Law of Crime – Exam Essay 2006

Provocation

The defence of provocation evolved at common law and offers a partial defence to murder. It reduces the offence to manslaughter and is a legal *excuse* rather than a justification. It is a common law defence in South Australia.

In this state the *Criminal Law Consolidation Act 1935* (CLCA) s 11 states:
11 Murder
Any person who commits murder shall be guilty of an offence and shall be imprisoned for life.
S 13 relates to manslaughter.

Therefore in order for the common law defence of provocation to be abolished it would be necessary for Parliament to amend the CLCA accordingly. This would no doubt require considerable political will but presumably would appeal to our Premier, give his law and order credentials.

As a defence it is necessary to establish objectively that the victim's conduct was provocative. This is a matter for the jury. *Stingel v R* is the leading case about provocation. If the accused can satisfy the evidential burden that he/she killed because of legally defined provocation then it is up to the prosecution to prove beyond doubt that the facts do not support the defence. It can only be used when the jury is satisfied that the prosecution has proven the offence of murder.

There must objectively have been provocative conduct. The defendant must lose self-control because of the provocation and form the intent to kill. Any evidence of pre-planning will cause the defence to fail.

The elements of provocation and loss of self-control leave the defence open so the courts have placed limits by invoking a two part test from *Stingel v R* (1990) High Court of Australia.
1) The conduct must have been sufficiently provocative to cause a hypothetical ordinary person to lose self-control as the accused did.
2) In determining how grave the conduct was the personal characteristics of the accused must be considered.

The former is confusing and if everyone said he/she was provoked without a standard the defence would be used in all cases of murder. It is necessary to determine the gravity of provocation and the standard of self-control, ie how bad was the provocation and how much can the hypothetical person put up with.

To arrive at such thresholds requires an assessment by the jury based on their experiences, expectations and prejudices, etc. It is an unfair test which is inappropriate in a multicultural society. See the following cases:
Mungatopi (1992) - standards for indigenous people – to constitute provocation the act must have been capable of provoking an ordinary Aboriginal person to the same degree as produced the death.
Mascantonio (1995) – affirmation of test – the attitudes and characteristics of the accused are relevant in assessing the gravity of the conduct said to constitute provocation.

The above two cases and also *Stingel* highlight some of the problems experienced by the courts in applying the test. Indeed I would argue that it is an anachronistic defence – apparently arising from wronged husbands

discovering their wives with lovers and thus provoking violence and murder. Violent behaviour resulting in murder attributable to provocation is unacceptable in modern society and indeed has never been acceptable.

The Victorian Law Reform Commission *Defence to Homicide Report* put forward the following reasons for abolition:

- Provocation and loss of control are taken into account at sentencing.
- Intentional killing is only justified in self-defence.
- The moral basis is inconsistent with contemporary views.
- It is of concern when a person is exercising their rights (eg leaving a relationship).
- It sends a message that the victim contributed to his/her death.
- It is incoherent, confusing and difficult to apply.

All of the above arguments are valid and I would add to the former that it is difficult for law students to understand also. The case law is confusing – see previous page. The defence should be abolished.

As outlined above the abolition of the defence will require an amendment to the CLCA. The scope of such an amendment will dictate whether provocation can be used in sentencing offenders convicted of murder. Mitigating factors are at issue during a sentencing hearing and could incorporate provocation. However, I would not advocate any form of qualification (in the form of years) as such matters are best left to the discretion of the judge. A jury might have a role in determining whether provocation did constitute a mitigating factor. Alternatively there could be a new offence *murder as a result of provocation*.

Degrees of provocation are subjective and thresholds to withstand provocation are contingent on an individual. It is proper that a judge make an assessment of these factors in determining an appropriate sentence. If seen as inadequate it is always open to the state to institute an appeal against a manifestly inadequate sentence.

My view, however, is that provocation should not constitute a defence to murder. A murderer has formed an intention to kill and provocation should not exculpate a murderer or mitigate the seriousness of the offence (ie reduce it to manslaughter). In other words it should be neither a defence under common law, nor (should SA law change) constitute a mitigating factor in sentencing.