

# A Sentencing Guideline for Manslaughter (by reason of Provocation) within the ECSC

Within the ECSC, in the nine member states and territories, the offence of manslaughter (by reason of provocation) is found in both common law and statute.

## Applicability of Guideline

In sentencing for this offence, the Chief Justice has issued guidelines<sup>1</sup> and the court must apply the relevant guidelines and sentence accordingly unless to do so would not be in the interests of justice. It is only permissible to depart from the guidelines in exceptional circumstances, where such departure can be justified. Clear reasons for not applying the guideline must be given when passing sentence.

It is expected that every court will follow the steps below, with each relevant step being identified to the offender in public before the sentence is passed. Starting points and ranges apply to all adult offenders<sup>2</sup> whether they have pleaded guilty or been convicted after a trial. Credit for a guilty plea is taken into consideration only at Step 3.

### Step 1

Consider the level of culpability by finding the starting point by consulting the guideline and the grid below. Then adjust the figure within the range for the aggravating and mitigating factors of the offence

<sup>1</sup> As at [date of publication]

<sup>2</sup> For persons below the age of 18, see the **Practice Direction 8D on Sentencing Guidelines no. 4 of 2019**.

**Step 2**

Adjust the figure within the range for the aggravating and mitigating factors affecting the offender.

**Step 3**

Adjust the figure on assessing discount for any plea of guilty, if applicable.

**Step 4**

Adjust the figure on assessing totality if sentencing for more than one offence.

**Step 5**

Give credit for time served on remand.

**Step 6**

Finally, consider ancillary orders, confiscation, compensation, etc, if applicable.

**Pass the Sentence**

The court must give reasons, explaining the construction of the sentence in a way that can be readily understood by the defendant, in particular justifying any departure from the guideline.

## CONSTRUCTING THE SENTENCE

### STEP 1

Consider the level of culpability by finding the starting point by consulting the guideline and the grid below. Then adjust the figure within the range for the aggravating and mitigating factors of the offence

A case of manslaughter by reason of provocation requires an assessment of the seriousness of the offence, including the culpability of the offender, and its consequences, by reference to the harm caused.

To establish the starting point for the offence within the relevant range, there are four stages within Step 1.

### FIRST STAGE

The first stage is to determine the offence category based on consequence.

The consequence of manslaughter is always the death of the victim.

## SECOND STAGE

The second stage is to consider seriousness by assessing the culpability of the offender.

A sentence for manslaughter by reason of provocation means it has been found or accepted there has been a loss of self-control by the defendant. The intensity, extent, and nature of loss of that control must be assessed in the context of the provocation that preceded it.

Culpability requires the court to determine the degree of provocation as shown by its nature and duration, and the extent and timing of the retaliation. The extent and timing of the retaliation can be:

- after a short period of provocation; or
- after provocative behavior built up over time (cumulative provocation).

Whether the provocation was suffered over a long or short period is important to the assessment of gravity and seriousness. The following factors should be considered:

- the impact of cumulative provocation; and
- consideration should not be limited to acts of provocation that occurred immediately before the victim was killed.

For example, in domestic violence cases, cumulative provocation may eventually become intolerable, the latest incident seeming all the worse because of what went before.

The levels arising are as follows:

Level A - a low degree of provocation, meaning higher culpability;

Level B - a significant degree of provocation, meaning medium culpability, which can be low provocation cumulative over a long period;

Level C - a high degree of provocation, meaning lower culpability, which can be significant provocation which is cumulative over a long period.

**SERIOUSNESS - Level A – High - low degree of provocation**

- Infidelity<sup>3</sup>
- Verbal abuse
- Conduct of the victim is not extreme
- Being armed with a weapon for use in advance

**SERIOUSNESS – Level B – Medium - significant degree of provocation**

- Adultery<sup>4</sup>
- Low provocation which is cumulative over a long period leading finally to loss of control
- Physical abuse of the offender by the victim falling short of extreme violence
- Psychological bullying of the offender by the victim
- Spontaneous use of a weapon that happens to be available

**SERIOUSNESS – Level C – Lower - high degree of provocation**

- Significant provocation which is cumulative over a long period leading finally to loss of control
- Gross and extreme conduct on the part of the victim
- Victim presented a threat not only to the offender, but to anyone in his/her care
- Significant violence from the victim
- Short period between the provocation and the killing

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<sup>3</sup> 'Infidelity' here means loss of self-control where either:

- there is an uncommitted sexual relationship where sexual relations are reasonably believed to have occurred with a third party; or
- a committed relationship where sexual relations are reasonably believed to have occurred with a third party not being sexual intercourse, or where sexual intercourse is merely suspected.

<sup>4</sup> 'Adultery' here means loss of self-control where there is a committed relationship - usually evidenced by living together, over years, being married or common-law spouses, often with children - and there has been evidence, not mere suspicion, sexual intercourse has occurred with a third party.

**THIRD STAGE**

Having determined the level of responsibility, find the starting point by consulting the grid below, where the sentences are expressed in years, not as percentages of a maximum.<sup>5</sup>

Consequence	Seriousness - Level A – High	Seriousness - Level B - Medium	Seriousness - Level C - Lower
Death of the victim	Starting point 30 years Range 20-40 years	Starting point 20 years Range 10-30 years	Starting point 10 years Range non-custodial-15 years

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<sup>5</sup> In the nine island nations of the ECSC, the maximum sentence for manslaughter by reason provocation is life imprisonment, except on Antigua & Barbuda, where it is 35 years, though this figure still allows for the figures expressed in the grid, though with a shorter range at level A. Nowtwithstanding the starting points expressed in years, in appropriate though rare cases the maxima may apply.

## FOURTH STAGE

Having determined the starting point, consider the following non-exhaustive list of aggravating and mitigating factors of the offence and adjust upwards or downwards if required, taking care not to double-count factors considered in stages 1 and 2.

### **AGGRAVATING FACTORS** of the offence

- More than one person killed as a result of the offence
- Offence took place in the presence of a child or other vulnerable person
- Victim was providing a public service or performing a public duty at the time of the offence
- Persistence of the violence
- Others at risk of harm by the offending
- Voluntary use of drugs or alcohol, contributing to the loss of control
- Post-conduct behavior including the concealment or attempting to dispose of evidence and dismemberment of the body (but not limited to these)

### **MITIGATING FACTORS** of the offence

- Intention to cause serious bodily harm rather than to kill
- Post-conduct behavior: summoning medical assistance, remaining at the scene, co-operating with the authorities
- Offender acted to a degree under a mental health condition (where not amounting to the partial defence of diminished responsibility)

## **STEP 2**

Adjust the figure within the range for the aggravating and mitigating factors affecting the offender.

### **AGGRAVATING FACTORS** of offender

- Previous convictions for violence offences
- Relevant convictions for other offences
- Offence committed whilst on bail

### **MITIGATING FACTORS** of offender

- Good character
- Genuine remorse
- Physical or mental disability or ill-health
- Steps taken to address offending behavior
- Youth and/or lack of maturity where it explains offending
- Assistance given to the authorities

## **STEP 3**

Credit should be given for a guilty plea as appropriate. A reduction of one-third should be given for a guilty plea entered at the earliest practicable opportunity. Credit will usually reduce significantly the later the plea.

## **STEP 4**

Adjust the figure on assessing totality if sentencing for more than one offence. If appropriate, dangerousness should also be considered.



**STEP 5**

Credit must be given for time spent on remand for the relevant offence, to be calculated with precision<sup>6</sup>.

**STEP 6**

Finally, consider ancillary and restraining orders, confiscation, compensation, etc, if applicable.

**Pass the Sentence**

The court must give reasons, explaining the construction of the sentence in a way that can be readily understood by the defendant, in particular justifying any departure from the guideline.

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<sup>6</sup> See the requirements for assessing time on remand in **Gomes v The State 2015** UKPC 8, see para 12; **Shonovia Thomas v The Queen** Appeal no.6 of 2010; and **Romeo Da Costa Hall v The Queen 2011** CCJ 6.