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Question 1

82/100

a) 46

1. David’s liability for assault with intent to have sexual intercourse under s61K of the Crimes Act 1900 (NSW) (“CA1900”)

In order for David to be liable for assault with intent to have sexual intercourse under s61K, the prosecutor has to show beyond reasonable doubt (Woolmington) that David has threatened to inflict actual bodily harm on Kate by means of an offensive weapon, with an intent to have sexual intercourse with her under s61K(b).

Physical elements

i) did David threaten to inflict actual bodily harm on Kate?

David showed Kate a syringe filled with blood and he told her to do what he said. Such act would clearly cause Kate to apprehend fear that David would do some harm to her if she did not follow his instructions regardless of whether she knew what was inside the syringe. And the apprehension is subjective, in the eyes of the victim, not the defendant (Zanker v Vartzokaas), so David’s statement that Kate knew he would not have hurt her would not be valid. According to R v Donovan, actual bodily harm covers any hurt or injury that interferes with the health or comfort of the victim provided that it is something more than merely transient and trifling. So even if the syringe contains regular blood, it will cause interference with Kate’s comfort if the David injects it onto her. (√) And here an intention will suffice without any actual bodily harm occasioned. So this element is likely to be made out.

ii) is the syringe an offensive weapon or instrument?

Offensive weapon or instrument is defined in s4 of CA1900. Under s4(b), it can be anything that is made or adapted for offensive purpose. Here, David filled the syringe with blood to make it look scary so that everyone seeing it will be scared. (√) So the syringe in this case is qualified to be an offensive weapon or instrument.

Fault elements

i) did David intend to cause fear?

From the conversation he had with Gary, David obviously had an intention to cause fear by using the syringe filled with blood.
ii) did he have the intent to have sexual intercourse?
Again, from the conversation he had with Gary and his telling Kate to do what he wanted, it is obvious that he had an intent to have sexual intercourse with Kate. Intoxication is relevant to the specific intent of having sexual intercourse (s428(c)(1), but it seems David has resolved to do it before he got intoxicated so it cannot be taken into account (s428(c)(2)(a)). (√)

On balances, David will likely be liable.

II. David's liability for aggravated sexual assault under s61J of CA1900
In order for David to be liable for aggravated assault, the prosecutor has to show beyond reasonable doubt (Woolmington) that David had sexual intercourse with Kate without her consent and before the sexual intercourse he threatened to inflict actual bodily harm on Kate and David knew that Kate did not consent to the sexual intercourse under s61J(1) and s61J(2)(b).

Physical elements
i) did he have sexual intercourse without consent?
Sexual intercourse is defined in s61(H) of CA1990. And it is know from the fact that he had sexual intercourse with Kate. Consent carries an ordinary meaning (Olugboja) and must be a free and voluntary engagement (R v Johns). David ma claim that Kate did not resist but under s61R(2)(d) absence of resistance alone does not amount to consent. Even though Kate followed him to the room, her consent is negated under s61R(2)(c) as she was doing it under threats or terror – the fact that David showed her a syringe filled with blood and she said he did not have to do that. (√√) Therefore, this element is likely to be made out.

ii) did David threaten to inflict actual bodily harm on Kate?
This element is established in the offence of assault with an intent to have sexual intercourse.

Fault elements
i) did he know that Kate did not consent to the sexual intercourse?
s61R(1) is an extension of s61I on the definition of knowledge by including recklessness as kind of knowledge. Recklessness is a foresight of possibility that the person is not consenting but does it regardless (Helmsley)(Coleman). David knew that anyone seeing the syringe will be scared to do anything he demanded which indicated that he knew Kate will submit to have sex with him. So he should know that she was doing out of fear, not out of free and voluntary consent. On the other hand, David can be said to have culpable inadvertence as he did not consider whether Kate was consenting at all (Kitchener)(Tolmie) as he knew she would do what
he wanted as long as he had the syringe in his hand. (√) Self-induced intoxication is not relevant here (s428(D)(a)). (√√)

In conclusion, David will likely be liable for aggravated assault.

b) 36
Assuming that David is convicted of the above offences, Gary may be tried and punished as an accessory under s345 or s351B. The likely possible charges are that he aided and abetted or procured the commission of the offence and common purpose.

**The elements of aiding and abetting are set out in *Girogianii*.**

**Physical elements**

i) **did he aid, abet or procure the commission?**
He drove the car to the gas station, a kind of helping David. And no causal connection was needed (Coney).

**Fault elements**

did he intend to aid, abet or procure?
He thought he was driving David back home, so he was not aware that he was actually helping him in the commission.

did he have actual knowledge of the essential facts of the crime (robbery and sexual assault)?
Yes, he had as the two of them had a discussion before.

On balance, he will unlikely be liable for aiding and abetting for the lack of intention. (√)

**Acting in concert**
If they two have an arrangement to commit a crime which is still on foot and both are present at the scene and one or either of them does all the things to constitute the crime, both of them will be guilty of that crime (Lowery v King). Here, Gary was present at the scene and they both had a plan to do robbery and have sexual assault. But what David did here was only sexual assault. Gary could claim withdrawal but it is not an unequivocal withdrawal communicated to David (White v Ridely), so it may not be valid. But he did whatever he could to stop Gary (White v Ridley) so it may be valid. On balances, he’s likely liable unless his withdrawal is valid. (presence+intent to sexual assault need exploration here)
Common purpose
Liable for any accidental crime in pursuance of a joint enterprise (John v the Queen).

is there a joint enterprise?
Yes, an arrangement to do robbery and sexual assault.

ii) foresight of possible offence?
Yes, David has told him that they could have fun with Kate, so it is highly foreseeable.

iii) same as acting in concert, his withdrawal is not unequivocal; but here he did whatever h could to stop David (White v Ridely), so withdrawal may be valid to an extent. (analysis needed)

So whether he is liable will depend mostly on the validity of his withdrawal.
LAWS 1206 Criminal Law and Procedures
2005 1st semester

Question 1
Mark 75
a) 29

Dennis’s liability for theft of the mountain bike under the Criminal Code 2002 (ACT)
In order for Dennis to be liable for theft of the mountain bike under the Criminal Code 2002
(ACT) (“CC2002”), the prosecutor has to show beyond reasonable doubt (Woolmington) (Code)
that Dennis has dishonestly appropriated property belonging to someone else with the intention
of permanently deprive the other person of that property under s308 of CC2002. And the
physical and fault elements must coincide (Meyers v the Queen). (√)

Physical elements
i) is the bike considered a property?
The dictionary in the Code gives a broad inclusive definition to cover a variety of things while
the Legislation Act states a property cover any equitable estate or interest, whether tangible or
intangible. So a bike is clearly a property under the Code. (√)

ii) did it belong to someone else?
A property belongs to someone as long as he has possession or control of it or has any
proprietary right or interest in it under s301(1). So Dennis could argue the bike was under his
control. (when?) But under s305(1), a reference to the person to whom the property belongs is
taken to be a reference to each of them. Here, Vladmimir has a proprietary interest in it, so it can
be said that the bike belonged to Vladimir. (√)

And if Dennis got the bike by Oskar’s fundamental mistake and Dennis was under a legal
obligation to make restoration, the property would be deemed to still belong to Vladimir, the
person entitled to restoration under s305(5)(a). (√)

was there a fundamental mistake?
Yes, Oskar made a fundamental mistake as to the essential nature of the property under
s305(6)(b). Although his bike looked the same as Vladmimir’s, Vladimir had modified
his adding extra value and functions to it, so the essential nature of the bike has
changed. (√)

was Dennis under a legal obligation to make restoration?
Legal obligation and restoration are not defined in the Code and common law applies here. According to Attorney-General’s Reference (No. 1 of 1983), restoration means restitution, which is a remedy for unjust enrichment. Requires? Dennis’s accidental receipt of a better bike is clearly an unjust enrichment, and he was under a legal obligation to fix the problem as the act between Dennis and Oskar was a trading transaction recognizable under the law. So the fundamental mistake is made out. (√)

As soon as Dennis decided not to make restoration, such act will constitute both an appropriation under s305(5)(b)(ii) (√) and an intention to permanently deprive Vladimir under s305 (5)(b)(i). (√) So the element to be proved is honesty. (√)

Fault element
i) was Dennis dishonest?
Under s302, dishonesty is a matter for the jury. (√) A 2-stage test is given in s300 to tell whether Dennis was dishonest. First, we have to ask whether his act of keeping the bike being aware of a fundamental mistake is dishonest per the standard of ordinary people. (Apply) The answer is likely yes. Then we have to ask if it is known by Dennis to be dishonest per the standard of ordinary people. The facts that he thought of whether Oskar would be able to track him down and that he was in fact when realizing who Vladimir was show that he was aware that his act was dishonest. (√) s38 or s303(3)?

Given the above, it is likely that Dennis will be liable for theft under s308 of the CC 2002.

b) 23
**Dennis’s liability for murder under the Crimes Act 1900 (NSW) (“CA1900”)**
In order for Dennis to be liable for murder under CA1900, the prosecutor has to show beyond reasonable doubt (Wollmington) that Dennis’s act of shoving the car door causing the death of Vladimir was done with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm (“gbh”) upon Vladimir under s18(1)(a) of CA1900. (√) **constructive murder**
To establish criminality, the physical and fault elements must coincide (Meyers v the Queen).

Physical element
i) Did Dennis’s act of shoving the car door cause the death of Vladimir?
Dennis shoved the car door twice and it is known from the facts that the second time was a fatal blow and caused Vladimir’s death, so causation is not an issue here. (√) (Common sense? Royall)

**Fault elements**

i) did he intend to kill? An intent to inflict gbh or reckless indifference to human life?

It is unlikely that Dennis had an intent to kill (law on this) because he was at first thinking of a way to calm Vladimir down and when he saw him with a branch, he tried to act quickly to protect his car. So if not, did Dennis intend to inflict gbh? The answer is likely yes. Dennis may argue that he first shoved the car door to protect his car and he only aimed at his stomach. The definition of gbh under s4 is an open definition and according to Smith, it has to be very serious bodily harm. (√) Dennis’s second hit was aimed at the head, which is a very fragile part of human being, with all his force, so this element will likely be made out. (√) Even if not, he may be considered having reckless indifference to human life.

Recklessness is a foresight of probability that one’s act must have resulted in death and still did it (Royall). Dennis was aware that Vladimir was already badly hurt from the first blow even tough it was only aimed at the stomach. So he could foresee that if he aimed at the head with all the force, the consequence would be much worse but he did it regardless. So he can be considered reckless. Can we infer foresight?

On balance, Dennis will likely be liable for murder under s18 of the Crimes Act 1900 (NSW). (√)

c) 23

**Dennis’s availability of using self-defence as a defence for the charge of murder.**

Assuming Dennis is prosecuted for murder and the prosecutor has shown that all the elements of murder have been made out, Dennis may raise the defence of self defence against his criminal liability under s418(1) as long as he could show that he believed that it was necessary in self-defence to do what he did to defend himself or property (his car) and such conduct is a reasonable response in the circumstances as he perceived then under ss418(2)(a)(c). (√)

i) **was it necessary to defend himself or his car?**

According to Katarzynski, the belief must be honest. It also covers the relationship between the with (R v McKay) (pre-provisions). Vladimir had a large branch with him threatening to break the car window and Vladimir looked very angry. Realizing who Vladimir was and aware that he had kept the bike dishonestly, Dennis could be in deep fear and that with the express threat from
Vladimir, he knew he had to do something to primarily protect the car and then himself as evidenced by the facts. So to Dennis, the act was necessary. (√)

ii) was the act a reasonable response?
Here, it is an objective test. And only Dennis’s sane belief, not delusions (Walsh)?? must be taken into account. And we also have to allow for fear/stress situation (Saler v Klingbiel) You need to look at post-provision cases – Katarzynski. Dennis’s first hit at Vladimir’s stomach may be deemed reasonable as a man in fear of being inflicted harm or protecting his property will try to do some harm to others to stop them from doing it. But his second hit at Vladimir at the head with all his force may be seemed too excessive as he could tell this will cause serious bodily harm and Vladimir was already struggling to stand, as being badly hurt from the first hit. (√)

The question here is if Dennis used self-defence only to protect his car, such defence will not be available in the case that death was inflicted (how?) in protecting his property, here his car, under s420(a). The facts indicate that he acted in self-defence primarily to protect his car. And the idea of protecting himself only came up in the interview with police. So this issue is quite arguable. But even if the jury believes that he was acting to protect or defend himself, his response might be deemed too excessive and he may still be charged of manslaughter under s421(2). Explain provision’s application.