

***JURD 7122***  
***Criminal Laws***

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## MURDER

### (MUST LOOK AT HOMICIDE BY CAUSATION TEST TO SATISFY AR)

Statute	Elements/Case Law/Statute
<b>S 18(1)(a)</b>	Act of accused or thing omitted caused death with (1) <u>reckless indifference</u> to life or (2) <u>intention</u> to kill <u>or</u> (3) <u>cause grievous bodily harm</u> or (4) <u>constructive murder</u> .
<b>S 18(1)(b)</b>	Every other punishable homicide shall be taken to be Manslaughter Manslaughter- includes everything else ( <i>Manslaughter not defined under statute but by CL</i> )
<b>Exclusions:</b> <b>S18(2)(a)</b> <b>S 18(2)(b)</b>	No act or omission which was <b>not malicious</b> , or for which the accused had lawful cause or excuse, shall be within this section. killing by misfortune is not murder
<b>"Death"</b>	<b>S33 Human Tissue Act 1983 (NSW)</b> – Person has died when there has occurred an irreversible cessation of all functions of the person's brain OR circulation of blood in person's body
<b>S 4</b>	<b>Grievous Bodily Harm -</b> (a) Destruction of foetus of pregnant woman, irrespective of whether woman suffers harm (b) Any permanent or serious disfiguring of the person (c) Any grievous bodily disease (includes reference to causing a person to contract a grievous bodily disease)
<b>AR</b>	P proves BRD the following elements to the jury ( <i>Pemble v Queen</i> ) <ul style="list-style-type: none"> <li>• Voluntary act (<b>Ryan</b>) - Presumed to be voluntary unless raised as a defence <ul style="list-style-type: none"> <li>○ Act directly causes the death (<b>Munro</b>)</li> <li>○ Human should be alive - cannot kill foetus but can kill anything that has evidence of heartbeat (<b>Iby</b>)</li> </ul> </li> <li>• Causation - Look blow to one of the 3 consequences (<b>Royall</b>)</li> </ul> => Difference in method that actually caused death from the method that was intended does not matter ( <b>Royall</b> )

<b>MR SUBJECTIVE TESTS</b>	<ul style="list-style-type: none"> <li>• Intent to kill (<i>Crabbe</i>)</li> <li>• Intent to GBH (<i>La Fontaine</i>)</li> <li>• RI (reckless indifference) to human life <ul style="list-style-type: none"> <li>○ <b>CHUAN MAP: RI ELEMENTS:</b> defendant does an act (1) <b>knowing</b> that is (2) <b>probable that death will result</b>. Accused <b>realised probability of consequence</b> of its action <u>and deliberately refrained from making further inquiries so as to deny knowledge</u>. Includes wilful blindness to the extent that there was suspicion.: <i>Crabbe</i>.</li> <li>○ Probability (<i>Crabbe</i>) of <b>death</b> not gbh (<i>Royall</i>) – It cannot be a <b>possibility</b>, needs to be a <b>probability</b> (<i>Boughey; Annakin; La Fontaine</i>). However, <b><u>if death is a possibility, then the accused will be charged with Manslaughter</u></b>.</li> <li>○ Actual awareness of the <b>probability</b> of consequences (<i>Crabbe</i>)- subjective standard.</li> <li>○ Wilful blindness =&gt; RI (<i>Crabbe</i>)</li> <li>○ RI to gbh but not to death =&gt; MS <b>NOT</b> murder (<i>Royall</i>)</li> <li>○ <b>'Likely' - Equates probable</b> (<i>Boughey</i>) - Accused should have thought consequences of action (actual knowledge NOT imputed knowledge = subjective test)</li> <li>○ <b>'May as well Result'</b> – Possibility (<i>Annakin</i>)</li> </ul> </li> </ul> <p><b>Probability vs. Possibility:</b></p> <ul style="list-style-type: none"> <li>• Probability = substantial or real chance of happening, as opposed to a mere possibility (<i>Boughey</i>)</li> <li>• Probability = real and not remote chance (<i>Faure</i>)</li> <li>• Probability = 'could well happen', not as a matter of certainty, but as a matter of probability (<i>Annakin</i>)</li> </ul> <p><b>ME:</b> probable is more likely to occur. Possible is less likely to occur.</p> <p><b>Exception</b> - Only those intending to kill are not the most culpable (<i>Aiton, 1993</i>)</p>
<b>Causation - See below Causation section (IMP)</b>	<ul style="list-style-type: none"> <li>• Causation: it is sufficient when the act is “a” cause of the death</li> <li>• Irrelevance of Method of Causing Death <ol style="list-style-type: none"> <li><i>Royall</i>: provided that one of the mental states required for murder was present, and the test for causation was satisfied, it did not matter that the accused did not intend the precise way in which the death actually occurred.</li> <li>E.g., A intended to kill B by striking B with an ashtray + B jumped to his death from a window in attempting to escape = A is guilty of murder</li> </ol> </li> </ul>
<b>Attempted Murder</b>	<ul style="list-style-type: none"> <li>• No death then acquitted of murder/manslaughter but can be charged with attempted murder.</li> <li>• This happens when the accused had Actual intention to kill (or any of the 4 criteria of murder) but victim survived (<i>Knight, 1992</i>)</li> </ul>
<b>JURY</b>	<ul style="list-style-type: none"> <li>• <b>Range of legal possibilities which the trial judge may have to deal with in a direction to the jury in a murder trial</b> (<i>Pemble</i>) - IMP</li> </ul>

<b>Intoxication 428C and 428E</b>	<ul style="list-style-type: none"> <li>• Self-Induced or Not will be taken into account for Murder</li> <li>• If Murder reduced to MS then self-induced not taken into account for MR of MS but Not Self-Induced may be</li> </ul>
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### CONSTRUCTIVE MURDER

<b>S18(1)(a)</b>	<p>Committed in course of committing another offence capable of imprisonment of 25 years. Killing during or immediately after the commission by the accused of a crime punishable by life imprisonment.</p> <p>Does not require proof of intent to wound BUT wounding must be the act of the accused</p> <p>No requirement for causal link b/w felony and death</p>
<b>AR</b>	<ul style="list-style-type: none"> <li>• <b>Act:</b> Committing of base offence with a penalty of more than 25 yrs (<b>Ryan</b>) <ul style="list-style-type: none"> <li>○ Act causing death must be done during or immediately after the commission of the base offence (<b>Foster</b>)</li> <li>○ Felonious conduct must involve violence or danger to some person (<b>Ryan</b>)</li> </ul> </li> <li>• <b>Consequence:</b> Act led to Death <ul style="list-style-type: none"> <li>○ <b>Causation</b> - Direct causal connection not required between wounding and death (<b>see below at causation also</b>)</li> <li>○ Only that the injuries sustained were an operative and substantial contributing cause of death (<b>Munro</b>)</li> </ul> </li> <li>• <b>Timing</b> – Immediately before, during or after <ul style="list-style-type: none"> <li>○ Matter for jury to decide (<b>Hudd</b>)</li> </ul> </li> </ul> <p><b>Crimes with punishments of &gt;25 years include:</b></p> <p>S 36: Causing grievous bodily disease with intent to cause someone to contract the disease</p> <p>S61JA: Aggravated sexual assault in company</p> <p>S96: Robbery with wounding (gbh)</p> <p>S97(1): Armed robbery with a dangerous weapon</p> <p>S98: Robbery with arms and wounding.</p> <p>S110: Breaking and entering and while therein in &lt; inflicting gbh</p> <p>S 33(3) DMTA Trafficking large commercial quantities (life in prison)</p>
<b>MR</b>	<ul style="list-style-type: none"> <li>• You need to prove Intention for base crime (<b>Ryan</b>)</li> </ul>

<b>OBJECTIVE TEST</b>	<ul style="list-style-type: none"> <li>○ Felonious conduct involves violence or danger (<b>Ryan</b>)</li> </ul> <p>**** P does not have to prove intent to kill (<b>Munro</b>) – a Conviction will take place even if death was accidental/consequential of base offence.</p> <ul style="list-style-type: none"> <li>• Direct causal connection is not required between wounding and death, only that the injuries sustained were an operative and substantial contributing cause of death.</li> </ul> <p>There is no requirement to prove that the accused or a reasonable person would have realised that there was a risk of death.</p>
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## MANSLAUGHTER

### All objective tests

<b>Voluntary Manslaughter</b>	<p><b>Murder + Mitigating Factors = Voluntary MS</b></p> <p><b>MR - Intention</b></p> <p>Culpability mitigated by partial defences - <b>extreme provocation, substantial impairment (also called diminished responsibility), excessive self-defence, and infanticide</b></p> <p>REMEMBER: it is open to the <b>jury</b> to reduce it to manslaughter.</p> <p><b>S 18(1)(b)</b> Every other punishable homicide shall be taken to be Manslaughter</p> <p>Manslaughter- includes everything else (<i>Manslaughter not defined under statute but by CL</i>)</p>
<b>INVOLUNTARY MANSLAUGHTER</b>	
<p><b>(a) Criminal negligence; This part is specifically for negligent ACT not omission.</b></p> <p><b>S 18(1)(b)</b> Every other punishable homicide shall be</p>	<p>Act which caused the death was done by the accused <b>consciously and voluntarily, without any intention of causing death or GBH</b> but in circumstances which involved such a <b>great failing short of the standard of care</b> which a reasonable man would have exercised and which involved such a <b>high risk</b> that death or GBH would follow that the doing of the act merited criminal punishment. (<b>Nydam</b>)</p> <p><b>(Risk of Death or GBH objectively determined)</b></p> <p><b>AR</b></p> <ul style="list-style-type: none"> <li>• <b>Act</b> – Intended, Conscious and Voluntary <b>act or omission</b> that causes death or gbh (<b>Nydam</b>) <ul style="list-style-type: none"> <li>○ Higher degree of negligence =&gt; a higher threshold to satisfy</li> <li>○ Unnecessary to prove that the act or omission was unlawful (<b>Andrews</b>)</li> <li>○ <u>But there is a common law duty not to harm others</u> (<b>Doherty</b>)</li> </ul> </li> </ul>

<p>taken to be Manslaughter</p>	<ul style="list-style-type: none"> <li>• <b>Circumstances</b> – Such Act must be done in circumstances which involved such a great falling short of the standard of care which a reasonable person would have exercised (<i>Nydam</i>)</li> </ul> <p><b>MR (Nydam- self-immolation case) – Objective Test (Nydam, affirmed in Lavender - ran over children with loader)</b></p> <p><b>UP to the jury to make it out:</b></p> <ul style="list-style-type: none"> <li>(1) Intent to do the act which causes death (<u>consciously and voluntarily</u>), without intent to cause death or GBH <b>AND</b></li> <li>(2) In circumstances which involved such a great falling short of the standard of care which a <b>reasonable person</b> would have exercised <b>AND</b></li> <li>(3) it involved such a high risk or likelihood that death or GBH would follow if that standard of care was not observed. <b>AND</b>  Defence of honest and reasonable mistake of fact is not available (<i>Lavender</i>= case of bulldozer scaring playing kids)  The act does not need to be of malice <i>Lavender</i></li> <li>(4) that the doing of the act merited criminal punishment (<i>Lavender</i>)</li> </ul> <p><b>Reasonable Person</b></p> <ul style="list-style-type: none"> <li>• Having ordinary fortitude and strength of mind but having the <u>same attributes</u> (knowledge of surrounding circumstances in the scenario) as the accused (<i>Lavender</i>)</li> <li>• Based on evidence presented, the jury must raise the particular standard to meet the duty of a particular individual- a doctor in this case, higher duty of care (<i>Patel</i>)</li> <li>• Jury <u>may</u> be instructed to take cultural background of accused into account but this has not been tested (<i>Sam</i>)</li> <li>• <b>IMPORTANT:</b> <u>If the accused were mentally retarded, obviously you wouldn't consider its mental condition at this stage. You do that in the defence stage.</u></li> <li>• CN occurs only where duty is established b/w individuals. Courts have confined the scope of duty to a narrow range of relationships for policy reasons. Not necessarily b/w 2 adult strangers.</li> </ul>
<p><b>(b) Unlawful and Dangerous Act</b></p> <p><b>Remember that an omission cannot be MS under this type</b></p>	<p><b>S 18(1)(b)</b> Every other punishable homicide shall be taken to be Manslaughter</p> <p><b>DEF.</b> - Killing of a person in the course of <b>intentionally</b> committing an act that was unlawful <b>AND dangerous</b> (<i>Holzer; Wilson</i>- bashing guy).</p> <p><b>ME:</b> the unlawful act has to be specifically dangerous.</p> <p><b>ME:</b> Elements &amp; what you need to prove for this offence are <b>(1) Intention</b> to commit unlawful and dangerous act, <b>(2)</b> whether such act is 'unlawful &amp; dangerous' is to be determined by the objective test bellow.</p>

as an omission is to be regarded as manslaughter by criminal negligence *Lowe or murder.*

AR

- (1) Voluntary Act/Intentionally committing unlawful act (*Wilson*)
  - **Must be proven to be unlawful and dangerous** (*Lamb (case of friends joking revolver); Holzer*)
  - **Dangerous – Objectively determined according to the facts** (*Holzer*)
  - **Risk be of ‘serious’ injury and not ‘really serious injury’ – seriousness of injury a lower threshold to satisfy** (*Wilson*)
  - **Must be a criminal offence and not a tort or regulatory infringement** (*Pullman*)
  - Minor injury or harm => Assault not MS (*Wilson*)
  - An Act performed in self-defence is not an unlawful act (*Cornelissen*)
  - An act performed pursuant to ‘the defence of rescue’ (helping others) is not an unlawful act (*Downs*)
  - When use of motor vehicles, MS will only occur when vehicle used as weapon (for example I want to push someone w my car, I do so but then he falls and hits his head and dies) (*Pullman*)
  - Encouraging minor to drink driving and dangerous driving constitutes unlawful & dangerous for this type of manslaughter ***Cramp***
  - Supply of illegal drugs is not unlawful act for the purposes of MS by way of unlawful and dangerous act (***Burns***). This is because voluntariness of ingesting it comes from the diseased.
  - Administering (injecting) a drug to the diseased even w her/his consent will be unlawful & dangerous act (***Cato***)
  - Encouraging a person to take a drug (and eventually such person dies as a result of ingesting the drug) is not an unlawful act for this MS unless accused holds a position of authority and forces victim to take it (***Wilhelm; Riley***). In this case diseased voluntarily took drugs
  - Giving a clean needle to deceased (for drug injection) is unlawful & dangerous act ***Cao***

**MR: (2)** Objective test of ‘unlawful and dangerous’ – act that a reasonable person in the position of the accused would have appreciated as exposing another person in ***risk of serious injury*** (*Holzer; confirmed in Wilson*)

- **Not Subjective Test** - P does not have to prove that the accused realised the extent of risk his unlawful act was creating- because its an objective test (*Holzer*)

**Reasonable Person Test** (*Wills*):

- The reasonable person knows the physical features of the situation.
- The reasonable person knows the physical nature of actions of the accused not the mental. This means that the reasonable person **does not know** about the **idiosyncrasies/ emotional/mental/ or degree of intoxication of the accused**, therefore, these are not



	<p>relevant or considered for the test (<b><i>Wills – Lush J</i></b>)</p> <ul style="list-style-type: none"> <li>Characteristics included – <b>age</b> (<b><i>DPP v Ty; Cornelissen</i></b>)</li> <li>The reasonable person is placed in the position of the accused <b><i>Cornelissen</i></b></li> <li><b><u>IMPORTANT:</u></b> <u>If the accused were mentally retarded, obviously you wouldn't consider its mental condition at this stage. You do that in the defence stage.</u></li> </ul> <p><b>ONE-PUNCH LEGISLATION</b></p> <ul style="list-style-type: none"> <li><b>S25A(1)(a) Crimes Act</b> – Assault causing death by intentionally hitting the person with any part of the person's body or with any object held by the person</li> <li><b>S25A(3) Crimes Act</b> – Death may be the result of the injuries received directly from the assault or from hitting the ground or an object as a consequence of the assault. Meaning that whether the punch or the fall is what caused the death is irrelevant.</li> </ul> <p><b>Using poison etc to endanger life or Inflict Grievous Bodily Harm (in this section diseased is not dead of course)</b></p> <p><b>s 39 of Crimes Act</b> – potentially provides the basis for unlawful act manslaughter by making it an offence to:</p> <ul style="list-style-type: none"> <li>Administers to another person, or causes another person to take, any poison, intoxicating substance or other destructive or noxious thing, <b>and</b></li> <li>The poison, intoxicating substance or other thing endangers the life of, or inflicts grievous bodily harm on, the other person, <b>and</b></li> <li>The person intends to injure, or is reckless about injuring, the other person</li> </ul>
<b>Suicide</b>	<p><b>S31A:</b> Attempting to commit suicide not a criminal offence</p> <p><b>S31B:</b> (1) Survivor of suicide pact not guilty of murder or manslaughter; (2) Def of suicide pact as a common agreement between 2 or more with same objective of death; (3) onus of proving existence of pact shall lie with the accused person on balance of probabilities</p> <p><b>S31C BUT</b> survivor may be guilty of aiding and abetting to commit suicide.</p>
<b>Harming Foetus</b>	<p>Violence to foetus which causes death in utero does not amount to murder or manslaughter because foetus is not treated as a human being</p> <p><b>King</b></p> <p><b>S82-84:</b> Abortion – these sections do not require proof that miscarriage has actually been brought about but that only certain acts have been performed by certain people with intention to procure a miscarriage</p> <ul style="list-style-type: none"> <li>The offences of <b>ulterior intent</b> below – success or failure in killing the foetus is dealt with in the same way.</li> </ul> <p><b>S82 Administering drugs etc to herself by woman with child</b></p>

Whosoever, being a woman with child,  
unlawfully administers to herself any drug or noxious thing, or unlawfully uses any instrument or other means, with intent in any such case to procure her miscarriage, shall be liable to imprisonment for ten years.

**S83 Administering drugs etc to woman with intent**

Whosoever:

unlawfully administers to, or causes to be taken by, any woman, whether with child or not, any drug or noxious thing, or unlawfully uses any instrument or other means, with intent in any such case to procure her miscarriage, shall be liable to imprisonment for ten years.

**S84 Procuring drugs etc**

Whosoever unlawfully supplies or procures any drug or noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used with intent to procure the miscarriage of any woman, whether with child or not, shall be liable to imprisonment for five years.

**S42 Injuries to child at time of birth:** a person who intentionally or recklessly causes infliction of grievous bodily harm on child during or after delivery shall be liable for 14 years of imprisonment.

**S21 Child murder by mother—verdict of contributing to death etc:** Wilful contribution to the death of her child whether during or after delivery, as an alternative verdict on a charge of murder. Penalty 10 years.

- Pregnant women are entitled to decide whether or not to undergo treatment and foetus's need for treatment does not prevail over this (***St George's Healthcare NHS Trust v S***)

- If foetus does not survive an attack, it still amounts to GBH to mother even where no harm is caused to her (***King, 2003***) & s 4 of Crimes Act (def of GBH includes destruction of foetus)

- NOTE: if an assailant's sole objective is to destroy a foetus, but in the course of doing so they kill the pregnant woman, they will be guilty of murdering the woman on the basis that intended to cause grievous bodily harm to her.

- If child born alive but dies because of earlier injuries inflicted while it was in womb, then can constitute criminal homicide and causing death by dangerous driving (***F, 1993***). **Me:** I think D in this case was done for manslaughter for criminal negligence.

-The above also applies when child born uninjured but premature coz of D's action and prematurity becomes substantial cause of its

	<p>subsequent death (<i>Whelan, 2012</i>)</p> <p><b>S 20 - Child Deemed Born Alive</b></p> <ul style="list-style-type: none"> <li>- If has breathed and has been wholly born into the world, whether had independent circulation or not</li> <li>- Any sign of life sufficient to satisfy CL born alive rule, including evidence of heartbeat. Not necessary to show capacity to breathe without assistance (<i>Iby, 2005</i>).</li> </ul>
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## HOMICIDE BY OMISSION

<b>S18(a) murder</b>	<p>Starting point is legislation - caused by voluntary omission</p> <p><b>Charge</b> – Murder or MS by Crim Negligence</p> <p><b>AR</b> There must be a breach of duty to act/care imposed on the accused in respect of the victim.</p> <ul style="list-style-type: none"> <li>• Step 1 - <b>Note that there must be a duty to act on behalf of the accused before murder can be committed by omission.</b> <ul style="list-style-type: none"> <li>◦ There are 4 categories where the accused have a duty to act, see below in manslaughter by omission.</li> </ul> </li> <li>• For Murder - In addition to the 4 categories, <b><u>'any person who deliberately puts another in danger comes under a legal duty to remove that danger'</u></b> <i>Taber</i> (guy robbed and tied victim, left her tied up and victim later died of dehydration).</li> </ul> <p><b>MR</b> same as murder. However, we only saw 2 cases involving murder by omission, <i>Taber</i>, and <i>BW &amp; SW</i> and both were by <b>RI</b> to human life.</p> <ul style="list-style-type: none"> <li>• In <i>BW &amp; SW</i> mother starved her daughter to death for a lengthy period in a negligent way. Jury's verdict indicated that the mother was fully aware the <u>probability</u> of her daughter dying because of the neglect and she deliberately omitted to do anything about it.</li> </ul>
<b>S18(b) manslaughter</b>  <b>Manslaughter by omission can only be caused by negligent criminal</b>	<p><b>AR:</b> There must be a breach of duty to act/care imposed on the accused in respect to the victim:</p> <ul style="list-style-type: none"> <li>• <b>Step 1</b> - There must be a duty to act on behalf of the accused. To establish such duty it is necessary to look at principles established at common law.</li> <li>• It is important to note that <b>not every moral obligation involves a <i>legal duty to act (Instant)</i></b>.</li> <li>• <b>IMPORTANT:</b> The <u>legal duty must be one connected with life</u> so that the ordinary consequences of neglecting it would be death <i>Pocock, Taktak</i>- overdose hooker/heroin</li> </ul>

<p><b>omission.</b></p>	<ul style="list-style-type: none"> <li>• <b>4 categories of duty to care: <i>Jones</i> used in <i>Taktak</i></b> <ol style="list-style-type: none"> <li>1. Statutory duty</li> <li>2. Contractual Relations: <ul style="list-style-type: none"> <li>○ employer/employee <i>Cittadini</i> (supervision, yacht)</li> <li>○ prison warden/prisoner, police/civilian, fire fighter/civilian, etc (it needs to involve death if they don't act)</li> <li>○ Dr/patient <i>Sood</i> (didn't do proper abortion, new-born died later = CN)</li> </ul> </li> <li>3. Status Relationship <ul style="list-style-type: none"> <li>○ Parent/children <i>Sam</i> (Indian homeopath)</li> <li>○ Parent/children- parents have duty to take reasonable steps to take care of their children, including preventing the commission of crime against them by third parties. But there is no duty between husband &amp; wife (<i>Rusell</i>)- drowning children/dad</li> </ul> </li> <li>4. Voluntary assumption duty: <ul style="list-style-type: none"> <li>○ A duty of care arises where a D voluntarily assumes a duty of care of a person who is helpless and unable to care for themselves. <i>Stone v Dobinson</i> (2 retards with the sister)</li> <li>○ If D secludes the victim from being assisted by others = criminal <i>Taktak</i> left her in a room instead of street where bypassers could have helped her.</li> <li>○ When one assumes a duty of care, <b>it needs to be honoured</b>. <u>The care needs to be adequate</u> or help should be summoned/materialised <i>Stone v Dobinson</i> they helped but not enough.</li> </ul> </li> </ol> </li> </ul> <p><b>MR: Test</b> similar to <b>MS-CN</b> negligent by act in <i>Nydam</i></p> <ul style="list-style-type: none"> <li>• The omission was conscious and voluntary</li> <li>• The accused fell so short of the standard of care that would have been exercised by the <u>reasonable person</u> <i>Nydam</i> or the accused failed to carry out that duty to such a high degree that it could be viewed as 'wicked' negligence <i>Taktak</i></li> <li>• No mens rea to cause death required <i>TakTak</i></li> <li>• The omission merited criminal punishment <i>Nydam</i></li> </ul> <p><b>Other Relevant Case Law</b></p> <p><b><i>Wacker (uk)</i></b> D was convicted of manslaughter by omission CN after smuggling immigrants in a tight compartment, they died asphyxiated. D tried to raise that he could not be criminally liable because there was no duty owed to immigrants. Court held that D voluntarily assumed</p>
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	<p>a duty to care, thus the conviction.</p> <p><b>Crown needs to prove BRD:</b></p> <ul style="list-style-type: none"> <li>A. D undertook care/or did not, of a person who by reason of age or infirmity was unable to take care of herself - legal duty to act due to one of 4 categories (<i>Russel</i>)</li> <li>B. <b>Causation</b> - Omission by accused to act under duty was proximate cause of death (<i>Taktak</i>)</li> <li>C. MS by Crim Negligence Test in the MR part similar to (<i>Nydam</i>)</li> </ul> <p><b>EXAM: When something happening in a group situation, think of Taktak...what is the relationship status between individuals?</b></p>
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## HOMICIDE BY CAUSATION

**To prove any of the above listed homicide offences, P must prove CAUSATION between the act and the death**

**P must prove BRD that 'but for' the presence of the factor caused by the accused, the death would have not occurred (*Moffatt*) - Whether an act or series of act consciously performed by accused is or are so connected with the event that it must be regarded as having substantial causal effect.**

MAIN CASE ***Royall (High Court)*** (chic jumped out of the window, trying to escape, after being attacked by boyfriend)

**3 main tests for assessing causation (*Royall*): - you chose the one you like or fits the facts**

**(1) Natural Consequence:** Where the conduct of the accused induces in the victim a well-founded apprehension of physical harm such as to make it a natural consequence (or reasonable) that the victim would seek to escape and the victim is injured in the course of escaping, the injury is caused by the accused's conduct. ***Royall***

- This test you would use when the victim is trying to escape from the D

**(2) Substantial Cause (the *Smith test in UK*):** Accused's **conduct need not be the single cause of death but it is sufficient if it was the substantial or significant cause of death.** Matter for jury to use their common sense to determine whether there was satisfactory connection b/w the accused's conduct and death of victim to attribute causal responsibility to the accused (***affirmed in Hallet (SA)***)

- This test you use when the deceased was rendered unconscious or in a hazardous position by the action of the accused. For example, in ***Hallet***, the victim was knocked out by the accused and the victim was left unconscious next to the beach, accused left for a cigarette and when came back victim was floating dead. Although the reason for his death was drowning, the substantial cause was the punch that put him in that position of not being able to avoid drowning.

**(3) Reasonable Foreseeability (I don't like this test, neither Chuan nor the HC):** Victim's action must be reasonable and proportional to the circumstances and were reasonably foreseeable consequence of the accused's conduct. When act done in self-reservation is disproportionate then it negates causal connection (**Roberts**) However, in **Royall** and even Chuan said that in cases where the victim has a well-founded apprehension, it is expected that victims fearful for their own safety forced to react on the spur of the moment will not always make sound or sensible judgements and may act irrationally. This means that even if the reaction is out of proportion, or the escape of the victim not reasonably foreseeable by the accused, it will still not be enough to break causation. To break the causation in crime is much higher than in tort.

**IMPORTANT: Causation is for the Jury to decide by applying common sense in conjunction with "BUT FOR"**

#### **Intervening Acts:**

- **Foreseeability** – Still an open question. Conflicting views of court in **Royall** and **McAuliffe**. However, I would stick w Royall cuz is HC.
- **Breaking Causation** - Extraordinary and not ordinary natural phenomenon can break the chain of causation-like an earthquake (**Hallett**)
- **Act of Victim** - Religious belief inhibiting victim from taking certain kind of treatment **does not** break chain of accused's act (**Blaue**) Jehovah witness refused blood transfusion after being stabbed.
- **Act of Victim** - Victim must be taken as they are found – their personal characteristics are irrelevant to proving causation (**Blaue**)
- **Act of Victim**- suicide will cut the chain of causation **Hallett**
- **Mental Capacity** - When decision to do something is taken by person of sound mind then accused not necessarily caused it (**Burns**)-victim took drug voluntarily and died, accused/supplier= not guilty.
- **Mental Capacity** – If deceased lacks mental capacity and is supplied by the accused a drug to commit suicide, the accused will be charged with homicide-**Justins**- euthanasia case, woman had Alzheimer, took drug given by husband.
- **Means of Escape** - Determines whether the response of the deceased was reasonable or proportionate in the circumstances (**Rik NSW 04**) in this case the deceased had more than one option for escape and chose the worse, haha. It was open to the jury to decide if reasonable on the spur of the moment.
- **Act of Third Party** – Acts of third party will only break the chain of causation where the act was 'free, deliberate and informed' (**Pagett**)
- **Medical Treatment**
  - **S33 Human Tissue Act 1983 (NSW)** – Person has died when there has occurred an irreversible cessation of all functions of the person's brain OR circulation of blood in persons body
  - **Second cause has to be so overwhelming that it makes the original wound a part of history** - Bad treatment may not break the chain of causation (**Smith**) but negligent treatment will (**Jordan**) deceased was given a medicine he was allergic to despite drs knowing of this. Will look at the Smith test (substantial and operating cause) to determine what originally caused the situation (**Malcherel and Steel**)

- Not part of the jury to decide degree of fault in med treatment unless it was so negligent that it overpowers independent acts of the accused and becomes the potent cause of death (**Cheshire**)
- If deceased victim of prior attack then medical treatment may not be the substantial cause (**Dyson**)
- Med practitioner **is** entitled to do all that is necessary and proper to relieve the patient from pain and suffering, even if measures taken incidentally shorten the life of the patients by hours (**Adams**)
- Adult of sound mind is entitled to refuse medical treatment (**St George NHS Trust v S**)
- A competent adult's right to self-determination prevails over the State's interest in preserving life even through the exercise of that right may result in death (**Hunter and New England Health Service v A**)
- Doctor carrying out med treatment without wishes of patient is guilty of crim offence of assault, unless the Court in its jurisdiction authorises it (**Royal Alexander Hospital v Joseph**)
- Where a patient is no longer capable of determining the course of medical treatment, it must be determined whether it is in the patient's best interest to continue treatment. Where not, the doctors will not be guilty of a homicide offence (**Airdale NHS Trust v Bland**)

**EXAM:** See why the person is in that position - is it coz of the act of the accused? Causation and Foreseeability are separate - Foreseeability for causation (AR) does not matter. Ques is - ***whether an act or series of act consciously performed by the accused is or are so connected with the event that it must be regarded as having sufficiently substantial causal effect.***

See whether medical treatment was no negligent that it broke the chain of causation? If not then what is the substantial cause?

## SOME THINGS TO REFRESH AND NOTE

**STEP 1 - P will always start with murder (intent or RI)**

**STEP 2 - If P cannot prove MR coz it is a subjective test, it will seek conviction for MS UDA/CN**

**STEP 3 - Alternative verdict to murder is MS which is available to Jury to decide based on evidence (*Downs*)**

**Sentencing: s19A, 19B, 24; S 21(1) and S61 *Crimes (Sentencing Procedure) Act 1999***

### **19A Punishment for murder CRIMES ACT**

(1) A [person](#) who commits the crime of murder is liable to imprisonment for life.

(2) A [person](#) sentenced to imprisonment for life for the crime of murder is to serve that sentence for the term of the [person](#)'s natural life.

(3) Nothing in this section affects the operation of section 21 (1) of the [Crimes \(Sentencing Procedure\) Act 1999](#) (which authorises the passing of a lesser sentence than imprisonment for life).

### **19B Mandatory life sentences for murder of police [officers](#)**

(1) A [court](#) is to impose a sentence of imprisonment for life for the murder of a police [officer](#) if the murder was committed:

(a) while the police [officer](#) was executing his or her duty, or

(b) as a consequence of, or in retaliation for, actions undertaken by that or any other police [officer](#) in the execution of his or her duty, and if the [person](#) convicted of the murder:

(c) knew or ought reasonably to have known that the [person](#) killed was a police [officer](#), and

(d) intended to kill the police [officer](#) or was engaged in criminal activity that risked serious harm to police [officers](#).

(2) A [person](#) sentenced to imprisonment for life under this section is to serve the sentence for the term of the [person](#)'s natural life.

(3) This section does not apply to a [person](#) convicted of murder:

(a) if the [person](#) was **under the age of 18** years at the time the murder was committed, or

(b) if the [person](#) had a significant cognitive [impairment](#) at that time (not being a temporary self-induced [impairment](#)).

(4) If this section requires a [person](#) to be sentenced to imprisonment for life, nothing in section 21 (or any other provision) of the [Crimes \(Sentencing Procedure\) Act 1999](#) or in any other Act or law authorises a [court](#) to impose a lesser or alternative sentence.

(5) Nothing in this section affects the obligation of a [court](#) to impose a sentence of imprisonment for life on a [person](#) convicted of murder in accordance with section 61 of the [Crimes \(Sentencing Procedure\) Act 1999](#).

### **21 General power to reduce penalties *Crimes Sentencing Procedures Act***

(1) If by any provision of an Act an [offender](#) is made liable to imprisonment for life, a [court](#) may nevertheless impose a [sentence](#) of imprisonment for a specified term.



## 61 Mandatory life [sentences](#) for certain offences *Crimes Sentencing Act*

(1) A [court](#) is to impose a [sentence](#) of imprisonment for life on a person who is convicted of murder if the [court](#) is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that [sentence](#).

### Crabbe (1985) - Authority for diff in probability and possibility

**Probability** - Good chance that something will happen. (*Boughey*, 1986)

**Possibility** - When knows that it is a probable result - may or may not happen => Not guilty of Murder but for Manslaughter

**Recklessness - foresight** that an action may cause death + **decision** to take that risk *Crabbe, (Pemble v Queen, 1971)*

### Royall (NSW Case)

P had to prove accused foresaw probability of death - **foresight of gbh not sufficient MR for murder in NSW. Intention of GBH necessary for murder. So a df who is recklessly indiff to serious GBH will be guilty of MS.**

## ASSAULT

Assault is an act by which a person intentionally or recklessly causes another person to apprehend the immediate infliction of unlawful force;

Battery is actual infliction of the unlawful force (*Darby v DPP*)

**\*\* Where ques. in exam, start with s61 then move towards s 59 and then s 33+35 - start by explaining why exclude any of these. Coz these are elements of common assault but only degree of injury is different.**

Common Assault	
<b>S61</b>	<p>Whosoever assaults any person, <b><i>although not occasioning actual bodily harm</i></b>, shall be liable to imprisonment for two years.</p> <ul style="list-style-type: none"><li>- Table 2 offence dealt summarily unless prosecutor elects otherwise</li><li>- Wide discretion available to police - it can chose not to proceed with charges</li><li>- Includes assault and battery (fear + touching)</li></ul> <p><b>Battery</b> - Application of Force</p>

### **AR(OBJECTIVE TEST)**

1. Act, not omission (**Fagan**) - But in some cases, an omission to act following excusable application of force will amount to continued assault (**Fagan**)
  - i. Act can be a continuing act - removal of car from foot of officer was a continuing act (**Fagan**)
2. Without victim's consent
  - i. **When ques of consent, start with Brown** - what is the degree of harm and is there a public policy reason to categorize it as assault
  - ii. Unlawfulness of the act is absence of consent of victim (**Bonora**)
  - iii. Crown has no obligation to prove the absence of consent (**Wilson**); lack of consent is presumed
3. Physical contact doesn't have to be violent in nature and in some circumstances can be a slight touch (**Collins v Wilcock**)
  - i. Includes spitting (**DPP v JWH**) and touching someone's clothes (**Stenecker v Police**)
  - ii. Can be committed without touching another person (**Rolfe**)
  - iii. Physical contact can be through body or medium of weapon controlled by offender (**Fagan**)
  - iv. Force is not unlawful if it is an incident of ordinary social intercourse s.a. patting on back (**DPP v JWH**)

### **MR (SUBJECTIVE TEST)**

1. Intentional or reckless (**MacPherson v Brown; Edwards v Police**)
  2. Recklessness - P proves foresight of possibility of inflicting act (**R v Savage; DPP v Parmenter**)
- Subjective Test - need to show actual intention or actual knowledge of possibility of physical contact (**MacPherson v Brown**)
  - **For an assault involving continuing act, MR does not need to be present at the time of the commencement of the act but can be superimposed onto an existing (and continuing) act (St George; Fagan); BUT MR cannot be superimposed on act that has been completed w/o MR to convert it into Assault (St George)**

### **Assault- Apprehension of Immediate Violence**

#### **AR (OBJECTIVE TEST)**

1. Act, not omission, by offender directly or weapon/instrument in control of offender (**Fagan**)
2. Without victim's consent i.e. no necessity for jury to have evidence that person being assaulted did not consent to application of force (**Wilson**)
3. Victim actually be put in fear /apprehension of *imminent* unlawful force

	<ul style="list-style-type: none"> <li>▪ <b>Immediate:</b> The threat must be sufficiently imminent and specific; not of occurring in future (<i>Knight; Zanker v Vartzokas</i>)</li> <li>▪ Threat can be a continuing fear or relatively immediate imminent violence (<i>Zankar v Vartzokas</i>)</li> <li>▪ <b>Fear:</b> Threat must give rise to actual apprehension of violence in mind of victim (<i>Barton v Armstrong</i>)</li> <li>▪ Words can alone constitute an assault if capable of creating fear (<i>Barton v Armstrong</i>)</li> <li>▪ Reasonableness of victim's apprehension is not required (<i>MacPherson v Brown</i>)</li> <li>▪ Can be conditional threat if the threatened act is in itself unlawful (<i>Police v Greaves</i>)</li> <li>▪ It can be an assault where A puts B in fear of C (<i>MacPherson v Brown</i>)</li> <li>▪ No assault if the other person is not aware of the accused's act (<i>Pemble</i>)</li> </ul> <p><b>MR (SUBJECTIVE TEST)</b></p> <ol style="list-style-type: none"> <li>1. Intention or recklessness</li> <li>2. Reckless - foresight of possibility (<i>MacPherson v Brown</i>) - Df while not desiring to cause such fear, realizes that his conduct may do so and persists with it</li> </ol> <ul style="list-style-type: none"> <li>○ Subjective Test - need to show actual intention or actual knowledge of possibility of physical contact (<i>MacPherson v Brown</i>)</li> <li>○ For an assault involving continuing act, MR does not need to be present at the time of the commencement of the act but can in be superimposed onto an existing (and continuing) act (<i>Fagan</i>)</li> </ul>
<b>Lawful Excuse</b>	<ul style="list-style-type: none"> <li>○ Defence will be considered if the accused raises evidence to suggest it (<i>Wilson</i>)</li> <li>○ If raises, P must disprove any lawful excuses open on the evidence BRD (<i>Zecevic v DPP</i>)</li> </ul> <p><b>Lawful excuses:</b></p> <ul style="list-style-type: none"> <li>○ <b>Consent</b> - if victim consented, then it is a lawful justification (<i>Bonora</i>) but consent cannot negate assault unless there is good reason to allow it such as sports (<i>Brown</i>) <ul style="list-style-type: none"> <li>○ 2 major considerations (<i>Brown</i>) <ul style="list-style-type: none"> <li>▪ Level of harm that results from the activity is imp - after a certain level of harm, consent will be irrelevant (<i>Donovan</i>)</li> <li>▪ When it is not in interest of public to allow defence of consent due to gravity of violence (<i>A-G Reference</i>)</li> </ul> </li> </ul> </li> <li>○ Parent can consent on behalf of the child if the child is incapable of giving consent + parental consent is subjective + welfare of child is objectively assessed (<i>Marion</i>)</li> </ul>

	<ul style="list-style-type: none"> <li>○ When an otherwise regular act converts into battery or assault, then need to show actual hostility or hostile intent to satisfy battery/assault (<i>Boughey</i>)</li> <li>○ Self-defence</li> <li>○ Police exercising lawful powers of arrest (<i>R v Turner</i>)</li> <li>○ Contact occurring in course of ordinary social activity (<i>Collins v Wilcock; DPP v JWH</i>)</li> </ul>
<b>Medical Treatment</b>	<ul style="list-style-type: none"> <li>○ Notion of Informed Consent - Patient's consent be freely given after an explanation of basic nature and risks involved in the procedure (<i>Marion</i>)</li> </ul>
<b>Violence in Sports</b>	<ul style="list-style-type: none"> <li>○ General rule: not assault, dealt with by sporting tribunals</li> <li>○ Once degree of injury exceeds actual bodily harm, consent is not an excuse and is immaterial (<i>Stanley</i>)</li> <li>○ Test is the reasonableness having regard to the rules of the game and generally accepted risks known to reasonable players as inherent in the sport (<i>Re Jewell</i>)</li> <li>○ Rugby game of physical contact necessarily involving use of force and that players consent to; BUT there are cases where assault when action cross line (<i>Billinghurst</i>)</li> <li>○ Act in game is assault when not done in legitimate pursuit of the objects of the game (<i>Stanley</i>)</li> <li>○</li> </ul>
<b>Aggravated Assault - non fatal violence in presence of additional or aggravating factors</b>	
Aggravating Factors: <ul style="list-style-type: none"> <li>• nature of the harm caused - ABH(s59)/GBH or wounding with intent (s 33)/ Wounding or GBH with reckless indifference (s35)</li> <li>• Use of weapon (e.g. bodily injury through use of gunpowder (s46); discharging or attempting to discharge a firearm with intent to cause GBH (s35A)</li> <li>• Special status of the victim - assaulting police officer (s60)</li> <li>• Context of the assault - assault during public disorder (s59A)</li> </ul>	
<b>S 59</b>	<p><b>Assault causing ABH</b></p> <p>(1) Whosoever assaults any person, and thereby occasions ABH, shall be liable to prison = 5 years</p> <p>(2) Person is guilty of the offence under this section if the person commits an offence under subsection (1) in company of another person. Person under this subsection goes to prison for 7 years</p> <ul style="list-style-type: none"> <li>○ Express or implied agreement b/w both persons to achieve a common result</li> </ul> <p><b>ABH: Common Law (OBJECTIVE TEST FOR GRAVITY OF INJURY)</b></p> <ul style="list-style-type: none"> <li>○ Based on assessment of degree of harm caused (<i>McIntyre</i>)</li> </ul>

	<ul style="list-style-type: none"> <li>○ Interpreted according to ordinary meaning of words</li> <li>○ <b>Anything interfering with health or comfort of victim. Need not be permanent but must be more than merely transient and trifling (<i>Donovan</i>).</b></li> <li>○ Less than GBH or wounding (<b><i>Overall; Lardner; McIntyre</i></b>)</li> <li>○ Bruises or scratches (<b><i>R v Cameron; McIntyre</i></b>) - includes causing black eye due to punch</li> <li>○ Includes psychiatric injury (depressive illness or anxiety disorder) but not mere emotions such as fear, distress, panic (<b><i>Chan-Fook</i></b>)</li> <li>○ Requires expert evidence of recognizable psychiatric injury (<b><i>Chan-Fook</i></b>)</li> <li>○ Psychological injury in a very serious way, going beyond merely transient emotions, feelings, and state of mind that would likely amount to ABH (<b><i>Li v R</i></b>)</li> <li>○ Nervous shock is not ABH (<b><i>Lardner</i></b>)</li> </ul> <p><b>AR:</b> Common assault + ABH</p> <p><b>MR:</b> No specific intent is required (<b><i>Coulter</i></b>); Sufficient if the accused intentionally or recklessly assaults the victim and ABH results (<b><i>William</i></b>) i.e. MR of Common Assault is sufficient</p>
<b>S59A</b>	<p><b>Assault during public disorder</b></p> <p>(1) A person who assaults any person during a large-scale public disorder, although not occasioning ABH, is liable to prison = 5y.</p> <p>(2) A person who assaults any person during a large-scale public disorder, &amp; by the assault occasions ABH, is liable to prison = 7y.</p>
<b>S54</b>	<p><b>Causing GBH (injury w/o further specific intent)</b></p> <p>Whosoever by any unlawful or negligent act, or omission, causes GBH to any person, shall be liable to prison = 2 years</p> <p>Degree of Negligence required = Gross Negligence (<b><i>D</i></b>)</p>
<b>S35</b>	<p><b>Reckless GBH or Wounding</b></p> <p><b>(1) Reckless GBH in Company</b></p> <p>A person who in company of another person(s):</p> <p>(a) causes GBH to any person, and</p> <p>(b) is reckless as to causing ABH is guilty</p> <p>Max Penalty - Prison for 14 years</p> <p><b>(2) Reckless GBH</b></p> <p>A person who</p>

	<p>(a) causes GBH to any person, and  (b) is reckless as to causing ABH is guilty  Max penalty - Prison 10 years</p> <p><b>(3) Reckless wounding—in company</b>  A person who, in the company of another person or persons:  (a) wounds any person, and  (b) is reckless as to causing actual bodily harm to that or any other person, is guilty of an offence.  Maximum penalty: Imprisonment for 10 years.</p> <p><b>(4) Reckless wounding</b>  A person who:  (a) wounds any person, and  (b) is reckless as to causing actual bodily harm to that or any other person, is guilty of an offence.  Maximum penalty: Imprisonment for 7 years.</p> <p><b>(5) Alternative Verdict:</b> If person charged with an offence under any of the above ss but jury is not satisfied but is satisfied that person has committed an offence against any other ss in this section, then jury may charge the person with alternative offence</p> <p><b>MR: Intention or Recklessness</b></p> <ul style="list-style-type: none"> <li>○ Crown prove that the accused caused GBH and he was reckless as to causing ABH (<b>Crimes Amendment (Reckless Infliction of Harm) Act 2002</b>)</li> </ul>
<b>S33</b>	<p><b>Wounding or GBH with Intent</b>  <b>(1) Intent to cause grievous bodily harm</b>  A person who:  (a) wounds any person, or  (b) causes grievous bodily harm to any person,  with intent to cause grievous bodily harm to that or any other person is guilty of an offence.  Maximum penalty: Imprisonment for 25 years.</p>

	<b>(3) Alternative Verdict:</b> If jury not satisfied that offence under this but satisfied that offence under s35, then charge under s35
<b>Wounding</b>	<b>Common Law Def</b> <ul style="list-style-type: none"> <li>○ Wounding = breaking of interior layer of skin (dermis); breaking of only outer layer is not enough (epidermis) <b>(Smith)</b></li> <li>○ Wound may be inflicted by a fist; no instrument or weapon is needed <b>(Bullock)</b></li> <li>○ Infliction of an injury which breaks the continuity of the skin <b>(Shepherd)</b></li> <li>○ Can be assessed through consequences - what caused and the requisite treatment <b>(Hatch)</b></li> </ul>
<b>GBH</b> <b>(S4 Crimes Act 1900)</b>	<b>GBH Includes:</b> <p>(a) the destruction of the foetus of a pregnant woman, whether or not the woman suffers any other harm, <b>(King; Zoe)</b> and</p> <p>(b) any permanent or serious disfiguring of the person, and</p> <p>(c) any grievous bodily disease (in which case a reference to the infliction of GBH includes a reference causing a person to contract a grievous bodily disease)</p> <ul style="list-style-type: none"> <li>○ GBH encompasses a range of injuries <b>(Woodland)</b></li> <li>○ Ordinary and natural meaning; 'grievous' means no more or less than really serious <b>(Smith)</b></li> <li>○ Injury may not be life-long or life threatening or permanent but is a really serious one <b>(Haoui)</b></li> <li>○ Includes complex skull fractures <b>(Remilton)</b>; severe multiple fractures to leg, nerve damage, closed head injury, facial neurological damage, severe injuries to knee <b>(Shannon)</b>; Injury resulting in insertion of metal plates <b>(Vann v Palmer)</b></li> <li>○ Jury determines whether injury is GBH - open to jury to be satisfied BRD that element of GBH were established <b>(M v Queen)</b></li> <li>○ <b>Passing Disease : s52 Public Health Act 2010</b> - person who has category 2, 3, 4 or 5 condition and is in public place must not fail to take reasonable precautions against spreading the condition. (includes HIV, hepatitis C, Chlamydia, syphilis); s72 Public Health Act 2010 - person who knows that he suffers from STD is guilty if he has sex with another w/o informing and consent of other person</li> </ul>
<b>Use of Offensive Weapon</b>	<ul style="list-style-type: none"> <li>○ An aggravated assault even in cases where there is no injury</li> </ul> <p>Def of Offensive Weapon - s4(1) Crimes Act - firearm, prohibited weapon, spear gun</p>
<b>S33A</b>	Discharging Firearm with Intent - intent to cause GBH by a person who discharges any firearm or other loaded arms OR attempts to discharge any firearm or other loaded arm with intent to cause GBH or to resist arrest
<b>S35 A</b>	Causing Dog to inflict GBH or ABH - person who has control of the dog is reckless and guilty

## APPREHENDED DOMESTIC VIOLENCE ORDERS

S5	<b>Meaning of Domestic Relationship</b> - Includes spouses, de facto spouses, intimate personal relationships (sexual or not), personal living or who has lived in the same house, persons in a relationship of ongoing, dependent care, and relatives. Extends to same sex relationships.
S9	<b>Objective</b> (1) Has objective of ensuring safety and protection of all persons including children who experience domestic violence and to inhibit violence by a person against another person where a domestic relationship exists (2) These objectives achieved by empowering courts to make ADVOs to protect from stalking and intimidation, and ensuring that access to courts is safe, speedy, inexpensive and simple
S11	<b>Domestic Violence Offence</b> - means a personal violence offence committed by a person against another person with whom the person who commits the offence has or has had a domestic relationship.
S16	<b>Grounds for Making an AVDO</b> - states that courts may make these orders if satisfied on <i>balance of probabilities</i> that a person who has or has had domestic relationship with another person has reasonable grounds to fear by the other person commission of personal violence or engaging in conduct that intimidates or stalks the person. But not necessary for the court to be satisfied if the person for whom order is made is a child, with low average general intelligence function or if person has been subjected to violence before and likely that will be again and so necessary to protect. If breach then serious matter - can be incarcerated.
S17	(1) In deciding whether or not to make order, court must consider safety and protection of the protected person and any child directly or indirectly affected by the conduct of the Df alleged in the application of the order
S35	<b>Prohibitions and Restrictions in Orders</b> - Imposed on behaviour of Df as required. Include approaches by Df to protected person, prohibiting/restricting access to premises occupied//place of work/any other frequented by person, approaching any of these within 12 hours of intoxication, no firearms, no destruction or damaging of property, specified behaviour

## SEXUAL ASSAULT

### Crimes Act 1900, Part 3 Div 10

61H	<b>Definition of “sexual intercourse” and other terms</b> (1) For the purposes of this Division, <i>sexual intercourse</i> means: (a) sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female
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	<p>person or the anus of any person by:</p> <ul style="list-style-type: none"> <li>. (i) any part of the body of another person, or</li> <li>. (ii) any object manipulated by another person,</li> </ul> <p>except where the penetration is carried out for proper medical purposes, or</p> <p>(b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person, or</p> <p>(c) cunnilingus, or</p> <p>(d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).</p> <p>(1A) For the purposes of this Division, a person has a <b><i>cognitive impairment</i></b> if the person has:</p> <ul style="list-style-type: none"> <li>. (a) an intellectual disability, or</li> <li>. (b) a developmental disorder (including an autistic spectrum disorder), or</li> <li>. (c) a neurological disorder, or</li> <li>. (d) dementia, or</li> <li>. (e) a severe mental illness, or</li> <li>. (f) a brain injury,</li> </ul> <p>that results in the person requiring supervision or social habilitation in connection with daily life activities.</p> <ul style="list-style-type: none"> <li>. (2) For the purposes of this Division, a person is under the authority of another person if the person is in the care, or under the supervision or authority, of the other person.</li> <li>. (3) For the purposes of this Act, a person who incites another person to an act of indecency, as referred to in section 61N or 61O, is taken to commit an offence on the other person.</li> </ul>
<b>S 61I</b>	<p><b>SEXUAL ASSAULT</b></p> <p><b>AR:</b></p> <ul style="list-style-type: none"> <li>a. <b><i>Act:</i></b> carnal knowledge; penile-vaginal penetration (<b>s61H + s61I</b>)</li> <li>b. <b><i>Circumstance:</i></b> non-consent; against the woman's will (proven by signs of resistance, including injuries and tearing of clothes) <ul style="list-style-type: none"> <li>i. the defence just need to raise doubt about victim's lack of consent</li> <li>ii. <b>Consent (61HA(2)):</b> A person <b><i>consents</i></b> to sexual intercourse if the person <b><i>freely and voluntarily agrees</i></b> to the sexual intercourse</li> <li>iii. <b>No Physical Resistance ≠ Consent: 61HA(7):</b> A person who does not offer actual physical resistance to sexual intercourse is not to be regarded as consenting to the sexual intercourse.</li> </ul> </li> </ul> <p><b>MR:</b></p> <ul style="list-style-type: none"> <li>c. <b>Intent of doing voluntary act +</b></li> </ul>

d. **Knowledge of non-consent (s61HA(3))**

i. Actual Knowledge (subjective)

ii. Advertant Recklessness (***Banditt; Hemsley***) OR Inadvertant Recklessness (***Tolmie; Kitchener***)

☐ Advertant: Aware or realised that complainant not consenting but still had intercourse

☐ Inadvertant: Failed to consider whether she is consenting or not

iii. Honest belief in consent but no reasonable grounds

→ To make finding, trier must have regard to all circumstances including steps taken by accused to ascertain victim's consent but **NOT INCLUDING SELF-INDUCED INTOXICATION**

→ Person consenting is taken as not consenting if doing so under a mistaken belief as to identity of the person - **Crown proves actual knowledge that the accused knew that victim consented under mistake**

→ TJ mentions recklessness only if facts require - otherwise standard direction deals with "actual knowledge" and "no reasonable grounds for believing"

**Negation of Consent (Consent = Non-Consent) (61HA(4)):** A person does not consent to sexual intercourse:

(a) if the person does not have the capacity to consent to the sexual intercourse, including because of **age or cognitive incapacity**, or

(b) if the person does not have the opportunity to consent to the sexual intercourse because the person is **unconscious or asleep**, or

(c) if the person consents to the sexual intercourse because of **threats of force or terror** (whether the threats are against, or the terror is instilled in, that person or any other person) (***Aitken***), or

- **'Threat of Terror'**: 'terror' means 'sharp, overpowering fear' or 'feeling, occasion or cause of great fear' (***Aitken***)

(d) if the person consents to the sexual intercourse because the person is unlawfully detained.

**Automatic Negation of Consent (Consent = Non Consent) (61HA(5)):** A person who consents to sexual intercourse with another person:

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

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

(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)

	<p><b>May or May Not Consent s 61HA(6):</b> The grounds on which it may be established that a person does not consent to sexual intercourse include:</p> <ul style="list-style-type: none"> <li>(a) if the person has sexual intercourse while substantially intoxicated by alcohol or any drug, or</li> <li>(b) if the person has sexual intercourse because of intimidation or coercive conduct, or other threat, that does not involve a threat of force (<b><i>Non-Violent Coercive Threats: Aitken</i></b>), or</li> <li>(c) if the person has sexual intercourse because of the abuse of a position of authority or trust.</li> </ul> <p><b>Immunities</b></p> <ul style="list-style-type: none"> <li>e. irrebuttable presumption that a male under 14 was incapable of rape</li> </ul>
61J	<p><b>AGGRAVATED SEXUAL ASSAULT</b></p> <p><b>AR:</b></p> <ul style="list-style-type: none"> <li>• Sexual Assault (AR+MR) (<b>61I</b>)</li> <li>• Aggravating circumstances (<b>61J(2)</b>)</li> </ul> <p><b>MR:</b></p> <ul style="list-style-type: none"> <li>a. <b>Intent of doing voluntary act +</b></li> <li>b. <b>Knowledge of non-consent (s61HA(3))</b></li> </ul> <p><b>Circumstances of Aggravation:</b></p> <ul style="list-style-type: none"> <li>(a) <b><i>at the time of, or immediately before or after</i></b>, the commission of the offence, the alleged offender <b><i>intentionally or recklessly inflicts actual bodily harm</i></b> on the alleged victim or any other person who is present or nearby, or</li> <li>(b) <b><i>at the time of, or immediately before or after</i></b>, the commission of the offence, the alleged offender <b><i>threatens to inflict actual bodily harm</i></b> on the alleged victim or any other person who is present or nearby by means of <b><i>an offensive weapon or instrument</i></b> (<b><i>RJS</i></b>) <ul style="list-style-type: none"> <li>• Sufficient for Crown to prove that the accused was using the object in an offensive manner at the time of the commission of the offence charged (<b><i>RJS</i></b>)</li> </ul> </li> <li>(c) the alleged offender is <b><i>in the company of another person or persons</i></b>, <ul style="list-style-type: none"> <li>• Mere presence of person is not sufficient - must be some encouragement or assistance (<b><i>Crozier</i></b>)</li> <li>• Presence a lower threshold - proximity s.t. it emboldened or reassured the offender in committing the crime or intimidated victim</li> </ul> </li> </ul>

	<p><b>(Button; Griffen)</b></p> <p>(d) the alleged <u>victim is under the age of 16 years</u>, or</p> <p>(e) the alleged <u>victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender</u>, <b>(KSC)</b></p> <ul style="list-style-type: none"> <li>• Ref. 61H(2) - Person under authority if the person is in care, supervision or authority of another person</li> <li>• Ordinary meanings of care, supervision, authority <b>(KSC)</b></li> <li>• Includes employee-employer relationship <b>(DH)</b></li> </ul> <p>(f) the alleged <u>victim has a serious physical disability</u>,</p> <p>(g) the alleged <u>victim has a cognitive impairment</u>,</p> <ul style="list-style-type: none"> <li>• 61H(1A) - See above</li> </ul> <p>(h) the alleged offender <b><i>breaks and enters into any dwelling-house or other building with the intention of committing the offence or any other serious indictable offence</i></b>, or</p> <p>(i) the alleged offender <b><i>deprives the alleged victim of his or her liberty</i></b> for a period before or after the commission of the offence.</p>
61JA	<p><b>AGGRAVATED SEXUAL ASSAULT IN COMPANY</b></p> <p><b>AR:</b></p> <ul style="list-style-type: none"> <li>• Act: Sexual Intercourse <b>(61H)</b></li> <li>• Absence of Consent <ul style="list-style-type: none"> <li>i. <b>Consent (61HA(2)):</b> A person <b><i>consents</i></b> to sexual intercourse if the person <b><i>freely and voluntarily agrees</i></b> to the sexual intercourse</li> <li>ii. <b>No Physical Resistance ≠ Consent: 61HA(7):</b> A person who does not offer actual physical resistance to sexual intercourse is not to be regarded as consenting to the sexual intercourse.</li> </ul> </li> <li>• Company of others (61JA(1)(b))</li> <li>• Circumstances of Aggravation (61JA(1)(c)) <ul style="list-style-type: none"> <li>○ <b><i>at the time of, or immediately before or after</i></b>, the commission of the offence, the alleged offender <b><i>intentionally or recklessly inflicts actual bodily harm</i></b> on the alleged victim or any other person who is present or nearby, or</li> <li>○ <b><i>at the time of, or immediately before or after</i></b>, the commission of the offence, the alleged <b><i>offender threatens to inflict actual bodily harm</i></b> on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument</li> <li>○ deprives the alleged victim of his or her liberty for a period before or after the commission of the offence</li> </ul> </li> </ul>

	<p><b>MR:</b></p> <ul style="list-style-type: none"> <li>• Intention</li> <li>• Knowledge of no consent (<b>61HA(3)</b>) <ul style="list-style-type: none"> <li>○ Actual knowledge</li> <li>○ Advertent Recklessness</li> <li>○ Inadvertent Recklessness</li> </ul> </li> </ul> <p><b>SENTENCE</b> - Life imprisonment (<i>AEM Jnr</i>; <i>AEM Snr</i>)</p>
<b>61L</b>	<p><b>INDECENT ASSAULT</b></p> <p><b>AR:</b></p> <ul style="list-style-type: none"> <li>• <b>ACT:</b> Assault <ul style="list-style-type: none"> <li>○ Battery (physical contact)</li> <li>○ Assault (reasonable apprehension of immediate and unlawful personal violence)</li> <li>○ cannot be omission or inactivity (<b><i>such as an invitation to do something</i></b>) such as the accused invites a child to touch his penis and she does not by her own wish (<b><i>Fairclough v Whipp</i></b>); (<b><i>DPP v ROGERS</i></b>)</li> </ul> </li> <li>• <b>CIRCUMSTANCE:</b> Indecency (at the time OR immediately before or after) on OR in presence of other persons <ul style="list-style-type: none"> <li>○ Act has a sexual connotation - the part of the body touched or doing the touching – with the genitals, breast and anus being relevant areas – is relevant (<b><i>Harkin</i></b>)</li> <li>○ ‘Indecent’ means contrary to the ordinary standards of morality of respectable people within the community (<b><i>Harkin</i></b>)</li> <li>○ The indecent act must be directed at or towards the victim of the assault such that he/she is aware or apprehends the indecent assault (<b><i>Johnson</i></b>)</li> <li>○ the act of indecency must be committed with ‘indecent intent’ – intent to commit an assault that right-minded persons would think was indecent (<b><i>Court</i></b>)</li> </ul> </li> <li>• <b>CIRCUMSTANCE:</b> Without Consent <ul style="list-style-type: none"> <li>○ Physical contact without victim’s consent</li> <li>○ No need to prove ‘hostility’ towards victim</li> <li>○ Consent of a child under 16 is no defence to this charge (s 77(1))</li> <li>○ For complainant above 16, the definition of consent is the CL definition (not the 61HA(1)) → ‘freely and voluntarily agrees’</li> </ul> </li> </ul>

	<p><b>MR:</b></p> <ul style="list-style-type: none"> <li>• Intention to do the act (<i>Fitzgerald v Kennard</i>)</li> <li>• Knowledge of non-consent (<i>Bonora</i>)</li> <li>• Recklessness (<i>Fitzgerald v Kennard</i>)</li> </ul> <p>=&gt; Ultimately, JURY decides what is indecent using objective standards. It needs to be contrary to the moral standards of society (<i>Court</i>)</p>
<b>61M</b>	<p><b>AGGRAVATED INDECENT ASSAULT</b></p> <p><b>AR:</b></p> <ul style="list-style-type: none"> <li>• Assault <ul style="list-style-type: none"> <li>○ Battery (physical contact - any kind of touching)</li> <li>○ Assault (reasonable apprehension of immediate and unlawful personal violence)</li> <li>○ cannot be omission or inactivity (<i>such as an invitation to do something</i>) such as the accused invites a child to touch his penis and she does not by her own wish (<i>Fairclough v Whipp</i>); (<i>DPP v ROGERS</i>)</li> </ul> </li> <li>• Act of Indecency (at the time OR immediately before or after) on OR in presence of other persons <ul style="list-style-type: none"> <li>○ Can be derived from the body part used of girl or boy (<i>Harkin</i>)</li> <li>○ 'Indecent' means contrary to the ordinary standards of morality of respectable people within the community (<i>Harkin</i>)</li> <li>○ The indecent act must be directed at or towards the victim of the assault such that he/she is aware or apprehends the indecent assault (<i>Johnson</i>)</li> <li>○ the act of indecency must be committed with 'indecent intent' – intent to commit an assault that right-minded persons would think was indecent (<i>Court</i>)</li> </ul> </li> <li>• Circumstances of Aggravation <ul style="list-style-type: none"> <li>○ In company of another person or persons OR</li> <li>○ victim is under 16 years</li> <li>○ Under authority of alleged offender <ul style="list-style-type: none"> <li>▪ person is in care or under supervision or authority</li> </ul> </li> <li>○ victim has serious physical disability</li> <li>○ victim has cognitive impairment</li> </ul> </li> <li>• Circumstance: Without Consent</li> </ul>

	<ul style="list-style-type: none"> <li>○ Consent of a child under 16 is no defence to this charge (s 77(1))</li> <li>○ For complainant above 16, the definition of consent is the CL definition (not the 61HA(1)) → ‘freely and voluntarily agrees’</li> </ul> <p><b>MR:</b></p> <ul style="list-style-type: none"> <li>• Intention to do the act (<i>Fitzgerald v Kennard</i>)</li> <li>• Knowledge of non-consent (<i>Bonora</i>)</li> <li>• Recklessness (<i>Fitzgerald v Kennard</i>)</li> </ul> <p>=&gt; Ultimately, JURY decides what is indecent using objective standards (<i>Court</i>)</p> <p><b>Standard Non-Parole Period -</b></p> <ol style="list-style-type: none"> <li>1. 61M(1): 5 years for aggravated indecent assault on person over 16 years</li> <li>2. 61M(2): 8 years for aggravated indecent assault on person under 16 years</li> </ol>
<b>61N</b>	<p><b>ACT OF INDECENCY</b></p> <p><b>AR:</b></p> <ul style="list-style-type: none"> <li>• Act of indecency with or towards a person under 16 OR</li> <li>• Incites person under 16 to act of indecency =&gt; 2 years</li> <li>• Act of indecency with or towards a person above 16 OR</li> <li>• Incites person above 16 to act of indecency =&gt; 18 months</li> <li>• Circumstance: Without Consent <ul style="list-style-type: none"> <li>○ Consent of a child under 16 is no defence to this charge (s 77(1))</li> <li>○ For complainant above 16, the definition of consent is the CL definition (not the 61HA(1)) → ‘freely and voluntarily agrees’</li> </ul> </li> </ul> <p>=&gt; Ultimately, JURY decides what is indecent using objective standards (<i>Court</i>)</p> <p><b>E.g. - (a)</b> accused invites a child to touch his penis and she does not by her own wish (<i>Fairclough v Whipp</i>); <b>(b)</b> accused exposes himself to his infant daughter and asks her to masturbate him and she does so (<i>DPP v Rogers</i>)</p>

	<b>CHECK - for words like invite, ask, request - if these words then not act but an omission or inactivity =&gt; act of indecency</b>
<b>610</b>	<b>AGGRAVATED ACT OF INDENCENCY</b> <ul style="list-style-type: none"> <li>• Act of Indecency</li> <li>• Aggravating Circumstances <ul style="list-style-type: none"> <li>○ offender is in company of other persons OR</li> <li>○ victim is under the authority of offender</li> <li>○ victim has a serious physical disability</li> <li>○ victim has serious intellectual disability</li> </ul> </li> </ul>
<b>61Q</b>	<b>ALTERNATIVE VERDICTS</b> <p><b>(1) Question of aggravation</b>  If on the trial of a person for an offence under section 61J, 61M or 61O the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied on the evidence that the accused is guilty of an offence under section 61I, 61L or 61N, it may find the accused not guilty of the offence charged but guilty of the latter offence, and the accused is liable to punishment accordingly.</p> <p><b>(1A) Question of aggravation in company</b>  If on the trial of a person for an offence under section 61JA the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied on the evidence that the accused is guilty of an offence under section 61I or 61J, it may find the person not guilty of the offence charged but guilty of the latter offence, and the accused is liable to punishment accordingly.</p> <p><b>(2) Question of consent regarding alleged victim under 16</b> If on the trial of a person for an offence under section 61I the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied on the evidence that the accused is guilty of an offence under section 66C (3) or 66C (4), it may find the accused not guilty of the offence charged but guilty of the latter offence, and the accused is liable to punishment accordingly.</p> <p><b>(3) Question of consent or authority regarding alleged victim under 16</b> If on the trial of a person for an offence under section 61J or 61JA the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied on the evidence that the accused is guilty of an offence under section 66A or 66C, it may find the accused not guilty of the offence charged but guilty of the latter offence, and the accused is liable to punishment accordingly.</p> <p><b>(5) Question of consent regarding cognitive impairment</b> If on the trial of a person for an offence under section 61I, 61J or 61JA, the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied on the evidence that the accused is guilty of an offence under section 66F, it may find the accused not guilty of the offence charged but guilty of the latter offence, and the accused is liable to punishment accordingly.</p>



# LARCENY

*Dishonest is defined in s4b of Crimes Act (includes subj + obj test like in Ghosh) but we don't use it for CL offences like larceny but only statute offences like fraud*

(Common Law Offence)

## **S117 Punishment for larceny *Crimes Act***

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.

Larceny is an offence against possession and not against ownership => person lawfully in possession cannot commit larceny (*Ilich v R*)

Owner of property can be guilty of larceny if he takes property from someone in lawful possession of it (*Rose v Matt*)

### **Elements: *Ilich v R***

#### **AR: 4 elements that you must mention, all 4.**

- (1) There is physical property capable of being stolen (*Croton* – taking money from joint account w/o telling wife. Money in bank is an asset of bank and bank with consent passes possession; *Lloyd* - Tangible personal property)
  - a. Wild animals are capable of being stolen but only if they are in captivity and in possession of some person (*Gadd* – property was bees)
  - b. Real property and fixtures cannot be subjects of larceny (*Billing v Pill*)
  - c. Abandonment requires more than an intention to cease possession (*Hibbert v McKiernan*). Occurs where the owner is indifferent to any asportation of the goods by any other person (*Donoghue v Coombe*)
- (2) The property is in the possession of a person other than the D (*Anic, Stylianou and Suleyman*)
  - a. Drugs also subjected to proprietary rights (*Waterhouse; Anic, Stylianou and Suleyman* – case of stealing drugs from house of owner)
  - b. Less than actual possession is sufficient (possession can be of someone not in actual possession of it) - property with employee is a possession of the employer and so employee can steal from employer (*William v Phillips*)
  - c. "Owner" will be the last person in possession of property (*R v Basildon Magistrates Courts*) – property will be rarely treated as abandoned. Last person becomes owner
  - d. Property found on a person's enclosed land is considered as in the possession of that person, even if unaware of it (*Hibbert v McKiernan*)

- (3) **Asportation:** The property is taken and carried away by the D (*Wallis v Lane*)
- Sufficient asportation if there is a removal of the property from the spot where it was originally placed with intent to steal. ***Slightest movement*** of goods ***with the intent to steal*** them is sufficient to constitute larceny (*Wallis v Lane*)
  - Larceny if the accused moves property already unlawfully moved by another where offence is considered to be a continuing one (*McDonald*)
  - Keeping of money originally obtained by mistake is not larceny** (*Potisk*) – coz voluntariness not satisfied
  - There has to be an actual taking, not just a thought/intention, for larceny** (*Preston*) – coz there has to be an act to satisfy AR
- (4) The taking is done without the consent of the possessor (*Croton*)
- Invito domino* - **lack of consent of the owner merely requires a lack of positive intent to pass the possession** (*Kennison v Daire* – case of man taking out money from ATM after closing account. Court said machine cannot give consent on behalf of bank)
  - Where there is consent to the taking, even though person giving the property is mistaken to the recipient, there is no larceny (*Kennison v Daire*)
  - Larceny is a crime against possession of property. The possessor can be a thief. It is unnecessary that the possessor is the true owner.
  - If license given of property but the property is dealt with in a manner that is a breach of that license then asportation w/o consent has occurred (*Kolosque v Miyazaki* – woman was shop lifting)
  - When lost property is found, then the owner is said to be consenting to allow the finder to have possession of it for the property to be returned (*Thurborn*)

**MR:**

- (5) The property is taken with an **intention to permanently deprive** (*Holloway* – took skin tanned by another employee and put in own storage area)
- Intention at time of taking the good is imp to determine larceny** (*Foster* – guy takes gun of watchman to show to father and tells mother that he is assisting watchman with his duties. Was not charged)
  - Intention to permanently deprive must exist at the time of the taking so that if obtaining of the property is innocent, a later intent to steal is insufficient (*Matthews*)
  - Intention to return the property or equivalent amount of money if accused has appropriated property for own use or for that of another person is no defence (**s118**)
  - If intention is to deprive only for a limited time then it is not larceny; but if intention is to exercise ownership of the good to deal with it as if own then an intention to return is not made out (*Foster*)
  - When intention to return is conditional = intention to permanently deprive will be found (*Lowe v Hooker; Sharp v McCormick* – D took parts home to see if fits in his car)

- f. True value of the property exhausted = intention to permanently deprive is found (**Lloyd** – practical value of the films not lost after D made copies)
  - g. Changing nature of property = intention to deprive (**Weatherstone** – melted rods owned by Council to fix tennis fence; **Smalls** – changed nature of sleeping beds). But determining the degree of change is imp – change in condition of property must be substantial and not that which would occur by reason of normal use of property (**Bailey**)
- (6) The property is taken fraudulently i.e., dishonestly – words are used interchangeably (**Glenister, Macleod**)
- a. Dishonest is defined in s4b of Crimes Act (includes subj + obj test like in Ghosh) but we don't use it for CL offences like larceny but only statute offences like fraud
  - b. 'Dishonesty' has its ordinary meaning and a moral basis (**Feely, Peters**)
  - c. **Meaning of 'fraudulently'** – moral obloquy (**Weatherstone, Baartman**)
  - d. Ordinary standard of reasonable and honest people (Obj.) (**Peters**) – Use of subj test in **Ghosh (UK)** not applied by HCA in **Peters** and the case has not been applied in NSW so *approach in NSW is unclear on what standard to apply (Aus is to apply objective – Peters)*
  - e. If taking of the property is innocent then it is not larceny (**Weatherstone**)
- (7) **DEFENCE:** The property is taken without any claim of right to the property – can be used as a defence that prop taken with claim of right
- a. Defence is successful when D can prove genuinely held belief as to legal and not moral right to the property/money taken (**Fuge; Nundah**)
  - b. **Accused bears evidentiary burden to show that claim of right existed or he honestly believed that it existed (Fuge)**
  - c. Belief does not have to be reasonable but should also not be a mere pretence (should be honest) (**Fuge; Nundah**)
  - d. Existence of such a claim will become a crime if means used involve assault or use of arms (**Love; Fuge; Salvo**)
  - e. Claim of right must extend to entire property or money (**Fuge**)
  - f. In case of offender charged to be an accessory, what is relevant is the existence of a bona fide claim in the principle offender, since there can be no accessorial liability unless there has in fact been a foundational offence (**Gregory, Richards, Fuge**) and the person intentionally aided, abetted the acts.
  - g. **P has to negate the claim of right where it is sufficiently raised on the evidence to the satisfaction of the jury (Astor v Hayes)**
- (8) **DEFENCE: Intoxication**
- a. Larceny a crime of basic intent so cannot take self-induced intoxication into account (s428D(a))
  - b. If not self-induced, then it may be taken into account (s428D(b))

**S118 Intent to Return Property is No Defence:** Where, on the trial of a person for larceny, it appears that the accused appropriated the property in question to the accused's own use, or for the accused's own benefit, or that of another, but intended eventually to restore the same, or in the case of money to return an equivalent amount, such person shall not by reason only thereof be entitled to acquittal.

## ROBBERY

### S94 Robbery or Stealing from person

Whosoever: Robs or assaults with intent to **rob any person or steals any chattel**, money, or valuable security from person of another, shall accept where a greater punishment is provided by this Act, be liable to imprisonment for 14 years

**\*\*Robbery is a strictly indictable offence** while stealing is a Table 2 offence (indictable but dealt summarily). Robbery held to be more serious coz it requires the **additional element of “a threat or force putting the victim in fear”** (*Young*)

**\*\*Stealing is an offence that property taken belongs to someone (whether known or unknown) that has dishonestly taken – not an offence that property not of accused (*Trainer*) – Defined in s187**

**\*\*\* P will put charge of Robbery and Assault with Intent to Rob so that in case elements of larceny are not made out (such as by D not taking the property away or having an honest defence of right to claim) then D can be charged with latter**

**\*\*Jury can return alternate verdict for larceny on charge of robbery where the evidence could realistically support such verdict such as where doubt whether an assault had taken place in relation to stealing (*Mifsud*). Similarly, verdict under s94 may be returned where charge is under s95**

- Robbery and assault with intent to rob are dealt with in indictment
- Stealing chattel, money, valuable security from another (a variant of robbery, different from larceny)
  - Value of property/thing > \$5000 (Table 1 Offence - tried summarily unless an election is made by P or accused to have the offence dealt with on indictment). Max Penalty = 2 yrs
  - Value of property/thing < \$5000 (Table 2 Offence – tried summarily unless an election is made by P to have the offence dealt with on indictment)

**AR:**

***All elements of Larceny + Violence (use or threaten to use) against person and not property***

- Force to be used **either before or at the time of taking** and must be of such nature as to show that it **was intended to overpower the party robbed, and prevent resisting, and not merely to get possession of the property** - when victim is accidentally hurt when person is taking property, then not robbery (*Gnosil*)
- Not sufficient if actual violence or threat of violence is made **after property** is taken (*Foster; Delk*) – here P will put separate charges of assault
- Goods need not be actually in hands of the victim – sufficient is victim is in care or personal possession of the goods so as to indicate to the Court that goods were constructively taken in his presence (*Smith v Desmond*). Sufficient if property is taken from presence of the person (*Delk*)

- Snatching property from victim is not robbery unless a degree of force is needed to remove it (*Mason*)

## MR

- Intention to permanently deprive must be proved (*Salameh*)
- Intention to use violence

## Defence – Claim of Right

- To negate fraud or dishonesty in taking possession, there must be a genuine belief in legal entitlement to the property – subjective belief of accused not of reasonable person (*Langham; Mazzara*)
- **While claim of right may remove liability for larceny or crimes of which larceny is an element, it has no application to other offences, such as assault. If those offences are charged instead of robbery, then D may be convicted. (*Langham, Kerrison v Richards*)**

**Intoxication** – NOT if self-induced as robbery is a crime of basic intent; MAY if '*assault with intent to rob*'.

## AGGRAVATED ROBBERY OFFENCES

### S95 Robbery with Violence

(1) Whoever robs or assaults with intent to rob or steals any chattel/money/valuable security, from another person, in *circumstances of aggravation* shall be liable for imprisonment (20 years).

(2) Circumstances of Aggravation include immediately before/at time/immediately after the robbery/assault/larceny. Involves one or more of – use of corporal violence by offender, intentional or reckless infliction of **actual bodily harm**, deprivation of liberty of any person by offender

\* P proves BRD any circumstance of aggravation

**AR** – elements of robbery + circumstance of aggravation

**MR** – Intention to permanently deprive + use violence

### S96 Robbery with Wounding

Committing offence under s95 and thereby wounding or inflicting grievous bodily harm (prison = 25 years)

AR – same as s95 + wounded or inflicted gbh

MR – Intention to permanently deprive + use violence (not necessary to prove intention to wound (*Munro*))

### S97 Robbery in Company with Another Person

(1) Whoever, being armed with ***an offensive weapon OR instrument OR being in company of another*** robs or assaults with intent to rob any person OR stops any mail, vehicle, railway train, or person conveying mail with intent to rob or search the same is liable for prison.

(2) Person guilty of ***aggravated version of this offence*** under this section if offence is committed armed with dangerous weapon (***Armed Robbery***)

(3) If on trial of (2), jury not satisfied that accused guilty but is satisfied that guilty of (1) then accused guilty of (1)

**AR – Same as robbery + accused either armed with offensive weapon/instrument OR in company of another person**

### **S98 Armed Robbery Associated with Wounding or Infliction of GBH**

Whosoever, being armed with an offensive weapon OR instrument OR in company of another, robs or assaults with intent to rob any person and immediately BEFORE or AT TIME or immediately AFTER such robbery or assault **wounds or inflicts grievous bodily harm** is liable for prison

### **S99 Demanding property (by threats or force) with intent to steal (specific intent)**

#### **AR (Robbery)**

- (1) Taking property
- (2) From victim's immediate control or presence
- (3) By use of violence or by putting victim in fear – violence is before or at time

#### **AR (Assault with Intent to Rob)**

- (1) Accused assaulted the victim; and
- (2) Accused intended to steal property from the victim or another person
- (3) By use of violence or by putting that person in fear

#### **AR (Stealing from the Person)**

- (1) Accused stole chattel, money, or valuable security – stealing means larceny (prove elements of larceny)
- (2) From the person of the victim

**Defences – Claim of Right (*Barker*)** – If negated, accused may still be guilty of assault/wounding/gbh

**Intoxication** – NO for robbery (basic intent) but YES for 'assaults with intent to rob' (specific intent); Yes for s99 intent to steal - So can take self-induced intoxication into account. Evidentiary burden on accused. But no level of intoxication is mentioned. =

**SENTENCING** – Using guideline judgment of ***Henry***

## **AGGRAVATED TRESPASS**

**Aggravating Circumstance – ONLY ABH.** Offender is armed with an offensive weapon/instrument; in company of another; uses corporal violence; intentionally or recklessly inflicts ABH; deprives anyone of their liberty; know that there is someone in the building.

**\*\*For someone in building, evidentiary burden on Df to show that they had reasonable grounds to believe that there was no one in the place (s105(2A))**

**Specially Aggravated Circumstance (s105) – GBH/WOUNDING.** Intentionally wounding or inflicting GBH; inflicting GBH and being reckless as to causing ABH; armed with dangerous weapon

### **S109 Breaking out of dwelling house after committing, or entering with intent to commit, indictable offence**

- (1) Entering the house with intent to commit a serious indictable offence or being in such house commit any serious indictable offence and in either case breaks out of the house -> 14 yrs;
- (2) Aggravated -> 20 yrs; and
- (3) Special aggravated -> 25 yrs

There are two offences her:

**Enter house with intent** – accused entered and intended to commit serious indictable offence and then broke out of house

**Committed Serious Indictable Offence** – Accused was in house of another and committed serious indictable offence and broke out of the house

### **S111 Entering Dwelling House**

Entering dwelling house with intent to commit a serious indictable offence liable for imprisonment (10 years); if offence committed under circumstances of aggravation (14 yrs); if committed under circumstances of special aggravation (20 years)

### **S112 Breaking into house/building and committing a serious indictable offence**

Person who breaks and enters into house/building and commits a serious indictable offence OR being in a house/building commits any serious indictable offence and breaks out of the house/building -> 14 years; if committed under circumstances of aggravation (20 yrs); if committed under circumstances of special aggravation -> 25 years

- If value of property < \$60000 -> Table 1 offence
- Breaking Out – Offence is committed even though the accused was lawfully in the house (**Wheeldon**)

**AR:**

- (1) Broke and entered house, school, shop, etc
- (2) Committed a serious indictable offence

OR

- (1) The accused was in house, school, shop, etc
- (2) Committed serious indictable offence
- (3) Broke out

If on trial jury not satisfied that accused is guilty of offence charged (aggravated offence or special aggravated), but is satisfied that accused is guilty of other offence under s112, then accused liable accordingly.

### **S113 Breaking into any house with intent to commit serious indictable offence**

A person who **breaks and enters** into a house/building with **intent** to commit serious indictable offence -> 10 years; if offence committed under circumstances of aggravation (14 yrs); if committed under circumstances of special aggravation (20 years)

### **S114 Being Armed with Intent to Commit Indictable Offence**

- (1) Person who (a) is armed with any weapon/instrument with intent to commit an indictable offence; (d) enters or remains in or upon any part of the building/land with intent to commit an indictable offence in or upon the building (**Dugan**)
- (a) And (d) – Table 1 offences

### **Definition of Breaking –**

- (1) Illicit methods of entry (breaking a window), and
- (2) Opening a closed door (even by merely turning a handle), and
- (3) Open a closed window by the ordinary method
- (4) Admission by a false pretence (*Boyle*: pretend to be a BBC inspector trying to locate disturbances on the radio)
- (5) **NOT** open further a partly open door or window

### **COMPUTER DATA ACCESS OFFENCES**

#### **Summary Offence:**

**S 308H** Unauthorised access to restricted data –max 2 yrs

\*\* Nature of data accessed or intent for which accessed is irrelevant

\*\* Access is prohibited only if access to the data involves an unauthorised circumvention of an “access control system” (such as password) OR if unauthorised modification is made to restricted data



S 308I Subsidiary summary offence which prohibit the impairment of data in any computer data storage device. (There is no requirement that impairment has any intended result)

***Indictable Offences:***

**S 308C** Unauthorised access, modification or impairment with intent to commit serious indictable offence

**S 308D:** Unauthorised modification of data with intent to cause impairment

**S 308E:** Unauthorised impairment of electronic communication

***Preparatory Offences for the committing/facilitating of offences in ss 308C-308E***

**S 308F** Possession of data with intent to commit serious computer offence

**S 308G** Producing, supplying or obtaining data with intent to commit serious computer offence

**MR**

- (1) The D engaging in activity that is knowingly unauthorised.
- (2) If the D is authorised to make the access, modification or impairment, the motivation for doing so is irrelevant.
- (3) If D is given access only for specific purposes, any access for any other purposes would be unauthorised (***DPP v Gilmour; DPP v Murdoch***)
- (4) It is not a defence to claim that while the D knew the access was technically unauthorised, they believed that in the circumstances their actions were honest; or ordinary people would not have considered the actions to be dishonest

## RECEIVING STOLEN PROPERTY

Starting Point	<b><i>Stealing must first be established for crime of receiving to be established</i></b>
<b>S 187</b>	<b>Term “stealing” in sections 188 and 189</b> Stealing includes the taking, extorting, obtaining, embezzling, or otherwise disposing of the property in question.
<b>S 188</b>	<b>Receiving stolen property where stealing a serious indictable offence</b> (1) Whosoever receives, or disposes of, or attempts to dispose of, any property, the stealing whereof amounts to a serious indictable offence, knowing the same to have been stolen, shall be guilty of a serious indictable offence, and may be indicted, either as an accessory after the fact, or for a substantive offence, and in the latter case whether the principal offender has been previously tried or not, or is amenable to justice or not, and in either case is liable: <ol style="list-style-type: none"> <li>(a) if property is a motor vehicle or a motor vehicle part, or a vessel or a vessel part, to imprisonment = 12 yrs or</li> <li>(b) in the case of any other property, to imprisonment for 10 years.</li> </ol>

	<p>(2) In this section:</p> <p><b>motor vehicle</b> has the same meaning as it has in Division 5A.</p> <p><b>vessel</b> means a vessel within the meaning of the <i>Marine Safety Act 1998</i>.</p> <p>-&gt; <b>Much more of stolen value compared to minor indictable offence</b></p>
<b>S 189</b>	<p><b>Receiving etc where principal guilty of minor indictable offence</b></p> <p>Whosoever <b>receives, or disposes</b> of, or attempts to dispose of, any property, the stealing whereof is a minor indictable offence, knowing the same to have been stolen, shall be guilty of a minor indictable offence, and whether the person guilty of the principal offence has been previously tried or not, or is amenable to justice or not, shall be liable to imprisonment for three years.</p>
<b>S 154E</b>	<p><b>Definition</b> for 'motor vehicle'</p> <p><b>motor vehicle</b> means:</p> <p>(a) a motor vehicle within the meaning of the <i>Road Transport Act 2013</i> (whether or not the vehicle contains the motor intended to form part of it), or</p> <p>(b) a motor intended to form part of, or capable of forming part of, any such motor vehicle, or</p> <p>(c) any part of any such motor vehicle containing, or consisting of, an identification plate for a vehicle under the <i>Motor Vehicle Standards Act 1989</i> of the Commonwealth.</p>
<b>S 154F</b>	<p><b>Stealing motor vehicle or vessel</b> - A person who steals a motor vehicle or vessel is guilty of an offence.</p>
<b>S 190</b>	<p><b>Receiving etc cattle unlawfully killed, or carcass etc</b></p> <p>Whosoever:</p> <p>receives any animal, unlawfully killed, with intent to steal the carcass, or skin, or other part thereof, knowing the same to have been so killed, or</p> <p>receives, or disposes of, or attempts to dispose of, any part of an animal so killed, or of an animal unlawfully stolen, knowing it to have been so killed or so stolen,</p> <p>shall be guilty of a serious indictable offence, and may be indicted and punished as if the animal had been stolen, and the accused had unlawfully received the same.</p>
<b>S 192</b>	<p><b>Receiving material or tools entrusted for manufacture</b> Whosoever receives any goods, article, or material or any tools, or apparatus for manufacturing, or working up, the same, knowing the same to have been purloined, embezzled, or secreted, within the meaning of section 151, or that the person offering the same is fraudulently disposing thereof, shall be liable to imprisonment for four years.</p>
<b>"Receiving"</b>	<p>3 elements:</p> <p>a. Stolen property (<b>AR</b>)</p> <p>i. the property must not have been returned to the possession of the person from whom it was 'stolen' – continue to remain stolen</p>

	<p>ii. police must only take temporary custody of property and not possession (<i>Villensky</i>)</p> <p>b. Receiving that Property (<b>AR + MR</b>)</p> <p>i. this is proved by evidence that D <b>took possession</b> of the property, not merely had custody of the property (<i>Fien; Hobson v Impett</i>)</p> <p>ii. possession may be held jointly with the thief (<i>Gleed</i>)</p> <p>iii. possession may also be held through an employee or accomplice (<i>Miler and Connors</i>)</p> <p>iv. receiving can be the act of disposing (<b>s 188 and 189</b>)</p> <p>v. must be dishonest (<i>Matthews</i>)</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> no receiving had occurred where D admitted knowing the property was stolen but at the time had intended to hand it in to police</li> <li><input type="checkbox"/> A later decision to keep the goods was held not to turn the innocent receipt into a dishonest one (<i>Illingworth; Balogh; applying Johnson</i>)</li> </ul> <p>c. With knowledge that property is stolen (<b>MR</b>)</p> <p>i. Knowledge is satisfied by <b>belief</b> that property is stolen (<i>Raad</i>)</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Belief, short of knowledge, is where state of mind of person is that “I can’t say I know for certain that these goods are stolen , but there can be no other reasonable conclusion in light of all circumstances, in light of all heard and seen” (<i>Hall</i>)</li> <li><input type="checkbox"/> Mere suspicion is not enough (<i>Hall; Raad</i>)</li> </ul> <p>ii. Timing of the knowledge is imp: <b>at the time of the receipt</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> An innocent receipt coupled with a later realisation that the property is stolen is insufficient (<i>Balogh</i>)</li> <li><input type="checkbox"/> However, if the D disposes of the property after his realisation, he is liable for the offence</li> <li><input type="checkbox"/> Left to jury</li> </ul>
<b>Recent Possession Doctrine (Circumstantial Evidence)</b>	<p>Unexplained possession of stolen property by accused =&gt; Jury infers guilty knowledge (<i>Bruce</i>) – Easier to prove</p> <p>If <b>Explained</b> =&gt; Jury asks if the explanation may <b>reasonably be true</b> =&gt; If true then no conviction for possession of recently stolen property (<i>Bellamy</i>) [not imp for Jury to be 100% sure...<b>possibility</b> that it might be true is enough]</p> <p>If <b>No Explanation</b> =&gt; Jury cannot declare guilty knowledge – Right to silence remains (<i>Bruce</i>)</p> <p>If <b>Explained but not Convincing</b> =&gt; Jury convicts based on circumstantial evidence (<i>Gilson</i>)</p> <p><b>“Recent” Possession</b> – must have come in possession by D recently. <b>Period of time determined by jury/magistrate</b> (<i>Bellamy</i>) – depends on nature and value of property, nature of circumstances in which obtained (<i>Sinanovic</i>)</p>
<b>Persons Unknown</b>	<p><b>Stealing must first be established for the offence to be established</b> =&gt; all elements, including that property belonged to someone else and not accused (whether true owner is known to unknown does not matter) (<i>Isaacs; Trainer</i>)</p>

<p><b>S 121</b></p> <p><b>Alternative Charge</b></p>	<p><b>Verdict of “larceny or receiving”</b></p> <p>Where, on the trial of a person charged with larceny, or any offence which includes larceny, and, also, with having unlawfully received the property charged to have been stolen, knowing it to have been stolen, the jury find specially that the person either stole, or unlawfully received, such property, and that they are unable to say which of those offences was committed by the person, such person shall not by reason thereof be entitled to acquittal, but shall be liable to be sentenced for the larceny, or for the unlawful receiving, whichever of the two offences is subject to the lesser punishment.</p> <p><b><i>P must charge D with both offences to rely on s121 – receiving + larceny</i></b></p> <p><b><i>When accused charged in alternative with stealing and receiving goods</i></b></p> <ul style="list-style-type: none"> <li>➤ If Jury is convinced that accused has performed one of the acts – stealing or receiving goods in custody but cannot say BRD which of the two, then accused charged with both (<b><i>Geitz</i></b>) but sentenced for offence carrying lesser punishment (<b><i>Clarke</i></b>)</li> <li>➤ If charged larceny and receiving is charged in the alternative, and the evidence is equally probative of either larceny and receiving, the D must be acquitted of both if acquitted of one (<b><i>Morgan</i></b>)</li> <li>➤ If larceny and receiving are not charged in the alternative, D must be acquitted on the larceny charge if there is any reasonable possibility that they actually received the goods in questions (<b><i>McCarthy and Ryan</i></b>)</li> </ul>
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### GOODS IN CUSTODY

<p><b>S527C Crimes Act</b></p>	<p><b>Aim: For accused not himself responsible for obtaining of the goods and where P cannot prove ‘possession’ or ‘receiving’</b></p> <p>(1) D proves he/she was not negligent; (2) used for money laundering offences</p>
<p><b>S527C(1)</b></p>	<p>Person unlawfully in possession of property reasonably suspected of being stolen – has anything in his custody/custody of another person/in premises whether or not used by him/gives custody of thing to another person not lawfully entitled to be in possession. Before Local Court (6 months prison; if motor vehicle, 1 year)</p>
<p><b>S527C(2)</b></p>	<p>Sufficient defence to a prosecution for an offence under (1) if D satisfies that there were no reasonable grounds for suspecting that thing was stolen or unlawfully obtained – no onus on D to show that thing lawfully obtained but only whether any reasonable grounds for suspicion</p> <p><b><i>Elements (only AR no MR):</i></b></p>

	<p>(a) Custody (b) Location on premise (c) Reasonable suspicion that stolen/unlawfully obtained</p> <p><b>**Objective test for proving the offence</b> – whether there are any reasonable grounds for suspicion based on facts available to the magistrate at time of trial.</p> <p><b>Objective Test for Defence</b> – Whether there were no facts available to Df at time of custody on which reasonable suspicion could be based</p>
<b>“Thing”</b>	Tangible property with regard to which there is reasonable suspicion that it has been unlawfully obtained ( <b>Grant</b> – delivered cash to prison which from drug trafficking)
<b>“Custody”</b>	<ul style="list-style-type: none"> <li>➤ Immediate de facto control or charge of the thing (<b>McPherson</b>);</li> <li>➤ Temporary or permanent (<b>English</b>);</li> <li>➤ Custody not destroyed by temporary seizure by police (<b>Miller</b>)</li> <li>➤ If person a bona fide purchaser w/o notice, then cannot be charged (<b>Gilroy v Jebara</b> – case of person selling stolen tool to handyman)</li> <li>➤ Relevant time is that immediately prior to giving of custody</li> <li>➤ If in premise (527C(1)(c) – <b>knowledge that thing on premise + ability to exercise control over it</b> (<b>Sturdy v Katarzynski</b>)</li> </ul>
<b>“Reasonable Suspicion”</b>	<ul style="list-style-type: none"> <li>• Objective determination by court based on fact – court must be satisfied BRD that circumstances such that the thing may reasonably be suspected of being stolen or unlawfully obtained (<b>English; Anderson v Judges of District Court NSW</b>);</li> <li>• Inferred from circumstances and behaviour of person under suspicion (<b>Anderson</b>)</li> <li>• Not dependent on state of mind of arresting officer (<b>Carter</b>)</li> <li>• D only proves that there were no reasonable grounds for suspecting that goods were stolen or unlawfully obtained (<b>Anderson v Judges of District Court of NSW</b>)</li> <li>• When objectively considered, if one of the suspicions is that the notes were stolen or unlawfully obtained, it does not matter if there are other possible explanations inconsistent with the guilt (<b>Chan</b>); <b>mere fact that there is more than one possible conclusion reasonably open on the facts does not mean that P has failed to make its point</b> (<b>Madden</b>)</li> </ul>

## FRAUD

*Dishonest is defined in s4b of Crimes Act (includes subj + obj test like in Ghosh) but we don't use it for CL offences like larceny but only statute offences like fraud*

### Offence has 3 parts:

1. **Deception:** The action of the accused was intentionally/recklessly deceptive; and
  2. **AR:** The actions caused an obtaining of property, a financial advantage or a financial disadvantage; and
  3. **Dishonesty:** It is dishonest to cause that consequence
- Start with proving deception – intentionally or recklessly caused.
  - Then prove that it has led to one of the 3 consequences – obtaining property, financial adv. or financial disadv.
  - Prove MR for whichever consequence it has caused

### Causation (IMP) – Act of the accused caused the consequence

- P has to prove causal link between deception and the money obtained – deception
- **Deception needs to be the means by which money was obtained OR deception was the cause of obtaining the money (Royal; Ho and Szeto)**
- P does not have to prove that person deceived suffered a loss (*Kovacs; Ho and Szeto*)
- If victim indifferent to false pretence i.e. was not induced by it then no misrepresentation (*Clemesha*)
- **Attempted Fraud** – When activity does not have the intended effect on mind of the person to whom it is addressed coz person realises that a deception is being practiced then offence not committed even if property handed over (*Gulyas*)

192 E

### Fraud

**(1)** A person who, by any **deception, dishonestly:**

- (a) obtains property belonging to another, or
  - (b) obtains any financial advantage or causes any financial disadvantage,
- is guilty of the offence of fraud.

Maximum penalty: Imprisonment for 10 years.

**(2)** A person's obtaining of property belonging to another may be dishonest even if the person is willing to pay for the property.

**(3)** A person may be convicted of the offence of fraud involving all or any part of a general deficiency in money or other property even though the deficiency is made up of any number of particular sums of money or items of other property that were obtained over a period of time.

**(4)** A conviction for the offence of fraud is an alternative verdict to a charge for the offence of larceny, or any offence that includes

	<p>larceny, and a conviction for the offence of larceny, or any offence that includes larceny, is an alternative verdict to a charge for the offence of fraud.</p> <p><b>Elements:</b></p> <p><b>AR: (Consequences of deceptive conduct)</b></p> <p>By deception, dishonestly -</p> <ol style="list-style-type: none"> <li>(1) Obtaining property (S192C) OR</li> <li>(2) Obtaining financial advantage OR</li> <li>(3) Causing financial disadvantage OR</li> </ol> <p><b>MR:</b></p> <ol style="list-style-type: none"> <li>(1) Action must be dishonest</li> <li>(2) Deception (192B) must be <ol style="list-style-type: none"> <li>a. Intentional, or</li> <li>b. Reckless</li> <li>c. And obtained dishonestly</li> </ol> </li> <li>(3) <i><b>Fraud and Larceny are alternative verdicts for either charge</b></i></li> <li>(4) <i><b>Even if the person is willing to pay for the property, it is still fraud</b></i></li> </ol>
<b>192B</b>	<p><b>Deception</b></p> <ol style="list-style-type: none"> <li>(1) <b>AR Elements: Deception</b> means any deception, by words or other conduct, as to fact or as to law, including: <ol style="list-style-type: none"> <li>(a) a deception as to the intentions of the person using deception or any other person, or</li> <li>(b) conduct by a person that causes a computer, a machine or any electronic device to make a response that the person is not authorised to cause it to make.</li> </ol> </li> <li>(2) <b>MR Elements:</b> A person does not commit an offence under this Part by a deception unless the deception was intentional or reckless.</li> </ol> <p><b>AR (S192B(1)): False Statements</b></p> <ul style="list-style-type: none"> <li>• outright lie,</li> <li>• partially true statement,</li> <li>• omission of material facts = deception (<i>M</i>)</li> </ul> <p><b>**NOTE: Difference between false statement and puffery</b> (exaggerated claims/descriptions – not a basis for fraud)</p> <ul style="list-style-type: none"> <li>• Conduct <i><b>without word</b></i> could amount to a form of false pretence or deception (<i><b>Barnard</b></i>)</li> <li>• Deception can be artificially defined to cover obtaining an unauthorised response from a computer or an ATM (<b>s192B(1)(b)</b>)</li> </ul>

	<ul style="list-style-type: none"> <li>• <b>No Continuing Representation:</b> No obligation on person making a statement that is true at that time or not recklessly false to warn the other person about change in circumstances that can lead to change in truthiness of the statement (<i>Nelson</i>)</li> <li>• <b>Excessively High Quotation:</b> Might amount to false representation in some circumstances (<i>Silverman</i>)</li> </ul> <p><b>MR (S192B(2)): Intention/Recklessness</b></p> <ul style="list-style-type: none"> <li>• Knowledge of falsity of statement + Intention to defraud (<i>Greene</i>)</li> <li>• Intention or recklessness where the D is reckless as to the truthfulness of the statements <ul style="list-style-type: none"> <li>○ foresees possibility that statement is not true or partially true but still makes it or</li> <li>○ foresees possibility that behaviour is deceptive but still goes ahead with it (<i>Blackwell; Strokes and Difford</i>)</li> </ul> </li> <li>• D need not know that behaviour/actions constitute deception. Recklessness about truthfulness of statement is sufficient</li> <li>• P proves BRD that could foresee possibility of truthfulness of statement or intentionally conducted fraud.</li> </ul>
<p><b>192C</b> <b>(Conseq. 1)</b></p>	<p><b>Obtaining Property Belonging to Another</b></p> <p>(1) For the purposes of this Part, a person <b><i>obtains property</i></b> if:</p> <p>(a) the person obtains ownership, possession or control of the property for himself or for another person, or</p> <p>(b) the person enables ownership, possession or control of the property to be retained by himself or by another person, or</p> <p>(c) the person induces a third person to do something that results in the person or another person obtaining or retaining ownership, possession or control of the property.</p> <p>(2) A person does not commit an offence under this Part by obtaining or intending to obtain property belonging to another unless the person <b><i>intends to permanently deprive</i></b> the other of the property.</p> <p>(3) For the purposes of this Part, <b><i>property belongs</i></b> to a person if:</p> <p>(a) the person has possession or control of the property, or</p> <p>(b) the person has a proprietary right or interest in the property (not being an equitable interest arising only from an agreement to transfer or grant an interest or from a constructive trust).</p> <p>If property is subject to a trust, the persons to whom it belongs include any person having a right to enforce the trust.</p> <p>(4) A person obtaining property belonging to another without meaning the other permanently to lose the thing itself has, nevertheless, the intention of permanently depriving the other of it <b><i>if the person's intention is to treat the thing as his or her own to dispose of regardless of the other's rights</i></b>. A borrowing or lending of the property may amount to so treating it if, but only if, <b><i>the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal</i></b>.</p> <p>(5) Without limiting the generality of subsection (4), if:</p> <p>(a) a person has possession or control (lawfully or not) of property belonging to another, and</p>



	<p>(b) the person parts with the property under a condition as to its return that the person may not be able to perform, and</p> <p>(c) the parting is done for the purposes of his or her own and without the other's authority, the parting amounts to treating the property as his or her own to dispose of regardless of the other's rights.</p> <ul style="list-style-type: none"> <li>➤ <b>Property</b> – Tangible + Intangible (<i>Crimes Act, s4</i>)</li> <li>➤ <b>Belonging to Another</b> – Ownership OR Possession OR In Control <ul style="list-style-type: none"> <li>○ <b>In Control</b> – Covers situations where the victim is tricked into <i>temporarily</i> handing over possession or control but he does not intend to hand it over permanently.</li> </ul> </li> <li>➤ <b>Intention to Permanently Deprive (MR)</b> – Same as MR for larceny.</li> </ul>
<b>192D (Conseq. 2)</b>	<p><b>Obtaining financial advantage or causing financial disadvantage</b></p> <p><del>192D</del> (1) In this Part, <b>obtain</b> a financial advantage includes:</p> <ul style="list-style-type: none"> <li>(a) obtain a financial advantage for oneself or for another person, and</li> <li>(b) induce a third person to do something that results in oneself or another person obtaining a financial advantage, and</li> <li>(c) keep a financial advantage that one has, whether the financial advantage is permanent or temporary.</li> </ul> <p>(2) In this Part, <b>cause</b> a financial disadvantage means:</p> <ul style="list-style-type: none"> <li>(a) cause a financial disadvantage to another person, or</li> <li>(b) induce a third person to do something that results in another person suffering a financial disadvantage,</li> </ul> <p>Whether the financial disadvantage is permanent or temporary.</p> <p><b>Financial Advantage (FA)</b></p> <ul style="list-style-type: none"> <li>➤ FA has ordinary meaning – finance includes payment of debt, compensation, ransom, stock of money, borrowing of money, pecuniary resources of state, engaging in financial operations, provide oneself with capital. Advantage means benefit/profit/better position (<i>Murphy</i>); Extends to only benefits which can be valued in terms of money and benefit which can be seen as financial as distinct from benefit from any other kind (<i>Coelho v Durbin</i>)</li> <li>➤ Time may be brief – even short period of time over which accused had control is enough (<i>Murphy</i>)</li> </ul> <p><b>Financial Disadvantage (FD)</b></p> <ul style="list-style-type: none"> <li>➤ Includes where D engaged in spiteful actions designed to cause harm to a victim, irrespective of any gain to the D</li> <li>➤ Caused by debtor to creditor by failure to repay</li> <li>➤ Easier to prove money removed from victim's account rather than used by D for his advantage</li> </ul>

	MR for FA and FD – Implied by He Kaw The. Unclear on whether Df intended to cause permanent FA/FD or temporary.
<b>Dishonestly</b>	<p><b>S4B Crimes Act</b></p> <p>(1) Dishonest means according to standards of ordinary people and known by the Df to be dishonest according to standards of ordinary people</p> <p>(2) Matter of fact =&gt; to be decided by jury looking at all circumstances</p> <p>NOTE: Dishonesty applies to obtaining of property or causing FA/FD. Does not apply to deception.</p> <p><b>**Feely test is used for larceny and Ghosh for all statutory offences</b></p> <ul style="list-style-type: none"> <li>➤ <b>Claim of Right:</b> There should be a <b>dishonest intent</b> in actual obtaining of property or causing a FA/FD – not dishonest intent in deception. If not in former, latter does not matter. Ques is whether there was a belief in legal right to obtain property NOT whether there was a belief in legal right to deceive.</li> <li>➤ Jury determines whether the defendant acted dishonestly and not the judge</li> <li>➤ Jury applies current standard of ordinary decent people, which judge does not define (<b>Feely; Ghosh</b>) <ul style="list-style-type: none"> <li>▪ If not dishonest according to objective test, then no case</li> <li>▪ If dishonest, then move to second step</li> </ul> </li> <li>➤ Second, Jury uses subjective test to see whether the Df realised what he was doing by those standards was dishonest (<b>Ghosh</b>)</li> <li>➤ Taking of thing or money to which no moral obloquy was attached is not stealing =&gt; taking mere change coz have big \$ is not stealing (<b>Feely</b>) <ul style="list-style-type: none"> <li>• Intention to return not enough (<b>Feely</b>)</li> </ul> </li> </ul>

### COMPLICITY – JCE, EJCE, ACCESSORIAL LIABILITY

<b>Complicity</b>	<p>Those with a common purpose to commit a crime together are liable as principles – <b>agreement + participation</b> is required. Presence at the scene not requirement but a way of proving participation (<b>Huynh, Duong, Sem</b>)</p> <p><b>**Threshold for complicity is not very high - person can be convicted even if has done little</b></p>
<b>Principle in First Degree (primary liability)</b>	Person who actually committed the crime + Person present at time of crime by reason of agreement ( <b>Osland</b> )

Principle in Second Degree ( <i>derivative liability</i> )	Person present but not participating physically but only encouraging or whose acts not substantial cause of death ( <i>Osland</i> )
Principle in Third Degree ( <i>derivative liability</i> )	Aided/abetted crime but were not present at scene of crime (Accessorial Liability) ( <i>Osland</i> )  When the actual perpetrator cannot be identified, P can rely on JCE/EJCE/Accessory to hold the accused liable.
STARTING POINT	<b>When onus of crim cannot be put on one person then what accused charged with will depend on role played in the crime (<i>Osland</i>).</b> P will start with charges of JCE/EJCE but rely on accessorial liability as alternative.
Joint Criminal Enterprise (JCE)	<p>Elements that P proves BRD (<i>McEwan, Robb and Dambitis</i>):</p> <ul style="list-style-type: none"> <li>(i) <b>Agreement:</b> Existence of an agreement/understanding to pursue crime + remained in existence at time of offence (<i>Osland</i>)</li> <li>(ii) <b>Participation:</b> By the accused in the agreement in some way (<i>Osland; Huynh, Duong and Sem</i>)</li> <li>(iii) <b>Commission of Offence:</b> Parties performed all necessary acts of offence in necessary circumstances</li> <li>(iv) <b>MR:</b> At time of entering into the agreement, the accused had the requisite MR for offence – Jury must separately assess MR of each accused party to JCE</li> </ul> <p><b>**If all these established,</b> actions of all parties to JCE attributed to all parties =&gt; each person in JCE liable for action of own + others. Holds even if a party is not present for entire time when all acts are committed</p> <p><b>**If P is unable to prove JCE,</b> it can rely on accessorial liability as a back-up.</p> <p><b>Agreement (<i>Tangye</i>)</b></p> <ul style="list-style-type: none"> <li>• <b>inferred from circumstances</b> (see presence of accused, spontaneity of agreement, facts of case)</li> <li>• need not be reached before crime – can be formed <i>spontaneously</i> (<i>Hawi</i> – case of Biekie gang where court said that it was an ongoing fight and a separate agreement was not reached b/w participants) <ul style="list-style-type: none"> <li>○ But if events unfolded too quickly, court might be reluctant to conclude agreement (<i>Wellgreen</i>)</li> </ul> </li> <li>• Can be unspoken understanding or arrangement amounting to agreement (<i>Tangye</i>)</li> <li>• Need not be expressed, reduced to writing or any formality (<i>Kanaan</i>)</li> </ul> <p><b>Participation</b></p> <ul style="list-style-type: none"> <li>• Presence at scene not a requirement but a way of participating (<i>Huynh, Duong and Sem</i>)</li> </ul>

	<ul style="list-style-type: none"> <li>• <b>Accused not present at crime scene:</b> P has to prove existence and scope of agreement + participation. Both <i>cannot</i> be inferred from circumstances in which offence committed coz there is no evidence of what accused said/did during offence (<i>Sever</i>)</li> <li>• <b>Withdrawal from JCE (Tietie)</b> - (a) Accused must have withdrawn completely; (b) timely; (c) make known to others about withdrawal; (d) do what is reasonable (words/actions) to dissuade others from continuing with act. <b>P must negate effective withdrawal.</b></li> </ul> <p><b>Act</b> - Same as of actual perpetrator (<i>Osland; Markby</i>). Equal guilt (<i>Tangye</i>) and includes presence at the scene of the crime (<i>Osland</i>) – AR is imposed on all; MR is difference and is assessed differently for each participant</p> <p><b>State of Mind</b> - Diff from actual perpetrator. Decided by jury looking at MR of each party separately</p> <p><b>NOTES in Exam:</b></p> <ul style="list-style-type: none"> <li>➔ <i>Can the onus of crime be put on one person firmly? Is there two or more person involved?</i></li> <li>➔ <i>See whether P can prove existence of Agreement and Participation based on facts</i> – can D argue any point</li> <li>➔ <i>Was the accused present at the scene - if yes then agreement can be inferred but if not then it cannot be.</i> Inference available to be drawn from a person's presence while another person commits an offence will vary according to the facts of the case (<i>Chishimba, Makasa and Mulenga</i>)</li> <li>➔ <i>If JCE then act of actual perpetrator can be attributed to accused + any other acts by actual perpetrator</i></li> <li>➔ <i>P then satisfies the MR for the offence separately for each participant</i></li> <li>➔ <i>Check for availability of defence or no MR of actual perpetrator:</i> If so, other participants can still be charged if they have the MR. (It is only AR that is shared amongst participants – MR isn't shared!)</li> <li>➔ <i>Degree of Culpability (Sentence) will vary</i> – Will depend on each party's moral responsibility for offence</li> <li>➔ <i>If elements of JCE not satisfied, P can rely on accessory liability</i></li> </ul>
<b>Extended Joint Criminal Enterprise (EJCE)</b>	<p>Run this argument only where there is an additional offence besides what was agreed upon - <b>P can simultaneously run arguments based on JCE and EJCE</b> (<i>Jacobs and Mehajer</i> – case where JCE was to commit robbery but a knife was taken to the scene – court could not determine whether crime was robbery or intent to cause GBH) - <b>Left on jury to determine based on evidence</b></p> <p><b>Rule (McAuliffe)</b></p>

	<ul style="list-style-type: none"> <li>• Agreement + Participation (same as JCE) AND</li> <li>• Foresight of <b>possibility</b> that further offence may be committed (individual contemplation of <b>possibility</b> that a further offence may be committed in addition to the agreed act is sufficient to establish intention)</li> </ul> <p><b>** EJCE where there is evidence of JCE to commit foundational crime and</b></p> <p><b>** P then has to prove elements of this crime also (<i>Taufahema</i>)</b></p> <p><b>Alternative Verdict</b> - Where an additional crime committed by primary offender is murder, P can secure a murder conviction for secondary participant if it can establish foresight in relation to the conduct and fault elements. If not murder, can be charged with MS (<b>Gillard</b>). Similar for other crimes also - one can be charged with intention to cause GBH, second for reckless wounding in company, and third acquitted (<b>AI</b>)</p> <p><b>Means of Harm (<i>Keenan</i>)</b> - Intended harm is the key consideration; not method by which harm is caused. Use of alternative means to cause harm than what was contemplated will not prevent crim liability.</p>
<p><b>Accessory Liability (principles in second degree)</b></p>	<p><b>Franklin</b></p> <ul style="list-style-type: none"> <li>• Step 1 - Like above, prove whether accused has acted in concert with others to an offence.</li> <li>• Step 2 – Each participant shares AR but MR is different</li> <li>• Step 3 - Whether the accused can only be held responsible as an accessory to another party's acts (counselling or procuring OR aiding/abetting)</li> </ul> <p><b>**Accessory can be charged with a higher offence even if principal is not charged with it due to availability of some defence or lower MR (<i>Likiardopoulous</i>)</b></p> <p><b>Elements:</b></p> <p>Prosecution must prove BRD that the secondary participant:</p> <ol style="list-style-type: none"> <li>(1) Intention to assist in offence (MR); AND</li> <li>(2) Had knowledge of the essential matters that make up the offence (including AR and MR) (MR); AND</li> <li>(3) Engaged in conduct that amounted to 'aiding, abetting, counselling or procuring' the commission of the offence (AR)</li> </ol> <p><b>MR: Intention and Knowledge (<i>Giorgianni</i>)</b></p>

- P must prove **knowledge and intention** - person cannot aid/abet/counsel/procure commission of an offence w/o intent based on knowledge of facts which constitute the offence
  - **Actual knowledge and not presumed/implied knowledge** - nature of essential matters - **Physical act AND the requisite state of mind of principal offender (*Stokes and Difford*)**
  - Knowledge not necessarily of exact crime committed - BUT some crime must be in contemplation of the accused at time of participation (*Lomas*)
  - E.g. Man who has counselled and procured an illegal and dangerous act from which death, though not intended, results (involuntary MS) then man should be guilty of being accessory before fact to MS. (*Creamer*)
  - Intention of accessory is to assist the principal; **there is no intention towards the victim** (this is a good differentiating point from JCE)
  - Recklessness not sufficient intent
  - Intent is absent of the person alleged to be accessory if he does not know or believe that what he is assisting or encouraging is something which goes to make up the facts which constitute the commission of the relevant criminal offence - participation must be intentionally aimed at commission of the acts constituting offence
  - Knowledge or belief extending to probability or possibility that acts in which assisting or encouraging are such as to constitute factual ingredients of a crime insufficient
  - **Negligence does not amount to abetting/aiding** - Mere failure to make an inquiry which would yield knowledge of essential facts is not in itself sufficient
- P does not have to prove:*
- D intended to assist the crime in precisely the way it was carried out by the principal. Lack of knowledge of exact details such as date and place is ok (*Bainbridge*). P proves knowledge of kind of crime committed (*Ancuta*)
  - D wanted the crime to be committed (*National Coal Board v Gamble*)
- AR:**
- *Aiding/Abetting* - Assistance or encouragement to main offender at scene of crime
    - Intentional **active steps** by words or conduct with intent to instigate principal (*Coney*)
    - **Accused linked in purpose** with principal and by words/conduct doing sth; encouragement or assistance (*Phan*)
    - Some meeting of the minds between parties to offence but this is not same for procuring (*Phan*)
    - Causal connection between the alleged procuring conduct and the commissioning of the offence required

	<p><b>(Phan)</b></p> <ul style="list-style-type: none"> <li>○ Includes contribution such as expressions, gestures, actions intended to signify approval <b>(Coney; Lam)</b></li> <li>○ Only mere spectator not criminal, even for murder <b>(Coney)</b>; non-interference to prevent crime not criminal <b>(Coney)</b></li> <li>○ <b>Presence without anything more would not suffice</b> - something more required <b>(Lam; Al Qassim)</b></li> <li>○ VOLUNTARY and PURPOSELY present witnessing and BEHAVIOUR such as offering no opposition to it when he might reasonably be expected to prevent and had power to do so or express dissent =&gt; aiding and abetting <b>(Coney; Lam)</b></li> <li>○ Silence in some cases = giving consent <b>(Russell)</b></li> <li>○ Direct participation in fighting or merely being present for the purpose of assisting or encouraging members of your side = participating in conduct <b>(Annakin)</b></li> <li>○ <b>Determined by Jury based on evidence</b></li> <li>● <b>Counselling/Procuring</b> - Participation in preparation or planning stages but not in execution of crime</li> </ul> <p><i>P Does not have to prove:</i></p> <ul style="list-style-type: none"> <li>● Principal derived assistance or encouragement from accessory's conduct <b>(Lam)</b>; or</li> <li>● That principal was aware of the encouraging words or acts <b>(Lam)</b></li> <li>● In case of numerous participants and multiple offences (brawls), the specific act of assistance by each accused in relation to every crime <b>(Annakin)</b></li> </ul> <p><b>SUMMARY</b> - P proves BRD (i) someone committed the offence; (ii) accused knew or believed in essential circumstances needed to establish the offence; (iii) accused intentionally assisted or encouraged the principal to commit the offence either by helping or encouraging or conveying support</p> <p><b>Withdrawal</b> - Same as JCE. Depends on circumstances whether accused has completely withdrawn - the more the accused has done by way of planning or providing assistance, the more needs to be done to show withdrawal <b>(Sully; Truong)</b></p>
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## CONSPIRACY

STARTING POINT	Offence is completed when an agreement comes into existence - irrespective of whether the offence takes place
AR+MR	No clear distinction between agreement and intention of agreement
Existence of Agreement (AR)	<p>P has to prove:</p> <ul style="list-style-type: none"> <li>• existence</li> <li>• <b><i>intent to agree</i></b> with one another to perform an unlawful act (<b>Agreement is always intentional not reckless</b>)</li> <li>• <b><i>intent to perform each physical element of the offence (LK and RK; Ansari)</i></b> =&gt; even if the offence requires recklessness or negligence, P still has to prove intention in case of conspiracy</li> <li>• <b>Admissible Evidence to show agreement</b> - acts, conversations, documents, testimony of witnesses</li> </ul> <p><b>NOTE:</b></p> <ul style="list-style-type: none"> <li>➤ Intention to enter into an agreement in the future is insufficient - <b>Prove of intention to enter into the agreement, not just that they were considering the plan (O'Brien</b>- clicking pics of prison. Court said no C)</li> <li>➤ Only talking about the possibility of committing some wrongful act not enough - Must reach the stage when they have agreed to commit that act if it lies in their power (<b>O'Brien</b>)</li> <li>➤ Knowledge of plan insufficient - Not enough that they only knew about the plan but intended to join the plan as a party to the offence</li> <li>➤ Precise info unnecessary - need to be an agreement to perform (<b>Douglas</b>)</li> <li>➤ What was <b>agreed</b> to be done is imp and not what was actually done (<b>Bolton</b>)</li> <li>➤ C is a continuous crime, extending over a period of agreement - remains on foot regardless of who joins or leaves the agreement, as long as there are min 2 people who are acting in agreement with the same crim objective at a time (<b>Master</b>)</li> <li>➤ No overt acts are required for the crime of conspiracy to have been committed (<b>Rogerson</b>); evidence of such acts is admissible for to demonstrate agreement between conspirators (<b>Bijkerk</b>)</li> <li>➤ <b>Admissible Evidence - acts, conversations, documents, testimony of witnesses</b></li> </ul>
Scope of Agreement	<p>P has to prove:</p> <ul style="list-style-type: none"> <li>• Subject-matter and purpose of the agreement was criminally unlawful (<b>Gerakiteys</b>)</li> <li>• <b>For as single C to be made out, an agreement b/w all parties with common objectives and purposes needs to be established (Al Shek)</b></li> </ul>



	<ul style="list-style-type: none"> <li>• If one participant knows that others are involved and activity in which person is dealing extends beyond his own dealing with person at the centre of the conspiracy, then there is single conspiracy even if the participant does not have details of other participants (<i>Griffiths</i>)</li> <li>• <b>Single conspiracy when enough similarities or links between the alleged separate conspiracies to sustain an indictment</b> (<i>Saffron; Lee</i>)</li> <li>• A in C with B and A in C with C does not mean ABC are conspiring (<i>Ah Shek</i>)</li> <li>• <b>There should be a common purpose between participants which involved the activities of the entire network w/o necessarily agreeing to do anything to further each others' activities</b> (<i>Ah Shek</i>)</li> </ul> <p>NOTE:</p> <ul style="list-style-type: none"> <li>➤ Person may be convicted of conspiracy with "persons unknown" to commit an unlawful act (<i>Howes; Harrison</i>)</li> <li>➤ May exist between persons who have neither seen nor correspond to each other (<i>Meyrick; Griffiths</i>)</li> </ul>
Convictions of Indiv for Conspiracy	<ul style="list-style-type: none"> <li>• Person may be convicted of conspiracy with "persons unknown" to commit an unlawful act (<i>Howes; Harrison</i>)</li> <li>• Indiv may be convicted of C where the "co-conspirator" with whom entered into agreement is an undercover law enforcement officer (<i>Yip Chiu-Cheng</i>)</li> <li>• Where 2 or more charged with C, possible to convict only one (<i>Darby</i>)</li> </ul>

## SENTENCING

*Crimes (Sentencing Procedure) Act 1999*

<b>Deterrence is a structural presumption of the criminal justice system (NSWCCA in <i>Miria; Wong</i>)</b>	
<b>Intuitive Synthesis</b> - Followed by courts in Aus for sentencing. Preferred over two-stage model. Decided in <i>Wong</i> that that 2 stage departs from the principle as it does not take into account the conflicting and contributory elements which bear upon sentencing. Confirmed by HCA in <i>Muldock</i>	
<b>Sentencing:</b> Court to impose sentence commensurate with seriousness of crime - otherwise fails in its duty to see that sentences are such as to operate as a powerful factor to prevent commission of offences ( <i>Radich</i> )	
s3A	<p><b>Purposes of sentencing</b></p> <p>The purposes for which a court may impose a sentence on an offender are as follows:</p> <ul style="list-style-type: none"> <li>(a) to ensure that the offender (<i>specific deterrence</i>) is adequately punished for the offence (<i>general deterrence</i>),</li> <li>(b) to prevent crime by deterring the offender and other persons from committing similar offences,</li> <li>(c) to protect the community from the offender,</li> <li>(d) to promote the rehabilitation of the offender,</li> </ul>

	<p>(e) to make the offender accountable for his or her actions,</p> <p>(f) to denounce the conduct of the offender</p> <p>(g) to recognise the harm done to the victim of the crime and the community</p> <p><b>The purposes overlap and none of the above can be considered in isolation (Veen Mason J).</b></p>
S 5(1)	Imprisonment to be last resort – Court must not sentence an offender to imprisonment unless it is satisfied having considered all possible alternatives, that no penalty other than imprisonment is appropriate.
S10	<p>Court that finds a charge proven against a person can, w/o proceeding to conviction, order the charge be dismissed, make an order discharging the person on condition that they enter into a good behaviour bond for a term not exceeding 2 years or participate in an intervention program.</p> <p>Factors relevant in making an order of release or good behaviour bond are persons' character, antecedents, age, health, mental condition, trivial nature of offence</p>
S21 + Common Law	Aggravating and mitigating factors (given below)
<b>De Simoni Principle</b>	principle provides that the court 'in imposing sentence is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence. Also in statute s21A(4)
Punishment	<b>Proportionality (ALRC/HCA)</b> - All penalties must be proportional to severity of the offence - proportionality a fundamental sentencing principle of sentencing at CL. Brown said there must be truth in sentencing and imprisonment should be a measure of last resort Parsimony, totality, consistency and parity (like offences to be treated like), individualised justice
<b>Aboriginality (Fernando)</b>	<p><b>Spigelman CJ:</b> An offender is not entitled to special leniency due to aboriginality. But particular mitigating factor may feature more frequently in some groups than in others.</p> <p>(1) Same sentencing principles to be considered in every case and aboriginality of offender to be considered not to mitigate punishment but only to explain circumstances of the offender.</p> <p>(2) Drunkenness not an excuse or mitigating factor but only considered where abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the person has grown up.</p> <p>(3) Court in sentencing aborig must objectively determine the seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender</p>
<b>Background of Offender (Bugmy)</b>	Confirming Fernando - <b>In imposing sentences, court must take into account all material facts that exist coz of ethnicity to explain the factors behind commission of offence - alcohol abuse to be taken into account if it is a reflection of the environment in which offender was raised.</b> Applicable for both Aborig and Non-Aborig offenders. But with passage of time, the extent to which social

**S 21A**

**Aggravating, Mitigating and Other Factors in Sentencing**

(1) General In determining the appropriate sentence for an offence, the court is to take into account the following matters:

- (a) the aggravating factors referred to in subsection (2) that are relevant and known to the court,
- (b) the mitigating factors referred to in subsection (3) that are relevant and known to the court,
- (c) **any other objective or subjective factor that affects the relative seriousness of the offence.**

The matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.

(2) **Aggravating factors** The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

- (a) ***the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions*** and the offence arose because of the victim's occupation or voluntary work,
- (b) the offence involved the ***actual or threatened use of violence***,
- (c) the offence involved the ***actual or threatened use of a weapon***,
- (ca) the offence involved the ***actual or threatened use of explosives or a chemical or biological agent***,
- (cb) the offence involved the offender causing the victim ***to take, inhale or be affected by a narcotic drug, alcohol*** or any other intoxicating substance,
- (d) the ***offender has a record of previous convictions*** (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences),
- (e) the offence was ***committed in company***,
- (ea) the offence was committed in the ***presence of a child*** under 18 years of age,
- (eb) the offence was committed ***in the home of the victim*** or any other person,
- (f) the offence involved gratuitous cruelty,
- (g) the ***injury, emotional harm, loss or damage caused by the offence was substantial***,
- (h) the offence was ***motivated by hatred for or prejudice*** against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability),
- (i) the offence was committed ***without regard for public safety***,
- (ia) the actions of the offender were ***a risk to national security*** (within the meaning of the *National Security Information (Criminal and Civil*

*Proceedings) Act 2004 of the Commonwealth),*

(ib) the offence involved a ***grave risk of death to another person or persons***,

(j) the offence was ***committed while the offender was on conditional liberty*** in relation to an offence or alleged offence,

(k) the offender ***abused a position of trust or authority*** in relation to the victim,

(l) the victim ***was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation*** (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant),

(m) the offence involved ***multiple victims*** or a series of criminal acts,

(n) the offence was part of a ***planned or organised criminal activity***,

(o) the offence was ***committed for financial gain***,

(p) without limiting paragraph (ea), the offence was a ***prescribed traffic offence*** and was committed while a child under 16 years of age was a passenger in the offender's vehicle.

**The court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence.**

(3) **Mitigating factors** The mitigating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

(a) the injury, emotional harm, loss or damage caused by the ***offence was not substantial***,

(b) the offence was ***not part of a planned or organised criminal activity***,

(c) the offender was ***provoked by the victim***,

(d) the offender was ***acting under duress***,

(e) the offender ***does not have any record*** (or any significant record) of previous convictions,

(f) the offender was a ***person of good character***,

(g) the offender is ***unlikely to re-offend***,

(h) the offender has ***good prospects of rehabilitation***, whether by reason of the offender's age or otherwise,

(i) ***the remorse shown*** by the offender for the offence, but only if:

(i) the offender has provided ***evidence that he or she has accepted responsibility*** for his or her actions, and

(ii) the offender has ***acknowledged any injury, loss or damage caused*** by his or her actions or made reparation for such injury, loss or damage (or both),

(j) the offender was ***not fully aware of the consequences*** of his or her actions because of the offender's age or any disability,

(k) a ***plea of guilty by the offender*** (as provided by section 22),

(l) the ***degree of pre-trial disclosure by the defence*** (as provided by section 22A),

(m) ***assistance by the offender*** to law enforcement authorities (as provided by section 23).

	<p>(4) The court is not to have regard to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so.</p> <p>(5) The fact that any such aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence (e.g good character NOT used if it was factor of assistance to offender in commission of for say child sexual offence)</p> <p>(5AA) Self-induced intoxic not to be taken into account as a mitigating factor</p>
<b>S 22A</b>	<p>(1) For sentencing an offender who has pleaded guilty, court must take into account the guilty plea + when the offender pleaded guilty/indicated an intention to plead guilty + circumstances in which he did that = impose a lesser sentence</p> <p>(1A) A lesser penalty imposed under this section must not be unreasonably disproportionate to the nature and circumstances of the offence.</p> <p>(2) If court not posing lesser sentence, then must give reasons</p> <p>(4) Failure of court to comply with this section does not invalidate the sentence (<i>Georgopolous</i>)</p>
<b>S23</b>	<p>(1) A court may impose a lesser penalty than it would otherwise impose on an offender, having regard to the degree to which the offender has <b>assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence concerned or any other offence.</b></p> <p>(2) In deciding whether to impose a lesser penalty for an offence and the nature and extent of the penalty it imposes, the court must consider the following matters:</p> <p>(b) the <b>significance and usefulness of the offender's assistance</b> to the authority or authorities concerned, taking into consideration any evaluation by the authority or authorities of the assistance rendered or undertaken to be rendered,</p> <p>(c) the <b>truthfulness, completeness and reliability of any information</b> or evidence provided by the offender,</p> <p>(d) the <b>nature and extent of the offender's assistance or promised assistance,</b></p> <p>(e) the <b>timeliness of the assistance or undertaking to assist,</b></p> <p>(f) <b>any benefits that the offender has gained or may gain</b> by reason of the assistance or undertaking to assist,</p> <p>(g) <b>whether the offender will suffer harsher custodial conditions as a consequence of the assistance or undertaking to assist,</b></p> <p>(h) <b>any injury suffered by the offender or the offender's family,</b> or any danger or risk of injury to the offender or the offender's family, resulting from the assistance or undertaking to assist,</p> <p>(i) whether the assistance or promised assistance concerns the offence for which the offender is being sentenced or an unrelated offence,</p> <p>(3) A lesser penalty that is imposed under this section in relation to an offence <b>must not be unreasonably disproportionate to the nature and circumstances of the offence.</b></p> <p>(4) A court that imposes a lesser penalty under this section on an offender because the offender has assisted, or undertaken to assist, law enforcement authorities must:</p>

	<p>(a) indicate to the offender, and make a record of the fact, that the lesser penalty is being imposed for either or both of those reasons, and</p> <p>(b) state the penalty that it would otherwise have imposed, and</p> <p>(c) where the lesser penalty is being imposed for both reasons-state the amount by which the penalty has been reduced for each reason.</p> <p>(5) Subsection (4) does not limit any requirement that a court has, apart from that subsection, to record the reasons for its decisions.</p> <p>(6) <b>The failure of a court to comply with the requirements of subsection (4) with respect to any sentence does not invalidate the sentence.</b></p>
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### Standard Non-Parole Period

<b>S 44</b>	<p>Sentencing Procedure for Setting Non-Parole period</p> <p>Sentencing court must:</p> <p>(a) Set the non-parole period or min term first</p> <p>(b) set the balance of the term of the sentence, which should be an additional one-third of the non-parole period</p> <p>(c) conclude with a ratio of three-quarters between non-parole period and full term</p> <p>3/4th formula can be circumvented by special circumstances provision.</p>
<b>S 54A</b>	<p>(1) For the purposes of this Division, the standard non-parole period for an offence is the non-parole period set out opposite the offence in the Table to this Division.</p> <p>(2) For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the Table to this Division that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness.</p>
<b>S 54B</b>	<p><b>Consideration of Standard Non-Parole Period in Sentencing</b></p> <p>(1) This section applies when a court imposes a sentence of imprisonment for an offence, or an aggregate sentence of imprisonment with respect to one or more offences, set out in the Table to this Division.</p> <p>(2) The standard non-parole period for an offence is a matter to be taken into account by a court in determining the appropriate sentence for an offender, without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender.</p> <p>(3) The court must make a record of its reasons for setting a non-parole period that is longer or shorter than the standard non-parole period and must identify in the record of its reasons each factor that it took into account.</p> <p>(4) When determining an aggregate sentence of imprisonment for one or more offences, the court is to indicate and make a written record of, for those offences to which a standard non-parole period applies, the non-parole period that it would have set for each such offence to which the aggregate sentence relates had it set a separate sentence of imprisonment for that offence.</p>

	<p>(5) If the court indicates under subsection (4) that it would have set a non-parole period for an offence that is longer or shorter than the standard non-parole period for the offence, the court must make a record of the reasons why it would have done so and must identify in the record of its reasons each factor that it took into account.</p> <p>(6) A requirement under this section for a court to make a record of reasons for setting a non-parole period that is longer or shorter than a standard non-parole period does not require the court to identify the extent to which the seriousness of the offence for which the non-parole period is set differs from that of an offence to which the standard non-parole period is referable.</p> <p>(7) The failure of a court to comply with this section does not invalidate the sentence.</p>
<b>NOTE</b>	<p><b>SNPP not a starting point</b></p> <p>➔ Courts do not start with SNPP and then oscillate about it by increasing or decreasing the sentence based on 21A. Correct approach is intuitive synthesis <i>(Muldrock)</i></p> <p>➔ Objective seriousness of offence is assessed w/o reference to matters particular to offender or class of offenders – to be determined wholly on nature of offending <i>(Muldrock)</i></p>