CHAPTER 5

MURDER AND MANSLAUGHTER

The structure of homicide offences

5.1 There are three offences under the Penal Codes relating to killing another person: murder, manslaughter and infanticide. Murder and manslaughter were crimes at common law before they were incorporated in legislation. The distinction between the two offences is still made in the Penal Codes. Infanticide is a creature of statute.

- Murder is the most serious offence. It has historically carried a mandatory sentence of death or life imprisonment. However, the penalty provisions in Solomon Islands, Kiribati and Tuvalu now vary.
    - In Solomon Islands and Kiribati, murder carries a mandatory penalty of life imprisonment. The Penal Codes SI s 200; Ki 193 provide that a person who is guilty of murder 'shall be sentenced to imprisonment for life'. Both jurisdictions also provide for shorter sentences to be imposed where a person is 'liable to' imprisonment for life: SI s 24(2); Ki s 25. However, the term 'liable to' refers to discretionary sentences. Moreover, murder and other offences carrying mandatory life sentences are expressly exempted from the general provision in Ki s 25.
    - In Tuvalu, the penalty for murder is discretionary but with a minimum sentence of 15 years' imprisonment: Penal Code s 193
- The penalty for the less serious offence of manslaughter under SI s 199(b); Ki/Tu s 192(b) is discretionary, with the maximum being life imprisonment.
- The offence of infanticide involves what would be murder except for special extenuating circumstances: SI s 206; Ki/Tu s 199. The maximum penalty for infanticide is the same as for manslaughter: that is, a maximum of life imprisonment. The offence of infanticide is found in the statutes of some but far from all jurisdictions.

5.2 The physical elements of the offence are the same for murder and manslaughter: a person causing the death of another person by an unlawful act or omission.

5.3 Murder and manslaughter have different fault elements. The fault elements for murder vary between jurisdictions but the focus is usually on a person's subjective state of mind respecting the results of the conduct. Under SI ss 200-202; Ki/Tu ss 193-195, the requirement is for 'malice aforethought', a technical expression that is examined below: **5.15-5.19**. The offence of

manslaughter focuses on forms of serious fault for causing the death of another person that do not amount to murder.

5.4 Infanticide has the same physical elements as murder and manslaughter, with the additional circumstantial elements that the perpetrator must be a woman causing the death of her child under the age of 12 months. In addition, SI s 206; Ki/Tu s 199 require that 'at the time of the act or omission the balance of her mind was disturbed' by factors associated with having given birth. No distinctive fault elements are specified for the offence. However, SI s 206; Ki/Tu s 199 provide that the offence is committed 'notwithstanding that the circumstances were such that but for the provisions of this section the offence otherwise would have amounted to murder'. The regular fault elements for murder will therefore usually be present.

5.5 The statutes on road traffic contain an offence of causing death by reckless or dangerous driving: see Road Transport Act SI s 38 (causing death by reckless or dangerous driving); Traffic Act Ki s 33(1) (causing death by dangerous driving); Traffic Act Tu s 21(2) (causing death by reckless driving). The scope of these offences is similar to a form of manslaughter commonly called 'criminal negligence manslaughter', although a conviction may not carry the same penalties and stigma as a manslaughter conviction.

5.6 Suicide (and therefore attempted suicide) is not an offence. However, aiding, abetting, counselling or procuring the suicide of another person can make a person liable for an offence of complicity in another's suicide: SI s 219; Ki/Tu s 212. See **Chapter 14** on the law of complicity.

Life, death and personhood

5.7 For a criminal offence to occur, both the offender and the victim must be a person. This is how the offences of murder and manslaughter are framed in the Penal Codes SI ss 199-200; Ki/Tu ss 192-193. A 'person' in the eyes of the law is a human being. This is well established as a matter of common law. Thus, neither murder nor manslaughter is committed when an animal kills a human being; nor when a human being kills an animal.

5.8 In criminal law, a human being comes into existence as a person only when it is fully born. The Penal Codes SI s 208; Ki/Tu s 201 provide: 'A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother'. It is expressly stated that it is immaterial whether or not the child has breathed and has an independent circulation, and whether or not the navel string is severed. Nevertheless, homicide can presumably be committed when a child dies after birth as a consequence of injuries inflicted before or during birth.

5.9 At earlier stages of life, the termination of a pregnancy can constitute a separate offence. Unlawfully performing an abortion is an offence carrying liability to life imprisonment under Penal Codes SI s 157; Ki/Tu s 150. A woman attempting to perform an abortion is also liable to life imprisonment: SI s 158; Ki/Tu s 151. In addition, causing the death of a child 'capable of being born alive' is an offence which also carries liability to life imprisonment: SI s 221(1); Ki/Tu s 214. In most cases, the dividing line between this offence and that of abortion will lie at the beginning of 28 weeks' pregnancy: SI s 221(2); Ki/Tu s 214 provides that evidence of pregnancy for 28 weeks or more shall be 'prima facie proof' that the child was 'capable of being born alive'. However, termination of pregnancy is not unlawful if the termination was done by a surgical operation performed with reasonable care and skill in good faith for the purpose of preserving the life of the mother: see **11.28**–**11.29** discussing SI s 234; Ki/Tu s 227.

5.10 The traditional definition of death at common law was the irreversible cessation of all vital functions, including those of the heart and lungs. This definition has failed to keep pace with the development of technological means for keeping organs functioning artificially. Life support machines can sometimes be used to keep the heart and lungs functioning for sufficient time to allow procedures such as medical diagnosis or organ transplantation. In circumstances where vital functions are being artificially maintained, switching off the machine raises difficult questions about the point at which death occurs. A modern medical conception of death has evolved in response. A person is considered to be dead when there is either irreversible cessation of blood circulation or irreversible cessation of all brain function, including that of the brain stem. When 'brain stem death' occurs, the body cannot function without assistance.

Causation of death

5.11 For discussion of the general principles of causation and some specific rules respecting the causation of death, see **3.15**-**3.25**. The general principles are that a person has caused the death of another if the person made a substantial contribution to the occurrence of the death, unless there is an independent later actor whose contribution is also substantial and who can be held criminally liable for the death. The specific provisions of the Penal Codes SI s 207; Ki/Tu s 200 largely reflect these principles.

5.12 The Penal Codes follow the common law in requiring that a death occur within a year and a day from the last unlawful act contributing to the death: SI s 209; Ki/Tu s 202. The origins of this rule may lie in the increasing difficulties of diagnosing of a cause of death as time passes. The rule has been abolished in many jurisdictions, following advances in medical diagnosis, but not yet in much of the Pacfic island jurisdictions.

Consent to death

5.13 It is a long-established rule of common law, now enshrined in Penal Codes SI s 236; Ki/Tu s 229, that the consent of a person to their own death does not affect the criminal responsibility of a person who causes the death. A person who intentionally causes a death commits murder even if the deceased asked to be killed. Thus, 'mercy killing' is still murder. SI s 236; Ki/Tu s 229 extends the principle to a 'maim' as well as a death: on the meaning of 'maim'. 'Maim' is defined in s 4 to mean 'the destruction or permanent disabling of any external or internal organ, member or sense'. See also **6.8**.

5.14 Nevertheless, there is no liability for omitting to maintain the life of another unless there is a breach of a duty of care: see **3.2-3.14**. Whether or not a person has requested to die is a relevant consideration in deciding whether an omission to maintain life breached a duty of care. This was recognised by the House of Lords in *Airedale National Health Service Trust v Bland* [1993] AC 789 at 864, [1993] 1 All ER 82, where it was said that, if a patient is capable of expressing his or her wishes, the principle of self-determination should prevail over the principle of the sanctity of human life.

Forms of murder

5.15 The scope of the offence of murder varies between jurisdictions, depending on which states of mind will satisfy the fault elements of the offence. The Penal Codes SI s 200; Ki/Tu s 193 make it murder when a person causes the death of another by an unlawful act or omission 'of malice aforethought'. 'Malice aforethought' is a technical expression derived from the common law of murder. It requires neither a desire to do harm nor premeditation. It has therefore been described as 'a doubly misleading expression': *AG's Reference (No 3 of 1994)* [1997] UKHL 31, [1998] AC 245, per Lord Mustill. It is defined in SI s 202; Ki/Tu s 195 in terms which give murder a relatively broad scope:

> (a) an intention to cause the death of or grievous bodily harm to any person, whether such person is the person actually killed or not; or
>
> (b) knowledge that the act which caused death will probably cause the death of, or grievous bodily harm to, some person whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

Each of these alternatives contains within itself another set of alternatives, so that malice aforethought actually encompasses four states of mind:

- Intention to cause death;
- Intention to cause grievous bodily harm;
- Knowledge that the act will probably cause death;
- Knowledge that the act will probably cause grievous bodily harm.

5.16 'Grievous harm' is defined in the Penal Codes SI/Ki/Tu s 4 to mean:

> any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense

As a matter of common law, the severity of the injury has traditionally been assessed at the time of its infliction and without reference to any expected results of medical treatment: see *R v Lobston* [1983] 2 Qd R 720. Allegations of intention or knowledge respecting causing grievous bodily harm will usually be easier to prove than allegations respecting causing death. These forms of murder are commonly argued where death results from impulsive actions such as kickings: see, for example, *Samani v R* [1996] SBCA 4; *Bina v R* [2006] SBCA 16. Allegations of intention or knowledge respecting causing death are better suited to cases where action was premeditated.

5.17 Under SI s 202(a); Ki/Tu s 195(a), the fault element for murder can be established by proof of 'intention' to cause death or grievous bodily harm. The term 'intention' is undefined in the Penal Codes. In the context of murder, it has generally been understood to encompass both forms of intention: not only purpose to bring about a result but also knowledge (or foresight or awareness) that a result will follow as a matter of virtual certainty. See the decision of the House of Lords in *R v Woollin* [1999] 1 AC 82; [1998] 4 All ER 103 on the common law of murder; and see the discussion in **4.50-4.55**. Thus, someone who shoots at another person in order to kill, or with the purpose of killing, intends to cause death, even if there is no more than a hope of hitting the target. On the other hand, a person who sets fire to a house in order to collect insurance money, knowing that people happen to be inside and will inevitably be killed, is said to intend to cause the death even if the deaths formed no part of the person's reasons for setting the fire.

5.18 Under SI s 202(b); Ki/Tu s 195(b), the fault element of murder can also be established by poof of 'knowledge' that an act will 'probably cause' death or grievous bodily harm. This amounts to a type of recklessness, in the sense in which the term 'recklessness' is used in criminal law: see **4.60**, **4.65.** Recklessness in criminal law means the unjustifiable taking of a known risk. There are two parts to this definition. A person is reckless with respect to a result if he or she is s*ubjectively* aware of a risk of it and it is *objectively* unjustifiable to take the risk having regard to the circumstances known to the actor: see **4.66-4.67**. The factors determining the justifiability of running a risk are the degree of risk, the magnitude of the harm if the risk materialises; the social

value of the end for which the risk is taken; and the costs of avoiding or minimising the risk. The value we attach to human life means that it will be exceptionally rare for running a risk of causing death to be justifiable. Nevertheless, the High Court of Australia has given the example of a surgeon performing a highly risky operation in an attempt to avert an otherwise unavoidable death: see *R v Crabbe* (1985) 156 CLR 464 at 470, discussed in **4.67**. If the patient dies from the surgery, the surgeon will not have been reckless respecting the death despite having been aware of the risk.

5.19 To satisfy SI s 202; Ki/Tu s 195, a person must know that the death or grievous bodily harm was a *probable* outcome. Some but not all statements of the general concept of recklessness include this requirement: others use terms such as 'possible' or 'substantial'. The choice of terms may make little practical difference. It has been held by the High Court of Australia that a 'probable' consequence is simply one that 'could well have happened': *Darkan v R* (2006) 227 CLR 373; [2006] HCA 34 at [81]. The term does not mean that the consequence must have been more likely than not to occur. A consequence is probable if it is unsurprising. Therefore, in the context of SI s 202; Ki/Tu s 195, it is not required that death or grievous bodily harm be foreseen as more likely than not to occur; it is sufficient if death or grievous bodily harm is foreseen as something that could well happen.

5.20 There is a difference between, on the one hand, recklessness respecting causing death or grievous bodily harm and, on the other hand, intention in the form of knowledge that death or grievous bodily harm will be caused.

- Intention under SI s 202(a); Ki/Tu s 195(a), requires knowledge of death or grievous bodily harm as a virtual or practical certainty: something that will occur 'in the ordinary course of events'.
- In contrast, recklessness under SI s 202(b); Ki/Tu s 195(b), merely requires knowledge of a probability that death or grievous bodily harm will occur. Knowledge that death is probable or even highly probable does not qualify as intention to cause death; it amounts just to recklessness respecting causing death.

5.21 Some jurisdictions broaden the fault elements for murder in cases where a death is caused during the commission of certain serious offences such as robbery. This form of murder is sometimes called 'felony murder' or 'constructive murder'. It is mentioned in the Penal Codes, but in a curious way. SI s 291; Ki/Tu s 194 is titled, 'Killing in the course of another offence'. It reads:

> (1) Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in

the course or furtherance of another offence.

(2) For the purposes of the foregoing subsection, a killing done in the course or for the purpose of resisting an officer of justice, or of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, shall be treated as a killing in the course or furtherance of an offence.

Subsection (1) clearly repudiates the idea of constructive murder. Murder requires malice aforethought for any murder; there is no extension of the offence to cover all cases of killing in the course or furtherance of some other offence. However, this makes subsection (2) redundant. Since malice aforethought is required for any murder, it makes no difference what is treated as a killing in the course or furtherance of an offence.

5.22 The intention or recklessness need only relate to 'any person'. SI s 202; Ki/Tu s 195 expressly states that It need not relate to the person who is killed. Thus, if a shot fired at one person misses and kills another person, the offence of murder can be committed against the person who is actually killed. It is irrelevant that the death of this particular person was never contemplated. Such cases are sometimes called cases of 'transferred intent' or 'transferred *mens rea'*. The *mens rea* for the contemplated death is transferred to the *actus reus* of the death which occurred.

Forms of manslaughter

5.23 The Penal Codes specify six forms of manslaughter.

- SI s 199; Ki/Tu s 192 identify two forms of manslaughter where malice aforethought, the fault element of murder, is not present:
    - manslaughter by unlawful act
    - manslaughter by criminal negligence.

  These forms of manslaughter are commonly called 'involuntary manslaughter'. All that the term 'involuntary' means in this context is that the fault element for murder is not present. There is no connection with the principle of voluntariness in the law of criminal responsibility: see **4.6-4.10**.
- SI ss 203-204; Ki/Tu ss 196-197 identify four forms of manslaughter where the fault element for murder is present but the offence is reduced to manslaughter because of certain extenuating circumstances:
    - diminished responsibility;
    - provocation;
    - defence of a person with excessive force;
    - belief in a legal duty to cause the death or do the act.

> These forms of manslaughter are commonly called 'voluntary manslaughter', signifying only that the elements of murder are present.

The offence of infanticide under SI s 206; Ki/Tu s 199 effectively constitutes another form of voluntary manslaughter in which liability for what would otherwise be murder is avoided because of extenuating circumstances. In this instance, however, the result is a distinct offence rather than a reduction from murder to manslaughter: see above, **5.1**, **5.4**.

Involuntary manslaughter

5.24 The Penal Codes SI s 199(1); Ki/Tu s 192(1) provide:

> Any person who by an unlawful act or omission causes the death of another person is guilty of the felony known as manslaughter. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

Two forms of involuntary manslaughter are specified in this provision:

- It is manslaughter when a person causes the death of another by an unlawful act;
- It is also manslaughter where a person negligently omits to discharge a duty of care, whether or not there is 'an intention to cause death or bodily harm'.

The distinction between the two types of manslaughter reflects a distinction drawn at common law between what are called 'unlawful act manslaughter' and 'criminal negligence manslaughter'. In 'unlawful act manslaughter', the offender intentionally engaged in an unlawful course of action causing a death, perhaps intending to injure but not contemplating the death or grievous bodily harm. In 'criminal negligence manslaughter', an offender engaged in a course of action which in itself may or may not be lawful but either advertently or inadvertently breached a legal duty of care and thereby caused death.

5.25 In most cases of 'unlawful act manslaughter', the unlawful act is an assault. An assault has traditionally been understood to require intention or at least recklessness with respect to the application or threat of force against another person: see **Chapter 6**. Unlawful act manslaughter therefore generally involves an unlawful and intentional act, establishing a clear line of difference from criminal negligence manslaughter where the conduct is typically inadvertent. However, there may be offences other than assault which also involve intentional conduct and can lead to a manslaughter conviction in the event that death is caused. For example, causing death by supplying drugs could perhaps found a manslaughter conviction, even if it was done at the request of the deceased: see, for example, *Cato* [1976] 1 WLR 110 (CA).

5.26 The Penal Codes do not include a requirement for an unlawful act to be dangerous. This is unlike the common law, where the scope of 'unlawful act manslaughter' has effectively been confined to dangerous acts: in English case-law, an act likely to cause injury (*AG's Reference (No 3 of 1994)* [1997] UKHL 31, [1998] AC 245); in Australian case-law, an act carrying with it an appreciable risk of serious injury (*Wilson* (1992) 174 CLR 313).

5.27 However, the scope of the offence under the Penal Codes is narrowed by the existence of the defence of accident under SI/Ki/Tu s 9. Section 9 states that a person is not criminally responsible for an event that occurs 'by accident'. On the scope of this defence, see **4.16 – 4.19**. An accident is an event 'which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person': *Kaporonovski v R* (1973) 133 CLR 209 at 231–2; 1 ALR 296. To defeat a defence of accident in a manslaughter case, the prosecution must prove that the death was foreseen or foreseeable as a possible outcome: see *R v Taiters* [1997] 1 QdR 333. An act which it is forseeable may cause death is a dangerous act. Therefore, the end result of confining manslaughter to cases where death is foreseeable is that the scope of the offence is similar to that at common law.

5.28 The second type of involuntary manslaughter is 'criminal negligence manslaughter'. This involves someone causing the death of another person simply through negligence, without any unlawful intentional act being involved. For example, a motorist may fail to notice a pedestrian and hit her or him. Such cases will constitute unlawful killing if two conditions are met. First, there must be a breach of one of the duty-imposing provisions in the Penal Codes SI ss 210-214; Ki/Tu s 203-207, discussed in **3.2–3.12**. In addition, there must have been negligence to the special degree which constitutes 'criminal negligence': see **4.71-4.73**, **5.33-5.34**.

5.29 The duty-imposing provisions in the Codes SI ss 210-214; Ki/Tu s 203-207 therefore serve two different functions:

- They create a foundation for general criminal liability for omissions: see **3.2–3.12**.
- They create a foundation for liability for offences against a person, including manslaughter, in cases where negligence is the sole fault element. This form of criminal liability can be based on positive acts as well as behavioural omissions. Although SI s 199(1); Ki/Tu s 192(1) refers to an 'unlawful omission', the reference is simply to a failure to discharge a duty of care. This failure can arise in the context of a positive act as well as a behavioural omission.

One of the duty-imposing sections only applies to certain dangerous acts: Codes SI s 213; Ki/Tu s 206. This section governs the special circumstance of an act, dangerous to human life or health, done in pursuance of an undertaking, such as an undertaking to administer surgical or medical treatment. Except in a case of necessity, the person must have reasonable skill and use

reasonable care in doing the act. The duties and the degree of negligence required are discussed in *Patel v The Queen* (2012) 247 CLR 531; 290 ALR 189; [2012] HCA 29.

5.30 The Codes SI s 214; Ki/Tu s 207 provide the most commonly invoked of the duty-imposing provisions in manslaughter cases. The section establishes a duty on persons in charge of or in control of dangerous things to use reasonable care and to take reasonable precautions in their use or management. More precisely, the duty applies to anything which may endanger the life, safety and health of any person in the absence of care and precaution in its use or management. Most cases involve motor vehicles, but the section applies to 'anything, whether living or inanimate, and whether moving or stationary'. For example, the dangerousness of a dog could be in issue.

5.31 In *R v Dabelstein* [1966] Qd R 411, the majority held that the section applies whenever a thing is dangerous in the particular use to which it is put, regardless of how innocuous it may ordinarily be. In *Dabelstein*, the appellant caused the death of a woman when he thrust a sharpened pencil into her vagina. The pencil penetrated the vaginal wall and the woman hemorrhaged to death.

5.32 An unresolved question is whether a person's own body, or part or fluids thereof, can be a dangerous 'thing' for the purposes of the Codes SI s 214; Ki/Tu s 207. Suppose, for example, that someone waves their arms in the air and strikes another person, causing that person to fall backwards down some steps and die as a result of injury. Different opinions have been expressed in Australian cases on whether or not the duty with respect to dangerous things could apply. In *Houghton v R* (2004) 28 WAR 399; [2004] WASCA 20, a case on unlawfully causing grievous bodily harm, a majority of the Western Australia Court of Appeal took the view that the section could apply to seminal fluid: at [122]–[126]. Murray J, however, disagreed on this point: at [51]. His view was supported by McPherson J of the Queensland Court of Appeal in *Reid* [2007] 1 Qd R 64; [2006] QCA 202 at [19]: 'Section 289 has hitherto been regarded as applying to "dangerous things" as objects external to the human body, such as knives and guns.' If this restrictive view were to prevail there would be a curious gap in the scope of criminal liability. On policy grounds, the broader interpretation of 'dangerous thing' is to be preferred.

5.33 To attract criminal liability, the negligence must be of such a degree as to meet the common law standard of 'criminal negligence': see *Patel v The Queen* (2012) 247 CLR 531; 290 ALR 189; [2012] HCA 29. Criminal negligence is sometimes equated with 'gross' negligence: See 4.xx-4.xx. In the civil law of torts, a simple departure from the standard of behaviour of a reasonable person would be sufficient to attract liability. In criminal law, however, the departure must be great enough to justify the kind of sanctions and stigma that follow on conviction.

5.34 It is difficult to see any textual basis for implying the common law standard of criminal negligence into the duty-imposing provisions of the Codes: see the arguments of Philp J (dissenting) in *R v Scarth* [1945] St R Qd 38. In *Callaghan* (1952) 87 CLR 115; [1952] ALR 941 the High Court of Australia justified importing the standard of criminal negligence merely on the ground that this would be appropriate for criminal liability. Such a liberal use of common law doctrine challenges the orthodox view that criminal codes are to be interpreted literally.

Diminished responsibility

5.35 There is a special defence of diminished responsibility which reduces the offence of murder to manslaughter. The Penal Codes SI s 203(1); Ki/Tu s 196(1) state:

> Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

Diminished responsibility must be proved by the defence: Penal Codes SI s 203(2); Ki/Tu s 196(2). The defence is available only for murder. In contrast, the defence of insanity under Penal Codes s 12 is available for any offence: see **Chapter 11**.

5.36 The defence of diminished responsibility requires an 'abnormality of mind'. This may be caused in any way. However, the defence is concerned with on-going medical conditions rather than transient states induced in a normal mind by, for example, consumption of alcohol or drugs.

5.37 The loose formula of a substantial impairment of 'mental responsibility' confers a wide discretion on a court to grant the defence wherever mental abnormality appears to have clouded the judgment or self-control of a person. In contrast, the defence of insanity is subject to tight conditions: see **Chapter 11**.

5.38 The mental abnormality must be such that it 'substantially impaired' the person's mental responsibility. A critical difference between the conditions for the defence of insanity and the defence of diminished responsibility is that the former requires an 'incapacity' to perform certain mental functions while the latter only requires a substantial impairment of mental responsibility. A state of diminished responsibility is a lesser abnormality than that required for a finding of insanity.

Provocation

5.39 Persons accused of offences of violence sometimes claim that they were 'provoked' by the victims so that they lost their self-control. There are several ways in which evidence of provocation may be relevant in criminal proceedings:

1. Provocation may sometimes be taken into account as a mitigating factor in sentencing.
2. Provocation may sometimes support a claim that a fault element of an offence was lacking. For example, the accused on a murder charge may contend that they acted in a 'blind rage' in which there was neither intention to kill nor cause grievous bodily harm, nor foresight of the risk of causing death or injury.
3. If certain conditions are met, loss of self-control due to provocation may provide a partial defence to the offence of murder, reducing the offence to manslaughter even though the fault elements for murder are present. The defence is only available for cases that would otherwise be murder. Provocation is therefore not a defence to any other offence, including attempted murder and manslaughter.

It is the third use of evidence of provocation that is of present concern.

5.40 Provocation was recognised as a partial defence to murder at common law and has been incorporated in the statutes of many jurisdictions including Solomon Islands, Kiribati and Tuvalu. The widespread recognition of provocation as a partial defence to murder is connected with the historical lack of sentencing discretion for this offence. Only by reducing the offence to manslaughter can provocation be taken into account as a mitigating factor in sentencing. In some jurisdictions, the partial defence has been abolished when discretionary sentencing for murder has been introduced.

5.41 The Penal Codes SI s 204; Ki/Tu s 197 provide:

> Where a person by an intentional and unlawful act causes the death of another person the offence committed shall not be of murder but only manslaughter if any of the following matters of extenuation are proved on his behalf, namely-
>
> (a) that he was deprived of the power of self-control by such extreme provocation given by the person killed as is mentioned in the next succeeding section; …

The next sections, SI 205; Ki/Tu s 198, provide:

> Where on a charge of murder there is evidence on which the court 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 determined by the court; and in determining

that question there shall be taken into account everything both done and said according to the effect which it would have on a reasonable man.

5.42 The essence of the partial defence is therefore not provocation in itself but rather loss of self-control due to provocation. The statutory provisions set two conditions:

1. *a subjective test* — under SI s 204(a); Ki/Tu s 197(a), provocation must cause actual loss of self-control;
2. *an objective test* — under SI 205; Ki/Tu s 198, the provocation must be enough to cause a reasonable person to lose self-control to the extent of committing an attack of the kind which occurred.

5.43 The wording of Penal Codes SI s 204; Ki/Tu s 197 require that a provocation defence be proved by the defence. However, the Kiribati Court of Appeal has held that this reverse onus is unconstitutional: *Republic v Bakaatu* [1996] KICA 1; *Bebeunga v Republic* [2019] KICA 7 at [7]. It violates the presumption of innocence enshrined in the Constitution of Kiribati s 10(2)(a):

> Every person who is charged with a criminal offence - *(a)* shall be presumed to be innocent until he is proved or has pleaded guilty;

The reverse onus should also be unconstitutional in Solomon Islands and Tuvalu, where there is also a constitutional presumption of innocence: Constitution of Solomon Islands s 10(2)(a); Constitution of Tuvalu s 22(3)(a). The Solomon Islands Court of Appeal in *Fo'oka v R* [2014] SBCA 10, at [13], said: 'As with all matters in a criminal case, once it is raised, the onus is on the prosecution to prove there was no such provocation.' In the result, provocation is governed by the standard rules respecting the persuasive and evidentiary burdens for exculpatory defences. It is for the defence to put provocation in issue. If a provocation defence is in issue, the prosecution will have to refute it beyond reasonable doubt. However, the prosecution will not be called upon to meet this burden if the judge considers there is no evidence to support the defence. Cases in which the evidential burden is not satisfied include cases where the judge considers that the objective test for the defence could not be satisfied on any view of the evidence: see, for example *Stingel v R* [1990] HCA 61; (1990) 171 CLR 312; *Bebeunga v Republic* [2019] KICA 7.

5.44 The requirement for actual loss of self-control is designed to exclude from the defence the calculating revenge-seeker or even the person who is just extremely angry. They are excluded, no matter how great the provocation. Provocation is not a defence that accepts retaliation as acceptable in some circumstances. It is a defence which views the provoked person as someone acting on an impulse while suffering from a temporary impairment of the capacity to make moral choices between courses of action. In considering whether or not an accused actually did lose self-control, account can be taken of any relevant evidence, including evidence that the accused

was intoxicated or short-tempered: *Salamon v The Queen* [1959] SCR 404 at 410–11; *Attorney General for Jersey v Holley* [2005] 2 AC 580 at [5]. However, such evidence is irrelevant in relation to the objective test.

5.45 The provocation must not only cause actual loss of self-control but also be enough to cause a 'reasonable man' to lose self-control to the extent of doing what the accused did. In practice, the test of the reasonable man is interpreted to mean an 'ordinary person': see **5.50**. The purpose of an objective test is to deny the defence of provocation to persons who lose self-control because of unusual temperament or excitability, or because of self-induced states such as intoxication. The rationale sometimes advanced is that society needs protection against dangerous persons. However, this is unconvincing in relation to a partial defence to murder because a successful defence of provocation will still lead to a conviction for manslaughter.

5.46 The limits of self-control for an ordinary person are open to debate. See, for example, the division within the High Court of Australia in *Green v R* [1997] HCA 50; (1997) 191 CLR 334 over whether an ordinary Australian might react to an unwanted homosexual advance by killing the other person. A bare majority thought that an ordinary Australian might react in this way but the minority vigorously dissented.

5.47 The Penal Codes do not incorporate any requirement for the response to follow immediately on the provocation. The defence may therefore succeed despite an interval between the provocation and the response. However, the absence of a requirement for suddenness of response does not mean that any delay is immaterial. It may indicate that the killing was driven by motives of revenge or punishment rather than loss of self-control: *Pollock v R* (2010) 242 CLR 233; [2010] HCA 35 at [62].

5.48 The defence is only available where the person killed was the person who gave the provocation. This excludes cases where a person who loses self-control 'runs amok' and attacks persons other than the provoker.

5.49 The Codes do not, however, limit the defence to cases where the provocation was aimed at the defendant. The provocation could conceivably be aimed at another person with whom the defendant has a close relationship. Moreover, a generalised insult, such as a racial or ethnic slur, could be provocation to other persons of the same group who hear it.

Provocation: the objective test

5.50 The provocation must have been grave enough to make a 'reasonable man' lose self-control and do what the defendant did. The term 'ordinary person' is generally used instead of

'reasonable man' or 'reasonable person' to describe the level of self-control which is expected: see, for example, *Loumia v DPP* [1986] SBCA 1; *Republic v Bakaatu* [1996] KICA 1. This follows the practice in England: see *DPP v Camplin* [1978] AC 705, at 718; [1978] 2 All ER 168. In *Bakaatu* it was said:

> When the law speaks of a reasonable person in this context, it refers to an ordinary person – a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused.

In *Stingel v R* [1990] HCA 61; (1990) 171 CLR 312, the High Court of Australia held that any reference to a reasonable person would be inappropriate. A reasonable person would never respond to provocation by loss of self-control and violence. Yet an ordinary person, who is subject to the inadequacies of most people, can sometimes behave in this way. It was also said in *Stingel* that 'ordinary' does not mean 'average'. The notion of ordinariness was taken to include a range of levels of self-control, with the critical point being the lowest rather than the average level within this normal range.

5.51 The expected level of ordinary self-control can be adjusted by taking account of the sex and age of the age of an accused: *Loumia v DPP* [1986] SBCA 1; *Republic v Bakaatu* [1996] KICA 1. In a case involving a young person, the provocation must be likely to cause an ordinary person of the age of the accused to lose self-control. This development recognises that young persons are widely believed to have lesser powers of self-control than adults. However, the courts have rejected the adjustment of the standard of the ordinary person in any other way. Other variables affecting levels of self-control are taken into account only for the purpose of determining the limits within which levels of self-control can be regarded as ordinary. This approach follows established authority in other jurisdictions, including England and Australia. See the decisions of the House of Lords in *DPP v Camplin* [1978] AC 705; [1978] 2 All ER 168, and the High court of Australia in *Stingel v R* [1990] HCA 61; (1990) 171 CLR 312.

5.52 McHugh J, dissenting in *Masciantonio v R* (1995) 183 CLR 58, [1995] HCA 67, argued that insisting on an essentially uniform standard for the ordinary person, as cases like *Stingel* and *Camplin* do, produces inequality rather than equality before the law. At issue here is the competition between formal and substantive conceptions of equality. Maintaining a uniform standard of the ordinary person preserves formal equality but may produce substantive inequality for persons with characteristics that make it difficult for them to attain the levels of self-control of most people. McHugh J was mainly concerned about differences in self-control stemming from ethnic or cultural background. Perhaps more problematic is the significance of mental impairment bearing on the power of self-control, since it may be possible to accommodate ethnic and cultural differences within the range of ordinary levels of self-control.

5.53 The insistence on a uniform objective standard was briefly repudiated by a majority decision of the House of Lords in *R v Smith* [2001] 1 AC 146; [2000] 4 All ER 289. *Smith* was a case of mental impairment in which it was alleged that serious clinical depression had reduced the accused's capacity to refrain from acting violently. The issue was whether the jury could take this into account in measuring the accused's loss of self-control against an objective standard. A majority of the House of Lords said that it could be taken into account. Their reasoning was that the point of an objective test is simply to demand that the accused exercise reasonable self-control, given any characteristics of the particular accused which might affect the power of self-control to be expected of that accused. Some flexibility is necessary to avoid injustice. However, the orthodox position was reasserted by the majority of the Privy Council in *Attorney General for Jersey v Holley* [2005] 2 AC 580. The majority in *Holley* held that an accused's alcoholism as a disease could not be taken into account. It was said that loss of self-control had to be judged by applying a uniform objective standard of the degree of self-control expected of an ordinary person of the defendant's age and sex with ordinary powers of self-control.

5.54 There is another less controversial way that particular characteristics of the accused can become relevant to the objective test. The gravity of any instance of provocation will often depend on its context, and characteristics of the accused are part of this context: see *DPP v Camplin* [1978] AC 705, at 718; [1978] 2 All ER 168; *Republic v Bakaatu* [1996] KICA 1. For example, a racial or ethnic slur may be serious when it is directed to the person who is actually a member of the insulted group, whereas it may be absurd when directed to someone who has been mistakenly supposed to be a member of that group. Thus, personal characteristics of the accused can be considered whenever these are relevant to assessing the gravity of the provocation. There is therefore an important distinction between characteristics of the accused affecting the power of self-control and characteristics affecting the gravity of the provocation. Of course, this may involve drawing a fine line when provocation involves a slur about a characteristic such as mental instability. Such a condition could also lower the level of self-control. One of the factors influencing the decision in *Smith*, above **5.53**, was the practical difficulties encountered in taking account of characteristics for one purpose but not the other.

5.55 Among the factors that can magnify the gravity of provocation are previous incidents between the parties. Cumulative provocation can occur in which the final incident becomes 'the straw that broke the camel's back'. The final incident must still be sufficiently grave to be likely to cause the ordinary person to lose self-control, yet it can be something which would be relatively trivial considered in isolation. The background of a history of provocation may be what gives the final insult its distinctive gravity. See *Republic v Bakaatu* [1996] KICA 1; *Bebeunga v Republic* [2019] KICA 7 at [9].

Excessive force in self-defence

5.56 The Penal Codes SI s 204(b); Ki/Tu s 197(b) provide for a reduction of a homicide from murder to manslaughter where defendant used excessive force but was justified in causing some harm: see, for example, *Ofea v R* [2019] SBCA 9. However, the defendant must have *'acted in such terror of immediate death or grievous harm as in fact deprived him for the time being of the power of self-control'*. It is difficult to discern the point of this provision. In its absence, a defendant who lost self-control in the face of terror of immediate death or grievous harm would still have a defence of provocation to reduce the offence to manslaughter. See also **11.xx**.

Belief in legal duty

5.57 The Penal Codes SI s 204(c); Ki/Tu s 197(c) provide for a reduction of a homicide from murder to manslaughter where the defendant 'acted in the belief in good faith and on reasonable grounds, that he was under a legal duty to cause the death or to do the act which he did.' The intended application of this provision is unclear. It might be meant to apply to cases where a person uses lethal force in supposed defence of another to whom a duty of care is owed: see the discussion of duties of care at **3.5-3.11**. However, it will be a rare case in which a mistaken belief in a duty to use lethal force was reasonable.

5.58 An unsuccessful attempt to invoke SI s 204(c) was made in *Loumia v DPP* [1986] SBCA 1. It was argued that the there was a customary duty to kill a person responsible for the death of a close relative and that this customary duty was made a legal duty by virtue of the recognition of customary law in the Constitution of Solomon Islands Schedule 3 cl 3. The Court of Appeal dismissed the argument on two grounds: (1) that the alleged custom would be inconsistent with the protection given to the right to life in the Constitution s 4(1); (2) that the law on offences is established by the Penal Code and cannot be modified by customary rules.