

CRIMINAL LAW. Third Edition. By COLIN HOWARD. [Sydney: The Law Book Company Ltd. 1977. liii+461 pp.]

In this new edition, the label 'Australian' has been deleted from the title as both the author and the publishers feel that the time has come to do away with "any suggestion that the contents are of merely parochial relevance" (p. iv). While it is true, as the author has pointed out, that the Australian law "whatever form it takes on particular points, shares its basic assumptions and guiding principles with the rest of the common law, particularly the law of England" and he has cited "numerous precedents and periodical literature from all over the common law world" (p. v), one still cannot help pointing out that the chief currency of this work would probably be among those who are, to borrow a line from the blurb, "concerned with the criminal law in Australia". In jurisdictions where the criminal law has been codified (as in Singapore and Malaysia), it can only be of limited usefulness when students are repeatedly exhorted to "look to the Code, not outside the Code" and where the English students are concerned, it is hard to expect them to choose Howard over Smith & Hogan, the latter being an established standard text.

Further, the 6 states in the Australian Commonwealth are evenly divided into common law jurisdictions and jurisdictions governed by criminal codes. Accordingly, the construction and application of these codes form a necessary part of the book but which is, at best, only esoteric in appeal to those outside Australia.

All this is not to suggest that the book is without its value. The basic approach of the book illustrates a lesson to be learned both by students and the profession in a Code jurisdiction like Singapore. The first step taken is always to examine the law in Australia, be it the store of precedents built up by the Australian courts or Australian statutes. English decisions, whilst not denying their influence, ought to be treated with an acute sense of proportion: undue reliance on the English position is not to be encouraged. Courts in Singapore and Malaysia which are wont to look first to English precedents, and then only to the Code, would do well to consider the Australian experience and learn from it.

In the opening chapter of the book, the state of the criminal law in Australia is placed in perspective with a discussion of origin and sources. The section on terminology, particularly with reference to analysis of offences, is instructive to the Singapore student. Howard urges the abandonment of the traditional analysis of crime into *actus reus* and *mens rea* when "the Codes use neither these expressions nor any exact synonyms for them" and especially when these expressions are "too obscure to be of any practical utility" (p. 9). The section on burden of proof simplifies the subject to an extent, without being misleading, which allows the student of criminal law a painless way of knowing certain fundamental procedural rules of evidence "without which the criminal law cannot be understood." Those of us who, as first-year students, struggled in vain to fathom Rupert Cross's treatment of the subject, will recognise the value of this.

The main change in this edition is the new section "The law in Victoria" under the chapter on theft which attempts to state the law in the wake of the wholesale amendment of the Victorian Crimes Act by the Crimes (Theft) Act 1973 (Vic.). The section was not written by the author but by his colleague, Elliot. He notes that while the Victorian amendments have gone far to remove previous inconsistencies and confusion in the law, the new statute has brought with it other problems which have since surfaced in the course of interpreting the English Theft Act of 1968 on which the Victorian legislation is largely modelled. He then launches into a lively discussion of some of these problems. The author is concerned *inter alia* with the question whether, under the new Act, acts which amount to obtaining property by deception are always capable of redescription as theft, a question which he feels is of practical importance. He puts it thus: "If it is not true that all cases of obtaining property by deception are also cases of theft then we shall need criteria for distinguishing those which are from those which are not. If the criteria are difficult of application they will inevitably generate cases of unmerited acquittal on the technical ground that theft was charged where only the offence of obtaining by deception could apply" (p. 237).

This practical problem is perhaps more apparent than real. Assuming that some criteria exist but are too obscure to be effectively applied, if circumstances are such that deception is used to obtain property and the prosecution is sure of making out a case of obtaining by deception but not so sure of making out a case of theft, one would imagine that the possibility of acquittal on a mere technicality would be avoided by the simple expedient of charging the accused in the alternative: obtaining by deception or theft.

In the example given in which D (Defendant) induced V (Victim) to part with a suit loaned to him (V) by O (Owner), Elliot proposes that whilst D may have committed the offence of obtaining by deception under section 81, he has not committed theft for the reason that, the appropriation necessary to constitute theft involves the assumption of the 'rights of an owner' which do not include V's very limited rights as a bailee (p. 238). It is difficult to reconcile this analysis with Howard's views that the definition of 'owner' in stealing is "wider than elsewhere in the law" and that "D steals if he takes goods not only from the owner in the usual sense but also from someone who is in lawful possession". As Howard points out, "a law of stealing confined to owners as opposed to people in lawful possession would be too limited in its practical application to be of much use" (p. 222). That having been said, it is wondered how Elliot can fail to note that V, having been loaned the suit by its owner, is a bailee in lawful possession.

Elliot further discusses the question whether if V transfers ownership, possession and control of property to D, can D then be said to have appropriated property "belonging to another" (pp. 239-240). Grammatically, 'belonging' connotes the state of *being* in someone (other than D) else's ownership, possession or control at the time of appropriation. Elliot's analysis is in effect to suggest that the words "belonging to another" referred to the point in time immediately before appropriation. Is this really necessary? One ventures to suggest that, in the example given of D purchasing a suit with a stolen cheque, it may well be that even after the suit has been parcelled and handed to D and he pays for it, the suit still belonged to V. As the suit was paid for with a stolen cheque, two things may possibly be said:

- (1) The transfer of ownership, possession and control intended here is clearly not a gratuitous transfer. If so, where no lawful consideration has been given, can the transfer (even if it is effective to pass possession and control) be effective to vest rights of ownership in D?
- (2) If the intended transfer of ownership, possession and control was induced by deceiving V, can this again be said to be effective in vesting rights in D? Even if fraud does not affect the transfer of possession and control, it would surely go some way to vitiate the transfer of ownership.

(Similarly, when V makes a transfer under a mistake.)

Elliot deals at length with the English decision of *Lawrence* [1971] 2 All E.R. 1253 and hesitates to suggest that the decision "unequivocally confirm the view that conviction for theft is possible where V has conferred all his proprietary and possessory rights on D" (p.242). In this connection, it is unfortunate that the author could not have had the benefit of considering *Edwards v. Ddin* [1976] 3 All E.R. 705, a June 1976 decision of the English Queen's bench. This is probably not due to any oversight on the part of the author, for as he has indicated in the preface, the law is stated as *available to him* on 30th June 1976. The report of a June 1976 English decision is quite unlikely to be available in Australia anytime before the book went to press. In *Edwards v. Ddin*, D, who had just had a gallon of petrol

pumped into his tank by an attendant at a garage, drove off without paying. It was held that *D* could not be convicted of theft as the ownership (property) of the petrol passed to *D* when it was pumped into his tank. He drove off with petrol belonging to him, not someone else. It is a matter of speculation, how the author would have dealt with *Edwards v. Ddin*. (The same case would probably have affected his discussion of the Coincidence of Act and Intention in Obtaining Property or Financial Advantage by Deception — see footnote 30 on p. 249).

Apart from this new section on the law in Victoria, Howard notes that “there has been few developments in the criminal law since the last edition” (p. v). That may well be in Australia, but in England, a new spate of cases like *Hyam v. D.P.P.* [1974] 2 All E.R. 41 (H.L.), *Mohan v. The Queen* [1975] 2 All E.R. 193, *D.P.P. v. Majewski* 2 All E.R. 142 and *D.P.P. v. Morgan* [1975] 2 All E.R. 347 has wrought certain changes even in fundamental concepts of intention and foresight.

It is surprising that the controversial case of *D.P.P. v. Morgan* merits only a footnote under the discussion of rape, without any consideration of its wider implications on the defence of mistake and the concept of *mens rea*. Howard reproduces without any change the whole section on “Reasonableness of Mistake”. It is perhaps a testimony to his clarity of mind and ‘inexorable’ sense of logic that despite this, it reads remarkably consistent with the majority judgement in *Morgan*.

The discussion of intoxication as evidence of incapacity to form *mens rea* must be regarded as incomplete as the author, surprisingly has not taken into account the 1975 Court of Appeal decision of *R. v. Majewski* [1975] 3 All E.R. 296 (subsequently affirmed by the House of Lords in *D.P.P. v. Majewski* ([1976] 2 All E.R. 142), the most significant English case on this subject since *D.P.P. v. Beard* [1920] A.C. 479. Although, it is probable that the April 1976 House of Lords decision may not have been available in Australia by 30th June 1976, one certainly cannot say the same of the 1975 Court of Appeal decision!

It remains to be said that Howard writes in an engagingly lucid style without any sacrifice to the erudition of his work.