

CRIMINAL LAW AND PROCEDURE

MARCH 2013

EXAMINER'S COMMENTS

The overall quality of the examination answers was good, reflected in a relatively low failure rate. Most students took heed of the advice given by the lecturers to properly manage time in the exam so that all questions were answered; and to structure the answer so that it was clear what offences were identified; the elements of each offence; discussing the application of each element to the facts; identifying any potential defences; identifying the elements of any defences; and applying the elements of the defences to the facts; and then providing a conclusion as to whether or not there was criminal liability.

In respect of the questions, the major issues requiring discussion were as follows:

QUESTION 1

John

- Sexual assault (particularly issues of consent and intoxication)

Will

- Aggravated assault

In respect of the discussion of sexual assault, a number of students did not address thoroughly all the elements of Section 61 HA of the Crimes Act 1900 (in particular, the issue of intoxication from the perspective of Diana (actus reus) , and from the perspective of John (mens rea). A number of students discussed the issue of intoxication from the perspective of Part 11 A of the *Crimes Act 1900* rather than Section 61 HA (3) (e) of the Act. A number of students did not discuss the relevance of the fact that Diana was “lapsing in and out of consciousness” and her reaction the following day (after finding out John had lied to her about his legal connections) on the issue of consent. A number of students raised the issue of mistaken identity under Section 61 HA (5)(a) of the Act, but did not make it clear that “mistaken identity” only applies to the identity of the person, not their background or personal attributes (*Gallienne* (1963) 81 WN (Pt 1) (NSW) 94; *Papadimitropoulos* (1957) 98 CLR 249).

In respect of aggravated assault, most students addressed assault occasioning actual bodily harm under Section 59 of the Act. This was an acceptable approach, but it was also arguable that Will could have been liable for reckless grievous bodily harm under Section 35 of the Act (*Blackwell* [2011] NSWCCA 93; (2011) 208 A Crim R 392). Some students raised the defence of provocation, despite the fact it only applies to the offence of murder, not aggravated assault.

QUESTION 2

The major issues requiring discussion were:

Debbie

- Aggravated assault and/or attempted murder;
- Automatism or self defence

Dave

- Aggravated robbery or aggravated assault;
- Self defence

In respect of Debbie, most students identified and adequately discussed aggravated assault (although the appropriate provisions were Section 33 or Section 35 of the Act rather than Section 59, because Dave suffered a gunshot wound). The discussion of the relevant defences of Debbie is where most students had difficulty. Of the students who discussed self-defence, many students did not identify the elements of the defence (*Katarzynski* [2005] NSWSC 613), nor the relevance of the fact Dave was driving away from her (rather than at her) when she shot at him. Many students did not discuss the defence of automatism, which potentially arose due to the blow to the head, nor the difficulty in reconciling the defence of self-defence with automatism (where the conduct is involuntary).

In respect of Dave, most students identified and adequately discussed aggravated robbery. Many students failed to discuss self-defence in adequate detail, particularly in respect of the application of its elements to the facts.

QUESTION 3

The major issues requiring discussion were:

Travis

- Murder (in particular, causation)
- Intoxication

Billy

- Complicity (in particular, doctrine of common purpose and withdrawal)
- Intoxication

Most students discussed the issue of murder (in particular, causation) adequately, although a number of students discussed manslaughter by unlawful and dangerous act rather than murder. The issues in which most students had difficulty were intoxication and complicity. In respect of complicity, many students failed to discuss in detail the criminal liability of Billy for murder on the basis of their being a joint criminal enterprise to commit an assault, and the doctrine of common purpose (*McAuliffe* (1995) 183 CLR 108; *Gillard* (2004) 219 CLR 1; *Clayton* (2006) 231 ALR 500).

QUESTION 4

Some students failed to discuss two cases, and only discussed one. A handful of students discussed more than two cases, indicating that they had not properly read the question. Most students structured their answer adequately, by briefly settling out the facts of the case; identifying the ratio decidendi of the case; and identifying any notable dissenting judgments. Many students failed to discuss, giving reasons, as to whether or not the case advanced the law, but simply identified the ratio decidendi of the case.

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CHAMBERS
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