act was voluntary. In the course of its judgment, the court considered and rejected developments under English common law that

⁵⁴ The outcome of the special verdict is provided for under s 335 of the Criminal Procedure Code 1973 (India).

⁵⁵ *Gamini v. Attorney General*, (1999) 1 Sri LR 321.

⁵⁶ *Gamini v. Attorney General*, (1999) 1 Sri LR 321 at 327 *per* Jayasuriya J. The other judge, Kulatilaka J, agreed entirely with Jayasuriya J’s judgment.

⁵⁷ This is s 298 of the Sri Lankan Penal Code.

⁵⁸ This is s 328 of the Sri Lankan Penal Code.

categorised cases of automatism into sane automatism and insane automatism.⁵⁹ The court viewed such developments as ‘not warranted because a plea of insanity [under Section 84 of the IPC⁶⁰] is a general exception which falls within the ambit of chapter IV of the Penal Code – whereas, a plea of automatism does not’.⁶¹ It went on to hold that the burden of proving a general exception was on the accused pleading it on a balance of probabilities, whereas the prosecution bore the burden of proving elements of an offence (such as voluntariness) beyond reasonable doubt. However, having acquitted the accused, the court made orders suspending his driving licence and requiring him to be assessed by a medical board and to have his licence reinstated only after the board found him to be in a fit condition to drive motor vehicles.⁶²

The approach taken in *Gamini* may be supported by a straightforward reading of Section 84 that the defence is confined to cognitive defects and not volitional defects. This also appears to be the view of the Indian courts as evinced by their refusal to apply Section 84 to cases where the accused had suffered from an ‘irresistible impulse’.⁶³ However, justice would be better served were Section 84 to incorporate volitional defects, paving the way for the judicial recognition of insane automatism (which would be covered by Section 84) and sane automatism (which would be dealt with as described in *Gamini*).⁶⁴

A novel way of achieving this could be derived from treating the words ‘act’, ‘done’ and ‘doing’ appearing in Section 84 as connoting volitional behaviour. It could then be contended that a person can be said to have ‘done’ an ‘act’ only if he or she had control over its performance. Adopting this stance, cases of insane automatism could be brought under the Section 84 defence on the basis that persons suffering from insane automatism have not ‘done’ the alleged offence on account of their inability to control their conduct by reason of unsoundness of mind. Such a reading of Section 84 maintains the position that automatism involves a volitional defect and circumvents the reference in that provision

⁵⁹ The court called this purported distinction ‘an affront to common sense’: see (1999) 1 Sri LR 321 at 330.

⁶⁰ This is s 77 of the Sri Lankan Penal Code.

⁶¹ *Gamini v. Attorney General*, (1999) 1 Sri LR 321 at 328.

⁶² At the time when *Gamini* was decided, the Sri Lankan courts were not empowered to hand down a special verdict where a person had been found not guilty by reason of unsoundness of mind. This power has since been provided for by ss 380 and 381 of the *Criminal Procedure Code* 1979 (Sri Lanka), bringing it into line with India and England.

Commenting on the Sri Lankan position prior to the 1979 enactment, Peiris, above note 1 at pp 168 – 169 suggests that, since the effect of sane automatism and insane automatism was the same (*viz* an unqualified acquittal), the distinction between these two types of automatism was not as significant as in England where insane automatism results in a special verdict whereas sane automatism results in an unqualified acquittal.

⁶³ For example, *See Queen Empress v. Lakshman Dagdu*, ILR (1886) 10 Bom 512; *Queen Empress v. Kader Nasyer Shah*, ILR (1896) 23 Cal 604.

⁶⁴ For clinical support for this stance, see A de Alwis and N. Fernando, *The insanity defense and the assessment of criminal responsibility in Sri Lanka* (2013) 4(2) SRI LANKA JOURNAL OF PSYCHIATRY 4 at 5.

to cognitive defects occasioned by the words ‘incapable of knowing’. That said, however persuasive this way of recognising volitional defects under Section 84 might be, the point remains that the courts in India, Sri Lanka and other jurisdictions which had adopted the IPC have not considered it, let alone embraced it. Consequently, the better course is for Section 84 to be amended to expressly include volitional defects alongside cognitive ones. This is the position in a majority of legal systems in the Commonwealth.⁶⁵

C. Distinguishing sane automatism from insane automatism

Assuming that the submission is accepted that the law should recognise both sane and insane automatism, the question arises as to how these two forms of automatism are to be distinguished. The distinction between sane and insane automatism is highly significant because, as we have seen, it determines which party – the defence or the prosecution – has the burden of proving (or disproving as the case may be) the disability. Additionally, the distinction determines whether the accused should receive a special verdict of not guilty by reason of unsoundness of mind or an unqualified acquittal.

The courts of several Commonwealth jurisdictions, notably Canada, England and New Zealand have been active in answering this question. They have relied on two tests to determine whether the accused’s mental dysfunctioning was due to a disease of the mind (i.e. an ‘unsoundness of mind’ under Section 84 of the IPC). These are the internal cause test and the ‘proneness to recur’ (or ‘continuing danger’) test. It is noteworthy that the courts in Malaysia, whose Penal Code is essentially the IPC (including having Section 84), have not only recognised sane and insane automatism but adopted these two tests to distinguish them.⁶⁶

Dealing first with the internal cause test, this test draws a distinction between a mental malfunctioning arising from a source primarily internal to the accused, such as his or her psychological makeup or organic pathology, as opposed to a malfunctioning produced by some specific external factor such as intoxication or concussion.⁶⁷ Both judges and commentators have criticised this test for creating some arbitrary distinctions as to what is considered a disease of the mind. For example, hyperglycemia (excess in blood sugar) has been treated as an internal cause leading to mental disorder automatism⁶⁸ whereas hypoglycemia, a deficiency in blood sugar, has been regarded as a cause of non-mental disorder

⁶⁵ See S. Yeo, *THE INSANITY DEFENCE IN THE CRIMINAL LAWS OF THE COMMONWEALTH OF NATIONS* [2008] SINGAPORE JOURNAL OF LEGAL STUDIES 241 at 254.

⁶⁶ See *Public Prosecutor v. Kenneth Fook Mun Lee (No. 1)*, (2002) 2 MLJ 563; See *Public Prosecutor v. Abdul Razak Bin Dalek*, (2007) 2 MLJ 255. For a discussion of these decisions, see Yeo, *Morgan and Chan*, above note 22, at paras [26.29] – [26.32].

⁶⁷ See *R. v. Rabey*, (1977) 37 CCC (2d) 461 at 477 per Martin JA and approved by a majority of the Supreme Court of Canada in *Rabey v. R.*, (1981) 54 CCC (2d) 1.

⁶⁸ *R. v. Hennessy*, (1989) 1 WLR 287 : (1989) 2 All ER 9.

automatism.⁶⁹ This example was relied on by the Sri Lankan Court of Appeal in *Gamini* to reject the internal cause test specifically and more generally the distinction between sane and insane automatism.⁷⁰ Likewise, cases of sleepwalking raise unique problems that cannot be resolved by the internal cause test.⁷¹ Acknowledging the strength of this criticism, the Supreme Court of Canada in *R. v. Stone* recognised that the test was not ‘a universal classificatory scheme for ‘disease of the mind’ because there were cases in which the dichotomy between internal and external causes becomes blurred’.⁷²

The second test of continuing danger holds that any condition of the accused that is likely to recur and thereby present a danger to the public should be treated as a disease of the mind. This test has likewise been criticised by judges and commentators on the ground that, if it was conclusively determinative of disease of the mind, a serious mental disorder could be excluded simply because it was unlikely to recur.⁷³ Acknowledging again this criticism, the Supreme Court in *Stone* held that the test ‘must be qualified to recognise that while a continuing danger suggests a disease of the mind, a finding of no continuing danger does not preclude a finding of a disease of the mind’.⁷⁴

Given these reservations over the internal cause and continuing danger tests, the Supreme Court felt it necessary to clarify the way these tests should be applied by trial judges. The court held that these tests should not be treated as exclusive and conclusive approaches, such as may be expected of a ‘theory’. Rather, the tests should be regarded as inter-connected and flexible ‘factors’ which may be combined to help decide whether an accused was suffering from a disease of the mind. In the words of Bastarache J:

I emphasize that the continuing danger factor should not be viewed as an alternative or mutually exclusive approach to the internal cause factor. Although different, both of these approaches are relevant factors in the disease of the mind inquiry. As such, in any given case, a trial judge may find one, the other or both of these approaches of assistance. To reflect this unified, holistic approach to the disease of the mind question, it is therefore more appropriate to refer to the internal

⁶⁹ *R. v. Quick*, 1973 QB 910 : (1973) 3 WLR 26.

⁷⁰ See *Gamini v. Attorney General*, (1999) 1 Sri LR 321 at 330. The court scathingly described as ‘wholly incongruous and fatuous’ the manner in which the test was applied.

⁷¹ See *R. v. Parks*, (1992) 75 CCC (3d) 287 at 307 *per* La Forest J.

⁷² *R. v. Stone*, (1999) 134 CCC (3d) 353 at 434 *per* Bastarache J citing La Forest J in *R. v. Parks*, (1992) 75 CCC (3d) 287, 309–310.

⁷³ *Rabey v. R.*, (1981) 54 CCC (2d) 1 at 17 *per* Dickson J; *R. v. Parks*, (1992) 75 CCC (3d) 287 at 309–310 *per* La Forest J.

⁷⁴ *R. v. Stone*, (1999) 134 CCC (3d) 353 at 438 *per* Bastarache J.

cause factor and the continuing danger factor, rather than the internal cause theory and the continuing danger theory.⁷⁵

The practical outcome of the *Stone* approach is that the internal cause and continuing danger factors should be viewed as merely analytical tools devised by the courts to meet the primary objective of societal protection. As such, these factors have no intrinsic value on their own nor are they fully determinative of any of disease of the mind. In line with this, the Supreme Court in *Stone* was open to recognising other factors, besides internal cause and continuing danger, to help determine whether the defendant's automatistic state stemmed from a disease of the mind.⁷⁶

In practical terms, what this means is that trial judges should not get bogged down by whether or not a particular factor has been established. Instead, they should have foremost in mind the overarching theme of societal protection. Consistent with this approach, trial judges should fully appreciate that factors such as an internal cause and a continuing danger merely attest to an accused's need for clinical treatment. This translates into ensuring that expert evidence should be sought which will help the triers of fact (be it judge or jury) to decide whether there is such a need.

Overall, there is much to be said in favour of the holistic approach propounded by the Supreme Court of Canada in *Stone*, and Indian and Sri Lankan courts would do well to adopt it when next dealing with the issue of automatism.

IV. INTOXICATION

Intoxication as a criminal law defence is normally classified as either voluntary or involuntary. Section 85⁷⁷ of the IPC recognises involuntary intoxication as a defence. Acceptance of voluntary intoxication as a defence is more problematic and controversial than acceptance of a defence of involuntary intoxication. This is primarily due to the fact that the former normally arises through the person's own fault whereas the latter normally does not. The ensuing discussion is concerned with the interpretation to be given to Section 86:

In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been

⁷⁵ R. v. *Stone*, (1999) 134 CCC (3d) 353 at 439.

⁷⁶ R. v. *Stone*, (1999) 134 CCC (3d) 353 at 440–441.

⁷⁷ It reads: 'Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law provided that the thing which intoxicated him was administered to him without his knowledge or against his will.'

intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

A. Imputing knowledge in cases of voluntary intoxication

Based on a natural reading of Section 86, it appears that the drafters rejected the idea that voluntary intoxication could be a defence to subjective fault crimes. In its apparent rejection of voluntary intoxication as a defence negating fault, Section 86 states that the intoxicated person ‘shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated’. As knowledge of the essential physical elements of a crime provides the foundation for proof of intent, it therefore seems clear that the aim of the drafters of Section 86 was to ensure that voluntary intoxication was not a defence to subjective fault crimes (i.e. crimes requiring knowledge or intent).⁷⁸

However, Indian courts (and, as we shall see, the Sri Lankan courts too) have found a way to recognise voluntary intoxication as a defence under Section 86. The courts have done so by pointing out that while the first part of Section 86 speaks of intent or knowledge, the second part only speaks of knowledge, thereby occasioning an element of doubt by this omission. The courts have decided that this omission was deliberate with the result that Section 86 denies a defence of voluntary intoxication to a person charged with an offence having knowledge as its fault element, but permits such a defence where intention was the fault element of the offence charged.⁷⁹

Through this line of reasoning, the Indian courts have adopted the following rulings by Lord Birkenhead in the House of Lords in *Director of Public Prosecutions v. Beard*:

1. That insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged;
2. That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent; and
3. That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily

⁷⁸ R.U. Singh, *History of the Defence of Drunkenness in English Criminal Law* (1933) 49 LAW QUARTERLY REVIEW 528.

⁷⁹ For example, See *Mandru Gadaba, In re*, 1914 SCC OnLine Mad 723 : ILR (1915) 38 Mad 479; See *Bishan Singh v. Emperor*, 1929 SCC OnLine Lah 228 : AIR 1929 Lah 637; See *Krushna Singh v. State*, 1971 SCC OnLine Ori 108 : 1971 Cri LJ 1497; *Enrique F. Rio v. State*, 1975 SCC OnLine Bom 76 : 1975 Cri LJ 1337.

gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.⁸⁰

It has been held that Section 85 of the IPC incorporates the first ruling in *Beard* and that the second and third rulings form part of Section 86.⁸¹

Having presented the Indian judicial interpretation of Section 86, we are in a position to examine the Sri Lankan case of *R. v. Rengasamy*,⁸² which, in spite of its age, remains a leading case on that provision. It should be stated at the outset that the decision in *Rengasamy* generally accords with the Indian decisions on Section 86. However, *Rengasamy* comments on certain aspects of the provision that have not received the same scrutiny in the Indian cases. For this reason, it is beneficial to study this Sri Lankan decision and the subsequent case of *Dayaratne v. Republic of Sri Lanka*,⁸³ which reviewed it.⁸⁴

Bertram CJ, who delivered the main judgment in *Rengasamy*,⁸⁵ commenced his interpretation of Section 86 as follows:

[Section 86] as I understand it, is intended to deal with two classes of cases:

- (a) Cases in which knowledge is an essential element of the crime.
- (b) Cases in which intention is an essential element of the crime.

In the first of these cases, it imputes to the drunkard the knowledge of a sober man. In the second of these cases it also imputes to the drunkard the knowledge of a sober man, in so far as that knowledge is relevant to his intention. To put the second case in another way, it often happens that for the purpose of determining a person's intention, it is material to know his knowledge. In such a case for this purpose the section attributes to the drunkard the knowledge of a sober man.⁸⁶

His Lordship next proceeded to expound on what the 'knowledge' referred to in these two classes of cases:

⁸⁰ *Director of Public Prosecutions v. Beard*, 1920 AC 479 at 501–502.

⁸¹ The leading Indian case which has done this is the Supreme Court of India decision in *Basdev v. State of Pepsu*, AIR 1956 SC 488 and followed in *Prabhunath v. State*, 1957 SCC OnLine All 95; AIR 1957 All 667. For Sri Lankan cases, See *R. v. Velaiden*, (1947) 48 NLR 409; *Dayaratne v. Republic of Sri Lanka*, (1990) 2 Sri LR 226.

⁸² *R v. Rengasamy* (1924) 25 NLR 438.

⁸³ *Dayaratne v. Republic of Sri Lanka*, (1990) 2 Sri LR 226.

⁸⁴ For a fuller discussion of *Rengasamy*, see Peiris, above note 1, at pp 193–203.

⁸⁵

⁸⁶ (1924) 25 NLR 438 at 445. This passage was re-affirmed by the Sri Lankan Court of Appeal in *Dingiri Banda v. Attorney General*, (1986) 2 Sri LR 356.

In the first case the knowledge referred to is ‘a particular knowledge’ that is to say ... the knowledge specified in the Code as the essential element of the crime. ... In [the second] case the Code does not specify any knowledge but only an intention. ... In my opinion the ‘knowledge’ meant, is ... ‘knowledge of the nature and consequences of the act’.⁸⁷

Having interpreted Section 86, Bertram CJ went on to reject the contention that adopted the English common law.⁸⁸ It is submitted that he was correct in doing so because his interpretation was based entirely on the wording of Section 86, and not on the adoption of the concept of ‘specific intent’ that is part of the English law on intoxication.⁸⁹ In this regard, *Rengasamy* is to be preferred to the Indian and subsequent Sri Lankan decisions⁹⁰ which have referred with approval to English cases on voluntary intoxication such as *Beard, cited earlier*,⁹¹ rather than *confining themselves to interpreting the Code provision*.

While Bertram CJ’s interpretation of Section 86 is commendable for its clarity, it nonetheless remains deeply troubling for its illogicality. As the Solicitor-General before his Lordship noted, the interpretation could produce the following unjust result – having an artificial knowledge imputed on a person irresistibly leads to imputing an artificial intention on him such that the person could be punished ‘on the basis of a knowledge and an intention which he did not in fact possess’.⁹²

In a similar vein, Garvin AJ in *Rengasamy* said:

I cannot believe that [s 86] contemplated that in such cases the knowledge of a sober man might be imputed to a person in a state of intoxication with a view to basing upon it an inference of intention from the knowledge so imputed. This would be to pass from an artificial imputation of knowledge to an artificial imputation of intention.⁹³

There is a further ruling on Section 86 by Bertram CJ, which highlights another deeply problematic feature of the provision. In *Rengasamy*, the

⁸⁷ *Ibid.*

⁸⁸ (1924) 25 NLR 438 at 446.

⁸⁹ While the end result of both approaches to the defence of intoxication might be broadly similar (i.e. that the intoxication cannot negate actual knowledge but can negate intention), the route taken to reach that result are different.

⁹⁰ See Notably *Dayaratne v. Republic of Sri Lanka*, (1990) 2 Sri LR 226, to be discussed below.

⁹¹ See especially the second ruling in the quotation from *Beard* reproduced in the main text accompanying note 80 above.

⁹² Submission by the Solicitor-General in *Rengasamy*, (1924) 25 NLR 438 at 445, as paraphrased by Bertram CJ. This was also the view of Sir Francis Soerz in his inaugural lecture as Professor of Law at the University of Ceylon: see 1949 *UNIVERSITY OF CEYLON REVIEW* 12 at 16–18.

⁹³ *Ibid* at 447.

Solicitor-General had sought to persuade the court that the ‘intoxication’ contemplated in Section 86 was of the same degree as intoxication under Section 85,⁹⁴ that is, ‘intoxication so intense as wholly to obscure in the mind of the drunkard the nature, the morality, or the criminality of the act done’.⁹⁵ Bertram CJ rejected this emphatically when he declared: “*I do not agree that the ‘intoxication’ there referred to means intoxication of the same degree as that defined in Section 85. It covers intoxication of any degree whatever*”.⁹⁶

The problem created by this ruling and judgments which have adopted it,⁹⁷ is that the prosecution’s task of proving *mens rea* of a crime is made significantly easier if there is evidence that accused was intoxicated, however slight, when he or she committed the alleged crime. In these cases, the prosecution can rely on Section 86 to impute knowledge of a sober person onto the accused whenever knowledge forms part of the *mens rea* of a crime. This artificial and objective form of knowledge is, without doubt, much easier to establish in criminal proceedings than having to prove actual knowledge of the accused. Even accepting that the drafters of Section 86 were disinclined towards voluntary intoxication, it is nonetheless contended that Bertram CJ went too far in holding that ‘any degree whatever’ of intoxication was sufficient to trigger the imputation of knowledge provided for under Section 86. It is proposed that the Solicitor-General’s submission that ‘intoxication’ under Section 86 should be of the same degree as that required by Section 85 is attractive at both conceptual and practical levels. Conceptually, it brings consistency and symmetry to these two provisions on intoxication in the IPC.⁹⁸ Furthermore, it is difficult to appreciate why the law would permit a low degree of intoxication to exculpate an accused who had self-induced, and demand a higher degree of intoxication for a person who had been administered alcohol or drugs without his knowledge or against his will. At the practical level, the accused would have to be very heavily intoxicated before Section 86 operates to impute the knowledge of a sober person onto him or her. This requirement of extreme intoxication has a double-edged effect – on the one hand, the prosecution will be unable to readily rely on Section 86 to impute knowledge; on the other hand, it will be very difficult for the defence to successfully rely on Section 86 to negate intention.

Rengasamy was subsequently the subject of review by the Sri Lankan Court of Appeal in *Dayaratne v. Republic of Sri Lanka*.⁹⁹ Silva J, who delivered the

⁹⁴ This is s 78 of the Sri Lankan Penal Code.

⁹⁵ *Ibid* at 442, as paraphrased by Bertram CJ.

⁹⁶ *R. v. Rengasamy*, (1924) 25 NLR 438 at 444. Emphasis added.

⁹⁷ For example, *See Jayathilake v. Attorney General*, (2003) 1 Sri LR 107; *See R. v. Marshall Appuhamy*, (1949) 51 NLR 140.

⁹⁸ As the Solicitor-General noted, s 85 is the only provision in the IPC which specifies the degree of intoxication.

⁹⁹ *Dayaratne v. Republic of Sri Lanka*, (1990) 2 Sri LR 226.

judgment of the court,¹⁰⁰ endorsed Bertram CJ's observations on the first class of cases but not those on his second class.

After discussing several Indian and Sri Lankan cases,¹⁰¹ Silva J concluded his analysis of Section 86 in this lucid and instructive passage:

In considering the provisions of [s 86] with regard to voluntary intoxication in the light of the case law here and in India it is clear that the legal position is as follows.

In regard to offences where knowledge is an essential ingredient, intoxication of whatever degree has no impact on the liability of the accused since the section imputes to him the knowledge of the sober man. In cases where intention is an essential ingredient of the offence the section does not impute to the accused any state of knowledge. It leaves the matter open for the application of the ordinary law. The basic premise of liability under our criminal law is that a man is presumed to intend the natural consequences of his act. This, however, is a rebuttable presumption. Therefore an accused who seeks to set up a plea of voluntary intoxication has to, on the evidence, rebut the application of that presumption.

As for the degree of intoxication required to rebut the presumption of intention, Silva J said:

This plea [of voluntary intoxication], in our view, postulates a high level of intoxication. The accused has to establish that at the material time, his state of intoxication was such that he did not know what he was about or that he imagined the act to be something contrary to its true nature. To draw from the examples given in the judgments cited above, that he imagined he was striking not a human being but a log or an animal. If [in a murder case] the accused succeeds in proving that at the material time he did not have the capacity to form a murderous intention, the provisions of Section 86 will apply and he would be imputed the knowledge of a sober man, resulting in a conviction for the offence of culpable homicide.

We note that Silva J's description of the level of intoxication and the example he draws from the cases is the same as the degree of intoxication required under Section 85, namely, that the intoxication was such as to render the accused

¹⁰⁰ The second judge, Perera J, agreed entirely with the judgment.

¹⁰¹ These included the Supreme Court of India case of *Basdev v. State of Pepsu*, AIR 1956 SC 488; and the Sri Lankan case of *R. v. Velaiden*, (1947) 48 NLR 409.

‘incapable of knowing the nature of the act’.¹⁰² This was the submission of the Solicitor-General in *Rengasamy* that was rejected by Bertram CJ.

Dayaratne is a significant improvement on *Rengasamy* in attempting to do away with the injustice and illogicality of imputing an artificial intention from an artificial imputation of knowledge. It is also laudable for requiring a very high degree of intoxication before Section 86 will negate the intention forming an essential element of a crime. However, by endorsing Bertram CJ’s rulings on the first class of cases, *Dayaratne* left untouched the low degree of intoxication that his Lordship considered sufficient to trigger the imputation of knowledge under Section 86.¹⁰³

Thus, while the judges in *Rengasamy* and *Dayaratne* may have done their best to interpret Section 86 in accordance with the wishes of its drafters, their interpretations remain flawed in one way or another due to the ambiguities inherent in the provision. The remedy therefore lies in amending Section 86. While it is beyond the scope of this article to fully canvass the best formulation for voluntary intoxication in the IPC, a few thoughts and suggestions will not be out of place.¹⁰⁴

Over the past two centuries, the common law and penal codes of various legal systems have adopted various positions in respect to liability for offences committed while in a state of voluntary intoxication.¹⁰⁵ Those positions can be divided roughly into one of three options:

- (1) voluntary intoxication is not a defence even if it negates the subjective fault elements for the offence committed;¹⁰⁶
- (2) voluntary intoxication is a defence for crimes of specific intent, but not basic intent. If the intoxication negates the specific intent required for an offence, the offender will be acquitted of this offence but will liable to be convicted of any lesser included offence which involves either basic intent or an objective fault element;¹⁰⁷ and

¹⁰² The provision is reproduced in full in note 77 above.

¹⁰³ For instance, in the later case of *Jayathilake v. Attorney General*, (2003) 1 Sri LR 107, the Sri Lankan Court of Appeal, citing *Rengasamy* (at 110–111) held that s 86 ‘applies to all cases of self-induced intoxication in any degree, so long as the offence in question specifies some definite knowledge or intent as an essential ingredient’.

¹⁰⁴ For a comprehensive discussion on reforming s 86 of the IPC, see W.C. CHAN, S. YEO AND M. HOR, *CRIMINAL LAW FOR THE 21ST CENTURY. A MODEL CODE FOR SINGAPORE* (Academy Publishing, 2013), Chapter 7.4. Voluntary Intoxication.

¹⁰⁵ For an excellent study, see G. Ferguson, ‘Intoxication’ in W.C. CHAN, B. WRIGHT AND S. YEO (eds), *CODIFICATION, MACAULAY AND THE INDIAN PENAL CODE: THE LEGACIES AND MODERN CHALLENGES OF CRIMINAL LAW REFORM* (Ashgate Publishing Limited, 2011), p 257.

¹⁰⁶ This was arguably what the Code drafters intended for s 86: see p 17 (to check) above. Intoxication is not a defence to crimes of objective fault because the reasonable person is not a voluntarily intoxicated person.

¹⁰⁷ This is the current English common law position, and broadly parallels the interpretation given to s 86 by the Indian and Sri Lankan courts.

- (3) voluntary intoxication is a defence for any subjective fault crime (such as intent or knowledge) if the intoxication negates that subjective state of mind. In lieu of conviction for a subjective fault offence, the offender will be liable to be convicted of *either* a lesser included offence that includes an objective fault element; *or* a new separate offence of criminal intoxication.¹⁰⁸

There are weaknesses and disadvantages with each of these options. It is submitted that option one is too narrow. Option two is too narrow as well and is also illogical and difficult to apply. Option three (or some variation of it) constitutes the most principled and fairest approach to the issue of voluntary intoxication. The major advantage of introducing a new, special criminal intoxication offence is that it meets the legitimate public concern that persons who commit offences as a result of self-induced intoxication deserve to be punished.

B. Intoxication and ‘s 300 fourthly’ murder

There is another ruling in *Rengasamy* that, while not directly concerned with Section 86 of the IPC, has a significant bearing on the impact that Section 86 on the scope of ‘murder’. Briefly, Section 300 of the IPC recognises four types of *mens rea* for murder, with the first three requiring proof of specified types of intention, and the fourth requiring proof of a specified type of knowledge.¹⁰⁹ Having interpreted Section 86 in the way described above, Bertram CJ had to attend to the concern that Section 86 could be relied upon in Section 300 cases that involved knowledge-based *mens rea* to convict and execute a person for murder. As the Solicitor-General in *Rengasamy* put it: the interpretation given to Section 86 by Bertram CJ “*makes liable to be hanged a man who had in fact entertained no murderous intention, simply on the basis of a supposed condition of knowledge, which he had not in fact possessed, but which the law has artificially imputed to him*”.¹¹⁰

¹⁰⁸ See the *Criminal Law Consolidation Act 1935* (South Australia), s 268, for an example of this option.

¹⁰⁹ Section 300 (or s 294 of the Sri Lankan Penal Code) reads: Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or

Secondly – 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, or

Thirdly – 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

Fourthly – 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.

¹¹⁰ (1924) 25 NLR 438 at 443, as paraphrased by Bertram CJ.

Acknowledging the strength of this criticism, Bertram CJ's solution was to heavily limit the cases in which Section 300 fourthly could operate. His Lordship said:

In my opinion, [s 300 fourthly] is not an enactment of general application, but was designed to provide for a particular case, which, if unprovided for, would have left the Code incomplete. That case was the case of a man who has no intention to injure anyone in particular, but who deliberately takes a risk, which may involve the infliction of death on some person or persons undetermined. A typical example of this class of case is that of the man who fires [a cannon into a crowd of persons as provided for in illustration (d) to s 300]¹¹¹ or charges with a motor car down a crowded street.¹¹²

This is a highly restrictive confinement of the scope of Section 300 part four but it has found support in some later Indian and Malaysian¹¹³ case authorities. As one judge has said, the provision “*contemplates the doing of an imminently dangerous act to people in general and not the doing of any act to any particular individual.*”¹¹⁴

This restrictive interpretation of the fourth clause in Section 300 may be criticised for giving undue weight to illustration (d) that accompanies the Section. As a matter of basic statutory interpretation, the law is contained in the main provision; illustrations are subservient to the provision - they serve the provision and not circumscribe it.¹¹⁵ Examining Section 300 fourthly, there is nothing whatsoever in its wording to suggest that it is limited to cases where the risk of death is to some person or persons undetermined. It is also telling that in *Rengasamy* itself, Bertram CJ backtracked on his position when he gave some case examples where the restriction would not apply. These were a mother exposing her child to danger;¹¹⁶ and a man who, from bravado and without an intention to injure, fires a gun in the direction of another person who he has had an altercation. For the purposes of this article, the point is that, since Section 300 fourthly cannot be restricted in the way proposed in *Rengasamy*, the concern remains that there could be a fair number of cases where a person is convicted of the capital crime

¹¹¹ Although the words in parenthesis do not appear in the quotation, it can be safely assumed that his Lordship meant to include them.

¹¹² (1924) 25 NLR 438 at 443-444, and agreed to by De Sampayo J (at 447) and Garvin AJ (at 448).

¹¹³ The Malaysian Penal Code is borrowed from the IPC and has an identical provision to s 300 fourthly.

¹¹⁴ See *Public Prosecutor v. Mahfar bin Sairan*, (2000) 4 MLJ 791 at 803, approving the views in *RATANLAL AND DHIRAJLA'S LAW OF CRIMES* (Bharat Law House, 24th Ed, 1997) at p 1279. See also *KALEGURA PADMA RAO V. STATE OF A.P.*, (2007) 12 SCC 48 : AIR 2007 SC 1299.

¹¹⁵ Cf. The courts have had occasion to reject an illustration on the ground of repugnancy to the provision itself: see notes 24 and 25 above and accompanying main text.

¹¹⁶ His Lordship obtained this example from H.S. GOUR, *PENAL LAW OF INDIA* (2nd ed), at pp 1343-1345.

of murder based on imputed knowledge. The remedy, it is submitted, lies not in the interpretation of Section 300 fourthly but in amending Section 86.

V. PROVOCATION

Provocation is recognised as a partial defence to murder under Exception 1 to Section 300 of the IPC.¹¹⁷ If successfully pleaded, the accused will be convicted of the lesser offence of culpable homicide not amounting to murder. This article will discuss two types of provocation that are seldom featured in case law, namely, hearsay provocation and self-induced provocation.

A. Hearsay provocation

As the name suggests, hearsay provocation comprises provocative conduct which the accused did not personally see or hear, but was reported to them by a third party. Exception 1 is silent on whether this type of provocation can be relied on in support of the defence. Although few in number, there are case laws which recognise hearsay provocation provided the accused had reasonable grounds to believe that the provocation had actually occurred.

The Sri Lankan case of *Gamini Silva v. Attorney General*¹¹⁸ is a good example. *V* was an elderly villager who had the habit of making sexual advances on women. A month before the killing, *V* had gone to *D*'s house and inquired about *V*'s wife from his mother-in-law. On hearing this, *D* had reprimanded *V* and chased him away. On the evening before the killing, *V*'s wife had gone to a shop near their home to purchase some coconuts. Soon after, *D* heard her cries of distress, and when she returned home, he questioned her as to the reason for her cries. After some resistance, she told him that *V* had made some improper advances towards her at the shop. The next morning, *D* was returning from the smithy when, a few blocks away from his home, he heard the cries of his wife. On seeing *V* coming out of his home, *D* recounted the events of the previous evening, lost his self-control and killed *V* with his katty. The main issue at the trial and on appeal was whether the time interval between his wife informing *D* of *V*'s advances the evening before and the time of the killing the next morning was so lengthy that *D* had time to regain his self-control. For present purposes it is noted that both the trial and appellate courts accepted without question as provocation the wife informing *D* about *V*'s behaviour at the shop. This constituted hearsay provocation since *D* had not witnessed that incident. However, the courts were correct to recognise the event as provocation because there were other circumstances witnessed by *D*, which made his wife's story reasonable. These were *D*'s previous encounter with *V* a month prior to the killing and hearing his wife's cries from the shop.

¹¹⁷ This is Exception 1 to s 294 of the Sri Lankan Penal Code.

¹¹⁸ See *Gamini Silva v. Attorney General*, (1998) 3 Sri LR 248.

Another example is the Indian case of *Gohra v. Emperor*.¹¹⁹ The Punjab High Court there considered the English case of *R. v. Fisher*¹²⁰ where a father had killed a man whom he heard had sodomised his young son. In conformity with the English common law, the court in *Fisher* rejected the defence of provocation on the ground that the accused had to have seen the provocative conduct.¹²¹ The Punjab High Court held that, had the case been tried under the IPC, the defence of provocation would also have failed because the accused had sufficient time to cool. As for being informed of the act of sodomy, the court opined that this amounted to provocation because the accused had heard of it from several people and had received confirmation from the person who had actually witnessed the incident.

The stance taken in *Gamini Silva* and *Gohra* is to be preferred to the English common law. As illustrated by these cases, certain forms of hearsay provocation could have as great an effect on the accused as provocation done in their sight or hearing. Indeed, there may be occasions when the evidence of hearsay provocation may actually be stronger than provocation that happens in the accused's presence. From an evidentiary standpoint, in the latter type of cases, the only evidence may be the word of the accused that it had occurred. In contrast, where a third party has informed the accused of the provocation, there is at least the possibility of that party testifying to the fact of the provocation. Furthermore, while it may generally be true that provocation done in someone's presence is likely to be graver than when done in their absence, it need not always be so. For instance, an intensely provocative incident performed in the accused's absence, such as raping or murdering a loved one, may more readily cause a loss of self-control than a moderately provocative incident done in the accused's presence, such an assault or an insult.

Certainly, the English common law is rightly concerned that recognition of hearsay provocation may generate widespread killings arising from mere accusations or confessions. This would be correct if hearsay provocation were to be considered without any qualification. However, the decisions in *Gamini Silva* and *Gohra* show that our courts will only recognise hearsay provocation provided the accused believed on reasonable grounds both that the provocation had occurred and that the deceased had perpetrated it.

¹¹⁹ See *Gohra v. Emperor*, (1890) PR No. 7 of 1890. See also *Chanan Khan v. Crown*, 1942 SCC OnLine Lah 101 : 1943 Cri LJ 595.

¹²⁰ *R. v. Fisher*, (1837) 8 C & P 182.

¹²¹ See also *R. v. Kelly*, (1848) 2 Car & Kir 814; *R. v. Pearson*, (1835) 2 Lew CC 216. For a critique of this aspect of the English common law, see D. Lanham, *Provocation and the requirement of presence* (1989) 13 CRIMINAL LAW JOURNAL 133.

B. Self-induced provocation

The first proviso to Exception 1 to Section 300 of the IPC expressly disallows the defence where the provocation had been 'sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person'. A distinction is drawn between cases where the accused had sought the provocation and cases where they had voluntarily offered the provocation. In the former type of case, *D* goes deliberately in search of the provocation although he or she may not have offered any provocation to *V*. An example of this is where an aggrieved husband, upon discovering that his wife is committing adultery, follows her to the place where she meets her paramour and kills him.¹²² In the latter type of case, *D* provokes *V* into provoking *D* in turn. An examples is where *D* had himself provoked a quarrel and ensuing fight with *V*,¹²³ and where *D* had uttered highly inflammatory remarks to *V* which prompted *V* to retort back at him.¹²⁴ Arguably, the Code's drafters were unduly pedantic in making this distinction since the notion of seeking the provocation is sufficiently wide to cover cases where *D* had offered provocation. The crucial factor under the proviso appears to be that *D* must have sought or offered the provocation 'as an excuse for killing or doing harm to any person'. Under this interpretation, the component of 'as an excuse for killing' applies to cases where the provocation was sought as well as to those where the provocation was offered.

However, this interpretation was rejected by the Sri Lankan Supreme Court in *R. v. Ridley de Silva*.¹²⁵ Koch J there held that the phrase 'as an excuse for killing or doing harm to any person' was restricted to cases where *D* had voluntarily provoked *V* into provoking *D* in turn, and did not apply to cases where *D* had sought the provocation. In that case, *D* and *V* were in the employ of *H*. Before the fatal incident, *D* had told *H* that, although *V* was very respectful in *H*'s presence, he was a 'great rogue' because he thieved behind *H*'s back. On learning of this, *V* had made an indecent remark accompanied by an equally indecent gesture at *D*, whereupon *D* lost his self-control and shot *V* fatally. Koch J held that on these facts, the defence of provocation was excluded because *D* had sought the provocation, and it was unnecessary to prove in addition that he had done so as an excuse to kill or harm *V*. In support of his decision, Koch J gave the illustration of a person who slaps another thereby courting a kick in return, after which he kills the other person. His Lordship declared that in such a case the defence of provocation should 'be discounted by the fact that the treatment he complains of was the necessary result of his own seeking, the *causa causans*'.¹²⁶

¹²² For example, see *Mehra Mistak v. Emperor*, 1933 SCC OnLine Lah 73 : AIR 1934 Lah 103; *Kanhaiya Lal v. State*, 1952 SCC OnLine MP 214 : AIR 1953 MB 243.

¹²³ For example, see *Kusta Balsu Kandnekar v. State*, 1985 SCC OnLine Bom 328 : 1986 Cri LJ 662.

¹²⁴ For example, see *Shyama Charan Sri Ram Saran v. State*, 1968 SCC OnLine All 295 : AIR 1969 All 61.

¹²⁵ (1936) 38 NLR 251.

¹²⁶ *Ibid* at 253.

The ruling in *Ridley de Silva* may be criticised on several fronts. First, it is submitted that there is too fine a distinction between cases where *D* had sought the provocation and those where they had voluntarily provoked the provocation. As suggested earlier, the former notion is sufficiently wide to cover the latter. Secondly, even if such a distinction could be made, one would be hard pressed to explain why a person who sought the provocation was so much more blameworthy than one who volunteered the provocation. To the contrary, if a choice had to be made, one would have thought that a person who voluntarily provoked another was more blameworthy than one who merely sought the provocation. Thirdly, the facts in both *Ridley de Silva* and the illustration given by Koch J appear to be cases of voluntary provocation and not of seeking the provocation.¹²⁷ Thus, the learned judge's reasoning was based on a wrong factual premise.

That said, rejecting the ruling in *Ridley de Silva* does not mean that *all* cases of self-induced provocation where the 'excuse to kill or harm another person' component was absent, will successfully support the defence. Put in another way, it does not follow that, just because the self-induced provocation in a given case was not excluded by the first proviso to Exception 1, such provocation will be invariably recognised by the courts. This is because the wording of the proviso shows clearly that it is confined to cases where the accused had *deliberately* sought the provocation or voluntarily provoked the deceased as an excuse to kill or harm him or her. Since the proviso is silent about cases where the accused lacked such deliberation, it is open to the courts to develop an approach to deal with them. In this regard, the approach devised by the Privy Council in *Edwards v. R.*,¹²⁸ an appeal from Hong Kong, for cases where the accused had merely risked being provoked, as opposed to deliberately courting the provocation as an excuse to harm the provoker, has much to commend itself.

In *Edwards* *D* had admitted to blackmailing *V*. He claimed that as a consequence of his act of blackmail, *V* had verbally abused and attacked him with a knife, whereupon *D* lost his self-control and killed him. On the facts, *D* had clearly not sought the provocation as an excuse to kill or injure *V* since his intention was solely to blackmail *V*. The Privy Council held that such a situation could ground the defence notwithstanding that the provocation had been induced by the criminal act of *D*. Lord Pearson, who delivered the judgment of the court, explained:

On principle it seems reasonable to say that –

- (1) a blackmailer cannot rely upon the predictable results of his own blackmailing conduct as constituting provocation ... and the predictable results may include a considerable degree of hostile reaction by the person sought

¹²⁷ They are akin to the facts in the Indian case authorities referred to in notes 126 and 127 above.

¹²⁸ 1973 AC 648 : (1972) 3 WLR 893, and affirmed by the English Court of Appeal in *R. v. Johnson*, (1989) 1 WLR 740 : (1989) 2 All ER 839. The courts in both *Edwards* and *Johnson* were dealing with statutory provisions on provocation which were silent on self-induced provocation.

to be blackmailed, for instance vituperative words or even some hostile action such as blows with a fist;

- (2) but if the hostile reaction by the person sought to be blackmailed goes to extreme lengths it might constitute sufficient provocation ...¹²⁹

Applying the above explanation to the facts before it, the Privy Council held that *V*'s attack with a knife was an extreme reaction and consequently an unpredictable result of *D*'s blackmail. Accordingly, the attack could amount to sufficient provocation. It is observed that Lord Pearson's test of predictability is objective in nature: the question is not whether *D* actually foresaw the possibility of a hostile reaction approximating *V*'s conduct but whether a reasonable person might have foreseen such a reaction.¹³⁰

If one were to apply the approach in *Edwards* to the facts in *Ridley de Silva*, the likely result would be that the accused would have been denied the defence of provocation. This is because *V*'s hostile reaction towards *D* (a rude insult and gesture) would have been a predictable result of *D* informing their mutual employer that *V* was a 'great rogue'. Accordingly, it was not open to *D* to contend that *V*'s provocation was sufficient for him to kill *V*. It is noted that this was the desired outcome of the court in *Ridley de Silva*. The same result would transpire in Koch J's illustration of a person who slapped another who reacted by kicking him back. Indeed, his Lordship's reasoning that *D* should be denied the defence because *V*'s kicking 'was the necessary result of his own seeking' is supportive of the approach in *Edwards*. This is so if a 'necessary result' is equated with a 'predictable result'. Were the illustration to be altered so that, instead of just kicking, the other person had pulled out a knife and tried to stab *D*, this could constitute an unpredictable result amounting to sufficient provocation.

There is an Indian case authority that follows a similar approach to that taken in *Edwards*. This is the case of *State of Karnataka v. Kamalaksha*,¹³¹ which was decided by the Karnataka High Court. In this case, *D* had visited the wife of *V* while *V* was at work and thereby risked provoking *V*. Upon discovering this occurrence, *V* confronted *D* and uttered the filthiest abuse at *D* for two hours and then attacked *D* with a knife. *D* reacted by losing his self-control and killing *V*. In these circumstances, the court was prepared to admit the defence of provocation. All said, the Indian courts would be wise to avoid the Sri Lankan decision in *Ridley de Silva*, and to expressly adopt the approach developed by *Edwards*

¹²⁹ *Ibid* at 658.

¹³⁰ See A. Ashworth, *Self-induced Provocation and the Homicide Act* [1973] CRIMINAL LAW REVIEW 483 at 486–487. In *R. v. Johnson*, (1989) 1 WLR 740 : (1989) 2 All ER 839 at 842, the English Court of Appeal, after quoting the above stated passage by Lord Pearson in *Edwards*, went on to hold that "the jury would have to consider all the circumstances of the incident, including all the relevant behavior of the defendant, in deciding ... whether the provocation was enough to make a reasonable man do what the defendant did."

¹³¹ *State of Karnataka v. Kamalaksha*, 1977 SCC OnLine Kar 189 : 1978 Cri LJ 290.

to deal with cases where the accused's conduct created a risk of their being provoked by the deceased.

VI. SUDDEN FIGHT

The defence of 'sudden fight' is recognised as a special exception to murder under Exception 4 to Section 300 of the IPC.¹³² If successfully pleaded, the accused will be convicted of culpable homicide not amounting to murder. As its name suggests, the killing must have occurred in the course of an unexpected fight where tempers are frayed. Exception 4 reads as follows:

Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation – It is immaterial in such cases which party offers the provocation or commits the first assault.

The ensuing discussion will consider two issues involving this exception that have come before the Sri Lankan courts. The first concerns how the Exception should operate in cases where members of the police force are involved in a sudden fight. The second concerns whether it is possible to form a 'common intention' as envisaged under Section 34 of the IPC in the course of a sudden fight.

A. Fights involving the police

In *Doole v. Republic of Sri Lanka*,¹³³ the Sri Lankan Court of Appeal considered a submission that Exception 4 was confined to fights between civilians exclusively and was unavailable in fights between the police and civilians. The facts were that *V*, a police inspector, and several constables had set out to arrest *D* in connection with an attempted murder. The police party surrounded a house where *D* and *H*, his confederate, were hiding. When *D* and *H* tried to escape from the back of the house, they were confronted by *V* and *A*, a police constable. *D*, who was armed with a pistol, threatened to shoot the police if they approached him. *A* had then grabbed *H* and held him between himself and *D*. Thereafter *D* had fired a fatal shot at *V* who was beside *A*. *V* had also fired simultaneously at *D* but missed him. *D* was charged with murdering *V* and, after a trial, was convicted of culpable homicide not amounting to murder. He appealed against his conviction on the ground of misdirections by the trial judge on his pleas of private defence and sudden fight. The Court of Appeal dismissed the appeal on finding that there had been no such misdirections. With regard to private defence, the

¹³² This is Exception 4 to s 294 of the Sri Lankan Penal Code.

¹³³ (1978-79) 2 Sri LR 33.

court held that as the police were lawfully attempting to arrest *D* at the time and *D* knew they were police, they were not committing any offence.¹³⁴ Consequently, *D* was not entitled to plead private defence against the police since the right of private defence is only available against an offence.¹³⁵

On the issue of sudden fight, the Court of Appeal had this to say:

This exception deals with a provocation not covered by the first exception under [s 300]. It is founded upon the same principle for in both there is the absence of premeditation, but while in one case there is the total deprivation of self-control, in this there is only the heat of passion which clouds the sober reason of 'a man and urges him to deeds which he would not otherwise do'. 'Sudden fight' implies mutual provocation and blows on each side. The homicide committed is not traceable to unilateral provocation. A fight suddenly takes place for which both parties are more or less to blame. It may be that one of them starts it, but if the other has not aggravated it by his own conduct, it would not have taken the serious turn it did. There is then mutual provocation and aggravation and it is difficult to apportion the share of blame which attracts to each fighter. They are, therefore, both equally liable.¹³⁶

Having given this description and the underlying rationale of Exception 4, the court applied the law to the evidence in the case before it and concluded that the jury could properly have determined that the elements of the Exception were proven. In particular, *D* could have been provoked by witnessing the way his confederate *H* was manhandled by *A*, the police constable. The jury could also have found that *D* had reacted in the heat of passion upon a sudden quarrel and without having taken advantage as *V* himself was armed with a loaded gun. Additionally, the jury might have decided that *D* had not acted in a cruel or unusual manner as he had fired only once at *V*. The court concluded its judgment by rejecting counsel's submission that Exception 4 applied only to fights between civilians. It noted that there was nothing in the wording of the Exception restricting its scope in this manner and accordingly, the Exception was available to fights between civilians and the police, against a mixed party of police and civilians, or among the police themselves.¹³⁷

The decision in *Doole* leaves much to be desired. Generally speaking, there was no problem with the court's proposition that Exception 4 could cover cases of

¹³⁴ *Ibid* at 52-53. For a similar ruling by the Sri Lankan Court of Appeal, see *R. v. Wannaku Tissahamy*, (1989) 51 NLR 402.

¹³⁵ By virtue of s 97 of the IPC. This is s 90 of the Sri Lankan Penal Code. See further the main text accompanying note 22 above.

¹³⁶ (1978-79) 2 Sri LR 33 at 54 *per* Colin-Thome J and agreed by the other two judges.

¹³⁷ *Ibid* at 55.

sudden fights involving the police. However, it is submitted that this proposition should have been restricted to cases where the acts of the police were *unlawful*. Without such a qualification, criminals could get away with murder by putting up a fight and using fatal force against police personnel who were lawfully attempting to arrest them, as occurred in *Doole*. In these circumstances, there are several reasons why the police would not fit the description and rationale of sudden fight as described by the court in *Doole*. First, since the conduct of the police was lawful, there is no question of their blameworthiness. It is therefore difficult to view the police as having a ‘share of blame’ and being ‘equally liable’ as the other party. Secondly, permitting a plea of sudden fight to succeed when a plea of private defence against the police was denied smacks of permitting exculpation of the accused through the backdoor. Thirdly, given that the police’s conduct was lawful, permitting Exception 4 to succeed would run counter to the IPC provision that does not recognise provocation that was ‘given by anything done by a public servant in the lawful exercise of the powers of such public servant’.¹³⁸

That said, one can understand why the Court of Appeal in *Doole* reached the decision it did since Exception 4, as presently worded, is silent on sudden fights involving the police in the lawful exercise of their duties. This situation could be rectified by adding the following proviso and accompanying after the Exception:

The above Exception does not apply where the fight involved a public servant in the lawful exercise of the powers of such public servant.

What this addition does is to exclude the operation of the Exception in cases where public servants, such as the police, were exercising their duties lawfully. However, it allows the Exception to apply to cases where the public servants were acting unlawfully when they engaged in a sudden fight with the accused.

B. Common intention and sudden fight

In a prosecution of several persons for murder in the context of a sudden fight, is it possible for them to have formed a common intention to kill pursuant to Section 300 read with Section 34 of the IPC?¹³⁹ This question was answered in the affirmative, albeit guardedly, by the Sri Lankan Court of Appeal in two cases. In the earlier case of *M.J. Fernando et al v. R.*¹⁴⁰ the court observed that since the fight had to be a ‘sudden fight’ on a ‘sudden quarrel’ and ‘without premeditation’, common intention, if it was to be formed at all, must have occurred

¹³⁸ Second proviso to Exception 1 to s 300 of the IPC. It is the second proviso to Exception 1 to s 294 of the Sri Lankan Penal Code.

¹³⁹ These are s 294 and s 32 respectively of the Sri Lankan Penal Code.

¹⁴⁰ *M.J. Fernando et al v. R.*, (1952) 54 NLR 255.

‘in the twinkling of an eye’.¹⁴¹ This observation was subsequently affirmed in *Wijesinghe v. State*¹⁴² with the Court of Appeal adding that:

as a common intention to kill can be formed in the course of a sudden fight only in exceptional circumstances, the ... trial judge’s [directions] should [be] subject to a most careful direction on common intention and of the impact of a sudden fight on the question of common intention.¹⁴³

In addition, the observation can be made that, while the fight must have occurred suddenly, its duration could be lengthy, thereby increasing the opportunity for members of a party to the fight to form a common intention to kill.

VII. CONCLUSION

This article reveals the rich source of case law on the IPC that is to be found in Sri Lanka. From a study of the small selection of cases featured here, significant problems concerning various defences have been identified and resolved. They include a clearer understanding of ‘good faith’ in exceeding private defence; highlighting the role of necessity in medical cases; recognition of insane automatism in the scheme of the insanity defence; showing up the flaws of the provision on voluntary intoxication as interpreted by the courts; categorising the types of self-induced provocation into those which can and cannot serve to exclude the defence; and the way the plea of sudden fight ought to be treated where the fight involves members of the police force.

As this article shows, even if one disagrees with the views of the Sri Lankan courts, studying them allows a sharper inquiry into the meaning and workings of the IPC provisions. This is because nothing quite compares with testing the efficacy and judicious nature of a Code provision than applying it to a real life situation. While some problem areas of the law can be readily rectified by the courts, it may not be possible to do so for other areas due to the constraints imposed by the language of the IPC. For these areas, the legislature should step in to amend the Code, as has been suggested for some of the issues discussed in this work.

¹⁴¹ M.J. Fernando et al v. R., (1952) 54 NLR 255 at 259.

¹⁴² *Wijesinghe v. State*, (1984) 1 Sri LR 155.

¹⁴³ *Wijesinghe v. State*, (1984) 1 Sri LR 155 at 165.