



# Reasonable Force

## Guidance from the CPS

[www.cps.gov.uk/legal/s\\_to\\_u/self\\_defence/index.html#Reasonable\\_Force](http://www.cps.gov.uk/legal/s_to_u/self_defence/index.html#Reasonable_Force)

## The Law and Evidential Sufficiency

Self-defence is available as a defence to crimes committed by use of force.

The basic principles of self-defence are set out in (*Palmer v R*, [1971] AC 814); approved in *R v McInnes*, 55 Cr App R 551:

*“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but only do, what is reasonably necessary.”*

The common law approach as expressed in *Palmer v R* is also relevant to the application of **section 3 Criminal Law Act 1967**:

*“A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.”*

Section 3 applies to the prevention of crime and effecting, or assisting in, the lawful arrest of offenders and suspected offenders. There is an obvious overlap between self-defence and section 3. However, section 3 only applies to crime and not to civil matters. So, for instance, it cannot afford a defence in repelling trespassers by force, unless the trespassers are involved in some form of criminal conduct.

## Reasonable Force

A person may use such force as is reasonable in the circumstances for the purposes of:

- self-defence; or
- defence of another; or
- defence of property; or
- prevention of crime; or
- Lawful arrest.

In assessing the reasonableness of the force used, prosecutors should ask two questions:

- Was the use of force necessary in the circumstances, i.e. was there a need for any force at all? and
- Was the force used reasonable in the circumstances?

The courts have indicated that both questions are to be answered on the basis of the facts as the accused honestly believed them to be (*R v Williams (G)* 78 Cr App R 276), (*R. v Oatbridge*, 94 Cr App R 367).

To that extent it is a subjective test. There is, however, an objective element to the test. The jury must then go on to ask themselves whether, on the basis of the facts as the accused believed them to be, a reasonable person would regard the force used as reasonable or excessive.



# Reasonable Force

It is important to bear in mind when assessing whether the force used was reasonable the words of Lord Morris in (Palmer v R 1971 AC 814);

*“If there has been an attack so that self-defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his defensive action. If the jury thought that that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought necessary, that would be the most potent evidence that only reasonable defensive action had been taken ...”*

The fact that an act was considered necessary does not mean that the resulting action was reasonable: (R v Clegg 1995 1 AC 482 HL). Where it is alleged that a person acted to defend himself/herself from violence, the extent to which the action taken was necessary will, of course, be integral to the reasonableness of the force used. In (R v OGrady 85 Cr App R 315), it was held by the Court of Appeal that a defendant was not entitled to rely, so far as self-defence is concerned, upon a mistake of fact which had been induced by voluntary intoxication.

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## **Section 76 of the Criminal Justice and Immigration Act 2008**

The law on self-defence arises both under the common law defence of self-defence and the defences provided by section 3(1) of the Criminal Law Act 1967 (use of force in the prevention of crime or making arrest). It has recently been clarified by section 76 of the Criminal Justice and Immigration Act 2008.

Section 76 of the Criminal Justice and Immigration Act 2008 provides clarification of the operation of the existing common law and statutory defences. Section 76, section 76(9) in particular, neither abolishes the common law and statutory defences nor does it change the current test that allows the use of reasonable force.

Section 76(3) confirms the question whether the degree of force used by the defendant was reasonable in the circumstances is to be decided by reference to the circumstances as the defendant believed them to be.

Section 76(4) provides that where the defendant claims to have a particular belief as regards the existence of any circumstances, the reasonableness or otherwise of that belief is relevant to the question whether the defendant genuinely held it. However, if it is established that the defendant did genuinely hold the belief he may rely on that belief to establish the force used was reasonable whether or not it was a mistaken belief and if it was mistaken, whether or not the mistake was a reasonable one to have made, i.e. the crucial test at this stage is whether the belief was an honest one, not whether it was a reasonable one. However, the more unreasonable the belief, the less likely it is that the court will accept it was honestly held.

Subsection (5A) allows householders to use disproportionate force when defending themselves against intruders into the home. The provision came into force on 25 April 2013 and applies to cases where the alleged force was used after that date. The provision does not apply retrospectively. It provides that where the case is one involving a householder (please see the section below for further details) the degree of force used by the householder is not to be regarded as having been reasonable in the circumstances as the householder believed them to be if it was grossly disproportionate. A householder will therefore be able to use force which is disproportionate but not grossly disproportionate.



# Reasonable Force

The provision does not give householders free rein to use disproportionate force in every case they are confronted by an intruder. The provision must be read in conjunction with the other elements of section 76 of the 2008 Act. The level of force used must still be reasonable in the circumstances as the householder believed them to be (section 76(3)).

In deciding whether the force might be regarded as 'disproportionate' or 'grossly disproportionate' the court will need to consider the individual facts of each case, including the personal circumstances of the householder and the threat (real or perceived) posed by the offender.

Section 76(7) sets out two considerations that should be taken into account when deciding whether the force used was reasonable. Both are adopted from existing case law. They are:

- that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action;
- that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.

This section adopts almost precisely the words of Lord Morris in (*Palmer v R* [1971] AC 814) which emphasise the difficulties often facing someone confronted by an intruder or defending himself against attack:

*"If there has been an attack so that defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his defensive action. If the jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought necessary that would be the most potent evidence that only reasonable defensive action had been taken..."*

## Householder Cases

### The definition of a 'householder case'

The heightened protection described above is only available in 'householder cases'. Subsection (8A) of section 76 of the 2008 Act explains the meaning of a 'householder case'.

Householders are only permitted to rely on the heightened defence for householders if:

- 1) They are using force to defend themselves or others (See (8A) (a)). They cannot seek to rely on the defence if they were acting for another purpose, such as protecting their property, although the law on the use of reasonable force will continue to apply in these circumstances.
- 2) They are in or partly in a building or part of a building (e.g. a flat) that is a dwelling (i.e. a place of residence) or is forces accommodation (see (8A) (b)). For these purposes, the definition of a 'building' includes vehicles or vessels (see (8F)), so that people who live in caravans or houseboats can benefit from the heightened protection. The reference to 'forces accommodation' acknowledges the fact that military personnel may spend lengthy periods away from home in service living accommodation such as barracks. The term 'in or partly in a building' is used to protect householders who might be confronted by an intruder on the threshold of their home, climbing in through a window perhaps. But householder cannot rely on the heightened defence if the confrontation occurred wholly outside the building, for example in the garden. The Government considered that the immediacy of the threat posed by an intruder is greatest when he is entering or has entered somebody's home and the heightened defence is only available to householders in those cases (see MOJ Circular No. 2013/ 02).
- 3) They are not in the building as a trespasser ((8A) (c)). Squatters, for example, could not seek to rely on the heightened defence. The fact that a person has gained permission to occupy the building from another trespasser does not stop them being considered as a trespasser for these purposes (see (8E)).
- 4) They genuinely believed (rightly or wrongly) that the person in respect of whom they used force, was in or entering the building as a trespasser (8A) (d)).



# Reasonable Force

The definition of householder contained in subsection (8B) is wide enough to cover people who live in buildings which serve a dual purpose as a place of residence and a place of work (for example, a shopkeeper and his or her family who live above the shop). In these circumstances, the 'householders' could rely on the heightened defence regardless of which part of the building they were in when they were confronted by an intruder. The only condition is that there is internal means of access between the two parts of the building. The defence would not, however, extend to customers or acquaintances of the shop keeper who were in the shop when the intruder entered, unless they were also residents in the dwelling.

Subsection (8C) makes similar provision for the armed forces whose living or sleeping accommodation may be in the same building as that in which they work and where there is internal access between the two parts. The definition of 'forces accommodation' is set out in subsection (8F).

## **Pre-emptive strikes**

There is no rule in law to say that a person must wait to be struck first before they may defend themselves, (see *R v Deana*, 2 Cr App R 75).

## **Retreating**

Failure to retreat when attacked and when it is possible and safe to do so, is not conclusive evidence that a person was not acting in self-defence. It is simply a factor to be taken into account rather than as giving rise to a duty to retreat when deciding whether the degree of force was reasonable in the circumstances (section 76(6) Criminal Justice and Immigration Act 2008). It is not necessary that the defendant demonstrates by walking away that he does not want to engage in physical violence: (*R v Bird* 81 Cr App R 110).

## **Revenge**

In *R v Rashford* [2005] EWCA Crim 3377 it was held:

*The mere fact that a defendant went somewhere to exact revenge from the victim did not of itself rule out the possibility that in any violence that ensued, self-defence was necessarily unavailable as a defence.*

However, where the defendant initially sought the confrontation (*R v Balogun* [2000] 1 Archbold News 3)

*...A man who is attacked or believes that he is about to be attacked may use such force as is both necessary and reasonable in order to defend himself. If that is what he does then he acts lawfully.*

It follows that a man who starts the violence, the aggressor, cannot rely upon self-defence to render his actions lawful. Of course during a fight a man will not only strike blows, but will defend himself by warding off blows from his opponent, but if he started the fight, if he volunteered for it, such actions are not lawful, they are unlawful acts of violence.

## **Use of Force against Those Committing Crime**

Prosecutors should exercise particular care when assessing the reasonableness of the force used in those cases in which the alleged victim was, or believed by the accused to have been, at the material time, engaged in committing a crime. A witness to violent crime with a continuing threat of violence may well be justified in using extreme force to remove a threat of further violence.

In assessing whether it was necessary to use force, prosecutors should bear in mind the period of time in which the person had to decide whether to act against another who he/she thought to be committing an offence.

The circumstances of each case will need to be considered very carefully.

See Public Interest Use of Force against Those Committing Crime, below.



# Reasonable Force

In *R v Martin (Anthony)* [2002] 1 Cr. App. R. 27, the Court of Appeal held that whilst a court is entitled to take account of the physical characteristics of the defendant in deciding what force was reasonable, it was not appropriate, absent exceptional circumstances which would make the evidence especially probative, to take account of whether the defendant was suffering from some psychiatric condition.

## Final Consequences

The final consequences of a course may not be relevant to the issue as to whether the force used was reasonable. Although, the conduct of the suspect resulted in severe injuries to another or even death, this conduct may well have been reasonable in the circumstances. On the other hand, the infliction of very superficial or minor injuries may have been a product of simple good fortune rather than intention.

Once force was deemed to be unreasonable, the final consequences would be relevant to the public interest considerations.

## Police Powers

Police officers are empowered by Section 117, Police and Criminal Evidence Act to use reasonable force, if necessary, when exercising powers conferred by that Act (Archbold 15-26).

## Private Rather than Public Duty

Prosecutors must exercise special care when reviewing cases involving those, other than police officers, who may have a duty to preserve order and prevent crime. This includes private security guards (including club doormen), public house landlords and public transport employees. The existence of duties that require people, during the course of their employment, to engage in confrontational situations from time to time needs to be considered, along with the usual principles of reasonable force.

## Civilian Powers of Arrest

Care must be taken, when assessing the evidence in a case involving the purported exercising of civilian powers of arrest. Such powers of arrest are dependent upon certain preconditions.

The principal civilian powers of arrest have been substantially amended by the implementation of section 110 of Serious Organised Crime and Police Act (SOCPA) 2005. The citizen's new powers of arrest can be found in section 24A, PACE 1984.

Members of the public (other than constables) may now only arrest for "indictable" offences.

- There are 2 conditions which apply:-
  - o That there are reasonable grounds to believe the arrest is necessary for a reason specified and
  - o It is not reasonably practical for a constable to make the arrest
- The reasons specified are to prevent the person in question:
  - o Causing physical injury to himself or any other person
  - o Suffering physical injury
  - o Causing loss of or damage to property
  - o Making off before a constable can assume responsibility
- Any force used to affect the arrest may be an assault and unlawful; and
- Any force used to resist the arrest may be lawful (see *R v Self* 95 Cr. App R. 42).

However in (*R v Lee*, TLR 24 October 2000), it was held that when a defendant was charged with assault with intent to resist arrest, it was irrelevant whether the defendant honestly believed that the arrest was lawful. Members of the public (as well as police officers) may take action, including reasonable force, to prevent a breach of the peace, which would not necessarily involve exercising the formal powers of arrest.



# Reasonable Force

## Burden of Proof

The burden of proof remains with the prosecution when the issue of self-defence is raised.

The prosecution must adduce sufficient evidence to satisfy a jury beyond reasonable doubt that the defendant was either:

- not acting to defend himself/herself or another; or
- not acting to defend property; or not acting to prevent a crime or to apprehend an offender; or
- If he was so acting, the force used was excessive.

Prosecutors should take special care to recognise, and ensure a sufficiency of evidence in, those cases where self-defence is likely to be an issue.

## Public Interest

Self-defence, being an **absolute defence**, is a matter of evidence and is not in itself a public interest consideration.

In many cases in which self-defence is raised, there will be no special public interest factors beyond those that fall to be considered in every case. However, in some cases, there will be public interest factors which arise only in cases involving self-defence or the prevention of crime.

These may include:

- Degree of excessive force: if the degree of force used is not very far beyond the threshold of what is reasonable, a prosecution may not be needed in the public interest.
- Final consequences of the action taken: where the degree of force used in self-defence or in the prevention of crime is assessed as being excessive, and results in death or serious injury, it will be only in very rare circumstances indeed that a prosecution will not be needed in the public interest. Minor or superficial injuries may be a factor weighing against prosecution.
- The way in which force was applied: this may be an important public interest factor, as well as being relevant to the reasonableness of the force used. If a dangerous weapon, such as firearm, was used by the accused this may tip the balance in favour of prosecution.
- Premeditated violence: the extent to which the accused found themselves unexpectedly confronted by a violent situation, as opposed to having planned and armed themselves in the expectation of a violent situation.

## Use of Force against Those Committing Crime

The public interest factors set out in the earlier section will be especially relevant where, as a matter of undisputed fact, the victim was at the material time, involved in the commission of a separate offence.

Common examples are burglary or theft from motor vehicles. In such cases, prosecutors should ensure that all the surrounding circumstances are taken into consideration in determining whether a prosecution is in the public interest.

- Prosecutors should have particular regard to the nature of the offence being committed by the victim;
- Degree of excessiveness of the force used by the accused;
- Extent of the injuries, and the loss or damage, sustained by either or both parties to the incident;
- Whether the accused was making an honest albeit overzealous attempt to uphold the law rather than taking the law into his/her own hands for the purposes of revenge or retribution.



# Reasonable Force

## **Apprehension of Offenders**

There are two important but sometimes contrasting public interest points regarding the apprehension of offenders. On the one hand, the rule of law and the Queen's Peace must be maintained and violence discouraged. On the other hand, the involvement of citizens in the prevention and investigation of crime is to be encouraged where it is responsible and public spirited.

The law provides a defence for those who act in extenuating circumstances. However, judicial comment has suggested that the courts should take a firm stand against illegitimate summary justice and vigilantism. Prosecutors will need to balance these potentially conflicting public interest considerations very carefully.

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