



# ZIMBABWE · LAW · REVIEW

Volume 1 & 2

1983-1984

THE  
**ZIMBABWE LAW REVIEW**

1983 — 84

VOLUMES I & 2

CONTENTS

Articles

	<i>Pages</i>
<i>Editorial</i>	1-2
<i>Family and Customary Law</i>	
Internal Conflicts Between Customary Law and General Law In Zimbabwe	
Family Law as a Case Study..... Doris Peterson Galen	3-42
Rules of Recognition in the Primary Courts of Zimbabwe: On Lawyers' Reasonings and Customary Law..... Robert B. Seidman	43-71
The Widows Lot — A Remedy? (The application of Spoliation Orders in Customary Succession)..... Julie E. Stewart	72-84
The Integration of Personal Laws: Tanzania's Experience..... B. A. Rwezaura	85-96
<i>Public Law</i>	
Fundamental Rights and Judicial Review:	
The Zambian Experience..... Simbi V. Mubako	97-132
Police Discretion..... C. S. Cant	133-139
Criminal Law Policy in Relation to the Defence of Provocation..... G. Feltoe	140-157
<i>Legal Education</i>	
Law and Legal Education in the Period of Transition from Capitalism to Socialism..... Shadrack B.O. Gutto	158-170
<b>Dialogue</b>	
International Law and the United States of America's Invasion of Grenada: Implications for Zimbabwe and the Frontline States . . . K. Makamure and Shadrack B.O. Gutto	171-188

### Student Contributions

Hire-Purchase Law in Zimbabwe — A Critical Historical Analysis.....	Ben Hlatshwayo	189-216
The Decision in <i>Katekwe v Muchabaiwa</i> : A Critique.....	Welshman Ncube	217-228
A Critique of Chigwedere's Book "Lobolo-The Pros and Cons" In relation to the Emancipation of Women in Zimbabwe.....	Moses Chinyenze	229-250

### Case Notes and Comment

<u>Suspect Witnesses in Rape Cases.....</u>	John Hatchard	251-254
Another Word on <i>Fideicommissum</i> .....	Julie E. Stewart	254-258
Arrear Maintenance and the Jurisdiction of Community Courts in Custody Disputes.....	Doris Peterson Galen	<del>259-265</del> 260-261
When is a Fugitive not a Fugitive.....	P. Nherere	266-269
The Legal Aid Clinic — Can it Survive?..	Felicity Rooney	270-273

### Documentation and Survey of Legislation

Text of the Nkomati Accords.....		273-276
A Survey of Major Legislation in the Period 1980-1984.....	G. Feltoe	277-284

### Book Reviews

The Interpretation of Statutes.....	J. C. Nkala	285-287
Evidence.....	F. G. Smith	288

### Editorial

Zimbabwe's Independence in April 1980, achieved as it was by a remarkable combination of revolutionary and legal activity, created a special challenge to Zimbabwean lawyers. Particularly significant for legal scholars at the University of Zimbabwe was the dramatic transformation resulting from the fact that a whole body of ideas and perspectives, unacceptable, unpopular or actually unlawful under the colonial state, suddenly became 'thinkable' and available to thinking Zimbabweans. Of these ideas, Marxism and Marxism-Leninism were only the most dramatic example, though by virtue of the election to government of a Party which proclaimed as its ultimate objective the achievement of a socialist order through Marxism-Leninism, they became especially relevant.

This new order was characterised then, as it remains today, five years later, by the basic elements of intellectual stimulation — contradiction, compromise, urgent demands for change and powerful claims for the retention of the *status quo*. Nowhere is this more evident than in the law, both within and around Zimbabwe, wherein is expressed in varying degrees of clarity, the tensions and tentative solutions generated by the material, social, economic and political realities of this ferment.

Thus Zimbabwean legal scholars face an agenda demanding, at a minimum, the study and awareness of the legal dimensions of, on the one hand — the articulated democratic demands of a liberated majority for justice, health, education, housing, employment and an end to poverty and dependence; and on the other hand — the equally articulate (if less rhetorical) claims of a powerful minority (as the first priority) for the retention or the minimum transformation of the capitalist economy. The legal dynamics of this contradiction must be analysed and understood in the light shed by scholars using a wide variety of perspectives.

The task also demands a thorough knowledge of the substantive elements that make up Zimbabwe's legal system. This must include a full awareness of the British-designed Lancaster House Constitution, replete with historic compromises, as well as of the inherited state machine, deeply imbued through both statute law and judicial practice, with authoritarian values and techniques. It demands the urgent study and exposition of the dense body of Zimbabwean Customary Law. Nor can it avoid a basic knowledge of Roman-Dutch Law and its deeper Romanist foundations. These provide a potential pathway to the conceptual treasury of one of the oldest legal systems and to a richness of Romanist ideas developed throughout the modern world in both socialist and capitalist states which share with us this tradition. The paucity of serious scholastic exploration of Roman Law during the colonial period may be explained by the overriding imperial connection with the Anglo-Saxon Legal system. Such scholarship provides an avenue to a storehouse of knowledge and ideas, which Zimbabwean legal scholars may tread. A serious gap in our scholarship, perhaps understandable in the context of the final chauvinistic days of "Rhodesia", namely an awareness of the comparative experience

and legal knowledge of post-colonial Africa, needs to be remedied so that insights from this source can be added to the others that we must use in our efforts to make sense, for ourselves and others, of Zimbabwean legal developments at this challenging stage.

*The Zimbabwe Law Review* is intended as an indispensable means of meeting the above challenges. Early in 1983 the Board of the Law Department decided to work towards its publication. It also saw the *Review* as an important part of the work to evolve a contemporary and more relevant curriculum for Zimbabwean legal education. Thus readers will notice the particular emphasis given in this first issue to matters relating to Family Law, including a contribution on the subject from Tanzania, which the editors saw as requiring particular attention. The Department is also conscious of the important role the *Review* should play in an ongoing legal debate involving the Bench, the Profession, the Government and academics. This was one of the roles of the *Zimbabwe Law Journal* founded in 1961 as the *Rhodesia and Nyasaland Law Journal* by Professor R H Christie. The *Journal* ceased publication at the end of 1982.

As presently conceived the *Zimbabwe Law Review* will provide a vehicle not only for academics but also for students whose work merits publication. As the present volume shows, the pages of the *Review* are also open to non-Zimbabwean contributors, especially those writing on matters relevant to Africa and the Third World. This volume also demonstrates the editors' readiness to receive contributions from authors in Government and the profession, and we are particularly pleased to be able to publish here an article by the present Minister of Home Affairs. The *Review* will seek to encourage active debate on contemporary issues and thus the section entitled *Dialogue* seeks contributions on more immediate and controversial subjects in a style of presentation less rigorous than that required of other articles. It is hoped that the review of legal developments and the publication of relevant documentation will be a regular feature.

Thus the *Review* is seen as being launched in a new context, offering new opportunities and challenges to Zimbabwean and other legal writers. The objective is to respond with scholarship of the highest quality, regardless of its viewpoint. The Editors are conscious that by taking full advantage of this new intellectual freedom and opening the *Review* in this way to scholars from all ideologies they are making a fundamental break with the past. This however is not only consistent with the newly acquired academic freedom of the University of Zimbabwe, but also with the progressive order which is the national objective. Nor, it seems, will this new policy be inconsistent with the motto emblazoned on the facade of the Law Department: LEX EST ARS BONI ET AEQUI (THE LAW IS THE ART OF THE GOOD AND THE JUST)

Lastly we express the Department's gratitude to the Ford Foundation for its assistance in the launching of the *Review*

Editor in Chief

Harare. 18th April. 1985.

# CRIMINAL LAW POLICY IN RELATION TO THE DEFENCE OF PROVOCATION

G. FELTOE\*

## 1. INTRODUCTION

All legal systems have had to address the difficult problem of deciding how to deal with the defence of provocation in the context of criminal cases.<sup>1</sup> This defence is very frequently pleaded in relation to crimes of violence where either death or physical injury has been caused.<sup>2</sup> It has been said that:

“... the criminal law must strike a proper balance between the protection of society from harmful conduct and ensuring justice and fairness to the individual accused”<sup>3</sup>

This applies equally in relation to the defence of provocation. The question is how properly this balance is to be achieved and what ought to be the policy of our criminal law in regard to this defence. In broad terms it can be observed that, on the one hand, the law has an obligation to take steps to discourage persons from losing their tempers when provoked and resorting to acts of violence which may cause death or injury. On the other hand, it would be unjust and unfair to an accused if no heed at all were to be paid to the fact that his behaviour may have been influenced by the provocation to which he was subjected.

Thus far, so good. What now is highly problematical is to *decide to what extent* the provocation should be taken into account, bearing in mind that the courts are concerned both with individual justice and protection of the society. This issue bears upon both verdict and sentence. What makes this matter so difficult is that different people react in widely divergent ways to provocative words or conduct.<sup>4</sup> Some people are able to maintain self-control despite being on the receiving end of the most severe provocation, whereas others lose their self-control completely in the face of the most slight provocation. And, between the polarities, there is an almost infinite range of varying responses dependent upon individual personality make-up. Loss of self-control, is, in fact, a function of two main variables, namely, the degree of provocation, and individual temperament. This can be illustrated by two rough diagrams.

---

\* B.A. (Rhodes), LL.B (London) M. Phil (Kent) Senior Lecturer in Law, University of Zimbabwe, Department of Law

1. As we will see later, very often other factors are found in combination with provocation in such cases. The most common of these is voluntary intoxication. In this introduction the focus will be upon provocation alone and the complications which creep in when provocation is combined with, say intoxication will be examined later.
2. An indication of the high incidence of provocation in such cases is given by the observation by Glanville Williams in his *Textbook of Criminal Law* at p. 477 that in England “Half the intentional killings of adult males are in rage or a quarrel”.
3. See Burchell and Hunt, *South African Criminal Law and Procedure*, Vol. 1. p. 301

Variable 1: Degree of provocation

---

OVERWHELMINGLY SEVERE MODERATE SLIGHT  
HIGH

Variable 2: Susceptibility to provocation<sup>4</sup>

---

Will not lose self-control even Will lose self-control even  
when degree of provocation high where degree of provocation slight

---

HIGHLY RESISTANT HIGHLY UNRESISTANT

---

The task thus faced by the criminal law is to design rules on the provocation defence which will both deal fairly with accused in diverse situation, involving differing intensities of provocation and variable responses thereto, and will also adequately accommodate the need to afford proper protection to the public.

The main purposes of this article will be to examine the nature of the formulas worked out in Zimbabwe to deal with this defence and to comment upon whether these formulas constitute a satisfactory compromise between the competing interests of fairness to the accused and public protection. Part 1 seeks to explain how the law presently operates and Part 2 addresses the issue of whether the law is satisfactory.

### Part I

## 2. THE ZIMBABWE LAW

The two-stage approach to the defence of provocation in relation to a murder charge enunciated in the Federal Supreme Court in the case of *R v Tenganyika*<sup>5</sup>, and followed in our law in a series of High Court cases, starting with *R v Majaye*<sup>6</sup> has now received the stamp of approval of our Supreme Court in the recent case of *R v Nangani*<sup>7</sup>. The then Chief

<sup>4</sup> In a challenging article entitled "The Physiology of Provocation" contained in 1970 *C.L.R.* 634, Brett observes -

"The degree of response to a stress situation varies considerably from one individual to another. Some men are highly vulnerable to stress, others strikingly resistant to it . . . It seems likely . . . that a number of factors, some genetic, others environmental, combine to produce the differences of susceptibility and response".

The extremes of reaction have been variously characterised in the judgments and text books. For example, the highly resistant individual is described by the use of such words as extremely even or good-tempered, stoical, tolerant, phlegmatic, whereas the highly unresistant individual is depicted as extremely quick-tempered, volatile, pugnacious, hot-headed, sensitive and so on.

<sup>5</sup> 1958 R & N 228 (F.C.S)

<sup>6</sup> 1965 R.L.R. 106

<sup>7</sup> 1982 (3) SA 800 (ZS)

Justice Fieldsend, did, however, suggest a possible modification to the test to be used under the second rung of the *Tenganyika* case.<sup>8</sup>

## 2.1 *Homicide cases*

### (a) *The Tenganyika approach*

The two-stage test for the defence of provocation in relation to a murder case set out in the *Tenganyika* case can be summarised as follows:

#### *Stage 1 (the subjective stage)*

At this stage the sole issue is whether the accused had subjective intention to kill.<sup>9</sup> If he did not, he cannot be convicted of murder as the requisite *mens rea* for this crime would be absent. He could, however, be convicted of culpable homicide.<sup>10</sup>

#### *Stage 2 (the objective stage)*

Even if the accused did have the intention to kill his victim, he may still have a partial defence. If the accused did intentionally kill, but he had completely lost his self-control at the time as a result of the provocation to which he had been subjected, then the question must be asked whether the provocation was of such a magnitude that it would have caused the reasonable man to lose his self-control. If, on an application of the objective standard, the court decides that the provocation was sufficient to have caused the reasonable man to act in the same manner as the accused, the accused will be found guilty of the lesser crime of culpable homicide. In other words, the key question at this stage is whether, like the accused, the reasonable man would have been unable to have stopped himself from intentionally killing in the circumstances.

### (b) *Commentary on the two stages in the Tenganyika case*

#### (i) *The subjective issue*

The first stage focusses upon the central factual issue in any murder case, namely, whether the accused possessed the requisite subjective intention to kill his victim. It is now emphatically established in our law that the test for intention is entirely subjective<sup>11</sup>. This applies both in respect of actual and legal intention. Thus, in respect of legal intention,

8. 1959 (3) SA 392 (A)

9. It can be argued that here provocation is not really operating as a defence as such. The accused will simply be denying that he had *mens rea* for the crime. He will be claiming that the provocation (perhaps combined with other things such as intoxication) caused him to act without the requisite intention. See J.E. Stannard "The Demise of Drunkenness" 1982 *Legal Studies* 291.

10. The question here is whether he is automatically found guilty of culpable homicide or whether the court will only find him guilty of this crime if it finds that the requisite *mens rea* is present. This issue will be dealt with later on in this article.

11. Thus in *R v Majahe* 1965 R L R 106 at 108, the judge stated "If the court believes the accused when he says [he did not intend to kill] that ends the inquiry as the test is a subjective one; and no matter how unreasonable it might seem that he should not have had the intent to kill, if the court believes him, then *caedit quaestio*."



the question is not whether the reasonable man would have foreseen that there was possibility of death ~~being caused as a result~~ of a particular activity, but instead, whether the accused foresaw a risk of death but nonetheless continued to act recklessly without paying due regard to whether or not that risk eventuated. Put in the context of provocation the issue is not, at this stage, whether the accused's reaction to the provocation was reasonable or whether the reaction was in reasonable proportion to the degree of provocation. The only issue is whether the State has proved beyond reasonable doubt that accused in fact intended to kill.

At the first stage, therefore, provocation must be considered together with *all* the other salient features of the case which may have a bearing upon whether the accused in fact intended to kill. The extent of provocation and its effect on the accused's state of mind may be only one of many subjective factors to be considered at this stage. For instance, personality characteristics may be relevant to the matter of intention to kill. Thus, for example, if the accused is a very quick-tempered or hot-headed individual who tends to act impulsively, without considering the consequences of his action, his responsive action in the face of provocation may not have been accompanied by the subjective intention required for the crime. So, too, if he is particularly sensitive about some physical feature or disability (such as a badly scarred face) and, when he caused death, he was angrily reacting to some taunt about this disability, the court will obviously have to take into account these circumstances when considering whether that particular accused formed the intention to kill. Finally, factors such as intoxication will also have to be taken into account. Very frequently provocation goes hand-in-hand with intoxication. Passions may be more readily inflamed as a result of the influence of alcohol or drugs. The combined effects of the impairment of perceptions brought about by alcohol consumption and loss of temper due to provocation may be such that the court is unable to find that the accused possessed the requisite subjective intention. On the other hand, the mere fact that there were a number of subjective features in addition to provocation which may have influenced the accused's behaviour does not necessarily mean that the accused lacked the intention for the crime. Thus, even though, when the accused responded to the provocation he was somewhat drunk, he may nonetheless have formed the intention to kill. Or, if the provoked person was somewhat mentally subnormal or psychopathic, he may still have been able to form the requisite intention.<sup>12</sup>

In the context, the expression "blind rage" is often used to describe the situation where the accused lacked any intention whatsoever to commit the crime because he had entirely lost his self-control and had acted without knowing at all what he was doing. However, it should be noted that the first rung of *Tenganyika* is not restricted to situations where loss of self-control was so complete that the accused had absolutely no awareness of what he was doing. It also encompasses cases where the accused had

<sup>12</sup> A good example of this is the South African case of *S v Grove-Mitchell* 1975 (3) SA 417 (A) where despite the fact that the accused had an immature personality, was somewhat provoked and his mind was befuddled by liquor, the court found that he had the intention to kill.

some partial awareness of what he was doing, but the accused did not appreciate that the particular consequence, namely death, would eventuate.<sup>13</sup>

The issue of whether the requisite subjective *mens rea* is present is frequently by no means easy to decide. Where the accused categorically denies that he intended to kill, the problem arises of deciding on an inferential basis whether it can be found that he had actual or legal intention despite his denial. This problem is most acute where the State concedes that there was no actual intention to kill, but seeks to persuade the court that on the facts the only reasonable inference is that there was legal intention to kill. In cases where there was some degree of provocation, the courts have constantly to bear in mind that each individual has his own unique personality make-up and that different people respond in widely differing ways to various types of provocative behaviour. The presence of further factors, such as intoxication, makes the exploration into the accused's state of mind even more complicated. Finally the entire incident may have occurred over a very short space of time and the courts are faced with the problem of trying to decide what was going on in the accused's mind over this brief period.

Reference to a few of the homicide cases involving provocation will serve to illustrate some of these complexities.

In the *Tenganyika* case, the trial court's finding of intention to kill was held by the Appeal Court to have been incorrect. In coming to this conclusion, it took into account the accused's advanced state of intoxication, the provocation to which he had been subjected, namely, the infliction of a painful and crippling injury in the dark by the deceased, and the wild and random manner of the knife wounds rendered by the accused. The Appeal Court also observed that the trial court had erred in attaching too much weight to the accused's recollection of events of the evening. Although he seemed to have had some general idea of what had happened, looked at carefully this knowledge did not go very far in establishing his mental state at the time of the crime.

A few cases where the accused were found not guilty of murder because it was found that there was no intention to kill may usefully be cited. Perhaps the most far-reaching case in this regard is that of *S v Turk*<sup>14</sup>. Here the court found that, although the accused was fully aware of what he was doing when he fetched the jack handle to use to assault the victim, and although he fully appreciated that he was beating the deceased over the head with this heavy metal object, there was reasonable doubt, given the extent of the provocation and the accused's very strong reaction thereto, as to whether he in fact appreciated that the assault would

<sup>13</sup>. See *S v Turk* 1979 (4) SA 621 (Z). On the other hand, in terms of our law it may be found that, although there was some loss of self-control, the accused still had enough awareness of what he was doing to possess subjective intention.

<sup>14</sup>. 1979 (4) SA 621 (Z)

result in death and, nonetheless, recklessly persisted therein. Here the court stated that whilst loss of self-control "might not prevent an accused knowing what he is doing, it might negative the inference that he appreciated the *full consequences* of his act." In the case of *Zibengwa v S*<sup>15</sup> the provocation was very strong indeed, consisting as it did, of a liberation fighter finding on his return from the war that his wife was pregnant by another man and later, discovering her in bed with another man, and wife then in the ensuing quarrel, grabbing his private parts and applying considerable pressure to them, as well as biting him. So too, intention was not found to have been present in *S v Nyakatambwa*,<sup>16</sup> where there had been a history of nagging by a husband of his wife and where, after the husband had arrived home drunk, he had poked his wife with a hoe, she had promptly seized the hoe and had struck him twice over the head with it. Finally, in *Chawana v. S*<sup>17</sup>, intention was found to have been absent where, after an altercation between a man and a woman, the woman had seized his private parts and the man had picked up a metal object and had inflicted a fatal stab wound upon her.

On the other hand, the accused in the following cases were found guilty of murder even though, in each, there was some degree of provocation.

In *R v Bureke*<sup>18</sup> despite the fact that the accused was angry at the time of the killing because he suspected (wrongly) that his wife was having a sexual liaison with another man, and despite the fact that the wounds were inflicted in a wild and random manner, the court still found him guilty of murder as the accused had admitted that he had not lost his self-control and had intended to kill his wife. Similarly, in *S v Howard*<sup>19</sup> the court found that, even though the accused had acted in an extravagant manner, he had formed the intention to kill. The court here stressed that in deciding upon whether there was an intention to kill, all the circumstances had to be taken into account and in the present case:-

"... the most careful consideration [had] to be given to the effect upon the accused of the combination of the factors of the beer he had consumed and the provocation to which the deceased had undoubtedly subjected him".

Dealing with the matter of intoxication, the court concluded that the consumption of liquor had not clouded the accused's judgement, but had "perhaps tended to render [him] a little less long-suffering than he might otherwise have been". On the question of provocation, although the accused had become completely enraged and had acted in an extreme fashion when he brutally attacked the deceased with a knife the court should be careful "not to infer too readily from the very extravagance of the accused's behaviour" that he had so completely lost his self-control

15. A-154-80

16. HC-H 76-82.

17. SC 89-83

18. 1960 (I) SA 49 (F S C)

19. 1972 R L R 254 (G D)

that he had lacked the capacity to form an intention to kill. Such extreme behaviour, it said, may simply "be the result of the accused having yielded to a passion which aroused in him an actual desire to bring about the death of his victim".

So, too, in the case of *Chidziwa v S*<sup>20</sup> intention to kill was found to have been present even though there was some verbal provocation and the accused was somewhat drunk. The same features were present in *Misheck v S*<sup>21</sup> and, again, the court found that nonetheless the accused had had intention to kill.

As the test is subjective at this stage, what is the significance of factors such as that there was a cooling-off period subsequent to the provocation or that the harm inflicted was disproportionate or excessive, given the amount of provocation to which the accused was subjected? Some of the Zimbabwean cases appear to lay down as a *rule of law* that the existence of some cooling-off period renders inoperative the defence of provocation even under the first rung of *Tenganyika*.<sup>22</sup> However, these dicta should not, it is respectfully suggested, be taken to establish an *absolute rule* that loss of self-control can never extend over a period of time, and that if objectively the responsive action was not on the sudden, immediately after the provocation, then the defence of provocation cannot avail, even at the first stage of *Tenganyika*.<sup>23</sup> Granted that in most cases a time lapse, particularly a lengthy one, between the provocation and the responsive conduct will mean that the accused must have recovered control over his mental faculties by the time he acted, and that the harm he inflicted was therefore intentionally done in retaliation or revenge. But this does not mean that there might not be exceptional cases where the court finds that the loss of self-control extended over a period of time on a continuous basis, and that when the accused finally acted, the accused was still

20. A-225-77

21. A-135-78

22. Thus, in *Tsiga v S* A-77-76, Lewis JA said "It is of the essence of a defence of provocation that has the effect of reducing the crime from assault with intent to do grievous bodily harm to common assault or murder to culpable homicide, that the reaction to the provocation must be sudden, in the sense that the person provoked acts on the spur of the moment and in circumstances where he has temporarily lost his power of self-control and does not appreciate what he is doing". In *A G v Tobiwa and Ors* A-78-80; Baron J A stated that "... the law simply does not allow retaliation of the kind resorted to by the respondents. Provocation - and severe provocation - there clearly was; but for provocation to be pleaded in mitigation of sentence it must, in fact, give rise to loss of self-control; anger or resentment, however understandable, is not sufficient. *This why the spontaneity of the reaction is vital for the defence to succeed*". Finally, in *Mapfumo v S* SC 80-83, George C J, in dealing with the matter of sentence in a murder case, attached significance to the fact that some time had passed from the moment when the accused became aware of the infidelity and the actual moment of the attack and that his action followed brooding over the wrong suffered and was not an instantaneous reaction to the provocation.

23. Referring to the position in English law, Smith and Hogan, in the 4th edition of their book *Criminal Law* at p. 297, deal with the requirement of subjective loss of self-control. In this connection they say "Cooling time is obviously a fact of great importance in deciding this particular question; but it should always be remembered that it is not a matter of law, but one item of evidence in answering the question: was D deprived of his self-control when he did the fatal act?" Brett in 1970 *C L R* at 638-9 suggests that these are situations where the lapse of time may cause the accused's temper to get hotter and not cooler.

suffering from loss of self-control to such an extent that he lacked the intention to kill. This would appear to be the basis of the decision in the *Turk* case referred to earlier, the court finding that even though the incident occurred over a period of time, the accused never regained his self-control. Indeed, from a psychological standpoint, it may be that the rage could intensify over time, leading finally to a complete loss of self-control.<sup>24</sup> It should be remembered that the subjective test is not concerned with how a reasonable person would have acted in those circumstances, but with the effect of the provocation upon the particular accused which necessitates reference to the subjective personality characteristics of that accused.

The fact that the accused acted in a fashion which was excessive in the light of the provocation he received should not be seen as being necessarily fatal to the defence of provocation at the subjective stage. Again, the essential aspect at this stage is whether the accused possessed the requisite subjective intention. There is thus no rule of law that there must be some reasonable proportion or relationship between the degree of provocation offered and the extent of harm inflicted. A complete overreaction to provocation may indeed be indicative of complete loss of self-control and of absence of intention.<sup>25</sup>

In both these situations, it would thus be possible for the court to reach the conclusion that although the accused acted in highly unreasonable fashion in the circumstance, he lacked the requisite intent and therefore he cannot be convicted of murder.

The next question which arises in relation to the first rung of the *Tenganyika* case is what happens if the court finds that the accused lacked the intention to kill? If the court makes this finding then it clears that the accused cannot be convicted of murder. He could, still be convicted of culpable homicide. The issue here is whether he is *automatically* found guilty of lesser charge of culpable homicide because of the operation of the specific intent doctrine or whether he can only be found guilty of the lesser charge if the requirements for that crime have been satisfied. It would seem that the former applies in our law and that the accused would be found guilty automatically of the lesser charge as the specific intent doctrine would appear to apply in our law to both cases involving voluntary intoxication and to cases where provocation is present. This does not seem to have been laid down *expressly* in any of our cases on provocation but it has been impliedly established in the cases where on an application of the first rung of *Tenganyika* the court found that there was no intention to kill and then went on to find the accused guilty of culpable homicide without any explicit enquiry into whether the re-

24. On the other hand, the fact that the accused acted in an extreme fashion after the provocation is not decisive on the matter of self-control. See cases such as *Bureke* and *Howard* referred to above.

25. Brett *op. cit.* at p 638 argues that in the light of the scientific evidence on the effects of provocation it is folly to demand "... a reasonable proportion between the provocative act and reaction." Subjectively the actor may be the sort of person who is unable to prevent himself from acting in an excessive way once he has lost his self-control.

quirements of culpable homicide were present.<sup>26</sup> That the specific intent doctrine is applied is further confirmed because it has been clearly established in our law that whereas provocation can reduce assault with intent to do grievous bodily harm to common assault, provocation does not operate as a defence to a charge of common assault.<sup>27</sup>

If, as it seems, the specific intent doctrine is still operative in Zimbabwe in respect of the defence of provocation, it may be that our law is different in this regard from the South African Law. (It is argued by the authors in the second edition of Burchell and Hunt, *South African Law and Procedure*, Vol I pp 308-309 that in the light of the subject matter approach to the defence of provocation in South Africa the specific intent doctrine is or should be inapplicable.)

A further difficulty arises where, in combination with provocation there was a significant degree of voluntary intoxication. What happens if the accused would not have succumbed to the provocation if he had been sober as where, for instance, in his drunken state he takes offence at an inoffensive remark or overreacts to a trivial insult? Here it would seem clear that the specific intent doctrine would have to be applied because of the presence of the factor of voluntary intoxication, just as it applies where there is a mixture of voluntary intoxication and other defences.

#### (ii) *The objective issue*

Whereas at stage one of the *Tenganyika* approach the court is considering the matter of subjective intention and therefore has to consider provocation together with all the other relevant subjective features which may be present, at the objective stage which is reached after it has been found that intention to kill was present, the exclusive focus is upon the matter of provocation. The vital question is whether despite the fact that the accused intentionally ended the life of his victim he is nonetheless entitled to a partial defence in the light of provocation. If the court finds that because of the provocation the accused subjectively lost his self-control before intentionally killing his victim, under the second rung of *Tenganyika* the sole remaining issue is whether the reasonable person placed in the same situation as the accused would have responded to that degree of provocation in same-manner as the accused. When this final objective question is being addressed no heed is paid to factors personal to the accused such as his personality idiosyncrasies, or the fact that he was drunk.

26. See, for instance, the cases of *Tenganyika*, itself and *Turk*, referred to above. In both cases it would, however, have been easy to have found that the requirements of culpable homicide had been satisfied. In *Tenganyika* the accused acted under the influence of considerable intoxication and in *Turk* the accused jumped unreasonably to the conclusion which caused him to lose his temper. (See the appeal judgment in this case A-159-79. In sorts of cases it is most unlikely that the *mens rea* for culpable homicide will be absent. See Burchell and Hunt, *South African Criminal Law Procedure* Vol 1 (2nd ed.) at p. 30.

27. See *Tsiga v S* A-77-76; *S v Gomene* G-S-115-79 and *Zengeya v S* 1982 R. L. R. 29 (R).

28. See *S v Jassane* 1973 (4) S.A. 658 (T). In this case the voluntary intoxication led to the mistake of fact. Because of the existence of voluntary intoxication, only a partial defence was allowed and the accused was found guilty of common assault instead of the crime with which he had been charged, namely, assault with intent to murder.

The essence of the second rung of *Tenganyika* is that in certain circumstances of provocation, it is proper to convict the accused of culpable homicide rather than murder *even though he intentionally killed*. (This can be characterised as the crime reduction approach). By contrast in South Africa the position is adopted that an intentional killing in these circumstances is by definition murder as provocation does not constitute a legitimate excuse and the provocation received can only affect sentence. (This may be described as the sentence reduction approach). In *Nangani* the Supreme Court, whilst conceding that there were arguments in favour of both these approaches, came down on the side of the crime reduction approach. In reading this conclusion the Appeal Court argues as follows: It accepted in principle that a provoked intentional killing accorded with the strict definition of murder, as an intentional killing without legitimate excuse. However, it maintained that if provocation could constitute an extenuating circumstance, then there could be "*no question of principle involved*" in reducing murder to culpable homicide where there was provocation on the same sort of basis as self-defence and compulsion can totally or partially excuse intentional killings.<sup>29</sup> Further it said certain practical consideration outweighed the desirability of adhering to strict legal theory in this field. Although the crime reduction approach "... might be seen as giving insufficient weight to the importance of enforcing proper standards in trying to reconcile that aim with the objective of treating the individual fairly", the *Tenganyika* approach better accommodated "the realities of human reaction to situations of stress" whereas the South African approach "imposed too demanding a standard on ordinary people" and tended "*to overlook the realities of human behaviour*."<sup>30</sup> In practice what may happen when a person is grievously provoked is that he becomes so angry that he intends to kill or to do serious injury to another. That is the position of the classic case of a person who kills his spouse caught in the act of adultery. It is not that he or she does not realise what he or she is doing, but that his or her self-control is so overborne that his or her intentional killing is partially excused. To require that the loss of self-control must be such that the consequences of the act are not intended is to ignore the true effect of provocation.<sup>31</sup> Further,

29. These arguments are not entirely convincing. There are many and varied circumstances where extenuating circumstances may exist despite the unavailability of any recognised total or partial defences. It would be untenable to maintain that in all of these situations we might just as well allow partial defences as deal with these by way of extenuation. Also it would seem that the policy considerations involved in allowing provocation as a partial defence to an intentional killing are of a different order from those involved in partially excusing an intentional killing where there was moderate excess over what was reasonable in cases involving self-defence or compulsion. See also the criticisms to be found in (1982) 99 S A L J at 526 - 528.

30. Sentence reduction exponents argue that as murder can attract sentences ranging from a suspended sentence to death, due consideration can be afforded to the provocation involved when it comes to deciding upon a suitable penalty. See (1982) 99 S A L J, 524 at 528

31. The line taken by Schreiner J A in *R v Krull* 1959 (3) SA 392 at 398-399 here was that. "Whether one says that a provoked man loses the powers of self-control or becomes unable to form the intention to kill seems to me to be substantially a question of the choice of words. Either form is probably only a roughly approximate description of the actual mental processes. Legal systems can only attempt by one approach or another to give effect to the basic idea, which is that the provoked person may have been so upset that the mental element requisite for murder may not have been present".

argued Fieldsend C J, if such a test was strictly applied then the defence would be admitted in very few cases as "it must be very rare for a person to be able to say that he lost control of himself to the extent of not intending the consequences of his reaction".<sup>32</sup>

The adoption of the second rung of *Tenganyika* was not, however, totally unqualified. At p. 807 Fieldsend C J had this to say:-

"The provocation must also have been such as to have actually caused the accused to have lost his self-control and acted in such a manner. The reference to the effect of the provocation on the ordinary or on the reasonable man is not a very satisfactory test to have to apply in a plural society. There is now particularly in South Africa greater stress being laid on the subjective approach to the mental element in crime. It may be that the solution is not to apply the test of the reasonable man, but to bring in the necessary objective factor in a different way. This could be done by requiring that the provocation was such that it could reasonably be regarded as sufficient ground for the loss of self-control that led the accused to act against the victim as he did. This, together with the requirement that the provocation actually caused the accused to lose his self-control, would cover both the objective and subjective criteria that any system requires if proper regard is to be paid to the sanctity of human life and the need to allow of a conviction for murder, the most serious of crimes, in proper cases. They are criteria which were approved by the English *Criminal Law Revision Commission* (1980) Cmnd. 7944, paragraph 81, and they accord with the reasoning in the *Tenganyika* and *Bureka* cases"

In order to discuss the import of these views, it may be useful to document the background to the recommendations made by English *Criminal Law Revision Committee* in this regard. In England, prior to the 1957 Homicide Act, the reasonable man test<sup>33</sup> which was used to determine whether the provocation should reduce murder to manslaughter, was interpreted so as to exclude reference to particular personal characteristics of the accused. Thus, in the 1954 case of *Bedder v DPP* the fact that the reason why the accused became so incensed was because he had been taunted about his sexual impotency was found not to be pertinent when the reasonable man test was being applied, said the House of Lords, as sexual impotency was not a characteristic of a normal,

<sup>32</sup> Emphasis added. A conflicting view was expressed by Beck J (as he then was) in *S v Howard* 1972 R L R 247 at 254G as follows:-

"In my view, it would indeed be a rare case in which it would be proper to hold that even a reasonable man would have reacted; not just impulsively and instinctively without being capable of forming any intention to kill, nor even recklessly, without caring whether death ensued or not, but purposefully with an actual desire to kill".

<sup>33</sup> This test has also been adopted in a large number of other countries, particularly those based on English law.



reasonable man. The English *Criminal Law Revision Committee* then recommended that "*the test for provocation should be reformulated so that the accused is judged with due regard to any disability, physical or mental, from which he suffered*", (Para 54) and the approach which they advocated in order to achieve this result was that provocation would be sufficient, to reduce the crime to manslaughter "*if, on the facts as they appeared to the accused it constitutes a reasonable excuse for his loss of self-control*". This view was slightly revised in their 1980 report, but the essence of the 1977 proposal was left unaffected. In the 1980 report the reasonable man test was rejected in favour of a test which simply directed the jury's attention to the question of whether they would consider the provocation to have been reasonably sufficient. The exact wording was that provocation should reduce the crime to manslaughter "*if . . . it can reasonably be regarded as a sufficient ground for the loss of self-control*", taking the facts as they appeared to the accused as well as taking into account "*any disability, physical or mental, from which he suffered.*"

In English law the resort to the reasonable person test for crime reduction in homicide cases was an attempt to reconcile the aim of protecting citizens from harmful conduct and that of giving due weight to the fact that the accused was provoked. As we have seen, however, this test gave rise to problems of interpretation. More fundamental objections have also been raised in Britain to the use of this criterion. Glanville Williams in 1954 *CLR* 740 at 741 argued that as the reasonable person test is an ethical standard, it is therefore absurd for the law to say, in effect, that even that paragon of virtue, the reasonable man, would give way to provocation and commit a serious felony. If the reason why provoked homicide is punished is to deter people from committing the crime, it seems to be anomalous for the law to concede that even despite the existence of a heavy penalty for the crime, the reasonable man would still commit the crime in exceptional circumstances. Based on these arguments, Glanville Williams contended that it was preferable for the acceptance of the defence of provocation simply to be viewed as a compromise where the law does not exact full punishment but at the same time the propriety of the act is not conceded by the law.

Even more fundamentally, Brett in 1970 *CLR* 634 forcefully argued that once one accepts that genetic and environmental factors produce widely varying susceptibilities and responses to provocation, one can no longer maintain that there is such a thing as a reasonable person standard which can be applied to provocation cases. It is a fiction, he says, to suggest that there exists one distinct type of persons comprising virtually the whole of the population who respond in a uniform way to differing degrees of provocation. Rather there are a multiplicity of different types of persons and it is unfair to punish a person simply because he is nearer to one end or the other of the range rather than the centre. He, therefore, advocated the total abolition of the reasonable person rule in this context.

It is respectfully submitted that these various objections to the reasonable person test are more compelling than some of these raised by

Fieldsend C J For instance, the reference to the greater stress laid in South Africa upon the subjective approach to the mental element in crime does not appear to advance the argument vis-a-vis the objective formulation at the second stage of *Tenganyika*. However, it must be accepted that the existence of a plural society may serve to compound the complexities in applying an objective test because of the increased likely range of responses to provocation. Thus, in one cultural context, certain words or conduct may be highly provocative, whereas in another, they may be totally innocuous.

In the light of the above-mentioned objections to the reasonable person formula as applied in the context, one cannot but agree that it would be wise to avoid using this test if this is possible. The question is whether the adoption of the formulation suggested by the English *Criminal Law Revision Committee* would overcome the difficulties inherent in the reasonable person test. On analysis of this substitute test, it would seem that it is by no means an easy one to apply. Having found that the accused lost his self-control, instead of applying an entirely objective test, the court has to take into account certain subjective features in deciding whether the provocation could reasonably be regarded as a sufficient ground for the loss of his self-control. The first subjective features which have to be taken into account are "*the facts as they appeared to the accused.*" (Presumably normally if the accused had unreasonably construed the fact and jumped to a false conclusion, the provocation could not be considered reasonable as a sufficient ground). Secondly, any physical disability has to be considered. Little problem is posed by physical disabilities. Thus, it seems appropriate to allow the defence if the accused was taunted about having only one arm or a badly scarred face. But what about mental disabilities? Should the defence be allowed if, for instance, the accused is particularly quick-tempered or somewhat psychopathic? Finally, is it possible to decide whether the provocation can reasonably be regarded as a sufficient ground without some reference to the reasonable person criterion as the very use of the word reasonably in the formulation seems to imply that the court must assess whether any reasonable person would have succumbed to that degree of provocation in those particular circumstances? That involves a balancing of the harm caused and the extent of provocation.

## 2. 2 Cases Other than Homicide

It would seem that the only other crimes in respect of which provocation can be raised as a partial defence are those of attempted murder and assault with intent to do grievous bodily harm. Attempted murder would be amenable to the two stage *Tenganyika* treatment. Under the first rung, if there was no intention to kill because of provocation, there is a partial defence and the crime would be reduced to assault with intent to do grievous bodily harm.<sup>34</sup> Presumably, also, the second rung would apply if there was intention but loss of self-control. If objectively

<sup>34</sup>. See *Ncube v. S* A-198-84

the loss of self-control and subsequent action was reasonably justifiable when liability would be reduced to assault with intent to do grievous bodily harm (or attempted culpable homicide).

With assault with intent to do grievous bodily harm, if intent to inflict grievous harm is absent because of provocation, then the accused is found guilty automatically of the lesser charge of common assault.<sup>35</sup>

With all crimes, other than murder, attempted murder and assault with intent to do grievous bodily harm, provocation does not constitute even a partial defence, but is only taken into account in mitigation of sentence.<sup>36</sup> Even if accused lack the *mens rea* for these other crimes, they are still found guilty of these crimes.

## PART 2

### 3. GENERAL ASSESSMENT OF THE LAW

In this final section I will venture a few observations on the central issue in this article, namely, whether our law on the defence of provocation as presently constructed and operated strikes a satisfactory and acceptable balance between the protection of the public and individual justice to the accused. To explore this issue, I will cite a range of hypothetical examples involving provocation and indicate how our present law would deal with these and I then make some overall comments about the law.

#### 3.1 Cases where there was a very high degree of provocation

In each of the cases under this heading it will be taken that the provocation was of such a high order that the court was of the opinion that any ordinary person faced with that amount of provocation would have acted in the self-manner as the accused.

##### Case 1

The accused, who was grievously provoked, completely lost his self-control and, acting without intent to kill, caused the death of the deceased. Charge - Murder. Verdict - Culpable homicide.

(Alternatively, the same circumstances, except that the victim did not die but sustained serious injuries.

Charge - Attempted murder Verdict - Assault with intent to do grievous bodily harm, or

Charge - Assault with intent to do grievous bodily harm.

Verdict - Common assault).

<sup>35</sup> See, for instance *S v Gomele* G-S-115-79

<sup>36</sup> See, for instance *S v Zengaya* 1978 (2) SA 319 (R A)

*Case 2*

The accused, who was grievously provoked, completely lost his self-control and intentionally killed his victim. The court found that the reasonable person, subjected to that degree of provocation would have acted in the self-same manner as the accused (or that the provocation could reasonably be regarded as a sufficient ground for the loss of self-control).

Charge - Murder.

Verdict - Culpable homicide.

*Case 3*

The accused who was grievously provoked, completely lost his self-control and, either with or without intent, assaulted the provoker.

Charge - Common assault

Verdict - Guilty as charged.

*3.2 Cases where there was only very slight provocation**Case 4*

The accused, who was provoked only to a very minor extent, was a very quick-tempered individual who was very easily angered and he completely lost his self-control and, acting without intent to kill, caused the death of the deceased.

Charge - Murder

Verdict - Culpable homicide.

(Alternatively, the same circumstance, except that the victim did not die but sustained serious injuries -

Charge - Attempted murder.

Verdict - Assault with intent to do

grievous bodily harm, or

Charge - Assault with intent to do grievous bodily harm.

Verdict - Common assault).

*Case 5*

The accused, who was provoked only to a very minor extent, had been drinking heavily and, because his passions were inflamed by the drink, he completely lost his self-control and, acting without intent to kill, caused the death of the deceased. (Or the accused in his drunken state mistakenly believed he had been provoked severely and, having completely lost his self-control, unintentionally caused the death of the deceased).

Charge - Murder

Verdict - Culpable Homicide.

*Case 6*

The accused, who was provoked only to a very minor extent was very quick-tempered and very easily lost his temper. In response to the provocation he completely lost his-control and unintentionally inflicted harm on the provoker.

Charge - Common Assault.

Verdict - Guilty as charged.

A comparison between these various cases reveals the following: If one compares cases 1 and 2 with cases 4 and 5, the blameworthiness of the accused in the first two cases is of a completely different order from that in the second two and yet the same verdict returned in all four although, of course, the different levels of blameworthiness will be reflected in the magnitude of the sentences imposed. Indeed, in cases 1 and 2 it is difficult to say that there is any blameworthiness at all if we concede that any person has his breaking point when faced with overwhelming provocation. If, in effect, we accept that in cases 1 and 2 any normal person might have responded in an identical fashion to the accused, then the question might be asked, what rational purpose is served by finding the accused guilty of culpable homicide and imposing a penalty upon them? It cannot simply be to register disapproval that death has been caused by the accused. If the objective is to teach the accused to exercise more self-restraint in the future this seems to be somewhat misplaced as we surely do not expect completely superhuman powers of forbearance to be exercised by citizens.

On the other hand, exactly the same verdict is rendered in cases 4 and 5, despite the fact that the moral blameworthiness of the accused in both these cases is very high. In case 4, although the accused may have been born with an irascible personality, the society cannot obviously condone the infliction of extreme harm in response to mild provocation and therefore, punishment must be imposed in order to inculcate into the accused a need for increased efforts towards self-restraint in the future. In case 5 the blameworthiness derives from the befuddlement of the accused's perceptions as a result of drink and the consequent excessive reaction or the making of the mistake.

Again, when we compare cases 3 and 6 we find a clear discrepancy in the degrees of moral blameworthiness which is not reflected in the verdict which is the same in both cases. The application of the specific intent doctrine in provocation cases leads to an absolute rule that if the crime is a non-specific intent crime (which common assault is) provocation is not a defence. The effect of this rule is that the magnitude of the provocation can only be weighed in respect of sentence. Immaterial of how serious the provocation, the accused must be found guilty as charged. In case 3 this approach may be seen as too harsh and it could be argued that the accused should be totally acquitted in this type of case. On the other hand, in case 6 the conviction is fully warranted. Although the accused lacked intention he was blameworthy in not controlling himself from inflicting harm. In this type of case it is submitted that unless we have something to put in its place to safeguard the public interest, we should not adopt the recent South African approach of completely rejecting the specific intent doctrine and demanding the presence of the subjective intention in all cases involving crimes of intention. (In that country, in the light of the ruling in the Appellate Division of *S v Chretien*<sup>37</sup> that the specific intent doctrine is no longer to be applied in cases involving voluntary intoxication, it seems likely that a similar

37. 1981 (1) SA 1097 (A)

approach will be followed in relation to the defence of provocation.)<sup>38</sup> It is submitted that if we were to throw out the specific intent doctrine, thereby making it possible for the accused to escape liability in a case like case 6 above balance would be weighted far too heavily in favour of the accused at the expense of considerations of public protection.

### 3.3. Conclusion

The effect of the specific intent doctrine is that the accused never escapes liability entirely on the basis of provocation. When charged with a specific intent crime a successful plea of provocation leads to a conviction for a lesser non-specific intent crime. If charged with a non-specific intent crime, provocation does not operate as a defence but only as a mitigatory factor.

It has been argued that this doctrine appears to be unduly harsh when the provocation was extremely grave. But the total abandonment of the doctrine would lead to too lenient treatment of an accused who lacked *mens rea* after having lost his temper when subjected to only very slight provocation. One possible solution to this problem is to apply to cases, whether the charge be a specific intent one or not, the test as to whether the provocation could reasonably be regarded as a sufficient ground for the accused's actions and to acquit the accused if this test is satisfied. It has, however, been pointed out that the application of the test advocated by the English *Criminal Law, Revision Commission* may not, in practice, be an easy one to apply.

Another possible solution would be to adopt the approach favoured by some writers in cases involving voluntary intoxication. In respect of voluntary intoxication the writers of *South African Criminal Law and Procedure*, Vol 1, 2nd ed. argue at p. 301 that it is correct to acquit a person of any crime requiring subjective *mens rea* if, because of intoxication, the accused lacked that *mens rea*. They then, however, add that the accused should not escape scot free in these circumstances since the accused is blameworthy in getting drunk and then causing the harm in question. They therefore argue in favour of the adoption of the German law approach which is to have a separate statutory offence

“penalizing a person who deliberately or carelessly gets himself into a state of acute intoxication and commits an act which would have been a crime if he had had criminal capacity”.

We could possibly have some similar provision to cover cases where the accused unreasonably loses his self-control in the face of provocation and commits a crime without the requisite intention. This would cover cases 4, 5 and 6 above. The issue of whether it is just and necessary to convict the accused of a crime at all in cases 1, 2 and 3 would still have to be considered.

<sup>38</sup> See *Burchell and Hunt South African Criminal Law and Procedure*, Vol 1, 2nd Ed p 308.

Finally, I would like to refer briefly to another difficulty which arises in provocation cases under our present law. We have seen that the specific intent doctrine ensures that accused are always convicted of some crime. The problem thus arises of deciding upon a condign level of punishment. When imposing punishment in such cases frequently the courts do not articulate explicitly the objectives of such punishment. It is respectfully submitted that the reasons for the level of punishment chosen should always be carefully thought out and then stated. Thus, for instance, if the rationale of the punishment is to persuade a quick tempered person to exercise greater self-restraint in the future, this should be stated. The appropriate level of punishment in such cases still nonetheless remains an extremely problematical matter to decide.



This work is licensed under a  
Creative Commons  
Attribution – NonCommercial - NoDerivs 3.0 License.

To view a copy of the license please see:  
<http://creativecommons.org/licenses/by-nc-nd/3.0/>

This is a download from the BLDS Digital Library on OpenDocs  
<http://opendocs.ids.ac.uk/opendocs/>