



LAWS1011 – Criminal Laws 2

FINAL EXAMINATION - Session 2 2005

- Time allowed: 2.5 hours, plus 10 minutes reading time
- Examination condition: THIS IS AN OPEN BOOK EXAMINATION.
You are permitted to bring any printed or handwritten materials into the examination room.
- Total number of questions: 5
- Value of questions: Each question is worth 30% of the final grade for this course
- Questions to be answered: You should answer ONLY 2 Questions – One question must be answered in each Part

OTHER INSTRUCTIONS:

1. Your NAME and STUDENT ID should be written on the front of each exam booklet you use.
 2. Your TEACHER'S NAME and your GROUP NUMBER should be written at the top right hand corner of each exam booklet you use.
 3. Write legibly in ink and leave a whole blank page between questions.
 4. Answer each question in a separate booklet.
 5. You may retain the examination paper.
 6. Unless otherwise indicated, all facts and events take place in NSW.
 7. Students are permitted to use abbreviated citations of primary sources (eg Crabbe and s18(1)(a), rather than Crabbe v The Queen (1985) 156 CLR 464 and ss18(1)(a) Crimes Act 1900 (NSW)).
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Part A – answer ONLY ONE question

(This question is worth 30 marks)

Question 1

Frank is a trainee surgeon working at a Sydney public hospital. As he has only recently qualified to perform operations, he normally performs only routine surgery with a relatively low degree of risk. He is rostered on for a Sunday morning shift with Wendy, a more experienced surgeon.

On Saturday Frank turns 30. He celebrates with friends at an inner city restaurant and then goes to a night club to dance and have a few more drinks. He is not normally a heavy drinker, but because of the excitement of the occasion he drinks more than usual. He only realises how intoxicated he is when he loses his balance and falls over on the dance floor. He goes home shortly after and is in bed asleep by 1am.

On Sunday morning he arrives at work at 7am with a bad headache. Apart from the headache he does not appear to have any ill effects from the previous night and he considers that he has sobered up. As he is sitting having a strong coffee, three ambulances arrive with survivors of a horrific vehicle accident. All the survivors need immediate surgery and Wendy is unable to deal with all the patients. She assigns one survivor, Tiffany, to Frank. Tiffany has head injuries and pressure on her brain that require an immediate burr hole to be drilled into her skull to relieve the pressure. Frank has never done this procedure before, and confides to Andrea, the senior theatre nurse that he is hung-over and anxious.

Andrea produces two tablets from her pocket and says: “Don’t worry, take these headache tablets. They’ll help”. Without thinking Frank swallows them.

During the operation, Frank’s hands begin to sweat and shake and he slips with the drill. This causes a severe gash across Tiffany’s head but does not create the hole necessary. Frank has a crisis of confidence. He says:

“I’m not up to this, I can’t do it. I must be still drunk. I’ll kill her.”

Andrea remonstrates with him and says:

“Frank, Wendy is in the other theatre. You’re the only one who can do this. If you don’t do it she’ll die. It’s an emergency. You’re the only chance she has.”

After some more coaxing, Andrea convinces Frank to continue with the operation. Because of the delay, the anaesthetist, Jeremy, has to administer more drugs to Tiffany in an attempt to keep her in a stable condition. Because of Frank’s mistake and delay the operation takes 15 minutes longer to complete. As the wounds on Tiffany’s head are being stitched up, Tiffany’s heart stops and she dies on the operating table.

As a result of a subsequent police and coronial investigation:

- Frank is found to still be mildly intoxicated with alcohol - at 0.08 it is a level that is above the legal limit to drive a motor car but does not prevent normal social functioning.
 - The tablets that Andrea gave Frank were pseudo-ephedrine which has the effect of increasing the ability to concentrate, but reduces hand-eye co-ordination. Frank is found to be heavily intoxicated with this drug and is likely to have had an impaired ability to make reasoned decisions.
 - The drilling of the burr holes is a risky but routine operation. Patients rarely die from mistakes or complications arising from the operation, and it is an operation that a surgeon of a few years
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experience would not consider a difficult operation.

- Tiffany lost consciousness before arriving at the hospital and never regained consciousness before her death. No consent was obtained to do the operation, but there is medical consensus that given the information available at the time the procedure was necessary to save her life.
- An autopsy on Tiffany reveals that her brain injuries were catastrophic and she would have needed a series of highly risky operations to have survived. Even if all those operations had been successful, the coroner finds that her chances of survival would have been less than 20%.
- The coroner concludes that Tiffany's death was a combination of her accident and the operation. There is a high probability that if the operation had been 15 mins shorter she would have survived the operation, but no-one can say with any certainty how long she would have lived after the operation.

Do Frank's actions amount to either murder or manslaughter? In answering this question you should refer to any defences you consider might be available to Frank.

Question 2

Bill is a 20 year old Sydney man who has just been sentenced to 18 months imprisonment with a non-parole period of 12 months for a series of car thefts and break and enter offences. He is taken to the Metropolitan Reception and Remand centre at Silverwater while awaiting classification. Bill is assigned to a cell and finds that it contains two bunks, and that he will have to share the cell for some weeks until he is classified and possibly sent to another prison such as Parklea. His cell mate, Joe, turns out to be a repeat offender who has "graduated" from the juvenile detention centre system and has since served several prison terms in adult gaols for drug dealing and assault offences.

In the first week while Bill is using the exercise yard he is approached by a group of other prisoners - Sam, Lex, and Yusef - who say they believe that Joe has some heroin secreted in his cell. They back Bill in to a corner of the exercise yard out of sight of any surveillance. The apparent ringleader, Sam, leans forward until his face is only an inch or two from Bill's. Meanwhile Lex, moves behind Bill and strokes Bill's buttocks on the outside of Bill's tracksuit.

Sam says to Bill in a threatening tone: "Search that cell from top to bottom when Joe is not there and bring us whatever drugs you find. If you don't get them within two days, you will be getting more than a massage on the bottom".

Bill is petrified and stammers that he will try. Bill manages to break away from the group, who laugh as he leaves and make lewd comments.

The following afternoon while Joe is having a visit from a member of his family, Bill searches the cell from top to bottom, having decided to comply with Sam's group's demands. He notices a split in the metal leg of the bunk through which Bill thinks he can see some white powder in a plastic bag, but he cannot get it out, as he cannot seem to prise open the split in the metal with his hands. Under Joe's mattress he finds a very small amount of marijuana, which he takes, thinking to himself:

"I will take this to keep them happy as I can not get to the heroin, but I'll get hold of some more marijuana and replace it before Joe notices. Because he only smokes it on Sundays I've got a few days before he will realise."

Confronted in the yard by Sam and his group later that day, Bill tells them: "Look, I think he has got some smack (heroin) in the bunk leg, but I can't get it out, I need some sort of tool or blade. I did find this though."

Bill hands Sam the marijuana.

Sam turns to Lex and Yusef and says: "What do you think boys, is he stringing us along?"

"Give him another chance" says Lex, "but take a down payment now".

"Good idea" says Sam in response. He hands Bill a small blade, saying; "Use this on the bunk leg, and come with me".

Bill complies, following Sam back to Sam's cell. There Sam tells Bill to pull his own pants down and insert a thick pencil stub which he hands to Bill, into his own (Bill's) anus. Bill does so reluctantly but with no outward show of resistance or refusal. Lex and Yusef are watching from the door, laughing and commenting.

"You'll be taking much more than that if you don't come good with that smack" Lex says.

The following morning while Joe is absent on an educational course Bill tries to extract what he thinks is probably heroin from the bunk leg, but is unable to do so, even with the use of the small blade. Later in the yard he is confronted by Sam's group and explains that he was unable to get the heroin.

"OK, you know the deal", says Sam and gestures towards his cell.

Bill follows, but Lex and Yusef remain in the yard which runs alongside the building containing Sam's cell. Sam's cell is on the third floor.

"Here, suck on this for a start, then we will see what you can take and how many" Sam says, while thrusting his penis into Bill's mouth.

Bill complies at first and tries to pleasure Sam, but suddenly produces the blade previously given to him by Sam and stabs Sam in the thigh and flees from the cell. Bleeding heavily from the wound Sam yells out to Lex and Yusef who confront Bill at the bottom of the stairs, but he holds them off by flourishing the blade and swinging it at them when they get close, until two prison officers alerted by the shouting, instruct Bill to drop the blade, which he does and the officers lead Bill away.

Bill later discovers on the grapevine that Joe knew what was going on all the time, indeed it was Joe's idea to use the drug ruse to obligate Bill into providing sexual services to the group in an apparently consensual manner. It turns out Joe had placed the marijuana where Bill would find it and was aware that the split in the bunk leg revealed a small piece of plastic wrapping used in the manufacture of the bunk, which in some lights looked as if it contained a white powder but which in fact contained nothing.

Ignoring any potential drug offences, discuss the potential criminal liability of Joe, Bill, Sam, Lex, and Yusef by specifying and discussing any criminal charges that might be laid against them, including the likelihood of the charges succeeding, together with any potential defences.

Part B – Answer only one question

(this question is worth 30 marks)

Question 3

You are a policy officer with the Criminal Law Review Division (CLRD) of the NSW Attorney General's Department. The Attorney has received a letter from a constituent expressing concern about the existence of the "goods in custody" offence, s 527C *Crimes Act 1900*. The Attorney is however aware that the offence is widely used by Police. The Director of CLRD asks you to prepare a submission for the Attorney dealing with the following issues:

- a) What are the elements of the offence and are there any defences available to an accused? (10 marks)
- b) How does the offence compare to the offence of receiving (ss 188 and 189 *Crimes Act 1900*)? (10 marks)
- c) Should the offence be reformed or repealed? (10 marks)

Question 4

You are a policy officer with the Criminal Law Review Division of the NSW Attorney General's Department. The Attorney is interested in codifying the legal meaning of recklessness. He is aware that a legal test for recklessness commonly applied in the criminal law is that an accused is reckless if they have a realisation of the possibility of some physical harm resulting from their action and yet they go ahead and act (see eg *Stokes and Difford* [1990] 51 A Crim R 25 at 40). However he seeks your advice as to:

- a) The legal test for recklessness in murder, sexual assault and indecent assault (15 marks)
- b) Whether there is justification for different tests for recklessness for different offences (15 marks)

Question 5

You are a policy officer in the Criminal Law Review Division of the NSW Attorney General's Department. The NSW Court of Criminal Appeal (CCA) has just handed down judgment in an appeal on a 75 year sentence for a series of aggravated sexual assault in company charges arising out of a series of gang rapes which attracted extensive media coverage. The CCA has allowed the appeal against severity of sentence and has reduced the sentence to 25 years imprisonment. The result has been heightened media coverage and public debate, much of it along the lines that the sentence is too lenient. The Attorney General is under media and political pressure to provide a "tougher" sentencing regime. His advisors tell him that there are a number of possible responses.

By way of background the Attorney asks you to prepare a memorandum that evaluates the appropriateness of the Attorney responding in the following ways:

- a) "It is up to the courts to set the sentence levels for serious sexual assault offences by way of the existing guideline sentence system" (10 marks)
 - b) "The Government is drafting legislation to make the existing standard non-parole periods mandatory" (10 marks)
 - c) "My Department is currently developing proposals for a preventive detention regime for all gang rape offenders based on the approach taken in the *Habitual Criminals Act 1957*" (10 marks)
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