1) outline the elements of the offence and the standard/burden of proof – “in order to prove X is guilty of the offence, the C/D will have to prove Y BARD/on BoP...”

2)ID disputed aspects (actus reus/mens rea and apply the facts)

3) Crown vs. Defence arguments – “I expect C/D to argue… but I will respond…”

4) “based on above, I expect Crown/Defence will succeed/fail for these reasons”

**ACTUS REUS (prohibited act)**

**CONDUCT:**

-What act(s) or omission(s) must the crown prove?

-**Omissions**: crim. law gen. applies to acts not failures to act EXCEPT where expressly specified in legislation or where there is a legal duty to act (*Fagan, Moore, Thornton*)

-**Involuntariness** could negate AR because it could be argued the physical act was not carried out by a conscious and controlling mind (*Lucki*, *Wolfe*)

**CIRCUMSTANCES:**

-Does the act/omission have to be committed in particular circumstances? Are the circumstances true?

-“Likely to cause”…is it reasonable/truly likely that the circumstance is valid? (Think, defence will argue that it wasn’t reasonable to believe **that someone would likely believe** she was a cop.)

-Circumstances may include **absence** of other circumstances.

**CONSEQUENCES:**

- Do consequences in fact pattern **match consequences listed in offence**?

-If there are consequences, you MUST prove causation

-Was there a break in chain of causation?

- If the wound was **still in operation** and a **substantial cause**, then it can be considered to have caused the death of the victim (*Smith*)

-You must take victim **as you find them**, so even if they refuse medical treatment (*Blaue*) or have a pre-existing med condition, the chain of causation is not broken.

-For all forms of homicide, use causation standard in **modified *Smithers* test** from *Nette* i.e. Was the conduct a **significant contributing cause** of the consequences?

-If first degree murder, then apply ***Harbottle*** **test** i.e. Was the conduct a substantial and integral cause of death? Defence will argue it applies only to s. 231(5)

**MENS REA (required mental element(s) of fault)**

-If there is no MR imported in the actual offence, mention that *Beaver*, *Lucki*, *Sault Ste. Marie* state that all true criminal offences must have at least some form of a guilty mind present for guilt to be found. However, **not every element of AR has corresponding MR**.

-Accused’s subjective state of mind is important (*Beaver*)

-If about fraud, reference *Theroux*

**CONDUCT:**

-Conduct of AR must be **intentional** and/or **reckless**

-If something about the word “wilfully” (whereby D: *Buzzanga* applies because they want intent to be MR requirement, Crown: *Buzzanga* doesn’t apply because facts different/”wilfully” modifies conduct as opposed to consequences as it did in that case)

-MR must be **concurrent in time** w/ AR (*Fagan*)

-**Motive** is *not* intent. Intent is exercise of free will to use a given means to produce a given result. Motive is ulterior purpose to using those means to bring that result. Can be used as relevant evidence (*Lewis*)

-**Continuing action**: an act that does not constitute a crime at its inception can become criminal if the person forms the intent/recklessness/MR to produce the apprehension which was flowing from the continuing act (*Fagan*)

**CIRCUMSTANCES:**

-Must exist with **knowledge** or be **reckless/wilfully blind**

-Crown may note that a MR isn’t required for the circumstances

-Remember that knowledge is subjective (*Beaver*)

- possible D: “accused didn’t know for sure and the MR for this offence implies that one must know with certainty that…”

*-*In terms of **wilful blindness**: where proof of knowledge is required, deliberately choosing not to know something (i.e. you know there is a need for further inquiry) is seen as tantamount to knowing it

-**Continuing Action** (*Fagan*)

**CONSEQUENCES:**

-If consequences, can also be a req. of **intent** or **recklessness** attached to them

-However, it is arguable whether there is a MR for consequences

-**Motive**: a person might have the guilty mind to carry out the consequences, but the AR must match the MR. Just because they have motive, it doesn’t necessarily follow that they have intent.

-“Even if \_\_\_\_ **should** have done something, this is negligence, not subjective intent or recklessness, and so is insufficient for conviction”

-If you are Crown, and don’t have much of a case for MR, could argue that there is no requirement wrt MR of consequence, given the nature of the offence

Intent: A person intends to carry out an **act** when he does so purposely/deliberately. A person intends the **consequences** of his act where he desires them OR when he is substantially certain the consequence will result from his act.

Recklessness: A person is reckless as to a particular **act** or **consequence** when he foresees the risk of it occurring but chooses to proceed. Mostly, reckless=intent

Knowledge: Actual awareness that a particular circumstance exists or did not exist

Wilful Blindness: =knowledge, suspicion of the existence or non-existence of a particular circumstance w/o confirmation. Not making an inquiry.

**SOURCES OF CRIMINAL LAW**

* **S. 91(27)** of *Constitution Act, 1867* (matter of federal jurisdiction)
* *Criminal Code*, R.S.C. 1985, c. C-46: **s. 8** (preserves CL defences) & **s. 9** set out the principle of codification
* *Charter*: **s. 1** *Charter* “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”; **s.7** life, liberty and security of person and right not to be deprived thereof; **s. 8** unreasonable search/seizure; **s. 9** not to be arbitrarily detained or imprisoned; **s.11(d)**-presumed innocent until proven guilty; **s.13** witness who self-criminates while testifying

**CLASSIFICATION OF OFFENCES**

* Summary Conviction: **s.787**; max. penalty = 6 mos. imprisonment & $2000 fine; trial takes place in provincial court without a jury and no preliminary inquiry
* Indictable: can only be created by federal Parliament
* accused has choice of trial: **1.** prov.ct. before judge alone; no PI; **2.**BCSC before judge+jury; PI before judge in prov.ct.;

**3.** BCSC=judge only; PI before judge in prov.ct.

* + *EXCEPTIONS to choice*: **s.469**-MURDER – absolute jurisdiction of BCSC-*must* be option 2 (above); **s.553** (theft under $5000) – absolute jurisdiction of prov.ct.-*must* be option 1 (above)
* Hybrid: Crown chooses to proceed by summary or indictable; e.g. sexual assault

# PROVING THE CRIME

**Evidence must be**: relevant (probative of a material fact or conclusion); material (probative of a matter in issue in the case; e.g. issue of identity and accused had beard); admissible (meets the rules of evidence); credible (judge makes findings of fact, jury makes findings of fact)

**EVIDENTIAL BURDEN AND BURDEN OF PROOF**

**Legal/Persuasive Burden:** Crown must prove each element of the offence **BARD** (standard jury must apply to evidence at end of trial)

**(Initial) Evidentiary Burden:** Crown must introduce evidence on each element of offence, which if believed, would support a conviction; accused has evidentiary burden to point to some evidence that will raise reasonable doubt

D can make a no evidence motion (=acquittal); at PI determine whether enough evidence to put D on trial, C has **evidentiary burden** to make *prima facie* case, J decides if met... if not met (=discharge).

Accused never bears burden to prove innocence BUT may have persuasive burden (reverse onus) for particular defence being raised, a particular element of the offence, or a presumed fact – this standard is on a **BALANCE OF PROBABILITIES**

*Lifchus* *(1997) SCC* **–** concept of **reasonable doubt** connected to presumption of innocence; based on reason and common sense; logically connected to the evidence or lack thereof; legal concept, not an ordinary concept; not amount to absolute certainty, though closer to this than the BoP, nor is it equal to “moral certainty.” (*Starr* – upheld)

*R. v. J.H.S. (2008) SCC (sexual assault of stepdaughter)***–** *R v. W.(D).* instruction on the issue of **credibility and reasonable doubt**: Must acquit if you believe the evidence of the accused; if you do not believe the testimony of the accused but are left in reasonable doubt by it; must be convinced BARD by evidence of the accused’s guilt.

**OAKES TEST**

*R. v. Oakes* (1980**)** SCC – (re: constitutionality of Narcotic Act) if s. 11(d) of Charter violated, apply s. 1 Oakes test to determine if reasonable limit on right (accused must disprove presumption on BoP): 1. Is there a pressing and **substantial objective**? 2. Is there a **rational connection** b/w the infringement and the objective of it? 3. Is there **minimal impairment** on the right/freedom in question? 4. Is there **proportionality** in terms of balancing the measures for limiting the right/freedom and the objectives? Accused must prove that s. 11(d) was violated. The Crown must prove that the limit is justified.

(*Whyte*s. 237(1)(a), *Downey* s. 212(1) – passed Oakes test)

# THE ELEMENTS OF AN OFFENCE

Crown must prove both **actus reus** and **mens rea**.

MR: presumption that **true crimes req. Crown to prove a subjective MR BARD** in relation to at least some element of the AR.

Subjective mental states are: **intent** (to carry out act, to achieve the consequences); **knowledge** (actual awareness that a particular circumstance does (not) exist; includes wilful blindness); **recklessness** (foresee that it might occur but choose to proceed anyway).

**Included Offences**: may be either specified in *Code* or through operation of **s. 662(1)**; all ‘attempted’ offences are included but excludes offences of greater severity with more conditions

**The principle of legality**: can’t be charged with something that doesn’t exist/law cannot apply retroactively; *Frey v. Fedoruk – SCC 1950*(committing action likely to constitute breach of peace NOT an offence)

**OMISSIONS**

Generally: criminal law concerned with ACTs and NOT omissions

* **EXCEPTIONS**: 1.offence in Code specifically states that omission (failure to act) is criminal, e.g. failure to remain at scene of accident or 2.failure to perform some legal or CL DUTIES is an offence

*Fagan***(1968) Eng. CA** – continuing act theory (becomes criminal the moment intention formed); court held that MR /intention is not necessary at the inception of AR

*Moore* **(1978) SCC** – police have statutory power to arrest and as such there is a reciprocal common law duty for Moore to assist in that effort (bike through light)

*Thornton* **(1991) CA –** legal/common law duty to refrain from conduct which it is reasonably foreseeable could cause serious harm to other persons (HIV blood donation)

**VOLUNTARINESS**

General principle that there can be no finding of guilt unless offence is committed voluntarily

*Lucki* **(1991) Sask. Police Court** - must intend to drive car in opposing traffic; not voluntary if caused by bad road conditions

*Wolfe* **(1974) Ont. CA** – hitting on head w/ phone was a reflex action

# CAUSATION

Whenever the AR incls. consequences that Crown must prove BARD, the Crown must also prove that the actions of the accused caused those consequences.

*Smith (1959) Eng.CA* - only if the 2nd cause is so overwhelming as to make the orig. wound part of the history can it be said that the death does not flow from it; D’s action must still be operative cause

*Blaue (1975) Eng.CA* – although victim didn’t do anything to stop her death, the stab wound was the cause of death and her actions did not break the chain of causation; victim has no duty to mitigate consequences

**CAUSATION OF DEATH IN CANADIAN LAW OF HOMICIDE**

*Smithers(kicked guy in stomach, he asphyxiated on own vomit)*– contrib. cause outside *de minimus* range (not trivial or insignificant)

*Harbottle* (1993) SCC– **“substantial and integral cause”** test for first degree murder (restrained victim’s legs); unclear whether this test applies to all 1st degree murder or just offences under **s.231(5)** (death while committing/attempting to commit list of offences)

*Nette***(2001) SCC** – standard of causation test from *Smithers* is the same for all homicide offences; reworded to **“a significant contributing cause”** (old lady tied up)

**MENS REA: THE SUBJECTIVE APPROACH**

*Beaver (1957) SCC* (sugar of milk) – there can be **no possession without knowledge** of the character of what you are possessing

*R. v. City of Sault Ste. Marie* *(1978) SCC* – **args in favour of absolute liability**: protection of social interests reqs a high standard of care and attention on the part of those who follow certain pursuits and such persons are more likely to be stimulated to maintain those standards if they know that ignorance or mistake will not excuse them; administrative efficiency; **args a/g absolute liability**: violates fundamental principles of penal liability; rests upon assumptions which have not been, and cannot be, empirically established

**Intent and Recklessness:** *Buzzanga and Durocher (1980) Ont. CA*– willfully promoting hatred (full intention req’d) (French Cdns)

*R. v. Theroux (1993) SCC* – **AR of fraud**: the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and deprivation caused by the prohibited act, which may consist of actual loss or the placing of the victim’s pecuniary interests at risk. **MR of fraud**: subjective knowledge of the prohibited act; and subjective knowledge that the prohibited act could have as a consequence the deprivation of another

**Wilful Blindness:** in cases where proof of knowledge is required, deliberately choosing not to know something (i.e. you know there is a need for further inquiry) is seen as tantamount to knowing it

**MOTIVE**

*Lewis v. The Queen (1979) SCC* – motive not same as intent (kettle bomb); jury only need be charged if proof of motive or absence of would affect verdict

**TRANSFERRED INTENT**

When the accused intends one offence but another one occurs because of a mistake or accident; codified for murder **in s. 229(b);** only when the harm that arose is the same legal kind as that intent

**DEPARTURES FROM SUBJECTIVE MENS REA**

Types of Offences (*Sault Ste. Marie – Ontario Water Resources Act*):

Absolute liability—no mental element

* strong presumption against offences of absolute liability
* if Parliament intends an AL offence, words of statute must be clear/admit no other interpretation (*Beaver*)

Strict liability—fault measured objectively

* burden shifts to accused to prove on BoP the defence of due diligence (that the accused was not negligent or reasonably believed in a set of facts, which if true, would render act innocent)
* usually for public welfare offences

Full mens rea—fault measured subjectively

* intent, reckless, knowledge, wilful blindness must be proved by the prosecution

**CRIMES OF OBJECTIVE FAULT**

* Offences of penal/criminal negligence where Crown must prove MR BARD on objective rather than subjective basis (based on what the reasonable person should have done, foreseen or known rather than actual state of mind of the accused)
* Some OF offences clearly defined in CC; others are defined by case law
* *Tutton – SCC 1989 (criminal negligence; parents convicted of manslaughter b/c stopped giving insulin to diabetic son);* **objective test:** marked or significant departure from the standard which could be expected of a reasonably prudent person in the circumstances
* *Hundal – SCC 1993 (dangerous driving of dumptruck causing death*); **modified objective test** appropriate for offence of dangerous driving b/c licensing requirements, reflexive nature of driving, wording of section suggests it’s a negligence offence, statistics; test must take into consideration context of events surrounding incident
* *Beatty – SCC 2008 (dangerous op of m.v. causing death);* AR subjective🡪was accused driving dangerously; MR objective🡪was accused driving marked departure from standard of reasonably prudent driver; momentary negligence does NOT meet this standard
* Crim. negligence causing bodily harm: AR: act/omission (where duty to act)🡪causation🡪bodily harm MR: intent to act ... bodily harm/death🡪marked departure from standard of reasonable person

**MENS REA & THE *CHARTER***

* **S.7**-Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof *except* in accordance with the principles of fundamental justice (PoFJ)
* Unconstitutional to deprive accused of liberty without proving MR
* Anytime you combine absolute liability with mandatory imprisonment you violate s.7; *MV Reference – SCC 1986 (7 days imprisonment absolute liability offence for driving w/ suspended licence*)
* It is a PoFJ that**the morally innocent should not be punished** & Parliament should regulate the criminal law only in the public interest
* Unlawful act causing bodily harm/manslaughter: unlawful (objectively dangerous) act interpreted broadly; any violation of prov. or fed. statute (cannot be an AL offence); **conviction requires proof of MR of unlawful act + objective foresight of bodily harm**; *Desouza – SCC 1992 (bottle smashing), Creighton – SCC 1993 (charged w/manslaughter for injecting drugs into girlfriend)*
* Reverse onus of strict liability offences may violate s. 11(d) but **may** be saved as reasonable limit by s.1;  *Wholesale Travel (SCC 1991)*
* Objective MR for SL offences does not violate s.7; s.7 does NOT apply to corporations; *Wholesale Travel*

**MENS REA OF MURDER**

* Constructive murder (**s.230**) causing death under aggravating circumstances; guilty even without intent to commit murder/cause death; found to violate PoFJ that the moral blameworthiness of the offence must be proportional to the stigma attached to the severity of the offence; *Martineau SCC 1991*
* Murderhas the highest penalty and social stigma attached than any other offence; MR to be proportionate to penalty & stigma
* **subjective foresight required to convict for murder—anything less violates s.7**

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| --- | --- | --- | --- | --- |
| **DEFENCES** | **Mistake of Law*** **s. 19** “ignorance of the law is not an excuse”; *Campbell and Mlyrnarchuk – ABCA 1973 (immoral performance)*
* However, recognition of CL defence of officially induced error based on facts; *Lévis – SCC 2006:*
1. Error of mixed law/fact was made
2. Person who committed act considered legal consequences of actions
3. Advice obtained came from an appropriate official
4. The advice was reasonable
5. The advice was erroneous
6. Person relied on advice in committing the act
* Would result in a judicial stay of proceedings

**Provocation*** **s. 232**, applies only to reduce murder to manslaughter
1. wrongful act/insult that would cause ordinary person to lose self-control 🡪 objective test
2. did accused act on the sudden (factual question) before passions had time to cool (was accused still in state of agitation?) 🡪 subjective test
* Onus on D to prove AOR, burden on Crown to disprove BARD; *Hill – SCC 1985 (homosexual advances)*
* Discretion of judge to mention age/race/sex in charge; *Hill*
* For part 1 of provision, it is a modified objective test: inherent characteristics (age, race, sex) *Hill*; history of relationship *Thibert – SCC 1996 (parking lot shooting); events preceding incident* *Daniels – NWTCA 1983 (husband’s gf)*
* A wrongful act or insult must be active or intentional; *Tran – ABCA 2008 (snuck into apt.)*
 | **Rolled Up Charge*** “holy trinity”: provocation, intoxication, self-defence;  *Nealy – OntCA 1986 (got into bar fight after insult to gf)*
* Judge can charge jury on cumulative effect of evidence on accused’s intent
* If rolled-up charge for murder succeeds, it would drop charge to manslaughter

**Intoxication (General)*** CL defence available for specific intent offences (e.g. murder) but NOT general intent (e.g. manslaughter, assault); *Leary*
* Onus on D to prove AOR
* Results in conviction of lesser included offence; if none, results in acquittal
* Negates part of the MR
* Sexual assault is a general intent offence; *Bernard – SCC 1988*
* Cannot raise defence where it is one of the elements of the offence; *Penno – SCC 1990*

**Intoxication (Extreme)*** CL defence, applies to general intent offences
* **s. 33.1** limits application of defence to general intent offences so that it cannot be used for any offences with violence/assault; Parliament legislated in response to *Daviault* *– SCC 1994 (alcoholic/65 yr old where so drunk that accused was acquitted)*
* Accused has to prove extreme intoxication on BoP
* Constitutionality of s. 33.1 debated as violating s. 7 of Charter in lower courts; applic. depends on jurisdiction
* Sopinka’s dissent in *Daviault*: transferred moral blame-worthiness (for self-induced intoxication) to criminal neglig.
 | **Mental Disorder (NCRMD)*** **s. 16** and **Pt. XX.1** (~ s. 672.1 in CC)
* Onus is on the party raising the defence to prove on BoP
* Results in special disposition
* Procedure for entering evidence of MD; *Swain – SCC 1991*:
1. Accused may plead at outset of trial.
2. Accused may plead “not guilty” but if Crown proves guilt BARD, can change plea to NCR.
3. Crown may raise evidence of MD during trial.
4. Crown may raise evidence of MD after finding of guilt but before conviction is entered.
* Separate inquiry for “fitness to stand trial”
* Definition: renders the person incapable of appreciating the nature and quality of the act or omission or of knowing it was wrong (**s. 16(1)**)
* “disease of the mind” is NOT a medical definition; it is a legal definition
* “disease of the mind” = any illness, disorder or abnormal condition which impairs the human mind and its functioning; *Cooper – SCC 1980 (strangling of woman at mental patient dance)*
* Knowledge of legal wrong disentitles defence (from *Cooper* and *Schwartz*) was overturned in *Chaulk – SCC 1990 (accuseds killed because they thought they had power to rule the world)* so now lack of moral blameworthiness negates MR
 | **Non-Mental Disorder Automatism*** Refers to situation in which an accused person does not have mental control of their physical actions
* Where alleged automatism is from voluntary intoxication, defence is intoxication; where it is from mental disorder, defence is NCRMD
* Non-MD automatism is a CL defence that applies to every offence in CC
* Onus on defence to prove involuntariness on BoP
* Results in full acquittal because it negates MR
* Ordinary stresses of everyday life are not enough to cause a disassociated state, however, it is possible that there might be some form of psychological blow that could be so extreme as to cause a disassociated state; *Rabey – OntCA 1977 (girl made fun of guy who liked her, he hit her w/ rock)*
* *Parks – SCC 1992 (sleepwalker killed parents-in-law)* established foundation (upon which to prove there is a history of internal cause) in order to use the defence
* *Stone – SCC 1999 (stabbed wife after nagging)* reinforced continuing danger theory (if trigger likely to recur, likely to be NCRMD (also from *Parks*); judge can’t instruct jury on both NCRMD and non-MD automatism (must choose one)
* *Luedecke (sexsomnia)* affirms continuing danger theory (found to me MD automatism)
 |
| **Mistake of Fact*** CL defence open to accused whenever he holds an honest belief in a set of circumstances that, if true, would otherwise entitle him to an acquittal (because it negates AR)
* Applies to any offence with an element of knowledge; *Beaver – SCC 1957 (sugar of milk)*
* Onus on D to prove AOR
* AR and MR must match; *Kundeus – SCC 1976 (mesaline/LSD)*; *Blondin – BCCA 1970 (scuba tanks)*

**Sexual Assault (s. 271):***AR* *MR*Force 🡪 Intent to applySexual nature 🡪 No MRW/o consent 🡪 Knowledge (accused may raise defence MOF/mistaken belief of consent)**s. 273.2**: Cannot give AOR to belief of consent if by way of accused’s own self-induced intoxication, recklessness or wilful blindness. Only if there is an AOR, accused must show that they took reasonable steps to get explicit voluntary consent and that complainant was saying “yes” through words or actions (silence =/= “yes”); *Ewanchuk* – SCC 1999 (trailer assault) |
| **Self-defence*** **ss. 34-37**; applies to any offence that has an element of assault; applies in defence of self or 3rd party
* If successful, results in full acquittal
* D must bring AOR to following 3 elements: **ELEMENTS** (must bring “air of reality” to each):

1. Unlawful assault was imminent (obj/subj)2. Apprehension of death or grievous bodily harm (obj/subj)3. No alternative other than death (obj)* In class, we focused on **s. 34(2)** (where accused causes death)
* *Lavalée – SCC 1990 (abused woman shot husband in back of head as he left room)*: modified objective test (“reasonable apprehension of death to be understood in terms of cumulative effect of brutality”); imminence of harm not required; duty to retreat does not apply if in your own home
* Can employ defence if mistaken or honest belief of threat is reasonable; *Pétel – SCC 1994 (mother killed daughter’s bf’s friend b/c felt threatened)*:
* Just because you’re a battered woman does not automatically trigger result from *Lavalée* (need to look at circumstances); *Malott – SCC 1998*
* *Mcintosh – SCC 1995 (fight over DJ equipment resulted in death)*: initial aggressors have no duty to retreat if death occurs; if death does not occur, accused subject to more onerous conditions of **s. 35** (Dissent: drafting error!)
* Reasonable person in society not the reasonable criminal; *Cinous* *– SCC 2002 (killed criminal associate at gas station; no AOR b/c other legal alternatives)*
 | **Necessity*** Where one acts in response to an emergency situation
* CL defence, applies to any offence
* Onus on D to bring AOR to:
1. urgent and pressing peril (mod obj/subj)
2. no reasonable legal alternative (mod obj/subj)
3. proportionality (obj)

*Perka – SCC 1984 (came on shore w/ cannabis); Latimer – SCC 1991 (killed daughter to “save from suffering”)** Results in full acquittal
* Defence of necessity probably not available for murder (hard to imagine harm proportionate to death); *Latimer*
* Successful in *Ungar – Ont 2002 (charged w/ dangerous driving while rushing to save someone)*
 | **Duress*** Where accused was acting under compulsion of threats from another
* **s. 17** lists excluded offences (had more onerous provisions); applies only to principal offenders
* Parties and not principal offenders can rely on CL defence of duress (less strict and ignores excluded offences) listed in s. 17; *Paquette – SCC 1977*, *Hibbert – SCC 1995 (took guy to apt. where he was shot)*
* Onus on D to bring AOR to all 3 elements:

1. Threat of death/serious bodily harm (mod obj/subj)2. No safe avenue of escape (mod obj/subj)3. Proportionality (obj)* If successful, results in acquittal
* *Ruzic – SCC 2001 (Yugoslav girl smuggled drugs)*: principal offender can rely on the CL defence if it’s not a listed excluded offence (s. 17 now just lists excluded offences); won s. 7 Charter challenge based on principle of fundamental justice that acts of moral involuntariness should not be criminally blameworthy; threat can be to a 3rd party/does not have to be imminent
 |

**ATTEMPTS**

* Inchoate offences: incomplete offences
* **S. 24** creates attempts as a crime; **s. 463** lists sentencing
* **MR:** intent to commit the completed offence (attempts are mostly crimes of intent); **AR:** some act/omission in furtherance of the offence that goes beyond mere preparation (quite minimal)
* To convict for attempted murder, recklessness is not enough; Crown actually has to prove intent to kill; *Ancio – SCC 1984 (went to home of ex, gun fired but did not kill)*
* Acts must go beyond mere preparation; this is a test of proximity—how close are acts to commission of offence itself?; *Sorrell and Bondett – OntCA (guys in balaclavas at chicken store)*
* **s. 24** criminalizes an impossible attempt; *Dynar – SCC 1997 (charged in US with attempt to launder money but was an impossible attempt)* found to be a crime (attempts are crimes of intent and it doesn’t matter why attempt was thwarted); Dissent: no criminality should attach to attempts where if completed there would be no crime

**AIDING AND ABETTING**

* **s. 21** defines who is a party: **a)** principal offender or **b)** aider or abettor for the purpose of aiding (assisting) or abetting (encouraging)
* Aiding & abetting always specific intent and thus intoxication always available as a defence even if offence aided/abetted was general intent; *Fraser – BCCA 1984 (aided/abetted robbery, also charged w/ general intent assault)*
* Criminal law does not prosecute bystanders or witnesses; more than mere presence necessary to be aiding/abetting; *Dunlop&Sylvester – SCC 1979 (claimed they watched while girl was gang raped)*
* S.21 is drafted so as to make the difference between aiding & abetting and committing the offence legally irrelevant—either makes the accused equally culpable; *Thatcher – SCC 1987 (not clear whether he hired someone to kill wife or did it himself-convicted of 1st deg murder)*

**SENTENCING general principles PART XXIII (ss. 718-718.2)**

* Sentencing always done by Trial Judge—must be proportionate to gravity of the offence & blameworthiness of offender
* Usually accused gets credit for time spent in custody awaiting trial/sentencing-ratio of 2:1-“deadtime”
* Sentencing options: imprisonment, fine, probation, conditional sentence, conditional/absolute discharge, firearms prohibition, DNA databank order (can be a mix but not more than 2)
* Evidence can be introduced by Crown/accused @ sentencing hearing:
	+ Criminal record, victim impact statement, letters of reference/support, statement by accused, evidence about attempts at rehabilitation
* In determining the fitness of sentence, the court must take into account circumstances and realities of life; *Sweeney – BCCA 1992 (drunk driving causing death, accused had a hard life)*
* “goals and ultimate purpose of sentencing”: general deterrence, specific deterrence, isolation, rehabilitation, denunciation; *Sweeney*
* **General rule:** jury has NO part in sentencing
* **Exception:** conviction of 2nd degree murder (mandatory life sentence w/ minimum period of parole ineligibility of between 10-25 yrs); jury asked to recommend a period of parole ineligibility in these cases
* *Code* does not allow discretionary “constitutional exemptions”-mandatory minimum sentences do NOT violate *Charter* and are gen. constitutional; *Latimer – SCC 2001 (challenged min. parole ineligibility of 10 yrs)* and are generally constitutional; *Ferguson* *– SCC 2008*
* long term offender (subject to supervision in the community for a period of 10 years); dangerous offender (may be jailed indefinitely); Crown has to apply for these desigs; can be used in plea bargaining
* Don’t apply “worst offence, worse offender” rule too literally for maximum sentences; *M.(L.) – (SCC 2008*)

**ABORIGINAL PEOPLE & THE CRIMINAL LAW**

* **S. 718.2(e)**-system should minimize reliance on imprisonment-judges to consider **all available sanctions other than imprisonment** and to pay particular attention to the circumstances of **aboriginal offenders**
	+ Remedial – meant to ameliorate the serious disproportionality of aboriginals in prison; encourages restorative approach to sentencing
	+ **Sentencing aboriginal offenders consider:** unique systemic or background factors of particular aboriginal offender; sentencing procedures and sanctions appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection; *Gladue – SCC 1999 (G convicted of manslaughter for “near murder” of her husband-20 yrs old, 5 mos pregnant with 2nd child-drunk-G and deceased fought physically right before killing-he was having affair with her sister-tried to flee and she stabbed him-sentenced to 3 yrs. imprisonment)*
* Need to re-create their own systems of justice; e.g. circle sentencing, healing circles, participation in traditional ceremonies while in prison