

## Self-defence against unprovoked assault: section 271(1)

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### Legislation

#### 271 Self-defence against unprovoked assault

- (1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.

### Commentary

In preparing a summing up on section 271(1), the following cases may be of assistance: *R v Bojovic* [2000] 2 Qd R 183; *R v Gray* (1998) 98 A Crim R 589; *R v Prow* [1990] 1 Qd R 64; *R v Muratovic* [1967] Qd R 15; *Marwey v The Queen* (1977) 138 CLR 630; *Zecevic v DPP (Vic)* (1987) 162 CLR 645 (re requirements in a common law summing-up).

The suggested direction below divides the defence into four matters for the jury's consideration, namely:

1. whether there has been an unlawful assault on the defendant;
2. whether the defendant has provoked that assault;
3. whether the force used by the defendant upon the complainant was reasonably necessary to make effectual defence against the assault; and
4. whether the force used was intended, or such as was likely, to cause death or grievous bodily harm.

As to issue 2, the suggested direction is consistent with the statement of the Court of Appeal in *R v Dean* [2009] QCA 309 that the trial judge should have directed the jury as to the meaning of provoked as outlined in *R v Prow* [1990] 1 Qd R 64.

If a jury finds that the assault was provoked by the defendant, then a defence under section 271(1) has been excluded. On this basis, section 271(2) is not available either. However, in an appropriate case, it might be necessary to direct under section 272 (Self-defence against a provoked assault).

As to issue 4, the expanded definition of grievous bodily harm under the Code means that the defendant may be disqualified from the protection of section 271(1) because he or she intended to cause "the loss of a distinct part or an organ of the body; or serious disfigurement": section 1. Whether disfigurement is serious is a matter for the jury: *R v Collins* [2001] QCA 547.

As to whether the force was likely to cause death of grievous bodily harm: "Likely" is a word in common use, and it should not ordinarily be necessary to elaborate on its meaning. If any explanation is needed, it is sufficient to say that what is required is a

'real or substantial' likelihood, without adding glosses such as 'more likely than not', 'more than a 50% chance' or 'odds on chance': *Bouhey v The Queen* (1986) 161 CLR 10. The standard is a higher one than that for the 'possible consequence' relevant to accident: *R v Hung* [2013] 2 Qd R 64.

As to whether the defendant intended to cause death or grievous bodily harm, see *R v Gray* (1998) 98 A Crim R 589; *R v Greenwood* [2002] QCA 360 at [20]. This does not often arise as a separate issue under section 271(1), because in cases where this is likely counsel usually opt for a direction under section 271(2).

### **Suggested Direction for section 271(1) – Self-defence against unprovoked assault**

**I must now give you instructions on the law about self-defence. The criminal law does not only punish; it protects as well. It does not expect citizens to be unnaturally passive, especially when their safety is threatened by someone else. Sometimes an attacker may come off second best but it does not follow that the one who wins the struggle has committed a crime. The law does not punish someone for reasonably defending himself or herself.**

**You will appreciate from what I have said earlier about the prosecution bearing the onus of proof that the defendant does not have to satisfy you that this defence applies. The prosecution must exclude or negate it, beyond reasonable doubt, to satisfy you that the defendant acted unlawfully.**

**And if the prosecution cannot exclude, beyond reasonable doubt, the possibility that [e.g. the wounding or injury] occurred in self-defence, as the law defines it, then that is the end of the case. The defendant's use of force would be lawful and you must find him not guilty.**

**You should appreciate that the law of self-defence is drawn in fairly general terms to cover any situation that may arise. Each jury has to apply it to a particular situation according to the facts of the particular case. No two cases are exactly alike, so the results depend heavily on the common sense and community perceptions that juries bring into court.**

[Read the sub-section and consider providing a copy of it to the jury:

271(1): **When** a person has been **unlawfully assaulted**

and has **not provoked** the assault,

it is lawful for the person to use such force to the assailant as is **reasonably necessary** to make effectual defence against the assault,

if the force used is **not intended, and is not such as is likely**, to cause death or grievous bodily harm.].

**You will see from the section that there are four matters you must consider in respect of this defence.**

**They are –**

1. **whether there has been an unlawful assault on the defendant;**
2. **whether the defendant has provoked that assault;**
3. **whether the force used by the defendant upon the complainant was reasonably necessary to make effectual defence against the assault; and**
4. **whether the force used was intended, or such as was likely, to cause death or grievous bodily harm.**

The burden remains on the prosecution at all times to prove that the defendant was *not* acting in self-defence (that is, that the defendant was acting unlawfully), and the prosecution must do so beyond reasonable doubt before you could find the defendant guilty.

**Taking those matters one by one:**

### **An unlawful assault?**

**The first matter is whether the defendant was unlawfully assaulted by [the complainant/deceased]. If you conclude that [the complainant/deceased] did not first unlawfully assault the defendant, this defence is not open.**

[If necessary, define assault: see section 245. Note that the definition of assault includes a situation in which violence is *threatened* so long as the assailant has an actual or apparent present ability to implement the threat.]

[If appropriate, direct the jury]: **It is common ground [or the evidence suggests] that the [complainant/deceased] unlawfully assaulted the defendant, and that on that basis the first part of the section is satisfied in the defendant's favour.**

### **A provoked assault?**

**The second matter that arises is, if there was such an assault, whether the defendant provoked it.**

**“Provocation” means any wrongful act or insult, of such a nature as to be likely, when done to an ordinary person, 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.**

[It has been suggested<sup>1</sup> that a jury should treat an assault as *unprovoked* unless they decide beyond reasonable doubt that the assault was provoked by the defendant. If there is an issue on this first point, deal with the competing contentions and then proceed.]

**If you conclude that the defendant provoked the assault, then this particular defence is not open to him/her. On this basis the prosecution has properly excluded the defence and you need not consider it further.**

**If you do not conclude that the defendant provoked the assault – that is, you are satisfied that the assault upon the defendant was unprovoked, then you will go on to consider these further matters.**

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<sup>1</sup> *R v Kerr* [1976] 1 NZLR 335 at 342 citing the unreported case of *R v Sampson* (Wellington, 25 July 1972, 61/72).

### **Reasonably necessary force?**

The third matter is whether the force used by the defendant was reasonably necessary to make effectual defence against that assault.

Whether the degree of force used was reasonably necessary to make effectual defence against an assault is a matter for your objective consideration and does not depend on the defendant's state of mind about what he/she thought was reasonably necessary.

In considering whether the force used by the defendant was reasonably necessary to make effectual defence, bear in mind that a person defending himself/herself cannot be expected to weigh precisely the exact amount of defensive action that may be necessary. Instinctive reactions and quick judgments may be essential. You should not judge the actions of the defendant as if he/she had the benefit of safety and leisurely consideration.

[Here an example might help e.g. if the assault is a push or a punch, a person may not be justified in shooting the other person who pushed or punched him.]

### **Whether the force used was intended to, or was such as was likely to, caused death or grievous bodily harm?**

The fourth matter to consider is whether the force the defendant used was not intended and was not such as was likely to cause death or grievous bodily harm.

“Grievous bodily harm” means any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life or cause or be likely to cause permanent injury to health.

The fact that the force used did cause death or grievous bodily harm is not the point. The question is whether it was likely to happen in all the circumstances.

**[In appropriate cases]: And there remains the question whether the prosecution has satisfied you that the defendant intended to kill the complainant or to do him grievous bodily harm?**

**To re-state all of that briefly, you will appreciate that, to prove the [first] element of the offence charged – that the defendant acted unlawfully – the prosecution must negate or overcome this defence, beyond a reasonable doubt,.**

**The prosecution will negate this defence (or satisfy you that it does not apply) if it is able to satisfy you, beyond reasonable doubt, of any one of the following:**

- 1. That the defendant was not unlawfully assaulted by the [complainant/deceased]; or**
- 2. That the defendant gave provocation to the [complainant/deceased] for the assault; or**
- 3. That the force used was more than was reasonably necessary to make effectual defence; or**
- 4. That the force used was either intended or was likely to cause death or grievous bodily harm.**

**It is critical that you appreciate that there is no burden on the defendant to satisfy you that [he/she] was acting in self-defence. The prosecution must satisfy you beyond reasonable doubt that [he/she] was not.**