



Sentencing Guidelines Council

Manslaughter by Reason of Provocation

Draft Guideline

FOREWORD

The Sentencing Guidelines Council was created in 2004 in order to frame guidelines to assist courts as they deal with criminal cases across the whole of England and Wales.

The Council receives advice from the Sentencing Advisory Panel which consults widely before tendering that advice. The Council then produces a draft guideline on which it seeks the views of a limited group as provided by the Criminal Justice Act 2003.

This draft guideline stems from a reference from the Home Secretary to the Panel to consider the issue of sentencing where provocation is argued in cases of homicide, and, in particular, domestic violence homicides. For the purpose of describing “domestic violence”, the Home Secretary adopted the Crown Prosecution Service definition.¹ The reference was preceded by the paper ‘*Safety and Justice*’, issued in June 2003, in which the Government stated that there is concern, “that current sentencing in cases of manslaughter by reason of provocation in domestic violence homicides does not adequately reflect the seriousness of the cases and the loss of life, and that the tariff is out of line with levels of sentencing in other cases of homicide and serious violence”. The Government also asked the Law Commission to review the operation of defences in homicide cases with particular reference to cases of domestic violence. The final report of the Law Commission, including recommendations, was published on the Commission’s website in August 2004.²

This guideline is relevant for use where the conviction for manslaughter is clearly founded on provocation alone. There will be additional, different and more complicated matters to be taken into account where the other main partial defence, diminished responsibility, is a factor.

The evidence put before the court in a trial arising from a charge of murder or manslaughter will only be that which is relevant to determining whether an offence has been committed. In many cases to which this draft guideline relates, material relevant to sentence, for example about the relationship between the offender and the victim and the circumstances leading to the death of the victim, will not emerge. This is an additional factor which adds to the complexity of determining the appropriate sentence.

The Council has asked the Director of Public Prosecutions and the Association of Chief Police Officers to consider whether changes can be made to the way in which information is gathered and made available to the prosecutor in order to provide a court with more information than at present.

¹ “Any criminal offence arising out of physical, sexual, psychological, emotional or financial abuse by one person against a current or former partner in a close relationship, or against a current or former family member.”

² Lawcom No 290 at www.lawcom.gov.uk

The Council has broadly accepted the advice of the Sentencing Advisory Panel and it is the intention of the Council that the guideline should maintain sentences at an appropriate level reflecting the loss of a life, the high level of intention and the impact of the provocation.

The advice (and the consultation paper that preceded it) contains further background details. The advice is published alongside this draft guideline. All documents can be found at www.sentencing-guidelines.gov.uk or can be obtained from the Council's Secretariat at 85 Buckingham Gate, London SW1E 6PD.

When the consultation period is concluded, the Council will consider any responses received and then issue a definitive guideline to which every court will have to have regard in accordance with section 172 of the 2003 Act.

A handwritten signature in black ink, appearing to read 'Chris Sainsbury', with a horizontal line underneath.

Chairman of the Council
May 2005

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MANSLAUGHTER BY REASON OF PROVOCATION

A. Statutory Provision

1.1 Murder and manslaughter are common law offences and there is no complete statutory definition of either. 'Provocation' is one of the partial defences by which an offence that would otherwise be murder may be reduced to manslaughter.

1.2 Before the issue of provocation can be considered, the Crown must have proved beyond reasonable doubt that all the elements of murder were present, including the necessary intent (i.e. the offender must have intended either to kill the victim or to cause grievous bodily harm). The court must then consider section 3 of the Homicide Act 1957, which provides:

Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

Although both murder and manslaughter result in death, the difference in the level of culpability creates offences of a distinctively different character. Therefore the approach to sentencing in each should start from a different basis.

B. Establishing the Basis for Sentencing

2.1 The Court of Appeal in *Attorney General's Reference (Nos. 74, 95 and 118 of 2002) (Suratan and others)*,³ set out a number of assumptions that a judge must make in favour of an offender found not guilty of murder but guilty of manslaughter by reason of provocation. The assumptions are required in order to be faithful to the verdict and should be applied equally in all cases whether conviction follows a trial or whether the Crown has accepted a plea of guilty to manslaughter by reason of provocation:

- **first**, that the offender had, at the time of the killing, lost self-control; mere loss of temper or jealous rage is not sufficient

³ [2003] 2 Cr App R (S) 42

- **second**, that the offender was caused to lose self-control by things said or done, normally by the person killed
- **third**, that the offender's loss of control was reasonable in all the circumstances, even bearing in mind that people are expected to exercise reasonable control over their emotions and that, as society advances, it ought to call for a higher measure of self-control
- **fourth**, that the circumstances were such as to make the loss of self-control sufficiently excusable to reduce the gravity of the offence from murder to manslaughter.

Bearing in mind the loss of life caused by manslaughter by reason of provocation, the starting point for sentencing should be a custodial sentence. Only in a very small number of cases involving very exceptional mitigating factors should a judge consider that a non-custodial sentence is justified.

The same general sentencing principles should apply in all cases of manslaughter by reason of provocation irrespective of whether or not the killing takes place in a domestic context.

C. Factors Influencing Sentence

3.1 A number of elements must be considered and balanced by the sentencer. Some of these are common to all types of manslaughter by reason of provocation; others have a particular relevance in cases of manslaughter in a domestic context.

3.2 ***The degree of provocation as shown by its nature and duration*** - An assessment of the *degree* of the provocation as shown by its nature and duration is the critical factor in the sentencing decision.

(a) In assessing the *degree* of provocation account should be taken of the following factors:

- if the provocation (which does not have to be a wrongful act) involves gross and extreme conduct on the part of the victim, it is a more significant mitigating factor than conduct which, although significant, is not as extreme
- **the fact that the victim presented a threat not only to the offender, but also to children in his or her care**

- the offender's previous experiences of abuse and/or domestic violence either by the victim or by other people, and
- any mental condition which may affect the offender's perception of what amounts to provocation
- **the nature of the conduct, the period of time over which it took place and its cumulative effect.**

(b) Whether the provocation was suffered over a *long or short* period is important to the assessment of gravity. The following factors should be considered:

- the impact of provocative behaviour on an offender can build up over a period of time
- consideration should not be limited to acts of provocation that occurred immediately before the victim was killed. For example, in domestic violence cases, cumulative provocation may eventually become intolerable, the latest incident seeming all the worse because of what went before

(c) When looking at the *nature* of the provocation the court should consider both the type of provocation and whether in the particular case, the actions of the victim would have had a particularly marked effect on the offender:

- actual (or anticipated) violence from the victim will generally be regarded as involving a higher degree of provocation than provocation arising from abuse, infidelity or offensive words unless that amounts to psychological bullying
- in cases involving actual or anticipated violence, the culpability of the offender will therefore generally be less than in cases involving verbal provocation
- where the offender's actions were motivated by fear or desperation, rather than by anger, frustration, resentment or a desire for revenge, the offender's culpability will generally be lower

3.3 *The extent and timing of the retaliation* - It is implicit in the verdict of manslaughter by reason of provocation that the killing was the result of a loss of self-control because of things said and/or done. The intensity, extent and nature of that loss of control must be assessed in the context of the provocation that preceded it.

3.4 The *circumstances of the killing* itself will be relevant to the offender's culpability, and hence to the appropriate sentence:

- in general, the offender's violent response to provocation is likely to be less culpable the shorter the time gap between the provocation (or the

last provocation) and the killing - as evidenced, for example, by the use of a weapon that happened to be available, rather than by one that was carried for that purpose in advance or prepared for use

- conversely, it is not necessarily the case that greater culpability will be found where there has been a significant lapse of time between the provocation (or the last provocation) and the killing. Where the provocation is cumulative, and particularly in those circumstances where the offender is found to have suffered domestic violence from the victim over a significant period of time, the required loss of self-control may not be sudden as some experience a “slow-burn” reaction and appear calm
- choosing or taking advantage of favourable circumstances for carrying out the killing (so that the victim was unable to resist, such as where the victim was not on guard, or was asleep) may well be an aggravating factor - unless this is mitigated by the circumstances of the offender, resulting in the offender being the weaker or vulnerable party.

3.5 The *context of the relationship* between the offender and the victim must be borne in mind when assessing the nature and degree of the provocation offered by the victim before the crime and the length of time over which the provocation existed. In cases where the parties were still in a relationship at the time of the killing, it will be necessary to examine the balance of power between one party and another and to consider other family members who may have been drawn into, or been victims of, the provocative behaviour.

Although there will usually be less culpability when the retaliation to provocation is sudden, it is not always the case that greater culpability will be found where there has been a significant lapse of time between the provocation and the killing.

It is for the sentencer to consider the impact on an offender of provocative behaviour that has built up over a period of time.

3.6 **Post-offence behaviour** - The behaviour of the offender after the killing can be relevant to sentence:

- immediate and genuine remorse may be demonstrated by the summoning of medical assistance, remaining at the scene, and co-operation with the authorities
- concealment or attempts to dispose of evidence⁴ or dismemberment of the body⁵ may aggravate the offence.

⁴ *R v Carter* [2003] 2 Cr App R (S) 524

⁵ In *R v Brooks* [2004] 1 Cr App R (S) 53 this was found to be an aggravating factor. It is an aggravating factor for the purposes of setting the minimum term to be served for murder as set out in the Criminal Justice Act 2003, schedule 21.

Post-offence behaviour is relevant to the sentence. It may be an aggravating or mitigating factor. When sentencing, the judge should consider the motivation behind the offender's actions.

3.7 Use of weapons

(a) The Court of Appeal has on many occasions (and in relation to many different types of offence) emphasised that the carrying and use of weapons is an aggravating factor. Courts must consider the type of weapon used and, importantly, whether it was to hand or carried to the scene and who introduced it to the incident.

(b) The use or not of a weapon is a factor heavily influenced by the gender of the offender.⁶ Whereas men can and do kill using physical strength alone, women often cannot and thus resort to using a weapon. The issue of key importance is whether the weapon was to hand or carried deliberately to the scene, although the circumstances in which the weapon was brought to the scene will need to be considered carefully.

The use of a weapon should not necessarily move a case into another sentencing bracket.

In cases of manslaughter by reason of provocation, use of a weapon may reflect the imbalance in strength between the offender and the victim and how that weapon came to hand is likely to be far more important than the use of the weapon itself.

It will be an aggravating factor where the weapon is brought to the scene in contemplation of use *before* the loss of self-control (which may occur some time before the fatal incident).

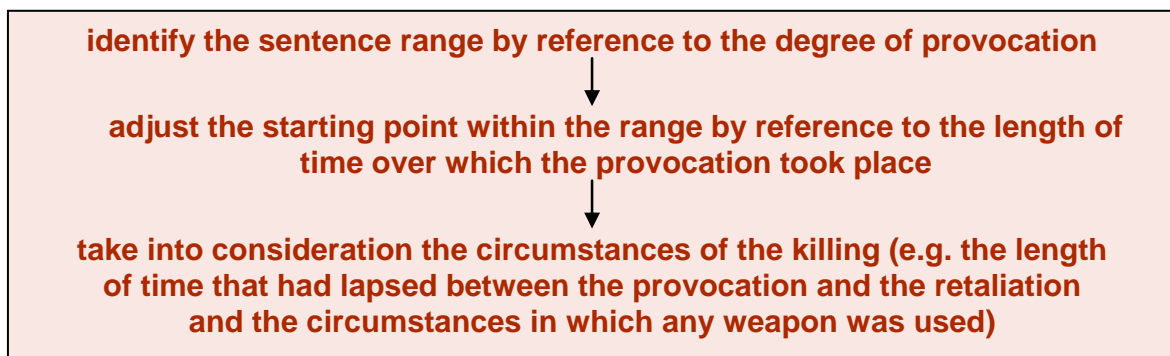
⁶ In the sample cases reviewed by the Panel (as detailed in paragraph 5 of its advice), 8 of the 50 cases of manslaughter by provocation involved a female offender and in all 8 a knife was used.

D. Sentence Ranges and Starting Points

4.1 Manslaughter is a “serious” offence for the purposes of the provisions in the Criminal Justice Act 2003⁷ for dealing with dangerous offenders. In many circumstances, a court will be able to use the sentences for public protection prescribed in the Act when sentencing an offender convicted of the offence of manslaughter by reason of provocation. An alternative is a discretionary life sentence. In setting the minimum term to be served within an indeterminate sentence under these provisions in accordance with normal practice, that term will usually be half the equivalent determinate sentence.⁸

4.2 **Identifying sentence ranges** – The key factor that will be relevant in every case is the nature and the duration of the provocation.

(a) The process to be followed by the court will be:



(b) This guideline establishes that:

- there are three sentencing ranges defined by the **degree of provocation** - low, substantial and high
- within the three ranges, the starting point is based on provocation taking place over a **short period of time**.
- the court will move from the starting point based upon the degree of provocation) by considering the length of time over which the provocation has taken place, and by reference to any **aggravating and mitigating factors**

⁷ Sections 224-230

⁸ R v Szczerba [2002] 2 Cr.App.R.(S) 86

4.3 **The three sentencing ranges**

1. Low degree of provocation:

Principal Features: A low degree of provocation occurring over a short period

Sentence range 10 years - life

Starting Point (on conviction after trial) – 12 years imprisonment

2. Substantial degree of provocation:

Principal Features: A substantial degree of provocation, over a short period

Sentence range 4-9 years

Starting Point (on conviction after trial) - 8 years imprisonment

3. High degree of provocation:

Principal Features: A high degree of provocation, over a short period

Sentence range – if custody is necessary, up to 4 years imprisonment

Starting Point (on conviction after trial) - 3 years imprisonment

4.4 **Aggravating and mitigating factors**

A list of the most important general aggravating factors indicating either a higher than usual level of culpability or a greater than usual degree of harm caused by an offence can be found in the 'Overarching Principles: Seriousness' guideline⁹ published by the Council in December 2004. The guideline also includes mitigating factors that may indicate significantly lower culpability.¹⁰

Many of the various factors that influence sentencing for this offence have the scope to be aggravating in some circumstances and mitigating in others.

⁹ Paragraphs 1.22 and 1.23.

¹⁰ Paragraph 1.25

Possible aggravating factors identified as being particularly relevant to the offence of manslaughter by provocation, are:

subject to paragraph 3.5 above,

- ◇ concealment or attempts to dispose of evidence
- ◇ dismemberment or mutilation of the body

and,

- ◇ offence committed in the presence of a child/children or other vulnerable family member;

Possible mitigating factors include:

- ◇ the offender was acting to protect another
- ◇ spontaneity and lack of premeditation
- ◇ previous experiences of abuse and/or domestic violence
- ◇ evidence that the victim presented an ongoing danger to the offender or another
- ◇ actual (or reasonably anticipated) violence from the victim

4.5 Reduction for a guilty plea

In accordance with normal principles and the guideline issued by the Council, account will be taken of a plea of guilty.