

Class 8 Common and Aggravated Assault

Assault generally

- Pattern of victimisation in assault offences
 - Men overrepresented as offenders and victims (Brown et al)
 - Social/public violence - significant majority of Vs are men
 - Often involves 'confrontational' violence - social interaction that escalates into physical conflict, young men, alcohol related.
 - Private violence - majority victims are female
 - Domestic/intimate relationships, characterised by power and control
 - Treated differently, heavy reliance on civil ADVO.
 - Hidden nature - more violent crime unreported than property crime
 - Familial or relational nature of much violence crime
 - Importance of age and gender in such crime (male to female, adult to children)
 - Social and group difference - racist violence, violence against gays, violence by police officers)
 - Indigenous Australians are experiencing violence at a higher rate than average
 - Context is everything.
- Types
 - Common assault
 - S61 - max penalty is 2 years imprisonment, but does not define it. Listed as indictable offence, but routinely dealt with summarily by local court. Police has large discretion, including whether to proceed with charge or not.
 - Aggravated assault
 - Covers a range of offence which are more serious since additional or aggravating factors. Usually table 1 or 2 offences, regularly dealt with summarily.
 - Assaults
 - ◻ Causing particular injuries
 - ◆ S59 assault occasioning ABH
 - ◻ With further specific intent
 - ◆ S33 Wounding or GBH with intent
 - ◻ On victims with special status
 - ◆ S58 assault police officer or prison officer in exec. of duty
 - ◻ Using offensive weapons or dangerous substance
 - ◆ S46 causing bodily injury by gunpowder
 - ◻ In particular circumstance
 - ◆ S60E assault at schools
 - Assaults in combination with other offences
 - ◻ S96 robbery + wounding
 - Sexual assaults
 - ◻ Division 10
 - Crimes (D & PV) Act 2007
 - ◻ S13 stalking and intimidation

Common assault - 2 years

Crimes Act s61 COMMON ASSAULT PROSECUTED BY INDICTMENT

Whoever assaults any person, although not occasioning actual bodily harm, shall be liable to imprisonment for two years.

- Definition
 - An assault is any act which intentionally (or recklessly) causes another person to apprehend immediate and unlawful personal violence or the actual intended use of unlawful force to another person without consent
[Fagan] at 444 per James LJ
- Types
 - Distinction recognised between two types [Darby v DPP]
 - Assault by force (battery)

- Assault by threat of force
- Physical element
 - **Assault using force - Use of force on another person (without consent)**
 1. **Make unlawful contact**
 - Merest physical touch may be sufficient e.g. a slap, push, spitting
 - Injury not required (that may make it an aggravated assault)
 2. **Omissions not likely to be sufficient, but a continuing act (do something, then remain like that) is**
 - **[Fagan v Commissioner of Metropolitan Police]**
 - ◆ Facts
 - ◇ F drove towards officer and stopped motor car on top of police officer's left foot. 'Get off, you are on my foot' said the officer. 'F*** you, you can wait' said F. Engine of car stopped running. Officer repeated statement and appellant reluctantly said 'Okay man, okay' and turned on ignition of vehicle and reversed it off officer's foot.
 - ◆ Held:
 - ◇ F 'knowingly, provocatively and unnecessarily allowed the wheel to remain on the foot after the officer said 'Get off, you are on my foot' which proved assault.
 - ◇ **To constitute the offence of an assault some intentional act must have been performed: a mere omission to act cannot amount to an assault.**
 - ▶ In this case, the first mounting of the foot was actus reus which continued until moment of removal. The initial mounting of wheel is an act, not omission.
 - ▶ Important to distinguish an act which is complete but results may continue to flow and an act which is continuing.
 3. **Unlawful: assumes that force is without consent of V, except where people are assumed to give consent to everyday contact (e.g. on a bus)**
 - **Crown does not have to prove it.** Assume no consent.
 - Also assume that D know V did not consent (unless evidence/circumstance suggest otherwise)
 - **Assault by threat of harm - Conduct that causes another to apprehend immediate infliction of force (without consent)**
 1. **Conduct: What kind of conduct is sufficient?**
 - Omission rarely sufficient **[Fagan]**
 - In NSW, words, gestures, acts
 - ◆ Threatening words IS sufficient **[Knight]**
 - ◆ **Phone calls - only sufficient if V apprehends immediate violence**
 - ◇ Threats over phone MAY BE sufficient **[Knight]**, but only if V apprehends immediate violence
 - ◇ MAY include silent phone calls (if UK law followed) but again only if test of immediacy is satisfied **[R v Ireland]**
 - ▶ **For silent phone calls, s13 C(D&PV) Act more likely charge here in NSW**
 2. **Apprehension: V must be put in fear of the threat of imminent bodily harm [Pemble]**
 - V must subjectively know what D is doing **[Pemble]**
 - Some uncertainty as to whether V must ACTUALLY fear this harm
 - ◆ **[Ryan v Kuhl] - requires subjective fear**
 - ◇ Two men in toilet, a hole on wall, D put a knife through.
 - ◇ P says that he was not afraid of it.
 - ◇ Held
 - ▶ **If victim not subjectively afraid, no assault.**
 - ▶ If super brave, does not fear, no assault
 - ◆ **[MacPherson v Beath] - does not requires subjective fear to be reasonable**
 - ◇ Common law principles that you take your victim as you find them **[R v Blaue]**
 - ◇ If V is especially timid, and D knows it, the unreasonableness of V's fear may not preclude conviction **[MacPherson v Beath]**
 - ◆ But in **[Brady v Schnatzel]** - not material that V should be put in fear, this would make offence depend on whether V is courageous or timid person, and not on D's intention.
 - ◆ But given the MR of intention or advertent recklessness, test of reasonableness is redundant
 - ◆ **Compare with s13(4) Crimes (D&PV) Act 2007: P need not prove V in fear**
 3. **Immediacy: threat must raise apprehension of immediate (imminent) bodily harm**
 - e.g. D is on other side of V's door

A. Threats of future violence/bodily harm not normally sufficient

◆[Knight]

- ◇ Facts
 - ▶ K convicted of crime, appealed and dismissed. Then, start to call police officers, judges from a phonebox far away and make threats over the phone.
- ◇ Issue:
 - ▶ Whether the threats sufficient to constitute assault
- ◇ Held:
 - ▶ Not assault
 - Assault requires 'apprehend immediate violence', not 'immediately apprehend violence'
 - Evidence is no further than that serious threats has been made, **but those threats are not of immediate violence**. They are mere threats that could have been executed at any time, if at all.
 - [Barton v Armstrong] held that threats made through phone can constitute assault, but it depends on circumstance.

◆ Phone calls

- ◇ Phone calls are **not normally sufficiently immediate but could in some circumstances** e.g. if D has some form of power over V and in position to carry out threats.
 - ▶ [Knights] limits [Barton] to this kind of specific factual situation.
 - ◇ **But, now situation change**. Mobile phones. Not like phone box where it is impossible that caller can be really close, like in backyard. Arguably be sufficient now.
 - ◆ Compare: may use AVO if threat not sufficiently immediate or s13 C(D&PV) Act
- B. Concept of 'immediate & continuing threat': present fear of future harm may be sufficient, in situations where V cannot get away**

◆[Zanker v Vartzokas]

- ◇ Facts
 - ▶ Young woman accepted lift from D. D accelerated van and offered her money for sexual favours, persisting after she rejected. She demanded to get out, D said 'I am going to take you to my mate's house. He will really fix you up'.
 - ▶ Threat in circumstances put her in such fear that she opened the door and leapt out onto the roadside. Suffered some bodily injuries.
- ◇ Held:
 - ▶ The fear had to be a present fear of physical harm in due course within the parameters of the incident of unlawful imprisonment - but the feared physical harm did not have to be immediate. **The threat could operate immediately on the V's mind but in a continuing way so long as the unlawful imprisonment situation continued**
 - ▶ The threat is explicit, being 'at mate's house', but how far is it? The next corner or an hour driving?
 - ▶ The fear in her head is a continuous one, its effect is the same when threat made and an hour later.

C. If threat is conditional, e.g. I will cut you to bits if you tried to punch me, it may still amount to assault if it's unlawful and raises apprehension of immediate harm [Rozsa v Samuels]

- Mental element for both
 1. **Intention to do the act**
 - D means to (i) use of force on the victim (ii) do the act to create the apprehension in V of immediate force
 - OR**
 2. **Recklessness**
 - D foresees (is aware of) the **possibility** *not probability [Aubrey]* that act would (i) make unlawful contact with V (ii) create apprehension of immediate bodily harm in V but still does it anyway
 - **Subjective test, advertent recklessness.**
 - ◆ D did not desire such fear, realize his conduct may do so but still did it/foresee the risk of application of force but still did so.
 - **Inadvertent recklessness NOT ENOUGH - D did not think about the possibility that his conduct may cause fear or unlawful contact at all but a reasonable person would have known**

◆[McPherson v Brown]

- ◇ Facts
 - ▶ During protest, a number of student took over a building, lecture try to re-occupy it.