

# **C**riminal Lawyers' Association

## When is an Offence Committed? – Section 2 of the Criminal Code as a Zen Koan

**“What is the sound of one hand clapping?” is probably the best known Zen Koan. Most of us think of Koans as riddles far removed from rational and logical processes. The Koan might be answered, or enlightenment achieved, through abandoning logical thought.**

According to Professor Barrett, the literal meaning of the word “koan” signifies “court case”, or “a file of legal documents”. Barrett also notes the development of the koan in its historical context - the administration of the law under Chinese emperors. He says law courts were a place of dread, and “hell itself was popularly understood as another court of law writ large in the afterlife”. To resolve the case was to resolve a matter of life and death. But the Koan cannot be resolved through any “form of answer” - resolution comes through enlightenment.

I bear the Koans in mind when I approach the question “When is an offence committed?” As with the sound of one hand clapping, it is tempting to state the obvious - an offence is committed when the physical and mental elements of the defined offence are proved and this occurs without authorisation, justification or excuse. *Criminal Code (NT)* s 2 does not however quite state the obvious. It provides as follows:

### 2. COMMISSION OF OFFENCE

For the purposes of this Part, an offence is committed when a person who possesses any mental element that may be prescribed with respect to that offence does, makes or causes the act, omission or event, or the series or combination of the same, constituting the offence in circumstances where the act, omission or event, or each of them, if there is more than one, is not authorised or justified.

Immediately on reading *Criminal Code (NT)* s 2, the omission of “excuse”

from the section is apparent. Read superficially the section suggests that criminal responsibility could attach to conduct notwithstanding the accused has been “excused”. It is clear however that an accused person who successfully raises an excuse contained in the *Criminal Code (NT)* will escape liability completely in most instances. Common examples are exculpation through s 31 *Criminal Code (NT)* (lack of intent or foresight of the act, omission or event) or s 34 (1) *Criminal Code (NT)* (the excuse of provocation in circumstances not involving death or grievous harm). Further, an accused person partially escapes liability when successfully raising *Criminal Code (NT)* s 34 (2) (provocation), *Criminal Code (NT)* s 41 (coercion) or *Criminal Code (NT)* s 37 (diminished responsibility) which reduce murder to manslaughter.

It would appear that *Criminal Code* s 2 represents an attempt to distinguish between criminal responsibility on the one hand and when “an offence is committed” on the other - the latter expression referring to a state of affairs which is not dependent on whether or not an accused has been excused. If this interpretation is correct, when D kills P with intent to kill an offence is still regarded as having been committed, even though D may be excused by, for example, insanity. However, if D kills P with intent to kill and D is justified (eg through self defence), no offence, according to *Criminal Code* s 2 has been committed. This is a contorted process but is perhaps necessary to give *Criminal Code* s 2 meaning.

In support of this suggested interpretation it must be remembered the *Criminal Code (NT)* envisages the unusual result whereby an accused may still be ordered to pay compensation for damage or injuries arising from the commission of an “offence” notwithstanding acquittal - if that acquittal is on the basis of voluntary intoxication. Further, the *Crimes (Victims Assistance) NT* s 5



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permits victims to claim for assistance after the commission of an “offence”, rather than upon conviction. At this point it would seem possible to answer the Koan one way - “When is an offence committed?” - “When its not committed”.

From the point of view of the successful prosecution of offences, *Criminal Code* s 2 may be significant in the area of accessorial responsibility. For instance, if D has used an innocent agent in the commission of an offence, D is still criminally responsible notwithstanding the acquittal of the agent through, for example, immature age or insanity. The drafting to achieve this result is however unfortunate given that a variety of interpretations of the section are left open. The section is the very cornerstone of criminal responsibility. To interpret the section any other way than suggested would result in D still attracting criminal responsibility in the face of successfully raising an excuse.

A further construction of the section is to assume that *Criminal Code* s 31 is the “prescribed” mental element in all offences, save for those which are specifically excluded. This approach ac-

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anyway.

- Most people will not accuse a person of a grave criminal offence without having a proper basis for doing so.
- Lawyers cannot ensure that witnesses will always comply with a prohibition.
- Juries can act properly on judicial directions regarding the way to deal with the issue of motive.

## HELD

(Per Brennan CJ, Gaudron, Gummow and Kirby JJ) (McHugh J dissenting)

1. The trial miscarried.
2. the fact that an accused has no knowledge of any fact from which a motive of the kind imputed to a complainant in cross examination might be inferred is generally irrelevant.
3. A complainant's account gains no legitimate credibility from the absence of evidence of a motive to lie.
4. It may nevertheless be appropriate in cases for counsel or the judge to put arguments to the jury relating to the validity of a motive to lie which has been asserted in relation to a witness.

A majority of the High Court found the verdict of the jury unsafe and unsatisfactory in view of the strength of the alibi raised by the appellant. The Court therefore quashed the convictions and entered verdicts of acquittal in their place.

## APPEARANCES

### Appellant

Counsel: Kent QC and Simon  
Solicitors: Kemp & Associates

### Respondent

Counsel: Morgan-Payler QC & Silbert  
Solicitors: DPP

## COMMENTARY

It appears that the Supreme Court of the Northern Territory has never been called upon to rule on this issue.

The appellant served almost two years of the sentence imposed by the trial judge before he was released by the High Court.

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knowledges the centrality of *Criminal Code s 31* to offences which do not prescribe a mental element. Under *Criminal Code s 2*, the argument would be that s 31 stands apart from other excuses as it is a prescribed mental element. This argument suggests the lack of the word "excuse" in *Criminal Code s 2* matters not, s 31 is a prescribed mental element and the offence is not committed unless (within the s 31 terminology), an accused person intends the act, omission or event or foresees it as a possible consequence of their conduct. In practice, s 31 *Criminal Code (NT)* provides the fault element for virtually all offences - importantly it must be noted there is controversy on whether s 31 *Criminal Code (NT)* applies to those offences which prescribe a mental element, a majority of the Court of Appeal having found that it does not. There has also been a suggestion by a recent Court of Appeal bench that the Court might be prepared to reconsider *Pregelj*.

A number of offences prescribed in the *Criminal Code (NT)* are prefaced by the term "unlawfully" which is defined as "without authorisation, justification or excuse". Plainly, an offence is not "unlawful" if it is committed without authorisation, justification or excuse, however, this cannot be reconciled easily with *Criminal Code (NT) s 2* which may, depending on the interpretation adopted, impose criminal responsibility on conduct which is excused. The textual difficulties are heightened given the "indiscriminate" use of "unlawfully" throughout the *Criminal Code (NT)* and given that no offences prescribed in other statutes contain the term "unlawfully".

*Section 2 Criminal Code* is rarely raised in argument, hence there are no

reported decisions dealing with its effect on criminal responsibility. The section is troubling given it has all the appearances of being so central to criminal responsibility. Perhaps it is best ignored - but that would be against the ideal of sound practice and would not resolve the koan. "When is an offence committed?" I conclude this cannot be answered through utilising our usual legal skills. I await enlightenment. In the meantime, consider this: the world is blue (like an orange).

– Jenny Blokland, General Counsel  
to the DPP

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