

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Tran, 2010 SCC 58, [2010] 3 S.C.R. 350 | **Date:** 20101126  **Docket:** 33467 |

**Between:**

**Thieu Kham Tran**

Appellant

and

**Her Majesty The Queen**

Respondent

- and -

**Attorney General of Ontario**

Intervener

**Coram:** Binnie, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

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| **Reasons for Judgment:**  (paras. 1 to 47) | Charron J. (Binnie, Deschamps, Fish, Abella, Rothstein and Cromwell JJ. concurring) |

R. *v.* Tran, 2010 SCC 58, [2010] 3 S.C.R. 350

Thieu Kham Tran *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario *Intervener*

**Indexed as:**R. ***v.*** Tran

2010 SCC 58

File No.:  33467.

2010:  May 13; 2010:  November 26.

Present:  Binnie, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

on appeal from the court of appeal for alberta

*Criminal law* — *Defences* — *Provocation* — *Objective and subjective components to provocation* — *Whether estranged wife’s relationship with another man after separating from accused amounted to “insult” sufficient to deprive accused of power of self‑control* — *Whether there was air of reality to accused acting on sudden at time of killing* — *Definition of “insult”* — *Criminal Code*, *R.S.C. 1985, c. C‑46, s. 232.*

The accused had knowledge that his estranged wife was involved with another man. One afternoon, the accused entered his estranged wife’s home, unexpected and uninvited, and he discovered his estranged wife in bed with her boyfriend. The accused viciously attacked them both, killing the boyfriend by repeatedly stabbing him. Having accepted the defence of provocation, the trial judge acquitted the accused of murder, but convicted him of manslaughter. The Court of Appeal allowed the Crown’s appeal and substituted a conviction for second degree murder.

Held:  The appeal should be dismissed.

Provocation is a partial defence exclusive to homicide which reduces the conviction from murder to manslaughter. There is both an objective and a subjective component to provocation in s. 232 of the *Criminal Code*. Once it is established that the wrongful act or insult was sufficient to deprive an ordinary person of the power of self‑control, the inquiry turns to a consideration of the subjective element of the defence, which is whether the accused acted in response to the provocation and on the sudden before there was time for his or her passion to cool.

The “ordinary person” standard is 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*. The accused must have a justifiable sense of being wronged. A central concern with the objective standard has been the extent to which the accused’s own personal characteristics and circumstances should be considered. A restrictive approach to the “ordinary person” approach ignores relevant contextual circumstances. Conversely, an individualized approach would lead to anomalous results if all the accused’s characteristics were taken into account; it would also ignore the cardinal principle that the criminal law is concerned with setting standards of human behaviour.

It is important not to subvert the logic of the objective inquiry. The proper approach is one that takes into account some, but not all, of the individual characteristics of the accused. Personal circumstances may be relevant to determining whether the accused was in fact provoked — the subjective element of the defence — but they do not shift the ordinary person standard to suit the individual accused. There is an important distinction between contextualizing the objective standard, which is necessary and proper, and individualizing it, which would only serve to defeat its purpose.

The subjective element of the defence of provocation focuses on the accused’s subjective perceptions of the circumstances, including what the accused believed, intended or knew. The accused must have killed because he was provoked and not merely because the provocation existed. The requirement of suddenness serves to distinguish a response taken in vengeance from one that was provoked. Suddenness applies to both the act of provocation and the accused’s reaction to it.

Here, on the basis of the trial judge’s findings of fact and uncontested evidence, there was no air of reality to the defence of provocation. The conduct at issue does not amount to an “insult” within the meaning of s. 232 of the *Criminal Code*, as the accused alleges, nor does it meet the requirement of suddenness. The discovery of his estranged wife’s involvement with another man is not an “insult” within the meaning of s. 232 of the *Criminal Code*. The accused’s view of his estranged wife’s sexual involvement with another man after the couple had separated — found at trial to be the insult — cannot in law be sufficient to excuse a loss of control in the form of a homicidal rage and constitute an excuse for the ordinary person of whatever personal circumstances or background. Furthermore, there was nothing sudden about the accused’s discovery and it cannot be said that it struck upon a mind unprepared for it.

**Cases Cited**

**Considered:** *R. v. Hill*, [1986] 1 S.C.R. 313; *R. v. Thibert*, [1996] 1 S.C.R. 37; *R. v. Parent*, 2001 SCC 30, [2001] 1 S.C.R. 761; **referred to:***R. v. Mawgridge* (1707), Kel J. 119, 84 E.R. 1107; *R. v. Hayward* (1833), 6 Car. & P. 157, 172 E.R. 1188; *R. v. Welsh* (1869), 11 Cox C.C. 336; *R. v. Semini*,[1949] 1 K.B. 405; *R. v. Manchuk*, [1938] S.C.R. 18; *R. v. Haight* (1976), 30 C.C.C. (2d) 168; *R. v. Galgay*, [1972] 2 O.R. 630; *Bedder v. Director of Public Prosecutions*,[1954] 1 W.L.R. 1119; *Salamon v. The Queen*, [1959] S.C.R. 404; *Wright v. The Queen*, [1969] S.C.R. 335; *R. v. Faid*, [1983] 1 S.C.R. 265; *R. v. Tripodi*, [1955] S.C.R. 438; *R. v. Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702; *R. v. Schwartz*, [1988] 2 S.C.R. 443; *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3; *R. v. Osolin*, [1993] 4 S.C.R. 595; *Parnerkar v. The Queen*, [1974] S.C.R. 449; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. Reddick*, [1991] 1 S.C.R. 1086; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120.

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Sullivan, G. R. “Anger and Excuse: Reassessing Provocation” (1993), 13 *Oxford J. Legal Stud.* 421.

APPEAL from a judgment of the Court of Appeal of Alberta (Hunt and Watson JJ.A. and Hillier J. (*ad hoc*)), 2008 ABCA 209, 91 Alta. L.R. (4th) 113, 432 A.R. 234, 424 W.A.C. 234, 58 C.R. (6th) 246, [2008] 9 W.W.R. 431, [2008] A.J. No. 587 (QL), 2008 CarswellAlta 709, setting aside the accused’s conviction for manslaughter and substituting a conviction for second degree murder. Appeal dismissed.

Peter J. Royal, Q.C., for the appellant.

Susan D. Hughson, Q.C., and Jason Russell, for the respondent.

Riun Shandler and Stacey D. Young, for the intervener.

The judgment of the Court was delivered by

Charron J. —

1. Overview

1. In the early afternoon of February 10, 2004, the appellant Thieu Kham Tran entered the locked apartment of his estranged wife, Hoa Le Duong, unexpected and uninvited. The couple had separated a few months earlier and the appellant had purportedly relinquished his keys to the former matrimonial home. Unbeknownst to her, however, he had kept a set of keys in his possession. Ms. Duong was in her bedroom, in her bed with her boyfriend, An Quoc Tran, when they heard the door open.
2. The appellant entered Ms. Duong’s bedroom through the half-closed door. Ms. Duong and Mr. An Tran stood up, naked. The appellant immediately attacked Mr. An Tran, scratching at his eyes, kicking and punching him. He then attacked Ms. Duong in the same fashion. Suddenly, the appellant ran out of the room to the kitchen. While he was gone, Ms. Duong and Mr. An Tran tried hastily to get dressed. Although the appellant had come to the apartment with a sheathed knife in the pocket of his coat, he came back into the bedroom armed with two butcher knives taken from the kitchen. He stabbed Mr. An Tran one time in the chest. Mr. An Tran asked to talk but the appellant was yelling and angry. The appellant then stepped back to the bedroom door, used his own phone and called his godfather. He told his godfather: “I caught them.”
3. At this point, Mr. An Tran was having trouble breathing. He tried to walk to the window. The appellant then turned to Ms. Duong and chopped her hand. When she showed him the wound he said he would kill her. With Mr. An Tran standing behind her at the window, Ms. Duong tried to block the knives that were still coming from the appellant towards Mr. An Tran and received two additional cuts to her forearm. The appellant then asked Ms. Duong: “Are you beautiful?” Pulling her head up, he slashed her face with a deep cut from her right ear across her right cheek.
4. Mr. An Tran finally managed to exit the bedroom. He was on the ground crawling into the living room. The appellant followed him and repeatedly stabbed him with both knives. Ms. Duong stayed in the bedroom. She went to the window and was yelling for help when she saw the appellant’s godfather arriving. She then tried to close the bedroom door, but the appellant forced himself back in. The appellant looked out the window, and, returning to the living room, stepped on Mr. An Tran’s face and stomach on his way out. With the two knives, the appellant proceeded to repeatedly stab Mr. An Tran’s chest and then stepped on his face. According to the autopsy, Mr. An Tran was stabbed a total of 17 times, of which six were lethal wounds. The appellant cut his own hand and arm with one of the knives and put that knife in the hand of Mr. An Tran, who was now lying motionless on the living room floor.
5. The appellant was tried before a judge sitting without a jury for five offences arising out of these tragic events. This appeal is only concerned with the charge of second degree murder of Mr. An Tran. The sole defence raised at trial was whether the murder should be reduced to manslaughter due to provocation. The trial judge accepted the defence, holding that the Crown had failed to disprove the elements of provocation. She therefore acquitted the appellant of second degree murder and convicted him of manslaughter. On appeal by the Crown, the Court of Appeal of Alberta unanimously held that the defence of provocation had no air of reality (2008 ABCA 209, 91 Alta. L.R. (4th) 113). The court therefore set aside the verdict, substituted a conviction for second degree murder, and remitted the matter back to the trial court for sentencing. The appellant appeals to this Court as of right.
6. The preceding overview of the facts reflects the trial judge’s findings and uncontested items of evidence. I agree with the Court of Appeal that, on those facts, there was no air of reality to the defence of provocation. In my respectful view, the trial judge proceeded on wrong legal principles concerning the requirements for the defence of provocation and, as a result, erred in law in finding that there was an evidential basis in this record for that defence.
7. Specifically, there was no “insult” within the meaning of s. 232 of the *Criminal Code*, R.S.C. 1985, c. C-46. As rightly concluded by the Court of Appeal, the appellant’s view of his estranged wife’s sexual involvement with another man after the couple had separated — found at trial to be the “insult”— cannot in law be sufficient to excuse “a loss of control in the form of a homicidal rage” and constitute “an excuse for the ordinary person of whatever personal circumstances or background” (Watson J.A., at para. 64). In addition, the uncontradicted evidence about the appellant’s knowledge that his wife was involved with another man and his own conduct in entering her home and bedroom, unexpected and uninvited, belied any notion that this supposed “insult” would have struck “upon a mind unprepared for it” as required by law (Hunt J.A., at para. 18). Finally, there was no air of reality to the appellant “acting on the sudden at the time of the killing” (Watson J.A., at para. 77).
8. As a conviction for murder was inevitable, both on the law and on the trial judge’s essential findings of fact, the Court of Appeal properly substituted a verdict of second degree murder and remitted the matter for sentencing. I would dismiss the appeal.

2. Analysis

1. Provocation is the only defence which is exclusive to homicide. As a partial defence, it serves to reduce murder to manslaughter when certain requirements are met. The defence, which originated at common law, is codified in s. 232 of the *Criminal Code*. The focal point for any analysis on the nature of the defence therefore lies in the wording of the statute:

**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

(*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,

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.

(4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.

1. As the opening words of the provision make plain, the defence will only apply where the accused had the necessary intent for murder and acted upon this intent. Parliament thus carefully limited the application of the defence. The requirements of the defence contained in s. 232 have been described variously by the Court as comprising either two, three or four elements. For example, in *R. v. Hill*, [1986] 1 S.C.R. 313, Dickson C.J. identified three general requirements for the defence of provocation:

First, the provoking wrongful act or insult must be of such a nature that it would deprive an ordinary person of the power of self-control. That is the initial threshold which must be surmounted. Secondly, the accused must actually have been provoked. As I have earlier indicated, these two elements are often referred to as the objective and subjective tests of provocation respectively. Thirdly, the accused must have acted on the provocation on the sudden and before there was time for his or her passion to cool. [p. 324]

In *R. v. Thibert*, [1996] 1 S.C.R. 37, Cory J. for the majority of the Court collapsed these three requirements into two elements, one objective and the other subjective, describing them as follows:

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. [Emphasis in original deleted; para. 4.]

Subsequently, in *R. v. Parent*, 2001 SCC 30, [2001] 1 S.C.R. 761, the Court reiterated the test in *Thibert* but framed it in terms of four required elements:

. . . (1) a wrongful act or insult that would have caused an ordinary person to be deprived of his or her self-control; (2) which is sudden and unexpected; (3) which in fact caused the accused to act in anger; (4) before having recovered his or her normal control . . . . [para. 10]

1. These various formulations do not differ in substance. While it may be conceptually convenient in any given case to formulate the requirements of the defence in terms of distinct elements and to treat each of these elements separately, it is important to recognize that the various components of the defence may overlap and that s. 232 must be considered in its entirety.
2. Before discussing the requirements contained in s. 232, it is useful to briefly review the historical development of the defence. As we shall see, prevailing social mores and judicial attitudes have played an important role in defining what amounts to provocation at law.

2.1 *Historical Development of the Defence*

1. The defence of provocation, presently codified in s. 232 of the *Criminal Code*, has its origins in the English common law. More specifically, its precursor lies in the sixteenth century concept of “chance-medley” killings. As the English jurist Sir Edward Coke described it, “[h]omicide is called chancemedley . . . for that it is done by chance (without premeditation) upon a sudden brawle, shuffling, or contention” (*The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* (1817), at p. 56). During these killings, persons were considered to act “in the Time of their Rage, Drunkenness, hidden Displeasure, or other Passion of Mind” (*Statute of Stabbing (1604)*, 2 Jas I, c. 8). Such killings were considered less morally reprehensible than deliberate “cold-blooded” killings and, informed by the value of honour that formed an important aspect of that period’s social context, were viewed as partially excused.
2. During the seventeenth century, another trend in the law of homicide emerged. It provided that anyone charged with murder was presumed to have acted with “malice aforethought”, for which the punishment at the time was death. In response to the severity of the law, the courts resorted to the separate crime of manslaughter to take into account certain human frailties that would operate to rebut the presumption. One such concession to human frailty was that the accused had been provoked into committing the act (Department of Justice, *Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property: A Consultation Paper* (1998), at p. 2). However, not any provocation would suffice; it had to be significant: see G. R. Sullivan, “Anger and Excuse: Reassessing Provocation” (1993), 13 *Oxford J. Leg. Stud.* 421, at p. 422.
3. By the eighteenth century, the doctrine of provocation had become entrenched in the common law. Initially, the accused’s state of mind, and in particular whether he was sufficiently deprived of self-control to have acted without malice in responding to the provocation, was the focus of the defence. Eventually, however, the courts set out to create greater certainty by establishing specific categories of “provocative events” that were considered “significant” enough to result in a loss of self-control. In the seminal case, *R. v. Mawgridge* (1707), Kel J. 119, 84 E.R. 1107, Lord Holt C.J. set out four categories of provocation. One category envisaged a husband catching a man in the act of adultery with his wife. The basis of the provocation, he wrote, was that “jealousy is the rage of a man, and adultery is the highest invasion of property” (p. 1115). Interestingly, while the killing of a sexual rival caught in the act of committing adultery with one’s wife was seen as a proper basis for the defence, the killing of one’s wife for infidelity was not: F. Stewart and A. Freiberg, *Provocation in Sentencing Research Report* (2nd ed. 2009), at para. 2.1.2. Another category included an “affron[t]” of “pulling . . . the nose, or filliping upon the forehead” (*Mawgridge*, at p. 1114). These categories carried the vestiges of a social view that privileged notions of preserving a man’s honour. As Sullivan has described it:

A violent response in such circumstances was not so much a matter to be condoned but to be required of a man of honour. The core perception of mitigating anger at this time was not of an emotion rendering the agent out of control but as a hot-blooded response informed and controlled by a rational understanding of the nature and degree of the provocation offered. It was a case of hot-blooded yet controlled vindication of one’s honour rather than spontaneous, uncontrolled fury. [p. 422]

1. By the middle of the nineteenth century, attempts to identify further categories were abandoned and the defence became more generalized. In *R. v. Hayward* (1833), 6 Car. & P. 157, 172 E.R. 1188, at p. 1189, Tindal C.J. told the jury that the defence was derived from the law’s “compassion to human infirmity”. The Law Commissioners’ Digest of 1839 provided that the provocative conduct must be “a wrongful act or insult”, which required that the conduct be inherently offensive (Law Commission of Great Britain, *Partial Defences to Murder*, Consultation Paper No. 173 (2003), at para. 1.27, citing “Fourth Report of Her Majesty’s Commissioners on Criminal Law”, in *Reports from Commissioners* (1839), 235). These developments occurred at the same time as another critical one. While an objective standard was always implicit in the defence, a more formal standard of self-control expected to be exercised by the “reasonable man” in the circumstances was eventually proposed: *R. v. Welsh* (1869), 11 Cox C.C. 336. Ultimately, the objective element came to play a heightened role in the operation of the defence as the recognized grounds of provocation were abandoned (see T. Macklem, “Provocation and the Ordinary Person” (1987-1988), 11 *Dal. L.J.* 126, at p. 130).
2. As this brief historical review demonstrates, the social context has always played an important role in defining what amounts to provocation at law. In 1949, Lord Goddard C.J. summarized the relationship between the defence and social context in the following manner:

At a time when society was less secure and less settled in its habits, when the carrying of swords was as common as the use of a walking stick at the present day, and when duelling was regarded as involving no moral stigma if fairly conducted, it is not surprising that the courts took a view more lenient towards provocation than is taken to-day when life and property are guarded by an efficient police force and social habits have changed.

(*R. v. Semini*, [1949] 1 K.B. 405, at p. 409)

1. The common law defence of provocation was adopted and codified in the Canadian *Criminal Code* from its inception in 1892. The wording of s. 232 remains substantially unaltered. The same cannot be said of the social context in which it is embedded. The continued appropriateness of the defence has been a source of controversy, both in Canada and abroad. Some commentators and reviewing bodies have recommended that the defence be abandoned altogether, leaving provocation, when relevant, as a factor to be considered in sentencing. For a discussion of such reform proposals in Canada and elsewhere, see D. E. Ives, “Provocation, Excessive Force in Self-Defence and Diminished Responsibility”, in Law Commission of Great Britain, *Partial Defences to Murder: Overseas Studies*, Consultation Paper 173 (App. B) (2003), 73, at pp. 78-81; Australia, Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004); New Zealand Law Commission, *The Partial Defence of Provocation*, Report 98 (2007).
2. Parliament has not chosen this course and the defence continues to exist in Canada. This does not mean, however, that the defence in its present articulation should not continue to evolve to reflect contemporary social norms, and in particular, *Charter* values. Just as at common law the notion of an “insult . . . sufficient to deprive an ordinary person of the power of self-control”, now codified under s. 232, is not frozen in time. By incorporating this objective element, the defence of provocation is necessarily informed by contemporary social norms and values. These include society’s changed views regarding the nature of marital relationships and the present reality that a high percentage of them end in separation.
3. It is with these considerations in mind that I turn to an examination of the defence as contained in s. 232 of the *Criminal Code.*

2.2 *Provocation Under Section 232 of the Criminal Code*

1. Viewing the provision as a whole, I offer some preliminary comments about the juridical nature of the defence. A criminal law defence is usually characterized as providing either an excuse or a justification for the impugned conduct. As Professor K. Roach rightly observes: “As a partial defence that reduces murder to manslaughter, provocation does not fit easily into the excuse/justification framework” (*Criminal Law* (4th ed.2009), at p. 358). In *R. v. Manchuk*, [1938] S.C.R. 18, at pp. 19-20, this Court explained that “provocation . . . neither justifies nor excuses the act of homicide. But the law accounts the act and the violent feelings which prompted it less blameable because of the passion aroused by the provocation, . . . though still sufficiently blameable to merit punishment ― and it may be punishment of high severity ― but not the extreme punishment of death.”
2. Thus, the accused’s conduct is partially *excused* out of a compassion to human frailty. While the call for compassion was particularly compelling in times when the alternative was the death penalty, the rationale subsists today, given the serious consequences to the offender flowing from a conviction for murder. It is not sufficient, however, that an accused’s sudden reaction to a wrongful act or insult may be explained from a purely subjective standpoint. The provision incorporates an objective standard against which the accused’s reaction must be measured — that which may be expected of the “ordinary person” in like circumstances. Not all instances of loss of self-control will be excused. Rather, the requisite elements of the defence, taken together, make clear that the accused must have a *justifiable* sense of being wronged. This does not mean, and in no way should be taken as suggesting, that the victim is to be blamed for the accused’s act, nor that he or she deserved the consequences of the provocation. Nor does it mean that the law sanctions the accused’s conduct. Instead, the law recognizes that, as a result of human frailties, the accused reacted inappropriately and disproportionately, but understandably to a sufficiently serious wrongful act or insult.
3. In my view, the requirements of s. 232 are most usefully described as comprising two elements, one objective and the other subjective. As Cory J. for the majority of the Court put it in *Thibert*:

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. [Emphasis in original deleted; para. 4.]

1. I will review each element in turn.

2.2.1 The Objective Element: A Wrongful Act or Insult Sufficient to Deprive an Ordinary Person of the Power of Self-Control

1. For the purpose of discussion, the objective element may be viewed as two-fold: (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.
2. While the concepts “wrongful act” and “insult” are not defined, the following limitation is set out in s. 232(3):

**232.** . . .

(3) For the purposes of this section, the questions

(*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,

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.

The second branch of s. 232(3) is not at issue in this case and I do not propose to discuss the limitation on the defence in circumstances where the accused himself incites the act of provocation with a view to providing himself with an excuse for committing the offence. The “legal right” limitation on the defence, however, merits further discussion in the context of this case.

1. It is well established that the phrase “legal right” does not include all conduct not specifically prohibited by law. For example, the fact that a person may not be subject to legal liability for an insult directed at the accused does not mean that he or she has the “legal right” to make the insult within the meaning of s. 232(3) and that provocation is not open to the accused. To require that an insult be specifically prohibited by law would effectively render the word “insult” under s. 232(2) redundant, as any such “insult” would necessarily be a “wrongful act”. The phrase “legal right” has been defined, rather, as meaning a right which is sanctioned by law, such as a sheriff proceeding to execute a legal warrant, or a person acting in justified self-defence (*Thibert*, at para. 29, citing *R. v. Haight* (1976), 30 C.C.C. (2d) 168 (Ont. C.A.), at p. 175, and *R. v. Galgay*, [1972] 2 O.R. 630 (C.A.), at p. 649). Interpreted in this manner, the notion of legal right serves to carve out from the ambit of s. 232 legally sanctioned conduct which otherwise could amount, in fact, to an “insult”.
2. There has been academic criticism of this approach. Professor Roach argues, for example, that the concept of legal right could be rethought in the context of domestic violence. He writes: “It could be argued that people have a legal right to leave relationships and even to make disparaging comments about ex-partners. The Court’s continued refusal to recognize this broader interpretation of a legal right could deny women the equal protection and benefit of the law” (p. 359).
3. In my view, these concerns, while legitimate, are better addressed at the stage when the gravity of the “insult” is objectively measured as against the ordinary person standard. In other words, while one spouse undoubtedly has a legal right to leave his or her partner, in some circumstances the means by which that spouse communicates this decision may amount *in fact* to an “insult”, within the ordinary meaning of the word. However, to be recognized *at law*, the insult must be of sufficient gravity to cause a loss of self-control, as objectively determined. The fact that the victim has the “legal right”, in the broad sense of the term, to leave the relationship is an important consideration in the assessment of this objective standard.
4. The “ordinary person”, as a legal concept, has generally been assimilated in the case law to the well-known “reasonable person” and the two terms are often used interchangeably: e.g., *Hill*, at p. 331. While I believe that the two fictional entities share the same attributes, at first blush some may question this as a logical inconsistency, given that a “reasonable” person would not commit culpable homicide in the first place. Indeed, “reasonableness” often defines the standard of conduct which is expected at law, and conduct which meets this standard, as a general rule, does not attract legal liability. The inconsistency is resolved when it is recalled that the defence is only a partial one, and that the defendant, even if successful, will still be guilty of manslaughter. The use of the term “ordinary person” therefore 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. Meeting the standard, however, will only provide a *partial* defence. In this context, it seems to me that the label “ordinary person” is more suitable and this may explain Parliament’s choice of words. Cory J. for the majority of the Court in *Thibert* explained how the ordinary person standard should be interpreted:

Yet, I think the objective element should be taken as an attempt to weigh in the balance those very human frailties which sometimes lead people to act irrationally and impulsively against the need to protect society by discouraging acts of homicidal violence. [para. 4]

1. Applying this objective standard has not been without difficulty. A central concern has been the extent to which the accused’s personal characteristics and circumstances should be considered when applying the “ordinary person” test. Traditionally, Canadian courts, endorsing the approach of their English counterparts, adopted a restrictive approach, prohibiting any reference to the accused’s characteristics or circumstances (*Bedder v. Director of Public Prosecutions*, [1954] 1 W.L.R. 1119 (H.L.); *Salamon v. The Queen*,[1959] S.C.R. 404; *Wright v. The Queen*,[1969] S.C.R. 335). However, this approach required the court to completely ignore relevant contextual circumstances in making its determinations.
2. Recognizing this deficiency, a broader approach was eventually adopted in conceptualizing the “ordinary person” so as to account for some, but not all, of the individual characteristics of the accused. As Dickson C.J. explained in *Hill*, this more flexible approach is essentially a matter of common sense:

. . . the “collective good sense” of the jury will naturally lead it to ascribe to the ordinary person any general characteristics relevant to the provocation in question. For example, if the provocation is a racial slur, the jury will think of an ordinary person with the racial background that forms the substance of the insult. To this extent, particular characteristics will be ascribed to the ordinary person. Indeed, it would be impossible to conceptualize a sexless or ageless ordinary person. Features such as sex, age, or race, do not detract from a person’s characterization as ordinary. Thus particular characteristics that are not peculiar or idiosyncratic can be ascribed to an ordinary person without subverting the logic of the objective test of provocation. [Emphasis added; p. 331.]

1. I emphasize the words of caution that, in adopting this more flexible approach, care must be taken not to subvert the logic of the objective test. Indeed, if all of the accused’s characteristics are taken into account, the ordinary person *becomes* the accused. As Dickson C.J. noted, this approach would lead to the anomalous result that “[a] well-tempered, reasonable person would not be entitled to benefit from the provocation defence . . . while an ill-tempered or exceptionally excitable person would find his or her culpability mitigated by provocation and would be guilty only of manslaughter” (p. 324).
2. Further, an individualized approach ignores the cardinal principle that criminal law is concerned with setting standards of human behaviour. As Dickson C.J. put it: “It is society’s concern that reasonable and non-violent behaviour be encouraged that prompts the law to endorse the objective standard” (p. 324). Similarly, McIntyre J. in concurring reasons expanded upon this purpose, stating:

The law fixes a standard for all which must be met before reliance may be placed on the provocation defence. Everyone, whatever his or her idiosyncracies, is expected to observe that standard. It is not every insult or injury that will be sufficient to relieve a person from what would otherwise be murder. The “ordinary person” standard is adopted to fix the degree of self-control and restraint expected of all in society. [p. 336]

It follows that the ordinary person standard 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*. For example, 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. Similarly, there can be no place in this objective standard for antiquated beliefs such as “adultery is the highest invasion of property” (*Mawgridge*, at p. 1115), nor indeed for any form of killing based on such inappropriate conceptualizations of “honour”.

1. Finally, the particular circumstances in which the accused finds himself will also be relevant in determining the appropriate standard against which to measure the accused’s conduct. This is also a matter of common sense, as it would be impossible to conceptualize how the ordinary person might be expected to react without considering the relevant context. Again here, however, care must be taken not to “subver[t] the logic of the objective [inquiry]” and assimilate circumstances that are peculiar to the individual accused into the objective standard (*Hill*, at p. 331). For example, in determining the appropriate objective standard, it will be relevant for the trier of fact to know that the alleged provocation occurred in circumstances where the deceased was wrongfully firing the accused from his long-term employment. This context is necessary to set the appropriate standard. But the standard does not vary depending on the accused’s peculiar relationship or particular feelings about his employer or his employment. Personal circumstances may be relevant to determining whether the accused was in fact provoked — the subjective element of the defence — but they do not shift the ordinary person standard to suit the individual accused. In other words, there is an important distinction between contextualizing the objective standard, which is necessary and proper, and individualizing it, which only serves to defeat its purpose.

2.2.2 The Subjective Element: The Provocation Must Have Caused the Accused to Lose Self-Control and Act While Out of Control

1. Once it is established that the wrongful act or insult was sufficient to deprive an ordinary person of the power of self-control, the inquiry turns to a consideration of the subjective element of the defence. The subjective element can also be usefully described as two-fold: (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.
2. The inquiry into whether the accused was in fact acting in response to the provocation focuses on the accused’s subjective perceptions of the circumstances, including what the accused believed, intended or knew. In other words, the accused must have killed because he was provoked and not because the provocation existed (*R. v. Faid*, [1983] 1 S.C.R. 265, at p. 277, citing Professor G. L. Williams in his *Textbook of Criminal Law* (1978), at p. 480).
3. The requirement of suddenness was introduced into the defence as a way of distinguishing a response taken in vengeance from one that was provoked. Therefore, suddenness applies to both the act of provocation and the accused’s reaction to it. The wrongful act or insult must itself be sudden, in the sense that it “must strike upon a mind unprepared for it, that it must make an unexpected impact that takes the understanding by surprise and sets the passions aflame” (*R. v. Tripodi*,[1955] S.C.R. 438, at p. 443). Further, the intentional killing must have been committed by the accused “before there was time for his passion to cool”: s. 232(2) of the *Criminal Code*.

2.3 *The Role of the Judge and Jury*

1. As noted earlier, s. 232(3) provides that determining whether a particular wrongful act or insult amounted to provocation and whether the accused was deprived of the power of self-control by the provocation are questions of fact. Consistent with the wording of this provision, it remains with the jury, and not the trial judge, to weigh the evidence in order to determine whether the Crown has discharged its burden of disproving that the killing was caused by provocation (*R. v. Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702, at para. 56, citing *R. v. Schwartz*, [1988] 2 S.C.R. 443).
2. However, the interpretation of a legal standard (the elements of the defence) and the determination of whether there is an air of reality to a defence constitute questions of law, reviewable on a standard of correctness. The term “air of reality” refers to the inquiry into whether there is an evidential foundation for a defence. Statements that there is or is not an air of reality express a legal conclusion about the presence or absence of an evidential foundation for a defence: *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at paras. 50 and 55; *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 682; *Parnerkar v. The Queen*, [1974] S.C.R. 449, at p. 461. Thus, this inquiry is not a review of the trial judge’s assessment of the evidence but of the judge’s legal conclusions in relation to the defence of provocation: *R. v. Ewanchuk*,[1999] 1 S.C.R. 330, at para. 21.
3. In a jury trial, the judge is the gatekeeper and judge of the law and must therefore put the defence to the jury only where there is evidence upon which a “reasonable jury acting judicially” could find that the defence succeeds (*Faid*, at p. 278). For the defence to succeed, the jury must have a reasonable doubt about whether each of the elements of provocation was present. This necessarily requires that there be a sufficient evidential basis in respect of each component of the defence before it is left to the jury: the evidence must be reasonably capable of supporting the inferences necessary to make out the defence before there is an air of reality to the defence (*Fontaine*, at para. 56; *R. v. Reddick*,[1991] 1 S.C.R. 1086, at p. 1088, citing *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, at p. 133). In a trial by judge alone, the trial judge must instruct himself or herself accordingly. Therefore, the trial judge errs in law if he or she gives effect to the defence of provocation in circumstances where the defence should not have been left to a jury, had the accused been tried by a jury.

3. Application to the Case

1. As stated at the outset, I agree with the Court of Appeal that there was no air of reality to the defence of provocation in this case. The conduct in question does not amount to an “insult”; nor does it meet the requirement of suddenness.
2. As for the objective element of the defence, the appellant does not suggest that he was provoked by a “wrongful act”. Rather, his contention is that, in the context of his relationship with Ms. Duong, his discovery of her sexual involvement with Mr. An Tran amounted to an insult at law. The facts do not support this contention.
3. First, it is difficult to see how the conduct of Ms. Duong and Mr. An Tran could constitute an insult on any ordinary meaning of the word. The general meaning of the noun “insult” as defined in the *Shorter Oxford English Dictionary on Historical Principles* (6th ed. 2007), vol. 1, at p. 1400, is “[a]n act or the action of attacking; (an) attack, (an) assault.” Likewise, the action of insulting means to “[s]how arrogance or scorn; boast, exult, esp. insolently or contemptuously. . . . Treat with scornful abuse; subject to indignity; . . . offend the modesty or self-respect of.” Here, Ms. Duong and Mr. An Tran were alone in the privacy of her bedroom, neither wanting nor expecting the appellant to show up. In these circumstances, I agree with Hunt J.A. 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” (para. 17).
4. Further, there was nothing sudden about the discovery. The appellant is the one whose appearance came as a total surprise to Ms. Duong and Mr. An Tran, not the other way around. On the factual findings made by the trial judge, the appellant had not only suspected his wife’s relationship with another man, but he made deliberate attempts to surveillance her activity, including by eavesdropping on her conversations. The night before the tragic events, the appellant told his godmother that he now knew who the man was whom his wife was seeing (trial judge’s reasons, at p. 26). Therefore, it cannot be said that his discovery, upon entering Ms. Duong’s bedroom unannounced and uninvited, “str[uck] upon a mind unprepared for it”.
5. Finally, I also agree with Watson J.A. that on “the subjective side of the question”, the trial judge’s findings of “[o]utward excitement and anger” could not be decisive (para. 76). The appellant did not testify about his state of mind. The evidence shows, as Watson J.A. notes, that he

was measuring his actions on what he was saying and doing. The trial judge should have addressed whether he could have regained his self control by the time he went into the living room and finished off the victim — not merely whether he was still angry and excited. The trial judge found his anger continued but she failed to direct herself to consider whether the continuation of his anger amounted to a continuing lack of the power of self control without an opportunity to recover it. [para. 76]

As Watson J.A. rightly concluded, “there was on the trial judge’s fact findings no air of reality to his acting on the sudden at the time of the killing” (para. 77).

4. Disposition

1. The Court of Appeal properly substituted a conviction for second degree murder and returned the matter to the trial court for sentencing. As Watson J.A. stated: “In light of the law, and of the trial judge’s findings of fact, and of the overwhelming evidence, a conviction for murder was unavoidable” (para. 81). I would dismiss the appeal.

*Appeal dismissed.*

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