

17:

COMMON OFFENCES

Unlawful Assembly

Section *s73 Penal Code (Cap. 26)*

Description Three or more people assemble together are defined as an “unlawful assembly” and are in breach of the *Penal Code* where, with intent to commit an offence or assemble with intent to carry out a common purpose, they conduct themselves in such a manner as to cause people in the neighbourhood to reasonably fear that they will commit a breach of peace or will needlessly and without reason provoke others to breach the peace.

Elements **Every element (i.e. numbers 1-6) must be proved by the prosecution.**

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused was among three or more assembled persons; **and**
 5. There was a intention to commit an offence or carry out a common purpose; **and**
 6. The accused’s conduct caused another to reasonably believe that the accused or another of the assembled group would either:
 - ⇒ cause a breach of the peace; or
 - ⇒ needlessly or without good reason, provoke others to breach the peace.
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CommentaryBurden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was **the accused** who was among three or more assembled people.

It is irrelevant to this offence if the original assembling was lawful if, once assembled, they conducted themselves with a common purpose in such a manner as contained in the description section above.

Neighbour's belief

The neighbours belief is a subjective test.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

The sentence for this offence is set out in *s74* as one year imprisonment.

Going Armed in Public

Section *s83 Penal Code (Cap. 26)*

Description Every person is guilty of a misdemeanour who, without lawful occasion, goes armed in public in a manner so as to cause fear to any person.

Elements **Every element (i.e. numbers 1-6 below) must be proved by the prosecution**

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused carried arms in a public place; **and**
5. The manner in which the accused carried the arms caused another person to have fear; **and**
6. The occasion in which the accused carried arms was one where it was not lawful to carry arms.

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was *the accused* who carried the arms.

Public place

'Public place' is defined at *s4 Penal Code*.

Fear

The test of a person being in fear is a subjective one. There must be someone present at the time of the offence who was in fear when he or she saw the manner in which the arms were carried.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum Sentence

2 years imprisonment or a fine, (*s41 Penal Code*) or both.

You may also make an order to have the arms forfeited.

Advertisements for Stolen Property

Section *s119 Penal Code (Cap.26)*

Description Every person is guilty of a misdemeanour who publicly offers, or prints or publishes an offer of, a reward for the return of any property which has been stolen or lost, and in the offer uses any words which purport that no questions will be asked or that the person producing the property will not be seized or molested.

Elements **Every element (i.e. numbers 1-5 below) must be proved by the prosecution**

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused publicly made an offer of reward for the return of stolen or lost property; **and**
5. The accused used word in the offer purporting that no questions would be asked or that the person producing such property will not be seized or molested.

OR

4. The accused printed and published an offer of reward for the return of lost or stolen property; **and**
 5. The offer used words purporting that no questions would be asked or that the person producing such property will not be seized or molested.
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Commentary**Burden and standard of proof**

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was *the accused* who offered or advertised the offer.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum Sentence

2 years imprisonment or a fine (*s41 Penal Code*) or both.

Bribe or Attempt to Bribe

Section *s122 Penal Code (Cap. 26)*

Description Any person is guilty of a misdemeanour who, in relation to any offence, bribes or attempts to bribe or makes any promise to any other person, with the intent to either:

- obstruct, defeat or pervert the course of justice in the Court; or
- dissuade any person from doing his or her duty in connection with the course of justice in the Court.

Elements **Every element (i.e. numbers 1-6 below) must be proved by the prosecution**

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused either:
 - ⊖ bribed or attempted to bribe another person; or
 - ⊖ made a promise to another person; **and**
5. The accused did this in relation to an offence; **and**
6. The accused did this with the intention of either:
 - ⊖ obstructing, defeating or perverting the course of justice in the Court; or
 - ⊖ dissuading any person from doing his or her duty in connection with the course of justice in the Court.

CommentaryBurden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was *the accused* who bribed or attempted to bribe.

Intention

Intention is an important element of this offence. Intention may be inferred from the surrounding circumstances before, during or after the offence has been committed.

Bribe

It is important to remember that the bribe or attempt to bribe must be in relation to any offence.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum Sentence

2 years imprisonment or a fine (*s41 Penal Code*) or both.

Resisting Arrest and Escape

Section *s125 Penal Code (Cap. 26)*

Description Any person is guilty of a misdemeanour who, on being arrested for an offence, violently resists any police officer arresting him or her, or being in lawful custody, escapes from such custody.

Elements **Every element (i.e. numbers 1-6 below) must be proved by the prosecution**

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused was being arrested for an offence; **and**
5. The accused violently resisted any police officer arresting him or her.

OR

4. The accused was in lawful custody; **and**
 5. The accused escaped from that custody.
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Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was *the accused* who resisted or escaped.

Arrest

s11 CPC provides that any person or police officer may arrest another person acting under a warrant of arrest.

s18 CPC provides that a police officer may, without a warrant, arrest any person whom he or she suspects upon reasonable grounds of having committed an offence.

Escapes

The accused must escape from lawful custody, i.e. escape from lawful arrest whilst in the custody of the arresting police officer, or from prison custody.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum Sentence

The general penalty for misdemeanour is at *s41 Penal Code*, that is, 2 years imprisonment or a fine or both.

Indecently Insulting or Annoying a Female

Section *s141(3) Penal Code (Cap. 26)*

Description Every person is guilty of a misdemeanour, who:

- intending to insult the modesty of any woman or girl, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman or girl; or
- intrudes upon the privacy of a woman or girl by doing an act of a nature likely to offend her modesty.

Elements **Every element (i.e. numbers 1-6) must be proved by the prosecution.**

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused uttered a word, made a sound gesture or exhibited an object; **and**
5. The accused intended the act to be heard or seen by the woman; **and**
6. The accused intended to insult the modesty of the woman or girl.

OR

4. The person named in the charge is the same person who is appearing in Court; **and**
 5. The accused intruded upon the privacy of a woman by doing an act; **and**
 6. The act was of a nature likely to offend her modesty.
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CommentaryBurden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was **the accused** who uttered any word, made any sound or gesture, or exhibited any object, or intruded upon the privacy of a woman or girl.

Act of a nature likely to offend modesty

The test for this element is objective, i.e. would most woman or girls regard the act of a nature likely to offend the modesty of a woman or girl.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

Maximum one year imprisonment.

Criminal Trespass

Section *s189(1) Penal Code (Cap. 26)*

Description Any person is guilty of a misdemeanour, who:

- enters another person's property with intent to commit an offence, or intimidate or annoy that person; **or**
- having lawfully entered another person's property, unlawfully remains there with intent to intimidate, insult or annoy that person or commit an offence; **or**
- unlawfully persists in coming or remaining upon another person's property after being warned not to come on to leave the property.

Elements Every element (i.e. numbers 1- 6) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date and/or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence is alleged to have been committed; **and**

Specific under s189(1)(a)

4. The accused entered in or onto property; **and**
5. The property was in lawful possession of another; **and**
6. The accused entered with the intention of either:
 - ⊖ committing an offence; or
 - ⊖ intimidating or annoying the other person.

Specific under s189(1)(b)

4. The accused lawfully entered in or onto a property; **and**
5. The property was in lawful possession of another; **and**
6. The accused then unlawfully remained there with the

intention of:

- ⊖ intimidating or annoying the other person; or
- ⊖ committing an offence.

Specific under s189(1)(c)

4. The accused continued to come onto property after being warned not to; **and**
5. The property was in lawful possession of another; **and**
6. The accused did not have a lawful right to come onto the property.

OR

4. The accused remained upon property after being warned to leave; **and**
5. The property was in lawful possession of another; **and**
6. The accused did not have a lawful right to remain on the property.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was *the accused* who committed the offence i.e. it was *the accused* who unlawfully trespassed.

Property in the possession of another

This will include ownership and lease and any other kind of possession. The possession must be lawful. You can infer that a person in possession of property includes family members or others who live there, even if they are not the person named on the title or lease.

Charges under s189(1)(a)

Intention

The prosecution must prove that the accused intended to commit an offence or intimidate, insult or annoy the other person. It is the accused's intention that is important. You may have to infer this from the circumstances. The prosecution does not have to prove that the accused actually committed an offence or intimidated, insulted or annoyed the other person —intention to do so is enough.

Charges under s189(1)(b)

Lawful entering

The accused must have entered the property for a lawful purpose. This includes being invited onto the property by the other person, entering to deliver something or other good reason.

Unlawfully remaining

The prosecution must prove that there was no lawful reason for remaining. If the other person asks the accused to leave and he or she does not, the accused is unlawfully remaining. If the lawful entering was something like making a delivery, as soon as that has been done, the accused should leave the property, otherwise he or she is unlawfully remaining.

Intention

The prosecution must prove that the accused intended to commit an offence or intimidate, insult or annoy the other person. It is the accused' intention that is important. You may have to infer this from the circumstances. The prosecution does not have to prove that the accused actually committed an offence or intimidated, insulted or annoyed the other person —intention to do so is enough.

Charges under s189(1)(c)

Unlawfully persists or remains

The prosecution must prove that:

- the accused was warned not to come onto, or to leave, the property; ***and***
- there was no lawful reason for coming onto or remaining on the property.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

3 months imprisonment, ***except*** where the property in which the offence is committed is a building, tent or structure used as a human dwelling, or as a place of worship, or a place for the custody of property, then the offender shall be liable to 1 year imprisonment.

Drunk and Incapable

Section *s179 Penal Code (Cap. 26)*

Description Any person is guilty of an offence if found in a public place drunk and incapable of taking care of himself or herself.

Elements **Every element (i.e. numbers 1-6 below) must be proved by the prosecution**

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused must have been found in a public place; **and**
5. The accused must have been drunk at the time he or she was found; **and**
6. The accused must be drunk to the extent that he or she was incapable of taking care of him or herself.

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was *the accused* who was drunk and incapable.

Drunk and incapable

To merely say that a person was drunk is to express an opinion. The Court needs to hear evidence of drunkenness such as unsteady walk, slurring of words, strong smell of liquor or sleepy and unable to walk. In addition, the prosecution must show that the accused was incapable of taking care of himself or herself.

Public place

The accused must have been found in a public place in that state. Public place is defined in *s4 Penal Code*.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

**Maximum
Sentence**

\$20 fine.

Causing Death by Reckless or Dangerous Driving

Section *s238(1) Penal Code (Cap. 26)*

Description Every person is guilty of a misdemeanour, who causes the death of another person by driving a motor vehicle on a road:

- recklessly; or
- at a speed or manner dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road.

Elements **Every element (i.e. numbers 1-5) must be proved by the prosecution.**

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused caused the death of another person by driving a motor vehicle on a road; **and**
 5. The accused was driving either:
 - ⊖ recklessly; or
 - ⊖ at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic actually on the road or reasonably expected to be on the road.
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CommentaryBurden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court. The prosecution must provide evidence to prove that it was **the accused** who caused the death of another by driving that was either reckless or dangerous to the public.

Motor Vehicle

See the *Land Transport Act* for definitions.

Recklessly

Reckless driving is when a person is aware of that there is a risk in their driving in a certain manner and it is, in the circumstances known to him or her, unreasonable to take that risk.

Speed or manner dangerous to the public

See definition of “public” in *Chapter II Penal Code*.

Nature, condition or use of the road

The prosecution will have to provide evidence to show the particular nature, conditions or use of the road, if the charge is based on this ground.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence. The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

Maximum five years imprisonment. The provisions of *s30, 31, 32* and *42* of the *Traffic Act* relating to disqualifications from holding or obtaining a driving licence; the endorsement of holding driving licences and restrictions on prosecution shall apply to prosecutions under *s238(1)* of the *Penal Code*.

Common Assault

Section *s244 Penal Code (Cap. 26)*

Description Every person is guilty of a misdemeanour who unlawfully assaults another.

Elements **Every element (i.e. numbers 1-5 below) must be proved by the prosecution**

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused used physical force on another person; **and**
 5. There was no legal excuse for the force being used.
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Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was *the accused* who assaulted another.

Assault

Assault includes actual physical contact. The accused must have some hostile intention.

The accused must be in a position capable of causing violence so

that the complainant would apprehend imminent danger to him or herself.

Physical force

The physical force used by the accused against the complainant must be without the complainant's consent.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum Sentence

1 years imprisonment **if** the assault is not committed in circumstances for which a greater punishment is provided in the *Penal Code*.

Simple Larceny (Theft)

Section *s261 Penal Code (Cap. 26)*

Description A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen, with intent at the time of such taking to permanently to deprive the owner of the thing.

Elements **Every element (i.e. numbers 1-7) must be proved by the prosecution.**

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused took and carried away anything capable of being stolen; **and**
 5. The accused did this without the consent of the owner; **and**
 6. The accused did this fraudulently and without a claim of right made in good faith; **and**
 7. The accused, at the time of such taking, intended to permanently deprive the owner of the thing.
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Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was **the accused** who stole the property.

Capable of being stolen

Section 257 Penal Code defines what things are capable of being stolen.

Takes

The expression “takes” includes obtaining possession:

- by any trick;
- by intimidation;
- under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained; or
- by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps: *s258(2)(a) Penal Code*.

Carries away

The expression “carries away” includes any removal of anything from the place which it occupies, but in the case of a thing attached, only if it has been completely detached: *s258(2)(b) Penal Code*.

Owner

See definition in *s4 Penal Code* at “Person” and “Owner”.

Under *s258(2)(c)*, the expression “owner” includes any part owner, or person having possession or control of, or a special property in, anything capable of being stolen.

Whether the owner is named or not, ownership must be proved by the prosecution as an essential element of the offence.

Bailee / part-owner

Such person may be guilty of stealing any such thing notwithstanding that he or she has lawful possession of the thing, if, being a bailee or part-owner of the thing, he or she fraudulently converts the thing to his or her own use or the use of a person other than the owner: *s258(1) Penal Code*.

Without claim of right made in good faith

See definition of bona fide claim of right in *s8 Penal Code*. An

accused may have a valid defence where he or she has an honest belief that he or she has a legal right to take the goods in question.

Intent at the time of taking to permanently deprive

See general rules regarding intent in *s9 Penal Code*.

There must be a coincidence of *actus reus* and *mens rea* for this element to stand, although issues of continuing trespass against the owner's property may arise.

The requirement of permanent deprivation disqualifies situations of borrowing or temporary possession.

Fraudulently

Usually the intent to defraud will consist of an intention to steal but not always so.

A fraud is complete once a false statement is made by an accused who knows the statement is false and the victim parts with his or her property on the basis of that statement: See *Denning* [1962] NSWLR 175.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

For instance, the defence may raise a belief of honest claim of right which the prosecution must rebut.

Sentence

Stealing for which no special punishment is provided under the *Penal Code* or any other Act is simple larceny and a felony punishable with a maximum imprisonment of five years.

If any person has been previously convicted of felony, the offence of simple larceny is liable to maximum imprisonment of 10 years. If previously convicted of a misdemeanour under *Chapter XXVII* or under *Chapter XXXV*, the offence of simple larceny is punishable by a maximum imprisonment of seven years: *s261 Penal Code*. Note the limits to your sentencing jurisdiction.

Conversion Under s278(1)(a)

Section *s278(1)(a) Penal Code (Cap. 26)*

Description Any person is guilty of a misdemeanour, who:

- is entrusted solely or jointly with another person with power of attorney to sell or transfer any property; and
- fraudulently sells, transfers or otherwise converts any part of the property to his or her own use or benefit or to the use or benefit of a person other than the person by whom he or she was entrusted.

Elements **Every element (i.e. numbers 1-7) must be proved by the prosecution.**

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused was solely or jointly entrusted with power of attorney to sell or transfer any property; **and**
 5. The accused sold, or transferred, or otherwise converted, any part of the property; **and**
 6. This was done fraudulently; **and**
 7. This was done for his or her own benefit or the benefit of a person other than the one by whom he or she was entrusted.
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Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.
Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was **the accused** who sold, transferred or converted the property.

See *R v Boyce* 40 Cr. App. R 62, 63:

“it is essential that three things should be proved to the satisfaction of the jury; first the money was entrusted to the accused person for a particular purpose, secondly that he used it for some other purpose and thirdly that the misuse of money was fraudulent and dishonest.”

Entrusted with power of attorney

“Entrusted” requires a fiduciary element. See *Stephens v The Queen* (1978) 139 CLR, 315.

Property

See definition in *Chapter II Penal Code*.

Fraudulently

Usually the intent to defraud will consist of an intention to steal but not always so.

A fraud is complete once a false statement is made by an accused who knows the statement is false and the victim parts with his or her property on the basis of that statement: See *Denning* [1962] NSWLR 175.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

Maximum seven years imprisonment. Note the limits to your sentencing jurisdiction.

Conversion Under s278(1)(c)

Section *s278(1)(c), s278(2) Penal Code (Cap. 26)*

Description Any person is guilty of a misdemeanour, who:

- being entrusted solely or jointly with another person with any property in order that he or she may retain in safe custody, apply, pay or deliver to another any part of the property or proceeds from the property; or
- having solely or jointly received any property for or on account of any other person,

fraudulently converts to his or her own use or benefit or the use or benefit of any other person, any part of the property or proceeds.

Elements **Every element (i.e. numbers 1-6) must be proved by the prosecution.**

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused was entrusted solely or jointly to, either:
 - ⊖ retain, apply, pay, or deliver any part of the property or proceeds to another; or
 - ⊖ receive property on the account of another; **and**
 5. The accused converted to his or her own use or benefit or to the use or benefit of any other person any part of the property or proceeds from the property; **and**
 6. This was done fraudulently.
-

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was **the accused** who converted the property to his or her benefit or the benefit of another.

Non-application to trustees

Section 278(2) states *ss(1)(c)* does not apply to or affect any trustee under any express trust created by a deed or will, or any mortgage of any real or personal property, in respect of any act done by the trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage.

Fraudulently

Usually the intent to defraud will consist of an intention to steal but not always so.

A fraud is complete once a false statement is made by an accused who knows the statement is false and the victim parts with his or her property on the basis of that statement: See *Denning* [1962] NSWLR 175.

Entrusted with power of attorney

“Entrusted” requires a fiduciary element. See *Stephens v The Queen* (1978) 139 CLR, 315.

Property

See definition in *Chapter II Penal Code*.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

Maximum seven years imprisonment. Note the limits to your sentencing jurisdiction.

Miners Removing Minerals

Section *s287 Penal Code (Cap. 26)*

Description Every person is guilty of a felony who, when employed in or about any mine, takes, removes or conceals any mineral found in such a mine, with the intent to defraud any owner or adventurer in such mine or any workman or miner employed there or the holder of any mining licence or prospecting licence.

Elements **Every element (i.e. numbers 1-6 below) must be proved by the prosecution**

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused was employed in or about the mine; **and**
 5. The accused took, removed, or concealed any minerals found or contained in the mine; **and**
 6. The accused did this with the intention to defraud:
 - ⊖ -any proprietor of the mine; or
 - ⊖ -any adventurer of the mine; or
 - ⊖ -any workman or miner employed in the mine; or
 - ⊖ -the holder of any mining licence prospecting licence.
-

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was *the accused* who removed the mineral.

Minerals

Minerals are defined under *s3 Mines and Mineral Act (Cap. 42)* as any substance found naturally in or on the earth formed by or subject to a natural geological process, but does not include petroleum as defined in *s3(1) Petroleum (Exploration) Act*.

Intention

Intention is an important element of this offence. Intention may be inferred from the surrounding circumstances before, during and after the commission of the offence.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum Sentence

2 years imprisonment.

All Magistrates are able to try this offence, however First and Second Class Magistrates may only pass sentence up to their sentencing limit.

False Pretences Under s308(a)

Section *s308(a) Penal Code (Cap. 26)*

Description Any person is guilty of a misdemeanour, who, by false pretence and with intent to defraud, either:

- obtains from any other person any chattel, money, or valuable security; or
- causes or procures any money, chattel or valuable security to be delivered to him or herself or to any other person,

for the use, benefit or on account of him or herself or any other person.

Elements **Every element (i.e. numbers 1-7) must be proved by the prosecution.**

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused falsely promised; **and**
 5. The accused either:
 - ⊖ him or herself, or through another, obtained any chattel, any money, or valuable security; or
 - ⊖ caused or procured any money to be paid, or any chattel or valuable security to be delivered to him or herself or another; **and**
 6. The property was for the use or benefit of the accused or some other person; **and**
 7. The accused did this with the intent to defraud.
-

CommentaryBurden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was **the accused** who falsely pretended.

False pretence

False pretence is defined as any “representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows it to be false, or does not believe to be true”: *s307 Penal Code*.

Intent to defraud

See general rules on intent in *s9* of the *Penal Code*.

The intent to defraud may be inferred from the facts of the case.

A fraud is complete once a false statement is made by an accused who knows the statement is false and the victim parts with his or her property on the basis of that statement: See *Denning* (1962) NSWLR 175.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

Maximum five years imprisonment.

False Pretences Under s308(b)

Section

s308(b) Penal Code (Cap. 26)

Description

Any person is guilty of a misdemeanour who, by false pretences, with intent to defraud or injure any other person, fraudulently causes or induces any other person to, either:

- execute, make, accept, endorse or destroy the whole or any part of any valuable security; or
- write, impress, or affix upon any paper or parchment:
 - ⇒ his or her name;
 - ⇒ the name of any other person; or
 - ⇒ the seal of any body corporate or society,in order that the same may be afterwards made or converted into, or used or dealt with as, a valuable security.

Elements

Every element (i.e. numbers 1-6) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused falsely promised; **and**
5. The accused fraudulently caused or induced any other person to:
 - ⇒ execute, make, accept, endorse or destroy any part of any valuable security; or
 - ⇒ write, impress, or affix upon paper or parchment, his or her name or the name of any other person or the seal of any body corporate or society, in order to be made, converted into, or used or dealt with as a valuable security; **and**
6. The accused did this with intent to defraud or injure any person.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was **the accused** who falsely pretended.

False pretence

False pretence is defined in the *Penal Code* as any “representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows it to be false, or does not believe to be true”: *s307 Penal Code*.

Intent to defraud

See general rules on intent in *s9* of the *Penal Code*.

The intent to defraud may be inferred from the facts of the case.

A fraud is complete once a false statement is made by an accused who knows the statement is false and the victim parts with his or her property on the basis of that statement: See *Denning* [1962] NSWLR 175.

Induces any other person

The false pretence must induce the victim to part with his or her property.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

Maximum five years imprisonment.

False Declarations on Passports

Section *s312 Penal Code (Cap. 26)*

Description Any person is guilty of a misdemeanour who makes a statement which is to his or her knowledge untrue, for the purpose of procuring a passport, whether for himself or herself or any other person.

Elements **Every element (i.e. numbers 1-6 below) must be proved by the prosecution**

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused made a statement; **and**
5. The accused knew the statement to be untrue; **and**
6. The statement was made for the purpose of obtaining a passport either for the accused or for another person.

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was *the accused* who made the false declaration.

Truth of the statement

It is no defence that the alleged untrue statement made by the accused is in fact true.

It is sufficient that, to the knowledge of the accused, the statement was untrue at the time he or she made it.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum Sentence

2 years imprisonment or a fine (*s41 Penal Code*) or both.

Removing Boundary Marks

Section *s329 Penal Code (Cap. 26)*

Description Any person is guilty of a felony who, wilfully and unlawfully and with intent to defraud, removes or defaces any object or mark which has been lawfully erected or made as an indication of the boundary of any land.

Elements **Every element (i.e. numbers 1-5 below) must be proved by the prosecution**

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused removed or defaced any object or mark lawfully erected or which indicated the boundary of any land; **and**
5. The accused did so wilfully and unlawfully and with an intent to defraud another.

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was *the accused* who removed or defaced the object or mark.

Wilful

This is an important part of the offence. The prosecution needs to prove the accused removed or defaced the object or mark wilfully, and not by accident or mistake.

Intention to defraud

Intention to defraud may be inferred from the surrounding circumstances before, during and after the offence.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

**Maximum
Sentence**

3 years imprisonment.

All Magistrates are able to try this offence: See *s27(3) Magistrates' Courts Act*.
