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## Evidence

A person can only be convicted on the basis of evidence before the Court. Evidence before the Court normally takes the form of oral testimony or documentary evidence specifically allowed under *Evidence Act 1977* (Qld). The Crown as part of its case will call witnesses. The defendant then has an opportunity to cross-examine the witness. If there are any questions arising from the cross-examination, the Crown is entitled to re-examine the witness. The defendant has no obligation to call evidence but he or she may choose to do so. Even if the defendant calls witnesses, he or she still has no obligation to give evidence.

## Alternative charges

If an offence cannot be proven beyond reasonable doubt, ss575-589 Code (QLD) provides a number of alternative offences for which a defendant may be convicted.

## Double Jeopardy and Double punishment

### Double Jeopardy

Defence according to s 17 QCC (protection against second persecution for the same offence (also alternative conviction) where successful, second prosecution will be prevented

*A person cannot be twice punished either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where the act or omission is such that by means thereof the person causes the death of another person, in which case the person may be convicted of the offence of which the person is guilty by reason of causing such death, notwithstanding that the person has already been convicted of some other offence constituted by the act or omission*

### Double Punishment

Section 16 Code (Qld) serves to protect a defendant from being doubly punished for the same offence.

*A person **cannot** be twice punished either under the provisions of this Code or under the provisions of any other law for the **same act or omission**, except in the case where the act or omission is such that by means thereof the person causes the death of another person, in which case the person may be convicted of the offence of which the person is guilty by reason of causing such death, notwithstanding that the person has already been convicted of some other offence constituted by the act or omission. (my underlining and emphasis)*

- **Prevention of double punishment for acts upon the same set of facts see Dibble.**

Dibble had been convicted of committing a public nuisance, s 6 *Summary Offences Act* on 17 January 2013 in relation to a street fight on 30 December 2011. On 2 March 2013, Dibble was charged with grievous bodily harm on 2 March 2013 in relation to the same fight. When an indictment was presented to the District Court for one count of grievous bodily harm, Counsel for Dibble successfully applied for a stay of proceedings of proceedings based on s 16 Code (Qld). The Attorney-General appealed to the Court of Appeal. The Court of Appeal dismissed the appeal. The Court found that the charge of grievous bodily harm was founded on the same acts (namely throwing punches at the complainant) as the offence of committing a public nuisance, for which Dibble had already been convicted. (The one punch that was gave rise to prosecution was in consensual fight)

## Module 3 – Selected property offences

Colvin, ch 7 (p.199) – Kenny ch 15 p359)

### Understand:

- The nature and elements of, and where relevant the differences between the offences covered in some depth:
  - dishonesty: stealing, s 391; fraud s 408C(1)(a); receiving s 433
  - Threat or force: robbery, ss, 409, 412, 413; break and enter offences, ss418-422
  - Damage: wilful damage, s 469
  - Associated regulatory offences
- How to break down and apply these offences

### Stealing

#### s 398 QCC

#### Punishment of stealing

*Any person who steals anything capable of being stolen is guilty of a crime, and is liable, if no other punishment is provided, to imprisonment for 5 years.*

**Section 398** Code (Qld) creates the offence of stealing, which is **defined in s 391**:

#### s 391(1) – Physical Element of Stealing

*'A person who fraudulently takes anything capable of being stolen, or fraudulently converts to the person's own use or to the use of any other person anything capable of being stolen, is said to steal that thing.'*

It is this definition, **read together with other sections of the Code (Qld)**, which create the elements of the offence:

- **s 391(6)** *The act of stealing is not complete until the person taking or converting the thing actually moves it or otherwise actually deals with it by some physical act;*

- **s 390** *Anything that is the property of any person is capable of being stolen if it is—(a) moveable; or (b) capable of being made moveable, even if it is made moveable in order to steal it.*

The offence of stealing can be broken down into the following elements:

- fraudulently;
- takes or converts;
- anything [property] capable of being stolen; (s 390, 391(6) QCC)
- asportation (s 391 (6) QCC)
- owned by another (s 390, s 391(1) and (2) and s 391(7) QCC)

### Fraudulently, s 391(2)

**Section 391(2) (mental elements)** outline the circumstances in which a person is deemed to have **fraudulently** taken or converted anything capable of being stolen.

- an intent to permanently deprive the owner of the thing of it;*
- an intent to permanently deprive any person who has any special property in the thing of such property;*
- an intent to use the thing as a pledge or security;*
- an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;*
- an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;*
- in the case of money an intent to use it at the will of the person who takes or converts it, although the person may intend to afterwards repay the amount to the owner.*

The **focus** of this **mental element** is on the **intent of the person** taking or converting anything capable of being stolen. Note that **ss (a) - (b)** require an **intent** to '**permanently deprive**', whilst **(c) - (f)** can occur in circumstances where the taking or conversion is **intended to be temporary**.

### Property not returned on the date

Mere failure to return property does not amount to conversion even if the failure was deliberate. There must be some physical dealing: s 391(6)

Remember that the taking or conversion must be **fraudulent**, that is accompanied by the requisite intent under s 391(2) or otherwise proven beyond reasonable doubt to be fraudulent. Therefore In *R v Angus* (video was not returned on the date) – *It was held that merely keeping possession of hired or borrowed goods beyond the agreed date for return did not amount to dealing with them in a manner inconsistent with the true owner's right. The codes require not just passive possession, but an act of conversion*

### Stealing by Finding

#### s 391(5) QCC

*When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes, on reasonable grounds, that the owner cannot be discovered.*

### 'Taken' or 'Converted' and Asportation – Physical Elements

According s 391(1) there are two ways by which stealing can be established whether by taking or by conversion. The concept of taking or conversion is not defined in the codes.

#### Taking

**Taking**: related to physical interference with the thing stolen. This requires physical movement or dealing with property with physical act which also referred to asportation which set out in **s 391(6) QCC**:

*'The act of stealing is not complete until the person taking or converting the thing actually **moves** it or otherwise actually **deals with it** by some **physical act**'*

**Note also s 390 (1)**: Things capable of being stolen

*'Anything that is the property of any person is capable of being stolen if it is—*

*(a) moveable; or*

*(b) capable of being made moveable, even if it is made moveable in order to steal it.'*

**Note**: The property [thing] must be moved or dealt with by some physical act (physical element).

- **Minor movement** or dealing with property sufficient, *Billing v Pill; Wallis v Lange*  
Offence of stealing complete (for jury to decide: question of fact) once taking or conversion is complete, see also: *R v Johnston*

#### Conversion

**Conversion**: arises where the accused deals with the thing in a manner inconsistent with the rights of the true owner: *Caxton Publishing Co v Sutherland Publishing Co* (def. approved in *Illich v the Queen*)

The offence of stealing by conversion is committed when possession of the property gained lawfully but the accused decides to subsequently deal with it in a manner inconsistent with the rights of the owner. Eg. keeping it, selling it and changing its appearances.

### Property not returned on the date

Mere failure to return property does not amount to conversion even if the failure was deliberate. There must be some physical dealing: s 391(6)

Remember that the taking or conversion must be **fraudulent**, that is accompanied by the requisite intent under s 391(2) or otherwise proven beyond reasonable doubt to be fraudulent. Therefore In *R v Angus* (video was not returned on the date) – *It was held that merely keeping possession of hired or borrowed goods beyond the agreed date for return did not amount to dealing with them in a manner inconsistent with the true owner's right. The codes require not just passive possession, but an act of conversion*

Conversion can occur after taking, *Illich v R*

### Lost property

The finder of lost property who disposes of it without making reasonable efforts to discover the owner may also commit an act of conversion; s 391(5).

### Anything (property) capable of being stolen

#### Property, def. in s 1 QCC

property includes :

- everything animate or inanimate that is capable of being the subject of ownership;
- Money (includes bank notes, bank drafts, cheques, warrants etc.)
- electrical or other energy, gas and water; a plant;
- an animal a thing produced by an animal mentioned in paragraph
- any other property real or personal, legal or equitable, including things in action and other intangible property.

Also s 390 (1): Things capable of being stolen

*'Anything that is the property of any person is capable of being stolen if it is—*

*(a) moveable; or*

*(b) capable of being made moveable, even if it is made moveable in order to steal it.'*

'Money' as defined in s 1 Code (Qld) includes:

*'bank notes, bank drafts, cheques and any other orders, warrants, authorities, or requests, for the payment of money.'*

The thing capable of being stolen must be property of any person, s 390CC.

### Ownership, Possession, Control or Special Property (I)

The property must belong to another.

**Owner** is a term that is used in s 391(2), and **defined in s 391(7)** as including:

*'the owner, or any part owner, or any person having possession or control of, or special property in, the thing in question'*

The **actual owner(s)** of the thing capable of being stolen need **not necessarily be identified** and a prosecution may proceed on the basis that ownership is not known. In *R v McKiernan*. (the appellant was convicted of stealing a bell donated to a church in 1926 which disappeared in 1978.) *It was contended on the appeal that the prosecution had not proved the true owner. It was dismissed as where a person has been in possession of a thing for a long period that person was then permanently deprived of the thing by having it taken by a thief. It was enough to establish that the property was the property of that person and no need to have true owner.*

See also s 565(e) QCC (indictment: particulars which need not be proved)

- Where Ownership is known and stated on indictment it must be proved
- **s 391(7) QCC** also includes persons having possession/control of (or special property) in the thing capable of being stolen  
*R v Walk*: Tenant of house guilty of stealing furnishing from house. Ownership was alleged to be in the Agent as Agent had control over property

### Special property is defined in s 391(2AA) to include:

*'any charge or lien upon the thing in question, any right arising from or dependent upon holding possession of the thing in question, whether by the person entitled to such right or by some other person for the other person's benefit.'*

### Property passed (Money transfers)

- The breadth of these provisions highlight that, the focus of the offence is on **the intent of the person** accused of stealing. However, where property of the thing capable of being stolen **has passed to the person accused**, then **s 391(1) and (2) will not apply**.