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DPP
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[6-410] Suggested direction

The final issue which the Crown must establish in order to prove that the accused is guilty of murder is that the accused was not acting under provocation when [he/she] killed [the deceased]. It is not for the accused to prove that [he/she] was acting under provocation but for the Crown to prove that beyond reasonable doubt that [he/she] was not.

If the Crown satisfies you beyond reasonable doubt that all the other elements of murder have been established beyond reasonable doubt and the accused was not provoked to do what [he/she] did, the appropriate verdict is “guilty of murder”. If, however, the Crown does not satisfy you that [he/she] was not provoked, the accused will be “not guilty of murder” but “guilty” of the less serious offence of manslaughter (that is, manslaughter by provocation).

How then do you determine whether the accused was (or may have been) provoked to do what [he/she] did?

The law provides that an [act/omission] causing death is an act [done/omitted] under provocation where —

1. The [act/omission] is the result of a loss of self control on the part of the accused that was induced by any conduct of [the deceased] (including grossly insulting words or gestures) towards or affecting the accused; and
2. That conduct of [the deceased] was such that it could have induced an ordinary person in the position of the accused to have so far lost self control as to have formed an intent to kill, or to inflict grievous bodily harm upon, [the deceased], whether the conduct of [the deceased] occurred immediately before the [act/omission] causing death, or at any previous time.

... [where raised, intoxication must be taken into account when considering question one, but not when considering question two].

Question One

These principles of law require you to consider the following question or questions. The first question is — “May [the deceased’s] conduct, that is, the things [he/she] did or said, or both, have induced (that is, caused) the accused to lose [his/her] self control?”.

[Where applicable

The conduct or words of [the deceased], which allegedly induced the loss of self control on the part of the accused, need not have occurred immediately before the act causing death but may have occurred at any previous time and may be a course of conduct over a period of time, even years, or may include a course of conduct over a period of time together with other conduct immediately prior to the act causing death.]

There must be a causal connection between the conduct of [the deceased] and the loss of self control by the accused. In determining whether there was such a connection, you must consider the gravity of the alleged provocation so far as the accused is concerned. There are relevant matters raised in this case by the evidence.

You must appreciate that conduct which might not be insulting or hurtful to one person may be extremely hurtful to another because of that person’s age, sex, race, ethnic or cultural background, physical features, personal attributes, personal relationships or past history ... [refer to the special characteristics of the accused raised by the evidence. This would include in an appropriate case the “battered wife syndrome”. It will be necessary to relate any expert

evidence as, for example, with regard to the “battered wife syndrome” to the particular facts and circumstances of the subject case].

It is proper that you view the words or conduct in question as a whole and also in the light of any history or disputation between [*the deceased*] and the accused since particular acts or words which considered separately could not amount to provocation may, in combination or cumulatively, be enough to cause the accused to lose [*his/her*] self control in fact.

That is quite different from a deliberate act of vengeance, hatred or revenge, and likewise quite different from a consideration of whether in the light of [*his/her*] conduct [*the deceased*] got [*his/her*] just deserts.

If you are satisfied beyond reasonable doubt that the answer to that question is “No”, then the Crown has negated provocation and providing you are satisfied beyond reasonable doubt as to all the elements of murder to which I have earlier referred, the appropriate verdict is “guilty of murder”.

Question Two

If, however, the answer is “Yes”, then you must turn to the second question, which is — “May the conduct of [*the deceased*] have induced an ordinary person in the position of the accused to have so far lost self control as to have formed an intent to kill, or inflict grievous bodily harm on [*the deceased*]?”.

An “ordinary person” is simply one who has the minimum powers of self control expected of an ordinary citizen who is sober and of the same age and consequent level of maturity as the accused.

When one speaks of the effect of provocation on an ordinary person in the position of the accused, that phrase means an ordinary person who has been provoked to the same degree of severity and for the same reason as the accused.

In the present case, this translates to a person with the minimum powers of self control of an ordinary person, as described earlier, who is subjected ... [*for example, to a sexual advance by the victim which is aggravated because of the accused’s special sensitivity to a history of violence and sexual assault within the family*]. [*None of the attributes or characteristics of a particular accused will be necessarily irrelevant to an assessment of the content and extent of the provocation involved in the relevant conduct*].

This question requires you to take full account of the sting of the provocation actually experienced by the accused, but eliminates from your consideration an extraordinary response (if such there be) by the accused to the provocation actually experienced.

You should understand that when you are dealing with this question you are considering the possible reaction of an ordinary person in the position of the accused, not [*his/her*] inevitable or even probable reaction, but [*his/her*] possible reaction.

If the answer to this question is “No”, the Crown has negated provocation and all the other elements of murder have been established beyond reasonable doubt, the appropriate verdict is “guilty of murder”.

If the answer is “Yes”, the Crown has failed to negative provocation and the appropriate verdict is “not guilty of murder but guilty of manslaughter”.