

Exam Notes

Tuesday, 10 August 2021 9:39 AM

Problem Question Scaffolding for Criminal Law

1. Identify which offences may be raised on the facts.
 - Multiple possible charges may be raised by the same facts.
 - Argue all possible charges, but identify which cases may be stronger or more likely for the prosecution to succeed upon.
2. Identify the precise statutory provision which makes the conduct a criminal offence.
3. Set out the elements which the prosecution must prove beyond reasonable doubt.
 - Identify both the evidentiary and legal burden of proof.
4. Analyse the physical elements, including act, circumstances, and consequences.
 - You must identify and relevantly analyse all elements, even those which are clear on the facts.
 - Dedicate the most in-depth analysis to the key legal issues.
5. Analyse the mental elements, including general and specific intent.
 - Even if you think the physical elements are weak or not made out, you must continue to examine the mental elements as if the physical elements had been made out.
 - You must identify and relevantly analyse all elements, even those which are clear on the facts.
 - Dedicate the most in-depth analysis to the key legal issues.
6. State the temporal coincidence rule.
 - Suggest whether or not coincidence is an issue on the facts.
7. Conclude by stating the likely outcome.
 - Your role is not to make a decision, but to weigh up the prosecution and defence cases to advise of a likely outcome.
 - It is the role of the jury to decide on the facts.
 - If the jury is convinced that XYZ, then the offence is likely to be established. Conversely, if the jury is not convinced that XYZ, then the offence is not likely to be established.
 - The prosecution does/does not have a strong case.
 - The offence is probably/may not be/is not proven.

Elements of Criminal Offences

- The evidentiary burden requires a party to produce sufficient evidence to raise the reasonable possibility of an issue or matter of fact: *Braysich* [2011] at [35]-[36]
- The prosecution bears the onus of proof of the defendant's guilt beyond a reasonable doubt: *Woolmington v DPP* [1935]
 - Beyond reasonable doubt is usually left for juries to apply their own common sense approach, and Courts have expressed disapproval for trial judge's overexplaining the standard to juries: *Dookheea* (2017); *Hadchiti* (2016)
 - Trial judges are discouraged from directing juries as to the meaning of reasonable doubt in contrast with any doubt: *Dookheea* (2017)
 - Trial judges are discouraged from directing juries as to the meaning of reasonable doubt through the use of reasonable possibility: *Hadchiti* (2016)
 - The defence only bears the onus of proof for the defence of mental health/cognitive impairment, SIAM or as provided by statute: *He Kaw Teh* (1985)
- It is the role of the jury to decide what facts the prosecution has proved beyond a reasonable doubt and apply the relevant law to them: *Pemble* (1971)
 - It is the role of the appeal court to ensure that the jury was directed by the trial judge to the relevant law.
- The *actus reus* of the offence is determined by the words of the statute which creates the offence.

- The test of criminal causation is the substantial cause test: *Smith* [1959]
- The *mens rea* of the offence is determined by the words of the statute which creates the offence.
 - The three main types of mental elements are: *He Kaw Teh* (1985) per Brennan J
 - (a) Intention
 - (b) Recklessness
 - (c) Knowledge
 - General intent usually refers to the *mens rea* requirement for the conduct element: *He Kaw Teh* (1985) per Brennan J
 - Specific intent usually refers to the *mens rea* requirement for the consequence element: *He Kaw Teh* (1985) per Brennan J
 - Where a statutory criminal offence is silent as to *mens rea*, there is a presumption that *mens rea* is an essential element, unless the language of the statute and nature of the offence suggest an intention that *mens rea* should be excluded: *He Kaw Teh* (1985) at 567 per Brennan J
 - Where the statute is silent as to *mens rea*, intention is ordinarily presumed to apply to an act or omission: *He Kaw Teh* (1985) per Brennan J
 - Where the statute is silent as to *mens rea*, knowledge of circumstances, or the absence of an honest and reasonable belief, is ordinarily presumed to apply to an act in circumstances: *He Kaw Teh* (1985) per Brennan J
 - Where the statute is silent as to *mens rea*, intention to cause the result or recklessness is ordinarily presumed to apply to a consequences: *He Kaw Teh* (1985) per Brennan J
 - The presumption set out in *He Kaw Teh* may or may not be overturned by *CTM*, but it is arguable that *CTM* is distinguishable and only applies to stricter factual matrices.
- For *mens rea* purposes, statutory criminal offences may be categorised as: *He Kaw Teh* (1985) at 533 per Gibbs CJ
 - (a) Full *mens rea* offences - there is an original obligation for the prosecution to prove *mens rea*;
 - (b) Strict liability - *mens rea* is presumed to be satisfied, unless the defence advances the existence of an honest and reasonable mistake, at which point, the prosecution must disprove the belief beyond a reasonable doubt; or
 - The honest and reasonable mistake must be a mistake of fact, not law: *Ostrowski* [2004]
 - The honest and reasonable mistake of fact must be one which would render the defendant's act innocent: *Proudman v Dayman* (1941); *Mayer v Marchant*
 - It is unsettled whether the honest and reasonable mistake of fact must be one which would render the defendant's act innocent of the specified offence or of any offence: *CTM* (2008); *Reynhoudt* (1962)
 - The requisite state of mind for an honest and reasonable mistake of fact may be an affirmative belief in a certain fact or a mere absence of knowledge: *SRA v Hunter District Water Board* (1992)
 - The requisite state of mind for an honest and reasonable mistake of fact is an exercise in statutory interpretation which must consider the purpose of the statutory offence: *SRA v Hunter District Water Board* (1992)
 - Although the defence has an evidential burden to satisfy the honest and reasonable mistake of fact, the prosecution bears the onus of disproving the defence beyond a reasonable doubt: *CTM* (2008)
 - (c) Absolute liability - *mens rea* is not an element of the offence.
 - In absolute liability offences, guilt is established by proof of the physical elements of the offence: *Wampfler* (1987)
 - The repeal of a limited defence under legislation does not indicate a parliamentary intention to impose absolute liability in respect of *mens rea*: *CTM* (2008)
 - Courts is generally unwilling to impose absolute liability for *mens rea* unless

the Parliament expresses a clear intention by language or necessary implication: *CTM* (2008)

- Categorisation of statutory criminal offences for *mens rea* purposes is an exercise of statutory interpretation which must consider the language of the statute and the nature of the offence: *He Kaw Teh* (1985) at 529-30 per Gibbs CJ
- When determining whether the presumption has been rebutted, the following factors must be considered sequentially: *He Kaw Teh* (1985) at 529-30 per Gibbs CJ
 - (1) The language of the statute, as articulating the intention of the legislature
 - (2) The subject matter of the statute, particularly
 - (a) The gravity of the social problem which the offence seeks to regulate
 - (b) The severity of punishment and stigma attached to the offence
 - (3) Whether placing the accused under strict liability will assist with the enforcement of the law

Homicide

- The test of whether an intervening act by a third party breaks the chain of causation of homicide is whether the original act is still an operating and substantial cause of death: *Smith* [1959]; *Evans & Gardiner (No 2)* [1976]
 - Whether surgical intervention will overwhelm the original wound is not a question of the degree of incompetence, but a question of the degree of independence of the surgery from the original act: *Cheshire* [1991]
 - There is no *Jordan* [1956] test, and it has been consistently held that *Jordan* should be confined to its facts.
- The test of whether an intervening act by nature breaks the chain of causation of homicide is whether the original act is still the substantial cause of death, without being spent or sufficiently interrupted by the act of nature: *Hallett* [1969]
 - Ordinarily, acts of nature does not break the chain of causation of homicide, but extraordinary acts of nature may break the chain of causation, such as natural disasters.
- An informed and voluntary act of an adult victim may break the chain of causation of homicide: *Burns* (2012) at [87]
 - The mere supply of drugs by the accused cannot be said to cause death where the deceased consumes the drug as a voluntary and informed act: *Burns* (2012) at [88]
 - An act may be voluntary and informed even if the victim's ability to reason is impaired by drugs at the time of the offence: *Burns* (2012) at [87]
 - Mistake will be a vitiating factor to a voluntary and informed act: *Burns* (2012) at [86]
 - The court is clear that a mistake as to the nature of the drug will break the chain of causation.
 - However, the court is vague as to the nature or kind of mistakes which will be a vitiating factor to breaking the chain of causation.
 - A victim who refuses medical treatment or rejects medical advice does not break the chain of causation of homicide: *Blaue* [1975]
- Where a victim of homicide dies during an act of fright or self-preservation, that act does not break the chain of causation unless the act was not a reasonable and proportionate response to the accused's threat of physical harm which created a well-founded apprehension in the victim's mind: *Royall* (1991); *RIK* [2004]
 - Where there are multiple modes of escape for a victim acting out of fright or self-preservation, whether the act is reasonable or proportionate in the circumstances is a question of fact for the jury: *RIK* [2004]
 - When directing a jury on causation of death in fright or self-preservation cases, a direction upon foreseeability will ordinarily be more confusing than helpful to the jury: *McAuliffe* (1995)
- The accused is only guilty of an offence if the actus reus is contemporaneous with the *mens rea*: *Meyers* (1997); *Thabo Meli* [1954]; *Le Brun* [1992]
 - In Australia, it appears that the temporal coincidence rule is applied strictly: