

## 91. Provocation: ss 268, 269

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### 91.1 Legislation

[Last reviewed: December 2024]

*Criminal Code*

[Section 268](#) – Provocation

[Section 269](#) – Defence of provocation

### 91.2 Commentary

[Last reviewed: December 2024]

This direction is concerned with the ‘defence’ of provocation as it relates to the lawfulness of an alleged assault. For the partial defence of provocation concerning murder, see Bench Book **Chapter 97** and **Chapter 98**. The excuse provided for in ss 268 and 269 of the *Criminal Code* applies only to offences of which assault is an element (*Kaparonovski v The Queen* [\(1975\) 133 CLR 209](#)).

A defendant is not criminally responsible for an assault which was provoked by the person who is assaulted. Where the defence is raised, the onus is on the prosecution to prove, beyond reasonable doubt, the defendant was not provoked to assault the complainant. Whether the defence of provocation has been raised on the evidence is a question of law for the trial judge. It is to be determined on the view of the evidence most favourable to the defendant (*Stingel v The Queen* [\(1990\) 171 CLR 312](#), 318). The availability of the defence does not depend upon some statement or evidence from the evidence and may be inferred from evidence adduced in the prosecution case (*Van Den Hoek v The Queen* [\(1986\) 161 CLR 158](#), 161-162, 169).

While it is always a matter for the trial judge to determine whether the defence is properly raised on the evidence, in *R v DCE Flanagan JA* (Dalton JA and Kelly J agreeing) observed that if there ‘is the least doubt, the issue should be left to the jury’ (*R v DCE* [\[2024\] QCA 165](#), [69]).

Provocation requires there to be a ‘wrongful act or insult’. The adjective ‘wrongful’ qualifies the word ‘act’ but does not also qualify the word ‘insult’ (*R v DCE* [\[2024\] QCA 165](#), [56]). It follows that provocation may be constituted by a ‘wrongful act’ or by an ‘insult’. ‘Wrongful’ serves to distinguish an act that may be provocative from a ‘lawful’ act which could not amount to provocation (s 268(3); *R v DCE* [\[2024\] QCA 165](#), [56]).

‘Insult’ is a non-technical word with a broad meaning. Whether words, alone or in combination with gestures, constitute an insult is to be determined objectively having regard to the context and circumstances. The context and circumstances will include the characteristics of the defendant (*R v DCE* [\[2024\] QCA 165](#), [61]-[64]). Because the

word 'insult' can have a broad meaning, it would ordinarily be a question for the jury to decide whether particular words, alone or in combination with gestures, constitute an insult.

If the defence of provocation is raised, it will be negated if the prosecution proves any one of the following:

1. There was no provocation.
2. The provocation did not actually deprive the defendant of their power of self-control.
3. The defendant did not act on the sudden, before there was time for their passion to cool.
4. The force used by the defendant was out of proportion to the provocation, or was intended, or likely, to cause death or grievous bodily harm.

In most cases the focus of the prosecution in attempting to negative the defence will be on one or two of these matters. In such a case it would be appropriate to adapt the directions to the jury to focus on the real issues in the trial.

### 91.3 Suggested direction

[Last reviewed: December 2024]

**Before you could find the defendant guilty of [the allegation to which provocation relates] you must be satisfied that the assault was unlawful. An assault is not unlawful if, at the time of the assault, the defendant was acting under what our law defines as 'provocation'. We call this a defence, but as I will explain it is for the prosecution to prove the defendant was not acting under provocation.**

(Consider providing the jury with a handout extracting relevant parts of ss 268 and 269).

**Provocation is:**

**'...any wrongful act or insult of such a nature as to be likely when done to an ordinary person to deprive the person of the power of self-control, and to induce the person to assault the person by whom the act or insult is done or offered ...'**

**The defence of provocation operates in this way. A person is not criminally responsible for an assault if:**

1. **The complaint provoked the defendant; and**
2. **The defendant was deprived by the provocation of the power of self-control; and**

3. **The defendant acted on the sudden and before there was time for the defendant's passion to cool; and**
4. **The assault was not disproportionate to the provocation, and it was not intended, or likely to cause death or grievous bodily harm.**

**The defendant does not have to prove these matters. It is for the prosecution to exclude the defence by satisfying you, beyond a reasonable doubt, that it does not apply. The prosecution can do that by disproving at least one of these matters.**

**In this case the defendant contends that before the assault the complainant [identify the wrongful act or insult raising provocation]. The defendant says that the assault is excused, and is not unlawful, because the defendant was acting under this provocation.**

**The prosecution says you would be satisfied the defence of provocation has been excluded because ... [identify the basis or bases on which the prosecution seeks to exclude provocation from the following and direct accordingly. If more than one basis is relied upon it will be necessary to adjust the language of the direction].**

**(Where the issue is whether the complainant did the act/s said to amount to provocation the following direction should be given):**

**... the complainant did not [identify the act/s relied upon as provocation]. If the prosecution proves that the [act/s] did not occur, then the prosecution has proved the defence of provocation does not apply and the assault in issue is unlawful.**

**[Summarise the arguments of the prosecution and defence as appropriate.]**

**(Where the issue is whether the act/s of the complainant amount to provocation):**

**... the complainant did not offer the defendant provocation for the assault.**

**The wrongful act or insult of the complainant said by the defendant to be provocation is [identify the matters in evidence potentially constituting provocation].**

**For the wrongful act or insult to amount to provocation, it must be of such a nature as to be likely, if done to an ordinary person, to deprive the ordinary person of the power of self-control.**

**In other words, the wrongful act or insult must have been serious enough to cause an ordinary person to lose self-control.**

**An ordinary person in this context is a person with the ordinary human weaknesses and emotions common to all members of the community and**

**with the same level of self-control as an ordinary person of the defendant's age.**

**It means an ordinary person, in the position of the defendant, who has been provoked to the same degree of severity and for the same reason as the defendant.**

**The question for you is whether the [act/s] of the complainant would have deprived an ordinary person in the defendant's position of the power of self-control?**

**If the prosecution proves that the [act/s] would not deprive an ordinary person in the defendant's position of the power of self-control, then the prosecution has proved the defence of provocation does not apply and the assault in issue is unlawful.**

**[Summarise the arguments of the prosecution and defence as appropriate].**

**(Where the issue is whether the defendant was in fact provoked):**

**... the defendant was not in fact deprived of the power of self-control by the wrongful act or insult.**

**You must consider the gravity of the provocation to the defendant. The defendant's race, colour, habits and relationship to the complainant may all be part of this assessment.**

**Conduct which might not be insulting to one person may be extremely insulting to another because of that person's age, race, ethnic or cultural background, physical features, personal attributes, personal relationships or past history. [Refer to special characteristics of the defendant raised on the evidence and relevant to the assessment of the wrongful act or insult.]**

**In considering whether the defendant was in fact deprived of the power of self-control by the wrongful act or insult, you must view the conduct or the words in question as a whole in light of any history or dispute between the defendant and the complainant. Particular acts or words which, considered separately, could not amount to provocation, may, in combination or cumulatively, be enough to cause the defendant to lose self-control in fact.**

**Also, the wrongful act or insult must have in fact induced the assault. A deliberate act of vengeance, hatred or revenge may not have in fact been induced by the wrongful act or insult despite the fact that such an act or insult was offered.**

**If the prosecution proves that the defendant was not, in fact, deprived of the power of self-control and thereby induced to assault the complainant,**

**then the prosecution has proved the defence of provocation does not apply and the assault in issue is unlawful.**

[Summarise the arguments of the prosecution and defence as appropriate.]

(Where the issue is whether the defendant acted while provoked):

**... the defendant did not act in response to the provocation, and there was time for the defendant's passion to cool and to think about [his/her] response before acting.**

**If the prosecution proves that the defendant did not act on the sudden and that there was time for the defendant's passion to cool, then the prosecution has proved the defence of provocation does not apply and the assault in issue is unlawful.**

[Summarise the arguments of the prosecution and defence as appropriate.]

(Where the issue is whether the defendant used disproportionate force):

**... the force used by the defendant was disproportionate to the provocation.**

**The question of whether force was disproportionate depends on all the circumstances of the case, including the physical attributes of the person offering the provocation, the nature of the attack, whether a weapon was used, what type of weapon and whether the person was alone or in company.**

[An example may be useful to explain the concept of force being disproportionate, e.g., a push or punch as provocation where a person responds by shooting the other.]

**If the prosecution proves that the force used by the defendant was disproportionate to the [act/s] amounting to provocation, then the prosecution has proved the defence of provocation does not apply and the assault in issue is unlawful.**

[Summarise the arguments of the prosecution and defence as appropriate.]

(Where the issue is whether the force used by the defendant was intended, or likely to cause death or grievous bodily harm):

**... the force used by the defendant was intended [or likely] to cause death or grievous bodily harm.**

**It is for you to determine, considering all of the evidence, whether the force used was intended by the defendant to cause death or grievous bodily harm, or was such as was likely to cause death or grievous bodily harm.**

**Grievous bodily harm means either** [ignore any parts of the definition of grievous bodily harm that are not relevant to the issues in the case]:

- 1. the loss of a distinct part or an organ of the body; or**
- 2. serious disfigurement; or**
- 3. 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.**

**If the prosecution proves that the force used by the defendant was intended, or likely to cause death or grievous bodily harm, then the prosecution has proved the defence of provocation does not apply and the assault in issue is unlawful.**

(When directing on a question of intention it may be necessary to adopt part of the direction on intention in Bench Book **Chapter 59 – Intention**)

[Summarise the arguments of the prosecution and defence as appropriate.]

(After giving appropriate directions concerning the issue/s in dispute, the following direction may be a helpful summary):

**To recap, the defendant is not criminally responsible for the assault, and the assault would not be unlawful if it was provoked by the complainant. The focus is on serious provocation, which would cause a sudden and proportionate response to it.**

**If the prosecution has proved** [identify the issue or issues said by the prosecution to disprove provocation], **the defence has been excluded and the assault was unlawful.**