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Domestic Violence in the Courts: re-victimising or protecting the victims?

How can a criminal defendant who is also a victim of violence be treated fairly?

1. By the time a person becomes a 'criminal defendant' in this context, he or usually she has used fatal or objectively excessive violence against someone they have been in an intimate relationship.
2. The challenge has been to decide whether the criminal act is excused because of this history or whether it provides the motive for it. And, whether if such a history is proved this should impact upon the sentence to be imposed.
3. The statutory framework now in place in Queensland which has sought to address these very vexed questions including s 132B of the *Evidence Act* (which sought to make it clear that 'relevant evidence of the history of the relationship' is admissible) and more recently s 304B of the *Criminal Code* (where a person guilty of murder in the ordinary sense may be liable to manslaughter only if certain matters including a history of abusive domestic violence are shown). I will examine the impact of both on these questions later and seek to argue why the first was really otiose and the latter is fraught with unintended consequences.
4. It may be useful to look at two examples in which I have had some involvement involving these issues
5. *R v Kina 1993* (unreported) CA 221 of 1993. In 1988, Robyn was convicted of murder, after a trial that lasted less than one day, of murdering her defacto husband on Australia Day 1988. She was Aboriginal and he was white. The evidence presented at her trial were limited to the fact she ran from their bedroom to the kitchen, return with a kitchen knife, knocked away a chair that he was holding and fatally stabbed him. The issue at trial was limited to whether there was any intention to kill him – the trial judge having taken provocation away from

the jury – a decision upheld by the first Court of Criminal Appeal. The jury, on that evidence did not hesitate for long and she was sentenced to life imprisonment.

6. Nearly six years later, another Court of Appeal quashed her conviction and in so doing stated:

'However, the present task, is not to second guess the appellant's lawyers at her trial or to attribute blame for what was done, or not done, in what were, on any view, unusual and difficult circumstances.

It is unnecessary to conduct such an exercise to conclude that the appellant's trial miscarried. That conclusion is inescapable. The legal system for the most part works well, but we must not shut our minds to the reality that sometimes matters go awry and produce a miscarriage of justice. Nor, when that occurs, should we shrink from a frank acceptance of what has occurred and an equal openness and readiness to put it right. In this matter, there were, insufficiently recognised, a number of complex factors interacting which presented exceptional difficulties of communication between her legal representatives and the appellant because of:

- her aboriginality;
- the battered woman syndrome; and
- the shameful (to her) nature of the events which characterised her relationship with the deceased.

These cultural, psychological and personal factors bore upon the adequacy of the advice and legal representation which the appellant received and effectively denied her satisfactory representation or the capacity to make informed decisions on the basis of proper advice.

In the exceptional events which occurred, the appellant's trial involved a miscarriage of justice'

7. What the court was referring to was the extraordinary sexual and physical violence that Robyn had endured over several years; violent forced anal sex during menstruation, permitting gang rapes and extraordinary acts of cruelty.
8. The trial court and the first Court of Criminal Appeal did not hear of any of this evidence or indeed that what triggered her fatal response at the end was his threat to do the same sexual violence to her niece.
9. *R v Mackenzie* 2000 QCA 324. Lorna was a 62 year old grandmother who had lived with her victim for 39 years. One day she cocked a shotgun and discharged it at point blank range, literally blowing her husband's head off as he was sitting on the back verandah of their house. She pleaded guilty to manslaughter and was

sentenced to 8 years imprisonment (rec after 3 years) but later sought to withdraw her guilty plea before the Court of Appeal. She contended that she had wanted to face a murder trial instead and run self-defence; but had been overborne by her trial lawyers. For reasons not bearing examination here today, the Court refused her application. The Court did however reduce her sentence by a 2-1 majority to 5 years imprisonment suspended after she had served 12 months.

10. Relevantly for present purposes: the President of the Court of Appeal observed:

Statements from her three daughters confirmed a long standing pattern of domestic violence based on physical and psychological terror, primarily to the applicant, but also to the daughters. His physical abuse included blows to the applicant's head, face and body; many hits with objects such as a broom handle or rope, on one occasion when she was recovering from a miscarriage; choking; on one occasion holding a knife and on another a broken beer bottle to her throat and pushing her over; kicking her whilst she was on the ground, on two occasions when she was pregnant causing miscarriages. He also subjected the applicant to mental abuse: he threatened to drown her when they were near water, a real threat to her as she is unable to swim; ordered her to take her clothes off; threatened to kill her; forced brutal sexual acts upon her, accompanied by threats of violence to her or the children; verbally belittled her; threatened to burn down the house whilst she was in it; criticised her efforts as a mother; nailed her bedroom door shut from the outside so she could not leave; required her to account for every moment she was away from the house; restricted her contact with other people, even family or friends and especially males; attended all her doctor's visits; demanded that she stay up and cook his dinner regardless of the hour he returned home. The violence usually occurred after the deceased had been drinking.

11. McMurdo P went on to observe:

An important issue for determination is what consideration, if any, the Court should give to the shocking history of domestic violence perpetrated upon the applicant by the deceased where the offence is one of criminal negligence. In my view, the history of domestic violence has considerable relevance and is a significant mitigating factor...

The applicant was a retired school teacher who, as the learned sentencing judge noted, should have known better than to point a cocked gun, even one which she believed was unloaded, in the direction of a human being. She did so in circumstances where she had been drinking, a factor which helps explain but not excuse her foolishness. The deceased's violence on that day and throughout their 39 year marriage further explains how, despite her education and the normal common sense one would expect from a 62 year old teacher, mother and grandmother, she was driven to stupidly pick up the gun, cock it, and point it in the general direction of the deceased, so that when she stumbled it discharged and killed him.

Psychologist Penny Gordon, who interviewed the applicant on a number of occasions and carefully documented her family dynamics and the history of the abuse, noted that one of the impacts on the applicant of the long term abuse and violence in the relationship was that it contributed "to ineffective problem solving behaviour and a perception by [the applicant] of the narrowing of her options over time. A perception of narrowed options can often result in decisions made by the abused woman that from

the outside look like poor judgment."

The history of domestic violence which led the applicant to react in an irrational and criminally negligent way is an additional mitigating factor which explains how she came to depart so gravely from normal acceptable community safety standards.

12. These two cases highlight the issues that often arise in these cases; but of course not the only issues. I suspect that these cases have driven the statutory response as both generated considerable public discussion and disagreement.
13. My sense is however that the legal profession, much like the general community has awoken from the malaise that surrounded consideration of so called 'domestic violence' over the last two decades. There is a much greater acceptance that it occurs and that it is relevant to considerations of criminal culpability. In both cases mentioned above lawyers were criticised for not having fully elicited or appreciated the relevance of domestic violence in representing their clients. But I query whether enlightenment is reflected in the discharge of responsibilities in this regard. Section 132B makes clear what was always arguable. Namely that when someone uses force the reasons for that use of force must be related to the nature of their prior relationship.
14. Section 304B of the *Criminal Code* is another matter altogether. The intent is noble but it is a poorly crafted provision. I, and most others consulted about this proposal disagreed quite vehemently with the terms of the amendment. We were collectively ignored, as were the raft of women's organisations that were also consulted. The hubris attached to the drafter's of the section in this respect is quite misplaced. I fear that it will result in verdicts for manslaughter against women who have perfectly arguable cases of self-defence. Considerable pressure will be placed upon some of them by lawyers to plead guilty to manslaughter when they may well be acquitted at trial.
15. The fact that Queensland maintains a mandatory sentence regime for murder is the one provision that ought to have been amended to bring it in line with NSW and some other states but successive Attorneys-General in this State have not had the political confidence to do so.

How can our lawyers be up-skilled to secure a fair outcome?

16. There are only a few suggestions that I have for lawyers faced with the task of acting for a defendant in these circumstances:
 - 16.1. Only take on a case like this if you are in a position to spend the time and energy necessary to take instructions as to the history of the relationship.
 - 16.2. Most people in this situation will be traumatised and will need assistance in recounting the history of violence; social workers are invaluable.
 - 16.3. Investigate every assertion that is made and seek to corroborate it by attending medical centres in the area in which the person lived. The client may not remember but records are kept and the power of the subpoena should be used.
 - 16.4. Consult family, neighbours, work colleagues and others that might know about the relationship.
 - 16.5. Carefully consider the elements of self defence and provocation and explain them to the defendant before you embark upon advising him/her to participate in any police interview or if you are retained after charge before you seek to elicit instructions.

17. Most importantly however, don't make any assumptions about human behaviour.

18. The criminal courts show the worst and best of the human condition and since most (but not all) defendants are the poor and often under-educated women, don't judge those who stay to the point of performing a fatal response; rather, see it as the best evidence that the criminal act was probably justified or necessary.