Self Defence in NSW

s418 - 423 Crimes Act (NSW) 1900

The laws of NSW recognise the right of a person to act in self-defence from an attack or threatened attack. Self Defence (or Defence of another) is raised in most assault matters in the Local Court. However, many advocates appear to be unaware of the legislative basis or the legal test applied in deciding this question of fact. This article is designed to assist practitioners appearing in the Local Court of NSW.

Legislation

Section 418(1) *Crimes Act (NSW) 1900* provides that a person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence. Section 418(2) sets out the circumstances where self-defence is available. The section provides two tests – both of which must be satisfied.

The questions to be asked by the finder of fact under s 418(2) are succinctly set out in *R v Katarzynski* [2002] NSWSC 613 at [22] - [23]:

1. Is there is a reasonable possibility that the accused believed that his or her conduct was necessary in order to defend himself or herself; and,
2. If there is, is there also a reasonable possibility that what the accused did was a reasonable response to the circumstances as he or she perceived them.

The First Test

Did the defendant <u>subjectively</u> believe the conduct was 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.

This requires consideration of the circumstances of the case and the background of the defendant and the victim[1]. The defendant may have been assaulted previously in similar circumstances. The fact finder must also take into account the defendant's level of intoxication (see below).

The Second Test

If the Subjective Test is answered in the affirmative, the finder of fact must then ask whether the conduct was:

'*a reasonable response in the circumstances as he or she perceives them*.'

1 R v Cakovski (2004) 149 A Crim R 21

The fact finder must determine what a reasonable person might do, not in the objective circumstances, but in the circumstances subjectively perceived by the defendant. This perception may be affected by alcohol or other drugs (see Intoxication below).

The magistrate is required to give reasons as to why the conduct was or was not reasonable within that subjective perception. The advocate should be properly prepared and ready to give those reasons and counsel the magistrate away from prejudice and extraneous matters – like media attention on 'alcohol fuelled violence'.

Defence or Right?

'Self-Defence' isn't really a defence in the legal sense. Usually, the defendant would carry the onus of raising and proving a defence. However, section 419 provides that the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence. So, it is up to the police to eliminate it as an issue by proving beyond reasonable doubt that the defendant's act was not done in self-defence.

The police will negative self-defence if they prove beyond reasonable doubt either:[2]

(i) that the accused did not genuinely believe that it was necessary to act as he or she did in his or her own defence, or
(ii) that what the accused did was not a reasonable response to the danger, as he or she perceived it to be.

The Intoxication Issue

Katarzynski was wrongly decided on the point of intoxication. Howie J held that for the second test (whether the defendant's actions were reasonable as they perceived them), the self-induced intoxication of the accused was irrelevant.[3]

This is contrary to both the statute and the previous common law position.[4] Section 418(2) clearly states that the test is whether the response was:

> *'a reasonable response in the circumstances <u>as he or she perceives them</u>.'*

The underlined words would necessarily require the fact finder to have regard to the intoxication of the defendant as this would affect his perception. This may be contrary to our government's rhetoric on 'alcohol fuelled violence' but, until it is changed by an act of parliament, it will continue to be the law of New South Wales.

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2 R v Katarzynski [2002] NSWSC 613 at [23]
3 R v Katarzynski [2002] NSWSC 613 at [21]
4 R v Conlon (1993) 69 A Crim R 92