

# Australian legal reasoning and methods: donker manslaughter case

[Experience](#), [Laughter](#)



**The overview.**

The facts of the case involve the accused, Donker and the Crown on the charge of manslaughter of her husband, Powell. The events of 7<sup>th</sup> of January 2017 and overnight is the product of a history of violence in their relationship leading to the death of Powell. In August 2014 to November, Powell was imprisoned for illegally trafficking ice, possession of MDMA, guns and prohibited weapons. During Powell's 15 months of imprisonment, Donker was successful in recovering her life by being sober, obtaining a stable job, joining social events, rent a property and take custody of her children. However, Powell's imprisonment came to an end and Donker's life failed to maintain as she lost the things she obtained when Powell was away, including parenting rights of her five-month old baby.

Croucher highlighted that although she may have intent to frighten him, the cause of Powell's death was indeed unforeseeable. There was no correlation from her driving towards him to the pole and the sign falling and splitting his head resulting in death. In doing this, he clarified that Donker can only be charged for driving towards Powell four times, with each time she should have considered how excessive and dangerous the act was. Donker has also admitted to loss of self-control during the incident, which is explained as a result of abuse caused by Powell.

As domestic violence was prevalent in the relationship, the facts cannot be seen objectively from an ordinary person's perspective. Upon seeing the events leading up to the incident, the circumstances made it likely that Donker believed he may assault her again. For such a person to be

provoked, an ordinary person would be expected to act in the way Donker did and lose self-control <sup>[1]</sup>. This was explicitly seen by how Powell invaded Donker's car and privacy, grabbing her hair, screaming abuse at her and using physical violence such as punching her face. <sup>[2]</sup> Croucher stated that Donker's moral culpability is understandably and substantially reduced as a result. In his judgement, he considered the factors and suggest the gravity and moral culpability of the act of driving towards Powell repeatedly was of a lower level and the inadvertent collision of the pole causing his death was not to Donker's intention, which was to frighten him.

### **Legal issues raised.**

Croucher noted that the punishment should not only reflect the gravity of the crime, but also to deter and denunciate others from aggravated behaviours that could potentially endanger others. Although Donker was subjected to the hardships of provocation and family violence, the punishment will nevertheless reflect that a person's life has been taken and the effect of other family members involved. This was considered on the basis of the victim statements submitted by Powell's family, and the consideration of their children losing a father. As a judge, Croucher had to find an appropriate sentence that would uphold the severity of Powell's death and its impact, to the position of Donker who had been abused and affected by the incident that has happened.

### **Legal reasoning employed by Judge Croucher**

Unlike other manslaughter cases, the mitigating factors were highly regarded and Croucher did not aim to impose a harsh sentence of severity

for Donker. Croucher deliberated on the current sentencing practices, and whether the outcome of previous cases can help determine an appropriate punishment for manslaughter committed by women with domestic violence backgrounds. In research of statistics of previous prison sentences for manslaughter, Croucher did not find relevance as the cases studied were not distinguishable according to how the sentence was considered. To use such statistics, it would result in an unfair comparison as the seriousness, mitigating factors, whether there was a plea of guilt and form of the offence will not be identifiable in comparison to Donker's case. However, this was used as a general guidance.

The main case of *R v McLaughlin* <sup>[3]</sup> was used in consideration as it referred to similar material facts. The case highlighted that there was no premeditation to the crime, to which was fuelled by anger as a response to the deceased's initial attack. The defendant's partner physically hit, kicked, slapped, grabbed her neck and throat and threw a glass tube at her. Similarly, there was a history of abuse, violence, use of force and mental instability in comparison to *Donker*. <sup>[4]</sup> Due to the provocation and abuse, it played a factor in reducing her moral culpability for the offence charged in *McLaughlin*. The judgement imposed a prison sentence of 537 days in combination with two years' Community Correction Order. Although Mr Rochford (Prosecutor) and Mr Tiwana (Defence) both made valid arguments in discussion of distinguishing the case, the case was unlikely to be considered based on the nature of this offence and mitigating factors. Croucher's intention in utilising the case and statistics was not to seek a

precedent for sentencing or for it to be distinguished. It is to 'gauge' how the sentence came to be upon the mitigating factors and whether it can be applied similarly to *Donker*<sup>[5]</sup>. Croucher was likely unable to use *McLaughlin* because provocation (of domestic violence) varies in each case. It is difficult to use precedent in crimes committed by domestic violence, even if the material facts are similar, 'it is not identical'<sup>[6]</sup>. As such, Croucher is to determine the sentence using solely the facts and circumstances provided to reach an appropriate sentence.

Suspended sentencing were discussed as an appropriate consideration if it was still available today. The case of *R v Denny*<sup>[7]</sup> and *R v Gazdovic*<sup>[8]</sup> were examples of lenient prison sentences due to the offenders background of domestic violence and abuse, both being charges of manslaughter. However, Croucher states judges are unable to impose such penalties due to the rise in offences and manslaughter in recent years. As a result, there is a prioritisation for harsher sentencing to deter people from offending. He highlights that this can be a problem in deserving cases such as *Donker's* where there is a substantial prospects of rehabilitation based on her actions proving remorse. Remorse was seen through her early plea of guilty (which she may have been acquitted should she did not), the reaction and call for help at the time of incident, and statement of submissions from her family and forensic psychologist report<sup>[9]</sup>.

**Outcome of the case.**

In reflection of the above mentioned cases, Croucher determined that they will not be considered directly to Donker's case. However, the background of hardship and abuse Donker has been subjected to leading towards the incident will be considered with substantial weight in his sentencing.

Croucher has regarded section 36(2) of the *Sentencing Act 1991* <sup>[10]</sup> and states irrespectively that a fixed term of imprisonment and non-parole period will be ideal to adequately satisfy the purposes of sentencing while acknowledging the various forms of sentencing practices today. The sentencing of Donker was considered with regards to her early plea of guilty, significant remorse shown, good character, limited prior convictions and good rehabilitation prospects. Croucher sentenced Donker to five years' imprisonment with a period of two years' non-parole. Although the non-parole period is usually greater in cases of manslaughter, he has taken in consideration prior plea of guilty and strong rehabilitation aspects with belief that she will benefit from returning to the community as early as possible with the help of supervision and assistance from parole authorities. In relation to her driver's license, Croucher has charged 24 months of disqualification in order for her to be able to return to the community (upon grant of parole) without any disadvantages to everyday life.

## Part 2

The justice system has inadequate processing approaches to investigate cases of manslaughter for women subjected to violence by their partners. In *R v Donker*, the case highlights the difficulties in sentencing family violence

homicides. Provocation was the main approach in which Croucher used to reach an appropriate sentence based on the evidence of family violence and incidents leading up to the death of Powell. Criticisms of provocation will be discussed as to why the abrogation was necessary. The question of why self-defence is not as frequently used for defences of murder or manslaughter, is evaluated to understand the weaknesses appropriate to defendants with family violence backgrounds.

### **Provocation Reforms from 2005.**

Prior to 2005 <sup>[11]</sup>, elements of provocation are to be established:

1. There was evidence of provocative conduct by the victim;
2. The defendant lost self-control as a result;
3. The provocation was such that it was capable of causing ordinary person to lose self-control and form intention to cause serious bodily harm; and
4. The provocation must actually deprive the defendant of self-control and defendant must of acted while so deprived and before his/her passion cooled. <sup>[12]</sup>

Upon the amendment of *the 2005 Act*, provocation is abolished under and included in section 3B of the *Crimes Act 1958* <sup>[13]</sup>. The rule originally allowed for charges of murder to be reduced to manslaughter if the defendant had met the elements of provocation. The abolition of the rule was subject to misuse of the defence, as it was commonly used by men who killed their female partner in situations of trying to end the relationship or

circumstances of infidelity <sup>[14]</sup>. In contrast, provocation raised by women have usually been subjected to physical or sexual violence by their partners. As such, reforms in Victoria have been made to address concerns of gender bias in legal responses to domestic homicides <sup>[15]</sup>. The VLRC Homicide report states that the purpose of abolishing provocation is to prevent men who kill their sexual partners to receive significantly reduced murder sentences just because they were provoked <sup>[16]</sup>. Today, provocation is only used as a mitigating factor in Victoria's jurisdiction for criminal offences.

### **Using provocation during sentencing.**

The provision which provides for admission of evidence to family violence cases is stated in Section 322J(1) <sup>[17]</sup> which clarifies the nature of relationships and impact of violence within social and psychological contexts. In doing so the cumulative effect of family violence on individuals and dynamics of abusive relationships can be used in context to determine whether the offenders response was disproportionate. The evidence can assist a jury and judge to understand how a defendant came too subjectively perceive and react in criminalising behaviour, whether the threat was immediate or not. While this does not necessarily reduce the offenders culpability, it enables the consideration of such circumstances when the judge imposes a sentence. In allowing this, courts have more flexibility to approach and determine the provocation in the particular case, should this be substantial, it will reduce the offenders sentence.



**Criticisms.**

The issue of provocation is that there is no universal or permanently applied legislation that can be implemented as it derives from a subjective view of the aggravating and mitigating facts, which varies from case. Judges are to rely principally on the material facts and mitigating factors to reach a conclusion of whether the circumstances leading to provocation is valid and impose an appropriate sentence <sup>[18]</sup>. Due to this, cases of this nature lack consistent approaches in reaching sentencing outcomes.

A criticism is that provocation relies too much on the subjective test, that it is difficult for prosecutors to negate beyond reasonable doubt. In a sense, the prosecution has to prove that the defendant's conduct is premeditated or without deprivation of self-control. The subjective test refers to the mental state of a hypothetical reasonable person, whom is acting in the accused perspective <sup>[19]</sup>. In combination with the objective test, it will be too difficult to explain and expect the jury to comprehend.

Jury's are more inclined to favour manslaughter, even if other legal constructions are available <sup>[20]</sup>. This is because the element of provocation has become a ' half-way' option for jurors and thus ' absolves the jury from grappling the big question of guilty of murder or acquittal' <sup>[21]</sup>. In a study mentioned in Tarrant (2018), " five of nine manslaughter convictions and two of four defensive homicide convictions resulted from guilty pleas". While four cases involving Aboriginals, three convictions were result of guilty plea.

These cases were all a response to provocation by intimate partner violence.

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This is especially problematic because women are forced to be constrained to charges of manslaughter or attempt to argue self-defence. Neither options are ideal. If they choose to argue for self-defence, it will be difficult to raise as self-defence tests operate unjustly for women <sup>[22]</sup>. However, should they plead guilty to manslaughter prior to trial, it will also reduce their sentences. This may be why manslaughter is more often criminally charged than self-defence.

Although the reform has acknowledged family violence as admissible evidence, its significance in the consideration of sentencing is often not used with substantial weight. Studies by the *DVRCV* (2016) discussion paper show case studies that evidences of family violence are frequently dismissed due to insufficient standards of proof <sup>[23]</sup>. This issue will implicate future cases as even upon the success of deducing provocation, it will not guarantee an acquittal nor leniency as the weight of the evidence is dependent on the judges subjective view.

### **Self-defence as a comparative option.**

In *R v Donker*, Croucher highlighted that self-defence could have been validly argued on the basis that the cause of death was not 'dangerous in the sense of law', that 'her actions did not cause death' and that an acquittal would have been granted <sup>[24]</sup>. The defence counsel may have considered the test of self-defence was difficult to argue. As the 'sequence of events on the morning of the incident was not entirely clear', in between Powell pulling her hair, hit her in the face and screaming abuse, it may be argued by the

prosecution that it was not evidently clear he was going to cause really serious injury or death <sup>[25]</sup> .

Section 322M of the *Crimes Act* highlights the test in which family violence circumstances can be considered as self-defence <sup>[26]</sup> . Where relevant evidence of violence can be used to determine if a person has committed the offence on reasons of self-defence or a reasonable response in the circumstances of harm that is not immediate or use of force in reaction to harm or threatened harm. This is in accordance to section 322K(3) that the conduct is to be necessary to defend infliction of death or really serious injury <sup>[27]</sup> . However, women who kill to protect themselves from serious harm or death because of ongoing domestic violence have difficulties in raising self-defence <sup>[28]</sup> . This is established in section 322I, where the accused has the onus of raising self-defence under situations of duress or extraordinary emergency events, to prove a reasonable possibility that it did occur <sup>[29]</sup> . Respectively, section 322I(2) highlights that once the accused raises evidential facts of self-defence, the prosecution is to prove beyond reasonable doubt that the accused did not carry out the conduct in self-defence <sup>[30]</sup> . The case of *Edwards v State Trustees* <sup>[31]</sup> highlights that the accused was a victim of family violence, and that there was an intention to kill the deceased or to cause him serious injury. Importantly, she accepted that while her conduct was unlawful, she believed it was necessary to defend herself from infliction of death or serious bodily injury. However, she did not have reasonable grounds to support this. The judge stated that the

defendant's response was due to her emotional state, disarming at him once and seeing he was aggravated, overwhelmed her sense of judgement and thus stabbed him with a knife because of fear. On comparing the statement the defendant provided and the forensic evidence, the sentencing judge found the circumstances 'improbable' where the wounds she inflicted was a disproportionate response to the alleged threat made by her husband at time of incident <sup>[32]</sup>. The sentencing judge imposed seven years imprisonment and non-parole of four years for manslaughter. As seen, it is difficult to determine a reasonable response by the subjective view of the defendant who has suffered years of abuse and psychiatric illness <sup>[33]</sup>. Although this case is distinguishable to *R v Donker*, it provides the element of causation of death, was excessive, lethal and directly correspondent to the accused, rather than Donker's intention which was only to threaten him by driving towards him.

In most cases of female defendants, self-defence is hard to raise due to physical body structures being weaker or smaller compared to males, leading them to use other methods such as when their abusive partners are asleep or have their guard down <sup>[34]</sup>. Other methods such as using weapons can also be seen. In such circumstances, the test of self-defence appears to be disproportionate to the threat and is therefore deemed unreasonable. However, this may be irrelevant to *R v Donker*, as Croucher said that previous violence and abuse by the deceased, as well as the substantial remorse provided, should be sufficient to persuade the jury did she not plead guilty early on.

**Legal impact.**

In having provocation as part of the sentencing process, its importance of deterrence and denunciation will be reduced than if it was a crime to be guilty of. As a result, this will encourage the emphasis on offender's rehabilitation once they return to society and community. However, should there be cases of serious violence that remain disproportionate to the act, the sentence will reflect more reliably on deterrence and denunciation and will not be subjected to reduce the offenders culpability <sup>[35]</sup>. This denounces people within the community that they should not resort to excessive means because of traditional reasons such as to the killing of your partner because of jealousy or the desire to control the other person (regardless of the fact that this has occurred in the past). Flexibility is a key element that will enable courts to devise an appropriate sentence based on the material facts of the specific case.

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### Part 3

In general, I was determined to have a topic in relation to Domestic Violence as it was a strong interest ever since my undergraduate degree in Legal and Dispute studies. However, there was no particular topic within the case study that immediately struck out to me. After writing part 1 of the assignment, I found it easier to see the issues which i could investigate further. At first, I approached the topic of provocation as Croucher mentioned it many times.

In researching cases dealing with provocation and manslaughter, I attempted to use Advance Lexis to see whether there was any recent cases which have cited or mentioned R v Donker but failed to find any. By looking at mentioned cases in journal articles such as R v Kells 2012 VSC 53 and using 'cases considered' in the online database, It minimised a lot of time and helped find a relevant case for my argument.

In attending the library classes, I was able to learn to prioritise terminology using annotation marks and use ('\*') to enable search terms with various endings. I attempted to search for secondary sources such as peer reviewed articles using Google Scholar. Terms like "*Provocation in sentencing women*" and "*Family violence as defence "provocation"*" were very successful. I found that both of these search terms was more effective than using "*provocation and manslaughter*" which was too broad and did not necessarily relate to family violence. Another problem I encountered was a lack of current journal articles within the past five years. In trying to find recent articles, i would try to amend the data range from 2010 onwards, and had better results. I resorted to finding legislative reforms for more information.

To grasp a better concept of provocation in family violence manslaughter cases, I used Google to find general information about the timeline of its legislative history. In doing so, I was able to find information within the Sentencing Advisory Council (“SAC”) and Domestic Violence Resource Centre Victoria (“DVRCV”). Using discussion papers and summary reports from the SAC and DVRCV, gave me plentiful information in regards to the social concerns of the community and justice system to lead to the abrogation of provocation. I delved into the Crimes Act 1958 for further clarification on how the implementation of the abolishment would mean for female defendants in family violence. This provided me to go forward with a statement by Croucher in Donker’s case, that she could have applied for self-defence and obtained an acquittal.

The time I spent on researching was significantly more than writing. Although I found my topic fairly quickly, it was hard to reach an argument of my own. I originally was in the position that provocation should be made available for female offenders, but this will greatly impact the concerns of gender bias and misuse of the defence. This was also stated statistically, which made me change my perception to analysing other current defences available for female offenders in family violence. Objectively, I believe I should have chosen one defence, either self-defence or provocation, and provide a deeper understanding in that aspect. As the word limit was restricted, it was difficult to include all the information that I found for both self-defence and provocation.

Total word count: 3500.

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[1] *R v Jessie Donker* [2018] VSC 210, [71] (*'Jessie Donker'*).

[2] *Ibid*, [21].

[3] *R v McLaughlin* [2016] VSC 189 (*'McLaughlin'*)

[4] *Jessie Donker* (n 1) [136]-[137].

[5] *Ibid* [142].

[6] *Ibid*.

[7] *R v Denney* [2000] VSC 323.

[8] *R v Gazdovic* [2002] VSC 588.

[9] *Jessie Donker* (n 1) [99]-[105].

[10] *Sentencing Act 1991* (Vic) s 36(2).

[11] Abrogation of provocation came into force on and after 23 November 2005 under *The Crimes (Homicide) Act 2005*, (*'the 2005 Act'*).

[12] Felicity Steward and Arie Freiberg, 'Provocation in Sentencing: Second Edition' (Research Report, Sentencing Advisory Council, July 2009).

[13] *Crimes Act 1958* (Vic), s. 3B, s. 322I - 322M (*'the Crimes Act 1958'*).

[14] Debbie Kirkwood, *Out of character? legal responses to intimate partner homicides by men in Victoria 2005-2014* (Collingwood, Vic. : Domestic Violence Resource Centre Victoria, 2016) 96.

[15] Domestic Violence Resource Centre Victoria, *Justice or Judgement? The impact of Victorian homicide law reforms on responses to women who kill intimate partners* (Discussion Paper No 9, 5-55. See page 5-6 for further information.

[16] Steward and Freiberg (n 12) see page 85 of para 8. 10. 86.

[17] the *Crimes Act 1958* (n 13).

[18] *R v Jessie Donker* (n 1) [142].

[19] Andrew Hemming, 'Provocation: A totally flawed defence that has no place in Australian Criminal Law Irrespective of sentencing regime.' (Pt 1) (2010) 14 *University of Western Sydney Law Review*, 8.

[20] Stella Tarrant, 'Self defence against intimate partner violence: Let's do the work to see it' (2018) 43(1) *University of Western Australia Law Review* 196-220.

[21] *Ibid* 212. (Bradfield)

[22] *Ibid* 211.

[23] Kirkwood (n 14) 74-75. A defendant's history of family violence is not always fully recognised in homicide prosecutions. Reasons are that the evidence is not available, or is not adequately collected during police investigation. In some cases, evidence can be excluded from plea negotiations.

[24] *R v Donker* (n 1) [99].

[25] *R v Donker* (n 1) [21] - [22].

[26] the *Crimes Act 1958* (n 13).

[27] *Ibid.*

[28] Debbie Kirkwood and Mandy McKenzie, 'Justice or Judgement? The impact of Victorian homicide law reforms on responses to women who kill intimate partners' (Discussion Paper No 9, Domestic Violence Resource Centre Victoria, 5).

[29] the *Crimes Act 1958* (n 13).

[30] *Ibid.*

[31] *Edwards v State Trustees Ltd and Others* (2016) 54 VR 1, ('*Edwards v State Trustees*').

[32] *Ibid.* 21.

[33] See Ibid 28 [103] for further information in regards to the defendant disclosing alleged domestic violence to medical practitioners, followed by significant history of psychiatric illness, in anxiety and depression. Whether this is linked is unknown.

[34] Tarrant (n 20), page 6 under the subheading self-defence. This point was also made earlier on in the VLRC 2004 report in page 62.

[35] Steward and Freiberg (n 12) see page 20 under para 4. 7. 1 and 4. 7. 2.