

**LAWS1206**

**Criminal Law and Procedure**

**1st Semester 2010**

**Question 1: Score: 86/100**

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R v Chuck – s 61I

Introduction:

The jurisdiction is NSW, as the alleged offence took part in Queanbeyan. The NSW Crimes Act applies, and all reference are to it unless otherwise stated. The prosecution must prove beyond reasonable doubt (BRD) that Chuck ('C') committed all elements of the offence (Woolmington v DPP). S 61I is sexual assault, and consists of

AR

1) Sexual intercourse

2) without consent

MR

3) actual knowledge of no consent, or

4) Recklessness as to consent

The elements must be concurrent.

1) Was there sexual intercourse?

Sexual intercourse includes the digital penetration of someone else's anus (s 61H(1)(a)(i)). It is clear that both penetrations, on the 3rd and 4th of June, were sexual intercourse.

Was the sex voluntary?

The AR must be done voluntarily. The accused must exercise their will to bring about the action. The penetration on the 3rd of June would probably be considered as accidental. It only lasted a couple of seconds and is a possible consequence of physical manipulation therapy where oils are often used. However, the penetration on the 4tgh of June was a deliberate act of Chuck, and he may be liable for it [double tick]

Did Nate ('N') consent?

A person consents to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse. The issue to be considered is the penetration of the 4th of June, as the 3rd of June penetration won't create liability. A person does not consent if they have no opportunity to consent, because they are unconscious or asleep (s 61HA(4)(b)) [Relevance on these facts?]. While Nate was on his front, and could not see what C was doing, he was still conscious, and muttering into the pillow.

A) Mistaken belief penetration for medicinal purposes?

A person does not consent if they have a mistaken belief the sex is for medical purposes (s 61HA(5)(c)) [tick]. Arguably, N knew it wasn't for medical purposes because C was an occupational therapist who deals with muscles, etc – not penetration [tick]. Also, the arousal and extra money paid suggests N did not believe that penetration was what was expected.

B) Previous sexual history?

In determining whether N consented to the penetration on the 4th of June, evidence of the experience on the 3rd of June is inadmissible (s 293(3) unless the probative value of the evidence is important enough to outweigh victim's distress (s 293(4)). Arguably, the sexual history here is central to consent on the 4th, and therefore the events of the 3rd would be considered. Arguably, N would not have returned to C the next day, for an unscheduled appointment, had he not freely and voluntarily agreed to further penetration. While the lack of physical resistance is not determinative (s 61HA(7)) [tick] N freely and voluntarily returned to C. It is likely a court would find N consented to the penetration. However, if they did not form this view, the other elements would still be considered [double tick; good analysis in this section].

MR: Did C have knowledge of no consent?

A person knows there is no consent if the person has no reasonable grounds for that belief (s 61HA(3)(c)) [tick]. N's arousal, and paying C extra, suggested to C that he had consented. The return on the 4th suggested further that N consented, along with N's arousal [tick]. N's muttering into the pillow did not give C any acknowledge of no consent.

Was C reckless as to consent of N?

C could either have been reckless if he realised the possibility of no consent but continued anyway (Coleman) [tick], or if he had not even considered the question of consent where a risk that here was no consent would have been obvious to the reasonable person (Tolmie). N's muttering into the pillow did not suggest there was no consent to C. N did not even consider there was a risk of no consent, as he said “I haven't done anything wrong to Nate … he came back looking for more”. C wouldn't be found guilty of Coleman recklessness as he didn't consider there to be a possibility of no consent. He wouldn't be liable for inadvertent recklessness either, as C clearly turned his mind to the question of consent. [Double tick].

Conclusion:

C wouldn't be held liable for s 61I sexual assault unless the prosecution can show a lack of consent, and can prove C had the fault element. This is unlikely.

[Excellent!]

R v Chuck, Property Offences

As the events occurred in Dunlop and Kingston, the ACT Criminal Code 2002 applies, to which all references are made. The prosecution must establish BRD that C committed all elements of the offences (s 12). Case law may be referred to to determine the meaning of special or technical terms (Kirby J in Barlow). The elements for s 321 and s 308 are:

AR:

* + 1. Property
    2. Belonging to someone else
    3. Appropriation

MR

* + 1. Intention of permanently depriving
    2. Dishonesty
    3. Recklessness as to property belonging to someone else [tick]

s 321 applies to the theft under $2000 (s 321(1)(b)), but this is an absolute liability provision (s 321(2)), so no fault element applies (s 24(2)(a)).

1) Are the money and earrings property?

Property includes “real and personal property (including money)” (Legislation Act 2001 Dictionary). Clearly, the earrings are personal property and the $300 is money. Uncontentious element. [Double tick]

2) Belonging to someone else?

Money and earrings treated differently. Property belongs to anyone with control or possession (s 301(1)), and to those with proprietary rights. Property belonging to 2 or more people belongs to each of them (s 305(1)).

Money?

* + When C puts the money in his pocked he takes possession and control of it, but Blair's mum still had proprietary rights to it, as it belonged to her, as he had paid for half of the lotto ticket. [at the point of appropriation it belonged to B's mum]

Earrings?

* + 1. At the moment C gives the earrings to S, he has been given them by Blair, and therefore owns them, controls them and possesses them. However, a deeming provision may apply.
    2. Was there a fundamental mistake?

A fundamental mistake must have occurred about either the property, the recipient's identity or the amount of money given (s 305(6)). Blair thought that C was Trevor, and Blair thought that she gave T the earrings. This is a fundamental mistake of identity (s 305(6)(a)). [Tick].

* + 1. Is there a legal obligation to make restoration?

Restoration is a technical term, can use case law (Barlow). AG's Reference held that a legal obligation exists to make restitution where a benefit is conferred because of a 'fundamental or essential fact'. Clearly, C's identity is an essential fact, which generates a legal obligation for C to give back the earrings to Blair. The earrings belong to Blair because of this obligation (s 305(5)(a)). [Double tick]

* + 1. Did C intend to make restoration?

By giving the earrings to Serena, whom he wanted to impress, C demonstrated an intention not to give them back to Blair.

* + 1. The result?

C's failure to make restoration demonstrates

A) intention to permanently deprive B of the earrings (s 305(5)(b)(i))

B) appropriation of the earrings (s 305(5)(b)(ii)). [Double tick].

Both the earrings and money belonged to Blair.

3) Appropriation of the money?

Appropriation is any assumption of the rights of an owner to ownership, possession or control without consent (s 304(1)). OPC is a technical term – case law. The rights of an owner include using the property (Stein). Clearly, by pocketing the money, C took over possession and control.

Consent?

Blair gave C consent to take $1000 of her money. No consent given to take Mum's money. Outside scope of any implied consent given to take Mum's money.

4) Dishonesty?

Dishonest means dishonest according to the standards of ordinary people and known to be such by the defendant (s 300). Dishonesty is a question of fact (s 302). [Tick].

A) Money:

A person is not dishonest when they believe property is theirs (s 38(2)). “That's the money she owed me”. However, the money wasn't C's because he

a) took an absurdly large amount extra as 'interest', and

b) he hadn't worked the hours that the money would have compensated C for.

A jury would find C dishonest. [Double tick].

B) Earrings:

A person may be dishonest even if they are willing to pay (s 303(3)). [Tick]. Just because C is happy to pay for the earrings doesn't mean he is honest.

A jury would find C was dishonest about the money and earrings.

5) Intention to permanently deprive

Earrings

* + Satisfied above

Money:

A person has the intention (s 18(2)) when a person means to permanently deprive. The circumstances in which someone has the ITPD is not limited (s 306(4)). Special term. Unlike Lloyd, C had no intention to give the money back. He put it in his pocked because he thought it was his.

C would be found to have the ITPD.

6) Recklessness as to whether property belongs to someone else?

Recklessness as fault element inferred (s 22) I intention or knowledge satisfies recklessness (s 22(4)) [X s 20 (4)]. C knew that the earrings belonged to someone else, either Blair or Trevor, because Blair said “these are the earrings you commissioned, Trevor”. C knew that the money was Blair's mum's because the envelope had her name on it. Therefore C was reckless. [Double tick].

7) Concurrence:

A) Money:

At the moment C put the money into his wallet the fault and physical elements were all present.

B) Earrings:

At the moment C gave the earrings to S all the fault and physical elements were present.

Concurrence is uncontentious. [Tick].

Conclusion:

Chuck will be liable under s 308 for theft of the earrings, and under s 321 for the theft of the $300. The prosecution will be able to satisfy the jury of his guilt on both charges. [Tick, Well Done!! 86/100].

**Question 2: Score 77/100**

R v Con; Murder, R v Dino and Anthony

Introduction:

The offences took part in NSW, so the NSW Crimes Act applies, to which all references relate. Prosecution must show BRD all elements (Woolmington). Elements are

AR

* + 1. Causing death
    2. human being

MR

* + 1. Intent to kill
    2. Intent to GBH
    3. Reckless indifference
    4. Concurrence [Constructive Murder?]

'Human being' not contentious. Element satisfied.

Rv Con.

1) Causing death

The conduct causing death was a series of acts (Thabo Meli). Tying v up, and gagging him and bashing in an unseen alleyway was C's acts. [Tick; heaving him?]

Causation?

In complex cases, the operating and substantial cause test is used (Royall). The acts need not be the sole cause (Pagett) [Tick]. The operating casue of V's death was leavin ghim exposed to the elements after C was brutally bashed and in the need of medical attention was the substantial cause of death [tick; therefore the omission after bashing? See above re your “series of acts”].

NAI?

Reasonably foreseeable and natural consequence test used (Royall). It would be reasonably foreseeable that a person tied up and gagged may die as a result of exposure, indeed it is a natural consequence. Court is not going to consider the ordinary operations of natural forces as a NAI (Hallett) [tick].

3) Volition

Not an issue.

MR

4) Intent to kill?

Intent is a decision to bring about a result (Brennan, He Kaw Teh) [Tick]. It could be inferred from all the evidence that C wanted to give V a 'going over', using the knife. However, the use of knuckle dusters around the head suggests an intent to cause GBH, but not to kill. [tick].

5) Intent to cause GBH?

GBH is “permanent or serious disfiguring” (s 4 NSWCA) or serious (Smith) injury. [Tick]. As above, likely jury will find C had intent to cause GBH [When he bashed? See causation above]

6) Reckless indifference? [to human life]

Indifference not relevant (Crabbe) [x Royall; ?? to what]. Reckless is actual kknowledge of probability of death but continuing anyway (Royall). Probable is something real and not remote (Boughey). That V was unconscious and bleeding heavily from the head suggests C knew there was a real chance V could die. [Maybe].

7) Concurrence

Not an issue; series of acts should not be artificially broken up (Thabo Meli) [See above though].

Conclusion

Con would be liable under s 18(1)(a) for V's murder [Tick].

R v Anthony and Dino; Murder

Accessorial Liability

s 346: accessory before the fact can be brought to trial at anytime. Accessorial liability punishes those who aid, abet, counsel or procure a crime. Dino and Anthony may be liable for murder [Deal with A and D separately].

1) A crime is committed [AR of AL here?]

As is clear from R v Con, a crime was committed (Osland).

2) Intentional assistance or encouragement

Assistance, encouragement or a contribution suffices (Giorgianni). Dino procured and encouraged the offence by telling the three friends about Vince [This is the AR]. D encouraged them to rob and assault V, and to casue him GBH = assistance or encouragement. Anthony waited in the car as a getaway driver, to assist B and C to get away [therefore is s 346 approp re A? What is more on point?]

Withdrawal

An accessory only withdraws by timely notice,

* unequivocal
* all reasonable steps taken to dissuade principals (Ngawaka) [Other tests?].

D removed his consent to knifing V, but still wanted GBH

A removed knife [a withdrawal and a new plan? Tick] but nothing else. Withdrawal would not be effective.

MR

A) Intention to encourage?

Intention as above. D actively sought to rob V, to get the money. A intended to drive B and C to the pub to split up the money [assist. Intention to a robbery then? Not murder.]

B) Actual knowledge of the essential matters? (Giorgianni).

D and A both knew that th eplan was to assault V and to make V feel some “very serious pain”, perhaps even break his fingers. This is assault causing GBH. This is the essential matters, no need that the result was death – the type of offence is what is relevent (R v Bainbridge) [Tick, maybe] [Presence required re aiding and abetting].

Intoxication of A not relevant as it was “dutch courage” (s 428C(2)(b)) [tick].

A and D may be held accessorially liable for V's murder. [Maybe]

Extended Common Purpose

R v A

Alternative to accessorial liability outlined in Tangye and McAuliffe.

Elements:

1. Agreement to commit crime? As above, to commit GBH [But new plan in car!]
2. Physically present? (Franklin)

A was in car 200m away, in position to give aid or assistance as in McCarthy v Ryan. Constructively present [maybe].

1. What did A and D foresee?

Foresaw GBH and assault. Equates to “really seroius injury” (Kirby, Clayton). [What is test re foresight? State and apply.]

1. Act committed whilst carrying out agreed crime.

Tying up and leaving contemplated as possible incidents of crime (McAuliffe). [What about violence?]

Therefore A and D would be liable under extended common purpose doctrine, as well as Accessorial liability. [Maybe. A very good answer under exam conditions. Be careful re accuracy. Good coverage of issues. 77/100].