PROVOCATION AND HOMICIDE IN PAPUA AND NEW GUINEA

R. S. O'Regan*

In the Territory of Papua and New Guinea; as in Western Australia, the Queensland *Criminal Code* has been adopted[1] and in homicide cases the provisions of the Code relating to provocation are frequently invoked. As the Queensland[2] and Western Australian[3] case law indicates these provisions pose many problems of interpretation and this article considers the little known but valuable contribution which the Supreme Court of the Territory has made to their solution. It also draws attention to the initiative of the Court in interpreting a Code enacted for Australian conditions in such a way that it applies with some measure of justice in the very different conditions of Melanesia.

The relevant sections of the Code as adopted in Papua and New Guinea are sections 268, 269 and 304. These are exactly the same as sections 245, 246 and 281 respectively of the Western Australian *Code* and, so far as material to the present discussion, read as follows:

> 268. The term "provocation", used with reference to an offence of which an assault is an element, means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental, filial or fraternal, relation, or in the relation of master and servant, to deprive him of the power of self-control, and to induce him to assault the person by whom the act or insult is done or offered.
>
> When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.
>
> A lawful act is not provocation to any person for an assault.

* Associate Professor of Law, Monash University. This article is reprinted with the permission of University of Western Australia Law Review.

1 The adoption of the Code in each territory preceded the administrative union of Papua and New Guinea which was accomplished by the *Papua and New Guinea Act 1949*. In Papua, then British New Guinea, the adopting legislation was *The Criminal Code Ordinance of 1902* and in New Guinea, *The Laws Repeal and Adopting Ordinance 1921*.

2 See *Sabri Isa*, [1952] Q.S.R. 269; *Herlihy*, [1956] Q.S.R. 18; *Young*, [1957] Q.S.R. 599; *Johnson*, [1964] Qd.R. 1; *Callope*, [1965] Qd.R. 456 and *Rose*, [1967] Qd.R. 186.

3 See *Scott*, (1909) 11 W.A.L.R. 52; *Dunstan*, (1931) 33 W.A.L.R. 118 and *Mehemet Ali*, (1957) 59 W.A.L.R. 28.

. . . .

269. A person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault, if he is in fact deprived by the provocation of the power of self-control, and acts upon it on the sudden and before there is time for his passion to cool; provided that the force used is not disproportionate to the provocation, and is not intended, and is not such as is likely, to cause death or grievous bodily harm.

. . . .

304. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute wilful murder or murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only.

By virtue of section 304 provocation may reduce wilful murder or murder to manslaughter. This is clear from the terms of the section itself. What is not so clear is whether provocation may also operate under section 269 as a complete defence to manslaughter. This question will be considered later. The first part of the article will discuss the operation of provocation as a qualified defence under section 304.

PROVOCATION, WILFUL MURDER AND MURDER

1. *The Definition of Provocation*

In the home of the Criminal Code it is now settled that the common law, not section 268, supplies the definition of "provocation" in section 304[4] but in both Western Australia[5] and in the Territory the contrary view has been upheld. The issue is important because in a number of respects the common law and section 268 are different. For instance, the common law requires the accused's retaliation to be proportionate to the provocation offered him[6] but section 268 contains no such stipulation. Again, at common law mere words seldom if ever amount to provocation[7] while section 268 includes an insult as a possible form of provocation. Because of these and other differences[8] the judges of the Supreme Court of the Territory have on many occasions been obliged to decide the matter and, with one exception, all have decided in favour of section 268. In general the judges have adopted the reasoning of Stanley J. who in the Queensland cases of *Sabri Isa*,[9] *Herlihy*[10] and *Johnson*[11] consistently differed from his brethren in preferring section 268 to the common law. The various arguments which, in the writer's view, convincingly support this conclusion have been fully expoun-

[4] See *Herlihy*, [1956] Q.S.R. 18; *Young*, [1957] Q.S.R. 599 and *Johnson*, [1964] Qd.R. 1.
[5] See *Mehemet Ali*, (1957) 59 W.A.L.R. 28.
[6] See e.g. *Mancini* v *D.P.P.*, [1942] A.C. 1 and *Lee Chun-Chuen*, [1963] A.C. 220.
[7] See *Holmes* v *D.P.P.*, [1946] A.C. 588.
[8] s. 268 appears to be wider than the common law in its categorisation of cases of indirect provocation. On the other hand it is narrower than the common law in that it precludes reliance on provocation where the accused's retaliation was misdirected. See the writer's Indirect Provocation and Misdirected Retaliation [1968] *Crim. L. Rev.* 319. Ollerenshaw J. in *Zariai-Gavene*, [1963] P. & N.G.L.R. 203, 207 suggested *obiter* than another difference was that while the common law regards a confession of adultery made in exceptional circumstances as provocation s. 268 does not. This opinion, it is submitted, is incorrect. See the text under the sub-heading Wrongful Act or Insult.
[9] [1952] Q.S.R. 269.
[10] [1956] Q.S.R. 18.
[11] [1964] Qd.R. 1.

ded elsewhere.[12] It suffices to summarise here the specific arguments which have been advanced by judges in Papua and New Guinea:

(i) In accordance with principle of interpretation applicable to codifying statutes enunciated by the House of Lords in *Bank of England* v *Vagliano Bros.*[13] and specifically applied to the *Criminal Code* by the High Court of Australia in *Brennan*[14] the *Code* should, if possible, be interpreted without reference to the common law. Although this principle is subject to an exception where a word has acquired a technical meaning at common law and provocation is such a word, the licence to resort to the common law is still not available because the *Code* itself in section 268 contains a definition of provocation.[15]

(ii) Although sections 268 and 304 are in different Chapters they are in the same Part of the *Code* and the words of section 268 and the subject matter of section 304 suggest that the two provisions are related. As Ollerenshaw J. said in *Zariai-Gavene*:[16]

> The definition of provocation in s. 268 is for the purpose of its use 'with reference to an offence of which an assault is an element' and for all practical purposes s. 304 applies only to unlawful homicide in which an assault is an element. It is difficult to conceive that where the act which causes death, is required to be performed in the heat of passion that has not had time to cool in order to make the offence manslaughter instead of wilful murder it could be other than 'assault'. . .

(iii) The words in section 268 "of which an assault is an element" do not mean "of which an assault is an expressed element".[17] For one thing the section does not say that and for another to so confine it would lead to anomalous results. It would mean, for instance, that section 269 could not operate as a defence to a charge of unlawful wounding because the term "assault" is not mentioned in the definition of the offence.[18]

(iv) The second paragraph of section 269 makes it clear that the particular provocation should be related to the particular assault actually committed. Thus provocation which is sufficient to justify a trivial assault will not *per se* suffice to mitigate an intentional killing to manslaughter.[19] Although the notion of proportionate retaliation cannot be read into section 268 its omission does not extend the defence of provocation to dangerous limits. The notion is still indirectly relevant because the absence of proportion may suggest that the accused did not act in the heat of passion.[20]

(v) If section 304 imports the common law then the words "and before there is time for his passion to cool" would be completely redundant or, in the alternative, the section must read as emphasising gratuitously a single element in the common law doctrine to the exclusion of other elements.

12 Morris and Howard, *Studies in Criminal Law* 101-112.
13 [1891] A.C. 107.
14 (1936) 55 C.L.R. 253.
15 See *Zariai-Gavene*, [1963] P. & N.G.L.R. 203, 209.
16 Ibid.
17 Id. at 209-210. See also *Hamo Tine*, [1963] P. & N.G.L.R. 9, 15; *Nantisantjaba*, [1963] P. & N.G.L.R. 148 and *Iawe Mama*, [1965-66] P. & N.G.L.R. 96, 100.
18 s. 323 [W.A. 301].
19 See *Hamo Tine*, [1963] P. & N.G.L.R. 9, 14.
20 See *Zariai-Gavene*, [1963] P. & N.G.L.R. 203, 211; *Iawe Mama*, [1965-66] P. & N.G.L.R. 96, 102; *Moses Robert*, [1965-66] P. & N.G.L.R. 180, 187 and *Pamboa-Takai* [1965-66] P. & N.G.L.R. 1, 7.

This suggests that the legislature intended sections 268 and 304 to be complementary.[21]

None of the Papua and New Guinea cases favour the Queensland view that the reference to "provocation" in section 304 is to the common law doctrine. However in the anomalous case of *John Bomai*[22] it was decided that the reference was to the "ordinary dictionary meaning"[23] of the word. The learned trial judge, Selby A.J., ruled as follows:[24]

> If a person is suddenly induced to do an act which causes death, and if the inducement causes him to act in the heat of passion and before there is time for his passion to cool, then . . . such inducement constitutes provocation within the meaning of s. 304.

Selby A.J. reached this conclusion because sections 268 and 304 appear in different Chapters of the *Code* and he could find no indication in the *Code* itself that the sections were interrelated. In his view section 268 referred only to its immediate neighbour, section 269, wherein provocation is made an absolute defence to assaults which, *inter alia,* are not intended to cause death or grievous bodily harm.

It is submitted that this reasoning is erroneous. As Ollerenshaw J. noted in *Zariai-Gavene,* sections 268 and 304 do appear in the same Part of the *Code* although in different Chapters and, as Minogue J. pointed out in *Iawe Mama,*[25] section 268 appears to be of general application and it would have been "a very cumbersome form of drafting"[26] to have appended another section 268 to section 304 to make this abundantly clear. Furthermore Selby A.J.'s interpretation abolishes the objective test in provocation. It would not be necessary for the court to consider whether an ordinary person, in the same circumstances as the accused, might have lost his self-control. It seems unlikely that the legislature intended to remove this limitation on the defence as it applies to wilful murder and murder while retaining it for lesser offences by virtue of sections 268 and 269. For these reasons it is submitted Selby A.J.'s reading of section 304 is incorrect and in subsequent cases the Supreme Court has generally chosen to ignore it.[27]

The many cases deciding that section 268 defines provocation for the purposes of section 304 have all been single judge decisons. The Full Court, constituted in 1968, has not yet had occasion to consider the matter. Nor has the High Court of Australia which is the final appellate tribunal in the Territory's curial hierarchy. Unfortunately, therefore, it is not possible to say with certainty that the question has been finally settled in favour of section 268. However all the judges who have considered the point over the past decade have, with the exception of Selby A.J., preferred section 268 and it is very likely that in comity newly appointed judges will continue to do the same. This Clarkson J. was disposed to do in *Oa*[28] decided in 1967.[29]

21 *Awabe,* (1960) unreported.
22 [1964] P. & N.G.L.R. 278.
23 Id. at 281.
24 Ibid.
25 [1965-66] P. & N.G.L.R. 96, 101.
26 Ibid.
27 Although the argument was specifically rejected by Smithers J. in *Nantisantjaba,* [1963] P. & N.G.L.R. 148, 152.
28 [1967-68] P. & N.G.L.R. 26.
29 Only a few months after the learned judge's appointment to the Supreme Court. Likewise Kelly J. shortly after his appointment to the bench in 1970 said in *Kink Aburu,* (unreported): 'At this point of time I am not prepared to differ from the

[*continued on p. 64*]

2. *Wrongful Act or Insult*

Provocation within the meaning of section 268 must involve a "wrongful act or insult" and this must be "done or offered" to the accused or in his presence to a third party standing in a special relationship to him. In the early Western Australian case of *Scott*[30] Burnside J. expressed the opinion that wrongful in this context means unlawful.[31] He attached significance to the later stipulation in section 268 that a lawful act is not provocation. However as Ollerenshaw J. pointed out in 1963 in *Zariai-Gavene* it does not necessarily follow that wrongful must be synonymous with unlawful.[32] One may argue that the act must be wrongful (as contrary to morality) and also unlawful (as contrary to law) before it can qualify as provocation. Perhaps this difference of opinion is of no practical consequence if one adopts counsel's suggestion in *Scott* that conduct becomes unlawful when it is calculated to lead to a breach of the peace.[33] It is difficult to imagine any wrongful conduct likely to cause an ordinary person to lose self-control which is not also unlawful in this sense.

Both Burnside and McMillan JJ. in *Scott* and Stanley J. in *Sabri Isa* suggested that "wrongful" qualifies "insult" as well as "act" in section 268.[34] This opinion also was questioned by Ollerenshaw J. in *Zariai-Gavene* because, he said,[35] "wrongful insult would be an inapt expression even if it would fall short of tautology". However he found it unnecessary to decide the point which, in any event, is probably unimportant if "wrongful" means "unlawful" and is defined as suggested in *Scott.*

A problem canvassed in some of the Territory cases is whether adultery or a confession of adultery may constitute provocation. Smithers J. in *Rumints Gorok,*[36] decided in 1962, held that adultery committed by a wife and subsequently admitted was, because of the marriage relationship, a "wrongful act . . . done" to the husband within the meaning of section 268. He said:[37]

> Although it is not physically done to him, I think that the act so closely touches and involves the relationship established between the spouses by marriage that when performed it is necessarily something done to the other spouse, no matter how far away or even how ignorant he or she may be when it is performed.

On the other hand in the same year in *Zariai-Gavene* Ollerenshaw J. expressed the view, *obiter,* that a confession of adultery, whatever its legal effect at common law, could not be provocation under section 268.[38] Clarkson J. in *Oa* agreed with Ollerenshaw J. and asked:[39]

> If a wife admits to her husband adultery committed many years before, what is the act—the adultery or its mere verbal disclosure?

29 *continued.*
views expressed by other judges of this Court, that section 268 of the *Code* defines provocation for the purpose of section 304. I am well aware of the conflict of authority on this point and I should like the opportunity of considering the matter more carefully before committing myself to a definite view.'

30 (1909) 11 W.A.L.R. 52.

31 Id. at 67.

32 [1963] P. & N.G.L.R. 203, 214.

33 (1909) 11 W.A.L.R. 52, 54.

34 (1909) 11 W.A.L.R. 52, 62, 67 and [1952] Q.S.R. 269, 296.

35 [1963] P. & N.G.L.R. 203, 214.

36 [1963] P. & N.G.L.R. 81.

37 Id. at 83.

38 [1963] P. & N.GL.R.. 203, 207.

39 [1967-68] P. & N.G.L.R. 26, 30.

The learned judge was inclined to think that only acts or words directed to the person seeking to rely on provocation would suffice. However in 1965 Frost J. in *Moses Robert*[40] had held that adultery could be a "wrongful act" within the meaning of section 268 and it is submitted that this view is preferable. Lapse of time between adultery and its disclosure does not alter the character of adultery as a wrongful act. It is however relevant, as Frost J. pointed out,[41] to the question whether an ordinary person similarly circumstanced would have lost his self-control. Furthermore it is not straining the language of section 268 to decide that adultery may be a wrongful act *done* to the accused. Section 268 should be broadly construed. As Minogue J. said in *Iawe Mama*:[42]

> It is not a section enacted in a vacuum but of course was designed to deal with human beings in the various situations in which they might find themselves.

3. *Ordinary Person*

It will be noted that section 268 requires that the words or conduct relied on as provocation must be such as might cause an "ordinary person" to lose his self-control. In 1946 the Judicial Committee of the Privy Council in *Kwaku Mensah*[43] interpreted the words "person of ordinary character" in the corresponding section of the Gold Coast *Criminal Code*[44] as meaning "the ordinary West African villager"[45] and added that in applying the section "the knowledge and common sense of a local jury are invaluable".[46] The Supreme Court in Papua and New Guinea has frequently relied on the Judicial Committee's remarks to justify a liberal interpretation of the phrase "ordinary person" in section 268. However, because the peoples of the Territory are neither culturally nor ethnically homogeneous and perhaps also because the judge in this jurisdiction has no jury to assist him,[47] the court has found it necessary to refine the "ordinary person" test quite considerably.

This development may be traced to *Hamo Tine*[48] decided in 1960. During the course of a fracas involving two clans in a primitive part of the Chimbu District of New Guinea the deceased had struck the accused a "substantial blow"[49] on the head momentarily stunning him. When he recovered the accused, seeing his assailant nearby, ran to a kinsman, seized his bow and arrow and shot an arrow into his assailant as he fled. The arrow wound proved fatal and the accused was later charged with wilful murder. It was argued on his behalf that he had acted under provocation and accordingly that he should be found guilty of manslaughter only. The trial judge, Mann C.J., accepted this submission. After referring to *Kwaku Mensa* he ruled that the

[40] [1965-66] P. & N.G.L.R. 180.
[41] Id. at 187.
[42] [1965-66] P. & N.G.L.R. 96, 100. Cf. *Zariai-Gavene*, [1963] P. & N.G.L.R. 203, 214.
[43] [1946] A.C. 83.
[44] s. 234.
[45] [1946] A.C. 83, 93.
[46] Ibid.
[47] There is no trial by jury in the Territory. The judge sitting alone decides all questions of fact and of law and, unlike his counterpart in many countries of Anglophonic Africa, he does not have the benefit of the advice of assessors on matters of native custom.
[48] [1963] P. & N.G.L.R. 9. This and some of the later Territory cases are discussed by Hookey, *The "Clapham Omnibus" in Papua and New Guinea* in Brown (Ed.), *Fashion of Law in New Guinea*, 117.
[49] [1963] P. & N.G.L.R. 9, 10.

C

words "ordinary person" in section 268 meant "an ordinary person in the environment and culture of the accused",[50] and concluded that "any able-bodied Chimbu in the remote area where this fighting occurred would be likely, indeed very likely, in similar circumstances, to lose his power of self-control to the extent of shooting an arrow at his fleeing attacker".[51]

This ruling accords with the approach of the Privy Council in the case cited but it goes a good deal further. Mann C.J. did not merely postulate an ordinary Melanesian villager as the Privy Council postulated an ordinary West African villager. He regionalised the ordinary man by investing him with some of the characteristics of the particular community to which the accused belonged. The result, of course, is that sometimes an accused person may set up as provocation words or conduct which in other more sophisticated communities within the Territory might be quite inadequate for this purpose. *Yanda Piaua and Ors.*,[52] a later decision of the same judge, provides a striking illustration. In that case the learned Chief Justice went so for as to hold that a sudden punch on the face could constitute provocation to a primitive New Guinea Highlander and his clansmen who retaliated by killing the attacker with axe-blows. Mann C.J. applied the "ordinary person" test as follows:[53]

> On the objective side of the question, it was contended that an unarmed attack, even taken at its worst, would not justify an armed attack with an obviously lethal weapon carried out with such violence as to indicate a plain intention to kill.
>
> In answer to this I must apply the normal test by reference to a village native living as he is required to do in his primitive environment. Such a person is "culturally conditioned" to immediate reaction and especially so in response to sudden attack. He is conditioned to the presence of lethal weapons always at the ready and to the fact that survival requires, and has required throughout the experience of his people, readiness for immediate attack or escape. In this kind of society matters can be talked about afterwards but there is no time to arrive at a fully considered decision as to the course that should be taken.
>
> In the circumstances I am satisfied that the ordinary peaceful (so far as this can be applicable) citizen, living in the cultural environment of the accused men, could be expected, almost to the point of certainty, to behave in the circumstances just as the accused Tambai (and the other accused) did behave.

The other members of the Supreme Court have adopted much the same approach in relating the "ordinary person" to the culture and environment of the accused himself. For instance, in *Zariai-Gavene* Ollerenshaw J. held that an accused from the unsophisticated Goilala area of Papua who had killed his wife after she had confessed to adultery and also spoken to him in terms which an ordinary Goilala would find most insulting could rely on provocation.

In each of the cases mentioned the accused was a villager living in a rural environment. If, however, the accused were to leave his village to live in a

50 Id. at 16.
51 Id. at 17.
52 [1967-68] P. & N.G.L.R. 482.
53 Id. at 487.

more sophisticated urban community would the same sort of test apply in respect of an intentional killing performed by him in his new surroundings? In other words is his loss of self-control then to be judged according to the standards of his rural or his urban home? According to the Supreme Court the answer depends on the extent to which the migrant has been assimilated into his new environment. Thus in *Manga Kitai*[54] decided in 1967 Clarkson J. took the view that for an unsophisticated Goilala who was only a transient resident of Port Moresby, the principal town in the Territory, where he committed the offence, the standard remained "that of the ordinary villager or even the ordinary villager of the Goilala area".[55] It was otherwise, however, in *Moses Robert* where the accused although originally from a rural area had been living in Port Moresby for some years and employed during that period in a semi-skilled occupation. In the opinion of the trial judge, Frost J., he was a "sophisticated native"[56] but, his Honour added,

> this is far from saying that I must view his conduct in the light of a civilised European. I must make due allowance for the fact that such a person as the accused may be more easily deprived of self-control than an ordinary European.[57]

Accordingly he accepted a defence submission that the test of the ordinary person in this case was "that of the ordinary native Papuan living and working here in Port Moresby".[58]

A further refinement of the test was made by Minogue J. in 1965 in *Iawe Mama*. The accused had killed his wife Magami with an axe after she had spat at him and signified her intention of leaving him. Both the accused and his wife lived in the Southern Highlands of the Territory where the inhabitants were, in his Honour's words, "quite primitive"[59] although "well aware that killing is forbidden by law".[60] At the time of the incident the accused was sick and under-nourished and he had been ailing for some time. Minogue J. applied the objective test as follows:[61]

> . . . I am of opinion that behaviour of that kind might well provoke an ordinary villager of Iawe's environment to loss of self-control sufficient to lead him to assault his wife and administer a beating to her. In my view it would not provoke such a villager in ordinary health to lose his self-control to the extent that Iawe in fact did. The degree of violence exhibited by him would denote in this area a man out of the ordinary and one of unusually excitable, violent or pugnacious disposition. On the other hand it seems to me that such loss of self-control

54 [1967-68] P. & N.G.L.R. 1.
55 Id. at 10.
56 [1965-66] P. & N.G.L.R. 180, 185.
57 Id. at 186. Frost J. referred to *Chibeka*, [1959] 1 R. & N. 476 in which the Federal Supreme Court of Rhodesia and Nyasaland made a similar distinction. Perhaps Frost J.'s indulgent generalisation is psychologically dubious. Cf. Naish, A Redefinition of Provocation under the Criinal Code, (1964) 1 *Nigerian L. J.* 10, 15: "It is not true that civilised and enlightened people are less easily provoked than illiterate and primitive people. The only statement that can be made with any confidence is that different people are provoked by different things. It might be that to call a "civilised and enlightened" Moslem a dog would constitute far more serious provocation than if the same statement were made to an illiterate farmer who did not happen to be a Moslem and therefore not so easily provoked by being called a dog".
58 [1965-66] P. & N.G.L.R. 180, 187.
59 [1965-66] P. & N.G.L.R. 96, 99.
60 Ibid.
61 Ibid.

> would not be extraordinary in a villager who should fall prey to the illnesses to which ordinary villagers are subject—and in the area from which Iawe comes malnutrition could well be such an illness. A villager sick and under-nourished would, I think, be less able by reason of his illness to control his emotional responses to conduct which an ordinary man would endure without violent reaction.

Thus the availability of the defence of provocation would depend on the relevance or otherwise of Iawe's state of health. Does the "ordinary person" in section 268 always enjoy good health? Minogue J. solved the problem as follows:[62]

> In deciding who is an ordinary person I am of the view that one must take such a person in ordinary sickness and in ordinary health. Long before *The Criminal Code of Queensland* was enacted, provocation existed as a defence to murder to allow for the frailty of human nature. It seems to me that the Code intended not only to preserve that concession to human frailty but to extend it. . . . To me it is natural that frailty should increase in times of sickness and I would think that the ordinary man must be regarded both in sickness and in health and that allowance should be made for his loss of ability to control his emotional responses brought about by the normal ills to which mankind is subject.

His Honour then found that the defence of provocation was open to the accused and returned a verdict of manslaughter. The result of these cases is that the "ordinary person" for the purpose of section 268 may be invested with at least three of the accused's own characteristics—his cultural background, degree of sophistication and state of health. It would seem also from *Manga Kitai* that in considering the accused's cultural background the court may take into account any special excitability of temperament or disposition to violence which may distinguish people of his community from others.[63] In that case Clarkson J. regarded as relevant the fact that people of the Goilala area are "mercurial"[64] and "inclined to violence when angered".[65]

It may be objected that the words of sections 268 and 304 do not authorise these refinements. Certainly there is no explicit warrant for regionalising the ordinary man. However in a fragmented society such as Papua and New Guinea any attempt by the bench to envisage a hypothetical ordinary Melanesian would have been ludicrous. The sensible alternative was an ordinary man invested with characteristics common among people of the accused's own community.

4. *Indirect Provocation*

Section 268 makes the defence of provocation available when the wrongful act or insult is done or offered not only to the accused but also to other persons standing in a specially defined relationship to him, that is

62 Id. at 103-104.
63 Cf. the way the objective test in provocation at common law has been applied to Samoans (Marsack, Provocation in Trials for Murder, [1959] *Crim. L. Rev.* 697) and to aborigines (Morris and Howard, *Studies in Criminal Law*, 93 *et seq.*). For other instances see Brown, The "Ordinary Man" in Provocation: Anglo-Saxon Attitudes and Unreasonable Non-Englishmen, (1964) 13 *I.C.L.Q.* 203.
64 [1967-68] P. & N.G.L.R. 1, 4.
65 Ibid.

a person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master and servant.

In Papua and New Guinea the clan, not the family, is the basic social unit and the Supreme Court has taken account of this in deciding whether any of the various familial relationships set out in section 268 are present in cases of indirect provocation. For instance in *Yanda Piaua* Mann C.J. held that the defence was open to three men closely related to the man to whom provocation was offered but not shown to be his blood brothers. He reasoned as follows:[66]

> The degree of relationship set out in the definition of "provocation" in s. 268 is not necessarily a direct and specific blood relationship. The words used are words in common and general use and are often used to describe relationships falling outside any strict definition. For example, the word "fraternal" has a much wider meaning in common use than could be derived from a reference to a full blood brother. . . . I can see no reason why section 268 should not extend to the many "fraternal" relationships as subsisting in established native society and which, as a matter of common experience, had led to precisely the same behaviour or response as would be encountered in the case of full blood brothers. Should the evidence of the precise relationship involved be somewhat deficient, I conclude that the onus would be on the Crown to eliminate any deficiency on this score.

Similarly in *Domara and Anor.*,[67] where provocation was set up as a defence to certain non-fatal assaults, Minogue J. held that a brother-in-law stood in a fraternal relation to the accused within the meaning of section 268.[68] He also held that when the section referred to a filial relation it was not limited to the son-father relationship. His Honour's experience in many cases in Papua and New Guinea was that it extended to the case of sons of brothers and in some instances to the sons of first cousins.[69] It is submitted that in this context as in its interpretation of the "ordinary person" the Supreme Court has shown commendable resource and common sense in relating the provisions of the alien Australian *Code* to the very different circumstances of Melanesia.

5. *Misdirected Retaliation*

However section 268 does impose some limits on such examples of judicial initiative and the case of misdirected retaliation is one of them. At common law provocation may sometimes be successfully raised as a defence where the accused retaliates by killing someone other than his provoker.[70] The terms of section 268 would seem to preclude reliance on the defence in these circumstances and Mann C.J. so held in the interesting case of *Kauba Paruwo*.[71] During the course of a fracas among primitive tribesmen in the New Guinea Highlands the accused had seen his father Paruwo attacked

66 [1967-68] P. & N.G.L.R. 482, 488.
67 [1967-68] P. & N.G.L.R. 71.
68 Id. at 77.
69 Id. at 76.
70 See the writer's Indirect Provocation and Misdirected Retaliation, [1968] *Crim. L. Rev.* 319.
71 [1963] P. & N.G.L.R. 18.

and killed by Hamo. Hamo had then fled but the accused, having lost his self-control, then killed Hamo's son Nuabo who had remained on the scene. According to the learned Chief Justice Kauba's retaliation against Hamo's 'nearest available relative'[72] was perfectly natural for a man of his cultural background. However it could not be provocation as defined in the *Code* and the accused was therefore convicted of wilful murder. His Honour reasoned as follows:[73]

> If the court were free to evolve a common law basis for the operation of the defence of provocation suitable for the primitive state in which many of the natives of the Territory are at present living, and are indeed required by circumstances to live, it might appear that the established practice of striking back against the nearest clan relative ought to be recognised as carrying a different degree of criminal responsibility from wilful murder, and it might be thought that the penalty prescribed for manslaughter carried sufficient sanction as a matter of public policy to lead the people to a more advanced standard; but in applying the provisions of The *Criminal Code* as they stand, there seems to me to be no justification for going outside the terms of s. 268 for a definition of provocation.
>
> . . . .
>
> Although s. 268 recognises that provocation may affect and sanction retaliation by a third party, who is in a parental, filial or other appropriate relationship to the person provoked, it is an essential feature of provocation that the action be directed against the person giving the provocation.
>
> . . . .
>
> The *Criminal Code* was drawn up and enacted in the light of many centuries' experience in the English community, during which time the community was thereby enabled to advance to a much higher social status. The Code inevitably expresses concepts of social responsibility in terms known to an advanced and civilised society. The kind of clan structure which gives rise to concepts of social responsibilities of the type in question in this case, has been absent from English society for a very long time and in my opinion there is no foundation upon which I can afford any appropriate relief to the Accused in applying the provisions of The *Criminal Code.*

In *Kauba Paruwo* the accused had deliberately selected a third party as his victim. It appears that section 268 would also render a defence of provocation inapplicable in a wilful murder or murder case where the accused directed his retaliation against the provoker but killed a third party by mistake. Certainly this would be so on a charge of manslaughter for the defence of provocation, if available, is then delimited by sections 268 and 269. The latter section applies only where it is the victim who gives the accused "provocation for the assault" which causes death. Thus in *Tsagaroan Kagobo*[74] Mann C.J. held that where an accused had thrown a stick at his wife who had provoked him and the stick struck and killed their baby, who unknown to the accused was in his wife's arms, he could not rely on provocation as a defence to manslaughter.

[72] Id. at 19.
[73] Id. at 20.
[74] [1965-66] P. & N.G.L.R. 122.

6. *Heat of Passion*

Section 304 requires that the accused must react to provocation in "the heat of passion". The judges of the Supreme Court have been unanimous in interpreting this phrase as involving a state of emotional disturbance going beyond mere anger. Ollerenshaw J. in *Zariai-Gavene* said it must involve 'a transport of uncontrolled passion'[75] or, as Smithers J. put it in *Nantisantjaba*,[76] there must have been 'an abdication of reason in favour of passion'.[77] This accords with the view of the Privy Council in *Parker* v *The Queen*[78] where the same phrase in the corresponding section of the New South Wales Crimes Act was interpreted as meaning 'a temporary suspension of the reason'[79] and two Supreme Court judges in the Territory, Frost J. in *Moses Robert* and Clarkson J. in *Manga Kitai* and *Oa*, have adopted the Privy Council's phrase as supplying the correct interpretation in section 304.

It has been noted that sections 268 and 304 do not specifically incorporate the common law notion that the mode of retaliation must bear a reasonable relation to the provocation. However evidence of disproportion remains important under the *Code* because it may indicate that the accused did not retaliate "in the heat of passion". It may suggest that he retaliated by way of revenge or under a sense of grievance or even in a spirit of deliberate chastisement. In *Iawe Mama* Minogue J. quoted with approval certain remarks of Stanley J. in *Sabri Isa*:[80]

> If an examination of the method of using force or the degree of force used in alleged retaliation discloses that the alleged wrongful act or insult was not really provocation at all in the sense that the accused had not been deprived of his power of self-control, but had seized the alleged provocation as an excuse or pretext for otherwise unrelated violence, then provocation in terms of sections 268 and 304 does not exist.

This sort of examination of the nature and quality of the act causing death has in many Territory cases led to the conclusion that the accused did not react in the "heat of passion".[81] Certainly the omission from the Code of the doctrine of proportionate retaliation has not led the Supreme Court to rule that minor assaults or insults may suffice to reduce intentional killings to manslaughter. Perhaps the Queensland judges who (with the exception of Stanley J.) regarded the omission of the doctrine as a powerful reason for resorting to the common law for the definition of provocation had little to fear from the application of section 268 alone.

7. *Sudden Provocation*

Under section 304 the accused's loss of self-control must have been induced by "sudden provocation". The obvious interpretation of these words is that the "wrongful act or insult" constituting provocation must be "sud-

75 [1963] P. & N.G.L.R. 203, 215.
76 [1963] P. & N.G.L.R. 148.
77 Id. at 153.
78 [1964] A.C. 1369.
79 Id. at 1391.
80 [1952] Q.S.R. 269, 294.
81 See e.g. *Nantisantjaba* [1963] P. & N.G.L.R. 148; *Moses Robert*, [1965-66] P. & N.G.L.R. 180; *Manga Kitai*, [1967-68] P. & N.G.L.R. 1; *Oa*, [1967-68] P. & N.G.L.R. 26 and *Pamboa Takai*, [1965-66] P. & N.G.L.R. 1. Of course savage response to provocation may, on the other hand, indicate genuine loss of self-control. See *Kink Aburu*, (1970) unreported.

den" in the sense of unexpected.[82] In the words of Smithers J. in *Rumints-Gorok*,[83] 'it contemplates an event which arises on the sudden and has in it elements of shock and surprise or gravity which may cause spontaneous, unreasoning, passionate action'. However to confine the quality of suddenness to the provocation offered would exclude from the ambit of the defence an act or insult which, although not unexpected, constituted the "last straw" for the accused and precipitated a sudden loss of self-control. It would exclude, for instance, a confession of adultery made by a spouse known already to be promiscuous or a taunt by one who had on many previous occasions attacked or gravely insulted the accused. The Supreme Court has declined to adopt such a narrow interpretation of section 304. Instead, implicitly or explicitly, it has treated "sudden" as an epithet which may qualify "heat of passion" as well as "provocation". For instance Minogue J. said in *Iawe Mama*:[84]

> The degree of violence and savagery exhibited by him does not bring to my mind any conviction that his actions were dictated by a pre-conceived design and not by a sudden and complete loss of self-control. . . .

Or as Clarkson J. held in *Oa*:[85]

> He was angry, indeed very angry, but he was not overwhelmed suddenly by any transport of passion.

It may be objected, of course, that section 304 actually relates the question of suddenness to the provocative act or insult only. However this does not necessarily mean that the court must confine its attention to the conduct which precipitated the accused's retaliation. The court may look at preceeding incidents involving the accused and his victim as, in the words of Clarkson J. in *Manga Kitai*,[86] 'setting the stage for what is said to be the sudden provocation'.

8. *Time for Passion to Cool*

Another aspect of the objective test in provocation under the Code is that the accused, to comply with section 304, must retaliate "before there is time for his passion to cool". In regionalising the "ordinary person" for the purposes of section 268 the Supreme Court has taken account of the temperament and degree of sophistication of members of the accused's own community. If such people are mercurial or inclined to violence then these temperamental characteristics are relevant in applying the section. The point has not been judicially considered but by parity of reasoning it would seem that if people of the accused's community, though apparently phlegmatic, tend to lose self-control after a period of slow-burning anger then the accused should be shown special indulgence in deciding whether there has been "time for his passion to cool" within the meaning of section 304. This has been the practice of courts when applying the corresponding aspect of the common law doctrine of provocation to aborigines[87] and Samoans.[88]

[82] Cf. the wording of s. 269 which requires the accused to react to provocation "on the sudden".
[83] [1963] P. & N.G.L.R. 81, 86.
[84] [1965-66] P. & N.G.L.R. 96, 103.
[85] [1967-68] P. & N.G.L.R. 26, 29.
[86] [1967-68] P. & N.G.L.R. 1, 9. See also *Kink Aburu*, (1970) unreported.
[87] See Morris and Howard, *Studies in Criminal Law*, 93 *et seq*.
[88] See Marsack, Provocation in Trials for Murder, [1959] *Crim. L. Rev.* 697.

In Queensland judicial opinion has been divided as to whether by virtue of section 269 provocation may operate as an absolute defence to manslaughter. Philp J. in *Martyr*,[89] and later in *Johnson*,[90] ruled that the section referred only to non-fatal assaults but more recently Hart J. in *Sleep*[91] has held that the section applies to manslaughter also. This division of opinion is not really surprising because as Minogue J. pointed out in 1963 in the New Guinea case of *Miawet*[92] there are two quite different ways of approaching the problem. He said:[93]

> It may be that though the assault is justified under that section, if death be caused by the assault, the mere fact that the assault was justified is immaterial to the question whether the killing was justified or excused. . . . On the other hand the proper view may well be that if the assault is justified no criminal responsibility can attach to the consequences of that assault.

The learned judge found it unnecessary to decide the point in that case but other judges in the Territory have since expressed a preference for the latter view thereby ruling that provocation may be a defence to manslaughter. Unfortunately with one exception these have been oral rulings given on circuit and without any subsequent publication of written reasons.[94] The exception was *Nantisantjaba* in which Smithers J. after deciding that manslaughter was "an offence of which an assault is an element" within the meaning of section 268 ruled that it was within the ambit of the defence of provocation as set out in the succeeding section. He said:[95]

> The offence of unlawful killing (manslaughter) requires not only a death but that it should be proved that the accused directly or indirectly caused the death by one means or another. If, in respect of the means, for instance, an assault by which the death was caused, the accused is declared by law to be free of criminal responsibility then it is difficult to see how he can be criminally responsible for causing the death.

This seems to be correct but even if provocation is theoretically available as a defence to manslaughter a successful defence would still be, as Frost J. said in *Bauoro Dame*,[96] an "unlikely event". The assault which causes death but is justified by section 269 must be of a very special character. It must not be "disproportionate to the provocation" and be not intended nor "such as is likely to cause death or grievous bodily harm".[97] The first limitation, as Minogue J. said in *Domara and Anor.*, poses an "extremely diffi-

89 [1962] Qd.R. 398.
90 [1964] Qd.R. 1.
91 [1966]Qd.R. 47.
92 Unreported.
93 Ibid.
94 These cases are noted in (1970) 1 *Melanesian L. J.* 58.
95 [1963] P. & N.G.L.R. 148, 151.
96 [1965-66] P. & N.G.L.R. 201, 204.
97 Minogue J. said in *Domara and Anor.*, [1967-68] P. & N.G.L.R. 71, 76: '"Likely" in the context of s. 269 means I am now of the view reasonably foreseeable by the ordinary person as probably having such a result'. The test is, therefore, completely objective and for the purpose of the test 'the ordinary person', said Minogue J. in Miawet, (1963) unreported, 'means a person of the same environment as the accused'. This obviously favours the accused in whose community medical knowledge is rudimentary.

cult"[98] problem for the trial judge. Nevertheless it is quite possible to envisage a retaliatory assault causing death which is not disproportionate to the provocation.[99] It is much more difficult to envisage a retaliatory assault which satisfies all three limitations in section 269. For this reason the application of provocation as an absolute defence to manslaughter is of little practical importance. It is as a qualified defence under section 304 that provocation has had a much more significant impact on the criminal law of Papua and New Guinea.

98 [1967-68] P. & N.G.L.R. 71, 76.
99 See *Gamumu,* [1963] P. & N.G.L.R. 1 and *Tsagaroan Kagobo,* [1965-66] P. & N.G.L.R. 122.