THINKING ABOUT MURDER

*Barry Mitchell**

In the last two years or so, our attention has been drawn to the very important issue of the nature and definition of murder,[1] and how it should be distinguished—assuming it should be distinguished—from manslaughter. It may be that there has been some increase in the overall numbers of unlawful homicides,[2] though it seems that the general characteristics of the cases remain fairly constant.[3] There is broad agreement that convictions for murder encompass a wide variety of situations, typically including deaths arising from domestic quarrels, drunken pub fights, robberies and burglaries that 'go wrong', revenge- or jealousy-inspired killings, as well as the very occasional terrorist offence. Sometimes there is evidence of premeditation, sometimes there is none at all.

There appears to be a general belief that society wishes to maintain some sort of distinction between murder and manslaughter, so that the former is reserved for what are regarded as the more heinous instances of criminal homicide.[4] Thus, the stigma of being labelled a 'murderer' is perceived and merited.[5] The suggestion of a single offence of, say, unlawful killing has also been rejected on the ground that it would incorporate too broad a variation of circumstances. In this article it is argued that the current legal definition of murder is too wide and fails to ensure a sufficient level of responsibility on the part of the offender, so as to justify a conviction for what many people assume is the most serious crime.[6]

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[1] The latest review of murder, by a House of Lords Select Committee in 1989, is discussed by Andrew Ashworth in 'Reforming the Law of Murder' [1990] Crim LR 75–84.

[2] The annual statistics produced by the Home Office show an increase in 'offences currently recorded as homicide' from 546 in 1979 to 576 in 1989; the lowest figure between those years is 482 in 1983, and the highest is 602 in 1987. See *Criminal Statistics England and Wales 1989* (1990) Cm 1322, Table 4.2.

[3] See E Gibson and S Klein, *Murder* (London, HMSO, 1961); E Gibson and S Klein, *Murder 1957 to 1968*, Home Office Research Study No 3 (London, HMSO, 1971); Evelyn Gibson, *Homicide in England and Wales 1967–71*, Home Office Research Study No 31 (London, HMSO, 1975); T Morris and L Blom-Cooper, *Murder in England and Wales since 1957* (*The Observer*, London, 1979); B Mitchell, *Murder and Penal Policy* (MacMillan, London, 1990).

[4] See Criminal Law Revision Committee, *Fourteenth Report, Offences against the Person*, (1980) Cmnd 7844, para 15.

[5] Naturally, the distinction between the two offences might also be reflected in separate sentences, and the House of Lords Select Committee (for full citation, see note 14, below), has proposed a change to the law so that life imprisonment, or its equivalent, should be discretionary for murder as well as manslaughter. The question of sentencing, though, remains to be debated over and above the issue of the retention of two crimes of homicide.

[6] The taking of a human life is often assumed to be the greatest harm that man can perpetrate, and yet there are various situations in which it is apparently justified. An interesting reminder of this is found in Tom Sorell, *Moral Theory and Capital Punishment* (Basil Blackwell, 1987) pp 1–3.

One of the fundamental difficulties is that there is no obvious or simple criterion for determining what makes a crime a particularly heinous example of its type.[7] One might consider any of the following:

(1) The extent to which the offence was premeditated or committed on impulse. The greater the degree of premeditation, the stronger the evidence of mens rea is likely to be, though that does not necessarily indicate intent rather than recklessness. Similarly, crimes committed on the spur of the moment allow less room for mens rea, but the courts have clearly felt there may still be intent.[8] Additionally, planned offences are regarded as deliberate, calculated breaches of the law and thus tend to result in tougher sentences.

(2) Alternatively, the vulnerability of the victim may be seen as an aggravating factor. The killing of the young or old, or handicapped, may generate feelings of such revulsion that the appropriate verdict should be murder rather than manslaughter.

(3) Attention might instead be focussed on the relationship between offender and victim. Some might argue that to kill a member of one's own family—someone with whom the killer shares a home—deserves the highest condemnation. Offenders must be severely castigated for taking advantage of sharing a home with the victim, as well as to protect the mutual trust and confidence which members of a family should feel free to enjoy.[9] If the offence is committed in the victim's own home, that in itself may exacerbate the gravity of the incident.

(4) Then again, certain methods of killing may be regarded as especially offensive—the obvious example being the use of a firearm. The fear of the harm that guns can cause, together with the power they give to the user may be thought to be sufficient to push all killings by this means into the category of murder.

(5) On the other hand, certain motives may be more significant than the method. Killing in the course of gain (such as robbery or rape) is an immediate possibility, on the basis that two serious crimes are being committed in the execution of what is essentially one criminal venture.[10] Homicides in the name of revenge or jealousy also tend to be regarded as serious since such motives are looked upon very critically, and they usually reflect a good deal of planning. In contrast, violence arising out of an argument tends to receive less condemnation in so far as the offence is committed in the heat of the moment and arguments are a less unacceptable feature of human conduct.

[7] Additionally, in 1983, the then Home Secretary announced that those convicted of certain types of murder can expect to serve at least 20 years in prison before being released on licence. These are murder of a police or prison officer, sexual or sadistic murder of a child, terrorist murder, and murder by firearm in the course of robbery.

[8] In manslaughter by provocation it is invariably assumed that the defendant intended to kill or seriously injure.

[9] Breach of trust is, of course, commonly regarded as a feature which is likely to aggravate the sentence.

[10] This will also usually aggravate the sentence.

MURDER AND THE LAW

The law relating to homicide is quite specific. Unless the defence can show some extraneous factor such as provocation or diminished responsibility, or a lesser form of mens rea than malice aforethought, the offence will be one of murder. The presence of a mitigating factor or a lack of malice aforethought are taken to indicate a less serious crime.

Intent to seriously injure

One example of what might be thought of as a generous (to the prosecution) construction of malice aforethought is the fact that foresight of causing serious injury may suffice.[11] Thus, the law currently conflicts with the 'subjective principle' that a person ought not to be held responsible for those consequences which he has not chosen to bring about (or at least to risk bringing about). Some very august and influential bodies—including the Criminal Law Revision Committee (CLRC),[12] the Law Commission,[13] and the House of Lords Select Committee (HLSC)[14]—have recommended that murder should require more than a mere intent to seriously injure.

At the same time, it must be acknowledged that the above bodies have also recommended that it should be murder if a person intends to cause serious personal harm whilst aware of the risk that he might kill.[15] The Criminal Law Revision Committee (1980), for example, thought that the robber who, whilst trying to escape, shoots at a pursuer intending to disable him but appreciating that the wound might be fatal deserves to be convicted of murder if the pursuer does die. Robert Goff has criticised the recommendation on two grounds.[16] First, it is confined to cases where there is an intent to cause grave harm, and would thus exclude the instance of a minor wound to a haemophiliac. Secondly, it requires a bare awareness of a risk of killing and would (wrongly, according to Goff) include the man who recognised the risk but hoped to avoid it or discounted it as unrealistic. A third objection may be added, simply that recklessness as to causing death should never suffice for murder. It will subsequently be argued that a satisfactory distinction between murder and manslaughter demands that an intent to kill (as is necessary for attempted murder) be proved.

[11] This point was specifically considered by the House of Lords in *R v Cunningham* [1982] AC 566.

[12] See note 4, above.

[13] See the Commission's draft code in Law Com 177. *A Criminal Code for England and Wales* (2 volumes, London, HMSO, 1989).

[14] House of Lords, *Report of the Select Committee on Murder and Life Imprisonment* (Session 1988–89, HL Paper 78), 3 volumes.

[15] See eg CLRC (1980) paras 28 and 31: Law Commission (1989) clause 54(1); and HLSC (1989) para 71.

[16] Goff, 'The Mental Element in the Crime of Murder' (1988) 104 LQR 30–59.

Voluntariness

There is, however, a more fundamental objection to the existing law, in that it fails to give adequate consideration to the extent to which the fatal act was carried out as the result of a freely-made decision. Determinists would surely claim that no decision is ever wholly freely made—but some are undoubtedly much freer than others. What is worrying about so many cases where a murder verdict is returned is that there was a good deal of evidence that something inhibited the freedom with which the offender acted.[17] 'Freedom' here is used in the sense of voluntariness. This is not to imply that whenever such factors as an argument or panic are present the verdict must be manslaughter.[18] But we should understand their impact on the voluntariness of the offender's actions—the extent to which they sapped the free will.[19] The need for malice aforethought is obviously closely allied to, but not synonymous with this. Not only should the fatal act itself be freely intended, but so too should the prohibited consequence of death—whether through desire, purpose, hope or foresight.

The principle that voluntariness is a condition of responsibility under the criminal law is traditionally illustrated by the defence of automatism. Put simply, if the mind is not in control of the bodily movement the defence may succeed, whether the defendant was conscious at the time (eg D had a spasm or reflex muscular contraction), or unconscious. This principle has been traced back to Austin[20] who, basing his ideas on those of Dr Thomas Brown,[21] held that willed acts are those which are desired. Professor Hart[22] criticises Austin's thesis on the grounds that it does not deal adequately with omissions and that normal voluntary conduct does not necessarily imply a desired movement of the muscles. Hart's version of the principle is expressed thus:

> Such (involuntary) movements are 'wild' or not 'governed by the free will' in the sense that they are not subordinated to the agent's conscious plans of action: they do not occur as part of anything the agent takes himself to be doing. (p 105)

Admittedly, Hart appears to limit the application of this principle to strict liability, or to cases requiring negligence at most, but it is submitted that it should have implications for other areas of criminal liability, including the relationship between murder and manslaughter.

[17] For example, my own study of murder (see note 3, above), which was consistent with earlier surveys, showed 46 per cent were committed in a fit of temper and a further 3.2 per cent in the course of a gang fight.

[18] Of course, the criminal law should seek to provide a general deterrent and encourage people to control their tempers etc, but surely this could be achieved through convictions for manslaughter and an appropriate sentence(?)

[19] The idea of sapping the free will was used (before the Police and Criminal Evidence Act 1984 came into force) as a criterion for excluding involuntary confessions.

[20] Lectures XVIII–XIX (5th ed, 1885) pp 411–424.

[21] T Brown, *Enquiry into the Relation of Cause and Effect* (1818) Part I, section 3.

[22] H L A Hart, *Punishment and Responsibility* (Oxford University Press, 1968) pp 99–104.

Murder, provocation and diminished responsibility

Pleas of provocation in murder cases are not uncommon, though the courts' verdicts do not always appear to reflect the theoretical distinctions between murder and manslaughter.[23] There seems to be a suspicion in some peoples' minds that at times the law is artificially stretched so as to avoid a conviction for murder. For example, it is said that extremely flexible interpretations of provocation and diminished responsibility are made in order to secure manslaughter verdicts.[24] Whether or not there is any foundation to these fears, there is surely some evidence that the converse is true, that some people are convicted of murder because that court takes a very restricted, technical interpretation of the law relating to manslaughter.[25] A tragic example of this was the recent case of *Cocker*[26] in which the defendant killed his wife who had been suffering from an incurable disease and had begged him to put her out of her misery on a number of occasions. For a considerable time he looked after her, ignoring her entreaties, but finally gave way and asphyxiated her by holding a pillow over her face. His plea of provocation was rejected both at first instance and by the Court of Appeal because, as Birch commented, he lost his self-restraint but not his self-control![27]

This blinkered interpretation of loss of self-control is but one illustration of the narrowness of the legal concept of provocation. A further criticism, made by many writers, is that there ought to be no need to show that the reasonable man would also have lost his self-control and reacted in the way that the accused did.[28] Having rehearsed the arguments on both sides, Weber[29] dismisses the supposed justification of an objective test thus:

> Provocation has to be understood in terms of the man who is responding to it. It is a relationship between two people. The effectiveness of the insult or provocatory conduct depends on the responses and make-up of the man at whom it is directed. The person who fashions the insulting words or conduct does not limit it to matters extraneous to the recipient's level of self-control. Most often, being malicious, he exploits the weak points of the person to be provoked . . . There is an inherent element of unfairness in not considering the whole man or in testing him by some standard other than himself. (pp 171, 172)

Some experts such as Professor Ashworth have argued that without the objective test verdicts of manslaughter could be reached which would conflict with popular moral sentiment,[30] in that any petty quarrel might be relied on to achieve a lesser conviction. Weber indicates that this is misguided and emphasises (rightly in the writer's view) that 'the fact that

[23] I found evidence of this in a later study of a sample of cases that came before the courts in 1984. Information was extracted from files held by the Crown Prosecution Service, whose co-operation was much appreciated; see B Mitchell, 'Distinguishing Between Murder and Manslaughter' (1991) 141 NLJ 935–937 and 969–971.

[24] It is understood that such fears were shared by some members of the Select Committee.

[25] This is discussed more fully in the article presently being considered for publication, referred to in note 23, above.

[26] [1989] Crim LR 740.

[27] Ibid, at p 741.

[28] Ie the rule illustrated in *DPP v Camplin* [1978] AC 705.

[29] Jack Weber, 'Some Provoking Aspects of Voluntary Manslaughter Law' (1981) 10 *Anglo-American Law Review* 159–179.

[30] A J Ashworth, 'The Doctrine of Provocation' (1976) 35 Camb LJ 292–320.

the person is not acting in a rational way is reason enough for reducing the offence to manslaughter and to satisfy popular moral judgments' (p 172). The concept of 'extreme emotional disturbance' which he offers as a substitute for the current law on provocation is, it is submitted, quite consistent with the suggested reforms which are set out in this article.

It is invariably felt that in provocation manslaughters the offender will have acted with malice aforethought. Assuming that actions committed in a fit of temper are not made wholly freely or voluntarily, one cannot help wondering whether it is sensible to say that a person, in those circumstances, *intended* to do what he did. A person who lashes out at his victim in the heat of a raging quarrel may, with some justification, claim that he couldn't really stop himself. Subconsciously or semi-consciously, he might have experienced a momentary awareness of what was happening,[31] but he may have been unable to do anything about it. He was carried along by the momentum of the argument. (Cocker may not have lost his temper, but the background and prevailing circumstances are surely likely to have had a major effect on the freedom with which he acted.)[32] Of course, the very fact that provocation can reduce murder to manslaughter is some sort of concession to human frailty, but the way in which the law presently confines it has properly been criticised.

Obviously, this is similar to the concept of 'irresistible or uncontrollable impulse', which may lead to manslaughter by diminished responsibility.[33] But here again, the law is quite specific—the defendant must have been suffering from such an abnormality of mind, resulting from one of the stated causes, that his mental responsibility was substantially impaired. Can there really be any justification for distinguishing (in the way that the law currently does) between irresistible impulse that complies with s 2 of the Homicide Act 1957 and that which arises out of the circumstances surrounding the offence? If we are to lend substance to the principle of voluntariness as a basic premise of criminal responsibility, then we must do more than pay mere lip-service to it. Ultimately of course, it is a question of public policy—the degree to which involuntariness should be allowed to exculpate a defendant, either wholly or partially.

A SUGGESTION FOR REFORM

There ought to be very real fear that the current legal definition of murder is too wide. The House of Lords Select Committee's proposal for amending the meaning of malice aforethought represents a step in this direction, but

[31] This idea has been discussed in the context of recklessness: see D J Birch, '"The Foresight Saga": the Biggest Mistake of All?' [1988] Crim LR 4–18; but it might also be applied to intention.

[32] In his version of the law, Hart (1968) described involuntary conduct as 'wild . . . not governed by the will . . . movements that are not subordinated to the agent's conscious plans . . . conduct which does not occur as part of anything the agent takes himself to be doing' (p 105). Superficially, these words may seem inappropriate to *Cocker*, yet it could be said that the defendant's actions were precipitated by his wife's will and the persistent torment to which she had subjected him in her efforts to be put out of her misery. His will had been subordinated to hers.

[33] See Homicide Act 1957, s 2(1), and *R v Byrne* [1960] 2 QB 396.

there must be some reservation about the extent of its likely impact. Even if the Committee's recommendations are accepted, how refined are juries at carrying out the necessary mental gymnastics to determine whether, although the defendant (only) intended to seriously injure, he was nonetheless aware that he might kill? Members of the House of Lords have already warned of the impossible demands which the law makes on jurors with regard to the requisite degree of foresight from which intent may be inferred![34]

It is suggested that, in addition to stressing the need for the act to be committed voluntarily, the most sensible way to proceed is to require some form of premeditation for murder. Before the idea is dismissed summarily on the ground that the courts have tried and rejected it, it should be recalled that many of the cases that are treated as first degree murder in the United States require, in addition to the intent to kill (or seriously injure), evidence of cool deliberation by the accused. This is not to imply that the United States has necessarily 'got it right', but it ought to make us rethink the arguments. Another jurisdiction which has closely followed the development of the common law in England and Wales has not been nearly so hasty in abandoning the need for premeditation.

In the United States the concept or premeditation is used to denote cases where the defendant *coolly reflected*, at least for a short time, before he killed. Of course, it is true that this aspect of American law has been criticised in that the premeditation may last for only a few seconds.[35] But others have criticised instances where this has happened for blurring the distinction between first and second degree murder.[36] The presence or absence of premeditation can be determined by inference from the defendant's conduct in the light of all the circumstances. Evidence of 'planning activity'—for example, details about how and what the defendant did may indicate activity directed at the killing. Prior possession of the murder weapon, or taking the victim to a place where it is unlikely that anyone else will be present, may be relevant here. Alternatively, the relationship between the parties may suggest a motive for the killing: the defendant may have threatened the victim, or he may have made plans that necessitated the victim's demise. Then again, the nature of the killing may be helpful where, say, it appears that the wounds were carefully aimed at a vital part of the body.

It may be objected, as the American Model Penal Code does,[37] that the concept of premeditation is too vague, that there are cases of such extreme depravity that should be regarded as murder (even though the killing was committed on impulse), and that some premeditated murders (such as mercy killings) merit some degree of compassion or understanding for the offender. It is suggested, however, that the law ought to emphasise the notions of responsibility and choice. The degree of culpability should reflect the extent to which the defendant made an unfettered choice to behave in the way that he or she did. One of the most fundamental

[34] See eg Lord Bridge in *R v Moloney* [1985] AC 805.
[35] See eg *State v Jones* 217 Neb 435, 350 NW 2d 11 (1984).
[36] See eg *United States v Shaw* 701 F 2d 367 (5th Cir 1983).
[37] Model Penal Code, 210.6.

assumptions made by the criminal law is that a person has it within his/her power freely to choose whether or not to behave in a particular manner. If that freedom of choice is restricted the law, on other occasions, excuses the individual from criminal responsibility, as in cases of duress,[38] necessity or self-defence.[39] Thus, where a person acts in the course of a heated argument or in a fit of temper, it may be argued that his behaviour (at least to some degree) is a reaction to and is precipitated by the immediate circumstances rather than an exercise of free choice.

It was earlier acknowledged that there is no universally accepted criterion for distinguishing the more heinous instances of unlawful homicide from the rest. The writer's view, however, is that most of the suggested criteria listed above should be discounted because they represent external elements of the offence and thus tend to provoke an emotive rather than a carefully considered response. The appropriate way to identify more culpable killings is surely to concentrate on the degree of fault,[40] in which mens rea naturally plays an important role. But fault is a broader, more complex notion, incorporating shades of immorality as well as mens rea in the strict legal sense.[41] The need for moral responsibility demands that account be taken of the extent to which the actor's conduct resulted from an exercise of free will.

A law which merely insists upon the presence of an intent clearly fails to distinguish between the person who makes a cool decision to act and one whose conduct is a response to surrounding events. Admittedly, this distinction is not one that can be made wholly clinically: a person may appear to be free of any overt constraints, but forensic psychologists have long warned us of the numerous influences which inevitably affect our behaviour. It must therefore be determined what sort of constraints should be recognised by the law, to reduce or negate criminal liability. This surely must include conduct which results in the 'heat of the moment', and any suggestion that a person can always extricate himself from the argument before it gets too heated should be dismissed because it is unrealistic. The phrase 'in the heat of the moment' should be interpreted sufficiently

[38] Admittedly, the House of Lords in *R v Howe and Others* [1987] AC 417 held that duress could not be a defence to murder (regardless of the defendant's mode of participation), but Lord Brandon (whilst concurring in the decision) was not happy with the result and seemed to be hinting at one point that it ought to afford a partial defence. Moreover, the Law Commission recommended that duress should be a complete defence to murder: see Law Com 83, *Report on Defences of General Application*.

[39] A person may kill another in self-defence, or in defence of others or to prevent a crime, provided he uses no more than reasonable force in the circumstances; see eg *R v Palmer* [1971] AC 814. Guilt is to be assessed on the facts as the defendant believed them to be, even if that belief was unreasonable. The HLSC (1989) agreed with the proposal by the CLRC (1980) that even where excessive force was used, there should be a partial defence, reducing the offence to manslaughter (see paras 86–89). Of course, duress, self-defence and defence of property have long been regarded as instances of conscious involuntary behaviour: see S Prevezer, 'Automatism and Involuntary Conduct' [1958] Crim LR 361, 440.

[40] The Law Commission's (1989) draft Criminal Code seeks to stress fault as a key factor in liability.

[41] The mercy-killer is clearly a prime example of someone who shows ample evidence of mens rea in the technical sense, but who is morally less culpable than many other defendants.

broadly to include, for example, the genuine mercy killer[42] who might outwardly appear to be in a cool frame of mind. But it would be absurd to ignore the effects of the acute mental anguish 行為造成嚴重的精神痛苦和痛苦 and suffering on his behaviour. In some cases, as well as some form of constraint (such as loss of temper), there will be evidence of premeditation. Generally, the offender should be guilty of murder, unless it can be shown that the willingness or desire to kill was abandoned before he lost his temper and committed the fatal act.

It is also worth noting that as a consequence of what is arguably an unduly liberal legal definition of murder, those cases that slip through the 'murder net' are regarded as instances where the offender has 'got away with it'. The crime of manslaughter has thereby been devalued; it is seen as little more than a consolation prize for the prosecution, a token gesture but no more. Only by limiting murder to cases where there is a free choice to kill will we bring a sufficient element of commonality to the crime so that those who are convicted of it may incur the desired stigma. In that way the offence would have a sound theoretical basis and a character which reflects public sentiment. Obviously, any apparent restriction of the law is likely to generate concern, but those who have the responsibility and privilege of shaping the law must have the courage of their convictions![43]

This means that murder should be limited to cases where the offender made a deliberate and voluntary choice to kill. By doing so, the definition of murder would focus only on the most serious and intentional acts of killing, ensuring that everyone convicted of it truly deserves the moral condemnation and stigma associated with being labeled a murderer. It aims to create consistency and fairness in how the crime of murder is applied.

Barry Mitchell critiques the current legal definition of murder for being too broad and not limited to cases involving a truly voluntary choice to kill.

1. Intent to Cause Serious Harm as Sufficient for Murder:
Under current law, mens rea for murder includes not just intent to kill but also intent to cause serious harm, even if the offender did not intend or foresee the victim's death. For example:

—> In R v Cunningham [1982], foresight of causing serious injury was considered enough for murder. This includes cases where the offender might not have voluntarily chosen to kill but intended harm that unintentionally led to death.

2. Recklessness Included:
The law can convict someone of murder if they were merely aware of a risk of death and proceeded with their actions. According to Robert Goff, this wrongly includes individuals who hoped to avoid causing death or thought the risk was unlikely. For example:
A person shooting to disable someone without wanting to kill but aware of the potential for death could still be convicted of murder if death occurs.

3. Cases of Heat-of-the-Moment Actions:
The law treats some killings that occur in emotionally charged situations (e.g., provocation or heated arguments) as murder, even when the offender may not have fully controlled their actions.
Mitchell highlights that voluntariness—acting with a clear and free choice—is not adequately considered. For example, offenders who act in a fit of rage might not have the same culpability as someone who plans a killing, yet both could face murder charges.

4. Rigid and Broad Application of Provocation:
In cases like Cocker (1989), even mercy killings, where the offender acted under severe emotional or moral strain, are classified as murder. The current law doesn't fully consider the lack of voluntariness in such actions.

Why Mitchell Advocates Limiting Murder to Voluntary Choices:
1. Mitchell believes the stigma and severity of a murder conviction should be reserved for cases involving deliberate, intentional, and voluntary killings.
2. By limiting murder to such cases, the law would align better with moral responsibility and societal expectations, ensuring that only those who freely choose to kill face the harshest label and punishment.
3. He argues that other cases, like unintentional killings or impulsive actions, should be categorized as manslaughter to reflect the lower degree of moral culpability.

[42] The HLSC (1989) acknowledged the fact that in practice what are regarded as genuine cases often lead to artificial constructions being put on the law so as to avoid a conviction for murder. The Committee felt that, rather than have a separate offence of mercy killing or a special defence for mercy killers (as proposed by the Law Commission), the substitution of a discretionary life sentence for murder would be sufficient (para 100).

[43] It is, of course, fully accepted that ultimately one cannot discuss a crime such as murder in complete isolation from the sentence which should be available. But the determination of the proper sentence can obviously only be addressed when the nature of the offence has been defined. Arguably, one of the main criticisms of the current position is that the law is too loose and leaves too much discretion to the court, thereby creating the opportunity for an inappropriate verdict and/or an inappropriate sentence.