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DIRECTOR'S CHAMBERS

DATE
4 October 2012

Select Committee on the Partial Defence of Provocation.
Legislative Council of NSW
Parliament House
Macquarie Street
Sydney NSW 2000

Inquiry into the partial defence of provocation

I refer your letter dated 3 September 2012 from Ms Vanessa Viaggio, Principal Council Officer.

I have reviewed the transcript of hearing on Wednesday 29 August 2012 and have no corrections to make.

I attach my responses to the questions on notice.

Yours faithfully

Lloyd Babb SC
Director of Public Prosecutions

Response to Questions on Notice

1. The NSW Council for Civil Liberties argues in its submission (Sub 32, p 5) that abolishing provocation will see more defence lawyers plead their cases as self defence and that the result could see more acquittals and other unintended outcomes. Can you comment on that suggestion?

Under the current law, self-defence is a full defence whereas provocation is a partial defence. If an arguable case exists for self-defence it is clear that Defence counsel would (and should) run this argument before an argument for provocation, as it may lead to a full acquittal of their client rather than a reduction from murder to manslaughter.

The tests for the self-defence and provocation are quite different and it may not be such an easy thing to merely transpose one to the other if provocation were to be abolished.

If a properly instructed jury accepts a defence of self-defence in a situation where previously only a defence of provocation would have been presented, I can not see how that can be viewed as problematic. It would tend to suggest that a defence of self-defence should have been the preferred defence in the first place.

2. In your experience, when issues of provocation are raised in relation to homicides, do these matters usually proceed to trial, or is a plea to manslaughter on the basis of provocation more commonly accepted as part of the negotiation process?

> ***a. Are there particular types of homicide matters that more commonly end up going to trial, as opposed to be finalised through charge negotiation?***

Each case is considered on its merits and the course of each individual matter is decided through application of the Prosecution Guidelines.

Some of the factors that may be taken into account are:

- How the defence of provocation is raised (ie the timing and circumstances).
- The evidence of the provocation and whether it is independently corroborated.
- The relationship between the accused and the deceased.

Ultimately, however, the three questions that are posed are:

- Is there a prima facie case for the offence of murder?
- Can it be said that there are no reasonable prospects of conviction; and if not
- Are there any discretionary factors that should be taken into account.

The very nature of the provocation test sometimes weighs in favour of a jury making a determination on the issue as it is a test that requires the application of a community judgement of a standard of behaviour.

3. In its submission, Women's Legal Services NSW (Sub 37, p 5) state that they are concerned about the Prosecution charging an accused with murder and then accepting

guilty pleas to manslaughter in circumstances where defensive elements are present. They suggest (p.26) that there is a 'strong need' for prosecutorial guidelines on plea negotiation, particularly where there is some evidence of self-defence'. Do you have any comments in respect of that statement?

I will consider that submission, however, I am of the view that the current Prosecution Guidelines are capable of dealing with negotiations relating to self defence.

4. In your submission (p.3) you suggest that if the defence of provocation were to be amended, the test to be applied by the jury should be able to be easily understood and applied. Can you explain what sort of test might be easily understood and applied by a jury?

I refer you to my response to the Options Paper

Questions taken on notice at the hearing (29 August 2012)

(1) ***Three cases put forward in the submission of the Bar Association*** *(Transcript p.48)*

In the case of *R v Hill* (1980) 3 A Crim R 397, the defence of self defence was run at trial and not accepted by the jury.

I have no material available to me to consider what consideration was given to any alternative charge to murder in the case of *R v Hill* (1980) 3 A Crim R 397. That case occurred before the creation of the Office of the Director of Public Prosecution.

In the case of *R v Russell* [2006] NSWCCA 722, the prosecution accepted a plea to manslaughter on the basis of provocation. It is not clear whether excessive self defence may also have been made out. If so, a manslaughter verdict may also have been justified on that basis. I cannot comment on why the police initially preferred a charge of murder in that matter.

In the case of *R v Duncan* [2010] NSWSC 1241, the prosecution accepted a plea to manslaughter on the basis of unlawful and dangerous act. It is not clear whether excessive self defence may also have been made out. If so, a manslaughter verdict may also have been justified on that basis. I cannot comment on why the police initially preferred a charge of murder in that matter.

(2) ***The matter of R v. Ramage: adverse inferences from a failure to give evidence*** *(Transcript p.49)*

James Ramage was a Victorian man who was acquitted of the murder of his estranged wife in the Victorian Supreme Court in October 2004. The jury instead convicted him of manslaughter on the basis of provocation. It was alleged that Mrs Ramage had told Mr Ramage that she had met someone else and that sex with Mr Ramage repulsed her.

Mr Ramage bashed and strangled his wife and then buried her body in a shallow grave.

Mr Ramage was sentenced to 11 years imprisonment with a non-parole period of 8 years.

I understand that at trial Mr Ramage did not give evidence and this was one of the matters of controversy when he was acquitted on the basis of provocation.

This is one of the key cases in Victoria that led to the abolition of the defence in that State.

In NSW, given the current state of the criminal law on the drawing of adverse inferences when an accused person does not give evidence, it is in my view impermissible (without legislative change) for a judge to direct a jury that the prosecution might more easily negative provocation in circumstances where the accused fails to give evidence.

*(3) **R v. Burke** (Transcript p.51)*

I note that the matter of *R v. Burke* [2000] NSWSC 356 is a case referred to in the submission of Professor Julie Stubbs (page 9) as a matter where the sentencing judge faced a dilemma in sentencing an aboriginal woman for murder where he found the case more closely resembled a manslaughter matter.

Roslyn Bourke entered a plea of guilty to the charge of murder on 7 October 2000. Ms Burke had previously faced a 12 day trial for murder in July 1999 in which the jury was hung. I note that the Crown rejected Ms Burke's plea to manslaughter at that trial.

As noted in the remarks on sentence (paragraph 2) the basis of the plea was unusual in that the Crown accepted that at the time of the act causing death the offender had the intent to cause grievous bodily harm but that the Crown was unable to discharge the necessary onus to show an intention to kill or a foresight of that consequence in the offender at the time of the doing of that act.

Ms Burke was sentenced to imprisonment for 9 years with a non-parole period of 4 ½ years.

The sentencing exercise in *Burke* shows that mitigating factors usually found in provocation manslaughter matters can be effectively taken into account on sentence for the offence of murder.

Justice James had particular regard for Ms Burke's mental state, level of intoxication, tragic history (which included a long history of domestic violence) and the principles in *Regina v. Fernando* (1992) 76 A Crim R 58.

The sentence imposed by the Court was a sentence more comparable to manslaughter rather than murder.

***(4) Pre-trial notification of provocation defence and examples of where the prosecution has been taken unawares of the raising of provocation** (Transcript p.58)*

Having consulted with a number of Crown Prosecutors I can advise that it is not common for the Crown to be taken by surprise by a defence of provocation.

Usually the possibility of provocation will be evident on the face of the brief.