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Legal System and Method
Question:
Critically evaluate the development of common law principles applicable to the defence of provocation in criminal law from the decision in Mancini v DPP [1942] AC 1 to Mascantonio v R (1995) 183 CLR 58. Assess the degree to which the common law has proved inflexible in responding changing societal needs and expectations. Are there other legal means of achieving substantive justice?

At the time of the case of Mancini the concept of provocation as a defence to murder was already a well established one dating back centuries. It originated from the days when men bore arms and engaged in quarrels of violence that often resulted in a homicide being committed. For provocation to be an ample defence to murder it needed to be something which incited immediate anger, or "passion" and which overcame a person's self control to such an extent so as to overpower or swamp his reason. What this something can be has been the subject of many views through the centuries, and these views have strongly depended upon the type of person whom the law has regarded as deserving extenuated consideration when provoked to kill. In the words of Viscount Simon "the law has to reconcile respect for the sanctity of human life with recognition of the effect of provocation on human frailty. " In this regard the difficult concept of the "reasonable man" or the "ordinary man" has developed and with it the legal doctrine that provocation must be such as would not only cause the person accused to behave as he did but as would cause an ordinary man to so lose control of himself as to act in the same sort of way. It is therefore interesting to examine how the doctrine of common law in relation to provocation has responded to changing societal needs and values. It also provides a useful case study in which the development of common law doctrine can be observed. It is useful to conduct a case-by-case analysis of the rule of provocation as a defence to murder in order to more effectively observe the legal evolution that has taken place.

In the case of Mancini v DPP [1942] AC 1 the appellant had been convicted for murder after stabbing a man to death in a club. The appellant's counsel contended that the trial judge should have directed that the jury was open to find provocation to reduce the appellant's conviction to manslaughter. Lord Simonds provided direction upon what kind of provocation would reduce murder to manslaughter. He said that the provocation must temporarily deprive the provoked individual of self-control and in deciding this regard must be had to the following circumstances: the nature of the act which causes death, the time which elapsed between the provocation and the act which caused death, the offender's conduct during that interval and all other circumstances which indicate his state of mind. It is here that the well known characteristics of "an unusually excitable or pugnacious" person are excluded from amounting to provocation. Lord Simonds also said that "the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter."

The case which was to follow Mancini was Holmes v DPP [1946] AC 588. In this case a man killed his wife after a confession of unfaithfulness on her behalf. He was convicted of murder and appealed that the defence of provocation should have been left open to the jury. In his judgment of the case Viscount Simon stated that the crux of the case was whether "mere words can ever be regarded as so provocative to a reasonable man as to reduce to manslaughter felonious homicide committed upon the speaker in consequence of such verbal provocation." "Mere words" however were attributed with having more than one meaning. There were words which were provocative by insulting or abusive language, and words that conveyed information of a fact, or an alleged fact.
In regards to verbal abuse Viscount Simon made his opinion clear; "the law expects a reasonable man to endure abuse without resorting to fatal violence," and in regards to the admission of adultery he also expressed his opinion as "a sudden confession of adultery without more can never constitute provocation of a sort

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which might reduce murder to manslaughter." Though these statements were indeed firm, Viscount Simon himself recognised the need for flexibility in the common law in climates of social change, saying "the application of common law principles in matters such as this must to some extent be controlled by the evolution of society." Indeed, the need for change would in fact alter these common law principles in the years to come.

The flexibility of the common law principles relating to provocation was examined in Bedder v Director of Public Prosecutions [1954] 2 All ER 801. In this case the appellant was a sexually impotent man who had been taunted by a prostitute regarding his inabilities, whom he then killed. Once again it was Lord Simonds who delivered the conclusive judgment in which he referred to his decisions in Mancini and Viscount Simon's decisions in Holmes. Despite Viscount Simon's acknowledgment of the need for flexibility in the common law, it would seem that the time was not ripe for it. Lord Simonds ruled that the test in Mancini and Holmes would stand, despite arguments for the appellant that the "reasonable man" should be endowed with the appellant's physical "peculiarities." Lord Simonds felt that this would make "nonsense" of the objective test that he referred to in Mancini. It would seem that physical defects held no sway on the scales that balanced "human frailty" against "the sanctity of human life."

R v Enright [1941] VR 663 would further influence the balance of the scales. In this case an illegitimate man had a particular sensitivity to the word "bastard." This was apparently the result of his illegitimacy and a brain injury, or mental disorder. Enright killed a man who had called him "bastard" a number of times. The appellant contended that the defence of provocation should have been left to the jury. Chief Justice Herring of the Supreme Court of Victoria did not agree with this contention. He referred to the now well established "reasonable man" test, however preferred to refer to it to the "ordinary man" test. He also stated that the concept of the "ordinary man" meant discarding any obsession that Enright had with the word "bastard", and ignoring any mental disorder that he may have had. Herring used Bedder as an authority for this decision. In Herring's view the provocation that Enright was exposed to (namely that of abusive language and an assault) would not have led the "ordinary man" to do what Enright did and a competent jury would not have found provocation. Despite the apparent inflexibility of this decision some concessions were made. Herring conceded that the "ordinary man" would in fact be endowed with the knowledge of illegitimacy and be "ordinarily" sensitive to this fact. The "ordinary man" could in effect stand in the shoes of the accused.

Parker v The Queen (1963-64) 111 CLR 610 was the case of a man who killed his wife's lover, after she left him and their children for the deceased. Chief Justice Dixon of the Supreme Court of New South Wales delivered the primary judgment. It is interesting to note at this point that legislation had been enacted in New South Wales with regard to provocation. This legislation re-iterated many of the principles established at common law. Dixon, however, believed that the common law principles still held some influence, and in this case the main focus was premeditation and its relation to provocation. In deciding this question Dixon used past case law, and also in his judgment stated that he could not adhere to English policy regarding some cases.

The next case to examine provocation was an English case. In Director of Public Prosecutions v Camplin a boy killed a man after being "buggered" by him, and then laughed at. The main issue to arise was whether the "reasonable man" test be applied to Camplin or "a reasonable boy of 15" test. In his judgment Lord Diplock distinguished this case from Bedder (as being aged 15 is not an abnormal physical characteristic), and ruled that the cases of Bedder, Mancini, and Holmes no longer held any authority especially after statutory change in England in 1957. He ruled "the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him."

The case of Moffa v The Queen (1977) 138 CLR 601 was similar to Holmes, where

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a wife admitted adultery, however the provocation here was of a more aggressive nature than in Holmes. Moffa's wife called him a "black bastard", and threw nude photographs of herself at Moffa after admitting promiscuity. Chief Justice Barwick took a sympathetic view towards the provocation Moffa was exposed to, and in his judgment stated "it was open to (the jury) to concluded that an ordinary man, placed as was the applicant, would so far lose his self-control as to form an intention at least to do grievous bodily harm to his wife."

The case of R v Dincer [1983] 1 VR 460 would see the issue of ethnicity raised. Out of this case, in a complete turnaround from the views held in Bedder, Justice Lush of the Supreme Court of Victoria ruled that "characteristics of a permanent ... nature, which marked the accused from ... the ordinary man in the community might properly be taken into consideration for the purposes of the "ordinary man" test."

The limits of this new test would be explored in R v Voukelatos [1990] VR 1. In an analysis on the defence of provocation Justice Murphy allows that any beliefs held by the accused, whether they be delusional or otherwise, are relevant to assess the degree of provocation to which the accused was exposed, and the "reasonable man" may be attributed with them. He did, in effect allow "self-induced" provocation.

Finally, the case of Masciantonio v The Queen (1995) 183 CLR 58 appears to attempt to tie of some loose ends regarding provocation, and to a large extent ignores the ramifications of Voukelatos. In judgments delivered by Brennan, Deane, Dawson and Gaudron JJ the ordinary person is clarified: "the characteristics of the ordinary person are merely those of a person with ordinary powers of self-control. They are not the characteristics of the accused, although when it is appropriate to do so because of the accused's immaturity, the ordinary person may be taken to be of the accused's age," they said however, "the provocation must be assessed by reference to relevant characteristics of the accused ... age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history."

Upon examination of the above cases it would appear that the common law has proven quite flexible in responding to changing societal needs and expectations. In the half century from Mancini to Mascantonio English and Australian society has undergone some major changes. Whilst pluralism and multiculturalism are the more obvious changes, there has been changes such as material conditions of dependency, differing patterns of response to threats and violence, and an emphasis on accommodating the position of women and children. Perhaps the key indicator of the flexibility in the common law is the evolution of the "reasonable man" test. We have moved from a position where the reasonable man is the model of prudence presented in torts, to a position where age, gender and ethnicity as well as any other permanent characteristics can be taken into account by the jury in assessing the level of provocation an accused person has been exposed to.

Perhaps the greatest proponent of these changes has been the issue of substantive justice. What constitutes substantive justice is necessarily a subjective opinion, and defined by the standards of society of the time. The law regarding provocation has been analysed, questioned and reformulated a number of times, and the most likely reason for this is to achieve substantive justice in the eyes of the judiciary. Viscount Simon believed that as society advanced one should expect more from its members, tipping the "scales" of provocation in favour of regard for the sanctity of human life. However, it is also true that as our society grows more complex there is a greater understanding of the human character, and greater sympathies for others frailties.

Perhaps the defence of provocation has outlived its usefulness, and justice could be achieved through easier means. However in R v Voukelatos [1990] VR 1 Justice Murphy makes a relevant point that "My own view is that many, if not most jurors would say, and, perhaps with more than a little justification that the law is an ass, and, if not consciously, at least subconsciously, they would dismiss such refinements and decide as they thought to be fair and just in the circumstances." What Justice Murphy failed to explore is the possibility that the same rule may apply to the Judiciary, and it is this observation which suggests

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that substantive justice will manifest itself in our legal system a high proportion of the time.

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