

LAWS 1016 – Criminal Law

Problem Question Outline

The Offences

1. Murder
2. Manslaughter
3. Assault
 - a. Common Assault
 - b. Assault Occasioning Actual Bodily Harm
 - c. Wounding Offences
 - d. Grievous Bodily Harm Offences
 - e. Domestic Violence Offences
 - f. Consent as a Defence to Assault
4. Larceny

Defences

1. Extreme Provocation (commutes murder to manslaughter only)
2. Self-Defence
3. Necessity
4. Duress
5. Mental Impairment Defences
 - a. Mental Illness
 - b. SIAM (commutes murder to manslaughter only)
 - c. Unfitness to Plead
6. Involuntariness
 - a. Reflex Actions
 - b. Automatism
7. Intoxication

Assault

Common Assault – covers battery and apprehension of physical contact (*Collins v Willcock*) – **s 61**

1. **Statutory Base** - whosoever assaults any person, although not occasioning actual bodily harm, will be liable for imprisonment for 2 years - **s 61, Crimes Act 1900**
2. **CONDUCT ELEMENT: the Immediacy Requirement** - assault is the application of force or an act causing the victim to apprehend the immediate infliction of force, without consent - **Fagan v Metropolitan Commissioner of Police; Barton v Armstrong**
 - a. **Immediacy of the Threat/Apprehension** - what constitutes an apprehension of *immediate* violence is ultimately a matter of the context of the threat or other act causing the apprehension - **Knight; Zanker v Vartzokas**
 - i. **Stretch of Immediacy** - apprehension of force does not have to be instantaneous - all about the context in which the threat is made - **Zanker v Vartzokas**
 - ii. **Threatening Words** - if words alone constitute the threat of the assault, then its about the temporal sequence of the threat implied - **Knight**
 - iii. **Conditional Threat** - conditional threat will only amount to assault if the condition precedent to assault set by the accused has occurred - **Rozsa v Samuels**
 - iv. **Phone Calls** - while a threat made over the phone will generally not constitute assault, there is no positive law ruling out a finding of assault - **Knight; Barton v Armstrong**
 - b. **Apprehension of Violence, not actual Fear** – victim does not need to actually fear the threat or act creating the apprehension - **Knight**
3. **CONDUCT ELEMENT: assault must be an act, not omission** - in principle, a mere omission cannot constitute an assault - **Fagan v Commissioner of Metropolitan Police**
4. **MENTAL STATE** – [two mental states available]
 - a. **Intent** - actual subjective intent by the accused to inflict bodily contact, or to create the apprehension of immediate application of force - **McPherson v Brown; Blackwell v R**
 - b. **Advertent Recklessness** - accused must have had subjective reckless forethought by realising that there was **some risk or possibility** of physical contact with the victim or creating the apprehension of immediate physical contact - **Blackwell v R; Coleman v R**
 - c. **Temporal Coincidence Requirement** - the physical/conduct elements of the offence must coincide with the mental element in order for the offence to be found - **Fagan v Commissioner of Metropolitan Police**

Assault Occasioning Actual Bodily Harm – [lower level harm inflicted]

1. **Statutory Base** - the offence has two separate sub-offences within it: - **s 59**
 - a. **ABH Assault** - whosoever assaults any person, and thereby occasions actual bodily harm, shall be liable to imprisonment for 5 years - **s 59(1)**
 - b. **ABH Assault in Company** - ABH in the company of another person or persons. Liable to imprisonment for 7 years - **s 59(2)**
2. **CONDUCT ELEMENT: "actual bodily harm"**- victim suffers any hurt or injury calculated to interfere with health or comfort due to accused's application of force - **Donovan; Brown**
 - i. **No Permanence Requirement** - hurt/injury does not need to be permanent, but cannot be merely transient or trifling - **Donovan**
 - ii. **Psychiatric Injury** - actual bodily harm can include psychiatric injury, but must amount to a recognised clinical condition - **Chan Fook; Ireland and Barstow; Lardner**
3. **MENTAL STATE: same as common assault** - for actual bodily harm, no foresight of actual bodily harm is necessary, only that assault itself would occur.
 - a. **Intent** - actual subjective intent by the accused to inflict bodily contact - **McPherson v Brown; Blackwell v R**
 - b. **Advertent Recklessness** - accused must have had subjective reckless forethought by realising that there was **some risk or possibility** of physical contact - **Blackwell v R; Coleman v R**
 - c. **Temporal Coincidence Requirement** - the physical/conduct elements of the offence must coincide with the mental element in order for the offence to be found - **Fagan v Commissioner of Metropolitan Police**

Wounding Offences

1. **Statutory Base** - ss 33 and 35 form the basis of various wounding offences:
 - a. **Wounding with Intent** - **s 33**
 - i. **Intent to Wound** - wounding with intent to cause GBH - 25 years - **s 33(1)(a)**
 - ii. **Wounding with Intent to Resist Arrest** – wounding with intent to resist or prevent own or another's arrest - 25 years - **s 33(1)(b)**
 - b. **Reckless Wounding** - **s 35**
 - i. **Reckless Wounding** - a person will be guilty of an offence if they: - **s 35(4)**
 1. **Wounds** - wound any person, AND - **s 35(4)(a)**
 2. **Reckless** - are reckless as to causing actual bodily harm - **s 35(4)(b)**
 - ii. **Reckless Wounding in Company** - in the company of other, a person: - **s 35(3)**
 1. **Wound** - wound any person, AND - **s 35(3)(a)**
 2. **Reckless** - are reckless as to causing actual bodily harm to that or any other person - **s 35(3)(b)**
2. **CONDUCT ELEMENT: "wounding"** - an incision or puncture of the skin caused by application of force by the accused- **Shepherd**
 - i. **Break Skin** – breaking the continuity of the skin - **R v Newman; Shepherd**
 - ii. **Inner Layer (dermis)** - injury must break the inner layer of skin (dermis) - **Shepherd**
 - iii. **No Need for Weapon** - injury need not be inflicted by weapon - **Bullock; Shepherd**
3. **MENTAL STATE**
 - a. **Section 33** – intent to cause GBH
 - b. **Section 35** – advertent recklessness as to possibility of causing actual bodily harm

Self-Defence – full defence – s 418(1), Crimes Act 1900

- a. **Onus of Proof** - where self-defence is raised to evidentiary burden, prosecution bears onus of proving beyond reasonable doubt that accused did not act in self-defence - **s 419**
- . **Power of Defence** - a person is not criminally responsible for an offence if the conduct constituting the offence was carried out in self-defence - **s 418(1)**
- a. **Necessary Factors of Self-Defence** - two parts to whether self-defence is available: - **s 418(2)**
 - i. **Belief of Necessity** - accused must believe conduct is necessary to: - **s 418(2)**
 - a. **Self-Defence** - defend self/another from another person - **s 418(2)(a)**
 - . **Deprivation of Liberty** - prevent unlawful deprivation of liberty - **s 418(2)(b)**
 - a. **Protect Property** - protect property from unlawful taking, destruction, damage or interference - **s 418(2)(c)**
 - b. **Trespass to Land** - prevent criminal trespass to land/premises, or to remove a person committing such a criminal trespass - **s 418(2)(d)**
 - 1. **SUBJECTIVE TEST** - is there a reasonable possibility that accused subjectively believed that their conduct was necessary to defend themselves? - **Katarzynski; Crawford**
 - i. **Genuine Belief** - accused must only hold a genuine belief that their conduct was necessary for one of the listed purposes - **Katarzynski**
 - ii. **Prosecution's Onus of Proof** - prosecution must prove beyond reasonable doubt that the accused did not genuinely believe action was necessary - **Katarzynski**
 - ii. **Reasonable Response** - the conduct must be a reasonable response in the circumstances as perceived by the accused - **s 418(2)**
 - a. **OBJECTIVE TEST** - was the response of the accused reasonable under the circumstances as perceived by the accused? - **Katarzynski; Crawford**
 - i. **Proportionality** - objectively reasonable determined by whether conduct was proportionate in relation to circumstances as perceived by accused - **Katarzynski**
 - ii. **Considerations as to Perception of Circumstances:** - **Katarzynski**
 - i. Surrounding physical circumstances,
 - ii. Age of accused,
 - iii. Gender of accused,
 - iv. State of health of accused

- iii. **Prosecution's Onus of Proof** - prosecution must prove beyond reasonable doubt that the conduct of the accused was not reasonable - *Katarzynski*
 - b. **Circumstances Precluding Self-Defence** – [cannot use these for killing people]
 - i. **Infliction of Death to Protect Property/Trespass** - self-defence not available: - s 420
 - a. **Protect Property** - to protect property - s 420(a)
 - b. **Trespass** - to prevent trespass or remove person committing trespass - s 420(b)
 - c. **Excessive Self-Defence: Partial Defence** - *only applies to murder* - accused acting in self-defence but uses excessive force that constitutes an unreasonable response, is guilty of manslaughter, but not murder so long as the conduct meets the requirements of manslaughter - s 421(2)
 - a. **When Excessive Self-Defence Applies** - excessive self-defence applies if: - s 421(1)
 - i. **Death** - the accused uses force causing death, AND - s 421(1)(a)
 - ii. **Unreasonable Response** - the conduct is not a reasonable response in the circumstances as perceived by the accused, BUT - s 421(1)(b)
 - iii. **Belief in Necessity** - accused must believe conduct is necessary to: - s 421(1)
 - i. **Defence** - defend themselves or another person, OR - s 421(1)(c)
 - ii. **Unlawful Deprivation of Liberty** - prevent/terminate unlawful deprivation of liberty of themselves or another person - s 421(1)(d)
 - d. **Response to Lawful Conduct** - self defence still applies even though: - s 422
 - i. **Response to Lawful Conduct** - the conduct responded to is lawful - s 422(a)
 - ii. **Other not Liable** - person carrying out conduct is not criminally responsible - s 422(b)

Self-Induced Intoxication - self-induced intoxication should be considered in relation to self-defence in the following ways: - *NSW Judicial Commission Bench Book*

- a. **Necessity: YES** - intoxication must be accounted for in determining whether the accused believed that their conduct was necessary - *Bench Book*
- b. **Perception of Circumstances: YES** - intoxication must be accounted for in determining how the accused perceived the circumstances - *Bench Book*
- c. **Reasonableness of Response: NO** - fact that accused was self-intoxicated at the time of the alleged offence is IRRELEVANT to the assessment of whether the response was reasonable - *Katarzynski [2002]; s 428F, Crimes Act 1900; Bench Book*

Nexus between Offence and Threat - there must be a close causal nexus between the threat or conduct of the other person and the actions purportedly in self-defence taken by the accused - *the threat must be imminent, not a generalised apprehension* - *Burgess; Saunders [2005]*

- a. **Directness of Threat** - if the court can find various things standing in the way between the self-defence act and the threat then nexus unlikely to exist - e.g. the various assumptions as to the future made by the protestors in *Burgess; Saunders*.
- b. **Battered Woman Syndrome** - think about how the statement above varies in cases of systemic abuse by the victim on the accused - *Osland*