EXCUSABLE HOMICIDE

A note on the historical development of Art:233 of the Criminal Code
(By A. Ganado, B.A.)

Art. 233 reads: Wilful homicide shall be excusable:
1. when provoked by a severe bodily harm, or by any crime whatsoever against the person, which is liable to a punishment higher than one year’s hard labour or imprisonment;
2. when committed in the act of resisting in the daytime, the scaling or the breaking of enclosures, walls, or the entrance of a house or of an inhabited apartment, or of the appurtenances which may have a direct or indirect communication with such house and apartment;
3. when committed by a person who was acting under the immediate influence of an instantaneous passion or mental agitation owing or which he was, in the act of committing the crime incapable of reflection;
4. when committed by a person who acting under the circumstance stated in art : 229, has exceeded the limits imposed by the law, by the authority or by necessity; provided, however, that if any such excess is due to such person being taken unawares, or to fear or fright, the same shall not be liable to punishment.

In order to its being declared that the offender was incapable of reflection it is necessary, in cases of provocation, that in the fact the homicide be attributable to heat of blood and not to a deliberate intention to kill or to cause severe bodily harm, and that the cause be such as would, in men of ordinary temperament, commonly produce the effect of rendering them incapable of calculating the consequences of the crime.

In a general sense homicide may be defined as: Violenta vitae hominis ademptio or hominis caedes. In this definition no distinction is made between a homicide deriving from a lawful or unlawful cause. Our law gives no definitions of homicide, but classifies it into:
I. Wilful or voluntary homicide (art : 218);
II. Involuntary (art : 231);
III. Excusable (art :233)
IV. Justifiable (art : 229).

It is only with excusable homicide that we are at present concerned. Willful homicide is excusable, when, though the offender is not exempt from liability, he is, because of certain circumstances accompanying the act, not fully responsible and therefore, the degree of the offence, and consequently of the punishment, decreases. As Nicolini says: “La scusa consiste unicamente nell’ragion motrice del reato cioe nell’efficacia dell’affetto: la quale debba essere di tale forza che senza la sua azione il reato non avrebbe avuto lungo, ma non di tanta forza da togliere all’intutto l’imputazione.” Thus, in order that homicide may be excusable it is necessary that there be certain circumstance accompanying the act, and these circumstances must be such as to bring about a change in the state of mind of the offender.
Our law contemplates the cases of excusable homicide in art: 233. The historical origin of this article whilst being of particular interest in itself is of great practical importance in the interpretation of the wording in accordance with the spirit of the law.

Paras: 1 and 2 of art: 233 can be traced back to the first Draft Code of Penal Laws published in Malta under British rule in 1836, which was compiled by five Maltese Commissioners and sent to the Government together with a Report in 1835. After its publication it was submitted by the Secretary of State to the Royal Commissioners of Enquiry who were appointed in 1836, and these suggested that it be revised by the Maltese Commissioners before being promulgated. Of the original five commissioners, the only two then still living prepared in 1842 a revised project which was by order of the Secretary of State submitted to a Scotch advocate, Mr. Andrew Jameson, who in a very learned Report suggested various amendments and correction, omissions of some provisions and additions of others. The draft of 1842 together with Jameson’s Report was submitted to Dr. Micallef, the Crown Advocate (afterwards Sir Antonio, President of the Court of Appeal) for his consideration. The revises code was approved by the Council of Government in 1845 and resubmitted to Jameson who made a second Report in 1846. The draft code was again approved by the council of Government and was published in 1848. When in 1849 the Council of Government was reconstituted by the admission for the first time of elected members the draft code came up for discussion before the newly-formed Council of Government at its first sitting in 1850.

In the draft of 1835, art: 299, which was taken from art: 377 of the Neapolitan code, read as follows: “Gli omicidi volontari saranno scusabili, 1. se fossero provocati da grave offesa sulla persona o da qualunque sia si crimine contro le persone; 2. se, fuori del caso contemplato nel no. 2 dell’art: 296, fossero commessi nell’atto di respingere di giorno la scalata, o la frattura dei recinti, dei muri o dell’ingresso di una casa o di un appartamento abitato o delle loro dipendenze che immediatamente o mediatamente avessero comunicazione con tale casa o appartamento.

In the draft of 1842 this art. Was numbered 211. In this new project, para: 1 was amended by substituting the word “delitto” to that of “crimine” and by adding after “delitto” the words “portante a pena maggiore di due anni di prigionia”. In para: 2, the words “fuori del caso contemplato nel nro.2 dell’art: 296” were omitted, since no. 2 of art: 296 of the draft of 1835 was left out altogether in the new draft. By proposing an alteration of the terms of art: 211, no. 1, Mr. Jameson intended to enlarge considerably

1. The Commissioners were: Claudio-Vincenzo Bonnici, Ignazio Gavino Bonavita, Giuseppe-Francesco Falsan, Filippo Torriggiani, Francesco Chappelle.
2. John Austin, George Cornwell Lewis.
3. Ignazio-Gavino Bonavita, Francesco Chapelle
4. No. 2 of art: 296 considered the following as one of the cases of actual necessity of lawful defence: “Quando l’omicidio e le offese sull persona fossero commessa nell’atto di respingere, anche di giorno, la scalata, o la rottura dei recinti, dei muri, o delle porte di entrata in casa o nell’appartamento abitato, o nelle loro dipendenza aventi comunicazione come sopra, in luoghi che non fossero entro l’abitato o prossimi a quello, cosicche si potessero chiamare in soccorso I vicini, e quelli potessero accortere.”
the application of the plea of adequate provocation excited by personal violence (5). In the Appendix he suggested that after the words “more than” the words “two years” he deleted and the words “one year’s” be inserted (6). Dr. Antonio Micallef concurred in Jameson’s suggestion and para : 1 as amended was later passed by the council of Government with the insertion of the words “di lavori forzati o” before the words “di prigionia”. Para : 2 was passed as it stood in the draft of 1842. since that time paras : 1 and 2 have never been amended. In the draft of 1848, the article became article 227 and passes as art : 218 into the Code promulgated in 1854, and paras : 1 and 2 of art : 299 of the original draft of 1835 are now paras : 1 and 2 of art : 233, the code of 1854 having been renumbered in 1901.

In the draft of 1842, para : 4 of art : 211 read as follows:

“4. se vi concorresse qualche altra valevole circostanza attenuante il dolo” ; that is, the concurrence of attenuating circumstances was considered as an excuse for homicide. The theory of attenuating circumstances which Jameson described as one of the prominent features of the new Code found its application also in this particular article of the draft. This theory was criticized by Cornwall-Lewis in a memorandum submitted to the Government on the Project of Penal Laws of 1835. In his observations, Mr. Lewis, referring to the power given to the Jury to declare the existence of attenuating circumstances, remarked that this theory was an imperfect means of supplying for the deficiencies of the law. The Maltese Commissioners in their Report accompanying the draft of 1842 stated that they agreed perfectly with Mr. Lewis on this point, but they held on the other hand that “qualunque sia il progresso che la legislazione abbia finora fatto presso qualsiasi nazione, si e tuttora da per tutto ben lontani dalla desiderato perfezione, che possa convenientemente dispensare un legislatore dal ricorrere a questa vaga, e vero, ma assai provvida teoria, la quale sola puo valere, ad impedire che in infiniti casi, la legge non devenga assai ingiusta.” The Commissioners also referred to the reasons brought forward in the Report of 1835, reasons which had induced the then five Commissioners to adopt unanimously the theory of attenuating circumstances. They finally stated that they still adhered even more strongly to their opinion(7).

After a lengthy consideration of the subject, Jameson recommended the suppression of the theory as one of the basic theories of the Code, and consequently for the same reasons, advocated the omission of para : 4 of art : 211 which was merely a particular application of the general theory. This suppression was approved by the Executive government of Malta and para : 4 was omitted in the draft of 1848.

6. Appendix to Jameson’s Report, entitled “Amendments and additional Articles in the order of the Draft”; Title IX, Ch.V, page
Para: 3 and the last paragraph of art: 233 are of special interest and importance. There is no trace of such provisions in the draft of 1835, just as there is no trace in the French and Neapolitan Codes of the time. It was in 1842 that the two Maltese Commissioners inserted a provision as para: 3 of art: 211 which ran thus:

"3. se fossero commessi da persona che avesse agito sotto l'immediata influenza di una instantanea passione ossia agitazione di mente, per cui nell'atto del delitto fosse incapace di riflettere.

Per dichiararsi essere stato l'accusato incapace di riflessione, è necessario che la causa fosse tale che in uomini di ordinario temperamento produrrebbe comunemente l'effetto di renderli incapaci di calcolare le conseguenze del delitto."

Jameson says that "this provision seems to have been derived from the Bavarian and other German codes". This may or may not be so. However, it is significant that this article reproduces faithfully in its context Dr. Bonavita's views when in 1823 he wrote a Memorandum on the Criminal Legislation of Malta which he later submitted to Sir John Richardson, a distinguished English Judge, one of the twelve Justices of the High court of England, who, being in Malta for reasons of ill-health, was in 1824 appointed Commissioner for the purpose of making a Report on the Laws and Practice in force in these Islands and of suggesting the necessary reforms. In this Memorandum Bonavita stated with regard to this subject that the legislator was to keep in mind two guiding principles. On the one hand, considering the temperamental character of the Maltese people there was an absolute necessity (arising from a principle of particular justice towards the offender) of showing towards the individual becoming guilty of an offence because of the heat of anger or passion, a portion of that indulgence shared by a mad-man, an infant, and all those who have not the right use of reason. On the other hand, the legislator was to do his utmost to avoid that a man should arrive at the stage of giving free rein to his passions and of allowing his emotion to overpower his reason thus guiding him to unpremeditated excesses.

This is exactly what Bonavita sought to do when as one of the two surviving Maltese Commissioners he was drawing up the draft of 1842; whilst admitting the excuse of instantaneous passion or mental agitation, he required that the offender be still under its immediate influence when committing the act, and that he be incapable of reflection, that is, that the cause be such as would in men of ordinary temperament commonly produce the effect of rendering them incapable of calculating the consequences of the crime. This latter limitation may have been taken from the Ionian, Bavarian or other German Codes which have a similar provision. Richardson, in his Report of 1826, acting most probably on Bonavita’s observations had inserted a paragraph providing for an excuse for homicide: "If any person willfully but without premeditation, shall by any means cause the death of another in the heat of passion occasioned by any affray, quarrel or other recent provocation not otherwise provided for law, every person so offending shall be adjudged to suffer imprisonment...." However, in four specified cases, notwithstanding that the homicide be committed upon or in consequence of any affray, quarrel or recent provocation, the homicide was to be deemed to have been committed with "pre-inedition, one of the cases being, for instance, "if the person

killed shall have been father, mother, or other lineal ancestor of the offender" (10). Considering that Bonavita had mentioned this excuse in the memorandum sent to Richardson and had commented at length upon it and that Richardson had suggested provisions dealing with this excuse it is rather strange that nothing in this regard is to be found in the draft of 1835.

Jameson severely criticised the provision of the draft of 1842 and he would not recommend the retention of this article unless considerably modified, the excuse of instantaneous passion being, according to him, very dangerous among a southern race and contrary to the sound principles of criminal responsibility. However, he admitted that "there is a great difficulty in coming to a satisfactory conclusion upon this matter, so as to reconcile due regard to human infirmity with the protection of life and the due administration of justice". Yet he considered that, notwithstanding the great difficulty of laying down satisfactory positive rules upon this subject there were some obvious qualifications of the plea of excuse which might and ought to be defined. The mere existence of uncontrollable passion as an extenuation of homicide, apart from the justness of the cause of provocation, would introduce dangerous latitude into the law on the subject (11). These and other considerations led Jameson to recommend certain modifications namely: “art : 211 no. 3. 1st clause after the word “reflection” insert the words “and provided that in fact the homicide be attributable to heat of blood and not to a deliberate intention to kill or do great bodily harm”. He also added an article when the excuse should not apply, as for instance, in the case of slight provocation or when the passion was provoked by mere words or gestures of reproach, contempt or derision (12).

Jameson considered the matter of such vital importance that he treated it more fully in the Notes appended to the Report. He passed under review the most important Codes and Laws of foreign countries. The Ionian, Bavarian and other German Codes were based upon erroneous theories of criminal responsibility and very mistaken views of humanity. The French escapes the difficulties of the subject by means of their theory of attenuating circumstances which was an evasion not a solution of the difficulty. The Law of Scotland demanded more self-command in cases of inconsiderable wrong than the Law of England, the latter admitting dangerous latitude for any interference, however inconsiderable, with the person. He finally concluded that “it humbly appears to me that the provision of the Project, would lead to very dangerous consequences in any country or climate and that these would be probably aggravated among such people as the Maltese” and he then went on to illustrate this statement (13).

The Crown Advocate, Dr. A. Micallef, had this to say on Jameson’s proposed amendments and additions: “la correzione suggerita dal sig Jameson sull’art : 211 e fondata sulle ragioni mi sembrano molto legali e convincentissimo e quindi non credo che la riforma proposta dal sig. Jameson possa essere disapprovata” (14). On the strength of this recommendation Jameson’s suggestions were accepted by the Government and inserted as art : 227 in the revised Draft published in 1848. Mr. Jameson in his Report on this Draft

10. Ibid. para. 1, no. iii
11. Jameson’s Report; (1843); page
12. Appendix to Jameson’s Report—Amendments etc—Title IX, ChV, ps c&ci
13. Appendix to Jameson’s Report :”Notes of observations on particular articles”—Note D; p.cxxxiv
14. Osservazioni dell’Avvocato della Corona (Dott. A. Micallef) sul rapporto del Sig. Jameson intorno al progetto si Leggi Criminali”. Osservazione CXX sull’art :211.
acknowledged the fact that "the excuse of instantaneous passion in homicide so dangerous among a southern race is retained but the limitations suggested by me with the view of restraining its dangerous latitude have been adopted".

When in 1850 this Draft came before the Council of Government, the Crown Advocate, at the sitting of the 7th of May, moved an amendment to art: 227 no. 3 where the article referred to the state of mind of the accused when he was incapable of reflection. He moved that after the words "e necessario" in the 2nd clause of para: 3, the words "nei casi di provocazione" be inserted, in order to show that the first clause contemplated the state of mind of the accused in general without taking into consideration any provocation. This amendment was adopted nem. con.

Dr. Adriano Dingli (at the time an elected member of the Council, afterwards Sir Adrian, President of the Court of Appeal), then proposed an amendment to the last part of art: 227 which included the five cases suggested by Jameson where the excuse should not apply. Dr. Dingli moved that the excuse was to apply in the first two cases, that is, in case of slight provocation, or when the passion was provoked by mere words or gestures, but the punishment was to be heavier than the ordinary punishment for excuses of instantaneous passion. The Chief Secretary (Mr. Lushington), on behalf of the Government, opposed the amendment and supported Mr Jameson's suggestion that the excuse should not apply in these two cases. Eventually, on a division the council adopted Dingli's amendment by seven votes against six. These two cases formed a separate article (art: 219) on the promulgation of the Code in 1854. Sir Ignatius Bonavita (then retired President of the Court of Appeal) in his unpublished Notes on the Criminal Code of 1854 expressed himself against the introduction of this article, which was later repealed by Ord. V of 1868 (when Sir Adrian Dingli was Crown Advocate) — experience having probably shown the ill consequences of such a provision. The other three cases were inserted in the Code of 1854 as Nos. 1, 2 and 3 of art: 229 and this article has since become art: 235.

Since 1854, the two clauses of para: no. 3 of art: 218 of the Code of 1854 have been separated by the insertion, in 1909, of para: no. 4, and the second clause of para: no. 3 has been removed to the end of the article which, as already stated, became are: 233 in 1901. Para: 4 was introduced by a Bill entitled “Criminal Laws Amendment Ordinance” which was read for the first time at the sitting of the Council of Government of the 23rd December, 1908. The amendment introduced by the Crown Advocate as Art. 13 of the Bill ran as follows: “il seguente inciso e aggiunto dopo il terzo inciso del primo paragrafo dell’art: 233 delle dette leggi: 4. Se fossero commessi da persona, la quale, agendo nelle circostanza prevedute nell’art: 229, avesse ecceduto I limiti imposti dalla legge, dall’autorità o dalla necessità”. This clause was taken from the Italian code. Explaining this amendment the Crown Advocate (Dr. V. Frendo Azzopardi, afterwards Sir Vincent, Chief Justice and President of the Court of Appeal) at the above mentioned sitting pointed out that this paragraph contemplated “what is styled in the Italian law ‘un eccesso di difesa’ or ‘un’eccesso nell’esercizio dei propri doveri’”. Since at the time there were no provisions for similar offences under our law, the Jury, if only

17. Proclamation: 21 Dicembre, 1868.
18. V. Italian “Codice Penale”; arts: 50 and 376
practical considerations were kept in sight, was faced with this alternative: either to excuse the accused on the ground of the heat of passion (when such passion had actually nothing to do with the offence), or discharge him because of lawful defence (while in reality it was not a case of pure lawful defence). And, under these circumstances, jurors of ten arrived at undesirable conclusions, the offenders being acquitted because there was no special provision in the law on the subject (19).

Dr. A. Mercieca (afterwards Sir Arturo, Chief Justice and President of the Court of Appeal) moved an amendment to that of the Crown Advocate by proposing the addition of the clause "Ma un tale eccesso non sara punibile se l’autore vi e incorso nella sorpresa, nel timore o nello spavento". When at the sitting of the 5th May, 1909 the art 23 was discussed in committee, the Crown Advocate stated that he was not disposed to accept the amendment of Dr. Mercieca which neutralized his own amendment of Dr. Mercieca which neutralized his own amendment. Dr. Mercieca rose to explain the purport of his proposed amendment and he was supported by Mr. F. Azzopardi, a learned legal procurator and leader of the elected bench from 1906 to 1911. the Crown Advocate then stated that he concurred perfectly in what the Honourable members had said and the only point on which he might be at variance referred to the question as to whether such a disposition as that proposed by Dr. Mercieca was to be inserted in the Code or whether the matter should be left to the discretion of the Judge, as was the case of the Italian law. Seeing that he was entirely of the same opinion as that of the hon. Members in regard to theoretical considerations, he would find no difficulty in having the disposition inserted in the law. Thus he declared he would not oppose the amendment (20). Consequently, art. 13 as amended was passed nem. con. and it finally figured as art: 21 of the Bill as promulgated by Ord. VIII of 1909 on the 24th September of that year.

The interpretations of para 3 of art: 233 claims our particular attention having recently given rise to much discussions in the Press, among University Law Students and among members of the legal procession. The point at issue was whether, according to the law as it now stands, the excuse of instantaneous passion or mental agitation would apply or not to a case of infanticide.

The best interpretation available of any law is that given by the legislator himself: Eius est interpretare leges, cuius est condere. In fact, as Prof. V. Caruana says in his notes on Prolegomena and Roman Law, "Legislative interpretation is universally obligatory because it is one with the law which interprets and it can only be made by the legislative power". Now, in the case, we have already seen that the Crown Advocate, when moving an amendment to the second clause of art: 227 no. 3, at the sitting of the 7th May, 1850, expressly stated that he was proposing the amendment to show that the first clause contemplated the state of mind of the accused in general without taking in consideration any provocation.

Moreover, Sir Ignatius Bonavita who was the retired President of the Court of Appeal when the Code of 1854 was promulgated, expressed himself as follows in his unpublished noted written after his first reading of the Code: "... in tale seguente paragrafo si speiga cio che si richiede per importate secondo la legge la capacita di riflettere — nei casi di provocazione — cioe quando questa incapacita succede solamente in seguito di una dat

20. Ibid., ps. 1132-1137
provocazione ed a questo caso e ristretta la spiegazione qui contenuta. Non potrebbe estendersi all’altro caso quando la incapicità avvenisse senza conseguita la provocazione caso benissimo inclus nei termini del numero tre che sono generici e compresi indistintamente d’ogni caso di incapacità si riflessione qualunque sia stata la causa senza punto far dipendere questo stato di incapacità da alcuna provocazione (21). And in his additional Notes written later, bby which he revise and enlarged his former Notes, he stated: “il nro. 3 di quest’articolo col paragrafo che ne continua la disposizione, nel progetto conteneva una sanzione sull’altro caso, in termini generali espresso nel nro. 3 e per la debita intelligenza ulteriormente e con dettagli spiegata nel paragrafo susseguinte. I riformatori del progetto nella loro mania di fare cambiamenti allo stesso vo’ introdussero in quel paragrafo le parole ‘nei casi di provocazione’ e con ciò, facendo che il numero tre contemplasse un caso ed il paragrafo un’altro del tutto distinto dal primo, snaturarono il fine cui le due parti dell’articolo, o per meglio dire il nro. 2 dello stesso, miravano, rendendole entrambi imperfetti (22).

This interpretation has recently been followed by local jurisprudence. The case “Rex vs. Sant” when the accused was charged with attempted murder may here be mentioned. In his summing-up, Judge Giovanni Pullicino, then A/President of the Court of Appeal, directed the Jury to accept the interpretation given by the defence that art : 233 no 3 contemplated the excuse of instantaneous passion or mental agitation, independently of any provocation.

It is thus manifestly clear that Art. 233 in para: 3 and in the last para: considers two distinct cases; one of the state of mind of the accused in general and the other of mental agitation in cases of provocation. A contrary opinion can hardly be logically entertained in the face of such authoritative and irrebuttable evidence and of such a consensus of opinion. However, whether art : 233 no. 3 provides sufficiently for infanticide is another matter. Once the interpretation of art. 233 as given above is accepted, it is undoubted that an infanticide committed under the influence of instantaneous passion or mental agitation would fall under para: 3; in support of this contention we have the application of that paragraph to cases of Infanticide by our Law Courts and the opinion of leading barristers, such as Sir Philip Pullicino and Professor G. E. DeGiorgio.

The excuse of instantaneous passion or mental agitation was adopted in a case of infanticide in re “Regina vs. Giuseppa Sultana” in 1861; the Court composed of three Judges (Sir Antonio Micallef, presiding) directed the Jury to accept the excuse, the existence of mental agitation having been actually proved. In another case, “Regina vs. Maddalena Camilleri e Marianna Bartolo” in 1890, the Jury, (seven against two) declared “essere l’accusata Marianna Bartolo rea del delitto imputatole nell’atto di accusa, colla circostanza, pero, che la Marianna Bartolo, nei commettere il delitto imputatole nell’atto di accusa, colla circostanza, pero, che la Marianna Bartolo, agiva sotto l’immediata influenza di una instantanea agitatione di mente per cui era incapace di riflettere”. Marianna Bartolo was subsequently condemned to 20 years imprisonment. Maddalena Camilleri was declared “not guilty”. Again, a few years ago, the Attorney-General (Sir Philip Pullicino) filed a Bill of Indictment admitting that the killing of the child was excusable influence of mental agitation.

Moreover, as Sir Philip Pullicino, later acknowledged in a letter to the “Times of Malta”:

His Majesty’s Judges have invariably satisfied public opinion in Malta. And, as Professor G.E. DeGiorgio pointed out in an article published in “Lehen is-Sewwa”: “Hadd minn dawk il-luminarji (referring to Sir Antonio Micallef, Mr. Andrew Jameson and Sir Adrian Dingli), la l-kompilaturi u lanqas ir-revizuri tal-Progett, ma hassew il-bzonn illi jitrattaw f’artikolu specjali, il-figura gjuridikata l-infanticidju, ghaliex dehrilhom illi l-artikolu 233 kien bizzejjed anke ghal dak id-delitt”. One may here add that the omission cannot have been due to an oversight, the more so when one considers that infanticide was dealt with separately in the Neapolitan Code of the time which formed the main basis for the drawing up of our Criminal Code.

Thus it is firmly established that the law, as it now stands, provides for certain cases of Infanticide. However, the question still remains: but does the law provide sufficiently for every case of Infanticide which deserves the excuse of mental agitation? The law requires that the offender be acting under the immediate influence of an instantaneous passion or mental agitation, and that he be incapable of reflection, and it is this limitation of the excuse, if interpreted rigorously and restrictively, that gives rise to the difficulty, as another contributor to “Lehen is-Sewwa” signing under the name of “Gregarius” has very appropriately pointed out. If any change is considered necessary, in order to remove any possible doubts on the matter, the best solution would be the insertion of a proviso laying down clearly that Infanticide shall be excusable when committed by the mother of the child under the influence of mental agitation (due to the effects pf childbirth owing to which she was in the act of committing the crime incapable of reflection. If such mental agitation does not result from the evidence before the Court the accused should, in my humble opinion, be held fully responsible for the commission of the crimes and, therefore, liable to be convicted for willful homicide.

23. “Times of Malta”— 6 December, 1944 p
24. “Lehen is-Sewwa”— 3 February, 1945, p
25. “Lehen is-Sewwa”— 6 January, 1945