

## Self – defence

### Brief notes and examples

#### Relevant sections of the Crimes Act:

#### **S58 Assault with intent to commit a serious indictable offence on certain officers**

Whosoever:

- assaults any person with intent to commit a serious indictable offence, or
- assaults, resists, or wilfully obstructs any officer while in the execution of his or her duty, such officer being a constable, or other peace officer, custom-house officer, prison officer, sheriff's officer, or bailiff, or any person acting in aid of such officer, or
- assaults any person, with intent to resist or prevent the lawful apprehension or detainer of any person for any offence shall be liable to imprisonment for 5 years.

#### **S418 Self-defence—when available**

- 1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.
- 2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary:
  - a) to defend himself or herself or another person, or
  - b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or
  - c) to protect property from unlawful taking, destruction, damage or interference, or
  - d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,

and the conduct is a reasonable response in the circumstances as he or she perceives them.

#### **S419 Self-defence—onus of proof**

In any criminal proceedings in which the application of this Division is raised, the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence.

#### **S422 Self-defence—response to lawful conduct**

This Division is not excluded merely because:

- 1) the conduct to which the person responds is lawful, or
- 2) the other person carrying out the conduct to which the person responds is not criminally responsible for it.

#### **Assumed Facts**

A young man runs from a distance and crash tackles a police officer who is standing beside a squad car, making a telephone call on his mobile phone, and wearing full police uniform.

The police officer is on the scene with other police officers in response to a call about an intruder on private property. The police dog handler is also on the scene, and the police dog is being used to subdue the intruder.

Can the young man who crash tackles the police officer plead self defence?

- He had been drinking,
- It was a very dark night and a dark area,
- He had been walking with a friend but had become briefly separated from the friend,
- He heard his friend yelling and screaming in pain,
- He thought his friend was being attacked and was in need of assistance,
- He saw a person where the sounds were coming from and he thought that person was involved in the attack,
- In response to his fear that his friend was in need of assistance he crash tackled the person,

- He did not know the person was a police officer,
- Only after he fell to the ground and had another police officer on his back did he look up and realise it was police,
- Once he realised it was police he did not resist but allowed himself to be cuffed and arrested.

There is no evidence contradicting the young man's evidence that he thought his friend was in grave and immediate danger and that what he did was in response to the danger as he perceived it to be.

Taking into account the onus of proof in a criminal prosecution, having raised the defence the onus is then on the prosecution **to disprove it beyond reasonable doubt**. The court does not have to make a decision as to whether to believe the young man or not; the court does not have to be satisfied that what he says is true; it is sufficient that he has raised the defence and it is then up to the prosecution to disprove it.

The principle is set out in **Katarzynski** [2002] NSWSC 613 at para [23] and **Dziduch** (1990) 47 A Crim R 378 as follows:

Taking into account the onus of proof in a criminal prosecution, to negative a defence of self defence, once raised, the prosecution must establish either that:

- The accused did not genuinely believe that he did what he did in self-defence,
- OR
- That the accused did not believe that what he did was a reasonable response to the danger, as he perceived it to be.

The first leg of the test is completely subjective. It is insufficient for the Crown to prove that the belief of the accused was unreasonable: **Katarzynski**.

The second leg of the test is whether the conduct of the defendant was a reasonable response in the circumstances as he or she

perceived them. It is partly subjective and partly objective – subjective as to the perceived danger and surrounding circumstances, including the need for a response, and objective as to the proportionality of the response.

To negative the defence the Crown must adduce evidence that the belief that the friend was in danger was unreasonable. It also must adduce evidence that crash tackling the imagined assailant (i.e. the police officer) was not a reasonably proportionate response to the perceived danger.

The test relates to whether the defendant's actions were reasonable, not to whether a reasonable man would have done the same thing: **Conlon** (1993) 69 A Crim R 92. As a result s. 428F Crimes Act does not apply (intoxication in relation to the reasonable person test), and the court can take into account characteristics of the defendant such as intoxication: **Conlon**.

In **Katarzynski** the Crown argued that intoxication should not be taken into account (at para 23) **in relation to the proportionality** of the accused's response (at para 23). Howie J accepted that argument. In this case there was no evidence from the Crown as to the unreasonableness of the proportionality of accused's response.

In **Katarzynski** Howie J directed the jury that they must take into account the accused's intoxication when considering whether he might have believed that it was necessary to act as he did in defence of himself and when considering the circumstances as he perceived them: **Katarzynski** at para [28].

The intoxication of the accused is relevant to all the factors to be taken into account except for the proportionality of the force that he used. The accused did not use a weapon. He did not arm himself. He used only his bare body against an opponent who

was heavier and taller than himself. When on the ground, prior to being subdued and for the few seconds before he realised the police were involved he did not use excessive force.

Once self defence is raised in the evidence, the Crown must satisfy the court that the defendant was not acting in self-defence beyond reasonable doubt: s 419 Crimes Act.

It matters not whether the court thinks there might be some doubt as to whether the accused knew or did not know it was the police, or that there is some doubt that the accused felt it was reasonable to respond

as he did, it is for the Crown to satisfy the court beyond reasonable doubt that either the accused did not believe his friend was in danger, or that he did not believe that his response was reasonable, in the circumstances as he perceived them, and that the proportionality of his response was unreasonable.

In a situation where the evidence of the accused is uncontested as to his state of mind, and there are some objective features that support that evidence then the defence is highly persuasive.

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