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THE PRESENT AND FUTURE OF PROVOCATION AS A DEFENCE TO MURDER IN SINGAPORE

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The practice of the local courts in relation to provocation as a partial defence to murder has hitherto been to follow the developments of the defence in English law. This article seeks to examine some of the recent developments from England and other parts of the Commonwealth, assess the current state of our law in Singapore, and discuss whether these developments ought to be followed locally.

THE law of provocation has been the subject of much development both locally and in other Commonwealth jurisdictions in recent years. This article will evaluate some of these developments with regard to the relevance of the characteristics of the offender and the "proportionality requirement" in the troublesome objective test of the defence.

Part I of this article considers whether certain triggering conditions must be met before an offender's characteristics may be considered for the purposes of assessing the "sting" of the provocative conduct or insult, and the proper approach of a court faced with such alleged characteristics. Part II analyses the recent interpretation of *Camplin*[1] by the English House of Lords and whether our local courts should follow suit. Finally, in Part III, the recent local developments in the "proportionality requirement" in the defence of provocation will be reviewed.

It will be seen that in many instances the Singapore courts have been able to keep pace with the developments in these two aspects of the provocation defence at common law and that only limited improvement is needed in these two areas.

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[1] [1978] AC 705.

I. Characteristics Of The Offender And The "Sting" Of The Provocation

A. *No need for the provocation to be intentionally directed at the characteristic of the offender*

At common law, it was once considered that there must be some direct connection between the provocative words or conduct and the characteristic sought to be invoked by the offender to warrant a departure from the reasonable man test.[2] Thus, the jury in the English case of *R* v *Newell*[3] were directed that the characteristic of chronic alcoholism was not to be taken into consideration as it did not have any connection with the provocation consisting of a derogatory reference to the offender's girlfriend and a suggestion of a homosexual act with the deceased. Similarly, in a case before the Canadian Supreme Court, it was pointed out that the race of a person is irrelevant if the provocation involves an insult regarding a physical disability; and the sex of the offender is irrelevant if the provocation relates to a racial insult.[4]

This view has since been set right by the Privy Council in *Luc Thiet Thuan* v *The Queen* where it was held that:

> [I]n the great majority of cases in which a characteristic of the defendant is relevant to the gravity of the provocation to him, the provocation will in fact have been directed at that characteristic, as where it is the subject of taunts by the deceased. But [their Lordships] wish to observe that this need not always be so, for there may be cases in which, for example, previous events mislead the defendant into believing that an innocent remark by the deceased was so directed when in fact it was not.[5]

There is thus no need for the provocation to be intentionally directed at the characteristic in question for that characteristic to be considered in determining the "sting" of the provocation, so long as the provocation had been taken to be so directed by the offender. In this writer's view, it is perhaps still too artificial to require the connection, either real or mistaken, of the provocation to the trait in question. The racial, religious or cultural background of a person plays a key role in determining how *any* provocative insult is viewed and not just in the case of an insult which is specifically directed to his race, religion or culture (or thought to be so

[2] The term "reasonable man" is used here purely for ease of expression. Other terms such as "ordinary person" or "reasonable person" may be used interchangeably.

[3] (1980) 71 Cr App R 331.

[4] *R* v *Hill* (1986) 25 CCC (3d) 322 at 337 *per* Dickson CJC.

[5] [1996] 3 WLR 45 at 59. There was unanimous agreement in the Privy Council on this point.

directed).[6] The race of an offender, for example, should be relevant even if the taunt is to his physical disability if members of that race find it especially shameful to have a physical disability.

The approach of the Singapore Court of Appeal in *Kwan Cin Cheng*[7] shows that a much wider view than the one presently available in the common law is to be adopted locally. In that case, the "emotional, vulnerable state of mind" of the offender was held to have been properly taken into account as he was in love with the deceased and was pleading with her to come back to him. His emotional state made her callous remarks that she was "very happy" with her new boyfriend harder to bear even though her remarks were not directed, intentionally or otherwise, at his state of mind:

> [I]n applying the objective test … the 'reasonable man' must be placed in the same circumstances and background events as the [offender] and hence would in all likelihood have been experiencing much the same mental anguish as the [offender]. It would have been absurd to apply the objective test by comparing the [offender's] reaction with a hypothetical man of his age and sex but in good spirits and with no sentimental feelings for the deceased.[8]

This case also confirms that the offender's relevant characteristics for consideration in the defence of provocation need not be confined to physical ones. Mental characteristics may also be considered.

B. *Characteristic must increase the "sting" of the provocation*

Flowing from the purpose for which the personal characteristic of the offender is recognised in the law of provocation, the offender must be able to show that it is due to the characteristic that his susceptibility to the provocation is increased. Hence, if the gravity of the provocation would be the same regardless of the age of the offender, there is no need to consider the fact that the offender was 20 years of age.[9] The Singapore courts have also confirmed that it is not a matter of "mere formula" that the characteristics of the offender must always be referred to.[10]

[6] Note that in *Camplin*, *supra* note 1, the characteristic of the accused's age was considered relevant even though the provocation was not directed at his youthfulness. This is also supported by anthropological evidence, see William I Torry, "The Doctrine of Provocation and the Reasonable Person Test: an Essay on Culture Theory and the Criminal Law" (2001) 29 IntJSocL 1 at 12-17, 23-24.

[7] [1998] 2 SLR 345 at para 72.

[8] *Ibid* at para 50.

[9] *Ali* [1989] Crim LR 736.

[10] *Ithinin bin Kamari* v *PP* [1993] 2 SLR 245 at 252.

In addition, the effect of the provocation on a person with those characteristics must be shown to be of such gravity as is likely to lead to the killing of the deceased if the defence is to succeed. In the Indian case of *Ghulam Mustafa Gahno* v *Emperor*,[11] the appellant had killed his adolescent wife with a hatchet after she had shown him a *booja* – a gesture of contempt amongst the Baluchis, a community to which both the appellant and deceased belonged. However, the evidence from the complainant who was also the uncle of the deceased and a Baluchi, was that if the *booja* were shown to him by his wife, he "would beat her but will not kill her". Hence, the defence of grave and sudden provocation failed.

C. *Consideration of the characteristic by the court*

In the local context where criminal cases are decided without the benefit of a jury trial, it may be a difficult task for a judge to assess how an ordinary person of another race or community will be affected by the provocation offered to him.[12] This is further complicated by a rule of evidence followed by the courts that "expert opinion is only admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge".[13] Since anger is an emotion which is common to all persons, there is a danger that expert evidence may not be allowed in provocation cases.

Where the offender is of a race, religion or culture which is well represented in Singapore, expert evidence as to the effect of the provocative words or conduct on the offender may well be unnecessary. It would, however, be a different matter if the offender is from a community which the judges have little experience with. It is hoped that expert evidence will be admitted, if it is offered, in such unusual cases.[14]

[11] (1939) 40 Cr LJ 778. The cases from India, Malaysia and other jurisdictions with provisions on murder and provocation *in pari materia* with the Singapore Penal Code (Cap 224, 1985 Rev Ed) are, for this reason, strongly persuasive and are frequently cited in the local judgments.

[12] For a historical account of the demise of the jury trial in the local context, see Andrew Phang Boon Leong, "Jury Trial in Singapore and Malaysia: The Unmaking of a Legal Institution" (1983) 25 Mal LR 50.

[13] *Chou Kooi Pang* v *PP* [1998] 3 SLR 593 at 598. See also *R* v *Turner* [1975] 1 QB 834, where the English Court of Appeal held that psychiatric evidence may not be admitted *inter alia* to show that the appellant was likely to be provoked as this was a matter within the scope of ordinary human experience which the jury did not require assistance. It should be noted, however, that the appellant here did not allege that he was suffering from any identifiable mental illness or was from an unusual race, religion or culture.

[14] S 47 Evidence Act (Cap 97, 1990 Ed) is arguably wide enough for such expert evidence to be admitted. See also *Ghulam Mustafa Gahno*, *supra* note 11, where such evidence was apparently admitted in India. The Attorney-General, Chan Sek Keong, has also pointed out the importance of taking into account cultural factors in determining criminal liability in a multi-racial and multi-religious society such as Singapore, see "Cultural Issues and Crime"

The admissibility of such expert evidence where the offender is from an unusual or minority background has special significance in Singapore. At common law, if provocation is in issue, the offender cannot be convicted of murder unless the prosecution can show beyond reasonable doubt that an ordinary person with the offender's minority background would *not* have reacted to the provocation in the same way. The prosecution will find it difficult to show this without expert evidence. The offender in Singapore, on the other hand, is saddled with the burden of having to prove, on a balance of probabilities, that the defence of provocation is made out.[15] The offender is unlikely to be able to do so without expert evidence if he relies on a meaning of a taunt peculiar to his minority community, or that his cultural conditioning is such that the violent response to the provocation is more or less unavoidable. Hence, whether expert evidence is admitted at trial will have grave consequences on the offender's chances of success in securing a reduction of the charge in Singapore owing to the different allocation of the burden of proof.

The next point is that even though the test of "grave and sudden provocation" under the Penal Code is accepted to be "whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control",[16] problems still occur in its application.

In the case of *Lorensus Tukan* v *PP*,[17] for example, the Malaysian Supreme Court criticised the trial judge for having misdirected himself by applying the standard of the trial court instead where he said in his judgment that:

> Though the accused must have been rather upset by the loss of his only savings and was angered by the deceased's refusal to go to the police station and running away, *I do not think* that these facts together and not in isolation can amount to grave and sudden provocation in law (emphasis in the original).

Another potential problem concerns the court's identification of the offender's relevant personal characteristics to be used in the reasonable man test. In *PP* v *Somwang Phatthanasaeng*,[18] the accused admitted killing the

(2000) 12 SAcLJ 1 at 20. However, obtaining an accurate portrayal of such cultural evidence is not without its difficulties, see Leti Volpp, "(Mis)identifying Culture: Asian Women and the 'Cultural Defense'" (1994) 17 Harv Women's LJ 57.

15 S 107 Evidence Act (Cap 97, 1990 Ed); *Govindasamy* v *PP* [1976] 2 MLJ 49. But such a reversal in burden of proof may not withstand constitutional challenge, see Chan Wing Cheong, "The Burden of Proof of Provocation in Murder" [1995] SJLS 229.

16 *Lorensus Tukan* v *PP* [1988] 1 MLJ 251, citing the Indian case of *Nanavati* v *State of Maharashtra* AIR 1962 SC 605. See also *Kwan Cin Cheng*, *supra* note 7.

17 *Ibid.*

18 [1992] 1 SLR 138.

deceased but raised the defences of provocation and diminished responsibility. Both the accused and the deceased were Thais who were employed as construction workers in Singapore at the material time. The accused gave evidence that he had loaned $800 to the deceased but was not repaid despite his requests over several months. On reminding the deceased to pay again the night before the accused was to leave for Thailand, the deceased got angry and grabbed hold of a broom and hit the accused with it twice. The accused ran away to another room. He later retrieved an axe from a colleague's bed and used it to hit the deceased seven times on the head, killing him.

The High Court rejected the evidence of the alleged loan and of the fight between the deceased and the accused immediately before the incident.[19] At the appeal, the then Singapore Court of Criminal Appeal commented:

> [W]e agree with the trial judges' finding that there was no fight between the deceased and the appellant on the evening of 24 March 1988. Even if there was a fight the defence of provocation would still fail. …[T]he provocation was not so grave, *by the standards of a reasonable man*, as to warrant a retaliation by the appellant with the use of an axe.[20]

In this writer's opinion, it would be better in this case if the gravity of the provocation was not assessed with reference to a purely hypothetical reasonable person but based on the standards of a reasonable Thai or, perhaps more properly, a reasonable Thai from the North-east of the country.[21] The provocation defence was run on the basis that being hit with a broom is particularly insulting to a North-eastern Thai.[22]

II. Characteristics Of The Offender And The Level Of Self-Control

Despite the fact that Lord Diplock's "classic" direction in *Camplin*[23] was given in the context of a jury trial and under a totally foreign statutory

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[19] *Ibid* at 150.

[20] [1992] 1 SLR 850 at 859 (emphasis added).

[21] Once it is accepted that the offender's cultural identity plays a significant role in determining his response to the provocation, it may become inevitable that fine distinctions such as this may have to be made. Another example is the Australian case of *Dincer* [1983] 1 VR 460, where the jury was invited to consider the reaction of not just a Turkish man or a Muslim, but an ordinary conservative Turkish Muslim.

[22] *Supra* note 18 at 144-6. "The accused felt greatly insulted that the deceased had used a broom to strike him. Where he came from in Thailand, striking a person with a broom was the worst insult a person could inflict", *ibid* at 144-5. The approach of the Singapore Court of Criminal Appeal could perhaps be justified on the basis that the defence failed to adduce adequate evidence to substantiate this claim.

[23] *Supra*, note 1 at 718E–F:

provision,[24] it had been repeatedly approved in the local context by the Singapore Court of Appeal: see for example, *Ithnin bin Kamari* v *PP*,[25] *PP* v *Kwan Cin Cheng*,[26] *Lim Chin Chong* v *PP*[27] and *Lau Lee Peng* v *PP*.[28] This direction was understood in much of the common law world, until the English House of Lords decision in *Smith*,[29] as giving rise to two separate inquiries for the purposes of the objective test. First, the content and "sting" of the provocation is assessed. To do so, it is relevant to consider how a reasonable man with the same characteristics as the offender (which affect the gravity of the provocation) would have viewed the insult. An example of this is that kicking away a crutch may well infuriate a one-legged man but not a two-legged man.[30]

The second part of the inquiry is to assess the offender's fatal response to the provocation. This part of the test is a purely objective assessment based on the reasonable man in which no characteristics of the offender (save age and sex[31]) may be considered. In other words, an individualised standard is used to judge the meaning of the provocation, but a generalised standard is used for judging the adequacy of the power of self-control

[The reasonable man] is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him; and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also whether he would react to the provocation as the accused did.

24 S 3 (UK) Homicide Act 1957.

25 *Supra* note 10 at 251. Stanley Yeo argues that the Indian Law Commissioners had intended a totally different provocation defence from the common law, see "Gravity of Provocation Revisited" (1993) 35 JILI 34; "Lessons on Provocation from the Indian Penal Code" (1992) 41 ICLQ 615. See also M Sornarajah, "The Interpretation of Penal Codes" [1991] 3 MLJ cxxix at cxxxv, where he writes, "The whole fallacy begins because an assumption is made that the Code is nothing but a statement of the English law and that every rule that is introduced into English law even after codification somehow finds its way into the law under the Code".

26 *Supra* note 7 at paras 48-50.

27 [1998] 2 SLR 794 at para 29.

28 [2000] 2 SLR 628 at para 29.

29 [2000] 3 WLR 654.

30 *Raney* (1942) 29 Cr App R 14.

31 It has been pointed out that it works to the disadvantage of women for their gender to be singled out for special consideration: *Hill*, *supra* note 4 at 351; *Stingel* (1990) 171 CLR 312 at 329; Stanley Yeo, "Power of Self-Control in Provocation and Automatism" (1992) 14 Syd LR 3 at 10; Glanville Williams, *Textbook of Criminal* Law, 2nd ed (London: Stevens and Sons, 1983) at 538-9. Men outnumber women by far statistically among those who kill in Singapore as elsewhere: Stanley Yeo, "Homicide in Singapore" (1985) 27 Mal LR 113 at 125. Hence, in a case of a female defendant, a court may be led into comparing her homicidal conduct with an ordinary woman. Since it is rare for a woman to kill, her response would not meet the standards set objectively.

exercised by the offender and whether the homicidal reaction deserves condemnation as murder.

In *Smith*,[32] the majority of their Lordships departed from this traditional understanding of the law of provocation.[33] Their reasons can be separated into the following. First, that this is not a proper interpretation to take of the direction in *Camplin*.[34] Second, that a fundamental change occurred with the passing of section 3 of the Homicide Act 1957 in the UK such that judges could no longer direct juries on what characteristics of the accused could, as a matter of law, be taken into account.[35] The third reason relates to the incomprehensibility of the traditional distinction.[36]

Lord Clyde also expresses it most clearly in terms of fairness:

> … I consider that justice cannot be done without regard to the particular frailties of particular individuals where their capacity to restrain themselves in the face of provocation is lessened by some affliction which falls short of a mental abnormality. It does not seem to me that it would be just if in assessing their guilt in a matter of homicide a standard of behaviour had to be applied to people which they are incapable of attaining.[37]
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> … It seems to me that the standard of reasonableness in this context should refer to a person exercising the ordinary power of self-control over his passions which someone in his position is able to exercise and is expected by society to exercise. By position I mean to include all the characteristics which the particular individual possesses and which may in the circumstances bear on his power of control other than those influences which have been self-induced. Society should require that he exercise a reasonable control over himself, but the limits within which control is reasonably to be demanded must take account of characteristics peculiar to him which reduce the extent to which he is capable of controlling himself.[38]

The first three reasons given in *Smith* need not detain us since our local courts are not bound by *Camplin* or by section 3 of the UK Homicide Act 1957. The dangers of an incomprehensible direction on the law given to

32 *Supra* note 29.

33 There is no doubt in Professor JC Smith's mind that this departure is wrong, see comment [2000] Crim LR 1005. See also Graham Virgo, "Provocation: Muddying the Waters" [2001] CLJ 23.

34 *Supra* note 29 at 659H (Lord Slynn of Hadley), 669D-671 (Lord Hoffman), 686A-E (Lord Clyde).

35 *Ibid* at 660D (Lord Slynn of Hadley), 667D-668F (Lord Hoffman).

36 *Ibid* at 661E-F (Lord Slynn of Hadley), 672-674 (Lord Hoffman).

37 *Ibid* at 682F-G.

38 *Ibid* at 684F-H.

laymen are also not relevant since we do not have a jury trial for capital or other offences. However, the concerns over fairness in the objective test need to be explored.

A. *Consideration of ethnicity*

The steadfast refusal of the common law to recognise any characteristic (other than age and sex) in the second stage of the objective inquiry has been argued to be unfair to ethnic minorities in multi-cultural societies. Stanley Yeo makes a strong case for considering a person's ethnic background in assessing a person's level of self-control and not just in assessing the gravity of the provocation.[39] He points out that a person's emotions and personality are very much molded by his customs and traditions. Recognition of the different ethnic groups' responses to provocation will not violate any principles of fairness and equality toward other members of society since it may not be fair to expect the same level of composure and temperament from all members of the society.[40]

The distinction that the personal characteristics of the offender can only be taken into account for assessing the gravity of the provocation but not the level of self-control to be expected had never been strictly made in cases decided under the Indian Penal Code anyway. It would seem that the social, cultural and ethnic background of the offender had been recognised as playing a part in conditioning the responses of the accused.[41] In *Ghulam Mustafa Gahno* v *Emperor* it was said:

> And in determining whether the provocation was so grave and sudden as to deprive the offender of the power of self-control, the Court will consider whether that provocation would be so grave and sudden as to

[39] Stanley Meng Heong Yeo, "Ethnicity and the Objective Test in Provocation" (1987) 16 Mel U LR 67; "Power of Self-Control in Provocation and Automatism", *supra* note 31, but he has since resiled from this position on the basis that it will lead to racist stereotypes, see "Sex, Ethnicity, Power of Self-Control and Provocation" (1996) 18 Syd LR 304. Decisions such as those from the Northern Territory Supreme Court which regard Aboriginal people as possessing lesser capacity for self-control are seen as promoting a greater evil, namely, a negative stereotype of Aborigines being at a lower order of the evolutionary scale than other ethnic groups. He now argues that the differences in ethnic groups can be taken into consideration in terms of the different reactions to be expected. It is beyond the purpose of this article to assess which approach is the better one.

[40] Stanley Yeo's earlier arguments were accepted by McHugh J of the High Court of Australia in *Masciantonio* v *The Queen* (1995) 183 CLR 58 at 73-74 and in *Green* v *The Queen* (1997) 148 ALR 659.

[41] *E.g. Nga Paw Yin* v *Emperor* AIR 1936 Rangoon 40; *Noukar Mouledino* v *Emperor* AIR 1937 Sind 212; *Atma Ram* v *State* 1967 Cri LJ 1697; *Mansa Ram* v *State* 1975 Cri LJ 1772; *Gandaram Taria* v *State* 1982 Cri LJ 1229. See also William I Torry, *supra* note 6 at 17–18.

> deprive the ordinary man of the class or community to which the offender belonged *of the power of self-control.*
>
> [The defence] must show that showing a *booja* is to Baluchis so grave and sudden a provocation as would deprive the ordinary normal Baluchi *of the power of self-control….*[42]

Hence, it would be open to the offender to show that he belongs to a peculiar class of society or community which possess a lower level of self-control than others. Such cases discussed in India include an *adivasis* (a class recognised as being "comparatively more volatile and more prone to lose their self-control on slightest provocation");[43] an aborigin;[44] and a villager from a remote part of the country.[45] In other jurisdictions, the different reaction times and different responses of persons of different ethnic backgrounds as compared to persons of European origins had been recognized before, including Australian aboriginals;[46] Papua-New Guineans;[47] Samoans;[48] and West African villagers.[49] The fact that the accused is an illiterate and primitive peasant was also taken into consideration in deciding whether his passions would be more easily aroused in Nigeria.[50]

Recognition of the offender's ethnic background may not be so important as the various minority communities are assimilated into the cultural mainstream over time, but this factor remains of significance to new immigrants and foreign visitors.[51] In the case of Singapore, there is a peculiar situation where a significant proportion of the murder cases involve foreign victims and assailants. It was reported that of the 48 murder cases in 1994, 13 occurred at building sites involving foreign workers who fought

42 *Supra* note 11 at 780 (emphasis added).
43 *Jamu Majhi* v *State* 1989 Cri LJ 753.
44 *Madi Adma* v *State* (1969) 35 Cuttack LT 337.
45 *Atma Ram* v *State*, *supra* note 41.
46 *Jabarula* v *Poore* (1989) 42 A Crim R 479; *Mungatopi* (1991) 57 A Crim R 341.
47 RS O'Regan, "Ordinary Men and Provocation in Papua New Guinea" (1972) ICLQ 551.
48 CC Marsack, "Provocation in Trials of Murder" [1959] Crim LR 697.
49 *Kwaku Mensah* [1946] AC 83 at 93.
50 *R* v *John Okoro* (1942) 16 NLR 63; *R* v *James Adekanmi* (1944) 17 NLR 99. It is probably too vague to extend leniency to illiterates and peasants, but the central point remains that the accused is not to be divorced from the community to which he belongs.
51 This assumption has been challenged in that "the notions of 'assimilation' and 'cultural mainstream' are so multifaceted, amorphous, and contested that any attempts at making hard and fast categorical distinctions of this kind may be futile" and it is not true that "the 'societal mainstream' is culturally homogenous", see William I Torry, *supra* note 6 at endnote 11.

during disputes;[52] and of the 31 murders reported in 1996, 16 cases involved victims who were foreigners killed by other foreigners.[53]

However, lest it be thought that this would open the door a little too wide, it must be noted that the level of self-control shown by the offender must conform to that of the community he belongs to. If the offender's power of self-control is regarded as abnormal even within his own class, the peculiar temperament is still precluded from the ordinary person test. Thus, in *Gulam Mustafa Gahno* v *Emperor*, it was said that:

> We do not think it was intended that in deciding whether the provocation was grave and sudden, it is open to an accused person to show that he was a person of a particular excitability or of a particular mental instability or of a particular volatile temperament. It was not intended that the law should take into account the peculiar idiosyncrasies of the offending individual, but it was intended that the Court should take into account the habits, manners and feelings of the class or community to which the accused belonged.[54]

It is perhaps unfortunate that the local Court of Appeal in two recent cases seemed to follow the then prevailing common law view without alluding to the other line of cases from the Indian Penal Code.[55] It is respectfully submitted that when the issue is properly raised, the court may yet consider the ethnicity of the offender as relevant to the consideration of the power of self-control to be expected.

It bears repeating that the burden of proof of provocation in this jurisdiction is a heavy one. I rests on the defendant on a balance of probabilities. Even if ethnicity of the defendant is relevant, it is by no means an easy task for the defendant to show that an ordinary person from the same background could have lost self-control in the circumstances. Finally, recognising ethnic differences underscores the "concession to human frailty" basis of the defence, the same reason why differences in age or sex of the individual are recognised in the reasonable person test.

[52] Tan Ooi Boon, "Crime down but illegal immigrants pose a problem" *The Straits Times*, 29 February 1995.

[53] David Miller, "Robbery and murder rates hit 30-year low" *The Straits Times*, 22 March 1997.

[54] *Supra*, note 11 at 780. This is also the case in Nigerian criminal law: see T Akinola Aguda, Isabella Okagbue, *Principles of Criminal Liability in Nigerian Law* (Ibadan: Heinemann Educational Books, 1990) at 391-92.

[55] The Court of Appeal approved of *Luc Thiet Thuan*, *supra* note 5, in *Kwan Cin Cheng*, *supra* note 7 at para 49; and *Lau Lee Peng*, *supra* note 28 at para 29.

B. *Consideration of mental characteristics*

The current controversy in the common law relates to whether the offender's abnormal mental characteristics may be taken into account in assessing the objective reasonable man test in provocation. The "battered women syndrome" suffered by the accused,[56] his obsessive and eccentric character,[57] and even his immaturity and attention seeking traits[58] had been recognized by the English Court of Appeal as relevant to the objective test in provocation. This development culminated in *R* v *Smith*,[59] where a majority of their Lordships held that in applying the objective test, the jury may take into account any characteristic of the defendant which affected his degree of self-control which society could reasonably have expected of him. In the instant case, the defendant's chronic depression, which may have disinhibited the defendant from behaving violently, was found to have been wrongly excluded by the trial judge.

The traditional understanding following from the earlier House of Lords decision in *Camplin*,[60] in comparison, is that offenders suffering from mental deficiencies ought to bring their defence under diminished responsibility. This was so held by the majority in the Privy Council case of *Luc Thiet Thuan* v *The Queen*.[61] Although there was medical evidence in the latter case to indicate that the appellant had brain damage, which could disinhibit his impulses, the majority held that there was no basis on which mental infirmity diminishing self-control could be attributed to the ordinary person test in provocation. The mental infirmity was relevant only if it had been the subject of taunts, in which case it may be taken into account in assessing the gravity of the provocation only.[62]

This traditional approach is followed in other common law jurisdictions, including Australia,[63] New Zealand[64] and Canada.[65] In the case of

[56] *R* v *Ahluwalia* [1992] 4 All ER 889; *R* v *Thornton (No 2)* [1996] 2 All ER 1023.

[57] *R* v *Dryden* [1995] 4 All ER 997.

[58] *R* v *Humphreys* [1995] 4 All ER 1008.

[59] *Supra* note 29. This development is surprising given the unanimous decision of the House of Lords in *Morhall* [1996] 1 AC 90 just five years earlier and the academic opinion in favour of the Privy Council's majority decision in *Luc Thiet Thuan* v *The Queen*, *supra* note 5. See JC Smith, *Criminal Law*, 9th ed (London: Butterworths, 1999) at 363; CD Freedman, "Restoring Order to the Reasonable Person Test in the Defence of Provocation" (1999) 10 KCLJ 26.

[60] *Supra* note 1.

[61] *Supra* note 5.

[62] *Ibid* at 56.

[63] *Stingel*, *supra* note 31; *Masciantonio*, *supra* note 40.

[64] *R* v *Campbell* [1997] 1 NZLR 16 and *R* v *Rongonui* [2000] 2 NZLR 385.

[65] *R* v *Hill*, *supra* note 4.

Singapore, the Court of Appeal had expressly approved of *Luc Thiet Thuan*[66] in *PP* v *Kwan Cin Cheng*[67] and *Lau Lee Peng* v *PP*.[68]

The traditional approach had, in fact, been taken locally in the 1972 case of *Osman bin Ali* v *PP*.[69] The appellant in that case was convicted by the High Court of two charges of murder. Medical evidence adduced by the appellant described him as:

> While generally he is a so-called stable dullard or defective in the sense that he has led a quiet and unobstrusive life without any significant conflict with others nevertheless, by virtue of his disability of mind he has all the potentials of being above normal in sensitivity and of even reacting with uncontrollable violence to trivial cause or provocations, at certain critical times.[70]

This evidence was found relevant only in terms of diminished responsibility under Exception 7 of section 300 of the Penal Code. No suggestion was made as to its relevance to provocation under Exception 1, and, it is submitted, rightly so.[71]

It may be argued that the defence of diminished responsibility, which admittedly covers a wide range of mental conditions,[72] still sets too high a threshold by requiring the abnormality of mind to arise from one of the bracketed causes[73] and the accused's mental responsibility to be "substantially impaired".[74] It thus fails to cover the whole field of mental conditions which may affect a person's degree of self-control.[75] However, it is submitted that any merging of the two defences will ignore their essential features. Offenders are given the provocation defence because of a sudden and impulsive reaction leading to an understandable loss of self-control whereas diminished responsibility focuses on the offender's impairment of

66 *Supra* note 5.
67 *Supra* note 7 at para 49.
68 *Supra* note 28 at para 29.
69 [1972] 2 MLJ 178.
70 *Ibid* at 180.
71 Diminished responsibility was found by the Court of Criminal Appeal to have been rightly rejected.
72 "Abnormality of mind" was described in *Byrne* [1960] 2 QB 396 as "wide enough to cover the mind's activities in all its respects" including "the ability to exercise will power to control physical acts in accordance with … rational judgment."
73 *I.e.* arrested or retarded development of mind, inherent cause, disease or injury. See *Ong Teng Siew* v *PP* (Criminal Case No 22 of 1996, 17 April 1998) at para 17.3.
74 *Chua Hwa Soon Jimmy* v *PP* [1998] 2 SLR 22 at 33. For a discussion of how a narrow or wide view of the defence of diminished responsibility interacts with the defence of provocation, see Jeremy Horder, "Between Provocation and Diminished Responsibility" (1999) 10 KCLJ 143.
75 See Lord Steyn's dissent in *Luc Thiet Thuan*, *supra* note 5 at 66; and Lord Clyde's judgment in *Smith*, *supra* note 29 at 682G.

mental responsibility due to his disordered personality.[76] The former affirms the reasonableness of the offender's response to the provocation, whereas the latter categories the conduct as deranged. Merging the two defences will subvert the theoretical basis of each defence and is a development which the courts in Singapore should not follow. Legislative reform is needed if a replacement of the two defences with a wider concept of "partial responsibility" is truly thought desirable.

In any case, the approach of the majority of their Lordships in *Smith*[77] is one which is difficult to reconcile in that some characteristics which affect the offender's ability to exercise self-control are still expressly excluded: an antisocial propensity, violent rages, childish tantrums, a violent disposition (*per* Lord Hoffman[78]); a quarrelsome or choleric temperament, an exceptional pugnacity or excitability (*per* Lord Clyde[79]) are all matters over which the person must exercise self-control at his own peril. No explanation was given as to why this should be so. The restrictions are no doubt due to an awareness that expanding the boundaries of the provocation defence brings it into direct conflict with its underlying basis of *ordinary* human frailty in the face provocative circumstances. As aptly explained in an Indian case:

> The provocation must be such as will upset not merely a hasty, hot-tempered and hyper-sensitive person but would upset also a person of ordinary sense and calmness. The law does not take into account abnormal creatures reacting abnormally in given situations. The law contemplates the acting of normal beings in given situations and, the protection that is offered by the Exception is the protection for normal beings reacting normally in a given set of circumstances.[80]

This underlying basis of the provocation defence also serves to draw a line between the offender's ethnicity or cultural factors (which should be considered) and mental characteristics arising from some other basis which render the offender to have sub-normal levels of self-control (which should not be considered).

[76] *R* v *Thornton* [1992] 1 All ER 306 at 316 *per* Beldam LJ.
[77] *Supra* note 29.
[78] *Ibid* at 674, 678.
[79] *Ibid* at 682, 684.
[80] *Shyama Charan Sri Ram Saran* v *The State* AIR 1969 All 61. See also AJ Ashworth, "The Doctrine of Provocation" (1976) 35 CLJ 292; and Glanville Williams, *supra* note 31 at 544. This approach also cuts short any argument towards incorporating the mental characteristics of the offender in the objective test of other defences, see *R* v *Martin*, *The Times*, 1 November 2001, where the English Court of Appeal rejected any change in the objective test in self defence in this respect.

III. THE "PROPORTIONALITY REQUIREMENT"

The requirement of some proportionality between the provocative act and the retaliation in response had been grafted onto the Penal Code from the common law. This is despite the fact that the Penal Code defence does not expressly require any comparison between the provocative act and the retaliatory act. The explanation for limiting the provocation defence under the Penal Code was given in *Vijayan* that:

> [A]s the test of the sufficiency of the provocation, namely, whether or not the provocation offered would have induced a reasonable man to do what the accused did, cannot be applied without comparing the provocation with the retaliation, the element of "reasonable relationship" is an essential factor to be taken into consideration.[81]

This requirement for a "reasonable relationship" or proportionality in the provocation defence may be viewed in one of two ways: by comparing the acts of provocation and the manner of killing the deceased; or by comparing the acts of provocation and the degree of loss of self-control. Disproportionality between the two in the latter view is only a factor to be considered in determining if the offender had completely lost his self-control on grave and sudden provocation or whether he was in fact acting for some other purpose, such as revenge, rather than disentitling the offender to the defence as a matter of law.[82]

Under the first view, the provocation defence will not succeed if the fatal assault had been excessively violent. Factors such as whether the offender had killed with his bare hands or if he had used a weapon on an unarmed victim, whether he had inflicted one or more blows, and the extent of the wounds are all relevant.[83] In the English case of *R* v *McCarthy*,[84] the appellant killed a man by knocking him down and beating him on the head, fracturing his skull in three or four places. The appellant alleged that the deceased had committed an indecent assault on him and invited him to commit sodomy with him. Lord Goddard CJ said:

> [I]t is undoubted law that the violence used must have some reasonable relation to the provocation. While this provocation would no doubt have

[81] [1975] 2 MLJ 8 at 12. *Cf Akhtar* v *State* AIR 1964 Allahabad 262 at para 11 where it was held: "At any rate, the language of Exception 1 to Section 300 Indian Penal Code does not require the imposition of a test of reasonableness of conduct upon an accused person even after loss of self-control and before an opportunity for 'reason to regain dominion over the mind'".

[82] See discussion in AJ Ashworth, *supra* note 80 at 296-7, 305.

[83] See the "classic" direction to the jury in the English case of *R* v *Duffy* [1949] 1 All ER 932 at 933 *per* Devlin J, approved by Lord Goddard.

[84] [1954] 2 QB 105.

> excused … a blow, perhaps more than one, it could not have justified the infliction of such injuries as to cause three or four fractures of the skull and the beating of the man's head on a stony road.[85]

The approach adopted in *Vijayan* is the first view of the "reasonable relationship" requirement:

> In our judgment, under our law, where an accused person charged with murder relies on provocation and claims the benefit of Exception 1 of section 300, the test to be applied is, would the act or acts alleged to constitute provocation have deprived a reasonable man of his self-control and induced him to do the act which caused the death of the deceased and in applying this test it is relevant to look at and compare the act of provocation with the act of retaliation.[86]

Most local cases had followed this interpretation of the "reasonable relationship" requirement. For example, it had been said that:

> …a blow by a bolster or an open hand which may increase the 'heat of blood' in a victim or which may make him lose some measure of self-control is no warrant for the use of a deadly weapon in retaliation.[87]

> …any provocation which the appellant might have been subjected to by no means justified the infliction of the brutal injuries on a vital part of

[85] *Ibid* at 109. See also *Mancini* v *DPP* [1942] AC 1 at 9; *Holmes* v *DPP* [1946] AC 588 at 597; *Lee Chun-Chuen* v *The Queen* [1963] AC 220 at 231.

[86] *Supra* note 81. It should also be noted that the then Singapore Court of Criminal Appeal found itself bound by the Privy Council case of *AG for Ceylon* v *Kumarasinghege Don John Perera* [1953] AC 200 as it was a decision interpreting a statutory provision *in pari materia* with Exception 1 to section 300 of the Penal Code (Cap 224, 1985 Rev Ed). In *Perera* it was held that:

> To reduce the crime from murder to manslaughter the offender must show, first, that he was deprived of self-control, and secondly, that that deprivation was caused by provocation which in the opinion of a jury was both grave and sudden. …The words "grave" and "sudden" are both of them relative terms and must at least to a great extent be decided by comparing the nature of the provocation with that of the retaliatory act. It is impossible to determine whether the provocation was grave without at the same time considering the act which resulted from the provocation, otherwise some quite minor or trivial provocation might be thought to excuse the use of a deadly weapon. A blow with a fist or with the open hand is undoubtedly provocation, and provocation which may cause the sufferer to lose a degree of control, but will not excuse the use of a deadly weapon… .

The Singapore Court of Criminal Appeal was asked to depart from this rule in *Wo Yok Ling* v *PP* [1979] 1 MLJ 101, but it refused to do so. The proportionality requirement was most recently affirmed by the Court of Appeal in *Asogan s/o Ramachandren* [1998] 1 SLR 286 at para 41.

[87] *PP* v *Cheng Ka Leung Edmond* (1987) CLAS News No 2 5 at 9.

> the body of each of the deceased with a weapon as deadly as the knife that was used. The retaliation of the appellant was entirely out of proportion to the alleged acts of provocation.[88]

This approach to the "reasonable relationship" requirement had been subject to the most trenchant criticisms on several fronts.[89] This rule has been said to be illogical from a scientific basis in requiring a measured response from a person who has lost self-control.[90] Secondly, that it is against judicial dicta and texts.[91] Thirdly, it has been pointed out that this approach leaves the concept of provocation devoid of any function since it would amount to a total defence if reasonable force could have been used in the circumstances under the doctrine of self-defence.[92]

Fourthly, to require a strict proportionality between the mode of retaliation with the provocation has also come to be seen as a source of unfairness to women. The concept of commensurate violence is predicated on aggressive behaviour demonstrated by men who, owing to their superior physical strength, are liable to respond instantaneously when angered and with their bare fists. Women, on the other hand, do not respond immediately in general. Even when they do, they tend to use weapons owing to their smaller size and lesser physical strength.[93]

The approach adopted in *Vijayan*[94] is doubly unfortunate in that the use of the phrase "induced [the defendant] *to do the act* which caused the death of the deceased" suggests a high standard of proof in that in order for the provocation defence to succeed locally, the defendant must show that the

88 *Ithinin bin Kamari* v *PP*, *supra* note 10 at 251. See also *Govindasamy* v *PP*, *supra* note 15 at 52.

89 JW Cecil Turner, *Russell on Crime*, vol 1, 12th ed (London: Sweet & Maxwell, 1964) at 548-53.

90 *State of Gujarat* v *Bhand Jusub Mamad* 1982 Cri LJ 1691; Commentary at [1963] Crim LR 851; Peter Brett, "The Physiology of Provocation" [1970] Crim LR 634; Smith, Hogan, *Criminal Law* 3 rd ed (London: Butterworths, 1973) at 242-44; Stanley MH Yeo, "Lessons on Provocation From the Indian Penal Code", *supra* note 25. AJ Ashworth, "The Doctrine of Provocation", *supra* note 80 at 305-6, dismissed this argument by drawing a distinction between our physiological reaction to anger (which we cannot control) from actions in anger (which we can).

91 It was pointed out in *Johnson* v *The Queen* (1976) 136 CLR 619 at 636-7 that the *dicta* in *Phillips* v *The Queen* [1969] 2 AC 130, *Lee Chun-Chuen* v *The Queen*, *supra* note 85, and *Mancini* v *DPP*, *supra* note 85, had been misread.

92 JW Cecil Turner, *supra* note 89 at 548-53. See also *Akhtar* v *State*, *supra* note 81, where it was suggested that this requirement was imposed in the Indian Penal Code owing to confusion between the defences of grave and sudden provocation on the one hand, and private defence on the other. In the latter case, a reasonableness of conduct is required as it secures a complete acquittal.

93 See statistics cited in Susan SM Edwards, *Sex and Gender in the Legal Process* (London: Blackstone Press Limited, 1996) at 366-71.

94 *Supra* note 81.

reasonable man *would*, instead of could, have killed *in the same manner* as he did.[95] In the key case which brought about the objective criterion into the law of provocation, *R* v *Welsh*,[96] it is only the *likelihood* of killing which must be evoked in the reasonable man:

> [T]he law does not say that an act of homicide, intentionally committed under the influence of that passion, is excused or reduced to manslaughter. The law contemplates the case of a reasonable man, and requires that the provocation shall be such as that such a man *might* naturally be induced, in the anger of the moment, to commit the act.

The other approach of treating retaliation as merely evidence of loss of self-control has some support in the early common law. Before the defence of provocation was clouded by the advent of the "reasonable man", it was understood that extreme brutality of the retaliation led to the inference of precedent malice. Hence, in the English case of *R* v *Thomas*[97] decided in 1837, it was said that:

> Suppose, for instance, a blow were given, and the party struck beat the other's head to pieces by continued, cruel and repeated blows; then you could not attribute that act to the passion of anger, and the offence would be murder.

Furthermore, the requirement of commensurate violence was developed in the common law at a time when it did not recognise words *per se* as amounting to provocation at law. The proportionality rule was easy to apply then as it was a simple matter of comparing the degrees of physical violence.[98] However, where words can amount to provocation under the Penal Code, it is surprising to find ourselves in a position where the proportionality of the homicidal violence might have to be measured against provocative words. In some jurisdictions, this proportionality requirement as an independent rule has been abolished either expressly[99] or by necessary implication by statute.[100]

Locally, the signs of a changed view of the "proportionality requirement" by the courts surfaced in the 1990s where the manner of retaliation was read as reflecting a conscious formulation of a desire to kill

[95] This may be due to a slavish adherence to the words found in section 3 of the UK Homicide Act 1957.

[96] (1869) 11 Cox CC 336 (emphasis added).

[97] (1837) 7 C & P 817, 173 ER 356.

[98] See also *Camplin*, *supra* note 1 at 717.

[99] *E.g.* section 23(3)(a) Crimes Act 1900 in New South Wales, Australia.

[100] *E.g.* under section 3 (UK) Homicide Act 1957, it is only a factor to be considered when deciding whether the provocation was enough to cause a reasonable man to do what the offender did: see *R* v *Brown* [1972] 2 QB 229.

rather than loss of self-control. In *Koh Swee Beng* v *PP*,[101] the then Singapore Court of Criminal Appeal held:

> In any event, we were in complete agreement with the trial judges that the appellant's repeated stabbings of the deceased were wholly disproportionate to any provocation that could have been caused to the appellant. The appellant inflicted no less than five stab wounds on the deceased, two of which were fatal, while the deceased was lying on the ground struggling against the assault of four or five persons. *Such stabbings were not the acts of a man provoked but one bent on revenge.*

In *Kwan Cin Cheng*,[102] this was taken a step further where the learned Chief Justice said:

> The objective test demands only that the accused should have exercised the same degree of self-control as an ordinary person. It does not require that his act of killing must be somehow capable of being viewed as 'reasonable'. *In applying the test, care must be taken not to peg the standard of self-control and the degree of provocation required at an unrealistically high level.*[103]
>
> … [A] 'proportionality' criterion would be more accurately expressed in the following terms: in deciding if an accused had exercised sufficient self-control for the objective test, a relevant question may be *whether the degree of loss of self-control was commensurate with the severity of the provocation*.[104]

Furthermore, on the previous understanding of the "proportionality requirement", the provocation defence in *Kwan Cin Cheng*[105] would have no doubt failed considering the number of injuries suffered by the deceased (23 stab and slash wounds in total); the number of fatal stab wounds (7);[106] and the severity of the fatal stab wounds (moderate force used).[107]

This may be contrasted with the earlier local cases of *Govindasamy* v *PP*[108] (7 fatal head wounds); *Wo Yok Ling* v *PP*[109] (16 external injuries and multiple depressed comminuted fractures of the skull); and *Asogan Ramesh*

[101] [1991] 3 MLJ 401 at 404 (emphasis added).
[102] *Supra* note 7.
[103] *Ibid* at para 65 (emphasis added).
[104] *Ibid* at para 69 (emphasis added).
[105] *Ibid*.
[106] *PP* v *Kwan Cin Cheng* (CC No 13 of 1997, 29 October 1997) (High Court) at para 5; *Kwan Cin Cheng*, *ibid* at para 11 (Court of Appeal).
[107] *Ibid* at paras 5, 5.1 of the High Court's judgment.
[108] *Supra* note 15.
[109] *Supra* note 86.

s/o Ramachandren v *PP*[110] (18 stab wounds of which 4 were serious enough to cause death) where in each of the cases, the injuries were found to be "disproportionate" to the provocation.

It can also be noted that the deceased in *Kwan Cin Cheng*[111] had not physically abused the respondent in any way and that she was completely defenceless against the respondent. The Singapore Court of Appeal chose to emphasize the loss of self-control by the respondent on hearing the remarks of the deceased instead. This included his inability to recall how many times he had stabbed the deceased or how he had held the knife; his failure to notice injuries to his hands; his ignorance of how his hands were injured and how the knife became bent; and his attempts to kill himself.[112] The learned Chief Justice continued:

> In practice, an inquiry into 'proportionality' does little to answer the essential question of whether an ordinary person would upon receiving the provocation in question, have lost his self control to this extent and reacted as the accused did.
>
> In summary, the issue in the present case [ie, the objective requirement] was *simply* whether the respondent had displayed the level of self-control to be expected of an ordinary person when provoked by the deceased, and the facts should be considered from this perspective.[113]

In *Lau Lee Peng* v *PP*,[114] the Singapore Court of Appeal pointed out that:

> In the light of the discussion in *Kwan Cin Cheng*, the test of proportionality is probably not a distinct requirement for raising the defence of provocation. It is a factor to be taken into account in determining whether the objective test of gravity and suddenness is fulfilled. Therefore, the fact that the retaliatory acts may have been out of proportion to the provocation offered does not necessarily mean that the defence must fail. …An inquiry into 'proportionality' does little to answer the essential question of whether an ordinary person would, upon receiving the provocation in question, have reacted in the same way the accused did.

However, old notions continue. In *PP* v *Seah Kok Meng*[115] which was decided after *Lau Lee Peng*,[116] the trial judge said:

[110] *Supra* note 86.
[111] *Supra* note 7 at para 74.
[112] *Ibid* at para 40.
[113] *Ibid* at paras 69-70 (emphasis added).
[114] *Supra* note 28 at para 31.

> Even if the response to a provocation in a case of murder is *ex hypothesi* always of an extreme degree, it is still necessary to determine whether it is commensurate with the provocation. …A subjective evaluation should be made taking into account the provocation the person received, his condition and circumstances, and his response. The defence will not succeed if the response is found to be excessive to the provocation. I found that even if there was provocation, the accused's actions were out of all proportion to it and did not come within Exception 1 as the deceased had not quarrelled with him or laid a finger on him.[117]

This was subsequently put right by the Singapore Court of Appeal when the case went on appeal. The court again emphasised that the fact that the act of retaliation was out of proportion to the provocation does not mean that the defence must fail.[118] In the present case, the severity of the injuries and the use of a weapon showed that the appellant did not act due to provocation but were instead the actions of a man bent on teaching the victim a lesson.

It is now clear that the provocation defence in Singapore does not require a matching of the retaliation with the provocation received. The focus of enquiry is on the degree of self-control lost by the offender as compared with the nature of the provocation. The mode of retaliation provides evidence of the degree of loss of self-control. Thus, if the offender kills by stabbing the victim violently in response to a mild provocation, the provocation defence would most likely fail because the homicidal killing is at best an over-reaction, or at worst, an act in revenge, and he is not to be excused for it in either case.

IV. CONCLUSION

From the above limited survey of the law of provocation, it can be seen that the defence in Singapore has evolved over recent years and is in a position to make "allowance for human nature and the power of emotions",[119] while at the same time expecting "people to exercise control of their emotions".[120]

Further, but limited, development is possible by allowing the recognition of characteristics such as the offender's ethnicity or acculturisation which

[115] CC No 62 of 2000, 5 February 2001 at paras 59-60.

[116] *Supra* note 28.

[117] The acts of provocation identified by the defence counsel were: (i) the victim had molested the accused's girlfriend earlier; (ii) the victim confronted the accused in a threatening manner; (iii) the victim exhibited a hostile persona towards the accused when the accused wanted to fetch his girlfriend home; and (iv) the victim's physical presence, gestures and stares at the accused.

[118] [2001] 3 SLR 135 at para 34.

[119] *Smith*, *supra* note 29 at 678 *per* Lord Hoffman.

[120] *Ibid*.

affects his or her level of self-control in the face of the provocation. An offender who seeks to rely on his abnormal mental characteristics which allegedly lower his level of self-control below the norm should, however, rely on the defence of diminished responsibility.

Although the requirement for proportionality or a "reasonable relationship" between the provocation and the retaliation is now properly treated as evidence of the offender's loss of self-control and not as an independent requirement in law, a further improvement is possible. The offender should be required to display the level of self-control to be expected of an ordinary person when provoked in the circumstances, and the ordinary person is one who *could* have lost his self-control to the same extent in the circumstances.