

Schedule 5

REPORT
OF THE
SELECT COMMITTEE
ON MURDER AND
LIFE IMPRISONMENT

VOLUME I-REPORT AND APPENDICES

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PART 6 DEFENCES TO MURDER

provocation and diminished responsibility

77. In England and Wales, although all the elements of murder as described above are proved, the defendant must be acquitted of murder and convicted of manslaughter if

- (a) he was provoked to lose his self-control by something said or done, or both, which was enough to make a reasonable man do as he did; or
- (b) he was suffering from an abnormality of mind which substantially impaired his mental responsibility for the act or omission in question (diminished responsibility).

78. In Scotland, diminished responsibility and provocation are also available as defences to murder. However, provocation is defined rather more narrowly in Scotland than in England and Wales. In Scotland, it is required that:

"there must have been actual injury or alarming threats producing reasonable perturbation"

for provocation to be made out. The Lord Justice General (Q 2072) commented that there was a general feeling in Scotland that the defence should be widened, and said that a re-consideration of the substance of the defence would be timely.

Infanticide

79. In England and Wales, but not in Scotland, a woman who would otherwise be guilty of murder must be acquitted of murder and convicted of infanticide if she kills her child of less than twelve months when the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth.

80. The primary function of the defences of diminished responsibility and provocation and the offence of infanticide is to free the judge from the duty to impose a mandatory sentence, originally a sentence of death and, since 1965, a sentence of life imprisonment, when the specified conditions are satisfied. He is enabled to impose whatever sentence he thinks appropriate to the particular facts of the case. If the mandatory sentence were to be abolished, there would then be a strong case for abolishing these defences as well. Their primary function would have disappeared. Abolition of the defences would bring the law of murder into line with the principles of the rest of the criminal law. The defences are peculiar to the law of murder. For example, a person charged with causing grievous bodily harm with intent, contrary to section 18 of the Offences against the Person Act 1861, may have been acting under provocation or with diminished responsibility or both, or be a woman who injured her child under the age of twelve months when the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child. These matters are no defence to the charge but will be taken into account by the judge in imposing sentence. If the judge can do this adequately for an offence under section 18 of the Offences against the Person Act 1861, or any other offence (and the law assumes he can), then he can do so on a charge of murder.

81. This was the approach of the Advisory Council on the Penal System, the Butler Committee on Mentally Abnormal Offenders¹(which was concerned only with diminished responsibility) and, at one time, the Law Commission. Some of those who submitted evidence to the Committee, including three of the judges who expressed views were of like mind. But a majority of the Criminal Law Revision Committee²saw virtue in retaining the defences even if the judge was given an unfettered discretion in sentencing for murder, for the following reasons:

- (i) The jury's verdict, accepting or rejecting the defence, would assist the judge in sentencing;
- (ii) a jury might be reluctant to convict of murder in a clear case of provocation or diminished responsibility and might acquit a guilty person altogether if told that the alternative of manslaughter was not open to them;
- (iii) the finding of provocation or diminished responsibility may enable the public to understand why a seemingly lenient sentence has been passed on a person who has taken another's life.

¹ Cmnd. 6244. Chapter 19.

² Fourteenth Report. paragraph 76.

82. The Law Commission is now of a similar opinion: even if the sentence became discretionary the defences would serve the valuable function of removing certain specific categories of acts from the stigma attaching to a conviction for murder and of ensuring that the facts were determined after a proper hearing before a jury. The Lord Chief Justice also stressed that it is not right that a person acting under diminished responsibility or provocation should be subject to the stigma of a conviction of murder (Q 831).

Opinion of the Committee

83. The Committee agree with this opinion and recommend that these defences should be retained. whether or not the sentence for murder were to become discretionary.

84. The Committee note the suggestion (p 551) that the offence of infanticide is no longer necessary, and that the defence of diminished responsibility could be used instead. The offence of infanticide does not exist in Scotland. and cases are dealt with as cases of culpable homicide with diminished responsibility. The Committee make no recommendation on whether the law should be changed in England and Wales, but suggest that the matter should be further considered.

The substance of the defences

85. The evidence to the Committee includes some weighty criticism of the substance of the defences. Judges criticised the defence of diminished responsibility as being difficult to explain to a jury. The Lord Chief Justice and nine judges thought that the defence of provocation should be reconsidered, considering the "reasonable man" test to be logically unworkable or as rendering the defence almost unworkable if it were strictly applied by juries (p 565, Q 831). The Committee have not considered in detail the technical problems of the defences to murder, because this matter was outside their terms of reference. The Committee note, however, that these matters have already been reconsidered by the Criminal Law Revision Committee in their Fourteenth Report.¹and that their recommendations (which, *inter alia*, would eliminate the concept of the reasonable man) have been incorporated by the Law Commission into the draft Criminal Code, clauses 56-58.

New defences to murder: (i) Excessive self-defence

86. The Criminal Law Revision Committee recommended that anew defence reducing murder to manslaughter should be created:

"Where a person kills in a situation in which it is reasonable for some force to be used in self-defence or in the prevention of crime but the defendant used excessive force ... if, at the time of the act, he honestly believed that the force he used was reasonable in the circumstances."

87. Any person is entitled to use reasonable force in self-defence, or in the defence of others. or in the prevention of crime. If a person kills while using force for such a purpose and is charged with murder, he is to be judged on the facts as he honestly believed them to be. whether reasonably or not: but it is for the jury to say whether, in the light of those facts. the force used was reasonable. If the jury is satisfied that. even in the circumstances that the defendant believed to exist. the force used was excessive, he is guilty of murder. The operation of this law is probably less harsh than might appear, [because as](#) Lord Morris of Borth-y-Gest said when delivering the judgement of the Privy Council in... R *v Palmer*:²

"If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken."

88. Nevertheless the law is that a person may be convicted of murder although he was *bona-fide* acting in self-defence or the prevention of crime. If murder is to be reserved for those homicides which are most deserving of stigma. this does not seem to be one of them. The Lord Chief Justice told the Committee that he had always thought it wrong that a person who goes too far in self-defence should be convicted of murder and^dthat, if any difficulties of definition could be overcome, the law should be changed (Q 834). The Committee note that for some years Australian law allowed a defence to murder of "excessive self-defence" but that this was overruled

¹ Criminal Law Revision Committee. Fourteenth Report. 1980. Cmnd. 7814, paragraphs 75-99-

² [1971]AC 814 at 832.

by the High Court of Australia in *Zekevic v Director of Public Prosecutions (Vic.)*.¹ The Court did so, not because it thought the principle was unsound but because of the difficulties which had arisen in directing juries in a form which took proper account of the burden of proof. The Law Commission is, however, of the opinion that these difficulties need not arise here and the draft Criminal Code makes provision for a defence on the lines proposed by the CLRC. Viscount Colville of Culross has argued cogently in favour of such a defence (pp 542-3).

opinion of the Committee

89. The Committee find the argument in favour of the provision of a qualified defence of using excessive force in self-defence to be convincing and recommend that provision for such a defence in England and Wales should be made on the lines proposed by the Law Commission in the draft Criminal Code. The Committee note that this would bring the law of England and Wales into line with the law of Scotland on this point.

Duress

90. Duress, consisting in a threat of death or serious personal injury, may be a defence to all crimes except some forms of treason and any form of murder and, perhaps, attempted murder. If a person is charged under section 18 of the Offences against the Person Act 1861 with causing grievous bodily harm with intent to do so, and he admits that he did cause such harm with that intent, he will nevertheless be acquitted if the jury think his defence, that he was acting under duress, is, or may be, true. But if the victim dies of the injury within a year and a day and the assailant is charged with murder, he *will* be liable, under the present law, to conviction of murder, and duress, however great, will be no defence. The act which was, in law, excusable while the victim lived, became inexcusable when he died. In *R v Howe*,² the House of Lords overruled its previous decision in *Lynch v Director of Public Prosecutions for Northern Ireland*,³ that duress might be a defence to a person charged with murder as an aider and abettor. But Lord Brandon of Oakbrook, concurring in the decision,⁴ said:

"I cannot pretend, however, that I regard the outcome as satisfactory. It is not logical, and I do not think it can be just, that duress should afford a complete defence to charges of all crimes less grave than murder, but not even a partial defence to a charge of that crime."

91. The House noted that Parliament had not acted on the recommendation of the Law Commission that duress, as defined in their Report, should be a complete defence to murder as it is to other crimes.⁵ The House declined to act on the suggestion made in argument that duress might be treated as analogous to provocation, reducing murder to manslaughter. The Lord Chancellor, Lord Hailsham, thought this would be illogical and contrary to principle. Lord Griffiths said that it would be an anomaly to treat duress as a mitigation rather than a complete excuse for murder alone. He might have been more tempted to follow this course if murder were still punishable with death; but thought that the matter could be adequately dealt with by the machinery for the review of life sentences. Lord Mackay of Clashfern said:⁶

"In my opinion we would not be justified in the present state of the law in introducing for the first time into our law the concept of duress acting to reduce the charge to one of manslaughter even if there were grounds on which it might be right to do so. On that aspect of the matter the Law Commission took the view that where the defence of duress had been made out it would be unjust to stigmatise the person accused with a conviction and there is clearly much force in that view."

92. Giving the judgment of the Court of Appeal in *Howe*⁷ the Lord Chief Justice said:

"It seems to us that it would be a highly dangerous relaxation in the law to allow a person who has deliberately killed, maybe a number of innocent people, to escape conviction and punishment altogether because of a fear that his own life or those of his family might be in danger if he did not, particularly when the defence of duress is so easy to raise and may be so difficult for the prosecution to disprove beyond reasonable doubt, the facts of necessity

1 (1987) 61 ALJ 375.

2 [1987] AC 417.

3 [1975] AC 653.

4 At 438.

5 Report on Defences of General Application, Law Commission. No. S3.

6 at 456□

7 [1986] QB 626 at 641

being as a rule known only to the defendant himself. That is not to say that duress may not be taken into account in other ways, for example by the Parole Board."

Opinion of the Committee

93. The Committee agree with the opinion of the Lord Chief Justice and consider that it is not appropriate to provide for a defence of duress reducing murder to manslaughter. If the mandatory sentence of life imprisonment were to be abolished (see paragraph 118 below), the judge would be able to take into account any evidence of duress in fixing the appropriate sentence. The Committee therefore make no recommendation for any change in the law relating to murder committed under duress.

Mercy killing

94. The so-called "mercy killing" is inevitably an intentional killing and so *will* fall within any of the definitions of murder which the Committee have considered. According to a report in *The Times*,¹ in August 1988 a 54-year old man was convicted of murder and consequently sentenced to life imprisonment after he had killed his wife who was confined to a wheelchair, suffering from a wasting disease, and who had repeatedly begged to be put out of her misery. Yet such a killing, done out of motives of compassion, is clearly not one of the most heinous types of homicide and may be thought by many to deserve little or no stigma. Sometimes the mercy-killer is found not guilty of murder but guilty of manslaughter on the grounds of diminished responsibility. The jury accept medical evidence that the defendant was suffering from an abnormality of mind which substantially diminished his responsibility in doing the act of killing. Some of the Committee's witnesses have said that they do not believe the defence of diminished responsibility is improperly stretched to include cases which could not properly be brought within its limits (p 95), but there is substantial evidence to the contrary (pp 125, 676-7).² The Committee took note of a recent case where a woman helped her terminally ill mother to die. She was charged with, and convicted of, attempted murder and was sentenced to two years probation. The illogical charge of attempted murder appears to have been brought in order to avoid the stigma of a murder conviction.³

95. In 1976 the CLRC made a very tentative proposal in a Working Paper that consideration should be given to the creation of a new offence of mercy-killing. It was proposed that a person who unlawfully killed another should not be guilty of murder or of manslaughter but guilty of an offence punishable with two years' imprisonment if he, from compassion, killed another person who was, or was with reasonable cause believed to be

- (i) subject to great bodily pain or suffering; or
- (ii) permanently helpless from bodily or mental incapacity; or
- (iii) subject to rapid and incurable bodily or mental degeneration.

96. This proposal received a hostile reception. The CLRC was persuaded that the public was not prepared to countenance what was seen as a threat to the sanctity of life and, when they published their Report,⁴ the proposal was abandoned.

97. The Committee have noted the report of the British Medical Association's Working Party on "Euthanasia" and its conclusions that:

"4. An active intervention by anybody to terminate another person's life should remain illegal. Neither doctors nor any other occupational group should be placed in a category which lessens their responsibility for their actions;" and

"16. The law should not be changed and the deliberate taking of a human life should remain a crime. This rejection of a change in the law to permit doctors to intervene to end a person's life is not just a subordination of individual wellbeing to social policy. It is, instead, an affirmation of the supreme value of the individual, no matter how worthless and hopeless that individual may feel."

1 6 August 1988.

2 See also: Wootton, *Crime and Penal Policy*, 1978, 143, Report of the Committee on Mentally Disordered Offenders (Cmnd. 6244), pp 244-8.

3 *The Times* 15 July 1989.

4 Fourteenth Report, p 53.

5 5 May 1988.

98. The Committee have received from the Law Commission a proposal with a different basis from that of the CLRC. The Commission agrees with the CLRC that there should be no separate offence of "mercy killing" but that some cases might be covered by a new special defence reducing murder to manslaughter. They suggest:

"The limits of the defence might be:

(a) that the killing was done in order to relieve a person who was permanently subject to great bodily pain or suffering, or permanently helpless from bodily or mental incapacity or subject to rapid and incurable mental or bodily degeneration; and

(b) at a time when the accused was affected by severe emotional distress."

99. This is based on the discarded proposal of the CLRC but condition (b) is new. In similar vein, Professor Leonard Leigh has argued in favour of a defence of "overwhelming emotional stress." The Law Commission point out that such a defence would not excuse a doctor or nurse from liability to conviction of murder and that it would be wrong for the law to appear to be sanctioning such killings by "professionals". This, in effect, would amount to an extension of the defence of diminished responsibility, explicitly bringing within the defence some cases which at present are accommodated only by a straining of the concepts beyond their proper limits and others where the defendant is not so fortunate and is convicted of murder.

Opinion of the Committee

100. The Committee have taken note of the strong arguments on both sides of this issue. However, they believe that the introduction of a discretionary sentence for murder *will* enable the judge to take the full circumstances of the crime into account in passing sentence. The Committee make no recommendation for a change in the law on this point.