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Domestic Violence and Provocation: The Door Remains Open

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Cases Considered:
R. v. Tran, 2010 SCC 58

The Supreme Court's most recent decision, *R. v. Tran*, is an Alberta case I commented on at the Court of Appeal level. *Tran* involves a man who killed his estranged wife's lover and slashed his wife's face, causing her permanent injury. The issue in this case was whether there was provocation arising from the fact that the accused found his wife in bed with her lover, such that he should be convicted of manslaughter rather than second degree murder. In a decision authored by Justice Louise Charron, the Supreme Court agreed with the Alberta Court of Appeal that provocation was not made out in the circumstances of the case, and upheld the accused's conviction for murder. While this is a positive outcome, in my view the Court did not go far enough in contextualizing this case as one involving domestic violence, nor did it foreclose future uses of the provocation defence in this context.

The Decision

According to the facts set out by the Court, on February 10, 2004 Thien Kham Tran ("the appellant") entered the former family home where his estranged wife, Hoa Le Duong, was still residing. The apartment was locked, and the appellant used a key he had in his possession to enter. He proceeded to the master bedroom, where he found Le Duong and An Quoc Tran naked and in bed together. The appellant began attacking Le Duong and An Tran by scratching, kicking and punching them. He had come to the apartment armed with a sheathed knife in his coat pocket, but ran to the kitchen to obtain two butcher knives. The appellant returned to the bedroom where he stabbed Tran in the chest. He then phoned his godfather to say "I caught them", after which he slashed Le Duong's hand, threatened to kill her, and slashed her across the face while asking her "[a]re you beautiful?" The appellant then stabbed Tran several more times (resulting in 17 stab wounds, 7 of which were lethal).

At a judge-alone trial, the appellant was acquitted of murdering Tran and convicted of manslaughter, based on the defence of provocation. The appellant was also convicted of aggravated assault against Le Duong and was acquitted of her attempted murder. The Crown only appealed the manslaughter conviction, and this appeal was allowed; the Court of Appeal substituted a verdict of second degree murder.

The Supreme Court commenced its analysis by noting that provocation is a defence which only applies to murder, and it acts as a partial defence only by reducing what would otherwise be murder to manslaughter (at para. 9). Although it is now codified in section 232 of the *Criminal Code*, R.S.C. 1985, c. C-46, the provocation defence originally developed under the common

law. The defence was meant to recognize that killings committed in circumstances where the accused was acting out of sudden rage or passion were "less morally reprehensible than deliberate "cold-blooded" killings" (at para. 13), and should be treated less harshly (particularly as the punishment for murder at the time was death). Certain categories of "provocative events" developed over time, and were highly steeped in notions of honour. The categories included adultery, or more specifically, "a husband catching a man in the act of adultery with his wife", which was seen as a provocative event because "jealousy is the rage of a man, and adultery is the highest invasion of property" (at para. 15, citing *R. v. Mawgridge* (1707), Kel J. 166, 84 E.R. 1107 at 1115). Killing one's wife for adultery was not a recognized category to which provocation applied, however.

Over time, the categorical approach to provocation waned, and the defence came to include both objective and subjective elements. The current version of the provocation defence codified in section 232 of the *Criminal Code* reads as follows:

> 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.
>
> (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.
>
> (3) For the purposes of this section, the questions
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> (*a*) whether a particular wrongful act or insult amounted to provocation, and
>
> (*b*) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,
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> are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being. …(emphasis added)

Justice Charron noted a number of cases where the provocation defence had variously been described as having 2, 3 or 4 elements, and eventually she settled (at para. 23) on the following formulation from *R. v. Thibert*, [1996] 1 S.C.R. 37 at para. 4:

> First, there must be a wrongful act or insult of such a nature that it is sufficient to deprive an ordinary person of the power of self-control as the objective element. Second, the subjective element requires that the accused act upon that insult on the sudden and before there was time for his passion to cool.

Beginning with the objective element, Justice Charron set out 2 sub-requirements: "(1) there must be a wrongful act or insult; and (2) the wrongful act or insult must be sufficient to deprive an ordinary person of the power of self-control" (at para. 25). She focused on whether this was a case where there was no provocation in objective terms because the victim was acting on a "legal right" at the time of the killing.

Based on the case law referred to by Justice Charron, "legal right" is not coterminous with all conduct not specifically prohibited by law, rather it "serves to carve out from the ambit of s. 232 legally sanctioned conduct which otherwise could amount, in fact, to an "insult"" (at para. 27). She noted that this approach had been criticized by Professor Kent Roach in the context of domestic violence cases, who argued that "people have a legal right to leave relationships and even to make disparaging comments about ex-partners, [and] [t]he Court's continued refusal to recognize this broader interpretation of a legal right could deny women the equal protection and benefit of the law" (*Criminal Law*, 4th ed. (Toronto: Irwin Law, 2009) at 359, cited at para. 28). For Justice Charron, this argument was "better addressed" at the stage of determining whether any insult was "of sufficient gravity to cause a loss of self-control, as objectively determined", rather than in terms of whether there was an insult in fact (at para. 29).

The Court then discussed the usage of the term "ordinary person" rather than "reasonable person" in section 232 of the *Code*. Justice Charron noted that the two terms are often used interchangeably, but remarked (at para. 30) that one would not normally think of a "reasonable" person committing homicide or attracting legal liability for his actions. "Ordinary" person, on the other hand, "reflects the normative dimensions of the defence; that is, behaviour which comports with contemporary society's norms and values will attract the law's compassion" (at para. 30). The ordinary person standard has also evolved "so as to account for some, but not all, of the individual characteristics of the accused" (at para. 32), and "must be informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the *Canadian Charter of Rights and Freedoms*" (at para. 34). Justice Charron contrasted a couple of interesting examples:

> it would be appropriate to ascribe to the ordinary person relevant racial characteristics if the accused were the recipient of a racial slur, but it would not be appropriate to ascribe to the ordinary person the characteristic of being homophobic if the accused were the recipient of a homosexual advance.

As for domestic violence, "there can be no place in this objective standard for antiquated beliefs such as "adultery is the highest invasion of property" …, nor indeed for any form of killing based on such inappropriate conceptualizations of "honour"" (at para. 34). Overall, the ordinary person standard is to be contextualized, but not completely individualized, in order to uphold "the cardinal principle that criminal law is concerned with setting standards of human behaviour" (at para. 34).

Justice Charron then discussed the subjective element of the provocation defence, breaking it down into two components: "(1) the accused must have acted in response to the provocation; and (2) on the sudden before there was time for his or her passion to cool" (at para. 36). There must be sufficient evidence to provide an air of reality to each of the objective and subjective elements of the defence (at para. 41).
Applying this test to the facts, Justice Charron agreed with the Court of Appeal that the requisite air of reality to the provocation defence was absent in this case.

In terms of the objective element, Justice Charron held (at para. 44) that there was no "insult" as required by the defence (a "wrongful act" not being alleged here). Oddly, given her focus on the "ordinary person" in discussing the application of provocation in the context of domestic violence, she based this conclusion on the ordinary meaning of "insult" rather than whether any insult was "sufficient to deprive an ordinary person of the power of self-control". Justice Charron

adopted the conclusion of Justice Connie Hunt of the Alberta Court of Appeal that "[n]othing done by the complainant or the victim comes close to meeting the definition of insult. Their behaviour was not only lawful, it was discreet and private and entirely passive vis-à-vis the [appellant]. They took pains to keep their relationship hidden. ... Their behaviour came to his attention only because he gained access to the building by falsely saying he was there to pick up his mail" (*R. v. Tran*, 2008 ABCA 209 at para. 17, cited at para. 44).

On the subjective element, Justice Charron focused on the fact that there was no "sudden" discovery by the appellant – he had suspected his estranged wife of having a new lover, had engaged in surveillance of her activities, and had told his godmother the night before the incident that he knew who his wife was involved with (at para. 45). Although the trial judge had found "[o]utward excitement and anger" on the part of the appellant (at para. 46), this was not sufficient to establish the requisite loss of self-control, as the appellant had also acted with deliberation. Accordingly, the appellant's conviction for second degree murder was upheld by the Supreme Court.

Comment

I find it unfortunate that Justice Charron focused on whether there was an "insult" in assessing the appellant's conduct objectively, when earlier in her judgment she had said that Roach's argument about provocation and domestic violence was "better addressed" to whether the ordinary person test was met. In that earlier passage (paras. 28-34), she seemed to indicate that adultery would not meet the ordinary person test *as a matter of law*, and that the provocation defence would not lie in these circumstances. By focusing on whether there was an insult *as a matter of fact* at the time of applying the test for the provocation defence, it seems that Justice Charron may have diminished the impact of the judgment.

Even if the holding in the case does extend to the proposition that adultery fails to meet the ordinary person test for provocation – in other words, an ordinary person should be able to retain self-control in these circumstances and murder will not be excused – this does not sufficiently limit the provocation defence in the domestic violence context. The Court did not go so far as to say that equality requires that provocation should *never* be available to reduce domestic homicide to manslaughter, which would have been the preferable outcome.

As things stand, it appears that the provocation defence is still available in some domestic violence cases. In *R. v. Stone*, [1999] 2 S.C.R. 290, provocation was raised as an alternative to automatism in a case where the accused stabbed his wife 47 times and killed her after she had berated him during a road trip. The automatism defence failed, but the accused was convicted of manslaughter rather than second degree murder based on the jury's acceptance of provocation. It appears that the Crown did not appeal the conviction for manslaughter; its appeal was based on the argument that the accused should not have received credit for provocation as a mitigating factor at the time of sentencing if provocation had already been used to reduce murder to manslaughter at the stage of conviction. The accused also appealed in *Stone*, seeking a new trial on the basis that the automatism defence had not been properly left with the jury. A majority of the Supreme Court (per Justice Michel Bastarache) rejected the accused's appeal and upheld his conviction for manslaughter. It also held that the sentencing judge had not improperly "double-counted" provocation as a mitigating factor (at para. 234) and had sufficiently considered the domestic context of the homicide as an aggravating factor (at para. 242). The Court does not refer to *Stone* in *Tran*, another indication that it intends to leave the provocation defence open in some domestic violence cases.

As I noted in my comment on the Alberta Court of Appeal decision in *Tran*, the Women's Legal Education and Action Fund (LEAF) recommended that the provocation defence be abolished altogether in a 1999 report. LEAF argued that the repeal of the provocation defence was consistent with the *Charter*'s guarantees of equality and security of the person. At the same time, LEAF called for an expansion of the definition of self-defence that would justify the use of defensive or protective force, including circumstances where there was "coercion by physical force or threats of physical force" (at p. 1). This recommendation was intended to recognize that women are often accused of domestic homicide in circumstances where self-defence is at play.

There is actually very little in the Court's judgment in *Tran* that acknowledges the reality of domestic violence or the gendered nature of this form of violence. Further, Justice Charron twice refers to the events in question as "tragic" (at paras. 5 and 45). This language was also employed in another family violence decision of the Supreme Court released in November 2010, *de Montigny v. Brossard (Succession)*, 2010 SCC 51. In *de Montigny*, Justice Louis LeBel used the word "tragedy" or "tragic" eight times to describe a triple murder / suicide committed by a man against his former wife and children. Domestic violence must be seen as involving more than "tragic" events in individual families or relationships. This language fails to convey the prevalence and systemic nature of this form of violence as well as the vulnerability of women and children, particularly post-separation. On the anniversary of the Montreal Massacre, this is a point that we would all do well to remember in our reflections on violence against women.