

## 124. Circumstances of Aggravation (Robbery, Assault, Burglary)

---

### 124.1 Legislation

[Last reviewed: September 2024]

*Criminal Code*

[Section 411](#) – Punishment of robbery

[Section 340](#) – Serious assaults

[Section 339](#) – Assaults occasioning bodily harm

[Section 419](#) - Burglary

### 124.2 Commentary

[Last reviewed: September 2024]

This Chapter concerns several circumstances of aggravation to offences addressed in the following Chapters of the Benchbook:

- (1) **Chapter 174 – Robbery**
- (2) **Chapter 108 – Assault on Police Officer in Execution of the Officer’s Duty (Serious Assault): s 340(1)(b)**
- (3) **Chapter 107 – Assault Occasioning Bodily Harm**
- (4) **Chapter 112 – Burglary**

The purpose of this Chapter is to bring together the sample directions for these aggravations in isolation from the other elements of those offences. Regard should be had to the Chapters dealing with the particular offence provision under consideration.

*Offensive weapon*

In many cases, whether the implement is an ‘offensive weapon’ will not be an issue. If the implement is capable of being used for normal purposes (e.g. a knife), the prosecution must prove that the defendant was armed with it with the intention of using it for an aggressive or offensive purpose: *Miller v Hrvojevic* [\[1972\] VR 305](#).

To be ‘armed’ with a weapon means that the defendant must be in possession of it and it must be available for immediate use as a weapon: *Miller v Hrvojevic* [1972] VR 305.

### *In company*

It is sufficient that the defendant and one or more other person or persons be physically present for the common purpose of assaulting or robbing the complainant (or carrying out a burglary) and of physically participating as required: *R v Brougham* [\(1986\) 43 SASR 187](#),191 (King CJ); *R v Leoni* [\[1999\] NSWCCA 14](#). For offences including assault as an element:

- (a) It is necessary that the complainant be confronted by the combined force or strength of two or more people; but
- (b) It is unnecessary that two or more people actually strike the complainant.

### *Wounding or using actual or personal violence*

The offence of robbery is aggravated if 'personal violence' is used. The offence of burglary is aggravated if 'actual violence' is used. In *R v De Simoni* [\(1981\) 147 CLR 383](#) at 394, Gibbs CJ stated:

[i]n my opinion there is no difference between using actual violence to any person, and using personal violence to any person. Actual violence means no more than physical force which is real and not merely threatened or contemplated. Personal violence means violence to the person — bodily violence.

Note that the same incident of actual violence which constitutes an element of the offence may also constitute the circumstance of aggravation of personal violence for the offence of robbery. See also **Chapter 174 – Robbery**.

For the direction on wounding see **Chapter 193 – Unlawful Wounding**.

## **124.3 Suggested Direction**

[Last reviewed: September 2024]

### *Armed:*

**The weapon must be in the possession of the defendant and available for immediate use as a weapon.**

### *Offensive weapon:*

**An offensive weapon means:**

**Anything that is not commonly used except as a weapon; or**

**Anything capable of being used and intended by the defendant to be used for offensive purposes [even though it is also capable of being used for innocent purposes].**

*In company:*

**Being “in company” requires proof that [the complainant] was confronted by the combined force or strength of two or more persons including the defendant or the force of two or more persons including the defendant must be deployed against [the complainant].**

**It is not necessary that more than one participant actually strike [the complainant]. It is sufficient that the defendant and one or more other person or persons be physically present for the common purpose of [assaulting, robbing] [the complainant] and of physically participating as required.**

*Wounding or using person violence to any other person:*

**Personal violence means bodily violence.**