Section 271(2) – Self-Defence against unprovoked assault when there is death or GBH

Further commentary on section 271(2)

In *R v Wilmot* [2006] QCA 91, McMurdo P explained (footnotes omitted) –

> [4] In *Gray*, McPherson JA agreed with the approach of Gibbs J in *Reg v Muratovic* (approved in *Marwey v The Queen*): s 271(2) requires that if the jury consider the nature of the assault on the defendant was such as to cause reasonable apprehension of death or grievous bodily harm and the defendant believed, on reasonable grounds, that they could not otherwise defend themselves from death or grievous bodily harm, or if the jury are left in doubt on those matters, the defendant must be acquitted; s 271(2) does not require the defendant's act causing death or grievous bodily harm to be objectively necessary.
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> [5] In *Vidler*, this Court considered [that]:
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> > "The effect of *Gray* is that the critical point for the jury to consider is whether the defendant's actual state of belief, based on reasonable grounds, was that the defender could not preserve himself otherwise than by doing what he did. If that is made clear to the jury, *Gray* considers that further directions on the question whether the force was necessary for defence are otiose, and worse still, positively erroneous if they are seen as creating a further requirement of objective necessity."
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> Whilst recognising that *Allwood* and *Julian* demonstrate that other views may be reasonably open, until the matter is reconsidered the ratio in *Gray* is binding on this Court so that s 271(2) requires that the defendant's belief set out above be on reasonable grounds but does not require that force used by the defender be reasonably necessary.

In *R v Saxon* [2020] QCA 85, Davis J (with whom Sofronoff P and Boddice J agreed) said at [17] – [20]-–

> It has been clear since *R v Muratovic* [1967] Qd R 15 at 19 and *Marwey v The Queen* (1977) 138 CLR 630 at 637 that there are four, not five, elements to the defence [created by s 271(2)].
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> Assuming an unlawful assault upon the person who made defence, and that is element 1, and assuming a lack of provocation by the person who made defence, and that is element 2, the two remaining elements are:
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> 1. the nature of the assault must have been such as to cause reasonable apprehension of death or grievous bodily harm to the person who made defence; and
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> 2. the person who made defence must have believed on reasonable grounds that he could not otherwise preserve himself or another person defended from death or grievous bodily harm.
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> Because the onus of proof of unlawfulness of the killing is on the Crown, the Crown must disprove beyond reasonable doubt one of the four elements.

It is not an element of the defence of self-defence created by s 271(2) that the force used was objectively necessary to make defence. See *R v Muratovic* [1967] Qd R 15 at 19 and *Marwey v The Queen* [1977] 138 CLR 630 at 637. Therefore, a direction to the effect that the Crown will disprove self-defence by proving that the force was objectively unnecessary is a misdirection. See *R v Gray* (1998) 1 Crim R 589, *R v Vidler* (2000) 110 A Crim R 77, and *R v Wilmot* (2006) 165 A Crim R 14).

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Sample Directions:

A defendant who has been the victim of an unprovoked assault may lawfully respond in self-defence with lethal force (that is, force which may kill or do grievous bodily harm) when the assault upon him/her was of such a nature as to cause reasonable apprehension of death or grievous bodily harm.

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 [the killing or the GBH] 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/her not guilty.[1]

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.

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[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).

Speaking generally, you will not be surprised to know that if the violence of the attacker is such that the person defending himself/herself reasonably fears for his/her life or safety, then the justifiable (or lawful) level of violence which may be used by the person attacked in self-defence will be greater also.

The level of violence in self-defence that is justifiable, or lawful, depends on the level of danger created by the attacker and the reasonableness of the defendant's reaction to it.

[Read the first part of s 271(1) (that is, finishing after "and has not provoked the assault"), and all of s 271(2) to the jury. You may wish to also provide them with a copy of those sections.]

Several matters arise for your consideration.

They are –

1. **whether there has been an unlawful assault upon the defendant;**

2. **whether the defendant has provoked that assault.**

3. **whether the nature of the assault was such as to cause reasonable apprehension of death or grievous bodily harm;**

4. **whether the defendant believed, on reasonable grounds, that he/she could not otherwise preserve themselves from death or grievous bodily harm, other than by acting as they did.**

The burden remains on the prosecution at all times to prove that the defendant was *not* acting in self-defence (that is, 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:

<u>An unlawful assault?</u>

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 theat.]

[If appropriate, direct the jury**]: It is common ground [**or the evidence suggests**] that the [complainant/deceased] unlawfully assaulted the defendant, and 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. [2]

[It has been suggested[3] that a jury should treat an assault as *unprovoked* unless satisfied 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 and you do not need to consider it further.

Assault upon the defendant such as to cause reasonable apprehension of death or grievous bodily harm.

It is for you to evaluate the nature of the assault upon the defendant and whether it was such as to cause reasonable apprehension of 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.[4]

Belief, on reasonable grounds, that he/she could not otherwise preserve himself/herself from death or grievous bodily harm

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2 In *R v Dean* [2009] QCA 309 the Court of Appeal held that a trial judge should have directed the jury as to the meaning of provoked as outlined in *R v Prow* [1990] 1 Qd R 64.

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

4 Note that the definition of grievous bodily harm under the Code also includes 'the loss of a distinct part or an organ of the body; or serious disfigurement': s 1. Whether disfigurement is serious is a matter for the jury. All of the injuries in the definition are qualified by the words 'whether or not treatment is or could have been available': *R v Lovell; Ex-parte A-G (Qld)* [2015] QCA 136.

You will see from the section that if the nature of the assault upon the defendant is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm, it is lawful for the person to use such force as is necessary for defence, even though such force may actually cause death or grievous bodily harm.[5]

Thus, the fourth matter that arises is whether the defendant believed, on reasonable grounds, that he/she could not otherwise preserve himself/herself from death or grievous bodily harm than by using the force he or she in fact used.

The critical issues are whether the defendant believed on reasonable grounds that the force used was necessary for defence.[6]

The important issue is the state of mind or belief of the defendant. Did he/she *actually believe* that it was necessary to do what he/she did to save himself/herself from death or grievous bodily harm? And was his/her belief that the force was necessary based on reasonable grounds?

You will need to assess, looking at all the circumstances of the case, the level of physical menace which you think that the deceased [or complainant] was actually presenting before the fatal [or serious] force was used by the defendant.

Remember that a person defending himself cannot be expected to weigh precisely the amount of defensive action which may be necessary.

Instinctive reaction and quick judgment may be essential and you should not judge the actions of the defendant as if he had the benefit of safety and leisurely consideration.[7] [8]

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[5] In "Battered Woman Syndrome" cases, expert evidence may be adduced as to the defendant's heightened awareness of danger, and the jury should be directed to its relevance to the defendant's belief as to the risk of grievous bodily harm or death. (General directions as to evidence of experts will be appropriate in such instances). Equally, the actual history of the relationship may require direction as going to the existence of reasonable grounds for any belief; *Osland* (1998) 197 CLR 316 at 337.

[6] *R v Wilmot* (2006) 165 A Crim R 14.

[7] *R v Gray* (1998) 98 A Crim R 589.

[8] The prosecution can no longer rely upon a submission that the force used by a defendant was not "necessary" for defence. Under section 271(2) the crucial factor is said to be the defendant's actual state of belief, and that it be based on reasonable grounds. For discussion see *Julian v The Queen* (1998) 100 A Crim R 430; *Corcoran v The Queen* (2000) 111 A Crim R 126, and *R v Wilmot* (2006) 165 A Crim R 14**.**

To re-state this, the prosecution will have negated or overcome this defence, and will have proved that the defendant acted unlawfully, if it is able to satisfy you, beyond reasonable doubt, of any one of the following:

1. **The defendant was <u>not</u> unlawfully assaulted by the [deceased/complainant]; or**
2. **The defendant <u>gave provocation</u> to the [deceased/complainant] for the assault; or**
3. **The nature of the assault was <u>not</u> such as to cause reasonable apprehension of death or grievous bodily harm; or**
4. **The defendant did <u>not</u> actually believe on reasonable grounds that he/she could not otherwise save himself from death or grievous bodily harm than by using the force which was used.**

If you are satisfied of any one of those matters, beyond reasonable doubt, then the defence has been negated or overcome by the prosecution.

Remember there is no burden on the defendant to satisfy you that he was acting in self-defence. The prosecution must satisfy you beyond reasonable doubt that he was not.

And I remind you that if the prosecution has failed to satisfy you beyond reasonable doubt that the defendant was not acting in self-defence, the defendant should be acquitted even though the force used actually caused [death or GBH].