

# DISCUSSION CLASS

CRW2601



UNISA



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of south africa



# General Principles of Criminal Law

## Introductory Topics

- Chapter 1**
- Theories of punishment (Read only)
  - Criminal liability (Summary)

## Principle of Legality

- Chapter 2**
- Concept of legality
  - Principle of legality
  - *ius acceptum*
  - *ius praeivium*
  - *ius certum*
  - *ius strictum*

## Criminal Liability

- Chapters 3-13**
- **Act** / Omissions
  - **Definitional Elements**/Causation
  - **Unlawfulness**
  - **Culpability** / Criminal capacity
  - Culpability / Intention
  - Culpability / Negligence
  - Intoxication / Provocation / Disregard of culpability / Corporate bodies

## Participation/ Attempt, Conspiracy, Incitement

- Chapters 14-16**
- **Perpetrators**  
Common purpose, joint-in
  - **Accomplices**
  - **Accessories after the fact**
  - **Attempt, Conspiracy, Incitement**

# STUDY UNIT 1

## INTRODUCTORY TOPICS

### SG: 1 - 11

#### Theories of punishment

Absolute theory

Retribution

Relative theories

Prevention

Deterrence

Reformation

Individual deterrence

General deterrence

Combination theory

*Zinn-triad:*  
crime,  
criminal;  
interests of  
society





# Criminal liability

## Act / Conduct

- Act or omission
- Voluntary

## Compliance with the definitional elements of the crime

## Unlawfulness

- Contrary to law
- Seen against totality of the rules of law
- Grounds of justification

## Culpability

- Criminal capacity = the ability to appreciate wrongfulness of act + to act in accordance with such appreciation
- Intention / Negligence

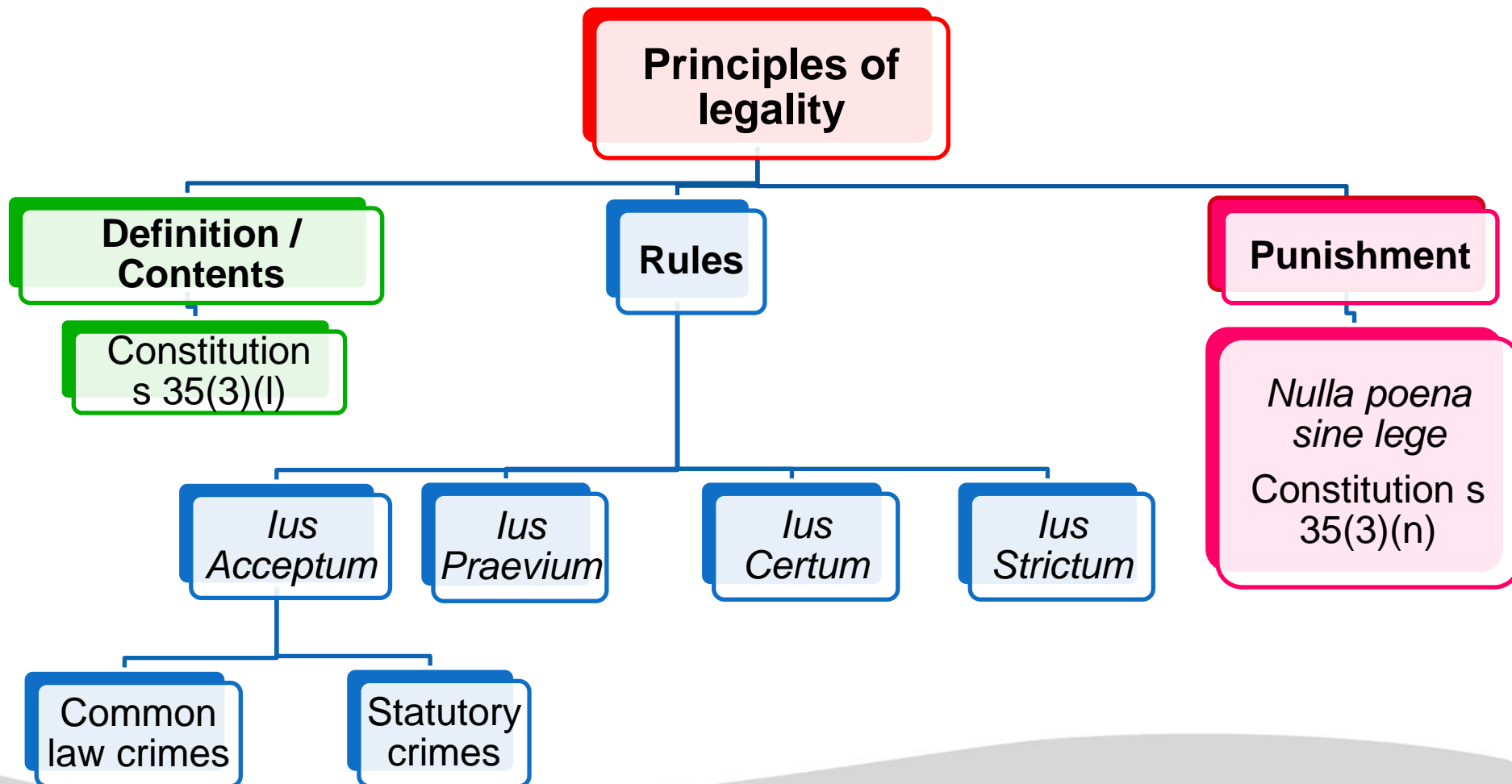
## • **Sequence**

**A**CT +  
**C**ompliance with definitional elements +  
**U**nlawfulness +  
**C**ulpability =  
**L**iability

# STUDY UNIT 2

## THE PRINCIPLES OF LEGALITY

### SG: 12 - 26



# DEFINITION AND CONTENTS OF PRINCIPLE OF LEGALITY

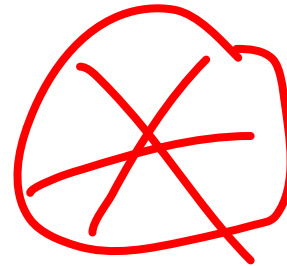
- *Nullum crimen sine lege* - “no crime without a legal provision”
- Section 35(3)(l) of Constitution

An accused,

- (1) **may not be convicted** of a crime -
  - (a) unless the **type of conduct** with which he is charged has been **recognised by the law as a crime**
  - (b) in **clear terms**
  - (c) **before** the conduct took place
  - (d) without it being **necessary to interpret the words** in def. **broadly**; and
- (2) if **convicted**, not be **sentenced** unless the **sentence also complies** with the four requirements in 1(a) – (d)

## Rules

- (1) Court may not create a crime –  
*lus acceptum*
- (2) Court may only find accused guilty of a crime if act was recognised as a crime at the time of commission –  
*lus praeivium*
- (3) Crimes must not be formulated vaguely –  
*lus certum*
- (4) Court must interpret definition of crime narrowly rather than broadly –  
*lus strictum*
- (5) Above rules must also apply to sentencing –  
*Nulla poena sine lege*



# Ius Acceptum

- **Common law crimes**

No provision in common law – no crime - a court has no legislative powers

- **Statutory crimes**

Parliament creates a crime – Act must declare (1) which type of conduct is a crime, and (2) what the punishment is.

Distinguish between a

1. **Legal norm** – Provision in Act creating a legal rule which does not create a crime
2. **Criminal norm** – Provision in Act making clear that certain conduct constitutes a crime
3. **Criminal sanction** – Provision in Act stipulating what punishment a court must impose after conviction.

***Director of Public Prosecutions, Western Cape v Prins* 2012 (2) SACR 183 (SCA):**  
No crime created in the absence of a penalty clause in the particular legislation –  
**imposition of punishment is left to the discretion of the court.**



# *Ius Praevium*

- Creation of a crime with retrospective effect not legal
- Section 35(3)(l) of Constitution

# *Ius Certum*

- Crimes must be formulated clearly, not vaguely

# *Ius Strictum*

- Provisions creating crimes must be interpreted strictly
- Where doubt exists concerning interpretation – accused must be given benefit of the doubt
- Court is not authorised to extend crime's field of application
- Court may extend field of application in exceptional circumstances; to promote the values enshrined in the Constitution (*Masiya*-case)
- Extension of definition of rape

# *Principle of legality in punishment*

- *Nulla poena sine lege* - No penalty without a statutory provision or legal rules
- *Ius Acceptum* – Court can only impose punishment prescribed by statutory or common law
- *Ius Praevium* – If punishment is increased, may not be imposed to detriment of accused
- *Ius Certum* – Punishment ought to be defined clearly
- *Ius Strictum* – An ambiguous punishment must be interpreted strictly

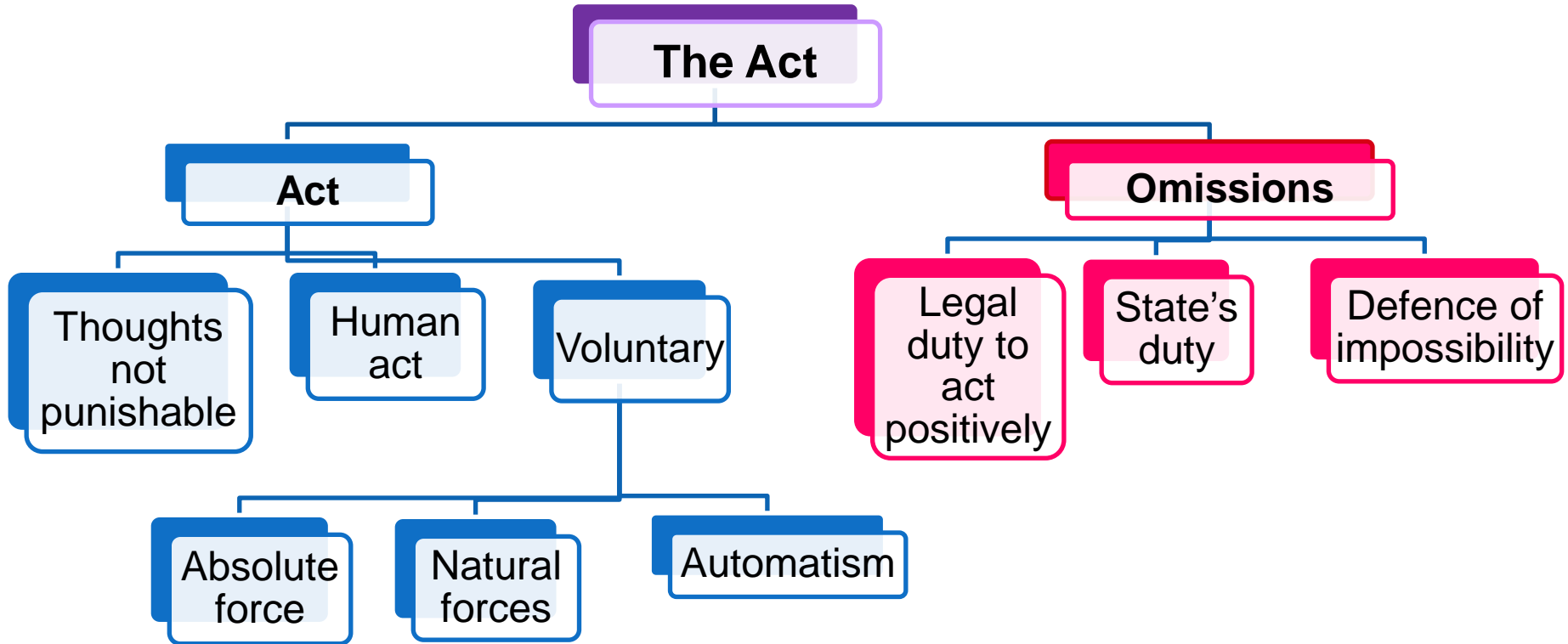
## Summary of the effect of the rules embodied in the principle of legality

<b>Principle</b>	<b>Effect on definition of the crime</b>	<b>Effect on punishment</b>
<i>Ius Acceptum</i>	<ul style="list-style-type: none"> <li>• Conduct should be recognised by law as crime</li> <li>• Courts may not create crimes</li> <li>• S 35(3) (1) of Constitution</li> </ul>	<ul style="list-style-type: none"> <li>• Punishment must be recognised and prescribed by law</li> <li>• Courts may not create punishment</li> <li>• Inferred from S 35(3)</li> </ul>
<i>Ius Praevium</i>	<ul style="list-style-type: none"> <li>• Act must be recognised as crime at commission</li> <li>• S 35(3) (1) of Constitution</li> </ul>	<ul style="list-style-type: none"> <li>• Punishment, increased after commission, may not be imposed to detriment of accused</li> <li>• S 35(3) (n) of Constitution</li> </ul>
<i>Ius Certum</i>	<ul style="list-style-type: none"> <li>• Crimes must be defined clearly</li> <li>• Inferred from S 35(3) of Constitution</li> </ul>	<ul style="list-style-type: none"> <li>• Punishment must be clear</li> <li>• Inferred from S 35(3) of Constitution</li> </ul>
<i>Ius Strictum</i>	<ul style="list-style-type: none"> <li>• Court should interpret definitions strictly</li> <li>• Inferred from S 35(3) of Constitution</li> </ul>	<ul style="list-style-type: none"> <li>• Courts should interpret description of punishment strictly</li> <li>• Inferred from S 35(3) of Constitution</li> </ul>

# STUDY UNIT 3

## THE ACT

SG: 27 - 44



# THE ACT

## A. Description

- a. “Conduct”, “act” and “omission”
- b. Thoughts not punishable
- c. Voluntary human act or omission – if X is capable of subjecting his bodily movements to his will or intellect

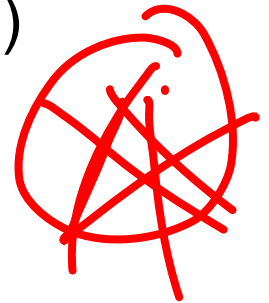
# VOLUNTARINESS

## B. Factors which exclude the voluntariness of the act

- Absolute force (*vis absoluta*) vs. relative force (*vis compulsiva*):  
Absolute force – excludes X's ability to subject his bodily movements to his will or intellect.  
Relative force – ability is left intact (*Goliath* case)

• Natural forces

• Automatism – mechanical behaviour of an automaton



## Sane automatism

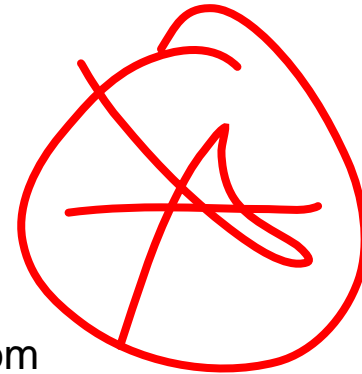
- Momentarily acted like an automaton – excludes voluntary act
- Onus of proof that act was performed voluntarily rests on the state – but X must provide evidential basis for defence, e.g. calling medical or expert evidence
- Successful defence – X leaves court a free person
- *Dhlamini* case – Stabbed and killed another while having a nightmare
- *Henry* case – shoots wife and mother-in-law in rage – appeal fails, no reasonable possibility that accused in state of automatism

## Insane automatism

- Defence of mental illness (insanity)
- Onus of proof on X to prove his mental illness
- Successful defence – X is committed to psychiatric hospital, loses freedom

## Antecedent liability

- X knows of risk, but still proceeds to act
- *Victor* - Knows effects of epileptic attacks, but still drives
- Performed voluntary conduct, even though risk of involuntary act, e.g. diabetes, epilepsy, low blood pressure, etc.
- Liable for crimes requiring culpability in the form of negligence





# OMISSIONS

## Description

- An omission is punishable only if there is a legal duty to act positively
- The **legal convictions of the community** require X to act positively  
(*Minister van Polisie v Ewels*)

## Legal duty: specific instances

- Statute
- Common law
- Agreement
- Responsibility for control of dangerous or potentially dangerous object
- Protective relationship
- Previous positive act
- Office
- Order of court

Expand



Legal duty	Example
Statute	Income tax – must submit tax forms
Common law	Treason – must report to police
Agreement	Railway crossing – <i>Pitwood</i> -case
Control of dangerous object	Baboon – <i>Fernandez</i> -case
Protective relationship	Parent or guardian – <i>B</i> -case
Previous positive act	Fire in veldt – go without extinguishing it
Office	Police – <i>Ewels</i> -case
Order of court	Omits to pay maintenance

**Does the State have a duty to protect citizens from violent crime?**

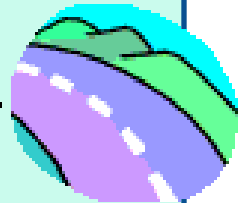


# The defence of impossibility

Omission must be **voluntary** - if it is possible to perform positive act

**Requirements** for defence of impossibility:

1. Legal provision which is infringed **must place a positive duty** (not mere prohibition)
2. Must **be objectively impossible** to comply with the legal provision – no person in that position must be able to comply. Inconvenience no impossibility (*Leeuw*-case – drives without licence, could not do test in particular area)
3. X must **not be responsible** for creating situation of impossibility



# STUDY UNIT 4

## THE DEFINITIONAL ELEMENTS AND CAUSATION

SG: 45 - 62

DEFINITIONAL ELEMENTS

Causation

Factual causation

Legal causation

Courts' approach and case law

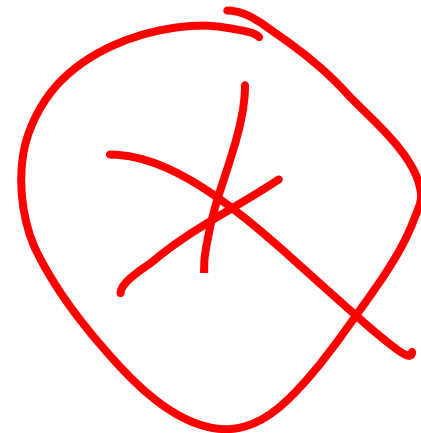
*Conditio sine qua non*

\* Policy considerations  
Theories:  
- Individualisation  
- Adequate causation  
- *Novus actus interveniens*

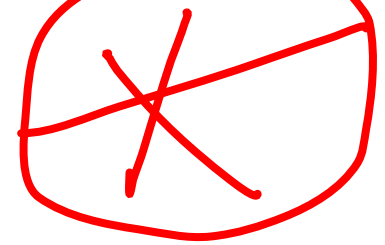
# THE DEFINITIONAL ELEMENTS AND CAUSATION

## 1 *The definitional elements*

- Concise description of the requirements set by law for liability for a specific type of crime.
- Differentiates between different crimes re:
  - Kind of act prohibited
  - Circumstances
  - Characteristics of person
  - Nature of object
  - Particular place
  - Particular time
- “Definitional elements” vs “definition of a crime”



## 2 Causation



### – Formally vs. materially defined crimes

- Formally – Definitional elements **proscribe a certain conduct** irrespective of what the result of the conduct is; e.g. perjury, possession of drugs
- Materially – Definitional elements **do not proscribe a certain conduct**, but any conduct which **causes** a specific condition; e.g. murder, culpable homicide, arson (Result or consequence crimes)

### The issue of causation

- Materially defined crimes – Causal link between conduct and prohibited result
- NB with murder and culpable homicide
- “Cause of death”
  - Did act cause the death?
  - Did act precipitate (hasten) the death?



## – Principles

### – Basic principle

- First determine whether X's act was the factual cause of Y's death
- Then determine if act was also legal cause – policy considerations

### – Factual causation (*Conditio sine qua non*)

- Condition without which the prohibited situation would not have materialised – (“*but for*”)
- If act cannot be thought away without the situation disappearing at the same time
- *Daniels case* – Two people shoot taxi driver – back & head

## – Legal causation

❑ **Policy considerations** – reasonable, fair and just

❑ **Theories**

➤ **Individualisation theory**

- Look for the most operative factual cause as the legal cause of prohibited situation
- *Objection:* Two or more conditions are often operative in equal measure

➤ **Adequate causation theory**

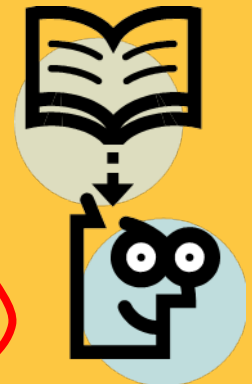
Act is a legal cause of a situation if:

- according to human experience
- in the normal course of events
- the act has the tendency to bring about that kind of situation

➤ ***Novus actus interveniens***

- New intervening event – chain of causation broken
- Unexpected, abnormal or unusual occurrence
- Differs slightly from test of adequate causation

❑ **Courts may apply one or more theory, or none**





# Courts' approach to legal causation

- *Grotjohn* – Assisted suicide – causal link between X's act and Y's death – Y's own act not *novus actus interveniens*.
- *Daniels* - X shoots Y in back – Y would die in 30 min.  
Latecomer Z shoots Y in head  
Majority – “- policy considerations –  
X is legal cause of Y's death  
Minority – head shot – *novus actus interveniens*
- *Mokgethi* – Bank teller (Y) wounded in robbery – paraplegic, but did not follow doctor's orders – dies from septicaemia after 6 months. Wounding – *conditio sine qua non*, but not legal cause. Policy considerations – X's act too remote from result



- *Tembani* – Accused (X) shoots Y twice. Y admitted to hospital. Medical personnel negligent. Y dies from wounds.



Can negligent medical care be regarded as a new, intervening cause that exempts the original assailant from liability?

The deliberate infliction of an **intrinsically dangerous wound** to Y from which Y was **likely to die without medical intervention** must generally lead to liability. Irrelevant whether wound was treatable or whether treatment was negligent or sub-standard.



**Only exception** – if Y had recovered to such an extent that the original injury no longer posed a danger to her life.



Approach justified because of two policy considerations:

1. An assailant who deliberately inflicts fatal wound consciously embraces death ensuing – intervening persons do not diminish moral culpability of perpetrator
2. Legal liability cannot be imputed on supposition that efficient and reliable medical attention would be accessible, especially in our country. In SA, improper medical treatment not abnormal nor extraordinary – not *novus actus interveniens* exempting accused from liability

# STUDY UNIT 5

## UNLAWFULNESS

SG: 63 - 79

Act



Definitional elements



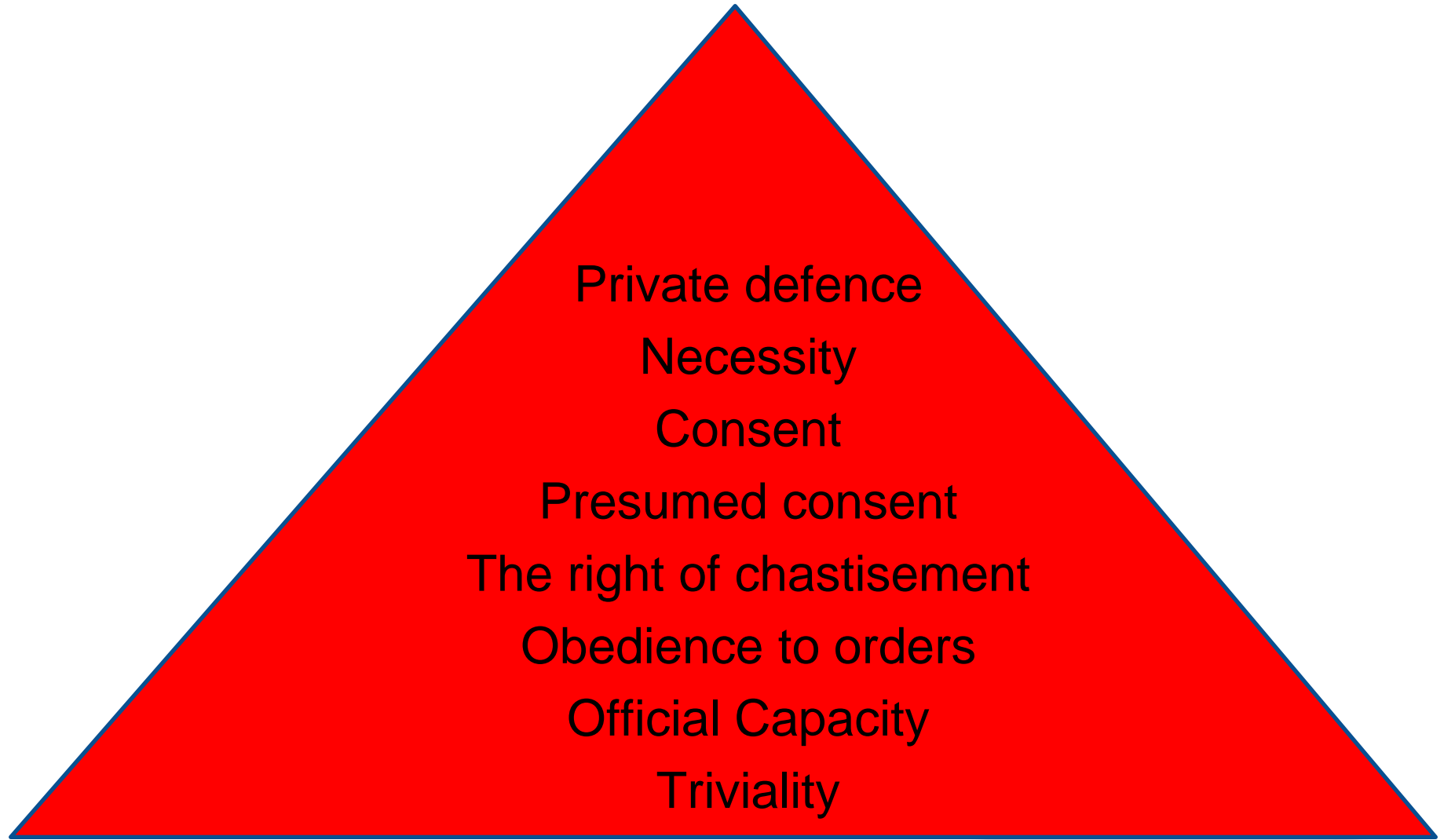
**Unlawfulness**



Culpability

- Unlawfulness (‘without justification’):
- **Conduct is unlawful if it conflicts with the *boni mores* (good morals) or legal convictions of society.**
- An act which complies with the definitional elements is provisionally (*prima facie*) unlawful.
- One must look at the grounds of justification (defence) as this may then exclude unlawfulness. If the defence fails then the conduct will be unlawful.

- Examples of grounds of justification:



# 1. PRIVATE DEFENCE:

- Test for PD = OBJECTIVE
- What about **putative private defence**?  
Not lawful but may escape liability as lack of culpability.



# Requirements for the attack

## 1. Must be unlawful

- need not be accompanied by culpability (can do PD against mentally ill; children; mistake)
- Not PD if against animals = necessity
- Attack need not be directed at the defender; may protect 3<sup>rd</sup> person
  - *Patel*

## 2. Directed against interests which should be protected

- *S v Van Wyk* - kill to protect property
- *Van Vuuren* – to protect dignity

## 3. Threatening but not yet complete

- *Mogohlwane* – although time elapsed, attack not yet completed.



# Requirements for the defence

1. Directed against the attacker
2. Must be necessary  
Snyman: Duty to flee:  
says no! (see p 108)
3. Reasonable relationship to the attack (*Steyn*-case)
  - not be more harmful than necessary
  - reasonable?
    - \*relative strength
    - \*sex; ages
    - \*means at disposal
    - \*nature of threat
    - \*value of interest
    - \*persistence of attack
4. The defender must be aware that he is acting in private defence

# Reasonable relationship?

Need not be proportionality between:

1. Nature of interests threatened and impaired
2. The weapons or means used by the parties
3. The value or extent of the injuries between the parties

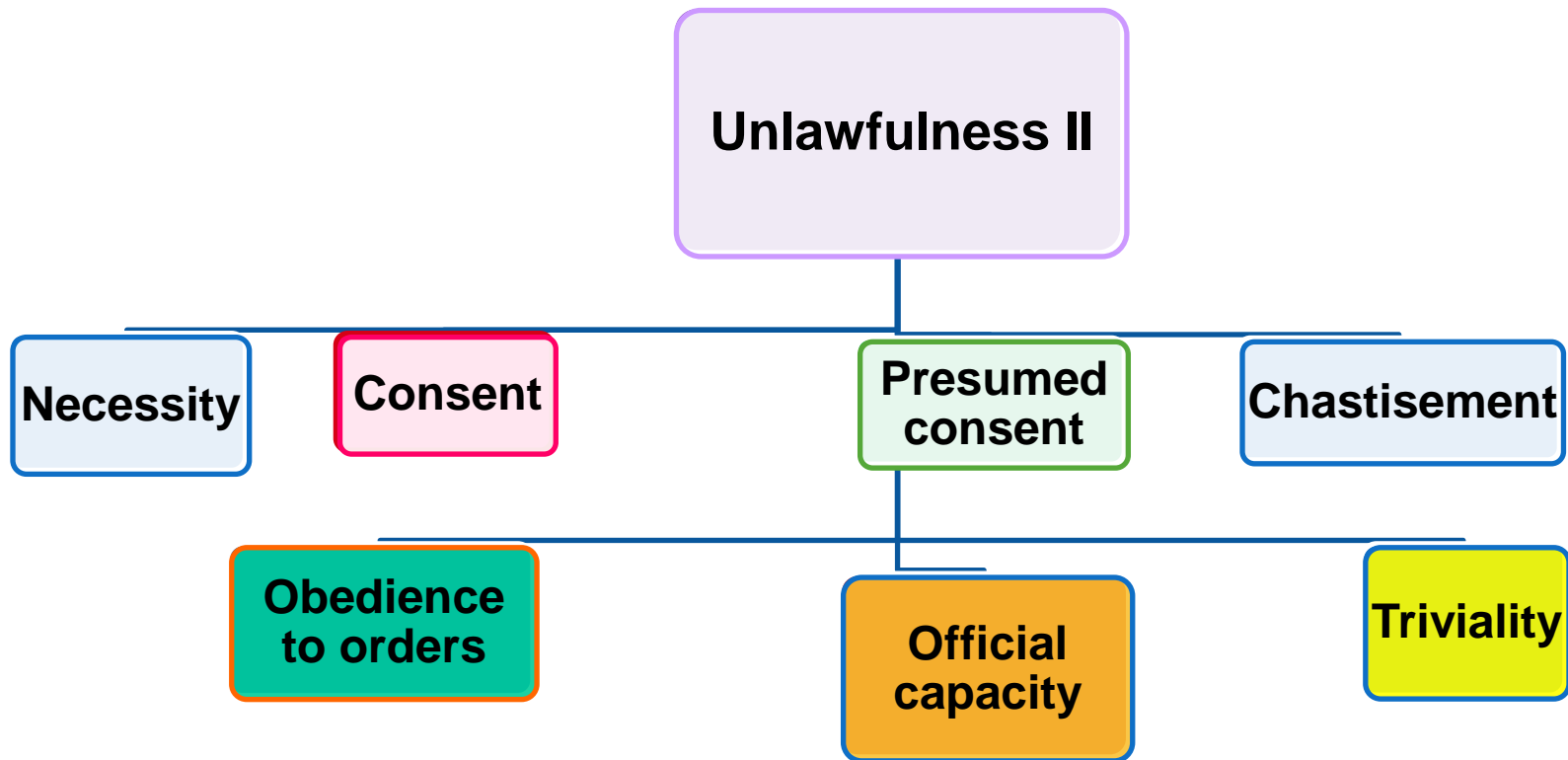
Example: Can you rely on PD if you shoot a burglar in your house in the middle of the night?

If objectively there are less harmful means, then no, BUT might not be guilty if lack intention (different requirement to unlawfulness). If negligent (reasonable person test applied) = culpable homicide

# STUDY UNIT 6

## UNLAWFULNESS II

### SG: 80 - 98



# NECESSITY

- Test for necessity: **OBJECTIVE**.
- What about putative necessity? Not lawful but may escape liability as lack of culpability.

Where a person acts in protection of her own or somebody else's life, physical integrity, property or other legally recognised interest which is endangered by a threat of harm which has already begun or is immediately threatening and which cannot be averted in any other way, provided that the person who relies on the necessity is not legally compelled to endure the danger, and the interest protected by the act of defence is not out of proportion to the interest threatened by such an act.

? What is the difference between necessity and private defence?

<b>Necessity</b>	<b>Private defence</b>
1. Stems from either human conduct or non-human intervention (i.e. chance circumstances)	1. Stems from human conduct only
2. Directed at the interests of an innocent third party or consists in the violation of legal provisions	2. Directed against an unlawful attack

## Distinguish between absolute and relative compulsion:

- Absolute compulsion: no voluntary act

- Relative compulsion: is a voluntary act. Only this form qualifies as necessity

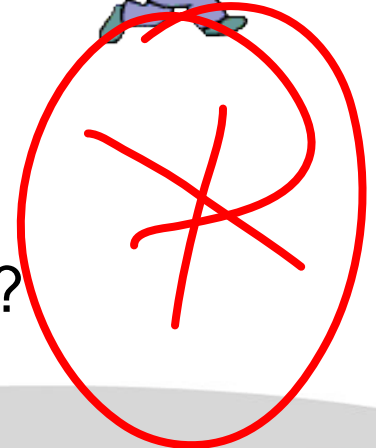
# REQUIREMENTS FOR NECESSITY

1. Legal interest threatened
2. May protect another
3. Emergency must have begun but not yet be terminated
4. May rely on necessity even if personally responsible for the emergency
5. Not legally compelled to endure the danger
6. Only way to avert danger
7. Conscious of the fact that emergency exists
8. Not cause more harm than necessary

Can necessity serve as a defence to murder?

?

Yes: See *Goliath* case.



# CONSENT (Snyman pp 122 – 127)

## REQUIREMENTS FOR CONSENT:

1. Must be voluntary
2. By a person with certain minimum mental abilities
3. Based upon knowledge of the true and material facts  
[must not be an *error in negotio* (type of act) or *error in persona* (identity of person)]
4. Be either express or tacit
5. Be given before the commission of the act
6. Be given by the complainant himself

## ? What possible effects can consent have?

- In some crimes consent is not a ground of justification but may form part of the definitional elements.
- Can you think of an example?
- In some crimes consent is never recognised as a defence.
- Can you think of an example?
- There are crimes where consent can operate as a ground of justification such as theft and malicious injury to property.
- There are crimes where consent can sometimes serve as a ground of justification and sometimes not, such as in the case of assault.



- To determine whether consent excludes unlawfulness, one should apply the *boni mores* of society (public policy) test / criterion.

- Can you think of examples where consent can justify an otherwise act of assault?



- What is presumed consent? See definition and info in Snyman 128 – 129!!!



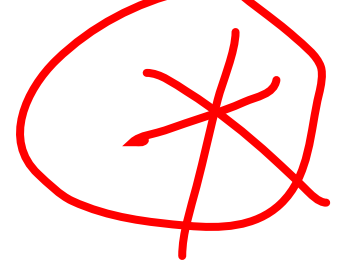
# THE RIGHT OF CHASTISEMENT (Snyman pp 137 – 138)

- What is the general rule?

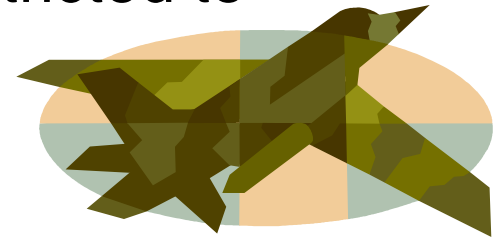
Parents have the right to punish their children with **moderate and reasonable** corporal punishment in order to maintain authority and in the interests of the child's education.

- Teachers may not use corporal punishment. S 10 of the SA Schools Act 84 of 1996 states it is a violation of constitutional rights.

# OBEDIENCE TO ORDERS (Snyman pp 134 – 136)



- No member of a security service may obey a manifestly illegal order.
- Usually applied to the military but not restricted to soldiers.



## Requirements:

1. Order must emanate from a person **in lawful authority** over the accused.
2. The accused must have been under a **duty to obey** the order (Test: Was the order manifestly and palpably unlawful?)
3. The accused must have done **no more harm than necessary** to carry out the order.

# OFFICIAL CAPACITY (Snyman pp 128 – 129)

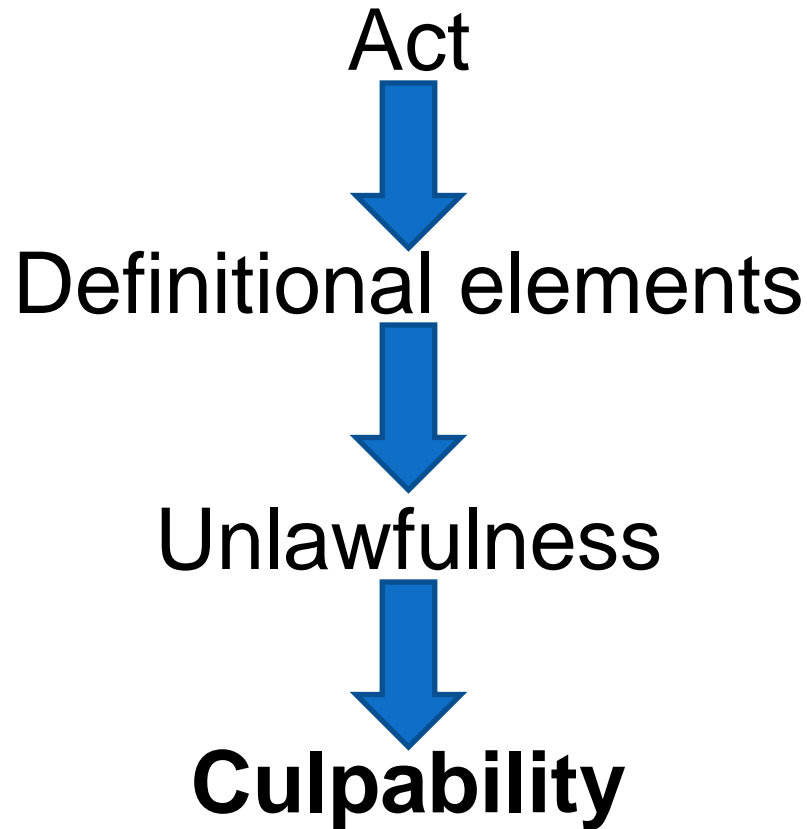
- An act which would otherwise be unlawful is justified if X by virtue of his holding a public office, is authorised to perform the act, provided the act is performed in the course of the exercise of his duties.
- Examples:
  - Security personnel doing searches
  - Police trying to arrest someone



# STUDY UNIT 7

## CULPABILITY AND CRIMINAL CAPACITY

### SG: 99 - 112

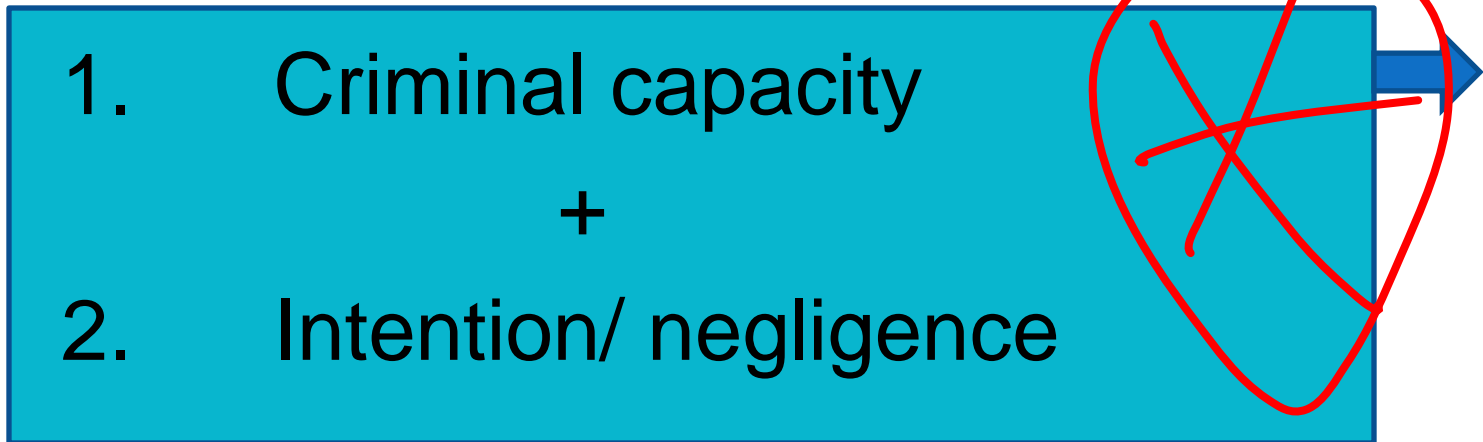


# Culpability looks at:

The blameworthy state of mind of the person and whether there are grounds for which he can be blamed for his conduct

The particular person as an individual and his personal characteristics such as aptitudes, mental abilities and knowledge

- Culpability has 2 legs:



- What is the principle of contemporaneity?

Culpability + unlawful act =  
contemporaneous (occur at exactly the  
same time) – *Masilela* case – single  
course of conduct.

# What is criminal capacity?


- Must have the ability to:
- Appreciate the wrongfulness of his act or omission (cognitive) and
- Act in accordance with such an appreciation of the wrongfulness of his act/ omission (conative)



# What are the defences which exclude criminal capacity?

- Mental illness
- Youth
- Non-pathological criminal incapacity (NPCI)
  - need not prove any mental illness
  - linked rather to an emotional collapse e.g. shock, fear, stress, concussion
  - if you raise this defence the state has onus to prove you did have criminal capacity

## Distinguish between the position before and after 2002 and *Eadie* case

- In *Eadie* says that there is no distinction between non-pathological criminal incapacity and sane automatism
- See SG 109!!!
- **Summary:** 
- *Eadie* - cases of provocation and emotional stress = sane automatism
- Other cases such as intoxication or other factors = non-pathological criminal incapacity

# STUDY UNIT 8

## CRIMINAL CAPACITY: MENTAL ILLNESS AND YOUTH

### SG: 113 - 123

#### Mental Illness

CPA Section 78(1)

Mental defect

Psychological leg

Onus of proof

Verdict

#### Youth

- Mental illness (defence previously known as insanity)
- 2 legged test in terms of section 78(1) CPA:

1. Pathological ('sick / diseased' test):

- **A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect:**

*Note -*

- Expert evidence must prove it
- Permanent or temporary nature
- Mental or organic origin
- Intoxication not mental illness but exception: *delirium tremens*
- Mental defect is different - low intellect, permanent, evident early on

## 2. Psychological test:

**Which:**

- **makes him or her incapable:**
  - (a) of appreciating the wrongfulness of his or her act or omission (cognitive); or**
  - (b) of acting in accordance with an appreciation of the wrongfulness of his or her omission (conative)**
- **Shall not be criminally responsible for such act or omission.**

- Onus of proof: S78(1A) of the Criminal Procedure Act 51 of 1977: every person is presumed not to suffer from a mental illness or mental defect until the contrary is proved on a balance of probabilities - burden of proving illness/defect rests on the party raising the issue.
- Verdict: if a defence of mental illness is successful, the court must find X not guilty and then apply one of the following orders:

1. Admit and detain in an institution
2. Release based on conditions
3. Unconditional release
4. Detainment in a psychiatric hospital

# Youth

## The Child Justice Act 75 of 2008

- Section 7 provides:

A child who commits an offence while under the age of 10 years does **not have criminal capacity** and cannot be prosecuted for that offence (s 7(1)).



A child who is 10 years or older but under the age of 14 years and who commits an offence is **presumed to lack criminal capacity, unless the State proves that he or she has criminal capacity** (s 7(2)).

- Section 11(1) provides:

The State must **prove beyond reasonable doubt** the capacity of a child who is 10 years or older but under the age of 14 to appreciate the difference between right and wrong at the time of the commission of an alleged offence and to act in accordance with that appreciation.



## **Go and have a look at what is:**

- Diminished responsibility?
- Mental abnormality at the time of the trial?
- The impact of youth on criminal capacity?
- What is the new minimum age for criminal capacity?

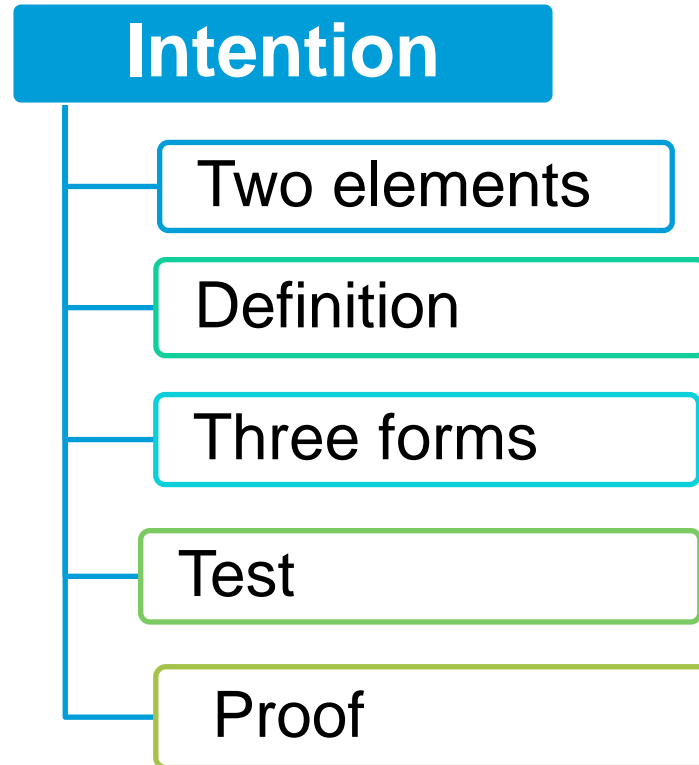




# STUDY UNIT 9

## INTENTION

SG: 124 -135



What are the 3 forms of intention?

1. *Dolus directus* (causing result = aim)
2. *Dolus indirectus* (result = not main aim but in doing main aim, it will necessarily cause the result)
3. *Dolus eventualis* (result = not main aim but foresees that conduct will cause the result and reconciles)

See definitions: 126 -127!

What are the 2 elements of intention?

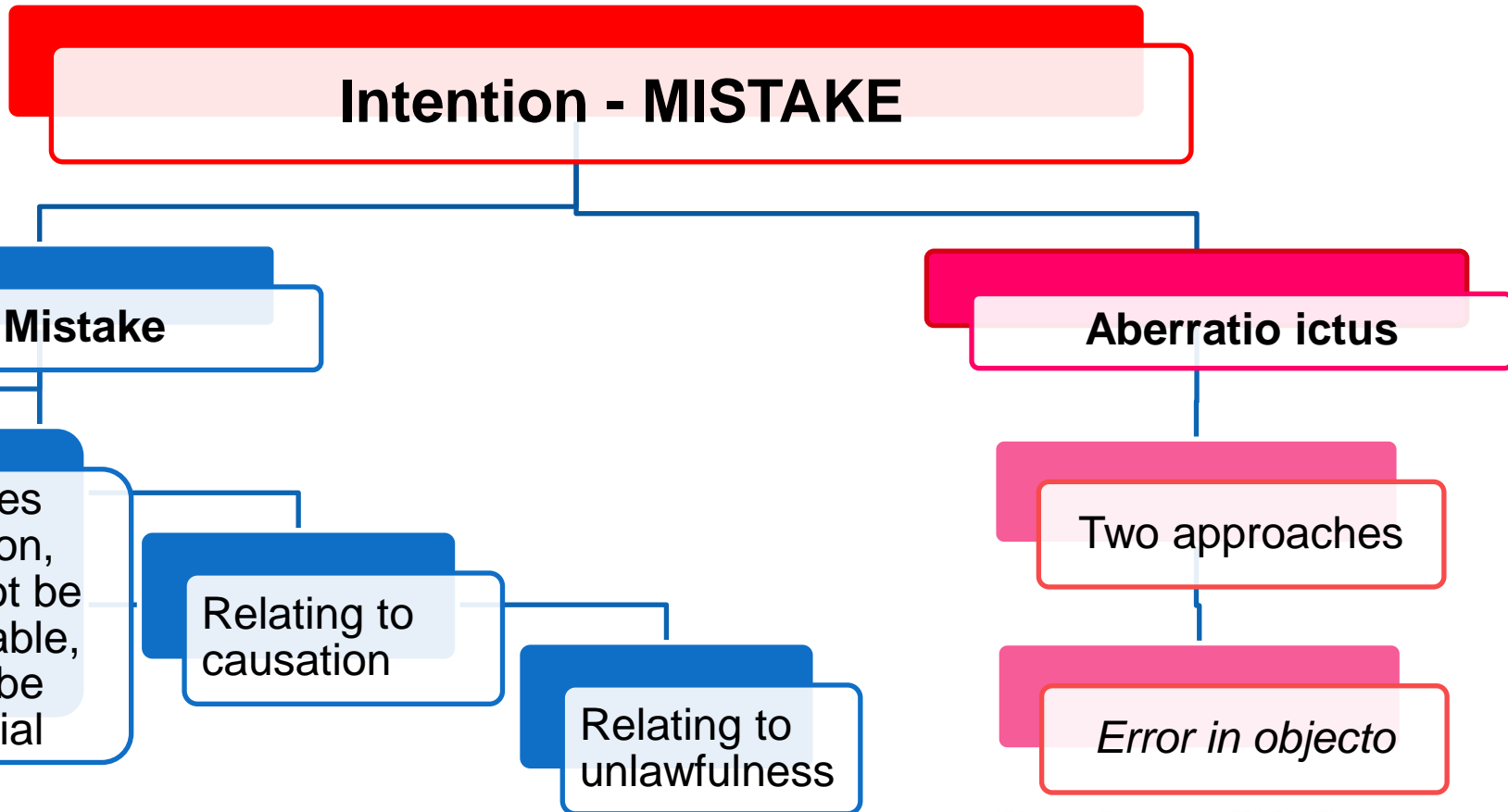
1. Knowledge (awareness/ foresight)
2. Will (direct will towards a certain result)

- Test for intention = **subjective** i.e. did X foresee the result as fact?
- Proof of intention can be direct or indirect
- Knowledge as an element of intention must cover all the requirements of the crime except the requirement of culpability

# STUDY UNIT 10

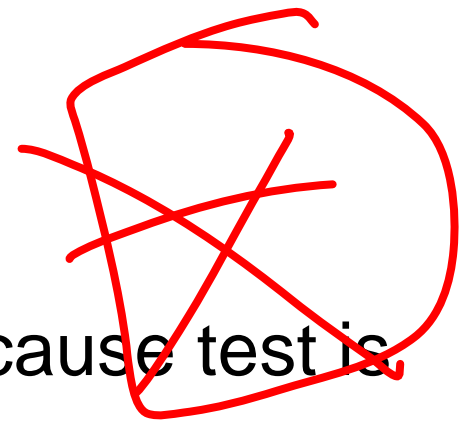
## INTENTION

SG: 137 – 155



# MISTAKE

- Mistake can relate to the act, the circumstances of the definitional elements and the unlawfulness of the conduct
- Effect:
  1. Mistake nullifies intention
  2. Mistake need not be reasonable because test is subjective
  3. Mistake must be material:
    - what happens if it is an *error in objecto*?



See SG 140 - 141

#### 4. Mistake relating to the chain of causation:

- may exclude intention if actual causal chain of events differed materially/ substantially from that foreseen by X (*Goosen, Lungile*)
- Does *aberratio ictus* constitute a mistake? No! e.g. aims at Y and hit Z with a bullet.
- Know the transferred culpability and concrete figure approaches. Expand!!
- Latter approach preferred (*dolus eventualis*)
- *Mtshiza* case



## 5. Mistake relating to unlawfulness

- 2 subdivisions of knowledge relating to unlawfulness:

1. Must know conduct not covered by ground of justification
2. Know that conduct is punishable as crime

- What happens if it relates to a **ground of justification**?

See examples SG 150 - 151 e.g. shoot randomly if think burglars in yard and someone is killed that not a burglar (*De Oliviera*)

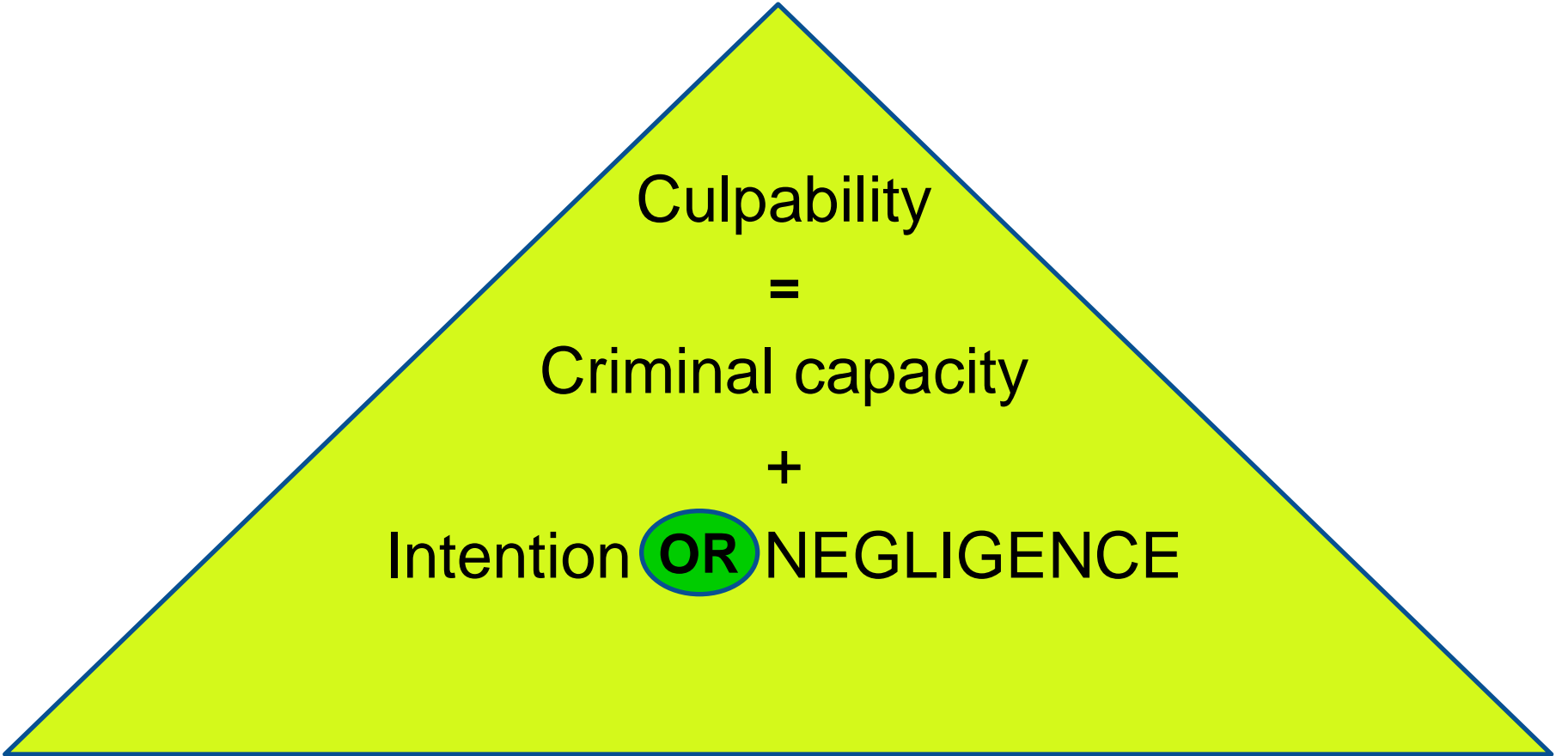
- What happens if it is a **mistake of law**?

- Prior to 1977 – no defence
- De Blom Case*
- Criticism – must be unavoidable mistake or reasonable
- Currently: Ignorance of the law excludes intention = complete defence

# STUDY UNIT 11

## NEGLIGENCE

SG: 156 – 168

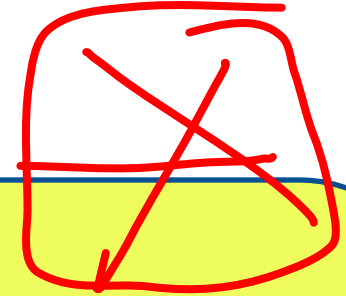


Culpability  
=  
Criminal capacity  
+  
Intention **OR** NEGLIGENCE



Test for negligence: usually objective (exceptions in SG 163-164)

Definition:



A person's conduct is negligent if:

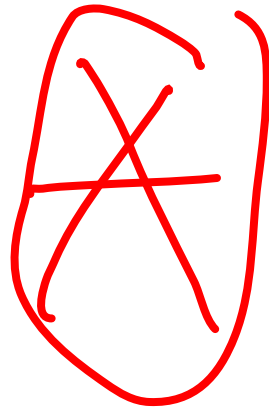
1. A reasonable person in the same circumstances would have foreseen the possibility
  - (a) that the particular circumstances might exist or
  - (b) that his conduct might bring about the particular result
2. A reasonable person would have taken steps to guard against such a possibility; and
3. The conduct of the person whose negligence has to be determined differed from the conduct expected of the reasonable person


# What is a reasonable person?

- Fictitious person
- *Bonus Paterfamilias*
- Ordinary/ normal/ average person
- Objective
- Need not be perfect/ robot – reactions are subject to limitations of human nature

# Reasonable foreseeability

- **Foreseeability by the reasonable person** (i.e. “would a reasonable person have foreseen possibility”), and **reasonable foreseeability by the accused** (i.e. X ought to/should have reasonably foreseen possibility) = same idea is expressed
- Foreseeability relates to a possibility and not a probability (likelihood)
- Test of the reasonable person in the same circumstances applied
- Negligence must relate to the **act**, definitional elements and unlawfulness



- What happens if one exceeds the bounds of private defence?
  - could be found guilty of assault/ murder/ culpable homicide depending on the **form of culpability** that is applicable
  - *Ntuli* – old woman killed with 2 blows to the head

### Principles:

1. If victim dies = murder/ culpable homicide, depending on form of culpability. If no culpability, then not guilty (see detail 11.7.3)
2. Ordinary principles of intention/ negligence **should be** applied to all cases where bounds were exceeded

# STUDY UNIT 12

## THE EFFECT OF INTOXICATION ON LIABILITY

SG: 169 - 185

### Intoxication

```
graph TD; Intoxication --> Involuntary; Intoxication --> Voluntary; Involuntary --> A["• Actio libera in causa – drink for courage"]; Voluntary --> B["• Intoxication leading to mental illness - delirium tremens"]; Voluntary --> C["• Remaining instances of voluntary intoxication"];
```

#### Involuntary

- *Actio libera in causa* – drink for courage

#### Voluntary

- Intoxication leading to mental illness - *delirium tremens*

- Remaining instances of voluntary intoxication

# Defence of voluntary intoxication

- **Prior to 1981:**

- was never a complete defence
- lenient / unyielding approach
- specific intent theory applied e.g. if commit murder could be found guilty of lesser charge of culpable homicide.



- **After 1981:**

- Position changed because of *Chretien* case

# *Chretien case*

1. If muscular movements involuntary – **no act** (not guilty)
2. If **lack criminal capacity** – not criminally liable
3. Specific intent theory rejected - **may exclude intention**
4. **Effect of** intoxication not lightly inferred

## 3 effects of *Chretien*

1. It can mean the voluntary requirement of an act is not complied with
2. It can exclude criminal capacity
3. It can exclude intention



**Result:** intoxication could result in a **complete defence!**



## Section 1 of Act 1 of 1988 (after *Chretien* due to criticism)

- Aimed at a **lack of criminal capacity**
- Effect: if intoxicated = might be not guilty of a crime but could then be found guilty under this section.
- See detail under 12.5.3. – 12.7! Elements of statutory crime (6), (7)?

# Summary of Intoxication

1. If so intoxicated that incapable of committing a voluntary act	1. Not guilty of the crime charged ( <i>Chretien</i> ) BUT guilty i.t.o. section 1 of Act 1 of 1988
2. If so intoxicated that lack criminal capacity	2. As above
3. If so intoxicated that lack intention	3. Not guilty of the crime charged NOR section 1 BUT can be found guilty on charge requiring negligence e.g. culpable homicide
4. If charged with negligence	4. Intoxication does not exclude negligence
5. If complies with all the requirements including intention	5. Guilty of the crime but can affect punishment

**STUDY UNIT 13  
DISREGARD OF THE  
REQUIREMENT OF CULPABILITY  
AND LIABILITY OF CORPORATE  
BODIES**

**SG: 188 – 191 (SELF-STUDY)  
Not for exam purposes – but for  
assignments**

# STUDY UNIT 13

## DISREGARDING CULPABILITY AND LIABILITY OF CORPORATE BODIES

SG: 188 – 191 (SELF-STUDY)

Disregarding culpability & liability of corporate bodies

Disregarding culpability

Strict liability

Vicarious liability

Rejection of *versari* doctrine

Criminal liability of corporate bodies

Acts of director/servant

Association of persons

# Strict liability

- In some statutory crimes culpability is not required e.g. Sea Fisheries Act
- To know whether culpability is required look at:
  1. Language and context of provision
  2. Object and scope
  3. Nature and extent of punishment
  4. Ease with which provision can be evaded if culpability is required
  5. The reasonableness in not holding culpability as a requirement

Is strict liability unconstitutional?

What about the right to a fair trial and the right to be presumed innocent?

## Vicarious liability – self study!!!



- Versari doctrine:
- The *versari* doctrine has been rejected

### Definition of this doctrine:

If a person engages in unlawful (or merely immoral) conduct, she is criminally liable for all the consequences flowing from such conduct, irrespective of whether there was in fact any culpability on her part in respect of such consequences

# Corporate criminal liability

- An example of a corporate body is a company which can have rights and duties
- S332 (1) of the Criminal Procedure Act provides that an act by a director (servant) of a company will be deemed to be the act of the company itself if the act was performed by the director exercising his powers or while furthering the interests of the company

# STUDY UNIT 14

## SG 193 - 212

### Participation I

- Introduction
- Perpetrators



# STUDY UNIT 14

## INTRODUCTION

### PERSONS INVOLVED IN A CRIME

```
graph TD; A[PERSONS INVOLVED IN A CRIME] --> B[PARTICIPANTS]; A --> C[NON-PARTICIPANTS]; B --> D[Perpetrators]; B --> E[Accomplices]; C --> F[Accessories after the fact];
```

The diagram is a hierarchical flowchart. At the top is a blue box labeled 'PERSONS INVOLVED IN A CRIME'. A line from this box branches into two paths. The left path leads to a purple box labeled 'PARTICIPANTS', which then branches into two light purple boxes: 'Perpetrators' and 'Accomplices'. The right path leads to a pink box labeled 'NON-PARTICIPANTS', which leads to a light pink box labeled 'Accessories after the fact'.

#### PARTICIPANTS

**Perpetrators**

**Accomplices**

#### NON-PARTICIPANTS

**Accessories after  
the fact**

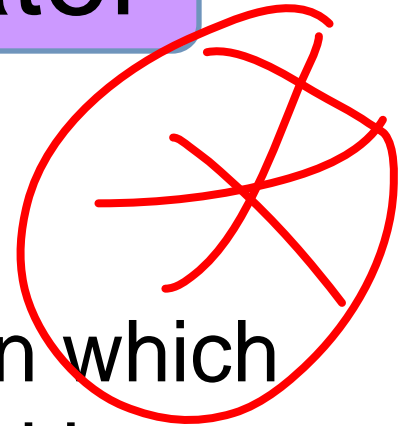
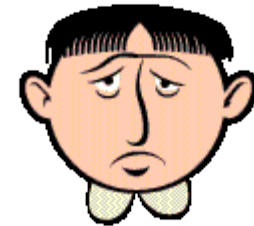
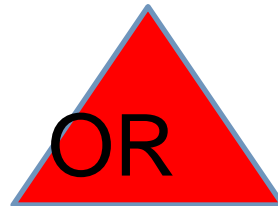


## What is a participant?

- Anyone who FURTHERS the commission of the crime
- A non-participant does not further the commission of the crime eg. accessory after the fact

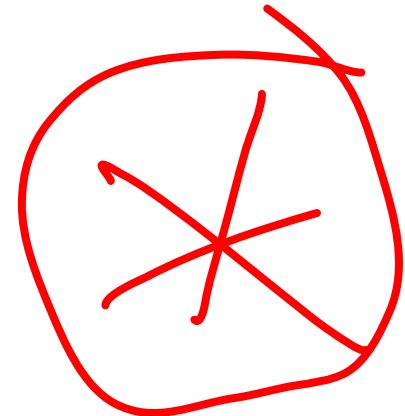
# Definition of a Perpetrator

- A person is a perpetrator if:
  1. His **conduct**, the **circumstances** in which it takes place and the **culpability** with which it is carried out are such that he satisfies the requirements for liability contained in the **definition of the offence**




# Definition of a perpetrator

2. If although his own conduct does not comply with that required in the definition of the crime, **he acted together with one or more persons** and the conduct required for a conviction **is imputed to him** by virtue of the principles relating to the doctrine of **common purpose**



# Definition of an accomplice

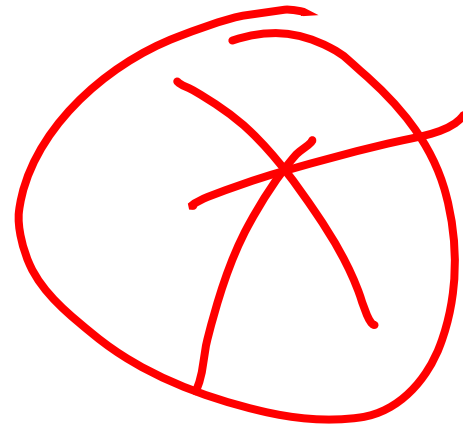
- A person is an accomplice if:
  1. Although he does not comply with all the requirements for liability set out in the definition of the crime, **and**
  2. Although the conduct required for a conviction is not imputed to him in terms of the doctrine of common purpose,  
 he engages in conduct whereby he furthers the commission of the crime by someone else.

# Difference between direct/ indirect perpetrator

- Irrelevant for purposes of determining liability
- Direct: own hands to commit a crime
- Indirect: uses someone else to commit a crime
- Co-perpetrator: is a perpetrator where several persons commit the crime together

# Doctrine of common purpose

If two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the **acts** of each of them in the execution of such a purpose **are imputed to the others**





# Proof of common purpose?

- Prior agreement
- Active association and participation in a common criminal design



Cases!!! You must know in detail:

- *Thebus*
- *Safatsa*
- *Mgedezi*
- *Molimi*





# *Mgedezi*

- If no proof of a previous agreement between the perpetrators, the following requirements **for active association-liability** must be proved to be found guilty based on common purpose:

1. Must have been present at the scene of the crime (not a passive spectator)
2. Must have been aware of the assault on Y
3. He must have intended to make common cause with others
4. He must have performed an act of association
5. He must have had the intention to kill or to contribute to the death



## When can active association result in liability?

- Y must still be **alive** and X's act of association must be at a stage **before** the mortal wound is inflicted (*Motaung*)



- Liability based on active association has been declared constitutional (*Thebus*)



## What if the conduct differs from the conduct in the initial mandate?

- *Molimi*: may not be imputed unless each of the latter **knew or foresaw** the possibility that it might be committed and **reconciled** themselves to that possibility.



# Disassociation/ withdrawal from common purpose

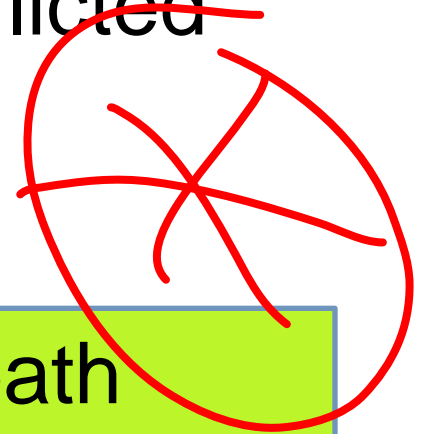
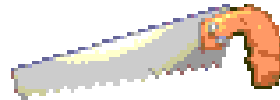
**READ ONLY- For assignments, not exams**

1. There must be a clear and unambiguous intention to withdraw
2. X must perform a positive act of withdrawal
3. The type of act required for an effective withdrawal depends upon a number of circumstances
4. The withdrawal must take place before the events have reached the commencement of the execution
5. The withdrawal must be voluntary



# Joiner-in (*Motaung*)

- A joiner-in participates at a stage when the lethal wound has already been inflicted



1. The injury must not hasten X's death
2. The victim (Y) must still be alive
3. There must not be a previous conspiracy or common purpose



## SELF ASSESSMENT



- A is the leader of a drugs syndicate. Y, a member, decides to sever his ties with the syndicate, and to join another syndicate. Avenging the defection, A cuts Y's throat. Mortally wounded, Y collapses. B, who previously had supplied drugs to Y, appears on the scene and, furious because Y owes him money, shoots Y in the stomach. (B had not agreed beforehand with A to kill Y.) The bullet wound does not hasten Y's death. Y dies as a result of the wound to his throat. A needs help to get rid of the corpse. For this purpose he calls in the aid of C, who had agreed before the murder to help A to get rid of the corpse, and D who had no such agreement with A. Together they drag the body to a secluded beach and dump the body in the ocean.



- Briefly discuss:
  - (i) the criminal liability of B, referring to authority /4/
  - (ii) the criminal liability of C /2/
  - (iii) the criminal liability of D /2/
- (8)





# Answer:

- (b) (i) The answer to this question is found in SG 1.3.5
- B is a joiner-in, because:
    - (1) the bullet wound he inflicted on Y did not hasten Y's death;
    - (2) Y was still alive at the time;
    - (3) there was no previous conspiracy to murder (common purpose).
  - B can be convicted of attempted murder, and not murder (*Motaung* 1990 (4) SA 485 (A)), because to hold B liable for murder in these circumstances would amount to holding him responsible *ex post facto* for his acts.



(ii) The answer to this question is found in SG 2.3.3 (2)

- Since C agreed prior to the commission of the crime to render assistance, he is regarded as a perpetrator since his conduct, culpability and personal qualities accord with the definition of murder. (C can also according to the *Williams* case be an accomplice to murder.)

(iii) The answer to this question is found in SG 2.3.2 – SG 2.3.3

- D is an accessory after the fact. D unlawfully and intentionally engaged after the commission of the crime in conduct that is intended to enable the perpetrator or accomplice to evade liability for the crime, or to facilitate such a person's evasion of liability.

# STUDY UNIT 15

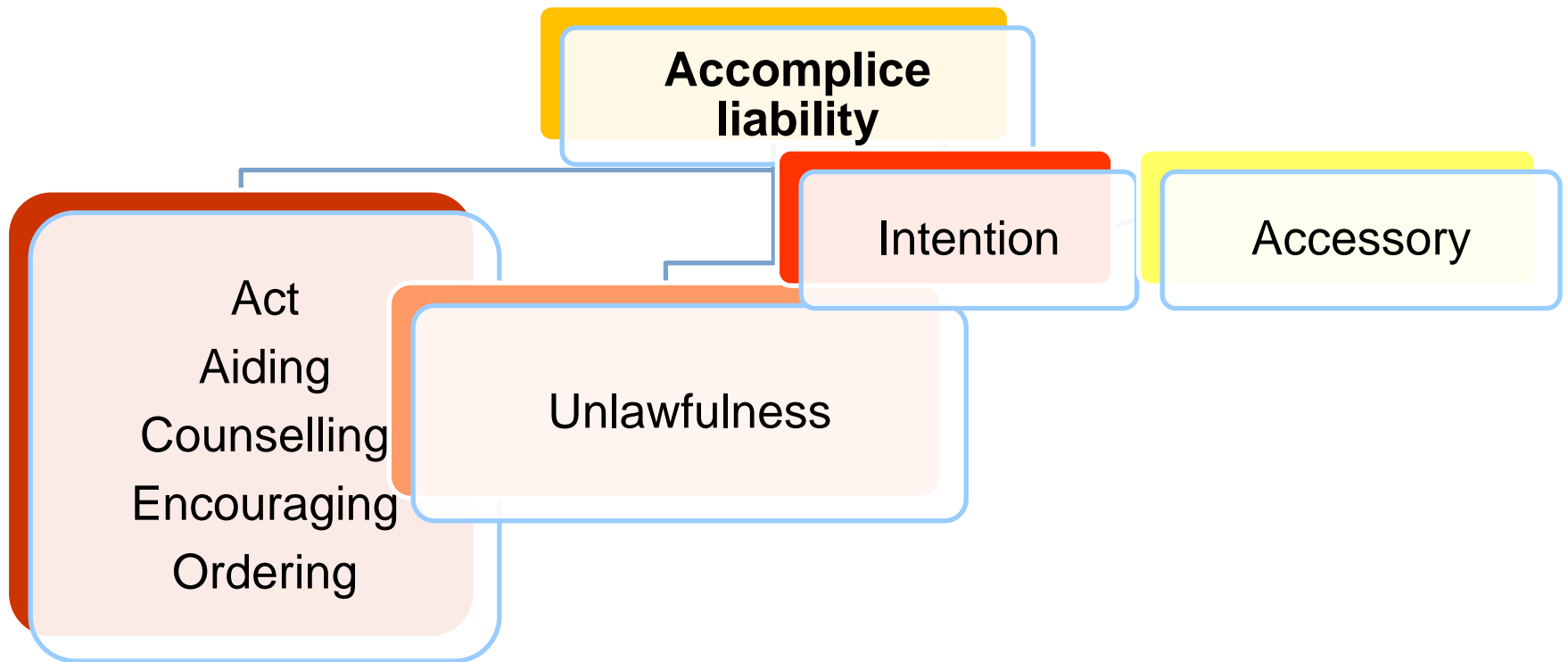
## SG 213 - 219

### Participation II

- **Accomplices**
- **Accessories after the fact**
- **Attempt, conspiracy and incitement**

# STUDY UNIT 15

## ACCOMPLICES AND ACCESSORIES



# Accessory nature

- There must be a perpetrator in order to be found guilty of this crime
- Can one be an accomplice to murder ?
- *Williams* case and criticism by Snyman
- i.e can you actually further a victim's death without also causing it ?
- See also *Safatsa* – common purpose and co-perpetrators

# Accessories after the fact

- Is not a participant. Why ?
- She does not further the crime
- Only in the picture AFTER the crime is committed and helps the perpetrator to evade liability

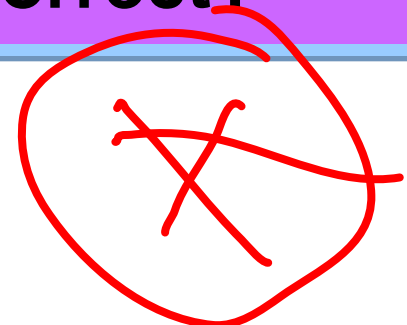
?

What is the definition of an accessory after the fact?

# Definition of accessory after the fact


A person is an accessory after the fact to the commission of a crime if, after the commission of the crime, she unlawfully and intentionally engages in conduct intended to enable the perpetrator or accomplice to the crime to evade liability for her crime, or to facilitate such a person's evasion of liability

**Did you get the definition correct?**





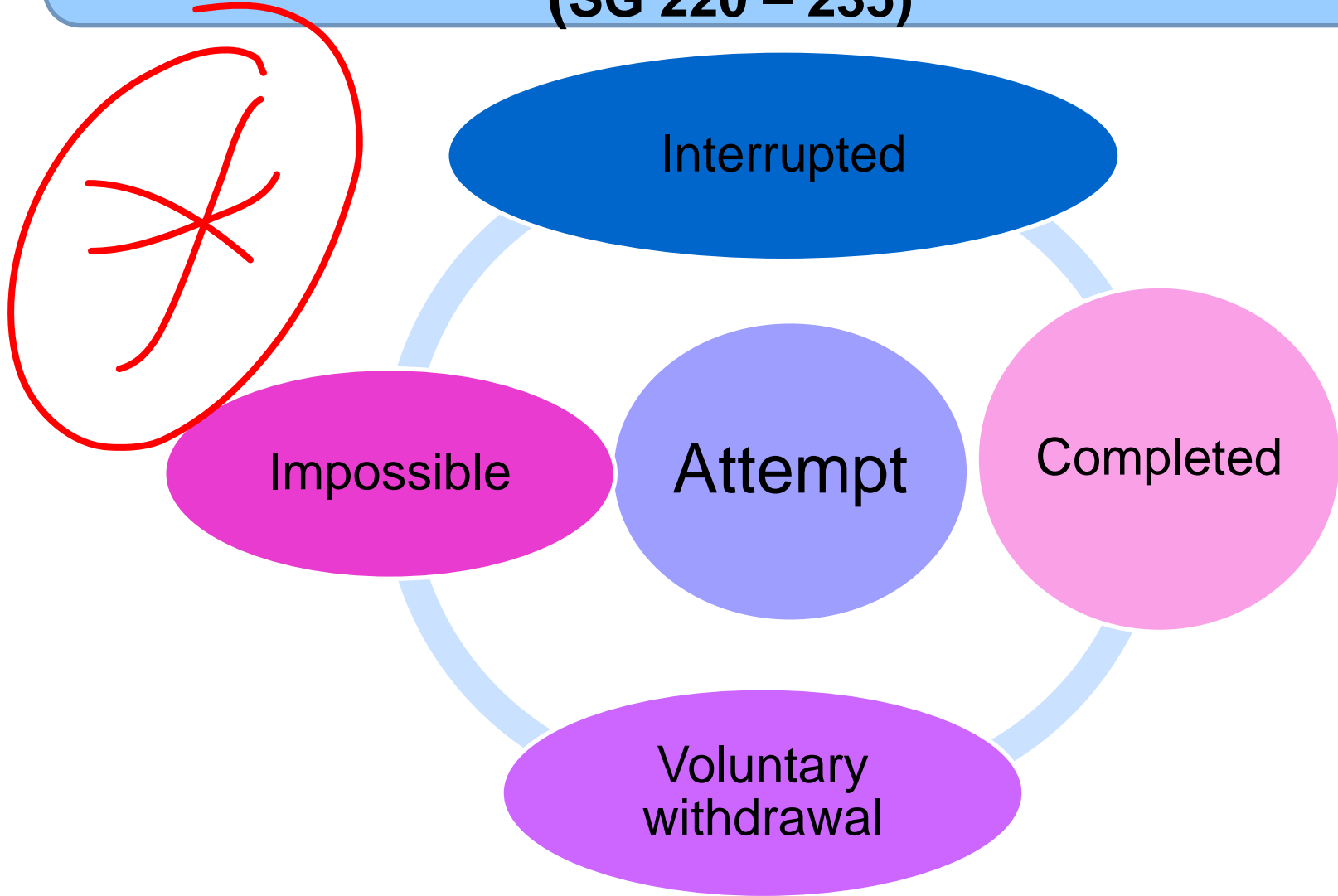
# Can you be an accessory to a crime committed by yourself?

- In principle no! There has to be a perpetrator as it is an accessory crime.
- Exception: See *Gani* and *Jonathan* cases
- Is this crime really necessary? 
  - overlaps with the crime of defeating or obstructing the course of justice.

# STUDY UNIT 16

## ATTEMPT, CONSPIRACY AND INCITEMENT

(SG 220 – 235)





# 1. Completed attempt

- Where X does everything to complete the attempt but the crime is not completed

Eg. X shoots at Y but misses



## 2. Interrupted attempt

X's actions are no longer preparatory but are acts of execution when they are interrupted

Rule:

Objective test used and distinguishes between acts of preparation and acts of execution

If it is merely preparation = no attempt

If acts of consummation = attempt

Eg. X wants to commit arson and pours the petrol but just as he is about to light the match he is caught by a policeman



See *Schoombie* case

### 3. Attempt to commit the impossible

- In this case the means used cannot bring about the desired result eg X wants to murder Y and uses vinegar to the deed as he think it is poisonous

OR



- The crime cannot be committed because of impossibility relating to the object eg. X wants to murder Y and shoots him in the head but Y is already dead due to a stroke.
- A subjective test is applied – the law seeks to punish X's evil state of mind.

*See Davies case*

# What is a putative crime?



- It is a crime which does not exist
- You must therefore distinguish between a:

## Mistake about the law

Not a punishable attempt if you are mistaken about the law  
= putative crime

## Mistake about the facts

Is a punishable attempt if you are mistaken about the facts (*Davies*)



## 4. Voluntary withdrawal

This is where X's actions have already reached the stage when they qualify as acts of execution when X of his own accord, abandons his criminal plan of action

Eg. X places poison into Y's porridge and then throws it away before giving it to Y.

*See Hlatwayo case*



2

PS: Is there such a thing known as negligent attempt?

NO!!! Why? You cannot intend to be negligent



## Self test/ Activity

- Discuss the type of attempt known as attempt to commit the impossible as well as the circumstances under which attempt to commit the impossible is **not** punishable (in other words the exception/s to the rule that attempt to commit the impossible is punishable). (10)



## ANSWER

- The answer to this question is found in SG 16.2.6. You were required to discuss the **attempt to commit the impossible**. Before 1956, uncertainty whether this type of attempt was **punishable or not** or whether an **objective or a subjective test** should be employed. Using an objective test (considering the facts only from the outside); X would **never be guilty** of attempt because what he is trying to do cannot objectively result in the commission of an offence. If, however, one employs a subjective test, X can be convicted of attempt, because according to this test what is decisive is **X's subjective state of mind**; e.g. *Davies case*.

- In this case concerning an attempt to commit the former crime of abortion where the foetus was already dead, though thought to be alive; the court adopted a **subjective** approach. It was immaterial whether the impossibility of achieving the desired end was attributable to the wrong means employed by X, or to the fact that the object in respect of which the act is committed is of such a nature that the crime can never be committed in respect of it.



- The law seeks to punish X's "evil state of mind"; not any harm which might have been caused by X's conduct.
- Although the general rule is that attempts to commit the impossible are punishable, this rule is limited to cases where the impossibility originated from X's mistaken view of the **material facts** (such as *Davies* case), and that it does not apply where the impossibility originated from X's **mistaken view of the law**.
- If X thinks that the type of act he is committing is punishable whereas the law in fact does not penalise that type of act, X's conduct does not qualify as a punishable attempt. This is a "**putative crime**" – a crime which does not actually exist, but which X thinks does exist and can never be punishable.

# Conspiracy

**READ ONLY- For assignments, not exams**

- Statutory crime (S 18(2)(a) of the Riotous Assemblies Act 17 of 1956)
- Definition: Any person who conspires with any other person to aid or procure the commission of or to commit any offence shall be guilty of an offence

- There must be a meeting of the minds
- The act of conspiracy thus consists into entering an agreement to commit a crime
- Must be more than one party
- Negotiation is not yet a conspiracy



# Incitement

**READ ONLY- For assignments, not exams**

- Statutory crime (S 18(2)(b) of the Riotous Assemblies Act 17 of 1956)
- Definition: Any person who incites, instigates, commands or procures any person to commit any offence shall be guilty of an offence



- As in the case of conspiracy X should only be charged with incitement if there is no proof that the crime to which he incited Y has been committed
- There does not have to be an element of persuasion (*Nkosiyana*)
- Can be committed in respect of a police trap
- Whether Y can be persuaded is immaterial
- If the incitement does not come to Y's knowledge, X can be guilty of attempted incitement



**PS: These notes used in the discussion class are merely supplementary**

**(in addition) to your prescribed material**

**i.e. your study guide, casebook**

**and textbook remain the prime sources**

**from which to study for the exam!**





**THANK YOU FOR YOUR ATTENDING THIS CLASS.**

**GOOD LUCK WITH YOUR EXAMS!**

