

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Cairney, 2013 SCC 55, [2013] 3 S.C.R. 420 | **Date:** 20131025  **Docket:** 34848 |

**Between:**

**Michael John Cairney**

Appellant

and

**Her Majesty The Queen**

Respondent

**Coram:** McLachlin C.J. and Fish, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 65)  **Dissenting Reasons:**  (paras. 66 to 84) | McLachlin C.J. (Rothstein, Cromwell, Moldaver and Wagner JJ. concurring)  Abella J. (Fish J. concurring) |

R. *v.* Cairney, 2013 SCC 55, [2013] 3 S.C.R. 420

Michael John Cairney Appellant

v.

Her Majesty The Queen Respondent

**Indexed as: R. *v.* Cairney**

2013 SCC 55

File No.:  34848.

2013:  April 26; 2013:  October 25.

Present: McLachlin C.J. and Fish, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

on appeal from the court of appeal for alberta

*Criminal law — Defences — Provocation — Self‑induced provocation — Whether fact that accused induced act or words said to constitute provocation precludes defence of provocation from being left to jury — Whether objective and subjective elements of provocation established, lending an air of reality to this defence — Whether defence of provocation should have been submitted to jury — Criminal Code, R.S.C. 1985, c. C‑46, s. 232.*

C shot and killed his long‑time friend F. At the time, C was living with F and R, who was C’s cousin and F’s common law spouse. F had a history of physically abusing R. On the day in question, F was drinking, became angry with R and started to verbally abuse her. C overheard F tell R that if her back had not been sore, he would have thrown her across the kitchen. At F’s request, C left the room. He retrieved a loaded shotgun. Disturbed by the argument that he was overhearing, C sat in another room, contemplating what to do. He decided to scare F to teach him a lesson and deter future aggression against R. He walked up to F, who was talking on the telephone and struck the phone with the muzzle of the shotgun. He then began to lecture F on his abuse of R. F reacted by saying, “What are you gonna do, shoot me? You don’t have the guts to shoot me.” F then started to leave the apartment. When C called out to F to “get back here”, F said: “Fuck you, you goof. This is none of your business, I’ll do with [R] whatever I want.” F then walked out of the apartment. C followed him into the stairwell, where he shot F, killing him. C was charged with second degree murder and tried before a jury. He argued that he lacked the necessary intention to be guilty of murder, and in the alternative that he had been provoked by F’s words to him. The trial judge, apparently concluding that there was some evidence to support all the elements of the defence of provocation, charged the jury on that defence. The jury acquitted C of second degree murder and convicted him of manslaughter. The Court of Appeal allowed the Crown’s appeal and ordered a new trial.

*Held* (Fish and Abella JJ. dissenting): The appeal should be dismissed.

*Per* McLachlin C.J. and Rothstein, Cromwell, Moldaver and Wagner JJ.: The trial judge erred in leaving the defence of provocation with the jury as there was no air of reality to the defence.

The air of reality test is intended to assess whether a properly instructed jury acting reasonably could have a reasonable doubt as to whether the subjective and objective elements of the defence of provocation are made out. The objective element of the defence of provocation asks whether there was some evidence upon which a jury could have a reasonable doubt that an ordinary person in C’s circumstances — which include having initiated a confrontation at gunpoint — would be deprived of the power of self‑control by F’s insults. The history and background of the relationship between the victim and the accused is relevant and pertinent to the “ordinary person” test, as are all factors that would give the act or insult special significance to an ordinary person. However, that does not change the fact that a certain threshold level of self‑control is always expected of the “ordinary person”.

While the cases on self‑induced provocation do not always distinguish between the objective and subjective elements of the defence, read generally they confirm that the accused’s conduct may be relevant to both elements of the defence and that it must be considered with other contextual factors to determine whether there is an air of reality to the defence. Self‑induced provocation is not a special category of the defence attracting special principles. Rather, it describes a particular application of the general principles that govern the defence of provocation. There is no absolute rule that a person who instigates a confrontation cannot rely on the defence of provocation. The fact that the victim’s response to the accused’s confrontational conduct fell within a range of reasonably predictable reactions may suggest that an ordinary person would not have lost self‑control, although it must be weighed together with all other relevant contextual factors. As in all cases where the defence is raised, whether it goes to the jury depends on whether the evidence provides an air of reality to it.

In this case, there was evidence sufficient to support the subjective element — that C in fact acted in response to the provocation before his passion had time to cool. However, there was no air of reality to the objective element of the defence. C argues that F’s words constituted a threat of imminent domestic abuse sufficient to cause an ordinary person to lose self‑control. However, F was no longer behaving aggressively towards R when C approached. His moment of anger against R had passed. The record simply does not support the contention that an ordinary person would have viewed the victim’s words as a threat of imminent domestic violence against R, leading to a loss of self‑control.

What is left is a concern on C’s part to prevent future abuse against R and C’s declared intention to achieve this by extracting a promise at gunpoint from F to stop abusing her. An ordinary person who seeks to extract a promise at gunpoint would not be surprised if the person confronted rebuffs the overture as did F here. There is nothing on the record to support the element of sudden shock required to cause an ordinary person to lose self‑control. It follows that a properly instructed jury acting reasonably could not have had a reasonable doubt about whether F’s conduct was sufficient to deprive an ordinary person of self‑control.

*Per* Fish and Abella JJ. (dissenting): The trial judge must determine whether the evidence is reasonably capable of supporting the inferences necessary to make out the defence of provocation. In relation to the objective element, the judge must determine whether there is evidence that could raise a reasonable doubt about whether the accused was faced with a wrongful act or insult sufficient to deprive an ordinary person of self‑control. To determine how the “ordinary” person would react to a particular insult, it is necessary to take the relevant context and circumstances into account, including the history and background of any relationship between the victim and the accused. The assessment of the evidence relevant to the objective element should not be skewed by placing predominant emphasis on the aggressive conduct of the accused at the determinative expense of the whole context.

F’s words and the reaction they would elicit from an ordinary person cannot be appreciated without considering the whole context, and, in particular, the history of the relationship between C and F. F and C were close friends. The only source of conflict between them was F’s long history of domestic violence against R, C’s cousin whom he thought of as his “little sister”. F had been attacking R for over a decade. The assaults were frequent — often weekly. They were also severe. C knew all about the assaults since R had repeatedly taken refuge with C and his wife, and R was sometimes so badly injured that she was unable to go to work.

Removing the defence of provocation from the jury turns on the characterization that C initiated an “aggressive confrontation”. On another view of these facts, however, F initiated the confrontation when he started verbally abusing and threatening C’s cousin — acts that could, in light of F’s history of relentless domestic abuse, readily and reasonably be interpreted as a prelude to another brutal assault. A jury might well conclude that the objective element of provocation was met based on a credible threat that F would again abuse C’s cousin, R.

While F’s dismissive *attitude* towards C might have been predictable, a jury could infer from the full context of this case that an ordinary person would not predict F’sresponse that he would keep beating R if he felt like it. The objective element of the defence of provocation should be informed by contemporary norms, including *Charter* values. These do *not* include aggressively proprietary attitudes about a spouse. It is thereforetroubling to conclude, as the majority does, that it was “predictable” for F to react to C’s warning by confirming his intention to continue inflicting domestic violence. It is difficult to accept that an expressed intention to continue assaulting a spouse could ever be considered“predictable”.

The trial judge’s decision to leave the provocation defence with the jury was therefore proper.

**Cases Cited**

By McLachlin C.J.

**Distinguished:** *R. v. Thibert*, [1996] 1 S.C.R. 37; **referred to:** *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3; *R. v. Buzizi*, 2013 SCC 27, [2013] 2 S.C.R. 248; *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350; *R. v. Mayuran*, 2012 SCC 31, [2012] 2 S.C.R. 162; *R. v. Pappas*, 2013 SCC 56, [2013] 3 S.C.R. 452; *R. v. Welsh* (1869), 11 Cox C.C. 336; *Mason’s Case* (1756), Fost. 132, 168 E.R. 66; *R. v. Tripodi*, [1955] S.C.R. 438; *Edwards v. The Queen*, [1973] A.C. 648; *Salamon v. The Queen*, [1959] S.C.R. 404; *R. v. Louison* (1975), 26 C.C.C. (2d) 266, aff’d [1979] 1 S.C.R. 100; *R. v. Squire*, [1977] 2 S.C.R. 13; *R. v. Gibson*, 2001 BCCA 297, 153 B.C.A.C. 61.

By Abella J. (dissenting)

*R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3; *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350; *R. v. Mayuran*, 2012 SCC 31, [2012] 2 S.C.R. 162; *R. v. Thibert*, [1996] 1 S.C.R. 37.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, s. 232.

*Criminal Code, 1892*, S.C. 1892, c. 29, s. 229.

**Authors Cited**

Ashworth, A. J. “Self‑Induced Provocation and the Homicide Act”, [1973] *Crim. L.R.* 483.

Ashworth, A. J. “The Doctrine of Provocation” (1976), 35 *Cambridge L.J.* 292.

Coke, Edward. *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes*. London: Clarke, 1809 (first published 1644).

Coss, Graeme. “‘God is a righteous judge, strong and patient: and God is provoked every day’. A Brief History of the Doctrine of Provocation in England” (1991), 13 *Sydney L. Rev.* 570.

Manning, Morris, and Peter Sankoff. *Manning, Mewett & Sankoff: Criminal Law*, 4th ed. Markham, Ont.: LexisNexis, 2009.

Parent, Hugues. *Traité de droit criminel*, t. 1, *L’imputabilité*, 3e éd. Montréal: Thémis, 2008.

Renke, Wayne N. “Calm Like a Bomb: An Assessment of the Partial Defence of Provocation” (2009), 47 *Alta. L. Rev.* 729.

Stuart, Don. *Canadian Criminal Law: A Treatise*, 6th ed. Scarborough, Ont.: Carswell, 2011.

APPEAL from a judgment of the Alberta Court of Appeal (Côté and O’Brien JJ.A. and Belzil J. (*ad hoc*)), 2011 ABCA 272, 513 A.R. 345, 89 C.R. (6th) 207, 277 C.C.C. (3d) 200, 52 Alta. L.R. (5th) 357, 530 W.A.C. 345, [2011] A.J. No. 1039 (QL), 2011 CarswellAlta 1666, setting aside the accused’s acquittal on a charge of second degree murder and ordering a new trial.  Appeal dismissed, Fish and Abella JJ. dissenting.

*Dino Bottos* and *Dane Bullerwell*, for the appellant.

*Susan D. Hughson*, *Q.C.*, and *Keith Joyce*, for the respondent.

The judgment of McLachlin C.J. and Rothstein, Cromwell, Moldaver and Wagner JJ. was delivered by

The Chief justice —

I. Background

1. The law has long recognized that murder may be reduced to manslaughter if the deceased provoked the attack by a wrongful act or insult, causing the accused to act in the heat of passion. This is called the partial defence of provocation.
2. But what happens if the act of provocation by the deceased was in response to an aggressive confrontation initiated by the accused? That is the problem at the heart of this case — sometimes referred to as the problem of self-induced provocation.

A. *The Facts*

1. The accused, Michael John Cairney, shot and killed his long-time friend Stephen Ferguson. At the time, Cairney was living with Ferguson and Frances Rosenthal, who was Cairney’s cousin and the common law spouse of Ferguson. Ferguson had a history of drinking and physically abusing Rosenthal.
2. On the day in question, Ferguson, who had been drinking, became angry with Rosenthal because she had put a roast in the oven that he wanted to cook himself. Ferguson started to verbally abuse Rosenthal. Cairney overherd Ferguson tell Rosenthal that if her back had not been sore, he would have thrown her across the kitchen.
3. At Ferguson’s insistence and Rosenthal’s request, Cairney left the room. He retrieved a loaded shotgun from a duffle bag in the closet. Disturbed by the argument that he was overhearing, he sat in the bathroom for five to ten minutes, contemplating what to do. He decided to scare Ferguson using the shotgun in order to teach him a lesson and deter future aggression against Rosenthal. He walked up to Ferguson, who was having a conversation on the telephone, and smashed the phone with the muzzle of the shotgun. He then began to lecture Ferguson on his abuse of Rosenthal.
4. Ferguson reacted by saying, “What are you gonna do, shoot me? You don’t have the guts to shoot me.” He then started to leave the apartment. Cairney called out to Ferguson, “Get back here, I want to talk to you.” At this point, Ferguson said the words relied on by the defence as provocation, “Fuck you, you goof. This is none of your business, I’ll do with Fran whatever I want”: A.R., vol. II, at p. 384. He then walked out of the apartment. Cairney followed him out of the apartment and to the stairwell. He shot Ferguson in the stairwell, killing him.

B. *The Trial*

1. Cairney was charged with second degree murder and tried before a jury. He argued that he lacked the necessary intention to be guilty of murder, and in the alternative that he had been provoked by Ferguson’s words to him.
2. The Crown objected to the defence of provocation going to the jury, maintaining that the defence had no air of reality in the circumstances. After several exchanges with counsel, the trial judge inquired:

And so the issue for me is whether there’s some evidence on each of the four questions, the four components of provocation. And I can’t weigh that evidence. I just have to — if there is any evidence, then the issue has to be left to the jury. [A.R., vol. I, at p. 129]

1. The trial judge then held that since there was no evidence that Cairney had set Ferguson up deliberately to be able to advance a provocation defence, she would leave the defence to the jury:

There’s nothing in the evidence to suggest that Mr. Cairney planned in advance to murder Mr. Ferguson and to set him up so that he would be in a position to advance a provocation defence to turn murder into manslaughter; therefore, I will allow provocation to go to the jury. [A.R., vol. I, at p. 151]

1. The trial judge, apparently concluding that there was some evidence to support all the elements of the defence of provocation, charged the jury on that defence. The jury acquitted Cairney of second degree murder and convicted him of manslaughter.

C. *The Court of Appeal*

1. The Crown appealed the acquittal on second degree murder, arguing, among other things, that there was no air of reality to the defence of provocation. The Alberta Court of Appeal agreed and ordered a new trial: 2011 ABCA 272, 513 A.R. 345.
2. The Court of Appeal reviewed the test for provocation, which consists of an objective element (that the act or insult was of a nature to deprive an ordinary person of self-control) and of a subjective element (that it actually deprived the accused of self-control), and concluded that the objective element was not met. Ferguson’s dismissive behaviour and insulting remarks were not enough to provoke a loss of control in an ordinary person:

Measured by an objective standard, and with concerns for the encouragement of reasonable and non-violent behaviour, we are satisfied that the victim’s oral retorts to Cairney’s threats of violence were not of sufficient gravity to cause a loss of control. Having initiated the unlawful confrontation which led to Ferguson’s retorts, Cairney ought reasonably to have understood that his conduct would elicit such a reaction on the victim’s part. Cairney had no reason to anticipate docile acquiescence from Ferguson in the circumstances. The reaction was foreseeable and, in any event, not of sufficient gravity to provoke a murderous response. [para. 45]

1. The Court of Appeal also found that the subjective element was not satisfied. Cairney had not acted “suddenly”: para. 47. He may have been angry that Ferguson had dismissed him so casually, but the ensuing act of shooting Ferguson in the stairwell was not committed in the heat of uncontrollable passion, in its view.
2. Since neither element was met, the trial judge erred in leaving the defence of provocation to the jury. The Court of Appeal acknowledged the trial judge’s conclusion that the defence of provocation was only one of the routes by which the jury could have reduced murder to manslaughter; it could also have done so because it did not find intent to kill. It was impossible to know what factors entered into the mind of each of the jurors. It followed that the instruction with respect to provocation may reasonably be viewed as having a material bearing on the deliberations of the jurors and the jury’s verdict, and a new trial should be ordered.

D. *Legislation*

1. Section 232 of the *Criminal Code*, R.S.C. 1985, c. C-46, provides:

**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.

II. Discussion

1. The appellant says that the defence of provocation had an air of reality on the evidence and that the trial judge correctly left it to the jury. The Court of Appeal wrongly interfered with the jury’s acquittal on murder, he asserts.
2. While the arguments are variously stated, the case presents one basic issue: What is required to give an air of reality to the defence of provocation where the provocative conduct of the deceased came about as a result of the accused initiating an aggressive confrontation?
3. This in turn raises two questions. First, when must the defence be submitted to the jury? This is the threshold air of reality question. Second, does the fact that the accused induced the act or words said to constitute provocation preclude the defence from being raised successfully?

A. *When Must the Defence Be Submitted to the Jury — The “Air of Reality” Question*

1. The trial judge appears to have acted on the view that, provided there was *any* evidence supporting the elements of the defence of provocation, she was required to leave the defence to the jury.
2. The Court of Appeal, by contrast, conducted a detailed examination of the evidence that went into the merits of the defence.
3. Neither of these approaches is strictly correct. “[T]he air of reality test [is not] intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day”: *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 54, quoted by Fish J. in *R. v. Buzizi*, 2013 SCC 27, [2013] 2 S.C.R. 248, at para. 16. The question is whether a properly instructed jury acting reasonably could have a reasonable doubt as to whether the elements of the defence of provocation are made out: *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350, at para. 41; *R. v. Mayuran*, 2012 SCC 31, [2012] 2 S.C.R. 162, at para. 21. The trial judge may engage in a limited weighing of the totality of the evidence to determine if a jury acting reasonably on that evidence could draw the inferences necessary to have a reasonable doubt as to whether the accused is guilty of murder, on the basis of the defence of provocation; see the companion case *R. v. Pappas*, 2013 SCC 56, [2013] 3 S.C.R. 452. This Court, *per* Abella J., described the appropriate approach to the air of reality test in *Mayuran*:

In determining whether a defence has an air of reality, there must be an examination into the sufficiency of the evidence. It is not enough for there to be “some evidence” supporting the defence (*Cinous*, at para. 83). The test is “whether there is (1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true” (*Cinous*, at para. 65). For defences that rely on indirect evidence or defences like provocation that include an objective reasonableness component, the trial judge must examine the “field of factual inferences” that can reasonably be drawn from the evidence (*Cinous*, at para. 91). [para. 21]

1. If this air of reality test is met, the judge should leave the defence to the jury. While judges must ensure that there is an evidential foundation for the defence, they should resolve any doubts as to whether the air of reality threshold is met in favour of leaving the defence to the jury.
2. This appeal turns on the application of the air of reality test to the objective element of the defence of provocation. As will be discussed further below, one of the requirements of the defence is that an ordinary person placed in the circumstances of the accused would have been deprived of self-control. Thus, the question is whether there was some evidence upon which a properly instructed jury acting reasonably could have a reasonable doubt that an ordinary person in Cairney’s circumstances — which include *having initiated a confrontation at gunpoint* — would be deprived of the power of self-control by Ferguson’s insults.

B. *The Elements of the Defence of Provocation*

(1) Historical Development of the Defence

1. At common law, as under s. 232 of the *Criminal Code*,the defence of provocation consists of two elements — one subjective and one objective.
2. Historically, the first requirement was that the accused have lost self-control as a result of the act or acts of the deceased. This was called the subjective element; the issue was simply whether the accused in fact (i.e. subjectively) lost his self-control as a result of the deceased’s acts.
3. The second requirement, which emerged progressively as a means of limiting the availability of the defence, was that the provoking act be capable of depriving a reasonable man (or ordinary person) of his self-control. This was called the objective element.
4. In the early cases, it was enough to establish the subjective element. The defence originated in the 16th century concept of “chance-medley” killings. These killings occurred “by chance (without premeditation) upon a sudden brawle, shuffling, or contention”: E. Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (1809, first published in 1644), at p. 57; G. Coss, “‘God is a righteous judge, strong and patient: and God is provoked every day’. A Brief History of the Doctrine of Provocation in England” (1991), 13 *Sydney L. Rev.* 570, at pp. 573-74. They were not premeditated and occurred in the heat of passion. They thus carried a lower degree of moral culpability than premeditated, cold-blooded killings: *Tran*, at para. 13.
5. However, the common law soon developed a means of restraining the situations in which the defence was available. This historical development was described in *Tran*:

. . . 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. [para. 15]

The use of limited categories in which the defence was available reflected the belief that “people *ought not* to yield to certain types of provocation, and that if they did the law should offer no concession to them”: A. J. Ashworth, “The Doctrine of Provocation” (1976), 35 *Cambridge L.J.* 292, at p. 295 (emphasis in original).

1. The use of categories as a means of limiting the availability of the defence eventually gave way to a formal standard — individuals raising the defence were held to the standard of self-control expected to be exercised by the “reasonable man”: *R. v. Welsh* (1869), 11 Cox C.C. 336; *Tran*, at para. 16.
2. In addition, the common law precluded the defence from being raised successfully in cases where the accused had intentionally sought a provocative act in order to manufacture a pretense for killing: *Mason’s Case* (1756), Fost. 132, 168 E.R. 66; A. J. Ashworth, “Self-Induced Provocation and the Homicide Act”, [1973] *Crim. L.R.* 483, at pp. 484-85. For example, in *Mason’s Case*, the accused lost a fight to his victim in a tavern. He thereafter returned, wearing a concealed knife, and again challenged his victim to a fight. The victim attempted to hit the accused, who pulled out his concealed knife. The court held that the accused was not truly provoked by the victim’s blows, but rather had sought out the provocation in order to have a pretense to commit a murder.
3. In Canada, these common law approaches to restricting the availability of the defence were both incorporated in the codification of the defence of provocation: *The Criminal Code, 1892*, S.C. 1892, c. 29, s. 229. They survive to this day. Section 232(2) of the *Criminal Code* contains the common law’s objective requirement: only 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” can constitute provocation. Section 232(3) precludes “manufactured” provocation from grounding the defence, by providing that “no one shall be deemed to have given provocation to another . . . 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”.

(2) The Modern Defence of Provocation

1. The elements of the defence of provocation were described by this Court in *Tran*.
2. First, there is a two-fold objective element: “. . . (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”: *Tran*, at para. 25.
3. Second, there is a two-fold subjective element: “. . . (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”: *Tran*, at para. 36.
4. The bulk of the argument by the parties centred on the ordinary person requirement: Would an ordinary person lose self-control after having initiated a confrontation at gunpoint? Cairney argues that the ordinary person standard must be contextualized to the circumstances of this appeal, taking into account the fact that for years he had been a powerless witness to Ferguson’s physical abuse of his cousin Rosenthal, whom he loved like a sister. The Crown, on the other hand, contends that no ordinary person would seek out a confrontation at gunpoint, and thereafter be surprised and lose self-control when the person who is being threatened reacts dismissively.

(a) *The Purpose of the Ordinary Person Standard*

1. The “ordinary person” element of the defence of provocation is something of a paradox. The ordinary person does not lose control and kill someone in the first place. However, the defence of provocation recognizes human frailties that can lead to violence. As Professor Renke writes:

The reality is that individuals will, in (what should be) extreme circumstances, respond to provocations with homicidal violence. For centuries, the courts have consistently recognized the potential for violence in our hearts and have explained the provocation excuse as a concession to our human frailty — not just the frailty of the accused, but *our* frailty. [Emphasis in original.]

(“Calm Like a Bomb: An Assessment of the Partial Defence of Provocation” (2009), 47 *Alta. L. Rev.* 729, at p. 769)

1. The law seeks to recognize this human weakness, without going so far as to condone socially unacceptable acts of violence. The “ordinary person” element serves to ensure that only losses of self-control which comport “with contemporary society’s norms and values will attract the law’s compassion”: *Tran*, at para. 30. As this Court underscored in *R. v. Thibert*, [1996] 1 S.C.R. 37, *per* Cory J., the “ordinary person” element implicitly entails a balancing exercise:

. . . 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]

(b) *Contextualizing the Ordinary Person Standard*

1. The “ordinary person” requirement limits the availability of the defence of provocation, in order “to ensure that the criminal law encourages reasonable and responsible behaviour”: *Thibert*, at para. 14. The downside of the “ordinary person” standard is that, if applied rigidly and in the abstract, it runs the risk of rendering the defence unavailable in virtually all situations. As discussed, the truly ordinary person in Canadian society does not kill a person who insults him or her. In response to the potential unfairness that could result from a purely abstract conception of the “ordinary person”, this Court has held that the standard must be applied in a contextual manner:

. . . the ordinary person must be taken to be of the same age, and sex, and must share with the accused such other factors as would give the act or insult in question a special significance. In other words, all the relevant background circumstances should be considered.

(*Thibert*, at para. 14)

1. As the appellant emphasizes in his submissions, “the history and background of the relationship between the victim and the accused is relevant and pertinent to the ‘ordinary person’ test”: *Thibert*, at para. 17. Indeed, all contextual factors that would give the act or insult special significance to an ordinary person must be taken into account: *Thibert*, at para. 18.
2. However, the consideration of background circumstances that contribute to the significance that an ordinary person would attribute to an act or insult does not change the fact that a certain threshold level of self-control is always expected of the “ordinary person”. For example, characteristics of the accused such as “a propensity to drunken rages or short tempered violence” are not relevant to the ordinary person test: *Thibert*, at para. 15. Only factors which contribute to the significance of an act or insult should be taken into account when contextualizing the standard: Ashworth, “The Doctrine of Provocation”, at p. 300. The standard should not be adapted to accommodate a particular accused’s innate lack of self-control; as “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”: *Tran*, at para. 35. As Professor Renke underscores, “[p]rovocation should be recognized only at that point where the ordinary person’s control has been taken to its limit, and that limit has been passed”: p. 772.
3. By appropriately contextualizing the ordinary person standard, the law on provocation strikes a balance between recognizing human frailties that lead to outbursts of violence, on the one hand, and the need to protect society by discouraging acts of homicidal violence, on the other: *Thibert*, at para. 4.

(c) *Self-Induced Provocation*

1. Self-induced provocation refers to the situation where the accused initiates or invites the act or insult he says provoked him. It is not a special category of the defence of provocation. The fact that the accused initiated or invited the provocation is simply a contextual factor in determining whether the subjective and objective elements of the defence are met.
2. The subjective component of the defence requires that “[t]he wrongful act or insult must itself be sudden, in the sense that it ‘must strike upon a mind unprepared for it’”: *Tran*, at para. 38, citing *R. v. Tripodi*, [1955] S.C.R. 438, at p. 443. The subjective component is not met where the accused in fact subjectively expected the victim’s response and, as a result, did not act on the sudden. Depending on the circumstances, where the accused precipitated the provocation, there may be no basis in the evidence for any reasonable doubt as to whether the accused acted on the sudden.
3. The objective component asks whether the provoking act would cause an “ordinary person” to lose his self-control, having regard to all the relevant circumstances. Again, depending on the circumstances, where the accused precipitated the victim’s wrongful act or insult by aggressively confronting him or her, there may be no basis in the evidence for any doubt as to whether that act or insult would cause an ordinary person to lose self-control. The fact that the victim’s response to the accused’s confrontational conduct fell within a range of reasonably predictable reactions may suggest that an ordinary person would not have lost self-control, although it must be weighed together with all other relevant contextual factors.
4. It has been suggested that “the defence [of provocation] will not be available where the accused is prepared for an insult or initiates a confrontation and receives a predictable response”: M. Manning and P. Sankoff, *Manning, Mewett & Sankoff:* *Criminal Law* (4th ed. 2009), at p. 770 (emphasis added); see also D. Stuart, *Canadian Criminal Law: A Treatise* (6th ed. 2011), at p. 590; H. Parent, *Traité de droit criminel*, t. 1, *L’imputabilité* (3rd ed. 2008), at pp. 734-35. This is best understood not as an absolute rule, but as the usual result of application of appropriate contextual factors to the question of whether an ordinary person would have lost control.
5. The matter is always one of context, and in cases of doubt, the question of whether the accused’s confrontational conduct undermines the defence should be left to the jury. In the case of *Edwards v. The Queen*, [1973] A.C. 648, in which it was alleged that the accused’s acts of blackmail gave rise to the victim’s provocative conduct, Lord Pearson acknowledged that “[o]n principle it seems reasonable to say that . . . a blackmailer cannot rely on the predictable results of his own blackmailing conduct as constituting provocation sufficient to reduce his killing of the victim from murder to manslaughter”: p. 658. However, he went on to hold that whether the inciting act would have this effect is a matter of fact that “would in many cases be a question of degree to be decided by the jury”: p. 658; see also Ashworth, “Self-Induced Provocation and the Homicide Act”, at p. 486.

(d) *The Cases on Self-Induced Provocation*

1. While the cases on self-induced provocation do not always distinguish between the objective and subjective elements of the defence, read generally they confirm that the accused’s conduct in inciting provocation may be relevant to both elements of the defence, and that it must be considered with other contextual factors to determine whether there is an air of reality to the defence.
2. The accused’s conduct in inciting the alleged provocation was held to deprive the defence of any air of reality in *Salamon v. The Queen*, [1959] S.C.R. 404. The accused had quarreled with the deceased, Joyce Alexander, at an acquaintance’s house. The accused then returned alone to his house, and waited for the deceased to come home as well. When the deceased arrived, the accused started a confrontation during which he assaulted the deceased, threw dishes at her and called her “a dirty name”: p. 407. Eventually, the deceased retaliated by also calling the accused a dirty name, at which point the accused shot her. This Court held that the defence of provocation should not have been put to the jury:

The evidence shows that from the time Joyce Alexander entered her home to that of the fatal shot, the appellant, and not she, took, and kept throughout, the initiative of the events leading to her death. He was evidently waiting for her arrival. He started the quarrel during which she retaliated. . . .

On this evidence, [the] appellant cannot justify or excuse his actions in saying that he was facing a situation characterized with suddenness, unexpectedness or lack of premonition. . . . There was no sudden provocation on the part of Joyce Alexander causing sudden retaliation on his part. [Emphasis added; pp. 409-10.]

1. In *R. v. Louison* (1975), 26 C.C.C. (2d) 266 (Sask. C.A.), aff’d [1979] 1 S.C.R. 100, the accused sequestered a taxi driver in the trunk of his own taxi. When he later opened the trunk, the driver sprung out and hit him with a hammer. The accused grabbed the hammer away, and proceeded to smash the driver’s skull with it, killing him. At trial, the accused argued that he acted in the heat of the passion aroused by the hammer attack. The Saskatchewan Court of Appeal, *per* Culliton C.J., held that the provocation was self-induced and that the driver’s attempt to escape was objectively predictable:

In my view there could not be a situation in which the appellant had and kept the initiative throughout more completely than in the present case. . . .

. . .

. . . I am satisfied that any reasonable person who had treated the deceased as did the appellant, would expect that person to use any means at his disposal to try and effect his escape if the occasion to do so arose. The striking of the appellant by the deceased is not an act for which his mind would be unprepared or would take his understanding by surprise, or that would set his passions aflame. Such an act was one that was not only foreseeable and predictable, but was one to be expected if the deceased was afforded any opportunity to escape. [Emphasis added; pp. 286-87.]

1. Similarly, in *R. v. Squire*, [1977] 2 S.C.R. 13, this Court found that an off-duty police officer who had gone out looking to pick fights in bars could not raise the defence of provocation, as no jury acting reasonably could conclude that the accused had been provoked in such a manner as to deprive an ordinary person of the power of self-control:

It must be remembered that on the evidence the respondent was, throughout the disgraceful incidents of the evening, a bad-tempered aggressor and that he seized on the slightest confrontation by [the deceased] to again become the aggressor. If, during the fight which followed . . . he suffered a couple of kicks of indefinite violence, the provocation resulting therefrom could not possibly have caused a police officer to draw his gun and fire five shots at his assailant. [pp. 21-22]

1. More recent cases have also confirmed that the defence of provocation may lack an air of reality when the accused initiated an aggressive confrontation which resulted in predictable acts of provocation. In *R. v. Gibson*, 2001 BCCA 297, 153 B.C.A.C. 61, the accused initiated a physical fight with the deceased. He lost the physical confrontation. The deceased pushed the accused away and made a dismissive gesture. The accused felt humiliated and stabbed the deceased with a knife as he was walking away from the scene of the confrontation. The British Columbia Court of Appeal held that there was no air of reality to the defence of provocation, since the provocation was not sudden and would not have caused an ordinary person to have lost his self-control. Ryan J.A. suggested that an ordinary person who initiates a fist fight would not lose control when he receives blows in retaliation:

. . . the sequelae of a lost match (as in *Squire*, the not unexpected blows exchanged during a consensual fight) are not such as to deprive the ordinary person of his power of self-control. . . . [T]he ordinary person standard is adopted to fix the degree of self-control and restraint expected of all in society. It recognizes human frailty when the threshold test is passed and a person is provoked beyond the level of tolerance of the ordinary person. Based on the evidence in this case no jury could find that under the same circumstances an ordinary young man in the appellant’s place would have been provoked by the actions, words and gestures of the deceased so as to cause him to lose his power of self-control. [para. 86]

1. Implicit in the appellate court’s reasoning is the conclusion that the victim’s response — inflicting minor damage in the fight the accused had initiated and then walking away — was within the range of reasonably anticipated responses. No other contextual factors suggested that an ordinary person would have lost self-control in the circumstances. Accordingly, there was no air of reality to the defence.
2. In the *Tran* case,this Court held that an accused who knew that his wife was seeing another man could not claim that finding her in bed with that man had “str[uck] upon a mind unprepared for it”: para. 45. The accused in *Tran* had maintained the initiative throughout: he had entered his estranged wife’s apartment unexpectedly, without being invited, and proceeded to attack his wife and her lover when he found them in bed together. Although this Court analyzed the predictability of the allegedly provocative act only under the subjective component of the test, there was an implied objective dimension to the analysis. An “ordinary person” who burst into his estranged wife’s apartment — and who knew that she had taken a new lover — could reasonably anticipate that he would discover the wife and her lover in bed.
3. Finally, I come to the case *Thibert*. In *Thibert*, a majority of this Court held that the defence of provocation was properly left to the jury, notwithstanding evidence that the accused’s conduct had precipitated the wrongful act or insult relied on as provocation. The accused, Thibert, who was distraught because his wife wanted to leave him and had begun seeing another man, went to his wife’s workplace in an attempt to convince her to stay with him. He had placed a loaded rifle in his car. He met his wife in the parking lot adjacent to her workplace. The wife’s lover interrupted the conversation. The accused took the rifle out of his car and pointed it at him. The deceased began walking towards the accused, with his hands on the wife’s shoulders and swinging her back and forth, all the while challenging the accused to shoot him. The accused shot him, and raised the defence of provocation at trial.
4. A majority of this Court, *per* Cory J., held that the trial judge had not erred in leaving the defence of provocation with the jury. The majority reasons focused predominantly on whether the accused could have subjectively lost control as a result of the victim’s taunts. The majority concluded that, since the accused did not expect to see his wife’s lover at the meeting, the confrontation with the deceased was unforeseen. Accordingly, the majority held that the subjective element could be met and that, by extension, there was an air of reality to the defence: *Thibert*, at para. 27. The accused could not be said to have sought out the confrontation, according to the majority’s reasoning. The reasons also referred to the significance that an ordinary person in the accused’s circumstances would attribute to the taunts, but did not explore how the objective element of the defence, as analyzed in this case, would be met in a situation of self-induced provocation. The majority appears to have relied heavily on the fact that, although the case was close to the line, deference should be shown to the trial judge who had left the defence to the jury: para. 33. *Thibert* is distinguishable from the present case, in which Cairney sought out a confrontation with Ferguson at gunpoint.
5. Taken as a whole, the cases support the view that the fact that provocation is “self-induced” by the accused may be relevant to both the objective and subjective components of the defence. Self-induced provocation is not a special category of the defence attracting special principles. Rather, it describes a particular application of the general principles that govern the defence of provocation. There is no absolute rule that a person who instigates a confrontation cannot rely on the defence of provocation. As in all cases where the defence of provocation is raised, whether the defence goes to the jury depends on whether the evidence provides an air of reality to it. However, the fact that an accused sought out an aggressive confrontation and received a predictable response is a factor which may deprive the defence of an air of reality.

III. Application

1. The question is whether on the evidence Cairney’s defence of provocation possessed an air of reality. The trial judge left the matter to the jury, although she appears to have applied a “some evidence” test instead of the air of reality test. The Court of Appeal disagreed, finding that there could be no reasonable doubt as to whether the objective or subjective elements of the defence were present.
2. In my view, this appeal can be resolved on the objective element of the test, which asks whether there was a wrongful act or insult by the victim, *sufficient to deprive an ordinary person of the power of self-control*.
3. The alleged wrongful act or insult was the deceased’s words to Cairney when Cairney confronted him at gunpoint: “Fuck you, you goof. This is none of your business, I’ll do with Fran whatever I want.”
4. Cairney argues that these words constituted a threat of imminent domestic abuse sufficient to cause an ordinary person to lose self-control. The record does not support this contention. Ferguson was having a conversation on the telephone when Cairney approached. He was no longer behaving aggressively towards Rosenthal — his moment of anger against Rosenthal had passed. Moreover, Ferguson was attempting to leave the apartment when he spoke those words. The record, as the Court of Appeal concluded, simply does not support the contention that an ordinary person would have viewed the victim’s words as a threat of imminent domestic violence against Rosenthal, leading to a loss of self-control.
5. What we are left with is a concern on Cairney’s part to prevent future abuse against Rosenthal, and Cairney’s declared intention to achieve this by extracting a promise at gunpoint from Ferguson to stop abusing her. An ordinary person who seeks to extract a promise at gunpoint would not be surprised if the person confronted rebuffs the overture, in words like those used by the victim here. Ferguson’s response fell within a range of predictable responses. There is nothing on the record to support the element of sudden shock required to cause an ordinary person to lose self-control. It follows that a properly instructed jury acting reasonably could not have had a reasonable doubt about whether Ferguson’s conduct was sufficient to deprive an ordinary person of the power of self-control.
6. There was evidence, provided by Cairney’s testimony, sufficient to support the subjective element — that Cairney in fact acted in response to the provocation before his passion had time to cool. The Court of Appeal entered into a minute weighing of the evidence that went into the merits of the defence, by examining whether Cairney’s passions had time to cool during the time that he followed Ferguson to the apartment building’s stairwell. This approach went well beyond the requirements of the air of reality test — the test only requires that there be an evidential foundation on which a properly instructed jury acting reasonably could find that there was a reasonable doubt as to whether the accused is guilty of murder, on the basis of the defence of provocation. However, the Court of Appeal’s error in assessing the subjective element does not change the outcome of this appeal, since there is no air of reality to the objective element of the defence.
7. In this case deference to the trial judge is not appropriate, since she appears not to have applied the correct test in deciding whether to leave the defence of provocation to the jury.
8. I add the following, from the perspective of policy as it applies to cases such as this. Violent confrontations like the gunpoint lecture that led to the death of Ferguson are to be discouraged. Where conduct of this nature occurs, it will generally play a role in assessing whether the defence of provocation meets the air of reality test, particularly under the objective element of the defence. The law does not condone the initiation of gunpoint lectures, regardless of the cause that led the accused to pick up a weapon.
9. Accordingly, I would dismiss the appeal and affirm the order for a new trial.

The reasons of Fish and Abella JJ. were delivered by

1. Abella J. (dissenting) — I have had the benefit of reading the Chief Justice’s reasons and agree that there was evidence to support the subjective element of the provocation defence. With great respect, however, I disagree with her conclusions on the objective element of the defence. In my view, the trial judge did not err in leaving the defence with the jury.
2. The role of the trial judge in deciding what defences to put to the jury is to act as gatekeeper and “review the evidence [to] determine whether, *if believed*, it could permit a properly instructed jury acting reasonably to acquit” (*R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 87 (emphasis in original)). This threshold determination “is not aimed at deciding the substantive merits of the defence”, and the trial judge must not make determinations of credibility, weigh evidence, make findings of fact, or draw determinate factual inferences (*Cinous*, at paras. 54 and 87).
3. For defences like provocation, the trial judge must determine whether the evidence is reasonably capable of supporting the inferences necessary to make out the defence (*R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350, at para. 41). When carrying out this “limited weighing” of the evidence, the trial judge “does not draw determinate factual inferences, but rather comes to a conclusion about the field of factual inferences that could reasonably be drawn from the evidence” (*Cinous*, at para. 91; see also *R. v. Mayuran*, 2012 SCC 31, [2012] 2 S.C.R. 162, at para. 21).
4. In relation to the objective element of provocation, the judge must determine whether there is evidence that could raise a reasonable doubt about whether the accused was faced with a wrongful act or insult sufficient to deprive an ordinary person of self-control (*Tran*, at para. 25). To determine how the “ordinary” person would react to a particular insult, it is necessary to take the relevant context and circumstances into account, but without going so far as to accept idiosyncratic characteristics of the accused that would subvert the objective standard (*Tran*, at paras. 31-35). One clearly relevant contextual circumstance that informs the inquiry is the history and background of any relationship between the victim and the accused (*R. v. Thibert*, [1996] 1 S.C.R. 37, at paras. 16-19).
5. In this case, Ferguson’s words and the reaction they would elicit from an ordinary person cannot be appreciated without considering the whole context, and, in particular, the history of the relationship between Cairney and Ferguson. The majority’s approach concentrates mainly on one aspect of the evidence — Cairney confronting Ferguson with a gun — to the exclusion of other evidence that could well have led the jury to conclude that the objective element of provocation was met based on a credible threat that Ferguson would again abuse Cairney’s cousin, Fran Rosenthal.
6. The predictability of the alleged provocation is certainly relevant to the analysis. But the assessment of the evidence relevant to the objective element should not be skewed by placing predominant emphasis on the aggressive conduct of the accused at the determinative expense of the whole context. An analysis that overwhelmingly focuses on whether the victim’s acts were the predictable consequence of the accused’s aggressive conduct appears to me to be too restrictive. It is noteworthy that two of the commentators cited by the majority in support of denying the defence of provocation “where the accused . . . initiates a confrontation and receives a predictable response” in fact *criticise* such an approach (Morris Manning and Peter Sankoff, *Manning, Mewett & Sankoff:* *Criminal Law* (4th ed. 2009), at pp. 770-72; Don Stuart, *Canadian Criminal Law: A Treatise* (6th ed. 2011), at p. 592).
7. Ferguson and Cairney were close friends. The only source of conflict between them, which ultimately led to the killing, was Ferguson’s long history of domestic violence against Fran Rosenthal, whom Cairney thought of as his “little sister”.
8. Ferguson had been attacking Fran Rosenthal for over a decade. The assaults were frequent — often weekly. They were also severe: Rosenthal testified about incidents such as Ferguson hitting her in the head with a golf club. Cairney knew all about the assaults since Rosenthal had repeatedly taken refuge with him and his wife. She would show up bruised and injured, sometimes so badly that she was unable to go to work.
9. Less than a year before the shooting, Cairney had witnessed one of the attacks. He had found Ferguson kneeling on Fran Rosenthal’s throat, choking her to the point of unconsciousness. Cairney had to push Ferguson off of Rosenthal, and spent that entire night with Ferguson to ensure that he did not attack her again. A few weeks before the shooting, Rosenthal told Cairney that she had thought she was going to die that time.
10. The incident leading to the shooting had the potential to turn into another assault. Ferguson suddenly became enraged and started screaming at Fran Rosenthal. He called her a “fuckin’ bitch” and a “fuckin’ cunt” and threatened her with: “If it wasn’t for your sore back, I’d be throwing you against the walls right now.” He ordered Rosenthal to tell Cairney to leave. When she did, Cairney expressed his concern to her that Ferguson was going to start beating her. She did not deny it. In cross-examination, she admitted that she wanted Cairney to leave because danger to her was imminent and she did not want him to see it.
11. While the majority suggests that Ferguson was “no longer behaving aggressively towards Rosenthal” and that “his moment of anger against Rosenthal had passed” by the time Cairney confronted him, the opposite inference can also be drawn from this record. Notably, Cairney’s evidence about the progression of the fight between Ferguson and Rosenthal is that it continued to escalate after Cairney left the room at Rosenthal’s request. Cairney testified during cross-examination, for instance, that hearing Ferguson screaming threats at Rosenthal was what led him to come back in and confront Ferguson:

Q And then in spite of your concerns about the potential for violence then, you actually do leave the two alone for a while, in spite of that explosive, you know, kind of *powder keg situation*. Right?

A Right.

Q And you come back with the gun, smash the phone. Right?

A *After I heard the argument escalating and Steve [Ferguson] screaming at her.*

Q Oh, okay. *What was Steve saying then in terms of the argument escalating?*

A I believe the words were, *You never fucking listen, you fucking cunt. I heard Frannie yelling back at Steve. That’s when I had enough.* And all I wanted to do was scare Steve. I did not want to shoot him. [Emphasis added.]

1. At that point, Cairney confronted Ferguson with the gun and said:

Do you think you own her? Do you think that she’s your property? Do you think that you can beat the shit out of her anytime you want? I said, I had it up to here, buddy. I said, listen, here you are all those months, when you’re not working and she’s buying your beer and whatever and toting [*sic*] to your every whim, and whenever you get pissed off about anything, you use her as your punching bag.

1. The response that caused Cairney to snap, according to his testimony, was this: “Fuck you, you goof. This is none of your business. I’ll do with Fran whatever I want.” The provocative act was not Ferguson responding dismissivelyto Cairney pointing the gun. Itwas his emphatic assertion that he would continue the conduct towards Fran Rosenthal that Cairney had just confronted him about — “beat[ing] the shit out of her” and using her as his “punching bag”.
2. The facts of this case illustrate the frailty of making the availability of the provocation defence hinge on a “who started it?” inquiry in circumstances involving a back-and-forth between the victim and the accused. Removing the defence from the jury turns on the characterization that Cairney initiated an “aggressive confrontation”. On another view of these facts, however, Ferguson initiated the confrontation when he started verbally abusing and threatening Cairney’s cousin — acts that could, in light of Ferguson’s history of relentless domestic abuse, readily and reasonably be interpreted as a prelude to another brutal assault.
3. Bielby J.’s decision to leave provocation to the jury was therefore a proper one. Her review of the evidence relevant to the objective element of provocation was flawless:

The event which Mr. Cairney testified caused him to lose control was Mr. Ferguson telling him he was a goof and that he would do what he wanted to with Fran, said as he walked away from Mr. Cairney who had just told him to come back. That event must be considered in the context of what occurred just before and in the context of Mr. Cairney’s knowledge of the history of domestic violence between Mr. Ferguson and Ms. Rosenthal. . . .

. . .

You must take into account everything that was said or done at the time and must also consider Mr. Cairney and Mr. Ferguson’s relationship and history. This includes evidence of Mr. Cairney’s knowledge of prior incidents when Mr. Ferguson had struck or been violent toward Ms. Rosenthal, including the one he personally witnessed the prior summer when he saw Mr. Ferguson place his knee on her neck, leaving her almost unconscious, where Mr. Cairney intervened to pull Mr. Ferguson off her, the fact that she told Mr. Cairney she thought she was going to die that night in a conversation held with him in January 2007 and the fact Mr. Cairney was attempting to scold Mr. Ferguson over his demeaning and violent treatment of Fran over the years.

1. The majority would, however, remove the defence of provocation from the jury solely because Ferguson’s words “fell within a range of predictable responses” to what it calls a “gunpoint lecture”. While Ferguson’s dismissive *attitude* towards Cairney might have been predictable, it would, in my view, be open for a jury to infer from the full context of this case that an ordinary person would not predict Ferguson’sresponse that he would keep beating Rosenthal if he felt like it.
2. This Court said in *Tran* that the objective element of the defence of provocation should be informed by contemporary norms, including *Charter* values. These do not include aggressively proprietary atavistic attitudes. It is thereforetroubling, with respect, to conclude that it was “predictable” for Ferguson to react to Cairney’s warning by confirming his intention to continue inflicting domestic violence. It is difficult to accept that an expressed intention to continue assaulting a spouse could ever be considered“predictable”.
3. It is true that “[t]he law does not condone the initiation of gunpoint lectures”, as the majority observes. The law never condones the conduct that gives rise to the defence of provocation. That is why provocation is only a partial defence, reducing the offence from murder to manslaughter and why the defence of provocation in the circumstances of this case in no way absolves the accused. Cairney’s nine-year prison sentence was based on the fact that he caused Ferguson’s death by using a firearm in the dispute.
4. I would allow the appeal and restore the conviction and nine-year sentence for manslaughter.

*Appeal dismissed,* Fish *and* Abella JJ. *dissenting.*

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