

Section 267 – Defence of a Dwelling House

The law provides certain protection for a householder where there is an intrusion onto his premises by someone he believes is intending to commit a crime. A person in peaceable possession of a dwelling may use force to prevent or repel another person from unlawfully entering or remaining in the dwelling if the person using the force believes on reasonable grounds, firstly, that the other person is attempting to enter or to remain in the dwelling with intent to commit an indictable offence in it and secondly, that it is necessary to use that force.¹ Now I will refer to this as a defence, but it is important that you understand this: it is not something that the defendant must prove, but something that the prosecution must rule out beyond reasonable doubt.

The first question that arises is whether the defendant was in peaceable possession of the dwelling.² A dwelling is a building or part of it kept by the owner or occupier for his residence and that of his family or servants.³ On the evidence the defendant was living in these premises which he rented as his place of residence, and there was no dispute about his entitlement to be there.

Was the force used for the purpose of repelling the intruder (X) from unlawfully entering [or remaining]? If the prosecution has satisfied you beyond reasonable doubt that (X) was lawfully on the premises,⁴ or that the force was used not to repel him but as a form of vengeance [as the case may be] then this particular defence is not open.

The next way the prosecution seeks to exclude the defence is this: It contends that the defendant could not have believed on reasonable grounds that (X) was attempting to enter or to remain in the dwelling with intent to commit an indictable offence in it. In other words, the question here is whether the defendant genuinely believed (X) had the intention of committing an indictable offence – that is to say

¹ See *R v Cuskelly* [2009] QCA 375 for a discussion of the defence and comparison with the requirements of self-defence in ss 271 and 272.

² For a useful examination of the authorities on “peaceable possession” see *Shaw v Garbutt* (1996) 7 BPR 97,600; [1997] NSW Conv R 55,277.

³ Refer to definition of “dwelling” in s 1 *Code* as applicable. Issues could conceivably arise, for example as to whether the part of the premises in which the offence occurred was connected to the main dwelling. Reference to a highset “dwelling”, at least as a general proposition, includes reference to the whole of the relevant structure from the top of the roof to the ground: *R v Bartram* [2013] QCA 361.

⁴ The question of mistake of fact might arise here.

one of sufficient seriousness to require it to be dealt with by a higher court – in this case it being suggested that he believed (X) meant to [steal property].

If you are satisfied beyond reasonable doubt that the defendant did not have that belief, or did not hold it on reasonable grounds, the prosecution has properly excluded the defence and you need not consider it further. Otherwise you go on to consider this further point.

The prosecution contends that the defendant did not believe on reasonable grounds that the force he used was necessary to prevent (X) from entering [or remaining].

You should remember that a person defending himself or his home cannot always weigh precisely the exact action which he should take in order to avoid the threat which he reasonably believes that he faces at the time. You should approach your considerations in a practical way. Take account of the situation in which the defendant found himself. Bear in mind that unlike those of us in this courtroom, he would appear to have had little, if any, opportunity for calm deliberation or detached reflection. It is relevant, of course, to look at the degree of force he actually used in considering whether he could have believed on reasonable grounds it was necessary, but it is only a part of the whole picture. You must consider the whole of the circumstances.

If you conclude in the end that he did not believe that the force he used was necessary, or if he did have that belief, that it was not held on reasonable grounds, that is the end of this particular question and this particular defence could not apply.

If the prosecution cannot, to your satisfaction beyond reasonable doubt, exclude the possibility that [eg. the wounding] occurred in the use of force which the defendant believed on reasonable grounds was necessary to prevent unlawful entry or remaining in the dwelling as I have outlined it to you, that is the end of the case. The defendant would not be regarded as criminally responsible for the result and you should find him not guilty.