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| Evidence  * **Relevant** (proof of fact make it more likely that event occurred) v **Material** (relevant with respect to matter at issue) * Evidentiary Burden * Crown – introduce evidence of each element of crime, prove concurrence of AR and MR * Accused – prove defence or disprove an element of the offence * **Direct** (eyewitness) – sources of error: *reliability* and *credibility* * **Circumstantial** (further inference needs to be drawn) – r and c issues also *mistaken inference*  Criminal Procedure  1. Crown Case – evidence for each element of crime 2. **No Evidence Motion** – D may make after crown cases closes but is a low standard of proof (assume no evidentiary sources of error) 3. Defence Case – may choose not to call evidence if crown is weak, may choose for accused to testify 4. Final arguments – facts, law and what verdict should be  * Judge – finds law * Jury – finds facts  Criminal Code  * Replaces common law but retained some cl defences  Components of Criminal Charge  1. **Identity**  1. Sheppard - All elements, including Identity, must be proven BARD - Could not prove that he was assailant BARD despite strong circumstantial evidence   1. **Actus Reus** 2. **Mens Rea** 3. **Charge** as per charge sheet - make D specifically aware so that they can defend themselves. Cannot be too vague (could not run another case on same charge)  2. Saunders – Offence exactly as particularized in charge must be proven - ‘heroin’ does not include other drugs | Beyond a Reasonable Doubt  * *Absolute Certainty – BARD – BOP (50%) – Suspicion* * Circumstantial evidence  4. Charemski – Circumstantial Evidence BARD: Not only a reasonable inference for guilt but must be only reasonable inference - Man in town, visited apartment, likely murderer   * Closer to Absolute Certainty  5. Lifchus – Beyond likely or probable but not certain - Jury cannot be directed to ordinary meaning 6. Starr – BARD is much closer to absolute certainty  * Credibility and Reliability of evid is paramount  7. Kyllo – Witness must be credible - Vetrovec witness with credibility problems enough to defeat BARD 8. C.W.H – Reasonable Doubt applies to Credibility  * Each element must be BARD  9. Morin – reasonable doubt to each element not to each piece of evidence - jurors can believe in different prices of evidence and may come to their conclusion in diff ways Presumption of Innocence  * Does not apply to facts: defences (must prove), sanity (must disprove)… * Reverse Onus in cases which are almost impossible for crown to prove BARD * Need to be justified under s. 1 * Crown prove Identity and AR and qualifying clause -> MR assumed * Onus on D to prove **no intent** (BoP) or **reasonable doubt of intent** (lowest threshold) * Pre-charter cases:  10. Appleby - Disprove on Balance of Probabilities11. Proudlock - Disprove by raising a reasnb doubt  * Application which does not fail oakes  12. Downey – Living off Avails – Reverse onus passes oakes test  1. Eliminate pimp relationships 2. Is a Connection 3. Only needs to raise a reasonable doubt 4. Low concern that innocent person will be convicted  13 Laba – Fails Min Imp – read out words (hard to justify balance of probabilities) |

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| Supremacy of the Charter  * Hierarchy of laws to reflect long standing values * Judge are not democratic instrument – but they must interpret and apply the charter  1. Onus on A – show on balance of probabilities that violates charter right 2. Onus of Crown – saved under s1?  * **Oakes Test**  1. Pressing and Substantial objective (easy but important for next step) 2. Rational Connection (between obj and means) 3. Minimal Impairment (does not need to be perfect) 4. Proportionality/Balancing (benefits for society v deleterious effects on indivs) 5. s 52 remedy – null and void to extent of inconsistency  * Strike down, Read Down, Read In  3. R v Sharpe – Child Pornography – Oakes Test - Essential criminal law value of broad protections for children from harm **v** limit on freedom of expression  - Decision: is constitutional, exceptions read in for 1) self created expressive material and 2) private recordings of lawful sexual activity both to be kept for private use as they fail c) and d) | Actus Rea  1. Conduct – voluntary act or omission 2. Relevant Circumstances – negative and positive elements in statute  14. Clark – Indecent act - elements of offence and statutory interpretation of ‘public place’ - Defined in code, ordinary meaning, contextual interpretation (other areas in code, Eng and Fr) 15. Terrence – Conduct needs to be defined – omission may be criminal conduct if explicit - ‘possession’ of stolen vehicle found to include element of consent and that requires control 16. Cooper – Culpable homicide – simultaneous principle for AR and MR - Could infer intent at time of grabbing 17. Moore – statute may create obligation for action, failing to do this may be AR of offence - If police ask for name, need to give it 18. Dunlop and Sylvester – a&a is equally guilty, need more then mere presence - Presence but encouraging is abetting. Presence that prevents escape is aiding.   1. Consequence or Result – causation required for some  * Causation issues in: Experimental medicine, assisted suicide, preexisting medical conditions, 2 people participating * **Factual** (but for causation) v **Legal** (needs factual but this is not sufficient, need a standard)  19. Smithers – Causation Manslaughter – beyond de minimus - Issue of causation for jury, Take victim as find them, does not need to be only cause 20. Blaue – intervening act must be sever enough to break chain of causation - Refusing blood transfusion is not sever enough (could break a) over distance or b) intervening act make it no longer de minimus) 21. Harbottle – Causation 1st Deg – Substantial cause test (higher since more stigma) - active, integral role in all elements for A&A 22. Nette – Causation 2nd Deg – De minimus - ‘substantial’, want to keep focus on MR |

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| True Mens Rea - Subjective23. Beaver – subjective MR requirement for true crimes unless statute clearly says otherwise  * Proving in cases without reverse onus * Infer that people intend natural conc of actions * Use evidence * Look to motive (reasoning behind action)  24. Lewis – motive is ulterior to intent - motive is always relevant and admissible but is not required   1. **Intent** or **Knowledge**– highest in terms of consequences and circumstances 2. **Willful blindness** - strong subjective suspicion and still not making inquiries  25. Briscoe – Willful blindness is same as actual knowledge - A&A while willfully blind 31. Malfara – Willful Blind is subjective and suspicion level must be high  * **General** intent (intend AR) v **Specific** intent (intend AR & additional intent or purpose) – Intoxication can be D only to SI – Attempts are SI  26. Wilson – Perjury - Double MR – know it was false (general intent) and intention to mislead the court (specific intent) **-** crown must prove both 27. Foti – Assault needs general intent, Aggravated Assault needs general intent with objective foresight of bodily harm, Discharge firearm with intent to wound needs specific intent - father shooting to scare or harm   1. **Recklessness** – subjective foresight that conduct will cause prohibited result, but do so anyways  28. Buzzanga –Promote Hatred - Reckless is not full member of subjective - Intent and Know not 100% certainty, just need likely or probably  - ‘willfully’ is ‘intentionally’ not ‘recklessly’ 29. Williams – Aggravated Assault – can be reckless30. Roach – fraud – A&A cannot include reckless - ‘for the purpose of’ usually does not include recklessness | Not True Mens Rea - Objective  * Regulatory Offences * Fin Penalties or lead to imprisonment  1. **Negligence** – objectively below standard of reasonable person 2. **Strict Liability** – shift burden of proof  * Leaves open door of defence of due diligence (reverse onus makes sense as they know what they did or did not do) * Fault standard when not explicit * **Defence of Due Diligence**   1. Acted on reasonable mistake of fact, that would have rendered conduct not guilty   2. Took all reasonable steps to avoid harm (not perfection but fairly high onus, industry standards may inform but are not determinative) * **Defence of Officially Induced Error** * Balance willful blindness w/ mistakes  1. An error of the law or of mixed fact and law was made 2. Person who committed the act considered the legal consequences of their actions 3. Advice obtained came from an appropriate official 4. Advice was reasonable 5. Advise was erroneous 6. Person relied on the advice in committing the act 7. **Absolute Liability** – just need AR  * Justification, no CC stigma and protect public interest * Drawback – no incentive to do good * No jail time [34]  32. City of Sault Ste Marie – elements of strict liab, set to default for reg crimes, elements of D of Due Diligence, elements of absolute liab - city contractor dumping 33. Levis – Elements of Defence of Officially induced error - waited on renewal notice for rego Mens Rea  * True crimes are usually sub – if read vague, assume * Does not need to apply to every element of AR but does need to occur at point in time * Should have higher intent as move away from crime or crime has more stigma |

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| Charter S 7 S7: 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**.   * Principles under s7: [34]   + 1. Has to be a legal principle (not pure policy)     2. Sufficient consensus that the alleged principle is vital or fundamental to our notion of justice     3. Articulation with precise enough language to lead to predictable results (Manageable standard) * Limit to Procedural matters?   + - * limited ability of judiciary to do justice – need to be able to attack the substance of the legislation       * Policy: bigger right for fundamental justice * High Stigma Crimes: Charter requires subjective fault for: Murder, Theft, Attempted Murder  34. Re Motor Vehicle Act – 1) can develop specific fundamental justice princ (AbLib cannot be combined with possibility of imprisionment) 2) Laws that engage our rights must meet certain criteria - Criteria: Fundamentally vague, Arbitrariness, Law Over Broad, Gross Disproportionality  - Leg stated: absolute liability, but we do not convict the morally innocent 35. Vaillancourt – Felony Murder - High stigmas require at least Objective foresight of death - Some degree of proportionality between severity of offence and subjective standard; FM vio s7&11  - pool hall robbery murder: s(d) 36. Martineau – Felony Murder - Where have high stigmas, s 7 requires a subjective foresight of death. - all of FM vio s7&11, not saved by s1  - trailor b&e murder: s(a) 37. Logan – Attempted Murder – High stigma for all participants: subjective fault standard38. DeSousa – Unlawfully Causing Bodily Harm – Fault standard is for Predicate Offence but cannot be strict liab and must have objective foresight of non-trivial bodily harm – low threshold 1) objective fault standards for criminal offences  2) one aspect to have limited subjective basis and causality carries over to a more serious charge  -Glass bottle cause harm | **Penal Negligence:**   * Given **consequences of bad driving** and the fact that you are entering into a **licensed activity** by **choice** – an objective fault standard is the one used. * **Modified objective test for penal negligence [39]**:   + 1) must be a marked departure from the standard expected of a reasonably prudent person (onus on Crown)   - brief is hard to prove marked departure  - some circ that affect actions of even a reasonab   * + 2) does not ignore the actual mental state of the accused, if raise a reasonable doubt as to whether a reasonable person in their position would be aware of the risks (onus on D)  39. Beatty – Dangerous Driving Causing Death – Modified Objective Test for Penal Negligence - crossing centre line is not crim in this case 40. Creighton – Manslaughter – fault standard: objective foresight of non trivial bodily harm, fairly high, want reasonable standard of care - less stigma: symmetry btw AR&MR does not need to be perfect  - inject drugs  **Abuses of Process:**   * Goal of Crim to find the truth * Judicial Stay Based on s7 and s11, remedy is 24(1)  1. No longer make full Question and Answer (truth) [OConnor] 2. Residual Category: Stay of Proceedings under Abuse of Process Doctrine (protect image of syst)    * + - Reasonable Apprehension of Bias [41]        1. Remedy to prevent future abuse: pattern        2. Rare: one event of really bad past misconduct        3. Weight against societal interest  41. Tobiass – War Crimes v breach judicial indp with high degree of misconduct – Sets high Bar for Residual Category42. Khadr – Terrorism v Torture – Rare where one really bad misconduct is enough, in clear cases do not need to weigh - Court’s Duty to protect own Rep  - CR most import with hi stigma and in hard times  - Lesser remedy: could still try in canada |
| Offences   * Living off Avails * Child Pornography * Indecent Act in Public Place * Aiding and Abetting * ‘for the purpose of’ implies strong directed subjective intent * Perjury – double intent * Assault – general intent to threaten * Aggravated Assault * Subjective intent to cause assault, objective/reasonable person have foresight of risk of harm * Can include reckless despite ‘intent’ * Discharge Firearm with intent to wound * specific intent * Fraud * Publish hate – willfully means intentionally * Non-Culpable Homicide * Culpable Homicides * Manslaughter – caused death through unlawful act with no intent to kill * Causation: Beyond de minimus (Smithers) * FS: Objective Foresight of non-trivial bod harm * 2nd degree – cause death with subjective intent to kill * Causation: Beyond de minimus (Nette) * FS: Subjective Foresight of death * 1st degree – aggregated form of murder including characteristic seen as more blameworthy a) planned b) purchased c) circumstances of domination * Causation – Substantial Cause test (Harbottle) * FS: Subjective Foresight of Death * Unlawfully Causing Bodily Harm – * FS of predicate offence (not abso lib) and objective foresight of non-trivial bodily harm * Attempted murder: * FS Subjective foresight of death for all parties * Theft * FS: subjective MR [35] | Fault Standards   * + 1. Subjective Foresight of death - what separates M v 2nd     2. Objective Foresight of death – A may not have foreseen, but a reasonable person would have foreseen death (fairly high)     3. Subjective Foresight of serious bodily harm – can use subjective tools (assumed to intent consequences of act)     4. Objective Foresight of serious bodily harm – reasonable person would have foreseen serious bodily harm     5. Objective Foresight of Non trivial bodily harm – reasonable person would have foreseen more then trivial bodily harm (this is the one for manslaughter)     6. Unlawful Act   Elements:   * + start with code   + statutory interpretation   + if high stigma, look to constitution |

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| Charter Issues  * **Section 10b** – right upon detention to retain and instruct council without delay. * Arises on detention (test: reasonably feel can go) * Purpose, need advice at moment of arrest to balance the state’s power  43. Sinclair – Cannot stop interrogation unless 1) subject to unusual procedure 2) change of jeopardy, purpose of 10b would be frustrated or undermined  * **Section 7 Right to silence** does not mean right not to be spoken to subject to reasonableness. [*singh*] * **Section 11b -**  right to trial in reasonable time * Measurement of time: Charge 🡪 Trial end * Purpose, protect accused right to security of the person and liberty; societal interests in fairness, effective trial before witnesses lose mem, if on bail want back in.  44. Morin – Framework for 11b  1. Does it engage possible 11b?  * 13/14 mths for PC and 22/24 mths for SC  1. Contextualize the delay. Why? 2. Complexity of the case  * Seriousness of case may be implicitly taken into account  1. Conduct of the defence (waiver?, trying to delay?) 2. Conduct of the crown 3. Prejudice to the accused  * i) Affecting ability to provide full answer and defence ii) personal impacts (liberty, financial, personal) * **Section 8** – protection against unreasonable search and seizure * Whenever you have a **reasonable expectation of privacy**, s8 is engaged * Purpose: privacy essential to free and democratic * Line: **suspicion v reasonable grounds**   Arguing s 8 violation (illlegit warrant):   1. Absence of reasonable grounds 2. Evidence giving reasb grounds violated s8  45. Tessling – no reasonable expectation of privacy to heat escaping from home | Mistake  * **Mistake of Fact**: may negate MR/ be a defence * May be defence or negate a charge element  46. Ewanchuck – sexual assault – consent has AR and MR section  * Sexual assault AR  1. Application of force 2. Sexual Nature – objective 3. Absence of consent – subjective mindset of V  * limits on when it is valid: s265: application of force, threats, fear, exercise of authority, fraud * Sexual assault MR  1. Intention to apply force 2. Knowledge of no consent  * Honest but mistaken belief – limited defence ex: no intox, reasonable steps (273.1 & 2); if different stories use 3 as determinative * **Mistake of Law:** is not a defence * Policy: incentive to be ignorant, hard to prove, balance V rights * Exceptions: sentencing, offences requiring knowledge, officially induced error  47. Prue and Baril, MacDougall - If the offence is a true crime, requiring MR, then mistake as to whether’s one’s licence has been suspended is a mistake of fact. If the offence is prov strict liab, the same mistake is a mistake of law.48. Docherty - Where knowledge is a component of the MR, the absence of knowledge is a valid defence  * + ‘willfully’ breach probation order  49. Cancoil Thermal Corp and Parkinson – officially induced error is defence to mistake of law  * + official said blade was safe without guard  A&A Special Issue  * Theory is not an essential element, but motive can be helpful   + Cannot be speculative   + Each one must be legally adequate – proper jury instr  50. Thatcher - Theories involving A&A and primary are legally equivalent, juries can use either to prove elements BARD and convict51. Yu – instructing juries, separate a&a and princ. A&A needs MR of knowledge that the crime will occur (principle’s intent is irrelevant) |
| Attempts  * S.660 – attempts included in charge * S.24 – whether or not it is possible to commit the offence * **AR:** something **beyond mere preparation** * **MR:** **same as for the substantive** crime * Issue: do not have AR to draw inferences from  52. Ancio - attempt murder - MR for attempted offence is intent to commit the completed offence (same as substantive)53. Sorrell and Bondett – attempt theft – use internal evidence (other then the limited conduct, items found at home, admissions, witness) and external evidence (extern to conduct that gives access to inference beyond conduct itself, ex letters – best if unequivocal)54. Deutcsh – attempt to procure - beyond mere prep is a contextual analysis with obj sense: 1) temporal connection 2) geographical 3) relationship between act and crime 4) steps under a control still left37. Logan – attempted murder is special stigma that requires subjective level of fault55. Dynar –launder money - factually impossible (attempt but cannot complet on the facts) and legal impossible (attempt commit a crime which is not due to mistake of fact) can fall under attempts since guilty mind. Imaginary crimes (not a crime) does not. **2. Automatism**   * Narrow defence and rare, **need history** of condition * Presumption is that acts are voluntary (issue for AR) - **onus on accused to prove on the balance of probabilities** * **Dissociated state** caused by**:**  1. NCRMD auto    * If due to MD 🡪 s16 so state retains control    * MD is broad: includes illness, drug induced, hysteria, concussion. Not sleep disorders.    * Strong presumption is here (Stone: **holistic test**)    * Nature of trigger (not unique then MD)    * Probability of reoccurrence (high then MD)    * Hereditary nature (likely MD) 2. Non-NCRMD    * Temp condition 🡪 common law right to aquital    * Rare cases  59. Leudecke – sexual assault – strong presumption is NCRMD auto | Defences  1. Crown’s **general Burden**: unable to prove every element due to credibility or reliability 2. **Impediment to proof** defence – legal reason crown cannot prove an element    * Intox, mistake of fact, reasonable but mistaken belief 3. **Justification** – accept c case, but there is legal justif: case of moral involuntariness [61]    * Self defence, necessity, duress  * Need to have an **air of reality** to admit 2 and 3 [57]   + Is there some eviden on which a reasonable jury could aquit? (assume cred, relib and reasonable objective inferences)   + Judge must lead every defence available * Onus on A: once admitted: every element of defence needs to be proven (to differing thresholds) * Onus on C: disprove one element BARD (some put this onus on A too)  57. Cinous – self defence - Air of Reality Test: whether there is (1) evidence on the record (2) upon which a properly instructed jury acting reasonably could aquit – question of law  * + Modified objective discussed: honestly perceive on reasonable grounds   **1. Not Criminally Responsible due to Mental Disorder**   * Strong presump that sane, **onus on accused to prove on the balance of probabilities** * Complete defence * **S 16**  1. no person **is crim resp** [though they may need to be put in medical] **while suffering** [at the time] from a **mental disorder** [have to come within this definition- Cooper: not transient] that rendered the person :   1) incapable of appreciating the **nature and quality** of the act or omission; OR  2) knowing it was **wrong**  - morally wrong: perspect of A of what reasonable members of society would think 58. Brown – murder - knew it was dangerous, did not know it was morally wrong |
| **3. Intoxication**   * General rule: **specific intent crimes** only (did not subjectively foresee consequences of action)   + Crown disprove on BARD   + Factors: task requires dexterity; post offence intentional acts, long course of conduct; motive evidence * Rare: if become **automaton** may apply to **general**   + D prove on BoP like auto defences   + **S33.1** – only applies to non-violent general intent offences (narrows common law)  59. Daley – murder to manslaughter – Intox limited **4. Necessity**   * Strong Intent (only negates MR if motive in offence [62]), but moral involuntariness  1. **Clear and Imminent Peril**    * Verge of happening, virtually certain to occur 2. **No reasonable legal alternative**    * Not last resort, just reasonable alternatives    * Perka – burning would cause more prob    * Sanous – could have left 3. **Proportionality** (pure objective)    * Comparable gravity (murder?)  * **Modified Objective Test – honestly believed on reasonable grounds**   + Honest belief – subjective   + Reasonable grounds – objective with attributes of accused: age, experience, knowledge, history of relationship, consistent with charter values  60. Perka, Nelson, Hines and Johnson – importing drugs – policy issues with defence61. Latimer – murder – moral necessity isnt **5. Duress**   * Common law [62]  1. **Threat of death or serious physical injury**    * Reasonable temporal connection 2. **No safe avenue of escape** 3. **Proportionality**  * **S17** - Statutory limit (narrower, principle only [62&3])  1. **Threats of immediate death or bodily harm** 2. From some1 who is present **[no safe escape](63)** 3. **Subject belief they will be carried out, not part of conspiracy**  62. Hibbert – a&a – statue applies only to princ63. Ruzic – import drugs – s7 (moral voluntariness) charter challenges on defence change elem 2Aboriginal Perspective  * Rational: society put in position, should not punish * S718 (purposes); 718.1(proportionality); 718.2 (principles – e is all other sanctions) * Figures show overrep; not their justice: both committing **more crimes** and **systematic discrim**   More crimes in one population   * Gladue Princ:   + Set out how person has exp bias and push   + Why alternatives are not appropriate  71. Gladue – murder bf – aboriginal considerations Jury Selection   * s634 – preemptory challenges * s638 – challenge for cause   + **Strong presumption** jurors will set aside bias   + **Test: Realistic** potential for partiality   + media and race (Parks)   + Worse when **relevant to crim** context or **unable to set aside**  72. Williams – theft – subconscious racism is rampant, challenge for cause with every case | **6. Defence of the Person**   * Crown disprove on BARD * Reasonable perception of assault (experts are useful) * Reasonable amount of force (fail if too much at start of continue) – don’t have to measure with nicety * **34(1)** Elements  1. **Reasonable perception** of assault 2. Without having **provoked** 3. **Not** **intended** to cause death or grievous b harm 4. No more then necessary (**Proportionality**)  * **34(2)** – Broadest scope (**no porp** (but may come into 3&4) or **provocation** and can **have intent)**  1. **Unlawfully** assaulted (does not have to be imminent – hostage, bws) 2. **Causes** death or gbh *justified if* 3. **Reasonable apprehension** of d or gbh ***AND*** 4. Believes on reasonable grounds that cannot otherwise preserve (**no avenue of escape**)  * **37** – Second broadest  1. **defend** self or third party **from assault** 2. no more force then necessary (**Proportionality)**  64. Petel – imminency only one factor in 34(2) 3.4.65. McIntosh – Provoker – not 34(1); yes 34(2)&3566. Pawliuk – Returned to scene – 34(2) ok w/ intent67. Lavallee – murder – reasonable apprehension & avenue of escape: objective, includes history of relationship; subjective, includes bws. **7. Provocation**   * Crown disprove on BARD * Partial D: murder to manslaughter * **232**  1. **Wrongful** act or insult (v did not have legal right) 2. Deprive **ordinary person** of power of self control 3. In the **heat of passion** caused by **sudden** (un prepped mind, close temporal proximity) 4. **Provocation** (subjective)  68. Tran – Murder – 1) act neutral to assused 2) dishonour/breakdown of marriage not ordinary person 3) was searching, no unpreped mind 4) long attack speaks to motive69. Thibert – murder – history of parties relevant to obj and sub **8. Mens Rea**   * Justification ds may negate MR even if unsuccessful  70. Nealy –bar fight murder – Rolled up instructionSentencing  * no presumption of innocence; inquiry into backgrnd * Sentences:   + Diversion   + Absolute Discharge   + Conditional Discharge   + Suspended Sentence   + Conditional Sentence   + Incarceration w/i Prov   + Incarceration w/i fed * Process:   + Look to code provision   + Circumstances of accused and offence (Mitigating and Aggravating)   + Balance s718 factors   + Consider s718.2 factors   + Decision re Provisional sentencing s742.1   + No min; 2yrs; no comm risk; exclu offen * S12 Challenges – cruel and unusual   + Particular person or generally unconst   + Use **reasonable** unjust **hypotheticals**   + Proportionality is critical but not the test   + Test: **Grossly Disproportionate**   + Deference to legislators  73. Howitt – grow op – lots of balancing  * + offence risky; violence; fire; role trusted (speci and gen deter and denunciation) VS no crim past; rehab good; pushed to it; no money to him (proportionality; rehab; jail last resort)  74. Morrisey – death by gun – minimum sentences can violate s12; Not here: hypotheticals showed proportionality (playing around with gun and hunting accident), parol eligibility, someone died  * + Manslaughter through crim negligence: departure from reasonable person with reckless disregard for live (objective)   + Reasonable behave is not wanton or reckless |