

Provocation: s 304 (for offences pre 4 April 2011)

With effect from 4 April 2011, s 304 of the *Criminal Code* was amended in several ways. The onus of proof was reversed so that for an alleged offence committed after then, it is for the defendant to prove that he or she was liable to be convicted of manslaughter only, by reason of provocation under this section. But cases involving offences committed before this date are governed by the previous terms of s 304.¹

The term “provocation” was [and remains] undefined for s 304 of the *Criminal Code*. The word takes its meaning from the common law, and ss 268 and 269 of the *Criminal Code* apply only to offences of which an assault is a defined element.²

There are three questions of fact, namely:

1. Was there provocation by the person who was killed?
2. Was the defendant actually provoked?
3. Was the defendant still provoked when doing that which caused death?

The onus of proof is on the prosecution to negative the availability of the defence. If the prosecution proves, beyond reasonable doubt, that:

1. there was no provocation by the person who was killed.
2. the defendant was not actually provoked, or
3. the defendant was not still provoked, when doing that which caused the victim’s death,

then the prosecution will have negated the defence.

The content and gravity of the provocative conduct must be understood and assessed from the viewpoint of the particular defendant.³ With that assessment of the victim’s conduct towards the defendant, what must then be considered is whether the conduct was something which could or might deprive an ordinary person of the power of self-control and cause the defendant to do what he or she did.⁴

This is an objective test of what would be the possible effect of the victim’s conduct, understood from the viewpoint of the particular defendant, upon the power of self-control of the hypothetical ordinary person.⁵

Provocation in this sense is not confined to the loss of self-control arising from anger or resentment, but extends to a sudden and temporary loss of self-control due to emotions such as fear or panic, as well as anger or resentment.⁶ In any case where the jury may take the

¹ *Criminal Code* s 728(3).

² *R v Buttigieg* (1993) 69 A Crim R 21; *R v Pangilinan* [2001] 1 Qd R 56 at 64.

³ *Stingel v The Queen* (1990) 171 CLR 312 at 326.

⁴ *Stingel* at 331; the Court there considered the provisions of the Tasmanian Code, which referred to the relevant conduct as something “of such nature as to be sufficient to deprive an ordinary person of the power of self-control”, and remarked that the terms of that code did not differ significantly from the provocation provisions of the Queensland Code (at 320).

⁵ *Stingel* at 327.

⁶ *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 168; *R v Pangilinan* [2001] 1 Qd R 56 at 64.

view that the defendant is immature, by reason of his or her youthfulness, it is appropriate to attribute the age of the defendant to the hypothetical ordinary person in the objective test, or in other words, to apply the test to a hypothetical ordinary person of the defendant's age.⁷

The "ordinary person" question is a threshold question, logically falling to be answered before it becomes necessary to consider whether the defendant was, in fact, deprived of his or her self-control.⁸

It is sufficient to raise a case of provocation for consideration by the jury, if there is some evidence which might induce a reasonable doubt as to whether the prosecution has negatived the question of provocation.⁹ A trial judge in determining this question must look at the version of events most favourable to the defendant which is open on the evidence.¹⁰

Various types of conduct have been held to be incapable of constituting provocation, such as provocation by mere words, except perhaps "in circumstances of a most extreme and exceptional character."¹¹

Suggested directions are as follows:

The final thing that the prosecution must establish, in order to prove that the defendant is guilty of murder, is that he/she was not acting under provocation when he/she killed [V].¹² It is not for the defendant to prove that he/she was acting whilst provoked; it is for the prosecution to prove to you, beyond reasonable doubt, that he/she was not doing so.

Our law recognises that a person may be killed in circumstances where the defendant was so provoked by something done by that person as to lose the power of self-control, such that this provides an explanation for his/her actions which should be taken into account. You only need to consider the issue of provocation if you provisionally reach the view that the defendant had the necessary intent to kill or cause grievous bodily harm and that he/she would be guilty of murder.

Under our law if a person acts under provocation, he/she is not guilty of murder but is guilty of manslaughter only. Provocation is therefore something which operates only as a partial defence, not a complete defence, because it reduces what otherwise would be a verdict of murder to one of manslaughter.

⁷ *Stingel* at 331.

⁸ *Stingel* at 324.

⁹ *Van Den Hoek* at 162.

¹⁰ *Stingel* at 334.

¹¹ *Buttigieg* at 37, citing *Moffa* (1977) 138 CLR 601 at 605.

¹² The victim's name.

In this context, provocation has a particular legal meaning. It consists of conduct which causes a loss of the power of self-control on the part of the defendant and which might have caused an ordinary person to lose the power of self-control and to act in the way in which the defendant did.

There are three questions of fact that are involved here. They are:

- 1. Was there any provocation by [V] towards the defendant?**
- 2. Was the defendant actually provoked by [V]?**
- 3. Was the defendant acting, whilst provoked, when he/she did the act (or acts) by which [V] was killed?**

The first question

You have to consider what the defendant argues was the provocation by [V] [detail here the defendant's argument and the evidence relevant to it]. You have to consider whether that conduct occurred. You have assess the conduct of [V] from the viewpoint of the defendant. Unless you understand the defendant's personal circumstances and any history between the defendant and [V], you may not understand how serious was the conduct of [V] from the defendant's perspective. [Here refer to any relevant personal circumstances, such as personal relationships or past history.]¹³

With that understanding of the conduct of [V] towards the defendant, you have to ask whether that conduct could have caused an ordinary person to lose his/her self-control and act as he/she did. An ordinary person is simply a person who has the minimum powers of self-control expected of an ordinary citizen [who is sober/not affected by drugs]. An ordinary person has the ordinary human weaknesses and emotions which are common in the community.

Particular conduct, when considered in isolation, might not amount to provocation but might, in combination with other conduct by the person who was killed, be enough to cause a loss of self-control.

¹³ See *Stingel* at 326.

Was the defendant actually provoked?

You have to consider whether [V's] conduct caused this person, the defendant, to lose his/her self-control and to [here describe the fatal act and the alleged intention of the defendant]. Again you have to consider the defendant's personal characteristics and any relevant history.

Was the defendant acting while provoked at the time when he did the thing [or things] which caused [V's] death?

Provocation is not necessarily excluded simply because there is an interval between the provocative conduct and the defendant's emotional response to it.¹⁴ So you have to consider whether the defendant remained deprived of his/her self-control and killed [V] whilst still without that self-control.

Onus of proof

As I have said, it is for the prosecution to satisfy you beyond reasonable doubt that the defendant did not act under provocation. The prosecution will have proved that matter if the prosecution satisfies you, beyond reasonable doubt, of any of these things:

- 1. That the conduct upon which the defendant relies as provocation did not occur.**
- 2. That the conduct upon which the defendant relies as provocation could not have caused an ordinary person [where relevant: of the defendant's age] to lose his/her self-control and to act as the defendant did, with an intent to cause death or grievous bodily harm.**
- 3. That the conduct on which the defendant relies did not cause the defendant to lose his/her self-control.**
- 4. That when the defendant killed [V], he/she was still deprived of his/her self-control, by [V's] provocative conduct.**

If you are satisfied beyond reasonable doubt as to any of those matters, then the prosecution has proved that the defendant did not kill [V] under provocation, and

¹⁴ *Pollock v The Queen* (2010) 242 CLR 233 at [51]-[52].

if you are satisfied beyond reasonable doubt as to all of the elements of murder, to which I have earlier referred, then the appropriate verdict is “guilty of murder”.

If, however, you are left with a reasonable doubt as to provocation, you must acquit the defendant of murder. In that event, you would convict him/her of manslaughter, if satisfied beyond reasonable doubt of all of the elements of manslaughter to which I have referred. The next question you must consider is whether the defendant was in fact provoked by the conduct of [V]. In doing that, again you would consider all of the defendant’s circumstances, and any history of disagreement between the defendant and [V]. Against that background, you have to ask whether, more probably than not, the defendant did lose his/her self-control as a result of what was done by [V] towards him/her. And doing so, again you have to consider the defendant’s personal circumstances [such as, in this case, his/her race], to assess the likelihood that what was done by [V] did cause him to lose his power of self-control and act as he/she did.

For this defence to apply it must be caused by a “sudden” provocation. But there may a sudden provocation in this sense although there is an interval between the provocative conduct and the defendant’s response to it [where appropriate, add this: the loss of self-control can develop after a lengthy period of abuse, and without the necessity for a specific triggering incident].

As I have said, it must also be shown that the defendant did the act which killed [V] before there was time for his/her self-control to be regained.