

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

The 2011 Amendments

With effect from 4 April 2011, s 304 of the *Criminal Code* was amended in three respects, namely:

1. The onus of proof is placed on the defendant to prove that the defendant is liable to be convicted of manslaughter only, under this section.
2. Other than in circumstances of “a most extreme and exceptional character”, the section is not to apply if the provocation is based on words alone.
3. Save in circumstances of “a most extreme and exceptional character”, s 304 does not apply where a domestic relationship existed between two persons, one of whom unlawfully killed the other, and the provocation is based on anything done by the deceased, or anything the defendant believed the deceased had done, to end the relationship, change the nature of the relationship or indicate that the relationship may, should or would end, or that there may, should or will be a change to the nature of the relationship. This is so even if the relationship ended before the provocation and killing happened.

In the proof of “circumstances of a most extreme and exceptional character” (within either of 2 and 3 above) regard could be had to any history of violence that was relevant in all the circumstances.

The amendments applied where the act or omission the subject of the offence happened after 4 April 2011.¹

Section 304 was also amended in 2012, to redefine a “domestic relationship”, according to the terms of the *Domestic and Family Violence Protection Act* (Qld) by s 217 of that Act.

The 2017 Amendments

With effect from 30 March 2017, the present subsections (4), (8) and (11) were added, in order to provide another category of case in which s 304 will not apply except in circumstances of “an exceptional character”.² This category is where the provocation is based on “an unwanted sexual advance” to the defendant, a term which is defined as a sexual advance that is unwanted by the defendant, and, if it involves touching, only “minor touching”. By subsection (8), for the proof of circumstances of an exceptional character, regard may be had to any history of violence, or of sexual conduct, between the defendant and the deceased that is relevant in all the circumstances.

At the same time, the references to “circumstances of a most extreme and exceptional character”, which applied to provocation by words alone or in the context of a domestic relationship, were changed in each case to “circumstances of an exceptional character”.

¹ *Criminal Code* s 728(3).

² These amendments apply to a proceeding for an offence only if the offence was committed after 30 March 2017: *Criminal Law Amendment Act 2017* (Qld) s 12 and see *R v Thompson* [2019] QCA 29.

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.³

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 is on the defendant to prove that this defence applies. The defendant must prove that, more probably than not:

1. There was provocation by the person who was killed,
2. The defendant was actually provoked, and
3. The defendant was still provoked, when doing that which caused the victim’s death.

The content and gravity of the provocative conduct must be understood and assessed from the viewpoint of the particular defendant.⁴ 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.⁵

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.⁶

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.⁷ In any case where the jury may take the 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.⁸

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.⁹

³ *R v Buttigieg* (1993) 69 A Crim R 21; *R v Pangilinan* [2001] 1 Qd R 56 at 64.

⁴ *Stingel v The Queen* (1990) 171 CLR 312 at 326.

⁵ *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).

⁶ *Stingel* at 327.

⁷ *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 168; *R v Pangilinan* [2001] 1 Qd R 56 at 64.

⁸ *Stingel* at 331.

⁹ *Stingel* at 324.

When two or more persons unlawfully kill another, the fact that one of them is guilty of manslaughter under s 304 does not affect the question of whether the killing amounted to murder in the case of the other person or persons.¹⁰

A question may arise as to whether the evidence sufficiently raises a case of provocation for the jury to be asked to consider it. Because the onus of proof is upon the defendant, the question will be whether there is evidence from which a jury could be satisfied, on the balance of probabilities, that the defendant is guilty of manslaughter only by the operation of s 304.

Suggested directions are as follows:

If you are satisfied that the defendant killed [V]¹¹ with an intention to kill or do grievous bodily harm [or in circumstances which would constitute murder, identifying them in the particular case], then there would be another subject which you would have to consider in this case, which is called provocation.

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.

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.

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 defendant must satisfy you that, more probably than not:

¹⁰ *Criminal Code* s 304(8).

¹¹ The name of the victim.

1. **There was provocation by [V] towards the defendant,**
2. **The defendant was provoked by [V] and**
3. **The defendant was acting, while still 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.]¹²

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.

[In a case where the provocation is based on words alone,¹³ the following direction should be added:

In this case, the defendant says that he/she was provoked by [V's] words, and nothing else. The law is that this defence of provocation does not usually apply in a case where the provocation is based on words alone, because usually an ordinary person would not lose self-control, and act with an intention to kill or do grievous bodily harm, in response to mere words. However, the defence can be available if you are satisfied that circumstances of this case are exceptional. To

¹² See *Stingel* at 326.

¹³ s 304(2).

decide that, you have to consider all of the circumstances, including any history of violence between the defendant and [V].¹⁴ Although, in an ordinary case, mere words could not provoke a person to act with an intention to kill or do grievous bodily harm, were the circumstances in this case exceptional, in that these words used by [V] towards the defendant could have caused an ordinary person [where appropriate, add “of the defendant’s age”] to lose self-control and respond as the defendant did?]

[In a case where provocation was based upon something done by the deceased, or believed to have been done by him/her, in respect of a domestic relationship,¹⁵ the following direction could be given:

In this case, the defendant says that he/she was provoked by something done by [V] (or believed to have been done by [V]) in respect of their domestic relationship. You have evidence that the defendant and [V] were in a domestic relationship [describe the relationship]. The defendant says that he/she was provoked by [eg. V ending the relationship]. The law is that this defence of provocation does not usually apply where the provocation is based on something done by the person who was killed to [end a domestic relationship between them], because usually an ordinary person would not lose self-control, and act with an intention to kill or do grievous bodily harm, in response to that conduct. However, the defence is available here if you are satisfied that the circumstances of this case are exceptional. To decide that, you have to consider all of the circumstances, including any history of violence between the defendant and [V].¹⁶ Although, in an ordinary case, acting to end a domestic relationship could not provoke a person to act with an intention to kill or do grievous bodily harm, were circumstances in this case exceptional, so that the conduct of [V] towards the defendant could have caused an ordinary person to lose self-control and respond as the defendant did?]

[In a case where the provocation is based on an unwanted sexual advance by the person who was killed to the defendant,¹⁷ the following may be added:

In this case, the defendant says that he/she was provoked by an unwanted sexual advance made by [V] towards him/her. The law is that this defence of provocation

¹⁴ See *R v Thompson* [2019] QCA 29.

¹⁵ s 304(3).

¹⁶ *Ibid.*

¹⁷ s 304(4).

does not usually apply in a case where the provocation is based on an unwanted sexual advance, because usually an ordinary person would not lose self-control and act with an intention to kill or do grievous bodily harm, in response to an unwanted sexual advance. An unwanted sexual advance means a sexual advance that is unwanted and, if it involves touching, involves only minor touching.¹⁸ In this case the evidence of the sexual advance is [describe]. If you find that the conduct by [V] was an unwanted sexual advance, then the defence is available if you are satisfied that the circumstances of this case are exceptional. To decide that, you have to consider all of the circumstances [including any history of violence, or of sexual conduct, between the defendant and [V]]¹⁹. Although, in an ordinary case, an unwanted sexual advance could not provoke an ordinary person to act with an intention to kill or do grievous bodily harm, were these circumstances exceptional, in that the advance by [V] towards the defendant could have caused an ordinary person [where appropriate, add “of the defendant’s age”] to lose self-control and respond as the defendant did?]

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/she 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.²⁰ 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

¹⁸ Where relevant, refer to the examples at the end of s 304(11).

¹⁹ Ibid.

²⁰ *Pollock v The Queen* [2010] 242 CLR 233 at [51]-[52].

As I have said, it is for the defendant to satisfy you that, more probably than not, the defendant acted under provocation in the legal sense. The defendant must satisfy you that, more probably than not:

- 1. The conduct upon which the defendant relies as provocation did occur.**
- 2. The conduct upon which the defendant relies as provocation could 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.**

[2A. That although the provocation is based upon words alone,²¹ the other circumstances here are exceptional].

- 3. The conduct on which the defendant relies caused the defendant to lose his/her self-control.**
- 4. When the defendant killed [V] he/she was still deprived of his/her self-control, by [V's] provocative conduct.**

If you are not satisfied of each of those matters, then the defendant has not proved that the defendant killed [V] under provocation, and 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 satisfied that the defendant killed [V] under 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.

²¹ Or refer to the exception in s 304 which is relevant in the case.