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Infidelity Does Not Necessarily Amount to Provocation

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Cases Considered:

R. v. Tran, 2008 ABCA 209

Domestic violence remains a terrible problem in Canadian society, and Alberta has one of the highest rates in the country (Karen Mihorean, *Family Violence in Canada: A Statistical Profile 2005* (Ottawa: Minister of Industry, 2005) at 15). Over the past 30 years, legislators, courts and law enforcement officers have generally progressed from treating such violence as a private matter, to confirming that it is as serious as other violence, and finally, to considering the family context as an aggravating circumstance. When domestic violence leads to death, however, perpetrators can argue a provocation defence just as they could in any murder trial. If successfully argued, provocation will reduce a charge of murder to manslaughter. In its recent decision in *R. v. Tran*, the Alberta Court of Appeal held that infidelity will not necessarily lead to a successful provocation defence in such cases.

Thien Kham Tran ("the respondent") was charged with several offences relating to an incident in February 2004 in Edmonton, including the murder of An Tran, his estranged wife's lover, as well as the attempted murder of his estranged wife, Hoa Le Duong. The respondent and Le Duong had been formally separated since November 2003, after which Le Duong retained custody of their children. Evidence at trial showed that on February 9, 2004 the respondent had spoken with his godmother to tell her he knew the man whom Le Duong was seeing, and he had earlier eavesdropped on a conversation between Le Duong and Tran. The next day, the respondent left work early and went to the apartment of Le Duong (in which he had resided with her before the separation). The building manager let him in when he told her he was there to check his mail. He then used a key to open the apartment, entered and removed his shoes, and proceeded to the master bedroom, where he found Le Duong and Tran nude and in bed together. The respondent, who was already armed with a sheathed knife, ran to the kitchen to obtain two more knives, and returned to the bedroom where he stabbed Tran in the chest, phoned his godfather, slashed Le Duong across the face, and then stabbed Tran several more times (resulting in 17 stab wounds and 20 cuts overall). The respondent called 911, and when the police arrived, he was found to have some self-inflicted wounds as well.

At trial, Madam Justice P.L.J. Smith rejected the Crown's argument that the respondent intended to kill Le Duong, finding him guilty of aggravated assault instead. Further, she rejected the

contention that the respondent should be convicted of first degree murder, finding that the Crown had not proved beyond a reasonable doubt that the killing involved foresight and planning. She did find intent to commit second degree murder, but applied the provocation defence in s. 232 of the *Criminal Code*, R.S.C. 1985, c.C-46, to enter a conviction of manslaughter. Section 232 provides as follows:

> Murder reduced to manslaughter
> 232. (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.
>
> What is provocation
> (2) A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool. …

As noted by Mr Justice Jack Watson of the Court of Appeal in his concurring opinion, provocation is a unique defence in that it is only activated when the intent to kill has been established, and then "forgives the intent" (at para. 43). In order to defeat the defence, the Crown must prove beyond a reasonable doubt that at least one of the following elements of provocation was absent: (1) a wrongful act or insult sufficient to deprive an ordinary person of the power of self-control; (2) loss of the power of self-control as a result of the wrongful act or insult; (3) suddenness of the wrongful act or insult; and (4) sudden commission of the acts causing death before there was time for the accused person's passion to cool.

The majority opinion of the Court of Appeal was written by Madam Justice Constance Hunt, with Mr. Justice Stephen Hillier concurring. The majority found that "there was no air of reality" to the defence of provocation, specifically the "wrongful act or insult" element (at para. 2). The trial judge had found that "[f]inding your previously faithful wife of 15 years in bed and unclothed with another man could be an insult" (quoted at para. 5 of ABCA decision). The majority of the Court of Appeal disagreed, noting that "this statement was entirely divorced from the context of this case" (at para. 6). In an application of the *ejusdem generis* rule of statutory interpretation, Justice Hunt found that the term "insult" in s. 232(2) of the *Criminal Code* must be read to include a degree of moral blameworthiness on the part of the victim(s), given its placement next to the words "wrongful act". While noting that some instances of infidelity might amount to such an insult, the only case cited by the majority to that effect was *R. v. Daniels* (1983), 47 A.R. 149 (C.A.), a case involving a woman who killed her husband's lover after a "long and public affair" culminated in the victim telling the accused to "fuck off" when she entered her bedroom in search of her husband.

In contrast, in the case at bar the respondent and his wife had been separated for over two months, had arranged their affairs and discussed the possibility of divorce, and he had advised his godmother of his suspicions surrounding his wife. As noted by the majority, the behaviour of

Le Duong and An Tran "was not only lawful, it was discreet and private and entirely passive vis-à-vis the respondent. They took pains to keep their relationship hidden. Their motivation for doing so is beside the point in considering whether there was an air of reality to provocation." Further, "[t]heir behaviour came to [the respondent's] attention only because he gained access to the building by falsely saying he was there to pick up his mail. … [H]is own choice to enter the apartment, without permission, cannot elevate what he there found to the level of an "insult" for the purposes of provocation" (at para. 17). The majority also questioned whether there was the requisite suddenness for provocation, given the respondent's suspicions about the relationship between Hoa Le Duong and An Tran.

In his concurring judgment, Justice Watson focused on the trial judge's "almost purely subjective" consideration of whether there was an insult (at para. 54). She had referred to the respondent as "a good provider, good worker, good tenant" and "nonviolent, honest, not a troublemaker". The trial judge also noted that "[c]ulturally, divorce is shameful in the Edmonton community of ethnic Chinese from Vietnam and particularly in the community of people who associated with the complainant and the accused" (at para. 51). In spite of this statement, Justice Watson noted that "this case is not one which gives rise to concerns about whether considerations of ethnicity should specially colour the interpretation of s. 232″, as the trial judge had said "that she regarded the cultural heritage to which she referred to be consistent with other traditional views in other cultures in Canada" (at para. 52). Cultural considerations aside, Watson, J. agreed with the majority that the "adultery" in this case "did not emanate from the deceased or the respondent's wife in the ordinary sense of an insult" (at para. 59). Quoting from an earlier case of the Nova Scotia Court of Appeal in *R. v. Young*, (1993) 78 C.C.C. (3d) 538, [1993] N.S.J. No. 14 (QL) (at 542 C.C.C.):

> It would set a dangerous precedent to characterize terminating a relationship as an insult or wrongful act capable of constituting provocation to kill. The appellant may have been feeling anger, frustration and a sense of loss, particularly if he was in a position of emotional dependency on the victim …, but that is not provocation of a kind to reduce murder to manslaughter.

While this case is important for its finding that infidelity does not necessarily constitute an insult supportive of a provocation defence, one might have hoped that the Court would go further and hold that infidelity can never support such a defence. To allow infidelity to amount to an "insult" for the purposes of s. 232 of the *Criminal Code* fails to take domestic violence seriously, and perpetuates a conception of relationships that is out of keeping with *Charter* rights, including equality and security of the person. Those who might argue that such a decision would overstep the bounds of the court's powers would do well to recall the case of *Lavallee*, [1990] 1 S.C.R. 852, in which the Supreme Court of Canada used an equality-based approach to interpret the law of self defence in the context of domestic violence.

In a 1999 report following a national consultation on the defence of provocation, the Women's Legal Education and Action Fund (LEAF) actually went further and recommended that the provocation defence should be abolished altogether. LEAF argued that this result was demanded

by the *Charter*'s guarantees of equality and security of the person. At the same time, and recognizing that women may be accused of domestic violence leading to death as well as be victims of it, LEAF called for an expansion of the definition of self-defence that would justify the use of force to allow the protection of one's personal security, including "coercion by physical force or threats of physical force" (at p. 1). These recommendations have not yet been acted upon, and it is interesting to speculate whether the current government would be amenable to doing so given its law and order agenda (see for example Bill C-2, the *Tackling Violent Crime Act*, which received Royal Assent on February 28, 2008). In the meantime, courts have an obligation to apply the *Criminal Code* in keeping with *Charter* values, and it is to be hoped that they will do so in the context of provocation.