

## Select Committee on the Partial Defence of Provocation

Legislative Council  
Parliament House  
Macquarie Street  
Sydney NSW 2000

18 September 2012

Reverend The Hon Fred Nile, Chair

Dear Rev Nile

### **Question on Notice: could the partial defence of provocation be limited to violent criminal behaviour?**

Thank you for giving me the opportunity to respond to a Question on Notice.

As the Committee well knows, my submission is that provocation should be abolished.

If provocation is to be retained, then I would favour the most stringent restrictions being placed on the defence. That includes reversing the onus of proof - as Queensland has done<sup>1</sup> - so that the accused would have to prove provocation on the balance of probabilities. At least one member of the Committee made that suggestion in the Hearing.

I was asked about restricting provocation to violent criminal behaviour. My initial reaction was to think in terms of self-defence. When pressed, I said that, off the top of my head, such a provocation restriction might be a possible way to go. But I appreciate the opportunity to think about this more carefully. Because I was given this task well before the distribution of the Options Paper, I will confine my response to the Question on Notice.

It was apparent in the Hearing that the famous House of Lords decision in *Camplin* was a stimulus for this proposal – the case was raised several times. In *Camplin*, the accused was fifteen years old when, against his resistance, he was buggered and then laughed at by the middle-aged deceased. The accused allegedly lost control and split his tormentor's skull with a chapati pan. It was put to me that this could not be a case of self-defence – and in the Hearing I agreed – and that it warranted a defence of some sort, and that the only possible defence available would be the partial defence of provocation.

I will begin by arguing that this could indeed be a case of **self-defence**.

In general, if someone is raped and they kill their rapist, then they may well be able to argue a defence of self-defence. I submit that should be straightforward if the killing occurs during the rape. If the killing occurs immediately after, then I submit it should be possible to argue that the accused was so traumatised and fearful of further violence (and possibly death) – that

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<sup>1</sup> The decision in Queensland to reverse the onus of proof was not taken lightly. For a thorough analysis of the catalyst to that decision, see Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report 64 (2008), pp387-392, 457-461, 491-497.

such a reaction should be understandable. It should be possible to argue that the accused honestly believed it was necessary to defend themselves, and it was a reasonable response in the circumstances as perceived by them. And I submit that should be possible regardless of the sex or age of the accused who has been raped.

In Camplin, the dual focus was on the rape AND the fact of being laughed at. Should such a case be heard today, I believe defence counsel would focus on the act of rape and the necessity of the lethal retaliation to that act. Counsel would surely stress that the 15 year old boy had just been violated and was humiliated and fearful – perhaps of further assault, or worse. Certainly the laughter added to the sense of humiliation. But the fear that the attacker might attack again (or do worse) could be very real.

What if there was a significant delay in the response to the rape? Imagine that the victim/survivor is confronted by their rapist days or weeks later – or even longer. I submit that it would depend on the facts whether self defence could still be possible. I have recommended that the inclusion of evidentiary provisions such as s9AH Crimes Act (Vic) is essential to broaden the availability of self-defence. That provision is limited to domestic abuse evidence. One possibility is to adopt but broaden the provision – so that it was not limited to domestic abuse. For example, that there be a sub-section dealing with a victim/survivor of a serious physical assault, who is again confronted by their attacker. It could then be utilised to help to explain why the accused who killed - for example when confronted by their former rapist - believed it was necessary to defend themselves, and why it was a reasonable response in the circumstances as perceived by them. A jury should be able to understand that it would be a terrifying ordeal for any victim/survivor of rape to again meet their rapist – and that the victim/survivor would likely feel angry and fearful - and many other emotions – but certainly seriously threatened.

The case of Mrs R – the axe-murder case – was raised during the Hearings. That case is often cited as a case on provocation. I think that is misleading. Self defence was not possible at the time because self-defence was then very limited at common law – and it certainly could not be invoked by an accused who hacked to death with an axe a sleeping husband who had expressed 'love' prior to falling asleep. Perhaps the important point to note is that the jury ultimately acquitted Mrs R – notwithstanding the only defence left for their consideration was the partial defence of provocation. They rejected provocation as inadequate. They clearly felt she was fully justified in killing her husband – a man who had subjected his family to years of abuse and the daughters in particular to years of sexual degradation – and that she had killed him to defend her daughters from further abuse. In other words, in lawful self-defence.

Although Mrs R learnt the truth of the horrors 16 hours before the killing, in bed her tormentor 'laughed' at her by telling her that he loved her and that they were going to be one big happy family. I believe that genuine analogies can be drawn between this case and a case like Camplin – although the temporal gap in Camplin was much shorter; the killing was immediately after the rape.

Clearly if the 'social-framework' evidentiary provision akin to s9AH Crimes Act (Vic) is adopted into our self-defence law in NSW, then a Mrs R would obviously plead self-defence – and a jury would likely (again) acquit. She had killed her husband in defence of her daughters

against his continuing sexual assault. And that new evidentiary provision would assist to explain both the issue of non-immediacy as well as non-proportion.

This 'reaction to a rape' logic should of course extend to a parent who walked in on a scene of their child being raped by another relative or acquaintance or a stranger – and who killed the rapist. They would be killing in defence of their child who was being subjected to a violent assault.

Leaving the self defence argument aside, I will return to the **Question on Notice** – a defence of provocation limited to violent criminal behaviour.

If such a new defence was created, then a Camplin should be able to claim the partial defence of provocation – he 'lost control' and retaliated to an act easily described as 'violent criminal behaviour'.

The Committee might want to consider the drafting of a definition of 'violent criminal behaviour' – not an exhaustive definition, which would be impossible, but one which merely gives examples. Such a definition can provide useful guidance.

Let's re-imagine the case of Ramage. He alleges that his estranged wife Julie mocked his 'improvements' to the matrimonial home, admitted she had a new partner, and said 'sex with you repulsed me' – but let's add an extra element - AND then, when he protested, she slapped him hard across the face. He then claims that was the final straw and he lost control and killed her.

Could the physical assault – the hard face slap – amount to provocation as 'violent criminal behaviour'? Perhaps it could. That's even assuming that the new provocation defence expressly excluded the alleged verbal taunts. But can you isolate the context and delete the non-'violent criminal behaviour'? - and ONLY focus on the violent criminal behaviour? The English Court of Appeal said in Clinton - when refusing to adhere to the express exclusion – that context is crucial. Some commentators recommend incorporating a partial exclusion – by the addition of the words 'except in circumstances of a most extreme and exceptional character' (as exists for example in the amended Queensland provisions). In this new version of Ramage, might that not make the whole incident sufficient to amount to provocation? Hurtful insults PLUS a physical assault. I think it is arguable that that could satisfy a 'new' provocation.

Unsurprisingly I hope that this is not the sort of scenario the Committee would be content to see perpetuated under a 'new' provocation defence. Surely not. And I hope that the Committee rejects suggestions of 'partial exclusions'.

Once again, one of the principal problems of the provocation defence is the issue of 'allegation'. Claims are made by an accused that cannot be challenged because the victim is dead – like Julie Ramage. Reversing the onus of proof, so that James Ramage would have to prove on the balance of probabilities that this 'fanciful' scenario occurred, would surely be not merely a fair compromise but, I submit, a necessity.

Such a reversal of the onus of proof would not impede a Camplin securing the defence – the rape could readily be proved on the balance of probabilities.

One of the members of the Committee raised the case of Middendorp. In that case the jury found him guilty of 'defensive homicide' - not unlike our excessive self-defence under s421 Crimes Act (NSW). That was so notwithstanding his history of violence, his breach of an AVO (or equivalent), and the fact that he was 90 kg and his victim 50 kg. He claimed he stabbed her in response to her wielding a knife at him. If Middendorp was heard today in NSW, and if the jury was as uncomprehending as their Victorian counterpart, then he would be found guilty of manslaughter under s421. In short, it is unlikely that the 'new' provocation defence would be needed.

My concern is that if there is any physical violence between a man and a woman then, besides arguments of self-defence being raised – and regardless of how flimsy the evidence - the new provocation defence might always be viewed as an option. As it is now. Once again, requiring a Middendorp to prove the scenario on the balance of probabilities seems an essential step to take.

Given that men kill seven times more frequently than women, I suspect that any 'new' provocation defence will be open to abuse by the sorts of accused persons the Committee would not have wanted to see utilise the defence. That being the case, I would again recommend that a 'new' provocation defence be monitored to gauge its effectiveness.

In sum, I do not believe it is necessary to retain the partial defence of provocation so as to offer a 'defence' to a Camplin. I submit that cogent arguments can be made in favour of self-defence. And that is so whether the lethal response takes place during the rape or immediately after it. If the lethal response is significantly delayed, then I have made suggestions as to how that too might still fall under the 'protection' of self-defence – although obviously such amendments would need carefully considered drafting to be successful.

If however my arguments are not seen as persuasive, then I agree with the suggestion forwarded by Committee members during the Hearing that provocation be restricted solely to 'violent criminal behaviour'. And I recommend expressly excluding all non-violent behaviour. Lastly, I believe it is essential to reverse the onus of proof so that the accused alleging provocation must prove it on the balance of probabilities, a requirement that best serves the interests of justice – as the QLRC concluded. I submit that amendments creating a new provocation defence would need to be monitored for 'abuse'.

Thank you again for the opportunity to respond to the Question on Notice.

Yours sincerely

Graeme Coss