

## Unlawful killing: Murder s 302(1)(a) (*Murder with intent*)

### Legislation

#### **302 Definition of murder**

- (1) Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say—
- (a) if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm;
- is guilty of **murder**.

### Commentary

#### *A species of unlawful killing*

Section 291 provides, “It is unlawful to kill any person unless such killing is authorised or justified or excused by law”. A charge of murder pursuant to s 302(1) requires proof of unlawful killing in any of the circumstances specified therein. The circumstance specified in s 302(1)(a) is that, at the time the defendant committed the acts or omissions which killed the deceased, the defendant intended to cause death or grievous bodily harm. An unlawful killing accompanied by that intention is the most commonly prosecuted form of the offence of murder.

#### *Elements*

Section 302(1)(a)’s four elements, set out as a potential jury handout in appendix A below, are:

- (1) the deceased is dead;
- (2) the defendant caused the deceased’s death;
- (3) the defendant did so unlawfully, ie any defences are excluded beyond a reasonable doubt;
- (4) at the time of the act(s) (or omissions) which caused death, the defendant intended to kill or do grievous bodily harm.

#### *Manslaughter an inherent alternative*

If an unlawful killing occurs where none of the circumstances listed in s 302(1) are proved the offender will be guilty of manslaughter, per s 303(1). Manslaughter (a form of “unlawful killing” per s 300) need not be alleged as a separate count from murder in the indictment because it is an available inherent alternative to a charge of murder (per s 576). Each offence shares the elements of unlawful killing, which are the first three elements listed above (the fourth element being required for murder per s 302(1)(a)). The common and safe approach to summing up a murder case is that the offence of manslaughter is explained and left to the jury as an alternative to murder. It is important to appreciate however, that the offence of manslaughter

does not arise as an inherent alternative on which a verdict can be returned unless the jury first reaches a unanimous verdict of not guilty of murder. Thus, if a jury cannot agree on its verdict in respect of murder, a verdict on the lesser alternative of manslaughter should not be taken.

Even if the elements of murder have been proved beyond reasonable doubt, s 304 “Killing on Provocation” and s 304A “Diminished Responsibility” may operate to reduce what would otherwise be murder to manslaughter. The onus of proof for those defences, contrary to the usual principle that it is for the prosecution to exclude potential defences beyond a reasonable doubt, is on the defendant to prove them on the balance of probabilities.

#### *The element of causation*

Section 293 provides “any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person”.

The allegedly causative acts or omissions need not be the sole cause of death but must be a substantial or significant cause of death or have substantially contributed to the death - per *Royall v The Queen* (1991) 172 CLR 378 at 398, 411, 423. This principle is to be understood subject to s 296 “Acceleration of death”, s 297 “When injury or death might be prevented by proper precaution” and s 298 “Injuries causing death in consequence of subsequent treatment”.

In *Royall v The Queen* (1991) 172 CLR 378, at 387, 411-412, 423, 441, the High Court endorsed the statement of Burt CJ in *Campbell v The Queen* (1980) 2 A Crim R 157 at 161 that it is enough if juries are told that the question of cause is not a philosophical or scientific question but a question to be determined by them applying their common sense to the facts as they find them, appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter.

Because the critical time to assess intention and the operation of potential defences is the time the defendant committed the act(s) resulting in death, difficulties with unanimity can arise where death has potentially been caused by a range of acts committed over some time by the accused and there is uncertainty as to which of those acts had a fatal contribution. In *Lane v The Queen* [2018] 265 CLR 196 the High Court allowed an appeal where the case had been left to the jury on the basis the fatal injury may have been inflicted in one of two separate physical events involving the appellant. It transpired on appeal that the earlier event was not sufficient to sustain a conviction whereas the latter was. The conviction could not be salvaged

via the proviso by reason of the strength of the evidence re the second event because, in the absence of a direction as to the need to be unanimous about what the fatal acts were, it remained a possibility some jurors convicted solely on the basis of the first event. Where it is open to the jury to be satisfied one or more of a range of potentially fatal acts of the defendant caused death but the jury may be uncertain which one or more of those acts caused death, the jury should be instructed of the need to be unanimous:

- (a) as to the acts included within that range of potentially fatal acts,
- (b) that potential defences have been excluded in respect of all of that range of acts,
- (c) that the requisite intent was held at the time of commission of each of that range of acts.

#### *The element of unlawfulness*

Section 291 provides, “It is unlawful to kill any person unless such killing is authorised or justified or excused by law”.

Defences providing such authorisation, justification or excuse include s 23 “Intention – motive” (accident), s 27 “Insanity”, s 266 “Prevention of crimes”, s 267 “Defence of dwelling”, s 271 “Self-defence against unprovoked assault”, s 272 “Self-defence against provoked assault” and s 273 “Aiding in self-defence”.

The operation of s 23 is, per s 23(1), “Subject to the express provisions of this Code relating to negligent acts and omissions”. This sometimes has the consequence in murder cases involving the use of weapons such as guns and knives, that s 289 “Duty of persons in charge of dangerous things” is left to the jury as an alternate potential pathway to conviction for manslaughter, in the event the prosecution fail to prove the element of intent beyond reasonable doubt.

While a defence under s 31 “Justification and excuse – compulsion” is not available for murder it is available for manslaughter – per *Pickering v The Queen* (2017) 260 CLR 151.

The trial judge is obliged to leave a defence to the jury, even if not sought by defence counsel, if, on the version of events most favourable to the accused which is suggested by material in the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the defence has been excluded - per *Masciato v The Queen* (1995) 183 CLR 67-68.

### *The element of intention*

Where, as here, proof of intention to produce a result is an element of the offence, the prosecution must prove the accused meant to produce that result by his or her conduct – per *Zaburoni v The Queen* (2016) 256 CLR 482, 490. Elaboration on the meaning of intent should be avoided, lest concepts applicable at common law, such as foreseeability and probability, are wrongly blurred with the meaning of intent - per *R v Willmot (No 2)* [1985] 2 Qd R 413, 418.

In *R v Glebow* [2002] QCA 442 at [3],[4], Davies JA observed it will sometimes be desirable, and will not encroach upon the above principle, if the jury are told:

- “1. that in ascertaining the defendant’s intent they are drawing an inference from facts which they find established by the evidence concerning his or her state of mind;
2. that those facts may include the circumstances in which a relevant event occurred, the conduct of the defendant before, at the time of or even after that event and what the defendant has said at any of those times;
3. and that intent need not necessarily be long standing; it may be a momentary intent formed immediately before the occurrence of a relevant event.”

The trial judge’s explanation of the element of intention should usually include a circumstantial evidence direction, it being common that the prosecution will seek to prove this element wholly or substantially by circumstantial evidence.

It is intention, not motive, which must be proved beyond a reasonable doubt as a constituent element of the offence. Depending upon the circumstances of the case, motive or lack of it may be taken into account as a circumstantial fact in the jury’s consideration of whether the defendant committed the offence charged – see *Plomp v The Queen* (1963) 110 CLR 234; *De Gruchy v R* (2002) 211 CLR 85 and chapter 49 of this Benchbook.

Pursuant to s 28(3), “intoxication, whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether” an intention to kill or do grievous bodily harm “in fact existed” – see chapter 84 of this Benchbook.

## **Suggested Direction**

**Our law provides that any person who unlawfully kills another is guilty of a crime which is called murder or manslaughter according to the circumstances of the case. A person who unlawfully kills another and does so in particular circumstances stipulated by law, is guilty of murder. Where a person unlawfully kills another but those stipulated circumstances are not present, that person will be guilty of manslaughter.**

**The circumstances stipulated by law which are relied upon here in support of the charge of murder are:**

- **that the accused intended to cause death or grievous bodily harm to [x].**
- [If other types of murder pursuant to s 302(1) are also to be left to the jury, list the other types relied upon in the alternative and adjust the draft direction as necessary.]

**I will for convenience refer to those particular circumstances as intent to kill or do grievous bodily harm.**

**Proof of any offence requires proof of the elements of the offence. The elements of an offence are the essential ingredients of it, all of which must be proved beyond a reasonable doubt to prove the offence.** (It will assist to accompany the direction with a jury handout listing the elements – see the example at appendix A below)

**In order for the prosecution to prove murder founded upon an intention to kill or do grievous bodily harm it must prove all of the following elements beyond a reasonable doubt:**

1. **that [X] is dead;**
2. **that the defendant caused [X]’s death;**
3. **that the defendant did so unlawfully; and**
4. **that the defendant intended to kill or do grievous bodily harm to [X].**

**I will discuss each element in more detail shortly.**

(Where multiple limbs of s 302(1) are to be put in the alternative consider expanding element 4 by listing the relevant alternative elements within it.)

The first three of those elements are the elements of an unlawful killing. Proof of them without proof of the fourth element would prove the offence of manslaughter. Manslaughter is an inherent alternative charge to murder but it only becomes available as an alternative in the event you find the defendant not guilty of murder.

So, after your deliberations have concluded, in taking your verdicts my associate will ask you, *“How do you find the defendant: guilty or not guilty of murder?”* If you find the defendant *“guilty”* of murder, that would be the end of the process (on that charge). However, if you were to say, *“not guilty”* then my associate would go on with a second question, *“How do you find the defendant: guilty or not guilty of manslaughter?”* and you would return your verdict of *“guilty”* or *“not guilty”* as the case may be in respect of manslaughter.

You will appreciate from what I have said that the first three elements are elements common to both murder and manslaughter. If any one of the first three elements have not been proved there will not have been an unlawful killing and you must find the defendant not guilty of murder and not guilty of manslaughter.

I will now discuss each element.

**Element 1** requires that [X] is dead. In this case it has been admitted [and/or you might think there is persuasive evidence] that [X] is dead. [If there is an issue as to whether X is dead, explain the relevant issue(s) of fact which the jury must determine in deciding whether X is dead].

**Element 2**, the element of causation, requires that the defendant caused [X]’s death. To decide whether the defendant caused [X]’s death you will need to decide whether [X]’s death was caused by the acts alleged against the defendant. [This direction only refers to “acts”, not “omissions” – those references will require variation to refer to omissions if omissions by the defendant are alleged to attract liability.]

Our law provides a person who causes the death of another, directly or indirectly and by any means whatever, is deemed to have killed that other person.

**[If death was delayed - It does not matter that death was not immediate. If the acts of the defendant led to the injury/condition of the deceased which in the ordinary course resulted in the death, then in law the defendant is responsible for that death however long after the defendant's acts the death occurred.]**

**The means by which a person causes the death of another may be direct or indirect, as long as those means are, or are caused by, the defendant's acts. To prove the defendant's acts caused death it is not necessary to prove they were the sole or only contributing cause of death. However, it must be proved the defendant's acts were a substantial or significant cause of death or contributed substantially to the death.**

**[Where the events causing death are uncertain or there are competing innocent causes: - Whether it has been proved that the defendant's acts were a substantial or significant cause of death or contributed substantially to the death is not a question for scientists or philosophers. It is a question for you to answer, applying your common sense to the facts as you find them, appreciating you are considering legal responsibility in a criminal matter and the high standard of satisfaction required is proof beyond a reasonable doubt.]**

**In considering whether the defendant caused [X]'s death you should take into account what (if anything) is known as to the medical cause of [X]'s death. The medical cause of death in the present case is alleged to be ... [Here identify the evidence based medical cause of death or, if it is unknown, the evidence relied upon to establish the mechanism(s) of death by inference. If the mechanism relied upon by the prosecution is in issue identify the material facts and or inferences to be determined].**

**Your consideration of the defendant's conduct as potentially causing death must be confined to such of the defendant's acts, if any, as have been proved beyond a reasonable doubt. This element of causation will only have been proved if you are satisfied beyond a reasonable doubt that acts of the defendant which you find to have been proved beyond a reasonable doubt were a substantial or significant cause of death or contributed substantially to the death.**

**The act(s) of the defendant alleged by the prosecution to have caused death is/are ... [Here list the act(s) relied upon (adjusting the direction appropriately if**

omissions are relied upon). Where the identity of the defendant as the actor or the occurrence of any acts is in dispute, identify the factual dispute(s) which the jury must resolve. This may require a direction about circumstantial evidence where an act or omission is alleged as an inference arising from proved facts.].

[Where more than one act of the defendant may have caused death and the acts range over time or circumstance to the extent it is necessary to avoid future doubt as to unanimity – **It may be that you conclude the deceased’s death was caused by one or more of a range of the defendant’s acts, but are uncertain or cannot agree as to exactly which of them, alone or in combination, was fatal.** [Identify the set of acts of the defendant which in this case the jury might think are the acts which alone or in combination must have caused death]. **Your uncertainty or lack of agreement about the exact causative contribution of the range of potentially fatal acts will not prevent the prosecution proving this element of causation, as long as you conclude it must have been one or more of the acts within that range which caused death. It is important for your further deliberations about elements 3 and 4 however that you reach unanimous agreement on which of the defendant’s acts are included within the range of potentially fatal acts. That is necessary because for a jury to reach unanimous agreement that an offence has been committed each juror must be satisfied the offence is constituted by the same acts. Thus, if you are satisfied element 2 is proved because, despite doubts about the precise cause of death, you are satisfied beyond reasonable doubt that death must have been caused by one or more of a range of potentially fatal acts of the defendant, ensure you are unanimously agreed as to the content of that range so it will be that range of acts you consider when you refer to the acts of the defendant in considering elements 3 and 4.]**

**Element 3, the element of unlawfulness, requires that in causing [X]’s death the defendant did so unlawfully. All killing is unlawful, unless authorised, justified or excused by law. Our law creates some defences which can operate to excuse a killing, making it lawful. A well known example is acting in self-defence. Where the facts raise the possibility such a defence may apply it is not for the defendant to prove it applies. Rather it is for the prosecution to exclude the application of such a defence beyond a reasonable doubt. The prosecution must do this because if there lingers a real possibility that such a defence operates to excuse the defendant then the prosecution will not have proved beyond reasonable doubt that the accused’s actions were unlawful.**

**In the present case....**[Here indicate whether any defences, such as self-defence, compulsion or accident arise for the jury's consideration and, if any do, proceed to explain the operation of the defence(s) including the prosecution's obligation to exclude them. Where the defendant's acts attracted the unanimity direction re the range of potentially fatal acts in element 2 - **You will recall I directed you in discussing element 2 that if you are satisfied beyond reasonable doubt death must have been caused by one or more of a range of potentially fatal acts of the defendant, you must unanimously agree upon the content of that range. In order for the prosecution to exclude the operation of this defence of ....., the prosecution must exclude it as operating in respect of all the acts within that range of potentially fatal acts.**]

**Before turning to element 4 I remind you that if any one of elements 1, 2 or 3 is not proved beyond a reasonable doubt then element 4 is irrelevant because the defendant could not be found guilty of unlawful killing, whether in the form of murder or manslaughter. In the event you are satisfied beyond a reasonable doubt of the first three elements the defendant would be guilty of an unlawful killing. Whether that killing constitutes murder or only manslaughter will depend upon whether or not element 4 is proved beyond a reasonable doubt [if relevant - , and if it is, whether the defence of provocation/diminished responsibility, which I will come to later, operates to reduce what would be murder to manslaughter].**

**Element 4, the mental element of intention, is the extra element required to prove an unlawful killing constitutes the offence of murder. If it is not proved beyond a reasonable doubt an unlawful killing would only be manslaughter. In the event you are satisfied the accused's actions unlawfully killed the deceased, element 4 requires you must be satisfied beyond a reasonable doubt that, in so acting, the accused intended to cause the death of the deceased or cause some grievous bodily harm to the deceased.**

**"Grievous bodily harm" (per s1) means the loss of a distinct part or an organ of the body, or serious disfigurement, or any bodily injury of such a nature that, if left untreated, would be likely to endanger life, or be likely to cause permanent injury to health, whether or not treatment is or could have been available.**

**“Intention” carries its ordinary meaning. A person intends to cause death or grievous bodily harm if that is what the person meant to do.**

**In considering whether the defendant actually held such an intention, you will be drawing an inference from facts which you find established by the evidence concerning the defendant’s state of mind. Intention may be inferred or deduced from the circumstances in which the defendant acted and from the defendant’s conduct before, at the time of and after the defendant’s actions. Of course, whatever the defendant has said about his/her intention may also be considered for the purposes of deciding whether the defendant held the requisite intention at the time he/she acted as alleged.**

**While you can have regard to earlier and later events in considering whether the requisite intention existed, you should appreciate it is not necessary for the prosecution to prove the intention was held for a long time before the defendant’s allegedly fatal actions or that the intention lingered afterwards. The time at which the defendant must be proved to have held the intention to kill or do grievous bodily harm is the time at which the defendant committed the act(s) causing death.**

[Give directions re intoxication and or motive (if relevant) and identify the main areas of evidence which may aid consideration of the defendant’s intention and issues in dispute regarding them.]

[Where the defendant’s acts attracted the unanimity direction re the range of potentially fatal acts in element 2 – **You will recall I directed you in discussing element 2 to reach unanimous agreement on the acts of the defendant you included within the range of potentially fatal acts. It is necessary in proving this element of intention that the prosecution must prove the defendant held the requisite intention at the time of all acts within that range of acts.**]

**For the element of intention to be proved you must be satisfied beyond reasonable doubt that in acting as he/she did the defendant actually held the intention to cause the deceased’s death or to cause grievous bodily harm to the deceased. Nothing less will suffice. What if you think the evidence may support more than one inference, so that there are competing potential inferences on this issue? There may be the guilty inference, that the defendant held the intention**

**to kill or do grievous bodily harm. There may also be inferences consistent with innocence, such as the defendant only holding an intention to frighten or cause pain [if other examples have been suggested in this case incorporate them here] or holding no particular intention at all about what would result from the defendant's actions. In such a situation it is essential not only that the evidence is strong enough to sustain the guilty inference but that it is the only remaining inference, that is, that all inferences consistent with innocence have been excluded beyond a reasonable doubt. This merely reflects the prosecution's obligation to prove the element of intention beyond a reasonable doubt. It will not have done that if there lingers a real possibility the defendant held no particular intention to do harm in acting as he/she did, or if he/she did, that the harm intended was something less than an intention to do grievous bodily harm.**

**If you are not satisfied beyond reasonable doubt that the defendant had the requisite intention at the time of the defendant's alleged actions, then you would acquit the defendant of murder. In that event, if you are satisfied beyond reasonable doubt of all the first three elements, you would convict the defendant of manslaughter. However, if any one of elements 1, 2 or 3 is not proved beyond a reasonable doubt, you would also acquit the defendant of manslaughter.**

**If you are satisfied beyond reasonable doubt of all four elements then you would convict the defendant of murder [if provocation/diminished responsibility arise in this case - unless you conclude the defence of provocation/diminished responsibility operates to reduce what would be murder to manslaughter. I will now turn to that defence ...here move to direct the jury re provocation/diminished responsibility.]**

**Appendix A**

**R v .....**

**Elements of Murder/Manslaughter**

	<b>Murder</b>	<b>Manslaughter</b>
	To prove murder the prosecution must prove all of these four elements beyond reasonable doubt:	To prove manslaughter the prosecution must prove all of these three elements beyond reasonable doubt:
<b>Death</b>	(1) [x] is dead; and	(1) [x] is dead; and
<b>Causation</b>	(2) the defendant caused [x]'s death; and	(2) the defendant caused [x]'s death; and
<b>Unlawfulness</b>	(3) the defendant did so unlawfully (that is, any defences are excluded beyond a reasonable doubt); and	(3) the defendant did so unlawfully (that is, any defences are excluded beyond a reasonable doubt).
<b>Intention</b>	(4) at the time of the act(s) which caused death, the defendant intended to kill or to do grievous bodily harm to [x].	