LAWS1206
Criminal Law
1st Semester 2011

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(Q2)

Mark: 78

IS D LIABLE FOR THEFT OF E’S MEMORABILIA?
Since these events take place in Canberra, all legislation applied will be from ACT criminal code [proper name?] for all possible charges against D and A.
For D to be charged with theft of memorability (guitar and cloak) under s 308, prosecution must prove BRD that D committed all elements of this offence concurrently (s 12(1)). If D is found guilty of theft, D may be liable for 10 year imprisonment.

Elements of s 308: [✓]

Memorability belonging to someone else? [why start here → at moment of appropriation]
Property belongs to anyone having possession, control, proprietary rights or interest in it (s 301(1)). Erik has proprietary rights in the memorability, as [what does D have? S 305(1).VERSION] [✓] D did not know that cloak/guitar was E’S. Therefore there was no appropriation and no theft. [✓] [+no FE]

IS D LIABLE FOR MINOR THEFT OF MANUSCRIPT?
Elements (s 321(1)(a))
1. Property (AR)
2. Belonging to Someone else
3. Intention to permanently deprive (ITPD)
4. Appropriation
5. Recklessness as to whether it belonged to someone else
6. Dishonesty
7. Replacement value of $200 or less (s 321(1)(b) [absolute liability?]

1. Property?

According to Legislation Act 2001 Dictionary, property includes legal interest in personal property. E and A have legal interest in manuscript, which is personal property as they wrote the song and signed it. Therefore the manuscript is property. [Is this a property/definitional issue? Be careful!]
2. **Belonging to Someone Else?**

Property belongs to anyone having possession, control, proprietary right or interest in it (s 301(1)). Although property belongs to D as he is in possession and control of the manuscript, E and A still own it was they have proprietary right (they signed and write it), and a reference to ‘belonging to someone else’ is a reference to each owner of property (s 305(1)). Therefore this element is satisfied. [Look again: Anna handed it over. Hence the mistake becomes an issue. E is a different case.]

Also, it is possible that D has gotten the manuscript from E and A by fundamental mistake. (E and A – what does the provision require?) If there is also a legal obligation to restore the item to E and A, the property is deemed to belong to E and A (s 305(5)(a)).

The fundamental mistake can [?] be a mistake about the essential nature of the property (s 305(6)(b)). Here there is a mistake about the essential nature because D thought he was getting a cloak and guitar and actually got a manuscript too.[√]

**Legal Obligation?** [‘legal’ – this is a separate enquiry]

This is a technical meaning and is not in th Code, so one can use common law to define it (Barlow). From AG’s Reference, there will be legal obligation to restore if:

1. E and A made a mistake about a fundamental fact
2. Payment was due to mistake
3. D was unjustly enriched.

A though only the cloak and guitar was being given. Therefore there was a mistake over a fundamental fact. D paid, because he thought he was just getting the cloak and guitar and D was unjustly enriched at E’s expense as D now has an original manuscript worth $500. Therefore there is a legal [see above] obligation.

Therefore legal obligation and fundamental mistake is satisfied. Therefore the property belongs to E (s 305(5)(s). [Didn’t it always? Wasn’t the FM Anna’s?]

**Intention not to make restoration (s 305(b))**

There was such an intention when D decided to put the manuscript in pool room. D said he doesn’t feel any hesitation in keeping the music. [√] Hence there ITPD (s 305(5)(b)(i) and an appropriation of the manuscript without E’s consent (s 305(5)(b)(i)) at the moment D put the manuscript in the pool room.

**Recklessness as to whether property belonged to someone else?**
As ‘belongs to someone else’ is a physical element involving a circumstance and it doesn’t have a fault element given, recklessness is the fault element (s 22(2)). D has knowledge that the manuscript belongs to someone else, because he found it in a cloak that he bought and knows the owners were from Eurovision. This satisfies the element (s 20(4)). [reference to recklessness?]

**Dishonesty?**
D’s conduct can be dishonest even though he was willing to pay (s 303(3)) – ‘I paid way more’ (Is this relevant here?)

D will be dishonest if it was dishonest according to the standards of ordinary people (s 300(a)) and it was known to be dishonest according to their standards (s 300(b)). [✓] An ordinary person would think it was dishonest – indicated by the wife telling D to tell the auctioneer what he found, and ordinary person would tell the auctioneer (and the wife was nervous) [✓]
It’s not clear whether D knew it was dishonest, as he said that paid way more, they were careless and probably forgot. [really? Justifying dishonest behaviour?]

D says he has right to the manuscript, but a claim to a right to property doesn’t apply here (s 38(1)) as he has a legal right to property (Walden v Hensler) [law on this?]

**Concurrence?**
All elements have been satisfied (except dishonesty) and are concurrent.
Replacement value of $2000 or less (s 321(1)(b))? [✓] This element is absolute liability (s 321(2)), meaning that no fault element is required (s 24(2)(a)). [✓] It is not clear what replacement value the manuscript has, as it’s an original and unique manuscript. However, similar manuscripts are $500, which is less than $2000. So this element is satisfied.

If dishonest is proven, D is guilty of minor theft (with imprisonment s 321).

**IS A LIABLE FOR THEFT OF E’S MEMORABILIA?**
Requirements are same as previous action but (not replacement value). [So, looking at s 308?]
1. **Property**

   Legislation Act 2001 – includes legal interest in personal property, which the cloaks and guitar are. Therefore this is satisfied.

2. **Belonging to someone else?** [at moment of appropriation?]
E’s memorability belongs to A as she has possession and control (s 301(1)). However, property belonging to 2 or more people belongs to each of them (s 305(1)) and hence the property also belongs to E as he has a proprietary right. [✓✓]

3. Appropriation?

The moment of appropriation will be taken to be when A let the memorabilia be put up at the auction. There must be an assumption of rights of an owner to ownership, possession, or control of property without consent of an owner. (s 304(1)). Anna put up the memorabilia for sale – which is an assumption of the right to ownership, and it was without E’s consent, as ‘without consent’ means to go beyond implied consent (Morris→technical meaning→go to common law, Barlow), as E did not imply that A could sell the memorabilia. [Is Morris relevant here? Also, implied consent an issue?]

Therefore there was appropriation.
[Swap sections 2 and 3 around]

4. Intention to permanently deprive?

Circumstances in which there is ITPD are not limited s 306(4). ITPD is in relation to a result, so the definition in s 18(2) applies: whether A meant to bring permanent deprivation about or was aware that it could happen in the ordinary course of events. [✓] As A put it up for auction, so that it would be sold to someone else in exchange for money, there was ITDP. [✓]

5. Recklessness as to whether property belonged to someone else

A performed the song with E, so knew that the memorabilia was his. Hence recklessness is satisfied (s 20(4)).

6. Dishonesty? (s 300)

It was dishonest according to standards of ordinary people as the ordinary person would ask before selling. [Husband/wife dynamic?] [s 302?] It was known to be dishonest as A initially didn’t think it was right (justified to F that she hadn’t asked E’s persmission, so couldn’t sell) and only agreed because F persuaded her.

Therefore dishonesty is satisfied and elements are concurrent. Therefore A is liable for theft.

You’ve covered most things but in a rather disjointed way. However, you have certainly demonstrated an excellent understanding of the relevant property offence provisions. Just a few gaps/oversights, as indicated above.