



SCHOOL OF LAW

COURSE NAME: CRIMINAL LAW & PROCEDURE I

COURSE NO: LA205

TIME ALLOWED: 3 HOURS

READING TIME: 10 minutes

NUMBER OF PAGES: 4

NUMBER OF QUESTIONS ON PAPER: Six (6)

NUMBER OF QUESTIONS TO BE ANSWERED: Three (3)

MARK ALLOCATED FOR EACH QUESTION:

PART A: COMPULSORY QUESTION. All students must answer the question in this part (20 MARKS)

PART B: PROBLEM QUESTION. There are 2 questions in this part and students must choose only 1 question (15 MARKS)

PART C: ESSAY QUESTION. There are 3 questions in this part and students must choose only 1 question (15 MARKS)

TOTAL MARKS: 50

MATERIALS PERMITTED IN EXAMINATION ROOM:

The exam is a restricted open book exam. Students may take into the exam the following materials only:

- Recommended textbooks as specified in the course outline

Prohibited materials are as follows:

- Any notes obtained from LA205 web-page or EASOL
- Any books, journals or articles issued by the Library or any photocopies thereof
- Any other books or textbooks not included in the course outline
- Any whole or part of a crimes statute or regulation

SPECIAL INSTRUCTIONS

For Part A, Question 1, and Part B, Question 2, you are provided with an excerpt from an imaginary crimes statute. You **MUST** use this to answer Question 1 and 2 **ONLY**.

LA 205 CRIMINAL LAW & PROCEDURE I

EXAMINATION 2004, SEMESTER 1

PART A: ANSWER ALL QUESTIONS IN THIS PART

Question 1. Answer ALL parts of this question.

Jessie and his girlfriend Masi split up recently and Masi want to live with Jessie's best friend, Jona. Jona is a very handsome man with particularly attractive facial features. Jessie is furious because Jona has enticed several of Jessie's girlfriends away from Jessie over the years. Jessie and his brother Jack, decide to pay Jona back for stealing all Jessie's girlfriends and they also want to make sure no woman ever looks at him again. They intend to achieve this result by throwing acid on Jona's face. They agree that they will drive to Jona's house and Jack will wait in the car while Jessie runs up to the door. When Jona opens the door, Jessie will throw the acid in his face and then leave.

Jessie and Jack go over the plan several times before putting it into action. However, when Jona opens the door, Jessie looks in to the house and sees Masi lying on the couch with very little clothing on. Jessie forgets about the acid and bursts into the house. He pulls a knife out of his pocket and stabs Masi several times in the chest. She dies. Jessie and Jack are charged with murder.

You are acting as defence counsel for the two accused. Using the relevant provisions of the Pasifika Penal Code as permitted material in this exam, answer all of the following questions:

- (i) Was there an intention to carry out a common unlawful purpose?
- (ii) Is a conviction of murder a potential outcome in respect of Jessie?
- (iii) Has Jack satisfied the actus reus and mens rea requirements for secondary participation under the Pasifika Penal Code?
- (iv) Is a conviction of murder and/or manslaughter a potential outcome in respect of Jack?
- (v) What chances does Jack have in being acquitted?

(20 marks)

PART B: ANSWER ONE QUESTION ONLY IN THIS PART

Question 2

Tom is separated from his wife Nicole. Nicole has custody of their three month old daughter, Mary, who was born after the separation. Tom has not spoken to Nicole directly since the separation. Tom contested custody but was unsuccessful. Tom feels robbed of the chance to be a father. One day he decides he is going to take Mary regardless of what the Court decided. He breaks into Nicole's house while she is asleep, and takes Mary from her cot. Tom is unaware that Mary is highly allergic to cow's milk and that Nicole has been breastfeeding her, while adhering to a strictly dairy free diet herself.

Back at Tom's place, he attends to feeding and changing Mary. He mixes up some baby formula that his girlfriend, Sina, bought at the supermarket while Tom was out. He feeds the formula to Mary from a bottle. Soon afterwards, Mary begins to choke and go very red in the face. Tom panics. He rushes her to the hospital where a receptionist tells him that the staff is very busy and he will have to wait. When a doctor eventually comes to look at Mary, he inserts a tube into her throat to enable her to breathe. However the tube is not sterile. Mary dies less than two hours after treatment. The post-mortem examination reveals that the cause of death was oxygen deprivation (lack of oxygen) as a result of an allergic reaction to the formula, which was dairy-based.

Tom is being charged under s.160 of the Pasifika Crimes Act for the death of Mary. Consider Tom's liability for culpable homicide. Also consider whether the chain of causation has been broken?

Refer to the relevant sections of the Pasifika Crimes Act in answering this question. This is provided at the back of this question paper in Annex 1.

(15 marks)

Question 3

This is a Case Note Question. The reported case is Regina v. Ahluwalia and it is provided at the back of this question paper in Annex 2.

Answer the following questions in relation to the case of Regina v. Ahluwalia

- (a) State the Name of case and which Court is the case heard in and who are the judge(s)?
- (b) Briefly outline the Relevant facts
- (c) What offence(s) is the defendant charged of?

- (d) What were the issues on appeal and what was the outcome of the case?
- (e) Were there any procedural and evidentiary differences between the trial and the appeal?
- (f) What is the significance of a “cooling-off period” when considering the question of provocation?
- (g) How much weight do you think the appeal court gave to the “relevant characteristics of the defendant”, and especially the fact that she was a battered woman?
- (h) Do you consider that this case has any impact on the existing law on the defence of provocation in the South Pacific

(15 marks)

PART C: ANSWER ONE QUESTION ONLY IN THIS PART

Question 4

"Many actions that people in one Pacific country or another would consider wrong did not find their way into the Criminal Code. On the other hand, many actions that people in one Pacific society or another would consider moral or right are prohibited by their introduced Criminal Codes."

(Jean Zorn)

- (a) Describe and discuss the relationship between morality and criminal law in the South Pacific region.**
- (b) Should the content and enforcement of the criminal law be determined by questions of morality?**
- (c) What other factors can be considered in determining what is crime?**

(15 marks)

Question 5

"It has been suggested, obiter, that payback may not constitute an assault. The Northern Territory (Australia) provided that an assault is not illegal where it is authorised by the victim, and the person who commits the assault does not intend to kill or cause grievous bodily harm. Neither does the person who administers the payback inflict grievous bodily harm. Midren J, pointed to recent authority which supported the view that mere spearing into the thigh muscle may not in fact cause any permanent injury to health so as to fall within the definition of grievous bodily harm."

Minor (1992) 59 A Crim R 227

- (a) Discuss the advantages and consequences of accepting "payback" in indigenous communities by the formal criminal legal system. In your answer, you can make reference to any South Pacific jurisdiction of your choice?**
- (b) Would you agree with that "payback" is distinguishable from the offence of assault. Comment on the unlawful act and fault element aspects of each of the types of acts?**

- (c) Imagine that you are responsible re-drafting the Penal Code or Crimes Act of your country to include "payback" as a defence. Write down 5 conditions that need to be satisfied before a defendant can claim the defence of "payback"?

(15 marks)

Question 6

"Out of the three offences of attempts, incitement and conspiracy, conspiracy is perhaps the vaguest and most problematic. This crime, unlike attempt, does not require conduct that is proximate to the completion of the substantive offence. This enables criminal responsibility to be proved on the basis of a preliminary plan or consensus between the parties. This obviously has certain advantages to the prosecution, but there is a danger that the crime of conspiracy may be abused if there are unclear limitations on its scope."

Bronitt, S and McSherry, B. (Law Book Company, 1998), p 432.

Address the following questions:

- (a) Briefly outline the elements of conspiracy?
- (b) Do you agree that conspiracy is vague and problematic, give reasons to support your answer?
- (c) Can you give 3 examples of situations where the crime of conspiracy can be abused by the prosecution in prosecuting accused persons. Make reference to any jurisdiction of the South Pacific of your choice?

(15 marks)

ANNEX 1

PASIFIKA PENAL CODE

s.100. **Parties to offences –**

- (1) Every one is a party to and guilty of an offence who-
 - (a) Actually commits the offence; or
 - (b) Does or omits an act for the purpose of aiding any person to commit the offence; or
 - (c) Abets any person in the commission of the offence; or
 - (d) Incites, counsels, or procures any person to commit the offence.
- (2) Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

s.149. **Duty of persons in charge of dangerous things –**

Everyone who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes, operates or maintains anything whatever, which, in the absence of precaution or care, may endanger human life is under a legal duty to take reasonable precautions against and to use reasonable care to avoid such danger, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.

s.150. **Homicide defined –**

Homicide is the killing of a human being by another, directly or indirectly, by any means whatsoever.

s.151. **Culpable homicide –**

- (1) Homicide maybe either culpable or not culpable.
- (2) Homicide is culpable when it consists in the killing of any person
 - (a) By an unlawful act; or
 - (b) By an omission without lawful excuse to perform or observe any legal duty; or
 - (c) By both combined; or
 - (d)
- (3) Except as provided in this Act, culpable homicide is either murder or manslaughter.
- (4) Homicide that is not culpable is not an offence.

s.152. **Murder defined –**

Culpable homicide is murder in each of the following cases:

- (a) If the offender means to cause the death of the person killed;

- (b) If the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not;
- (c) If the offender means to cause death, or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed;
- (d) If the offender for any unlawful object does an act that he knows to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without-hurting anyone.

s.153. **Manslaughter** - With the exception of infanticide, culpable homicide not amounting to murder is manslaughter.

s.156. **Duty of persons doing dangerous acts** – Every one who undertakes (except in cases of necessity) to administer surgical or medical treatment, or to do any other lawful act the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable knowledge, skill and care in doing any such act, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.

ANNEX 2

REGINA -v- AHLUWALIA

Court of Appeal Criminal Division: Lord Taylor CJ- Swindon Thomas and Judge JJ.: July 31, 1992.1

Murder - Homicide Act 1957, s.3 - provocation - "sudden and temporary loss of self-control" - whether proper test - definition of "characteristics"- of reasonable person-whether special characteristics admissible - proper direction

Criminal Appeal Act 1968, s.23-retrial-fresh evidence-not disclosed at original trial - whether proper to order retrial

A was charged with murdering her husband. There was a long history of domestic violence by him. On an occasion at Easter 1989 (about a month before his death) he knocked her unconscious; and on an occasion when he left her in April 1989 she had to write him a grovelling letter to induce him to return. On the night of May 8-9, 1989, he made further threats to beat her and burn her with a hot iron, which he was using; and demanded money from her. A who had bought some caustic soda with a view to using it on her husband, also bought a can of petrol then threw some at him in his bed, throwing a lighted stick after the petrol. He received burns from which he died some days later. There was evidence that A was standing in the burning house with a glazed expression, saying "I'm waiting for my husband". Later she said that she had given him a fire bath to wash away his sins. However she said in police interview that she did not intend to kill him, only give him pain. She did not give evidence at trial; her defence was lack of intent to kill and (secondarily) manslaughter due to provocation. She was convicted (10:2) of murder and appealed, submitting that (1) the judge misdirected the jury on provocation in inviting them to consider if there had been sudden and temporary loss of self-control; (2) the judge misdirected the jury concerning the "characteristics of the reasonable person in looking at the provocation test; (3) the murder conviction was unsafe and unsatisfactory because of A's diminished responsibility (not put forward at trial).

Held, allowing the appeal and ordering a retrial, (1) the judge followed faithfully the test of provocation laid down in *Duffy* [1949] 1 All E.R. 932 (Devlin J.) when directing the jury. It had been boldly submitted that the *Duffy* test, in referring to sudden and temporary loss of self-control, was wrong. However, the test had been approved in a number of later cases (*Ibrams & Gregory* (1982) 74 Cr.App.R. 154; *Whitfield* (1976) 63 Cr.App.R. 39) and most recently in *Thornton* [1992] 1 All E.R. 306 *per* Beldam L.J. All these cases made it clear that section 3 of the Homicide Act 1957 had not changed the law in this regard. (*Camplin* (1978) 67 Cr.App.R. 14, H.L.; Smith & Hogan, *Criminal Law* (6th ed.), p.337 considered.) It was open to the judge when leaving the question of provocation to the jury to take account of the interval between the provocative conduct and the reaction of the defendant to it. It had been submitted that delay or a "cooling-off period" might cause a defendant to react more strongly, in a "slow-burn" case. Certainly lapse of time would not in law negative provocation but the longer the delay the more likely it was that

provocation could be negated. The court was essentially being asked to change the law on provocation and only Parliament could do that. (2) The judge also directed the jury properly on personal characteristics according to the test in *D.P.P. v. Camplin* (above) at p.21 per Lord Diplock. Counsel had complained that the judge had not directed the jury concerning the "battered woman syndrome" which was an important characteristic in the present case. Special characteristics were admissible to show provocation (*Newell* (1980) 71 Cr.App.R. 331; *McGregor* [1962] N.Z.L.R. 1069, *Taaka* [1982] 2 N.Z.L.R. 198, *Leilua* [1985] *Recent Law* 118 (New Zealand) considered.) In the present case there had however been no medical evidence that A suffered from the battered woman syndrome or post-traumatic stress disorder. The directions referred fairly to the history and left to the jury the question whether the deceased's acts or words might have caused a reasonable person to lose self-control. (3) However, the Court of Appeal had been furnished with a quantity of material, not before the trial judge and jury, suggesting that A suffered from diminished responsibility. Usually such evidence should have been available at the trial; but this was an exceptional case. One report which was available at the trial but for some reason not pursued then referred to A's endogenous depression at the time of the killing; and the new material would be admitted under section 23 of the Criminal Appeal Act 1968. Coupled with A's strange behaviour after lighting the fire, an arguable defence was disclosed which was not raised below and accordingly a retrial was appropriate.