LPAB02 Criminal Law and Procedure

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Exam tips

- NEVER GIVE A SOLID ANSWER - EXPLORE ALL POSSIBILITIES
- 'it is likely that…' 'Failing this…'
- If asked to identify/explain offences there is no need for defences.
- If asked to discuss the criminal liability then both offences and defences need doing.

Exam Response – Basic Structure (IRAC)

Introduction/issue:

- D could be charged with [insert offence] under [insert statute]
- D may seek to rely on the defence [insert defence]
  - D bears the evidentiary burden to raise the 'reasonable possibility' of his defence

Rule - Offence:

- Elements/offence in NSW Crimes act or common law
- Definitions in Act or common law
- Split into AR and MR

Application - Offence

- Actus Reus
  - What is element/How is element satisfied
  - Has element been satisfied?
  - If assault/murder, identify harm, then go from most serious to least serious charge

- Mens Rea
  - What is element/How is element satisfied
  - Has element been satisfied?
  - If assault/murder, identify harm, then go from most serious to least serious charge

Rule – Defences

- Elements/offence in NSW Crimes act or common law
- Definitions in Act or common law
- Split into AR and MR

Application – Defences

Conclusion

- D would likely be found liable for _____
- If there is any reasonable doubt as to any of the essential elements, the defendant will be acquitted.

Extension of Criminal Liability

- Aid + Abetting = party present at the crime
- Counsel + Procure = Not present (Accessory before the fact)
- Innocent agent – innocent person commits AR/someone else has MR
- P2 – at scene (or close enough), helped out but did not agree to anything
- JCE – at scene (or close enough), agreed to something
- Common purpose – agreed to something and something unexpected happened

Conclusion

- X is liable under the doctrine of JCE

Offences

Stealing/larceny

LARCENY

(Name here) may be liable for larceny under s 117 Crimes Act. (Name here) may seek to rely on the defence of intoxication/necessity.

Actus Reus

The actus reus of the crime is the taking and carrying away property belonging to another without their consent (*Illich 1987*).

*IF THERE ARE NO ISSUES: On the facts, all elements of the actus reus are easily proven.

1. Voluntariness:
   - The prosecution can presume voluntariness without evidence of the contrary (Falconer 1990)
   - There is evidence that voluntariness may be an issue here. Involuntariness will be discussed below under defences.
2. Taking and Carrying Away (Asportation)
   - The P must prove that (Name here) physically removed the property so as to have adverse possession of the property.
   - Even the slightest movement is enough to satisfy this element (*Wallis v Lane 1964*) White (1904)
   - There must be a positive act by (Name here) (*Thomas 1953*). (Name here) must have adverse possession by taking and carrying away.
3. Property
   - ~Different from the definition of property under s 4 Crimes Act.
   - The property must be moveable, therefore it is not possible to move land (*R v Wilson (1874)*
   - The property must be tangible (*Perry 1845, White 1904*).
   - The property must have value, even the slightest is enough (Morris 1840) R v Daley (1879)
   - The property must have an owner. Abandoned property cannot be stolen (*MacDonald 1983*). Abandonment occurs when an owner is indifferent to any asportation of the goods by another person (Donoghue v Coombe 1987).
   - Property being stolen may be a portion of a larger whole (*Russell v Smith 1958*)
   - Excludes: Land, fixtures, animals.
   - *The facts clearly state the property was capable of being stolen. This requirement is easily established.
4. Belonging to another
   - Possession can be actual or constructive.
   - Actual: The person has the present physical custody of the property or has it in such a place that he or she alone has the right or power to place their hands upon it and take custody of it (Moors v Burke 1919)
   - Constructive: Where a person does not have actual possession, but has the legal right to assume possession whenever that person wishes to do so.
   - Property in the unlawful possession of another can be stolen (Anic 1963, *Waterhouse 1911*)
5. Without Consent
   - P must prove the property was taken without the consent of the owner.
   - If there is consent there is no larceny (Illich 1987)
   - Except: If the consent is from a computer/machine. Only a human can give consent. (Kennison v Daire 1986)
   - Except: If the consent is facilitation (Martin v Puttick 1968, Turvey 1946)
   - Except: If the consent is a fundamental mistake (Illich 1987)
     - Where V consented to handing over property due to (unilateral) mistake, it is not larceny because the handing over was with consent (Potisk 1973) *Not binding.
     - Where V consented to handing over property due to unilateral or mutual mistake, there will not be consent if there is a fundamental mistake (Illich 1987) *Authority.
       - Mistaken Identity (Middleton 1873)

Stealing/larceny in NSW is dealt with under s117 of the Crimes Act 1900 (NSW):

Penalty 5 years

> **117 Punishment for larceny**
> Whosoever commits larceny, or any indictable offence by this Act made punishable like larceny, shall, except in the cases hereinafter otherwise provided for, be liable to imprisonment for five years.

ELEMENTS of larceny are not defined in the section and are still to be found in the common law: **(*Illich* v *R* (1987) 162 CLR 110 at 123, per Wilson and Dawson JJ)**

> *"… is committed by a person who, without the consent of the owner, fraudulently and without a claim or right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof.*

The elements of larceny are:

ACTUS REUS - the accused took:

- Property capable of being stolen;
- Property belonging to another;
- Property taken and carried away; and
- The taking has been done without the consent of the owner.

MENS REA - the accused, at the time of the taking, took the property:

- With the intention to permanently deprive the owner;
- Without a claim of right; and
- Fraudulently.

ACTUS REUS of Larceny

a) '*Property capable of being stolen*' is limited to tangible personal property.

Land or real property IS NOT capable of being stolen and so-called 'land theft' is dealt with by a set of separate specific provisions.

Section 4 of the Crimes Act defines property:

Section 94AA - Property which is "already out of possession of the owner by reason of its having been **previously stolen" can be stolen**, and the offender convicted of larceny OR other property offences.

> **94AA Property previously stolen**
> Where on the trial of a person for any offence which includes the stealing of any property it appears that the property was, at the time when it was taken by the accused, already out of the possession of the owner by reason of its having been previously stolen, the accused may be convicted of the offence charged notwithstanding that it is not proved that the taking by him or her amounted to an interference with the right to possession of, or a trespass against, the owner.

- Physical movement is required (if not moved, then it's not stolen) ***R* v *White* (1904) 21 WN (NSW) 104**
- Must be of some value, even paper is sufficient (eg, cheques) ***R* v *Daley* (1879) 12 SCR (NSW) 151**
- Land / Fixtures cannot be stolen (because it cannot be moved) ***R* v *Wilson* (1874) 12 SCR NSW) L 258 ; *Billing* v *Pill* [1954] 1 QB 70**
- **However – some fixtures have statutes that cover this (s139-154) – eg, stealing trees under s140