

Provocation ss 268, 269

In order to convict the defendant [of xx] you must be satisfied that the assault¹ was unlawful. An assault is unlawful if it is not authorised, justified or excused by law.

An assault is excused by law if, at the time of the assault, the defendant was acting under what our law defines as “provocation”. Provocation, as defined in our law, is a defence to an assault.

(Judges may wish to provide jurors with a copy of the relevant parts of section 268 and 269.)

Provocation is defined in our *Criminal Code* as

“...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 ...”²

Our law provides that:

“When such an act or insult is done or offered by one person to another, the former is said to give the latter provocation for an assault.”³

The defence of provocation operates in this way:

“A person is not criminally responsible for an assault committed upon a person who gives the person provocation for the assault, if –

- the person is in fact deprived by the provocation of the power of self-control; and**
- acts upon it on the sudden and before there is time for the person’s passion to cool, and**

¹ Provocation is only available in relation to “an offence of which an assault is an element” (s 268(1) *Criminal Code*). The section does not apply to a charge of unlawfully doing grievous bodily harm, *Kaporonovski v The Queen* (1975) 133 CLR 209, or an unlawful wounding.

² See s 268(1) *Criminal Code*.

³ See s 268(2) *Criminal Code*.

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

It is not for the defendant to establish the defence by proving that he or she was provoked to assault the complainant.

It is for the prosecution to exclude the defence by satisfying you, beyond a reasonable doubt, that it does not apply.

You need to consider –

- **whether the complainant has offered the defendant provocation for the assault;**
- **whether the defendant was deprived by the provocation of the power of self control;**
- **whether the defendant acted on the sudden and before there was time for their passion to cool; and**
- **whether their response to the provocation was proportionate.**

Whether the complainant has offered the defendant *provocation* for the assault

The wrongful act or insult of the complainant which the defendant wishes to rely upon as provocation is ...

[Here identify the matters in evidence potentially constituting provocation.]⁴

For the wrongful act or insult⁵ 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.⁶

⁴ Whether provocation arises for consideration is a question for the judge. The decision must be made by reference to the version of events most favourable to the defendant: *Stingel v The Queen* (1990) 171 CLR 312 (“*Stingel*”) at 318. A judge should leave the issue to the jury if in the least doubt whether the evidence is sufficient: *Stingel* at 334. It is immaterial that the defendant does not raise provocation in any statement by him in evidence, or in a record of interview or elsewhere, or that counsel may or may not raise it: *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 161-162, 169.

⁵ As to whether the word ‘wrongful’ in the phrase ‘any wrongful act or insult’ should be read as qualifying the word ‘insult’, see *Stingel* where the court ruled in relation to s 160(2) of the Tasmanian Criminal Code 1924 that word ‘wrongful’ should not be read as qualifying the word ‘insult’.

⁶ It is a two stage test for the jury to determine, firstly, if the particular act or insult was such as to deprive the ordinary person of the power of self-control, then to decide from the view point of the particular defendant if the defendant was in fact deprived of the power of self-control: *Stingel*.

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.⁷

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.

So, the first question for you is whether the wrongful act or insult would have deprived an ordinary person in the defendant's position of the power of self-control?

Whether the defendant was actually provoked.

The next question for you is whether the defendant was 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 particular defendant. His/her race, colour, habits and relationship to the complainant may all be part of this assessment.⁸

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.

⁷ See *Stingel* at 326.

⁸ See *Stingel* at 326.

Acting while provoked

Provocation only applies if the defendant has, in response to the provocation, acted on the sudden and before there is time for his/her passion to cool – before there is time for him/her to think about his/her response.

Disproportionate force

The force used by the defendant must not be 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.

To recap:

The defendant is not criminally responsible for the assault committed upon the complainant if the complainant gave the defendant provocation for the assault and –

- **the defendant was in fact deprived by the provocation of the power of self-control; and**
- **acted upon it on the sudden and before there was time for his/her passion to cool; and**
- **if the force used by the defendant was not disproportionate to the provocation [and is not intended, or is not such as is likely to cause death or grievous bodily harm.]⁹ (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).**

The focus is on serious provocation, which would cause a sudden and proportionate response to it.

As I have said, there is no burden on the defendant to satisfy you that he was provoked. The onus is on the prosecution to satisfy you beyond reasonable doubt that provocation does not apply. .

⁹ Section 269(1) *Criminal Code*. In most, or in many cases, there will be no evidentiary basis for considering whether death or grievous bodily harm might have eventuated.

Has provocation been excluded by the prosecution?

Provocation will be excluded by the prosecution, and the assault will be unlawful, if the prosecution satisfies you beyond reasonable doubt of any of the following:

- 1. that the accused was not the subject of wrongful act or insult by the complainant; or**
- 2. that there was no provocation, bearing in mind how an ordinary person would be likely to react to the wrongful act or insult; or**
- 3. that the defendant was in fact not deprived by the provocation of the power of self-control; or**
- 4. the defendant did not act upon the sudden and before there was time for his passion to cool; or**
- 5. the force used by the defendant was out of proportion to the provocation; or**
- 6. [Where appropriate] that the force used was intended and was likely to cause death or grievous bodily harm.**