



# ANU LAW STUDENTS' SOCIETY

## LAWS1206 Criminal Law and Procedure 1<sup>st</sup> Semester 2006

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## Question 1

72/100

The roles of the reasonable and ordinary person in criminal law are to create an objective standard to which offenders are compared. By doing so the law is able to set up a divide between the objective and subjective person, and use a standard role for this. However, the roles of these two hypothetical people differ to the extent that one upholds the power of restraint and caution that each human is purported to possess. Whilst the other opens itself up to human folly, it is a more realistic representation of a person in law.

The role of the reasonable person in criminal law is an important one. It is used as a bench mark for a variety of offences, ranging from the causation issue of murder or manslaughter (Royall) to the reasonable person test in legislation for intoxication (s 428F, Crimes Act 1900 (NSW)). (*are better egs*)

In using such a hypothetical person, criminal law is demonstrating that it expects people to act with caution, and forethought. By setting up such a hypothetical person, lawyers, judges and juries alike have a standard by which to compare an accused's conduct to. In a sense, it works as a device of equality, in that the benchmark of comparison does not change for certain offences that use such a hypothetical person. Each offender is held up against the same expected standard.

This role is vital in the criminal law because irrespective of age, ethnicity, etc the reasonable person is not swayed. They are 'the epitome of prudence' by which people should be compared. Any lowering of this standard would be a lowering of how criminal law and society in general expect people to behave. (*do hybrid tests do this?*) There does need to be a benchmark, and the reasonable person fits this by instilling on the law a state of being by which offenders can be compared to.

(*use subheadings?*)

The ordinary person, on the other hand, is the person you see in the street. This is the hypothetical person with faults, such a person in criminal law is used mainly in defences to certain crimes. However by opening this hypothetical person up to human faults and traits, it becomes less of an equalising standard, as discussed in the 'ordinary person test' debate.

In issues relating to culture and ethnicity, homosexuality and the 'battered woman syndrome' the 'ordinary person' has become a contentious issue. In Masciantonio v The Queen, in his dissent, McHugh J argued that the ordinary person test did not provide equality for people in Australia. The reason being that the ordinary person is based and judged by the standards of middle class, Anglo-Saxon Australians because they are purported as being the ordinary person within Australia. McHugh J argued that more characteristics needed to be added so as to equalise the ordinary person. This argument has merit in the sense that the 'ordinary person' is a socially constructed figure and with any socially constructed idea, it is a representation of the dominant

class. Therefore migrants and ethnic groups are subjected to an 'ordinary person' standard which in fact would be an alien concept to them. (*interesting but it is less of a rigid/prudential/unattainable socially constructed standard than the reasonable person?*)

In the case of homophobia, the 'ordinary person' has been argued to 'judicially inscribed as a violent homophobe' (Adrian Howe) (*more info regarding citation*). Such debate arose when the High Court allowed the accused in Green to use provocation (as in provocative conduct of a homosexual advance) to be used. Brennan CJ alone accepted that a homosexual advance could be considered as provocation. As previously stipulated, the ordinary person is opened up to human folly, but it could be argued that it could go too far by inscribing such a discrimination to homosexuals.

Lastly, the issue of the battered woman syndrome and how it fits in with the ordinary person (Osland). Women's experience of abusive relationships and the then subsequent killings of spouses is a contentious issue. If by using McHugh's J argument from Masciantonio the ordinary person does not open itself up to experiences of minorities. Predominantly the experience of white, male, middle class Australian's is upheld by such a hypothetical person. This can be demonstrated in the comparison that if a man kills a partner when he sees them having an affair may be liable for manslaughter, because of the provocation defence. (*would it be worse with reasonable person rather than ordinary person test?*) However if an abused woman kills her husband she will be liable for murder (Week 9 lecture, defence). This all rides on the use of the 'ordinary person' test and what the law (or indeed judges and jurors) perceive to be ordinary. It has been argued therefore that the ordinary person needs to adapt to contemporary attitudes and circumstances rather than keeping the concept static.

Therefore the role of the hypothetical person in relation to the reasonable person and the ordinary person are similar and yet extremely opposite. The reasonable person is purely objective and attempts to hold up the importance of caution, prudence, and foresight. On the other hand, the ordinary person, while theoretically it is meant to be objective, it opens itself up to human faults. In doing so it lets in social prejudices and maintains the dominant class's perception of what is ordinary.

## **Question 2: 70%**

A) Sharon's (S) liability for murder under s 18(1)(a) of the Crimes Act 1900 (NSW) (CA, NSW).

In order for S to be found liable under s 18(1)(a) the prosecution needs to prove beyond a reasonable doubt (Woolmington) that the accused through an act or omission caused the death of Roger (R) with an intention to kill, intention to cause GBH or with reckless indifference to human life (s 18(1)(a)).

### Physical elements

Did S act or omission cause the death of R?

It can be stipulated that a common sense approach can be used to show that S act killed R (Royall). On the facts of the autopsy the act that killed R was the blow by the ashtray. S administered this blow to R after she had rendered him unconscious (*concurrency?*) from hitting him with her stiletto. Therefore S act of hitting R on the head with the ashtray caused R's death.

#### Intoxication

On the facts S had injected herself with a drug called 'ice.' Under s 428A of the CANSW in the definition section intoxication can be through a drug. However this form of intoxication cannot be taken into account regarding S voluntariness in doing the acts, under s 428G. Therefore S acts are rendered to be voluntary.

#### Fault elements

Prosecution must prove that S had the mental state required for this offence.

Was there an intent to kill?

On the facts, and in the interview (*unless you infer a lot?*), S did not convey any intent to kill R, and there appears to have been no purpose to bring about a particular result by S when attacking R (He Kaw The).

Was there an intention to cause GBH?

Under s 4 of the CANSW GBH is defined as an injury that is permanent or seriously disfiguring. However this is a non-exhaustive definition, and so under the common law GBH is said to be harm of a serious kind (Smith [1967]).

It could be argued on the facts that S, after rendering R unconscious, intended to cause GBH by continuing to hit him with the ashtray even though he posed no threat or resistance. By continuing the act, it could be argued that she has developing the fault element (Fagan) to cause GBH by not stopping.

Was there reckless indifference to human life?

The common law definition of recklessness is the 'subjective foresight that death or GBH would result as a probability' (Crabbe, Royall).

If it can be shown that S did not have the intention to cause GBH, her continuing acts with the ashtray could be shown to demonstrate reckless indifference to causing GBH or death. By continuously hitting R with a 'large glass' ashtray it is foreseeable, from any subjective view, that at least GBH would occur, especially when the blows are administered to the head of an already unconscious person. Therefore such behaviours could be shown to be reckless indifference to GBH or death.

#### Intoxication

Since S intoxication was self induced under s 428 E(a) (*WRONG: s 428 C*) of the CANSW, intoxication cannot be taken into account regarding the fault element of murder.

Therefore it would be fairly likely that S would be found liable for the death of R under s 18(1)(a) of the CANSW.

## B) DEFENCES

### Self defence (SD) (full defence)

Could S use SD as a defence to the charge of murder under s418 of the CANSW?

For S to be able to use SD she had to believe that her conduct was necessary AND that the conduct was a reasonable response in the circumstances as S perceived them (S418(2)).

SD can be used to defend oneself or another person (s418 (2)(a)(b)). It could be argued that since R's friends were bashing her brother and that R had yelled at her to go away, but she did not, that when he began to walk towards her she believed that she was about to be assaulted. However, in view of the facts, it does not appear that SD can fully be explored because S conduct and interview does not give much subjective insight into whether she believed her conduct was necessary or reasonable. (*What about making some inferences? What evidence would you need?*)

On these grounds, provocation would be a more suitable option of defence to explore. (*intoxication? Excessive self defence? S 421?*)

### Provocation

S possible use of provocation under s 23 of the CANSW.

Was there provocative conduct?

As R's friends were beating up S's brother and then he insulted her by calling her 'mole' and 'bitch,' and then making a sexist comment, this could be regarded as provocative conduct. Under s23(2)(a) grossly insulting words can be considered as provocative conduct, therefore R's conduct was provocative. (*and because reminded of Lars' abuse?*)

Did S lose self control as a result of the provocative conduct?

Loss of self control has been stipulated as forms of anger. As S stated in her interview, after R's provocative statement 'I just saw red!' This can be interpreted as being exceptionally angry. Therefore S did lose self control.

Was the provocation capable of causing an ordinary person to lose self control and act in the way in which the accused did? (Masciantonio).

What was the gravity of the provocation?

Under s 23(2)(a) the court can take into account a range of different perspectives of the accused, and how the provocation may have impacted them (Stingel). (*and all s 23(2)(b) elements*)

On the facts S had just left an abusive relationship, whereby her boyfriend had a sexist attitude in where women belonged in society. This was said to have angered S. In addition, S was intoxicated (Moffat), however under s428 E(a) (*wrong legislation*) this cannot be taken into account. Therefore S was highly sensitive to sexist remarks because of this relationship (Green) and so the gravity would have been great, when faced with R's conduct.

Could an ordinary person in the position of S have acted the same way?

Taking age and maturity into account (Stingel), the act of R's watching his friends beat up S's brother, his insulting words, and his movement towards S, it could be argued that an ordinary person could act in the same manner. However, there may be some difficulty in combining S's abusive relationship evidence (battered woman syndrome) with the ordinary person test (Osland). However there is reasonable belief that an ordinary person could have been provoked.

Therefore there is reasonable evidence of provocation, and so it must be left open as a defence to the jury (Parker).