

## Larceny (s 117)

***Ilich v R* (1987) defined larceny:**

<i>Actus Reus</i>	<i>Mens Rea</i>
1. Taking and carrying away	1. Intention to permanently deprive at the time of taking
2. Property	2. Without a belief in a claim of right
3. Belonging to another	3. Fraud/dishonesty
4. Without consent	
AR & MR coinciding	

### Actus reus

#### **1. Taking and carrying away**

- Slightest asportation is sufficient (*Lapier*)
- Another requirement of taking is the (involuntary) transfer of possession, even if only momentary (*Croton*)
  - In *Lapier*, there was a momentary transfer of possession, where the accused took the victim's earring which immediately became entangled in her hair; momentary taking was sufficient
- In *Croton*, the accused took money out of a joint bank account; it was said that this was not larcenous because the transference of possession was voluntary on the part of the bank; she did not have legal entitlement to the money as it was a joint bank account; lastly, evidence of the arrangement suggested that the money passed to the applicant solely, even if he had to account for it

#### **2. Property (capable of being stolen)**

- At common law, only physical property is included, and must be of at least the slightest value (*Perry; Morris*)
- s 4 of the *Crimes Act* included intangible property

#### **3. Belonging to another**

#### **4. Without consent**

- Facilitation does not amount to consent (*Kennison v Daire* – ATM case); difference between facilitation and consent will be a matter of degree
  - 'The bank consented to the withdrawal of up to \$200 by a card-holder who presented his card and supplied his PIN, only if the card-holder had an account which was current'
- Facilitation does not amount to consent [1968] (*Marvin v Puttick*)

- The shop owner merely facilitated the customer taking his product, which did not amount to real consent; while she had possession, he still had ownership as there was no transfer – she did not pay for the goods
- Possibly anomalous case of *R v Turvey* [1946]
  - Held there was consent where an employer consented to a third party, allowing another employee to steal property so that he could catch him; it was held that the employer willingly gave consent
  - This case was also authority that consent can be given through a third party
- The distinction between *Martin v Puttick* vs *Turvey*: in *Puttick*, the accused did not give up constructive possession of her shopping bag when she gave it to the manager to pack; therefore, the manager did not consent to her taking the goods because he did not have constructive possession of the bag at the time, and merely facilitated in giving her bag back
- Shop assistant cannot consent to the taking of property by another, as they do not own the property (*Ellis v Lawson*); employer still has constructive possession
- **Consent due to mistake (vitiates or voids the consent):**
  - Mutual mistake is made when neither party realises that a mistake has been made, and when the accused realises they have gained from the mistake they form a dishonest intention
  - Unilateral mistake is made when the accused realises immediately that the other party has made a mistake and from that point forms the dishonest intention to take advantage of it
- ***Illich v R* (Illich was overpaid by his employer, and put the excess money aside);** it was held in this case that there were three kinds of fundamental mistake that prevented ownership from passing:
  - Mistaken identity of the person to whom the property is given (*Middleton*)
  - Mistake as to identity of the property or thing that is handed over (*Ashwell*)
  - Where an excess of goods has been transferred, ownership of the excess has not been handed over (there is no vitiation of consent and hence no larceny,

however a civil action can be raised for the excess); this is because ownership of money in the form of currency passes when the person in possession hands it to another intending them to be the owner; a mistake merely as to the amount was not a fundamental mistake

- Where there is a mutual error and the accused lacks mens rea at the time of taking, different results are yielded depending on whether *Ilich* or *Potisk* applies. If *Potisk* is applied, not only will the prosecution be unable to establish a taking without consent, but D will also lack mens rea at the time of taking. However, if *Ilich* is applied and a fundamental mistake has been made and an accused only subsequently becomes aware of the error but decides to keep the property, then the *Riley* principle can be applied to overcome the difficulty of an absence of mens rea at the time of taking; that is, once a fundamental error has been established, so that consent is vitiated (according to *Ilich*), the original taking will be trespassory. Under the *Riley* principle, this original trespassory taking will extend unless and until the accused forms the necessary mens rea. D can thus be guilty of larceny in cases of mutual and unilateral (fundamental) mistakes under *Ilich*

**s 94AA of the Crimes Act:** A person may be convicted of stealing property, even if at the trial it appears that the property had already previously been stolen, and hence notwithstanding that the person from whom the property was stolen had no right of possession.

### **Mens rea**

#### **1. Intention to permanently deprive at the time of the taking (*Foster*)**

- Focus is on exercising ownership rather than the reasonableness of the intention to return it
- In *Foster*, the gun case, it was held that there was no larceny as he did not exercise ownership over the gun, and intended to return it later that night
- An intention to return the property will negate mens rea; a mere temporary appropriation is insufficient to constitute a felonious taking (*Holloway* – case where accused moved leather skins)

- However, an intent to return the property will not be a defence if the person has appropriated the property in question for their own use or benefit (s 118)
- s 118 was narrowed by *Foster*, where it required a conversion of the property, enough to repudiate the rights to the property of the original owner; along with appropriating the property, it must be shown the accused intended to exercise ownership of the goods
- Fungibles are not to be treated differently than other property (*Cockburn*); cannot return the same currency, therefore it is larcenous if without consent

## **2. Without a belief in a claim of right**

- D must satisfy the evidentiary burden of proof (*Lopatta*)
- Legal, not moral right (*Bernard*)