

Murder

Strength of the murder charge against _____

Murder is defined in s18(1)(a) of the *Crimes Act 1900* (NSW) ("CA") as an act or omission causing death. Section 19A(1) CA stipulates that a person who commits murder is liable to imprisonment for life. The prosecution has both the evidential and legal burden of proof regarding the elements of murder. The elements of murder, which the prosecution must prove beyond a reasonable doubt (*Woolmington*), are as follows:

Physical Element

1. Act/Omission causing death

-Requires a positive act (it is presumed that A's act was voluntary & willed (*Bratty; Falconer*); or

-Mason J in *Royall*: the first step in a murder case is to identify which act caused death this is what s18 is predicated on.

-Which act? The jury decides the precise act that caused death — if there is more than one possible cause (*Ryan*; confirmed in *Arutlthilakan* [55] (Kirby J)).

-Or an omission eg: *SW and BW (No 1)*: 7 yr old 'Ebony' died from starvation & neglect; mother guilty of murder due to omission to provide adequate nourishment and/or medical treatment (mother fully realised the probability of her daughter dying and deliberately omitted to do anything about it).

-What is death?

Human Tissue Act 1983 (NSW): s33 Death = irreversible cessation of all brain function or irreversible cessation of blood in the body

What is life? Life begins if child has breathed and is wholly born: s20 CA

2. causing

-Causation: A's conduct must cause the death

-Causation is objective question of fact for jury (*Ryan*) but there may be more than one possible cause of death

-Usually arises where there is an **intervening act of:**

-**Third party** (*Smith; Evans and Gardner; Page*)

-**Nature** (*Hallet*)

-**The victim** (*Blaue; Royall*)

*Currently favoured test: operating and substantial cause test (except for cases of victim fright or self-preservation): *R v Smith* approved in *Royall* 386 (Mason CJ)

Third Party

-Ask: did A inflict a wound which was the operating and substantial cause of the death? *R v Smith* approved in *Royall* 386 (Mason CJ)

-Only if original wound is 'merely the setting' or if second cause is 'so overwhelming' as to make original wound 'merely part of history' is causal chain interrupted: *R v Smith* at 42-43

Surgical intervention: *Evans and Gardiner (No 2)*: blockage caused death, not doctor's failure to diagnose, & blockage caused by stabbing, which could still be operating and continuing cause of death 11 months later; inferior medical treatment is not enough to break the chain of causation.

-Whether surgical intervention will overwhelm original cause is less about the degree of incompetence (although recklessness will break the chain) and more about how independent the surgery is from the original act (*Cheshire*); cf *Jordan* [1956]: where treatment 'palpably wrong'.

[further material omitted]

Sexual Assault

Strength of the sexual assault charge against ____

Sexual assault is defined in s611 of the *Crimes Act 1900* (NSW) ("CA") as sexual intercourse without consent, the punishment for which is up to 14 years imprisonment.

The prosecution has both the evidential and legal burden of proof regarding the elements of sexual assault. The elements of sexual assault, which the prosecution must prove beyond a reasonable doubt (*Woolmington*), are as follows:

Physical Element: sexual intercourse + without consent

Sexual intercourse

s61H(1) defines sexual intercourse as:

(a) sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of any person by:

- (i) any part of the body of another person, or

- (ii) any object manipulated by another person

- except where the penetration is carried out for proper medical purposes or

(b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person, or

(c) cunnilingus or

(d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

Without consent

s61HA(2): A person consents to sexual intercourse if the person **freely and voluntarily** agrees to the sexual intercourse.

s61HA(4) **Negation of consent** — A person does not consent to sexual intercourse if:

(a) lacks capacity (including because of age or cognitive incapacity)

- Capacity requires comprehension of physical aspect of act and its sexual nature
(*Roden*)

(b) lacks opportunity due to being unconscious or asleep

(c) consents because of threats of force or terror (against self or another)

(d) consent due to unlawful detention

s61HA(5) **Negation of consent (via MISTAKES)** — A person who consents to sexual intercourse with another person in the following circumstances:

(a) under a mistaken belief as to the **identity** of the other person

(b) under a mistaken belief that the other person is **married** to the person

- *Papadimitropoulos*: Greek man had represented to a Greek immigrant girl, who spoke little English, that they were married

(c) under a mistaken belief that the sexual intercourse is for **health or hygienic purposes** (or under any other mistaken belief about the nature of the act induced by fraudulent means) — (overcomes *Mobilio*)

[further material omitted]

Self-defence

Self-defence is a complete defence (s418(1) Crimes Act 1900 (NSW)) and is available as a defence to all offences. A has the evidentiary burden and the prosecution has the legal burden to disprove self-defence beyond reasonable doubt (*Woolmington*). This requires legitimate reasoning, not mere speculation: *Colosimo*. The statutory test for self-defence is as follows:

1. s418(2) Self-defence: 2 Limb Test

Katarzynski per Howie J [22]; approved in *Harafias* [2016]

i) Belief: is there a reasonable possibility that A believed his/her conduct was necessary in order to defend self or others (*Silva*)

-Entirely subjective test

-A's honest perceptions as to necessity to defend self

-“It is sufficient if the accused genuinely holds that belief.” (per Howie J, *Katarzynski*, [24])

-If A **intoxicated**: self-induced intoxication can be taken into account in deciding whether A believed it was necessary to do what was done in SD: *Katarzynski*; *Conlon*

ii) Response: is there also a reasonable possibility that what A did was a reasonable response to the circumstances as he or she perceived them?

-Mixed objective and subjective test

-Jury is assessing the reasonableness of A's response, having regard to his/her state of mind: *Katarzynski*; *Crawford*

-s418 requires a 'reasonable response' not a 'proportionate response' (cf *Conlon*). Proportionality might be important as a factual (but not legal) consideration to determine reasonableness.

-Jury decides what matters will be taken into account in determining reasonableness of A's response: relevant matters include age, gender, health, surrounding physical circumstances in which A acted, whether some personal characteristics of A will be taken into account depend largely on the facts of the case

Katarzynski F: K had been drinking in pub, made rude comment when V's aunt walked past, K left pub and got gun, shot V after luring him outside. Tried to plead SD.

-What if A is **intoxicated**? Relevant to determine the circumstances as A perceived them

-But not relevant in determining whether A's response to those perceived circumstances was reasonable: *Katarzynski*

-> Judges Commission suggest instruction to jury: consider what would have been a reasonable response by a sober person in the circumstances as A drunkenly perceived them.

2. Nexus between the threat and the offence

Burgess and Saunders F: Men painted No War on Opera House sails in protest of Australia's middle east involvement. Appellants were defending unknown property that may be damaged by terrorists

H: There is a need for a nexus between the offence and the threat in a self-defence case BUT imminence of attack is not necessarily required.

Specific situations

Can A rely on SD if responding to lawful conduct?

-Yes, the conduct promoting SD can be lawful conduct: s422

-*Crawford*: Police came to house of A's ex girlfriend where A had attempted entry. Police stopped A and fight ensued. A charged with assaulting police, causing GBH/ABH etc. Was A able to raise SD?

H: the lawfulness of the police action did not exclude the reasonable possibility that A acted in self-defence. SD only arises when actions of A are directly taken against person threatening A (or others or property)

Can A rely on SD if A 'wants to fight'?

If A is the original aggressor, the jury must be convinced that A in some sense has withdrawn from the fight/A's original aggression had ceased: *Colosimo* in relation to s418; *Zecevic* at common law.

[further material omitted]