



Sentencing Guidelines Council

**Manslaughter by
Reason of Provocation**

Guideline

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FOREWORD

In accordance with section 170(9) of the Criminal Justice Act 2003, the Sentencing Guidelines Council issues this guideline as a definitive guideline. By virtue of section 172 of the Act, every court must have regard to a relevant guideline. This guideline applies to offenders convicted of manslaughter by reason of provocation who are sentenced after 28 November 2005.

This guideline stems from a reference from the Home Secretary for consideration of 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 guideline applies to sentencing of an adult offender for this offence in whatever circumstances it occurs. It identifies the widely varying features of both the provocation and the act of retaliation and sets out the approach to be adopted in deciding both the sentencing range and the starting point within that range.

This guideline is 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 Council’s Guideline *New Sentences: Criminal Justice Act 2003* recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. Consequently the sentencing ranges and starting points in this guideline take that principle into account.

Guidelines are created following extensive consultation. The Sentencing Advisory Panel first consults widely on the basis of a thoroughly researched consultation paper, then provides the Council with advice. Having considered the advice, the Council prepares a draft guideline on which there is further consultation with Parliament, with the Home Secretary and with Ministers of other relevant Government Departments. This guideline is the culmination of that process.

The Council has appreciated greatly the work of the Sentencing Advisory Panel in preparing the advice on which this guideline has been based and for those who have responded so thoughtfully to the consultation of both the Panel and the Council.

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.” A new definition of domestic violence was agreed in 2004 (and appears in the CPS Policy on Prosecuting cases of Domestic Violence, 2005) “any incident of threatening behaviour, violence or abuse [psychological, physical, sexual, financial or emotional] between adults who are or have been intimate partners or family members, regardless of gender or sexuality.”

The advice and this guideline are available on www.sentencing-guidelines.gov.uk or from the Sentencing Guidelines Secretariat at 85 Buckingham Gate, London SW1E 6PD. A summary of the responses to the Council's consultation also appears on the website.



Chairman of the Council
November 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)*,² 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
- ❑ **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

² [2003] 2 Cr App R (S) 42

- ❑ **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
- ❑ 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
- ❑ discovery or knowledge of the fact of infidelity on the part of a partner does not necessarily amount to *high* provocation. The gravity of such provocation depends entirely on all attendant circumstances.

(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 or prepared for use in advance
- ❑ 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 the other 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.

An offence should be regarded as aggravated where it is committed in the presence of a child or children or other vulnerable family member, whether or not the offence takes place in a domestic setting.

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 evidence or dismemberment of the body may aggravate the offence.

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 a weapon**

(a) In relation to this offence, as in relation to many different types of offence, the carrying and use of a weapon 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. 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).

D. Sentence Ranges and Starting Points

4.1 Manslaughter is a “serious offence” for the purposes of the provisions in the Criminal Justice Act 2003³ for dealing with dangerous offenders. It is possible that a court will be required 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 accordance with normal practice, when setting the minimum term to be served within an indeterminate sentence under these provisions, that term will usually be half the equivalent determinate sentence.

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:

identify the sentence range by reference to the degree of provocation



adjust the starting point within the range by reference to the length of time over which the provocation took place



take into consideration the circumstances of the killing (e.g. the length of time that had elapsed between the provocation and the retaliation and the circumstances in which any weapon was used)

³ Sections 224-230

(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**

MANSLAUGHTER BY REASON OF PROVOCATION

Factors to take into consideration

1. The sentences for public protection must be considered in all cases of manslaughter.
2. The presence of any of the general aggravating factors identified in the Council's Guideline *Overarching Principles: Seriousness* or any of the additional factors identified in this Guideline will indicate a sentence above the normal starting point.
3. This offence will not be an initial charge but will arise following a charge of murder. The Council Guideline *Reduction in Sentence for a Guilty Plea* will need to be applied with this in mind. In particular, consideration will need to be given to the time at which it was indicated that the defendant would plead guilty to manslaughter by reason of provocation.
4. An assessment of the *degree* of the provocation as shown by its nature and duration is the critical factor in the sentencing decision.
5. The intensity, extent and nature of the loss of control must be assessed in the context of the provocation that preceded it.
6. 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.
7. It is for the sentencer to consider the impact on an offender of provocative behaviour that has built up over a period of time.
8. The use of a weapon should not necessarily move a case into another sentencing bracket.
9. 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.
10. 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).
11. 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.

MANSLAUGHTER BY REASON OF PROVOCATION

This is a serious offence for the purposes of section 224 of the Criminal Justice Act 2003

Maximum penalty: **Life imprisonment**

Type/Nature of Activity	Sentence Ranges & Starting Points
<p>Low degree of provocation: A low degree of provocation occurring over a short period</p>	<p>Sentence Range: 10 years – life</p> <p>Starting Point – 12 years custody</p>
<p>Substantial degree of provocation: A substantial degree of provocation occurring over a short period</p>	<p>Sentence Range: 4 – 9 years</p> <p>Starting Point – 8 years custody</p>
<p>High degree of provocation: A high degree of provocation occurring over a short period</p>	<p>Sentence Range: if custody is necessary, up to 4 years</p> <p>Starting Point – 3 years custody</p>

Additional aggravating factors	Additional mitigating factors
<ol style="list-style-type: none"> 1. Concealment or attempts to dispose of evidence* 2. Dismemberment or mutilation of the body* 3. Offence committed in the presence of a child/children or other vulnerable family member <p>*subject to para 3.6 above.</p>	<ol style="list-style-type: none"> 1. The offender was acting to protect another 2. Spontaneity and lack of premeditation 3. Previous experiences of abuse and/or domestic violence 4. Evidence that the victim presented an ongoing danger to the offender or another 5. Actual (or reasonably anticipated) violence from the victim

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

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