LAWS1206

Criminal Law and Procedure

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 Semester 1 2013QUESTION 3B (MARK OBTAINED = 12/15 = 80%)

How to Use this Script:

These sample exam answers are based on problems done in past years. Since these answers were written, the law has changed and the subject may have changed. Additionally, the student may have made some mistakes in their answer, despite their good mark.

Therefore DO NOT use this script by copying or simplifying part of it directly for use in your exam or to supplement your summary. If you do so YOUR MARK WILL PROBABLY END UP BEING WORSE! The LSS is providing this script to give you an idea as to the depth of analysis required in exams and examples of possible structures and hence to provide direction for your own learning.

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**Is Draco liable for murder?**

The relevant act is Draco hitting Vasko on the head with the champagne bottle. This took place in Queanbeyan, NSW, so the *NSW Crimes Act* is the relevant legislation **[√]** (*Crimes Act 1900* (NSW) s 10C). All subsequent legislative reference are to the *Crimes Act 1900* (NSW) unless otherwise stated.

Draco will be liable for murder if the prosecution is able to prove beyond reasonable doubt (*Woolmington*) that a voluntary act by Draco, done with intent to kill or inflict grievous bodily harm (gbh) or reckless indifference to human life caused the death of Vasko (s 19A(1)).

***1 Actus Reus* [√]**

There is no evidence to suggest that Draco's act was not "willed" (*Viro*) **[√]**and thus it was voluntary. Although Draco was intoxicated, this cannot be taken into account in determining voluntariness pursuant to s 428G(1) as his intoxication was self-induced. **[√]**

Did Draco's act cause Vasko's death?

The leading case for causation is *Royall*. **[√]** In this case the court found that causation would be established if the death was a natural consequence of **[√]** the defendant's act (Dawson and Deane JJ), because it was reasonably foreseeable **[√]** (McHugh) or because the defendant's act was an 'operating and substantial cause of death'. Each of these are easily satisfied, **[√]** so causation can be left to the jury (*Campbell*). **[√]**

***2 Mens rea***

Intention to kill **[√]**

In *He Kaw Teh* Brennan J defined intention as "desire to bring about a specific result". On the current facts it would be difficult to prove beyond reasonable doubt that Draco intended to cause Vasko's death as the only thing that could allude to this is his statement 'Out of my way! Out of my life! '**[√]** but a jury is unlikely to be satisfied with the high standard of proof required. **[should mention "beyond reasonable doubt" (BRD)]**

Intention to inflict gbh

The *Crimes Act* s 4 defines gbh as "permanent of serious disfiguring" **[√]** and *DPP v Smith* further defines it as "really serious injury". **[√]** It is likely a jury would find that hitting someone on the temple with a champagne bottle shows intention to cause "really serious injury", **[√]** thus this is likely to be satisfied **[mention BRD]**.

Reckless indifference to human life

It is unlikely to be established **[√]** as the recklessness must be to a probability, not just a possibility (*Crabbe*) of death (*Royall*) **[√]**. Again, because of the high standard of proof this is unlikely to be made out but this doesn’t matter as intention to inflict gbh is likely to be made out. **[√√]**

***3 Intoxication***

Draco could argue that his intoxication rendered him unable to form intent. As murder is a specific intent crime (s 428B), **[√]** self-induced intoxication can be taken into account as long as the defendant did not resolve to do the conduct before becoming intoxicated (s 428D(a)) **[√]** of which there is no evidence on the facts. However, the intoxication only MAY be taken into account, so will not automatically negate intention. **[√]**

In *R v Grant* it was found that the accused was unable to form intent **[√]** because he was unable to recall key events. In the current case Draco was also unable to recall key events, however this could also be due to his loss of self-control (discussed later). Nevertheless, Draco was quite intoxicated (having consumed about 10 standard drinks and an ecstasy pill) so it is likely this could have had an effect on his ability to form intent. **[√√]**

**Conclusion**

Thus far, Draco is liable for murder if a jury does not find that intoxication affected his ability to form intent. However, he may be able to argue the defence of provocation. **[√]**

**Did Draco murder Vasko as a result of provocative conduct? [√]**

Provocation is a partial defence available for murder so if Draco is successful in his argument he will be liable for manslaughter (s 23(1)) and up to 25 years imprisonment (s 24). **[√]** Pursuant to s 23(2), Draco must show that he lost self-control as a result of provocative conduct (s 23(2)(a)), and that an ordinary person in his position would **[should be "could"]** have lost self-control (s 23(2)(b)). **[√]**

***1 Was there provocation?***

This is a subjective test (*Masciantonio*). **[√]** Considering that D was angry about V selling his artwork as his own and believed that V had given his mother's necklace to his new boyfriend it is quite likely the provocative conduct as a could have caused him to lose self-control (like in *Stingel*, where the defendant lost self-control over his ex with a new partner).

***2 Was there a loss of self-control?***

In *Masciantonio* **[√]** the ferocity of the attack, inability to recall events and location (public) were used to determine that the D did lose self-control. **[√]** Considering that Draco also had blackouts, performed the attack in public and just used an available weapon (champagne bottle) it is likely to be found that he did lose self-control. **[√]**

***3 Would* [could] *ordinary person have lost self-control*?**

Only age + maturity can be taken into account (*Stingel*). Ordinary person probably wouldn't **[couldn't]** have.

**Conclusion**

No provocation so liable for murder if intoxication doesn’t negative ability to form intent.

**Marker's comments: Very good answer, a few more headings and less grouping of issues could have made it better.**

**Course convenor's comments: For the causation section did not need to discuss all the tests from *Royall* but could have just gone straight to *Campbell*.**