

## Grounds of Justification

### Introduction:

- The accused will escape liability if his conduct is lawful or justifiable.
- Thus the accused will only be found guilty if his conduct is unlawful.
- South African law tests unlawfulness negatively – there is an assumption that if the accused commits a prohibited action it is unlawful **unless** there is a defence on the facts.
- Distinguish between:
  1. Defences which negate mens rea or capacity **and** –
    - These do not apply to crimes of strict liability but rather to crimes which require mens rea.
    - Differ in standard depending on whether the crime is a crime of culpa or dolus.
  2. Defences which negate the unlawfulness of the actus Reus –
    - These apply to crimes of strict liability and **all crimes**.
    - Standard is the same regardless of whether the crime is one of culpa or dolus.
    - Thus the ground of justification is the same and is tested **objectively**
    - Unlawfulness is the same for everyone
    - Unlawfulness evaluates the act (actus reus)
- Court is entitled to create a new ground of justification. Ultimately unlawfulness is a matter of the LCC. **Clark v Hurst NO**
- **General Rule:** An act is punishable if it is unlawful. Therefore if the act is lawful, then, the accused will escape liability i.e. it will be a ground of justification.
- The grounds for justification may be as follows:
  1. **Private Defence** (self defence)
    - **Definition:** A person who is the victim of an unlawful attack of his person, property or other recognised legal interest may resort to force to repel such attack.
    - Any harm or damage inflicted upon an aggressor in the course of such private defence is not unlawful.
    - Private defence is broader than self-defence – it covers self-defence (defence of one's self) and more (property and other recognised legal interest).
    - **General Rule:** Not allowed to use force to protect own interest – victim is supposed to go to the law as this is in the interests of public peace.
    - **Exception:** In cases of emergency victims are entitled to protect themselves subject to clear limits.
    - To rely on private defences – 6 elements must be met:
      - 3 relating to the attack
      - 3 relating to the defence

### The Attack:

- There must be an:
  1. Unlawful attack – cannot use private defence against a lawful attack (i.e. a lawful arrest by the police)
  2. Attack on property – danger to property (theft, vandalism, trespassing and breaking and entering) or danger of risk or loss to property.

### Elements Relating to the Attack:

1. It is not necessary that the other person be the original aggressor to rely on private defence.
  - Example: A slaps B, B takes out a knife and lunges at A. A shoots B to prevent the stabbing.
    - A started the assault but B's reaction is excessive.
    - The law will regard B's response as an unlawful attack and will allow A to rely on private defence.
  - You cannot use private defence against another private defence.
  - Example: A unlawfully strikes B with his fists. B defends himself by producing a knife and advancing on A. A draws a gun and wounds B. Can A rely on private defence?
    - No since B's act is unlawful and B is relying on private defence
    - Look at what the accused is reacting to?
      - Is he reacting to a lawful or an unlawful attack?
        - If he is reacting to an unlawful attack then private defence is justified.
  - Example: A is walking – B incorrectly believes that A is coming to kill him. B takes out a gun to kill A. A shoots B first to protect himself. What is A's liability?
    - Is A being unlawfully attacked?
      - Yes in South African law it is a matter of 'are you being attacked'
      - It is a question of 'what is in fact happening' **not** what one can reasonably believe (not what a RP would have believed)
      - B cannot rely on private defence – the reality is that he is not being attacked. Thus the test is objective.
      - A can use private defence against B because B's act was unlawful.
2. The unlawful attack must be used in relation to an attack on an interest recognised and protected by the law.
  - The South African law approaches this on a case by case analysis:
  - One can protect:
    1. Life and limb and bodily integrity (whether yourself or of someone else and you need not be related to that person)
    2. Premises – act against unlawful entry into your premises.
    3. Can act in private defence of dignity – **R v Van Vurren**

3. Attack must have begun or must have been imminent (about to begin)
  - Thus if the attack is already completed, the victim cannot use private defence and any force used is regarded as revenge or retaliation.
  - Cannot use force against a future attack – can only use force against an attack that is immediately pending (this is a value judgement)
  - One can, however, use a protective device (i.e. set up a trap gun that triggers as someone enters premises). This is allowed since the private defence only occurs when the attack on the property has begun.

#### Elements Relating to the Defence

1. Defence must be directed against the attacker
  - Example: A says to B if you do not punch C I will shoot you. B punches C. Is B acting in private defence?
    - No, because he is not acting against the attacker (A)
    - Cannot use private defence against an innocent person
2. Defence must be necessary to avert or avoid the attack
  - It must not be possible (objectively) for the threatened person to avert the attack in a less harmful way.
  - Example: A lease ends and the lessee refuses to vacate the premises. Can the lessor use physical force to evict the lessee?
    - No as there is a less harmful way (court order)
  - Example: If X is being attacked and he can run away safely should he fight or flight?
    - **R v Zikalala** – AD held that X should flight if he can do so safely. It must be clear that the X could run away safely.
    - Burchell criticises this on the basis of one's bruised dignity.
  - **R v Zikalala** – Does not apply to property. A person is not expected to run away of his property is being attacked.
3. Means used to avert the attack must be reasonable
  - Means used must not have been more harmful than necessary to avert the attack
  - In the past the South African law used a proportionality approach to reasonability (i.e. it is not proportional to kill someone to protect yourself from having your leg broken)

#### **S v Van Wyk –**

- Shop owner was continuously being burgled causing him financial ruin.
- He set up a trap gun that would go off and shoot the intruder in the leg.
- He had informed the police, hired a guard (who was threatened), put up bars (which had been broken) and got a dog (which was killed)
- Victim crawled in and the gun shot him in the face
- Accused charged with murder
- Escaped liability on basis of private defence.

- Court Held: All factors must be taken into account to determine whether the defence was reasonable including:
  - The nature of the attack
  - Interest threatened
  - Relationship of parties
  - Age, size and strength
  - Location of incident
  - Nature of means used in the defence
- Thus the court did not apply the proportionality test
- Court Held: Can kill in defence of property
- Issue: Can someone rely on a private defence to kill in defence of property?
  - Court unanimously said yes provided:
    - There is not a less harmful method available
    - The accused first issued a warning and
    - Protected possessions are not of small value
- Issue: Where the boundaries of private defence exceeded on the facts in this case?
  - Court divided 3:2
  - Majority held that the accused could rely on private defence. And drew attention to the **unusual** facts of the case:
    - Shop keeper had tried every reasonable avenue
    - He had taken fairly strenuous measures to ensure nobody would be killed (positioning of the gun and placement of warning signs)
- Majority said that they would have found the accused guilty if he had set up the gun with the intention of killing or with negligence.
  
- **NB: Reasonableness** measures the kinds of physical violence that is acceptable while **necessary** goes to the actual means used.

#### Putative Private Defence (PPD)

- Situation where you think that you are acting in self-defence (supposed self-defence)
- Tested objectively – the courts look at the position of someone who knows all the facts of the case
- It is not the perspective of the accused. **Do not** look at the position of the RP
- If the defence of private defence fails then the accused can fall back on PPD
- PPD negates mens rea (whereas private defence negates unlawfulness)
- Can rely on PPD depending on whether the crime is one of culpa or dolus.

#### Test for Crime of Dolus:

- Accused will escape liability if the accused genuinely believed that certain facts existed, which if they did exist, would constitute a situation of private defence. (mistake of fact)

- Example: A threatens to slap B. There is no way for B to avoid the slap apart from killing A. He kills A. B thinks law allows the killing of someone to avoid a slap.
  - Defence is necessary but not reasonable. Therefore B cannot rely on private defence but could perhaps rely on PPD.
  - Has A made a mistake of law? Yes
  - The mistake is genuine thus he can escape liability for murder but not for CH.
- Example: Knife vendor (A) selling knives. B believes that A is trying to kill him. B shoots A.
  - Can B rely on private defence? No there is no objective attack (mistake of fact)
  - There is a genuine mistake – thus B can escape liability for murder but not for CH.

### S v De Oliveira

- First time that the AD said that Private defence is objective
- With regards to PPD must take account of the accused's beliefs and thoughts

### S v Mokhanto –

- Court Held: Self-defence is tested according to whether a RP would have thought that he was being attacked.
- RP would not believe in witchcraft.
- PPD not used- but could have escaped liability if it was used.

### Catch up lectures from the 31<sup>st</sup> July and 3<sup>rd</sup> August 2007.

#### Excessive Force:

- Accused is in a self-defence situation but over reacts in his self-defence
- Example: A runs towards B intending to slap him. B believes that A is armed and is going to cause him serious injury or kill him. Actually A is not. B kills him
  - Elements:
    - Unlawful Attack – yes
    - Defence must be directed at the person doing the attacking – yes
    - Attack must have started or be imminent – yes
    - Reasonableness – no
- Cannot rely on private defence if excessive force is used
- But can rely on PPD
  - There is a mistake of fact

#### Partial Excuse Rule (old law)

- An accused exceeded the boundaries of reasonable self-defence only slightly and killed his attacker, then the killing would be partially excused i.e. not murder but CH even though the killing was intentional.
- In the past the law adopted a partial excuse approach

- If an accused slightly exceeds the boundaries of reasonable self-defence he would be partially excused and therefore would be found not guilty of murder but CH even though the killing was intentional.
- Now if you exceed the boundaries of self-defence you will be guilty of murder (even if exceeded slightly)
- **S v Ntuli** – Authority for the rejection of the past law.
- Partial excuse rule no longer used **Bailey Case**

2. **Necessity** (includes compulsion and duress)

3. **Impossibility** (impossible not to commit the crime)

4. **Obedience to Order** (crime committed by a soldier on an order given to him by a superior)

5. **Authority**

6. **Consent**

Introduction:

- The law of delict protects the individual interest.
- Criminal law protects the public interest as well as individual interest.
- In the law of delict the victim may excuse the wrongdoer and consent to harm (Volenti non fit Injuria – an injury is not done to one who consents).
- In criminal law **generally**, the victim **cannot** consent to harm.
- There are exceptions when consent in the criminal will be a defence:
  1. Certain crimes are defined to include the absence of consent by the victim (rape).
  2. In some crimes consent renders the conduct lawful because of public policy.

Requirements:

1. The complainant's consent must be recognised by the law
2. The consent must be real
3. The consent must be given by a person capable in law of consenting

Consent Must be Recognised by the Law

- If the absence of consent is part of the definition of the crime (rape)
- What if the definition of the crime says nothing about consent? (murder)
- The test is public policy.
- Can you consent to murder and bodily aggressions (assault)?

Murder:

- **General Rule:** The law does not allow a person to consent to being murdered.

Bodily Aggressions

- Sometimes consent is a ground for justification and sometimes it is not
- When it is:
  1. During medical treatment
  2. Injury during sport
    - Lawful Sport – where the intention of the participants is not to inflict serious injury and where the rules are designed to prevent serious injury. A participant may validly consent only to the injuries that are normally to be expected in that particular sport.
    - Unlawful Sport – where the contestants is subject to imminent risk of death or serious injury. Consent can never be a defence.
  3. Where there is an assault for religious, customary or superstitious purposes (circumcision) – consent is only allowed for minor injury unless it offends against public policy

### R v Njikelana

- X rubbed a powder believed to be an aphrodisiac on Y's private parts causing her pain.
- X was charged with indecent assault
- Minor injury therefore consent was a valid defence

### S v Sikunyana

- X burnt Y's head and body with coals to exercise an evil spirit
- X was charged with assault
- Consent did not succeed as the injury was not minor
- When it is not:
  1. Can M consent to being whipped by S as part of an S&M practice?
- Consent would be recognised only if no injuries were inflicted.

### Consent Must be Real

- Must be given voluntarily without coercion

### R v McCoy

- Accused was GM of an airline
- He caned an air hostess for failing to fasten her safety belt during a landing
- Court Held: Her consent was not real as it was given under duress. She feared for her employment.
- Consenting party must be aware of the true and material facts. Example: Not rape where a woman mistakes to the identity.

### Consent must be given by a Person Capable in Law of Consenting

- The person must be able to understand the nature and consequences of the act to which he is consenting.
- Youth, mental illness, intoxication and unconsciousness are examples of states where the victim lacks capacity.

### Euthanasia

- Governed by the South African Law Reform Commission
- 3 situations:

#### 1. Artificial Preservation of Life where the Patient is Clinically Dead

- Medicine is not unanimous as to when death occurs
- Traditional Test: When the heart and lungs stop functioning.
- When the patient is brain dead.
- Can be brain dead but machines can keep the heart and lungs functioning

### **S v Williams**

- X shot Y in the neck
- Y was brain dead but was kept alive artificially by means of a respirator
- The doctors disconnected the machine and the heart and lungs stopped functioning
- Issue: Was the disconnecting a nova causa
- Issue: When is a person dead?
- X argued that Y was only dead when the machine was disconnected
- AD did not decide on the second issue
- Court Held: If the victim is dead when the brain stops functioning then X is guilty of murder
- Court Held: If the victim is dead when the heart and lungs stop functioning then the disconnecting of the machine is not a nova causa.
- What is the doctor's liability? Is the doctor guilty of murder?
- If the victim is dead at the time he is brain dead then the doctor is not guilty.
- Technically it is murder according to the general principles of criminal law
- New legislation must clarify the issue of when a person is dead (according to the commission)

#### 2. Cases where the Patient is Competent to make Decisions and Request the Doctor to Hasten Death

- Is the consent of the patient lawful?
  1. The Cessation of Life-Sustaining Medical Treatment
    - This refers to stopping medical treatment which is sustaining the patient.
    - Competent, terminally ill and there is no effective treatment available and your life is being artificially sustained.



- Such a patient may find life unbearable because of pain or lack of dignity.
- Commission says that if a patient wants life-sustaining medical treatment to stop and this is carried out by the doctor then it is lawful.
- Technically, though, speaking such a doctor is guilty of murder.
- Palliative Care is where pain killing drugs are administered to relieve the pain but there is a double effect is that it may hasten death.
  - Is this murder? Technically this is murder (Dolus Eventualis)
  - The commission suggests that palliative care is lawful.

## 2. Assisted Suicide

- Not just the stopping of life-sustaining medication but where the doctor gives the patient means to kill him.
- Does the patient's own act of killing himself break the chain of causation?
  - Not a nova causa (must be unforeseen) therefore murder.
  - **S v Grotjohn**

## 3. Voluntary Active Euthanasia

- Here the doctor actually administers the death causing product.
- **S v Hartman**

## 4. Involuntary Euthanasia

- This is where the patient does not want to die.
- This is murder.

## 3. Cases where the Patient is Incompetent to make a Decision

- Patient is in a permanent vegetative state and there is no real hope of recovery or improvement and they cannot make their own decisions.
- 2 situations:

### 1. Where there is an Advanced Directive or Living Will or Power of Attorney

- The patient has indicated before becoming incompetent in a written and signed document what he wants to be done should he become incompetent.
- Living Will or Advanced Directive – not a legal will. A request to doctors to act in a particular manner in certain circumstances.
  - 2 types:
    - What you want to happen when you become incompetent
    - You do not decide but you appoint a person to decide on your behalf.
- Power of Attorney – gives another person the power to act on your behalf. In South Africa a power of attorney comes to an end when the principle becomes incompetent. Therefore it cannot be used for euthanasia

**Clarke v Hurst –**

- Wife of patient who was in a persistent and irreversible vegetative state asked the court for permission to authorise her to disconnect the machines that were keeping him alive.
- She was requesting advanced legal advice.
- Court Held: Must not give facile effect to the living will of the patient.
- Living will was not disregarded but it was viewed as a factor to be taken into consideration.
  
- Law Commission advises that law be passed which recognises living wills.

## 2. No Living Will or Power of Attorney

- Traditionally euthanasia is not allowed if there is no living will
- Law commission recommends that there should be legislation allowing the chief medical officer of a hospital to authorise the cessation of life sustaining treatment in consultation with family and friends.

### Clarke v Hurst –

- Court held that the grounds of justification are open-ended.
- Unlawfulness can be developed.
- Public Policy must be applied
- Balancing exercise between the quality of life and society's sense of right and wrong.
- Court granted the wife the order sought because the patient's brain had lost permanently the capacity to exist at a level which qualified as human life.
- Court said there is a difference between withdrawing human intervention which is natural, and injecting someone.

## Criminal Liability of Corporations

### Introduction:

- **Common Law Rule:** Only a human being can commit a crime.
- The exception is that a corporation can commit a crime (in terms of s332 of the Criminal Procedure Act).

### S332 of the Criminal Procedure Act

#### 1. S332 (1)

**332. Prosecution of corporations and members of associations.**—(1) For the purpose of imposing upon a corporate body criminal liability for **any offence**, whether under any law or at common law—

(a)

Any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and

(b)

The omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body, in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavoring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.

- Deals with the liability of a corporation for the acts (crimes) of its directors or servants
- Imposes criminal liability on a corporation for **any offence**.
- Mens Rea for a corporation can take the form of culpa **S v Sauk**
- Higher level than the civil law doctrine of vicarious liability as the CPA refers to “Furthering the interests of that corporate body”.

2. S332 (5) (declared unconstitutional in **S v Coetzee**)

“When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefore, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefore”

- Holds the director or servant liable in personal capacity
- Mens rea here is dolus
- Onus of proof on the accused on BOP
- When a crime had been committed for which a corporate body was liable for prosecution a director or servant of a corporate body was deemed to be guilty of the crime **unless** he could prove:
  - i. That he had not taken part in the commission of the crime **and**
  - ii. He could not have prevented it.
- In effect one director or servant is liable for the crime committed by another director or servant. The provision placed a heavy responsibility on the director or servant. If

he realised that someone in the company was committing or about to commit a crime which related to the company's operations he could not turn a blind eye and argue that what was happening was someone else's responsibility, he had a duty to prevent the commission of the crime. However, if he was not aware of the crime he was not guilty because he could not have prevented it. The fact that he could have known of it but negligently failed to investigate the matter did not make him liable because the test was subjective.

### S v Coetzee –

- Declared s332(5) of CPA unconstitutional
  - Majority judgement given by Lange J – s332 (5) of CPA violated the presumption of innocence in s25 (3) (c) of the Interim Constitution.
  - The 2 part mens rea part violated the presumption of innocence.
  - The statute violated the presumption of innocence despite the existence of a reasonable doubt as to whether he had taken part or not.
  - In terms of s332 (5) the State must prove:
    - A crime by the corporation
    - Director or servant of the corporate body
  - Defences:
    - He did not take part on the crime and
    - He could not have prevented it.
  - Issue: Are the defences above an essential element of the crime? Yes, according to court.
  - State argued that it was not an essential part of the crime (merely a defence) therefore not violation of presumption.
  - Accused argued that it was an essential part of the crime and therefore there is a violation of the presumption of innocence.
  - Court Held: “The provision imposes an onus on the accused to prove an element which is relevant to verdict. It should make no difference in principle whether or not an offence created by a statute is formulated in a way which makes proof of certain facts an element of the offence or proof of the same facts an exemption to the offence. What matters in the end is the substance of the offence. If a provision is part of the substance of the offence and the statute is formulated in a way which permits a conviction despite the existence of a reasonable doubt in relation to that substantial part, the presumption of innocence is breached”.
  - Minority Judge Kentridge – wanted to declare subsection 5 to be valid.
    - Considered two rights being possibly violated.
1. Presumption of innocence – did not think that s332 (5) violated this right. If the legislature had left out the last words (defences) of subsection 5 (i.e. from unless onwards) could there have been a violation of the presumption of innocence? No as there is no reverse onus. By giving the accused a defence it was making the trial fairer than if it had not given him a defence at all. Therefore no violation of the presumption.

2. Freedom and security of the person s11 (1) of Interim Constitution – subsection 5 imposed a form of strict liability by holding all directors liable for the crime committed by other director's.
  - Didcott agreed with Lange but added that subsection 5 is overbroad:
    1. “Servant” (not limited to a manager but covered all employees)
    2. “Offence” – covers all offences.
    3. “Any corporate body” – too broad as it covers all corporations. What about a body corporate of a sectional title scheme?

### **Degrees of Participation in Crime**

- People involved in a crime are divided into 2:
  1. Participants – take part in some way before the crime has been completed (involved in the crime itself). 2 kinds:
    - Principal/ perpetrator – someone who satisfies the definition of the crime himself.
    - Accessory/ accomplice – someone who does not satisfy the definition of the crime but in some way knowingly helps the principal in the commission of a crime.
- Whether you are a principal or an accessory depends on the definition of the crime with which you are charged. The more specifically or formally the crime is defined the more likely you as a person in a subsidiary role is to be an accessory rather than as a principal.
- Example 1: A gives B an iron bar knowingly to B. Knowing that B will kill C.
  - Are A and B guilty of murder? If yes to what degree?
  - Crime of murder
  - B is guilty of murder as he satisfies the definition of the crime.
  - A is both a factual and legal cause of death and has mens rea in the form of intention.
  - A is guilty of murder as a principal as he satisfies the definition of the crime
- Example 2: A gives B an iron bar knowingly to B. Knowing that B will use the bar to commit theft.
  - Are A and B guilty of theft? If yes to what degree?
  - B is guilty of theft as a principal as he satisfies the definition of the crime
  - A has mens rea in the form of intention. He does not satisfy the definition of the crime
  - A is liable for theft as an accessory.
- The difference between example 1 and 2 is that theft is more specifically and formally defined than murder.
- It does no matter whether you are guilty of a crime as an accessory or as a principal.
- The idea of accessory liability is to catch those persons who would otherwise not be found guilty.
  2. Non-participants. 1 kind:

- Accessories after the fact (people who help after the crime has been completed)
- The word “accomplice” means one of two things:
  1. Accessory **or**
  2. Any assistant in crime whether principal or accessory
- If there is more than one principal then they are referred to as co-principals.
- Accessory – socius criminis (“partner in crime”)

## Principals and Accessories

### Principal

- Principal – a person can be held liable as a principal if he satisfies the definition of the crime
- Can be a principal in one of three ways:
  1. Where the accused personally satisfies the definition of the crime

### **S v Williams –**

- A killed C by hitting him with a broken bottle
- B helped A by holding C down so that he could not resist the attack
- A is guilty as principal
- Court Held – B was liable an accessory to murder.
- B should have been guilty as a principal because he satisfied the definition of the crime himself
  
- Whiting makes the point that the court was wrong. Whiting speculates that the reason for the mistake was because the court first asked whether or not B was an accessory. The court should have started with the principal. A case of putting the “cart before the horse”
- **NB:** For murder and CH there can never be accessory liability. If there is conduct which causes death and is accompanied by the right mens rea then you are liable as an accessory.

### 2. Through the Doctrine of Common Purpose

### 3. Through the Principle of Instrumentality

- *Qui facit alium facit per se* “He who does an act through another does it himself”
- Example 1: A hires B to commit theft. B is guilty as a principal as he satisfies the definition of the crime. A is guilty through the principle of instrumentality
- **Exception: Eiehandige crimes:** There are certain crimes where this principle does not apply. Rape, bigamy and drunken driving.

## Accessory:

### S v Willaims –

- Provides the definition of an accessory
- Cannot have an accessory without a principal.
- An accomplice is not a principal.
- Mens rea for an accomplice is intention.
- Must be a causal connection

### Actus Reus of an Accessory

- The conduct of an accessory: The accessory must associate himself with the commission of the crime by the principal by giving the principal the opportunity, means or information which furthers the commission of the crime.
- Can you be an accessory to a crime which you cannot commit as a principal? Yes, answered in the cases below:

### R v M –

- A woman had helped a man to commit the statutory crime of sex with a girl under the age of 16.
- Under the past law a woman could not be held laible for this crime only a man
- She could only be held laible as an accessory.

### R v Jackelson –

- Statute made it a crime for a coloured person to be in possession of alcohol but not for a European
- J, a European, assisted a coloured person (X) to purchase liquor.
- X's liability – guilty as principal
- J's liability – guilty as an accessory
  
- Accessory liability is accessory in nature – i.e. cannot have an accessory without a principal.
- What do you need to be a principal?
  1. Do you need to have convicted the principal? No
  2. Strict accessoriness – The principal must have committed both the actus Reus and the mens rea (including capacity). So that if the “principal” lacks the mens rea then the accessory cannot be found guilty.
  3. Limited accessoriness – The principal must only have committed the actus Reus for there to be an accessory.

### R v Rasool –

- AD authority for strict accessoriness approach
- Accused charged with assisting his 3 year old son to enter Natal illegally.

- Son lacks capacity as he is under the age of 7
- Father cannot be guilty as a principal as he does not satisfy the elements of the crime.
- Father's liability using strict accessoriness – no liability as the son lacks capacity (mens rea).

#### S v D –

- A procured B to have intercourse with C against her will and B believed that she (C) consented.
- A was held liable by the court as a principal on the basis of the principle of instrumentality.
- A is **not liable** as a principal as he does not satisfy the definition of rape and instrumentality does not apply to rape.
- A's liability as an accessory – under strict accessoriness A not an accessory due to no principal
- B's Liability – B not liable (mistake of fact in relation to consent both material and genuine).
- A's liability as an accessory – Under limited accessoriness he would be guilty.

#### R v Parry –

- A who was insane shot and killed his wife B, C helped him
- A was not guilty because of mental illness
- It was argued for C that he also should be acquitted because there was no guilty principal offender.
- Is C principal? C had the intention to kill (MR) and he helped A (AR) and he is both the factual and legal cause. Therefore C is liable as a Principal.

Example: A gets B an automatin to rape C.

- What is B's liability? – B lacks voluntariness.
- What is A's liability? – A is not guilty as an accessory as there is not principal.
- Can you be held liable as an accessory for an omission? Yes but only if there is a duty to act.

#### R v Shikuri –

- A drove a truck, B his employer was with him
- While A was driving negligently he caused an accident killing C
- After the collision A carried on driving without stopping
- B said nothing
- A was charged with the statutory crime of failing to stop his car to render assistance to an injured person.
- A's liability – yes as he satisfies the definition of the crime



- B's liability – B cannot be a principal as he does not satisfy the definition of the crime. Instrumentality does not apply. Can B be an accessory?
  - Does B have conduct? Is there a duty for B to act?
- Court Held: There was a duty to act as he was A's employer and A was driving on the employer's business.
- If you know a crime is about to be committed and you fail to warn the police or the intended victim? Or a crime is committed in front of you and you fail to act? Is there a duty to act?
- **General Rule**: There is no duty to act to prevent harm to another. Therefore no duty.
- **Exception**: If a crime of treason is being committed then you do have a duty to report it.
- Certain crimes require the co-operation of at least two people in order for them to be committed:
  - Accepting a bribe
  - Selling liquor without a license
  - Statutory rape
- What is the liability of the other person?

### S v Kelner –

- A accepted a bribe from B
- A was found guilty of a statutory crime of accepting a bribe
- Issue: Was B an accessory to A's crime?
- Court Held: B was held liable as an accessory as he satisfied the requirements
- What if the other person is the victim of the crime? For example statutory rape – raping a girl under the age of 16.
  - If the other person is the victim of the crime then the other person should not be held liable as an accessory. The purpose of the crime is to protect her.

### Mens Rea of an Accessory

- In order to be an accessory the accessory must **intentionally** (dolus) further the crime by someone else.
- Dolus Eventualis suffices
- Negligence **does not** suffice
- Can be an accessory for a negligence crime i.e. the principal's crime can be one of dolus or culpa.
- The principal does not have to be aware of the accessory's assistance.
- Can X be an accessory if he gives Y the means to commit crime A and Y uses those means to commit crime B? Alternatively

- Can X be liable as an accessory if he gives Y the means to commit a particular crime and Y uses those means to commit a number of similar crimes?
  - **Test:** Does X foresee the possibility of Y committing the crime B or the other similar crimes?

### Common Purpose

- Where 2 or more people agree to commit a crime or where they actively associate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design.
- Liability arises from their common purpose to commit the crime.
- The idea of common purpose is attribution – act of one is attributed to others
- If you are liable under common purpose you are a principal.
- Cannot have accessories to common purpose

Example: A and B rob a bank. A will drive the car and B will do the robbing. C will divide the spoils. What is the liability of A, B and C?

- B – guilty of the crime as a principal as he satisfies the definition of the crime.
- A & C – will also be liable for robbery as principals because of common purpose even though they do not satisfy the definition of the crime.

- Common purpose can be based either on **mandate** or **active association**
- **Mandate** – also known as authority. Traditional and less controversial basis for common purpose. This is an agreement. Mandate has the effect of finding you guilty even if you were not present at the scene of the crime and even if they did not attribute physically to the achievement of the criminal purpose.
- Requirements:
  1. There must be a mandate (agreement) given by the others to the actual person doing the crime **and**
  2. The act must fall within the scope of the mandate.
- The agreement does not have to be express it can be implied from conduct and it can even arise on the spur of the moment without premeditation.
- The parties do not have to be at the scene of the crime to be held liable under mandate. Parties only have to agree to the commit the crime.

### **R v Du Randt –**

- A and B set out to rob a bank
- A had a knife but he assured B that he did not plan to use it for anything else but intimidation
- They met with resistance the soon to be deceased was a big person who attacked A and there was a struggle
- B rushed to A's assistance and in the struggle the deceased was stabbed by A and died.

- A was found liable for murder as the principal as he satisfied the definition of the crime.
- B was found liable on the grounds of common purpose (there is a mandate to rob but the killing did not fall within the mandate).
- Court Held: B was liable for murder on the basis of common purpose he had impliedly given A the mandate to kill by rushing to his assistance in the struggle.
- Criticism: Could view it differently; the fact that B ran to assist A meant he did not want A to kill.

**NB:** Cannot be guilty under common purpose as a principle for any of the eiehandige crimes such as rape, bigamy and drunken driving.

### Active Association

- Controversial part of common purpose.
- Involves typically the situation where a crowd is violent.
- The crowd has a common object but there is no agreement.

### **R v Dladla –**

- Accused was armed with 2 sticks and was at the front of a group of people which attacked and killed a policeman
- Immediately after that he was part of a crowd which pursued a second policeman (which wanted to kill the second policeman)
- He was part of the crowd when the second policeman was killed
- He did not assault the 2<sup>nd</sup> policeman himself
- He was found guilty for killing the 2<sup>nd</sup> policeman on the basis of common purpose
- Court Held: There was a common object to kill the 2<sup>nd</sup> policeman but there was no agreement. Therefore active association.

### Difference between Mandate and Active Association

- With mandate there is agreement between the parties
- With active association there is a common object but their minds have not met therefore there is no agreement.

### **S v Mgedezi –**

- AD said that there are 5 requirements for common purpose based on active association:
  1. The accused must have been present at the scene of the crime.
  2. The accused must have been aware of the crime (in this case assault)
  3. The accused must have intended to make common cause with those who were actually perpetrating the crime (assault)

4. The accused must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others; such as joining a crowd obviously intent on the commission of the criminal act and showing solidarity with whoever commits the act. A mere spectator in a crowd cannot be liable for the violence committed by others. Act of association.
5. The accused must have the necessary mens rea. For murder the accused must reasonably foresee that death might occur and he carries on with his own act of association regardless.

### S v Safatsa – ‘The Sharpeville Six Case’

- There was an attack and killing of the Deputy Mayor of Lekoa
- On the day an angry crowd went to his house and they inflicted on him 2 sets of injuries each one of which was fatal.
- One set involved severe head wounds because of heavy blows
- The other set were all over his body because of him being set a light
- There were 8 accuseds:
- Accused 1 – Grabbed hold of the deceased as he was trying to flee wrestled with him to take his pistol and threw the first stone at the deceased which hit him on the head causing him to fall.
- Accused 2 – Was part of the crowd that threw stones at the house of the deceased he also threw a stone at the deceased which hit him in the back
- Accused 3 – Grabbed the deceased wrestled with him for possession of his pistol and succeeded
- Accused 4 – Carried a sign in sighting the crowd to do various actions and repeatedly shouted to the crowd “He is shooting at us lets kill him”. She had slapped another woman in the face when she urged the crowd not to burn him
- Accused 5 and 6 – Were acquitted because there was not enough evidence to show that they had the intention to kill.
- Accused 7 – Was part of the crowd that was throwing stones. He had made petrol bombs. He set the house of the deceased a light. He pushed the car of the deceased and also set it a light
- Accused 8 – He made petrol bombs and handed them out and showed people how to sue them. He also carried stones in his hand.
- Court Held: It was not possible to find out which members of the crowd caused the death of the deceased.
- Court found that 6 of the 8 were guilty of murder on the basis of common purpose because they had actively associated themselves with the actual killers.

### Common Purpose in General

- Causation – the State does not need to prove causation for holding someone laible on the grounds on common purpose between the conduct of the accused and the death of the deceased. S v Safatsa

- Mens Rea – tested separately in respect of each accused. Common purpose only has the effect of attributing conduct to the other parties **not** mens rea.
  - When is conduct attributed from one party to another? When the requirements of mandate are satisfied and the first 4 requirements of active association are satisfied.
  - Is it possible for **different** accused's to be liable for **different** crimes under common purpose? Yes because mens rea is tested separately.
- When is mens rea tested for common purpose?
  - **General Rule:** Contemporaneity Principle – mens rea must exist at the time of the crime.
  - **Exception in the case below** – tested at the time of the agreement

### S v Nkwenya –

- Majority held that mens rea is tested at the time that the common purpose is formed.
- Mandate – at the time of the agreement
- Active Association – at the time of the active association.
- The accused formed a plan to rob and came on two persons sitting in a car at night
- Each accused pulled open a door of the car and assaulted the persons in the car
- As a result one of the people in the car died.
- Both accuseds had contemplated that in the execution of their plan to rob either or both of them might have to use such force as might be necessary to achieve their purpose.
- It was reasonably foreseeable by both of the accused but not actually foreseen by either of them that the use of such force might result in death but a RP would have foreseen death.
- It was not established who inflicted the fatal blow.
- It was reasonably possible that only slight force was used to inflict the fatal blow.
- The person who inflicted the fatal blow could not reasonably have foreseen death.
- At the time of the crime there was no dolus or culpa.
- At the time of the agreement there was no dolus but there was culpa.
- Court Held: Both guilty of culpable homicide as mens rea tested at the time that the common purpose is entered into
- The court should have allowed both the accuseds to escape liability.

### 1. What Acts do you attribute in a Mandate Situation?

- Those that the parties expressly agreed to
- What if you agree to commit crime A and in the course of that crime B is committed?
- Mandate does not only cover those things that are expressly agreed but also those that are impliedly agreed to
  - **Test for implied agreement:** Subject foresight – test by way of reasonable foresight.

- Example 1: A and B agree to rob a bank. B is armed with a gun and A says to B “You are not to use the gun to kill anyone”. Nevertheless B disregards this and kills C. A foresees that B might use the gun. Is A liable for murder?
  - Based on the test of subjective foresight A is liable and there is reasonable foresight.

### S v Nhlapo –

- 3 people set out with the common purpose to rob
- In the course of the robbery a gun battle occurred with armed security guards
- One guard was killed by one of his own in the cross-fire
- Issue: Were the robbers guilty of the murder of the security guard?
- Court Held: Robbers must have foreseen the possibility that anyone involved in their attack might be killed.
- Could have been held liable on the basis of causation; but for their conduct the murder would not have occurred.
- Cannot attribute the act of the security guard to the robbers as there is no agreement between the robbers and the security guard.
- A’s act of starting the shooting is attributed to the other robbers.

### S v Nzo –

- 1<sup>st</sup> appellant was the leader of the ANC in the P.E. area
- The 2<sup>nd</sup> appellant was the groups underground contact and arranged accommodation for ANC members and for the storage of arms
- Mrs T the wife of another ANC member threatened to lay a charge against her husband for harbouring an ANC member.
- The threat was made in a house where the 1<sup>st</sup> appellant was staying and where he heard it.
- He reported it to Joe, another ANC member who murdered Mrs T
- 1<sup>st</sup> and 2<sup>nd</sup> Appellants were charged with the murder of Mrs T
- The prosecution could not prosecute Joe as he had escaped to Lesotho
- The 1<sup>st</sup> appellant was not guilty as the court held that he had withdrawn from the common purpose as before the killing he had gone to the Police and given evidence
- Issue: Was the 2<sup>nd</sup> appellant guilty for the murder of Mrs T on the basis of Common purpose?
- 2<sup>nd</sup> appellant argued that while he was an active member of the ANC he had not agreed to Mrs T’s murder.
- Court Held: The design of the ANC was to wage a localised campaign of terror and destruction and the murder was conducted in the furtherance of this objective and to preserve the ANC in the P.E.
- In other words, parties to a common purpose are liable for every foreseen offence committed by one of them in their execution of that purpose.

- Minority Held: A broad purpose to achieve something is not enough to pin a murder on a specific person.

## 2. Withdrawal from Common Purpose

### Dissociation from a Mandate

#### S v Musingadi –

- 4 appellants were convicted of murder and robbery
- In relation to the murder they were found guilty of killing the deceased by assaulting and strangling her to death and also attempted to poison her. They then took money from the safe in her mother's house.
- 3<sup>rd</sup> and 4<sup>th</sup> appellants argued that they had dissociated themselves from the murder because after tying up and blindfolding the deceased they refused to take part in poisoning her and they left the scene while the 1<sup>st</sup> and 2<sup>nd</sup> appellants attempted to poison her and after they left she was strangled to death.
- Court Held: Whether you have withdrawn from the common purpose depends on the circumstances which vary from case to case. There is not a workable rule of law to determine whether or not there has been dissociation but generally speaking the greater the participation of the accused and the more the crime has progressed the more the accused has to do to dissociate. It is a value judgment as to whether or not the accused has dissociated.
- Issue: Had they done enough to pull out? They had simply left the scene.
- Court Held: They had not done enough. At least they should have untied her and maybe they should have done even more than that. By leaving the scene of the crime they were leaving her to her fate and agreeing to the death.
- Snyman says that there are 5 guidelines from the case law with regards to dissociation from a mandate:
  1. Accused must have a clear **intention** to withdraw,
  2. Accused must perform some **positive act** of withdrawal mere passivity is not enough.
  3. The withdrawal must be **voluntary**. If the police find out about it, it is too late to withdraw.
  4. The withdrawal must take place **before** events have reached the execution stage when it is impossible to withdraw or to frustrate the commission of the crime. If the events have gone very far then withdrawal is harder.
  5. **The type of act** required for an effective withdrawal depends on the circumstances.

### Dissociation from Active Association

#### S v Singo –

- Appellant was convicted in the trial court of murder on the basis of common purpose with a crowd (active association)
  - The assault had taken place in 2 stages:
    - Singo took an active part in the 1<sup>st</sup> stage by throwing two stones at the deceased
    - After he had thrown the stones someone else hit him on the head with a stick. He left the scene and went home.
    - After he left the deceased was lying on the ground, she got up and the crowd attacked her again and killed her
    - Singo was not present at the time of the killing
  - Issue: Could he be said to have withdrawn from the common purpose by leaving the scene of the crime before the murder?
  - Court Held: To be held liable for common purpose based on active association there are 2 requirements:
    1. Commit an act of association **and**
    2. Must have intention to commit the crime
  - To dissociate **both** requirements must be satisfied. In other words where the accused desists from active participation and were the accused abandons his intention to commit the crime.
  - Court Held: Both requirements of dissociation were satisfied on the facts.
  - Paizes 'common purpose by active association: Some questions and difficult choices ' suggests that the court should ask:
    1. Whether the accused has done enough to actively associate? Does the accused satisfy the requirements for active association?
      - a. Was he present??
      - b. Was he aware of the crime being committed? Yes
      - c. Did he have intention to make common cause??
      - d. Was there an act of association??
      - e. Was there foresight of a possibility of death? Yes
  - The requirements for active association should therefore be this:
    1. Continued existence of the intention to commit the crime and of the intention to make common cause with the conduct of the actual killers **and**
    2. Either continued performance of acts of active association until the commission of the act or at least continued presence at the scene until the commission of the act without doing anything to dissociate himself
- 3. Joining In**
- Example: Someone (X) intending to kill joins in a murderous attack which has already started by one or more other people. Can he be held liable for the death?
    1. What if X joins in after the death of the deceased? He will be laible for attempted murder



2. What if X joins in before the fatal blow? He will be guilty of murder on the basis of common purpose
3. What if X joins in and his act hastens death? Murder as he satisfies the definition of murder.
4. **NB: This scenario is joining in:** What if X joins in after the fatal blow but before death?

Law before Motaung:

- One position was that you would be liable for murder because the crime of murder is not complete until the victim dies there is no reason in principle to distinguish between a common purpose with the killing which arose before the fatal act and a common purpose with the killing which arose only after the fatal act as long as the common purpose arose before death.
- Court rejected this is **Motaung** – to hold someone liable like this would be to hold him liable ex post facto. Criminal liability is firmly opposed to ex post facto ratification in any situation.

**S v Motaung**

- Accused found guilty of attempted murder.
- To hold someone liable like this would be to hold him liable ex post facto. Criminal liability is firmly opposed to ex post facto ratification in any situation.

**4. Constitutionality of Common Purpose**

**S v Thebus –**

- **Issue:** Whether the SCA had failed to develop the doctrine of common purpose in accordance with s39 (2) of the Constitution.
- Accused argued that 3 Rights had been violated – The right to dignity, Right to freedom of the person and the presumption of innocence
- This case only concerned active association and **not** mandate.
- The key attack was that causation does not have to be proved by the State.
- On causation the court held that the aim of common purpose is to crack down on joint criminal enterprise. In such a situation (mob violence) it may be difficult to prove causation and the aim of common purpose is to help the prosecution.
- Court Held: Causation is not a requirement of all crimes for example it is **only** required for consequence crimes. Excluding it is not fatal.
- Court Held: Group misdeeds are more serious and therefore common purpose is justified.
- Court Held: If it is appropriate to find you guilty of a crime then you can restrict the rights to dignity and freedom.
- The right to dignity – accused argued that by treating him as a faceless part of a group his individuality was taken away.

- The right to freedom of the person – as no causation had to be proved by the state.
- Presumption of innocence – because the State did not have to prove all the elements of liability beyond reasonable doubt, in particular causation.
  - Court Held: Common purpose does not place an onus on the accused. The State is required to prove all the elements of common purpose beyond reasonable doubt. There is no shift of onus on the accused.
- Some text writers criticise common purpose on 2 grounds:
  1. It has been argued that the requirements of active association are sometimes too broad.
  2. It has been argued that there are other lesser forms of criminal liability that can be used to catch people than common purpose, such as the crime of public violence or incitement.
    - Court held that this is a proportionality argument which belongs under the limitation analysis. Since the court found no violation of a right therefore there is no limitation analysis.
- Active association is still valid.

### Accessory After the Fact

- Is **not** an accessory and therefore is **not** guilty of the main crime.
- His liability is based on his own actus Reus and mens rea.
- He does not further or cause the main crime
- It is someone who intervenes **only after** the crime has been completed.
- Definition: Someone who unlawfully and intentionally after the completion of the crime associates himself with the commission of the crime by helping the principal or accessory to evade justice
- General Rule: An accused cannot be an accessory after fact to his own crime
- Problem: X, Y and Z are charged with murder. There is no common purpose between them. We know that either X, Y or Z or a combination killed but it is not clear who did it. It is clear that all of them disposed of the corpse.
  - Can we find anyone guilty of murder? No as none of them satisfy the definition of the crime
  - Can all 3 be guilty as accessories after the fact? No, as an accused cannot be an accessory after the fact to his own crime.

### **S v Phallo –**

- Issue: Can X, Y and Z be guilty as accessories after the fact even though they may be murderers
- Court Held: Yes, exception to the general rule that an accused cannot be an accessory after the fact to his own crime.
- Burchell is unhappy with this exception to the general rule. Rather the accused should be guilty of attempting to defeat the ends of justice

## Actus Reus

- 2 different approaches in the case law:
  1. Wide approach – Merely requires the accessory after the fact to have associated himself with the crime in a broad sense
  2. Narrow approach – accessory after the fact must have helped the perpetrator to evade justice

## **S v Morgan** –

- AD preferred the narrow approach in obiter.
- If the narrow approach is taken then accessory after the fact liability is the same as the crime of defeating the administration of justice in which case you can scrap accessory after the fact liability
- If you take the broad approach then there is a role for accessory after the fact liability
- **S v Augustine** – Mere approval is not enough conduct
- Does a failure to act result in accessory after the fact liability? Depends on whether or not a duty exists.

## **S v Williams** –

- Police officer failed to report a crime after it had been committed.
- Was found liable as an accessory after the fact.
- Is there a duty on civilians to report a crime after it has been committed?

## **S v Nooroodien** –

- Yes, if they are questioned by the police.
- What if someone tries to assist but is unsuccessful?

## **R v Pather** –

- Y had unlawfully purchased unwrought gold
- With the object of assisting him X removed what he believed to be the gold but it was something else
- Issue: Was X guilty as accessory after the fact?
- Court Held: Yes it does not matter whether the assistance is effective or not.

## Mens Rea

- The purpose of the accused is irrelevant and mere knowledge of the main crime is sufficient
- Does the accessory after the fact have to foresee the possibility that **the actual crime** will be committed or is it enough if you foresee the possibility of **some crime being committed**? Open question

## Inchoate/Incomplete Offences

### Attempts

- In the common law it is a crime to attempt to commit a crime
- Riotous Assemblies Act s18(1) – makes it a crime to attempt to commit a statutory crime

### Mens Rea

- A person can only be guilty of an attempt if he had the **intention** to commit the crime.
- Dolus Eventualis suffices.
- Can you be guilty of attempting to commit a **culpa crime**? No you can only be held liable for attempting to commit a **dolus crime**.

### Actus Reus

- **Problem of proximity** – how close do you have to be to the completion of the crime to be found guilty?
- Problem dealt with by dividing attempts into 2 kinds: **R v Schoombie**
  1. Completed Attempt – where the wrongdoer has done everything he set out to do but has failed in his purpose either because of a lack of skill, lack of foresight or **any other reason**
    - Example 1: A fires at B and misses.

### **R v Nlovo** –

- A gave poison to B for B to put into A's food with the intention of killing C
- B took it to C and told him of A's evil plan and reported it to the police
- A was charged with attempted murder.
- Applied literally there is a completed attempt
- Court Held: Not an attempt because B at no stage had any intention of carrying out the instructions so that A, when he gave the poison was not close to the administration of the poison.
- Decided before **R v Schoombie**

### **S v Laurence** –

- L interviewed a banned person (person with restricted liberty) and he took down the interview in writing.
- There was a statutory provision prohibiting the publication in South Africa of statements of banned persons

- L sent a copy of the interview by post to B in London with instructions to have it published in a British newspaper which would be available in South Africa
- The South African police intercepted the letter before it reached B in London
- Issue: Had A completed the crime?
- Court Held: Guilty of a completed attempt because he had done everything he had set out to do.
- Burchell suggests that A could have done more (ensured that B administered the poison) whereas L could not have done any more, therefore both cases are correctly decided.

### S v Du Plessis –

- Accused was charged with attempting to publish or communicate secret information to publishers in London in contravention of the Official Secrets Act
- He wrote letters to publishers in London which was no more than a tentative enquiry about the publication of an offending manuscript which was not enclosed.
- He received a reply expressing interest but he decided against publication.
- Court Held: Not guilty for 2 reasons: He lacked the actus Reus and he lacked mens rea.
- In the previous case he had done everything he set out to do here he had not.

#### 2. Uncompleted Attempt

- Can be held guilty
- Wrongdoer has not completed to carry out everything he set out to do because of whatever stops him.

### R v Schoombie –

- When you are close enough to be guilty of an uncompleted attempt
- S was charged with attempted arson he went to a shop in the early hours of the morning taking with him a tin of petrol and a tin containing inflammable material.
- He placed the tin against the door of the shop and poured petrol into the tin and around it, the petrol ran under the door and into the shop.
- He was then interrupted by a policeman.
- Had not done everything he set out to do? No, as he had not set it alight.
- 2 tests in the alternative:
  1. Commencement of the Consummation (completion) Test – an accused is guilty when the court is satisfied from all the circumstances that the wrongdoer at the time he was interrupted intended to complete the crime and had **at least carried his purpose through to the stage at which he was commencing the completion of the crime i.e. he had gone beyond the stage of mere preparation and had started on the last series of acts which would lead inevitably to the completion of the crime.** Applying

this test the court held that he had gone beyond the stage of mere preparation

2. Equivocality (Ambiguous) Test – focuses more on the mind of the accused than on his acts. Mentally has he reached the point of no return? Provided that his acts have reached such a stage that it can properly be inferred that his mind was finally made up to carry through his evil purpose he deserves to be punished.

- **NB:** Two tests should not be separated combine the two and make a value judgement.
- **NB:** First test completed attempt and then uncompleted attempt

### Change of Mind

- If the accused voluntarily withdraws from a criminal plan should the accused be able to escape liability?

### **R v Hlatwayo –**

- Accused was a domestic servant who put poison in the porridge of her employers with the intention of killing them.
- She was seen by someone else who threatened to tell on her.
- The accused emptied the porridge and put water into it.
- Court Held: She was guilty of attempted murder she had done all that was necessary for her to do to complete her plan. In the ordinary course of events they would have been poisoned.
- **General Rule:** Cannot change your mind after the commencement of the consummation of the crime.
  
- Snyman suggests that the accused should be able to change his mind. We want to encourage people to withdraw from a crime. However, he thinks that **Hlatwayo** was correctly decided as the withdrawal was involuntary. Only voluntary withdrawal should be allowed. The law, however, is that an accused cannot withdraw.

### Factual or Physical Impossibility

### **R v Davies –**

- X was charged with attempting to commit abortion where the foetus was already dead.
- The old crime of abortion could only be committed in relation to a live foetus therefore not guilty of abortion.
- Issue: Is he guilty of attempted abortion?
- Court Held: Followed a subjective approach and found him guilty.
- **General Rule:** If you attempt to do what is factually or physically impossible you can still be found guilty of an attempt.

- The fact that an accused's criminal purpose cannot be achieved, whether because the means are in the existing circumstances or in all conceivable circumstances, inadequate or because the object is not attainable does not prevent his endeavour from amounting to an attempt.

### Legal Impossibility/Putative (alleged) Crime

#### **R v Davies –**

- A putative crime is not punishable
- A putative crime is one which does not exist but which the accused thinks exists.
- If the accused thinks that the law regards certain conduct as criminal but in fact it is not he **cannot** be found guilty.

#### **Test:**

1. Put yourself in the position of the accused and say what am I trying to do?
2. Answer I am trying to violate the criminal law by shooting a person I think is alive.
3. Is this a crime?
  - If yes, then we have factual impossibility and the accused can be guilty.
  - If no, then we have legal impossibility and the accused cannot be guilty.

### Incitement and Conspiracy –

#### Incitement

- **Definition:** An inciter unlawfully makes a communication to another with the intention of influencing him to commit a crime.

#### **R v Nhlovo –**

- Crime at common law to incite someone
- S18(2)(b) of the Riotous Assemblies Act makes it a statutory offence
- **General Rule:** It does not matter whether the incitee (person being incited) actually commits the crime or not.
- Academics argue that incitement should only be used where the crime is not committed.

#### Actus Reus

- Communication by the accused to the incitee by words or conduct which reaches the mind of the incitee.

- It does not matter how you communicate **S v Nkosiyana**.

### Mens Rea

- Mens rea is intention.
- The accused must at least foresee the possibility that the communication might reach the incitee's mind and might influence him in committing a crime.

### **R v Milne and Erleigh –**

- E was charged with inciting G to make a false entry in his books of account in contravention of the Companies Act
- E knew that the entry was false but G did not
- E knew that G would make the entry thinking it was correct
- Issue: Should the fact that G does not have mens rea affect E's liability
- Court Held: It should not matter whether the act would be a crime for the incitee. The incitor's liability should be dependant on his own mens rea.
- If the incitee does the act which he was incited to do. The incitor can be liable either for incitement or for the substantive crime.
- Incitor has mens rea and actus Reus for incitement but the incitee does not. Incitee is guilty of incitement.
- E knew that G thought that the entry was correct therefore he was not intending to influence G to commit the crime. E did not have mens rea.

### Conspiracy

- Definition: Agreement between two or more people to commit or to aid or to procure the commission of a crime
- S18(2)(b) of the Riotous Assemblies Act makes it a crime to commit conspiracy
  - This section does not distinguish between the situations where the crime is committed and where it is not.

### **S v Basson –**

- Court Held: No problem with charging a person with conspiracy even if the crime has been committed.
- If the crime is committed do not need conspiracy can use common purpose.

### Actus Reus –

- Actus Reus consists of an agreement.
- They do not have agree to the details
- There must be a meeting of the minds

### **R v Harris –**

- Accused suggested to L, a public prosecutor that they should make money from certain people in consideration of the charges against them being dropped
- L pretended to agree to the plan in order to trap the accused.



- Issue: Was the accused guilty of conspiracy
- Court Held: There was no agreement (meeting of the minds)
- Accused was found guilty of attempted conspiracy

### S v Alexander –

- Court Held: Not necessary that the conspirators were in direct communication with each other.
- Merely becoming or remaining a member of a criminal organisation suffices.

### Mens Rea –

- Mens rea is intention
- Accused must foresee the possibility that their agreement might result in a criminal act.

### Specific Crimes

#### Theft

- Definition: The unlawful contrectatio with intention to steal of a thing capable of being stolen
- Common Law crime
- 4 elements

#### 1. Contrectatio

- “Touching or handling or dealing”
- In law it means an assumption of control which the law regards as sufficient
- Point One: Usually involves the **removal** of property but this is **not** necessary **R v Mlooi**
- Point 2: A mere touching of the thing is not enough there must be an assumption of control.

### R v Tarusika –

- X puts his hand into Y’s pocket with the intention to steal Y’s wallet
- Issue: What does X have to do for there to be contrectatio?
- When X grips the wallet in Y’s pocket
- Point 3: There may be sufficient assumption of control **without depriving the possessor of his control.**

### R v Carelse & Kay –

- K worked at a garage
- He planned with taxi driver B to steal a can of petrol from the garage.

- A was to take a full tin of petrol from the store and put it amongst the empty cans in the store. B would then remove it.
- Garage owner replaced the petrol with water.
- Issue: Were A and B guilty of theft?
- Court Held: A and B were guilty of theft. They had effected contrectatio even though the owner had no been deprived of his control A and B had assumed control by removing the tin.

#### R v Mapiza –

- An employee removed a box of cigarettes from a place on the employer's property and hid them under the stairs with the intention of stealing them later
- Court Held: Guilty of theft

#### S v Dlamini –

- In a self-service shop the accused having no money took a t-shirt from shelf, looked to see if anyone was looking, put the t-shirt under his jacket securing it with his arm
- Before reaching the till he was apprehended by a security guard.
- Court Held: Accused guilty of theft. In a self service situation, where there is intention to steal then the assumption of control becomes contrectatio.
- Point 4: Contrectatio can be affected even in circumstances where the accused has acquired possession of the object innocently.

#### R v Naidoo –

- X innocently bought stolen goods
- His state of mind subsequently changed and he came to realise that they were stolen but he continued to hang onto the goods.
- He was then arrested
- Court Held: Mens rea must exist at the same time as the actus reus (Contemporaneity Principle)
- Point 5: Contrectatio does not have to be affected by the accused himself. It can be done through an agent, even an innocent agent.

#### R v Moodley –

- A had a store at a market where he sold vegetables
- He left the store for a while to attend to other business
- B stationed himself behind the store without authority and sold vegetables
- Customers bought from B in good faith and B pocketed the money.
- Court Held: Accused guilty of the theft of the vegetables through a convoluted agent. The customers were his innocent agents. Could have been guilty of the theft of the money

- Point 6: In the case of money and funds which are commonly manipulated by negotiable instruments, book entries and other non-tangible means, these transactions are sufficient assumption of control and can amount to contrectatio. The actual notes and coins do not have to be dealt with. **Constructive contrectatio**

### R v Milne & Erleigh –

- The appellants were MDs of a company and they had credited their loan accounts in the company.
- Court Held: There was contrectatio
- Point 7: Contrectatio comes from Roman-Dutch law. In modern times there is a strong push towards replacing contrectatio with what Snyman refers to as appropriation. There are 2 requirements:
  - Negative Aspect: The owner or lawful possessor must be deprived of the exercising of his rights of ownership or possession. **AND**
  - Positive Aspect: The thief must give to himself and exercise the rights over the property.
  - Irrespective of whether the control was exercised physically or not.
  - Some cases use appropriation but the law is still contrectatio.

## 2. Unlawfulness

- Contrectatio must be unlawful
- **Test:** Conduct is unlawful if there is no ground of justification to make it lawful.
  - Grounds of Justification applicable to theft – Necessity, consent (which is the most important ground of justification within the realm of theft), *de minimis non curat lex* rule – the law does not concern itself with trivial things.
- **Consent** – an accused is not guilty of theft if he takes property with the consent of the owner even if the accused is unaware of the owner’s consent and even if the accused has the intention to steal.
- If there is consent then the accused can still be guilty of attempted theft.
- In order to be guilty of theft you must take the property in veto domino – against the consent/wishes of the owner.

### Reality of Consent

- Issue: When is consent not real consent
  1. There is no real consent in cases of tracking
    - a. Example: A wants to steal from C. He goes to B who is C’s employee and asks him to assist him by removing the property from C’s house. B tells C of A’s plan. B and C decide to set a trap for A. Is there consent by the owner that A can take the property? It is not real consent **Maserow Case**

2. Consent may be legally ineffectual because of minority or insanity or non-compliance with the legal requirements for consent. Sometimes the law imposes certain requirements in order for consent to be real:

#### S v De Jager –

- X and Z were directors and SH of a company
- They agreed to the removal by X of R20 000 of the company's money
- Court Held: Not real consent

3. Consent is unreal if it is given by mistake.

#### S v Graham –

- The company owed the accused R37 000 and sent him a cheque
- A little while later they sent him another cheque by mistake
- The accused banked the cheque knowing the mistake and spent the money
- Accused was found guilty of theft
- Court Held: Consent is not real if given as a result of a mistake

4. If consent is given as a result of force or threats the consent is not real **R v Gesa; R v de Jongh**

5. If consent is induced by fraud then it is not real **R v Gesa; R v de Jongh**
  - a. Example: A says to B “I have been sent by C, your brother to fetch your car”. B gives A his car and A steals it.

#### 3. Intention

- Known as *Animus Furandi* – Intention to steal
- 2 Requirements:
  1. There must be an intention to deprive the owner **permanently** of the full benefit of his ownership. Special intention.

#### R v Sibiya –

- The accused took the owner's car for his own amusement. Intending to return the car afterwards
- Issue: Was the accused guilty of theft
- Court Held: Not guilty as he did not intend to deprive the owner permanently of his ownership. *Furtum Usus* – unauthorised borrowing is not theft.
- Unauthorised borrowing is, however, a crime in terms of Section 1 of the General Law Amendment Act 50 of 1956

- Issue 1: What if there is unauthorised borrowing and then the property is abandoned without caring whether or not the owner gets the property back. Is this theft?

#### R v Laforte –

- X removed Y's car from his garage without his permission
- He went for a drive intending to return it
- On the return journey he crashed into a lamp post.
- Without notifying anyone he left the car at the scene of the accident
- Court Held: Accused guilty of theft because he foresaw the possibility that the owner might be permanently deprived of his ownership
- Depends on the facts of the particular case.
- Contrectatio exists at the time he abandons the car as when he took the car he did not have the intention to steal it. In terms of the Contemporaneity Principle mens rea and the actus Reus must exist at the same time. When he abandoned the car this principle is satisfied.

- Issue 2: Theft of fungibles (consumables).

- Example: X works at a shop and needs cash. There are no ATM machines. He takes money from the till to spend on the weekend and he intends to go to the ATM on Monday and return the sum taken before the owner comes in. Is he guilty of theft?
  - Does he intend to deprive the owner permanently of those **specific** notes? Yes therefore it is theft. He does not intend to return those **actual** notes.
  - Snyman argues that this should not be theft.
  - What if X does not spend the money and then on Monday returns the **actual** notes?
    - Guilty of theft. He has mens rea to deprive the owner permanently of the notes at the time of the taking.
  - What if X takes the money **not intending** to spend it?
    - Not guilty of theft. No mens rea at the time of the taking
- Fungibles attract liability for theft in situations where non-fungibles do not.

- R v Albertyn

- R v Hurhold

- Issue 3: Pledge

- Security for a loan or a debt.
- Example: X takes Y's property without his consent not in order to deal with it as if he was the owner but only to keep it as a pledge or security for Y's payment of a debt. Is this theft?
  - Depends on whether the accused foresees the possibility that he might deprive the owner permanently of his ownership.

### S v Van Coller –

- Accused was a doctor who was charged with stealing four microscopes from the Botswana government for which he worked.
- His motive in doing this was to influence the government to withdraw charges that were pending against him.
- It was reasonably possible that he intended to return the microscopes even if the charges were not dropped
- Court Held: Not guilty as he did not foresee the possibility of permanent deprivation.
  
- Issue 4: Motive irrelevant.
- Roman Dutch law distinguished between theft and causing damage to another person's property by requiring a thief to have intention to derive a benefit from his dealing with the property *lucri faciendi gratia* – for the purpose of making a profit.
- Our law dropped the requirement because of English influence. It was replaced with the intention to deprive the owner permanently of the full benefits of his ownership.
- For intention motive is irrelevant.

### R v Kinsella –

- X was an officer in command of a military camp
- In order to provide his men with what they needed he sold scrap metal belonging to the state
- He knew he was not allowed to do this without authority
- Issue: Was he guilty of theft?
- Court Held: Guilty as he intended to deprive permanently.
  
- Example: Under the current law, if an accused destroys property of another, this is technically theft as there is an intention to permanently deprive.

#### 2. Intention must extend to every element of the actus reus

#### 4. Property Capable of Being Stolen

- Only movable, corporeal property can be stolen.
- There are 6 categories of property:
  1. Immovables – cannot be stolen including the things that attach to them such as a house, trees or crops until they become movable by detachment and removal.

### R v Shandu –

- Accused detached lead piping from houses and removed it
- Court Held: Guilty of theft.

## 2. Incorporeals –

### R v Milne and Erleigh –

- AD did not decide whether incorporeals could be stolen.
- It seems that the general rule is that incorporeals cannot be stolen

### R v Renaud –

- Accused obtained board and lodging by making false statements that he was in employment.
- Charged with theft of board and lodging
- Court Held: Not guilty of theft by false pretences because the property was incorporeal.

### R v Cheeseborough –

- Accused was charged with the theft of a design or idea
- Court Held: Not guilty.
- There is some authority that incorporeals can be stolen

### S v Harper –

- Court Held: Can steal a company's share

### S v Graham –

- Money can be stolen even if it does not take the form of corporeal cash.
- Can electricity be stolen?

### S v Mintoor –

- Not sure whether electricity, nuclear or solar power are parts of physical nature but even if they are it is not a material or physical object.
- Cannot steal electricity

## 3. Res Communes – Things which are common to all but are not capable of ownership by any one particular person. Example: Air, water etc.

- Cannot steal res communes in its natural state.
- If it reduced to private possession then we say that the property is *in commercium* and then it is capable of being stolen.

## 4. Res Nullius – Things which are unowned but capable of being owned. Can acquire ownership of it by *occupatio* (taking it). 2 kinds of res nullius:

- Wild animals –

- i. Common Law – Wild animals cannot be stolen until they have been captured and under control.
    - ii. Game Theft Act of 1991 – If you own a game farm which meets the requirements of a game farm, then the property on the game farm is yours and if someone takes it they are guilty of theft.
  - Res Derelictae – Abandoned property.
    - i. Physical abandonment
    - ii. Intention to abandon
    - iii. Abandoned property cannot be stolen.
5. Res Sua – Your own property. Generally you cannot steal your own property unless you take your own property and somebody else has a right or an interest in it. Examples are a right of pledge, lien etc.

#### R v Janoo –

- Railways were in possession of property belonging to the accused
- Contract of consignment
- Accused had paid the fees of consignment but he had not yet signed a receipt acknowledging receipt of the goods
- He secretly stole the goods from the railways to make a fraudulent insurance claim.
- Court Held: Guilty of the railway's right of retention
- Jointly owned property – can a co-owner commit theft of a commonly owned property? Yes if he intends to deprive the other co-owners permanently of the full benefits of their ownership.

#### 6. Theft of Money –

#### R v Manuel –

- Accused was a South African who began to live with a girl in Egypt with an understanding that they would get married when he gets back to South Africa and divorces his wife.
- Egyptian lady sent him money for the airfare for herself and him
- He took the money and used it to marry someone else.
- Court Held: Her giving him the money transferred the ownership to him. Generally you cannot steal your own money but he can be held guilty of theft in this scenario.
- This is called trust money – money which is handed over to someone subject to an obligation on the recipient to deal with the money in a certain way.
- Even though the money belongs to the recipient it can be stolen according to the criminal law if it is spent for a different purpose. It would not, however, be theft if at the time the accused has an equivalent liquid fund to cover the amount spent.



- The opposite of trust money is a creditor/debtor relationship – this does not attract liability for theft.
- **Test:** On the facts what is the intention of the person giving the money? If the intention is that it be used for a particular person then it is trust money.
- **Situation in Relation to trust Money:** If the trustee spends the money for a different purpose, he has an equivalent liquid fund but he improperly fails to account to the other person. Is this theft? Yes.

Example 1: A prepaid contract is a creditor/debtor relationship

Example 2: A deposit made into a bank is a creditor/debtor relationship.

Example 3: Money received by an agent (auctioneer, estate agent, and stockbroker etc.) is normally trust money.

Example 4: Money paid to an attorney for revenue stamps and fees. Fees are a creditor/debtor relationship while money for revenue stamps is trust money.

#### Short – Changing

- **Issue:** Is short changing (giving the wrong change or not giving change) theft?

#### **R v Schouides –**

- **Court Held:** This is a trust money situation
- The purchaser hands over the money not in order to make the seller unconditionally the owner but only to make him the owner on condition that he gives the correct amount of change.

#### Over – Payments

#### **S v Graham –**

- Being overpaid is a form of theft.
- A creditor/debtor relationship cannot be created by a mistake
- This is a trust money situation.

#### Creditor/Debtor Relationship

- **General Rule:** Ordinarily this does not attract liability for theft.
- **Exceptions:** Guilty if you don't pay the debt and you don't give a proper account of the debt to the creditor.

#### **R v Satisfsky –**

- Accused was an agent of the complainant.
- Part of his duty was to sell ostriches for the complainant
- He had to account to the complainant for all the money he received
- He could use it for his own purposes.

- He fraudulently withheld some money from the complainant and he did not enter the money into the books of account.
- Court Held: Guilty of theft

### Theft as a Continuing Offence

- Theft is a continuing crime. Theft continues for as long as the property is in the possession of the thief or his agents.
- 2 consequences:
  1. Procedural consequence – Jurisdiction of the courts
  2. The effect on the Substantive Law
    - Has an effect on the degrees of participation. If A commits a crime and B thereafter helps A. What is B's liability? He will be liable as an accessory after the fact.
    - Theft, however, is different as B will be liable for as long as A is in possession of the stolen article, in relation to the crime itself, as either a principle or accessory.

### Example:

A stole a car and after he took it B who knew of the theft and who wanted to help A drove the car from one place to another so as to help A to escape suspicion. What was B's liability? B satisfies the definition of the crime and can therefore be held liable either as an accessory or as a principle for as long as the thief is in possession of the stolen item. He cannot be held liable as an accessory after the fact as the crime of theft is continues.

### Assault

- Definition: Unlawfully and intentionally either applying force to the person of another or inspiring a belief in the other person that force is immediately to be applied to him
- 3 elements:
  1. **Unlawfulness**
    - Possible grounds of justification include authority, consent, private defence and necessity
  2. **Intention**
    - Dolus Eventualis – Accused must foresee the possibility of either applying force to the person of another or inspiring a belief in the other person or that force is immediately to be applied to him.
    - Negligence is **not** enough
    - The motive of the accused is irrelevant to his liability
  3. **Applying Force or Inspiring the Apprehension of It**
    - **Actual Application of force** – can be either direct (X hits Y) or indirect force (X sets a dog on Y).

### S v Marx –

- X gave 3 glasses of wine each to two children 5 and 7 years old and they became ill
- Court Held: He had applied force and therefore he was guilty of assault.
- Administering a substance which will cause harm is applying force even though the harm is internal.

### S v A –

- Administering any substance to a person can be assault. It does not have to be harmful.
- This is subject to the de minimis rule. The slightest contact with the victim's body can be assault. Depends on the context.
- If there is an actual application of force it is not necessary that fear that force results.
- Force must be applied to the body of the victim.
- **Inspiring of fear (belief or anticipation) that force is to be applied –**
- Must the fear be reasonable? It does not matter. In no case has the decision of the court rested on the fear being reasonable.
- Burchell – it should not matter if the fear is reasonable.
- Requirement of Immediacy – the fear of force must be immediate
- Conditional Threats – Does the condition make the threat a non-assault? If the condition is one that the accused is allowed to impose then it is not an assault and visa versa

### R v Dhlamini –

- X stood at the entrance of Y's hut with stones and threatened to kill Y if he came out.
- Court Held: This was an assault
- **NB:** Fear can be aroused by words, gestures, acts etc.
- What if the accused does not intend to carry out the threat or cannot carry it out is this assault? Yes

### Attempted Assault

- Because of the two elements of assault there is not much scope for attempted assault. But there is such a concept in our law.

### Competent Verdict

- Fall back crime
- Assault is a competent verdict for murder, culpable homicide, rape and robbery

### Assaults with Intent

- There are several kinds of qualified assault each of which is a separate offence. It consists of an assault and the intention of committing a crime more serious than assault.
- Assault with intent to murder, rape, commit robbery or to commit GBH.
- All the elements of assault and the intention to commit the more serious crime have to be proved.
- These crimes can be charged with attempted murder, rape, robbery etc.

### **Assault with Intent to do Grievous Bodily Harm – “Assault GBH”**

- Assault with intent to commit GBH is an important crime. It is more serious than assault but less serious than murder,
- Elements:
  1. Assault – can take the form of either applying of force or inspiring the belief that force will be immediately applied. Actual application of force is not necessary. GBH is not important only an intention to commit GBH
  2. GBH – depends on the circumstances and the facts whether there is an intention to commit a serious injury.
  3. Intention – there must be an intention to commit GBH. Dolus Eventualis is enough. What is the test for intention?
    - Severity of the injury
    - Weapon used
    - Degree of force
    - Degree of persistence
    - Part of the body attacked etc.

### **Robbery**

- Definition: Theft of property by intentionally using violence or the threat of violence to induce submission to the taking of the property of another.
- Theft plus violence
- Elements:
  1. Theft – all the elements of theft must be satisfied
  2. Violence or the threats of violence – assault part of robbery. Assault can be committed in one of 2 ways:
    - (a) Physical violence – actual application of force to the person of the victim **or**
      - Any violence is enough and may be very slight in degree and need not cause injury (example: bag/cell phone snatching)
    - (b) Threats – threat to apply force to the person of the victim
      - **Ex Parte Minister of Justice: In re R v Gesa; R v De Jongh** – threats of violence suffices for robbery.
      - It is not clear what threats suffice? Must the threats be to the complainant himself or can it be to another person or to property?

- Textbook writers suggest that threats to another person or property should not be robbery but extortion, (blackmail) only threats to the complainant himself are robbery.
  - The threat of violence must be of immediate violence and not future violence. If it is a threat of future violence then it is covered by extortion (blackmail).
- 3. The taking of the property must be accomplished as a result of the violence or the threat of violence. There must be a causal link between the violence and threat of violence and the taking or the retention or control.

### S v Pachai –

- X made threatening phone calls to a shopkeeper, Y
- Later X threatened Y in his shop.
- Y handed X the goods demanded by X not because he was afraid of X but because he had previously arranged with the police to set a trap for X
- Issue: Was the accused guilty of robbery?
- Court Held: No X was guilty of attempted robbery because the 3<sup>rd</sup> element was not proved.
  
- Does this element mean that the victim has to be aware of the taking and formed a determination to resist the taking? No the victim does not have to be aware of the taking as long as the accused used violence to affect the taking.
- Example: X knocks Y unconscious in order to steal
  
- If threats are used can the accused argue that the victim's fear was unreasonable? No
  
- 4. There must be an intention to cause submission by the violence or threats of violence. Mens rea (must **intend**)
- Example: X assaults Y. In the course of the assault Y's wallet falls to the ground. X picks up the wallet and runs away with it. Is the accused guilty of robbery or attempted robbery? No he did not **intend** to cause submission by the violence. The accused is guilty of theft and assault.

### R v Kannusamy –

- The accused attacked the victim and the victim escaped by slipping out of his overcoat.
- Issue: Was the accused guilty of robbery?
- Court Held: No he did not **intend** to cause submission by the violence.

### R v Edwards –

- X secretly cut the string securing Y's basket.

- While he was cutting the string she saw the basket moving and moved her hand towards the basket. He cut her hand.
- Issue: Was the accused guilty of robbery?
- Court Held: No he did not **intend** to cause submission by the violence.
- Guilty of theft and was sentenced to 10 years in Australia.
  
- **This is not an element:** The violence or the threats of violence must precede the taking of property. It used to be an element of robbery.
- Example: X enters a house and steals. As he comes out of the house he is confronted by the owner of house. He puts down the stolen object and runs away. He is blocked by the owner and knocks the owner down and then continues to run away. Is the accused guilty of robbery? There is theft and violence. Here the violence takes place after the theft. Should this be robbery? Yes answered in the following case:

### S v Yolelo –

- M returned to her house and she noticed that a suitcase was on the floor of her bedroom.
- She went into the bathroom and two men attacked her, they hit her with an iron bar and bound and gagged her.
- She heard the men searching through the house and then trying to start a car.
- They left with some of her property.
- Issue: Where they guilty of robbery?
- Court Held: Robbery can be committed where violence follows the initial contrectatio.
- She was attacked very soon after the theft and in the immediate vicinity of the initial contrectatio.
- **Test:** In all the circumstance in particular the **time and place** of the accused's acts was there such a close link between the theft and the violence that they can be regarded as connecting components of one transaction. If the 2 crimes cannot be regarded as one transaction they will be guilty of theft or assault or both assault and theft.
- The violence or threats must be used to get the property or to retain control of the property.
- Court asked the question and left the question open: If X uses violence after he has taken the goods **in order to escape** and not to cause submission to the taking is that robbery?
  - Burchell thinks that this should not be robbery.

### Bag Snatching Cases:

### S v Mogala –

- The victim had the strap of her handbag over her shoulder and under here arm

- The accused grabbed the bag and pulled at it so she fell to the ground
- She lost her grip of the bag and ran off and stole the bag
- Court Held: Guilty of robbery
- Example: X snatches Y's handbag out of her hands in a sudden and unexpected movement with no resistance from Y. There is a minimal degree of violence here and the object of the taker is to acquire possession not so much by violence but through surprise. Is this small degree of violence enough for robbery?

#### S v Mogala –

- In obiter the court held that this scenario is robbery. It is not necessary that the victim resist. The whole point of bag snatching is to combine surprise with a slight degree of force in order to prevent resistance.
- Most of the lower courts have said that this is robbery.

#### S v Sithole –

- Bag snatching is robbery if the accused intentionally uses force to overcome the hold that the victim has on her bag for the purpose of ordinarily holding it or if the accused intentionally uses force to prevent resistance if the victim becomes aware of his intentions.

#### S v Mati –

- Cell phone snatching out of a victim's hand is theft and not robbery.
- The violence was used to remove the property not to cause submission
- A pick pocket is not robbery as there is no violence intended.
- **Not sure whether this is an element:** What relationship must exist between the victim assaulted and the property taken?
  1. Must the taking be from the person of the victim or in his presence?

#### S v Dlamini –

- X assaults Y with the intention to rob him and B dies before the theft takes place. Has X committed robbery?
- Court Held: Such a person would be guilty of robbery here. The court rejected the presence of the victim as an element for robbery.

#### Ex Parte Minister van Justicie: In re S v Seekoei –

- S broke into the home of the complainant and by threats forced her to hand over the keys of the shop.

- He then tied her up and took her car and drive to the shop which was 2km away and stole money and goods from the shop.
  - Issue: Is he guilty of robbery?
  - Court Held: He was guilty of robbery; the property does not need to be taken in the presence of the victim as long as the taking of goods and the violence of threats form part of one continuing transaction.
  - The lapse of time and distance helps to decide whether there is a continuous transaction. The distance of 2km and the time to travel 2km is not enough to break the transaction into 2 separate transactions.
2. Must the property taken be under the immediate care and protection of the victim? Can robbery only be committed where the victim has an interest in the property? Example: Innocent bystander in a bank robbery. This is an open question.

### **Fraud**

- Definition: Unlawfully making with the intent to defraud a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.
- 4 Elements:

1. Unlawfulness

- Ground of justification will negate unlawfulness (coercion, duress, consent or authority)

2. Misrepresentation

#### Misrepresentation by Conduct

##### **S v Myeza –**

- Accused parked his car and inserted a beer can ring into the parking metre
- He was guilty of a fraud

##### **R v Persotam –**

- X buys goods on credit from Y; X has no funds to pay for the goods. Has he made a misrepresentation?
- Court Held: When you buy on credit you represent that you are able and willing to pay. If you are not then you misrepresent your state of mind.

#### Misrepresentation by Silence (non-disclosure/concealment)

- The law of omission applies here. There is only a duty to speak when there is a legal duty to do so. When does this duty arise?
  1. **General Rule** – if there is a statutory duty to speak

##### **S v Heller –**



- Section 234 of Company Act says that a director must disclose the nature of his interest in any transaction with the company.
- Court Held: If the director is a buyer or seller of the company (in his personal capacity) then he must disclose his identity to the company. If he does not then it is fraud.

### S v Yengeni –

- Y was a member of Parliament and he was the chairman of the defence committee which was buying weapons for SA
- A German company was planning on selling arms to SA
- This Company sold Y a Mercedes at 50% below normal price by using false documents
- In terms of Statute (code of conduct) all members of Parliament are under a duty to disclose to Parliament any benefits received
- Y failed to do so
- Court Held: This was fraud. His failure to speak was a misrepresentation.

2. **General Rule:** where X's words although they are literally true give a false impression unless they are qualified.

### R v Larkins –

- X told Y on the 24<sup>th</sup> of the month that X's salary for that month would be deposited into his bank account on the 30<sup>th</sup> of the month
- On the strength of this Y lent X money
- X failed to disclose to Y that prior to the 24<sup>th</sup> he had ceded his entire salary to someone else.

### Misrepresentation of Opinion/State of Mind

#### R v Persotam –

- When you buy goods on credit you are representing your state of mind as to your ability and willingness to pay.

#### R v Deetlefs –

- X bought and took delivery of a van by giving the seller a PD cheque.
- X explained that he had no money in the bank at present, that money went in and out of his account, and the cheque would be met on the post date
- The cheque was not met
- When he wrote the cheque he had no intention of meeting the debt.
- Court Held: When you write a PD cheque you are representing your state of mind as to your ability and willingness to pay.
- Guilty of fraud as he had misrepresented his state of mind as to the ability and willingness to pay

### Misrepresentation of the Future

- No such thing
- Can only misrepresent fact (actual fact or what you are thinking)
- You can misrepresent your state of mind now about what is going to happen in the future.

### Misrepresentation of Law

- If X fraudulently misrepresents the law to Y he cannot argue that Y should have known the law.
- Can be guilty.

### **S v Schnittker –**

- X persuaded a butcher Y to buy signs from him which contained certain extracts from legislation by telling him that the law required it
- X knew that the law did not require this
- Court Held: Guilty of misrepresentations

### Exaggeration of Puffing

- Extravagant statements praising a product will generally not be regarded as a misrepresentation but rather as a ‘puff’. A puff is a statement that should not mislead even the most gullible person.
- Not fraud as you lack intention to defraud

#### 3. Intention to Defraud

- 2 elements:
  1. Intention to Deceive
  2. Intention by this deceit to induce the other person to act to his detriment or prejudice (intention to defraud in the narrow sense)

### **In re London and Globe Finance Corporation –**

- “To deceive is...to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.”
- **NB:** Fraud is a dolus crime culpa does not suffice but dolus Eventualis suffices.
- Where a person makes a statement the truth of which he doubts or is not certain of he will satisfy the intent element of fraud if:
  1. He foresees the real possibility of it being false and deceiving the other person and
  2. He foresees the real possibility that the other person might be caused to act to his detriment by the statement
- Court looks at objective factors to prove intention to defraud

- It is not necessary that the accused should intend to make a gain/profit by the misrepresentation.
- The motive of the accused in making the misrepresentation is irrelevant.
- Section 245 of the CPA was declared unconstitutional by the CC in the case of **S v Coetzee**  
*'Where an accused is charged with an offence of which a false representation is an element and it is proved that the false representation was made by the accused then he shall be deemed unless he proves the contrary on a balance of probabilities to have made the representation knowing it to be false'*
- If the State proved element 2 the accused was presumed guilty of element 3 part 1.

#### 4. Prejudice/Detriment

- 2 part enquiry:  
Prejudice can be actual or potential
- State does not need to prove actual prejudice, potential prejudice suffices.
- What is potential prejudice? A misrepresentation is potentially prejudicial if there is a real possibility of it causing prejudice. It does not matter that the person did not act on the misrepresentation or even believe it, provided that there was a real possibility that the misrepresentation might cause prejudice.
- Potential prejudice is looked at objectively; ask is the misrepresentation potentially prejudicial to an ordinary person of ordinary knowledge.

#### **R v Dyonta –**

- X tried to sell glass as diamonds to Y and Y knew that the glass was not diamonds.
- Issue: Is X guilty of fraud?
- Here there is no actual prejudice as Y did not purchase the “diamonds”
- Court Held: Accused was guilty of fraud and the kind of prejudice here was potential prejudice. There was a real possibility of prejudice to an ordinary person

#### Variation 1:

- It was obvious that the diamonds were made from glass? Accused would have been guilty of attempted fraud.

#### Variation 2:

- It was obvious that the diamonds were made from glass but Y is foolish and purchases the glass? Here there is actual prejudice and the accused is guilty of fraud

#### Variation 3:

- The items are actually diamonds and the seller thinks that he is selling glass and Y purchases the diamonds? No actual prejudice as they are diamonds. No potential prejudice as they are diamonds. Not guilty of fraud but an attempt to commit fraud (factual impossibility)

- Actual Prejudice is tested when it happens not at the time of misrepresentation.
- Potential Prejudice is tested at the time that the misrepresentation is made.

Example:

- A wants to sell shares to B in a company prospecting for oil. He tells them that the company has just struck oil and that the share will go up. A knows that this is not so. Oil is then discovered and the shares go up. B has bought the shares.
  - There is no actual prejudice
  - Is there a potential prejudice? Yes, at the time that A made the misrepresentation there was a real possibility of prejudice.

Variation 1:

At the time of the misrepresentation, unknown to A oils is struck. No actual prejudice. No potential prejudice as the company has struck oil. A is guilty of attempted fraud (factual impossibility)

Prejudice can be financial (proprietary) or non-financial

- Prejudice does not have to be financial.
- One: Where a misrepresentation substantially inconveniences public administration

**R v Heyne –**

- Accused was a liquor license holder who had made false entries in his books of account in order to conceal illegal liquor transactions.
- Presented these books to the police who were investigating.
- Police picked up that he was lying.
- There was no financial prejudice – his misrepresentation weakened the control given to the police by the Liquor Act, and affected the State’s interest in controlling the supply of liquor and preventing its abuse.
- Potential not actual prejudice to the State.

**R v Frankfort Motors –**

- During the time when petrol rationing was imposed in the interests of the war effort, the owner of a garage falsified his papers in order to obtain a larger supply of petrol than he was entitled by law to receive
- Issue: Was the accused guilty of fraud?
- Court Held: Potential for non-financial prejudice to the State in trying to undermine the war effort, and prejudice to other retailers and the general public as there would be less petrol from them.
- The obtaining of a permit or a privilege that you might not otherwise have obtained might constitute prejudice.

**R v Thabeta –**

- X1 wrote a teachers exam under the name of X2

- Potential for non-financial prejudice as it undermines the quality of education.
- Two: Where there is a risk of civil proceedings or prosecution as a result of action on the misrepresentation

#### R v Seabe –

- X was a coloured who was not allowed to purchase meths
- He obtained it from the shop by saying that he had been sent by a white person to purchase it.
- Court Held: Potential non-financial prejudice to the shopkeeper as he might be exposed to prosecution for selling meths to a coloured.
- This case is an example of a third kind of non-financial prejudice **impairing dignity which is sufficiently serious is prejudice**
  - Court Held: viewed badly by his community and he might have his license withdrawn.
- Three: Prejudice where X induces Y to make a contract which he would otherwise not have made even though Y does not end up worse off financially.

#### R v Deale –

- Accused induced people to purchase medicines by saying that it was German when in truth it was South African
- They were not worse off financially as the medicine was good
- Court Held: Non-financial prejudice as they would not have contracted otherwise.
- **NB:** Any non-financial prejudice suffices for fraud as long as it is not too remote or fanciful.
- Courts have a discretion to determine whether or not the non-financial prejudice is prejudice

#### S v Tshoba –

- Accused presented a false passport to an arresting officer
- Issue: Was this fraud
- Court Held: It would be going too far to regard this as fraud. The public's welfare was not an issue the only prejudice was to the police investigation
- In the CPA there is an offence for this.

## Rape

- Definition: Unlawful, intentional sexual intercourse with a woman without her consent
- 4 Elements:
  1. Unlawfulness
    - In our old law it was not possible (unlawful) for a husband to rape his wife.
    - This position (marital rape exemption) was abolished in 1993 in Section 5 of the Prevention of Family Violence Act
    - This was then replaced by the Domestic Violence Act which retains Section 5.
    - Under old law a boy under the age of 14 was irrebuttably presumed incapable of sexual intercourse and so could never be convicted of rape.
    - In 1987 section 1 of the Law of Evidence and the Criminal Procedure Amendment Act abolished this rule. A boy of 7 and older can be convicted of rape.
    - There are grounds for justification in exceptional circumstances. Burchell suggest that there are no grounds of justification.
  2. Sexual Intercourse with a Woman
    - **Until recently** the crime could **only** be committed by the penetration of a woman's vagina by a man's penis.
    - The CC in the case of **S v Masiya** extended rape to the penetration of a woman's anus by a man's penis.
    - The slightest penetration is enough to satisfy conduct. It does not matter if there is a tearing of the hymen or emission of semen
    - Is a man guilty of rape if a woman consents and then changes her mind and refuses and he persists?

### **R v Handcock –**

- X had commenced intercourse with Y with her consent.
- He penetrated Y.
- Y then heard someone coming and withdrew her consent.
- X continued.
- Issue: Is this rape?
- Court Held: Not guilty of rape in refusing to desist
  
- A man cannot be raped and a woman cannot commit rape. If a woman aids a man to rape then she will be guilty as an accomplice (provided that there is a principal).
- What if a man uses physical force against a woman and she dies in the course of her assault and he penetrates her after? Open question but there is some weak authority in the following case:

### S v W 1976 –

- Only guilty of attempted rape.

### 3. Without Consent

- Physical resistance by the woman indicates lack of consent but it is also rape if the woman submits because of threats of violence or of duress.
- Mere submission does not mean that a woman has consented
- The threat does not have to be of extreme violence it can be of sufficient force to overcome any resistance by the woman.

### R v Swiggelaar –

- The accused was a policeman who went to the complainant's home and ordered her to go with him to the police station late at night
- She went unwillingly and on the way he pushed her against a wall and told her he was going to have intercourse with her
- She protested but did not physically stop him
- Court Held: Guilty of rape as his conduct had reduced her to a frightened state of subjection. She was scared for her safety, he was physically superior to her, and he had a revolver.
  
- Does not have to be threats of physical violence only other forms of threats suffice

### S v Volschenk –

- Accused was a white policeman who threatened a black woman whom he had arrested that he would take her to the police station and charge her if she refused to have sexual intercourse with him
- She submitted
- Court Held: Guilty of rape even though the threat was not of violence.
  
- A woman may lack capacity to consent because of mental defect or intoxication or because of an irrebuttable presumption that a girl under the age of 12 is incapable of consenting to sexual intercourse.
- A sleeping woman cannot consent to intercourse
- Fraud can negate consent but only if it is one two kinds:
  - If the fraud induces an error in personae (error as to the person)
    - If the woman is confused between two actually existing persons then it negates consent.
    - X induces Y to believe that he is her husband
    - It is not fraud for the purposes of negating consent if the man lies about anything else about himself (his marital status, pedigree, health, bank balance or his willingness to pay for her services)

### R v C –

- Complainant was asleep in her bedroom
- Awoke to find a man lying on her having sexual intercourse with her
- Believing that it was her husband she willingly participated until she realised it was a protruder
- Court Held: Guilty of rape
  - If the fraud induces an error in negotio – where the victim fails to appreciate that what she is consenting to is rape and sexual intercourse.

### S v W 2004 –

- Consent was given to sexual intercourse because the woman was told that she would derive a medical benefit from it.
- She knew what she was consenting to but he fraudulently made her believe what the result would be
- Court Held: Not guilty of rape

### 4. Mens Rea

- Mens rea is intention
- Very often a defence

### Law Reform Possibilities –

#### Sexual Intercourse with a Woman

- There are other acts of humiliation in addition to penetration by the male penis which can be equally as hurtful.
- Criticism that it is object specific (penis)
- Criticism that it is orifice specific (hole)
- Criminal Law Amendment Bill –
  - At page 10 – clause 3 see definition of sexual penetration.
  - At page 10 – clause 5
- What is likely to change is what object can be used to penetrate (in addition to the penis) and what will be penetrated (in addition to the anus and vagina)
- Also, male rape is likely to become rape
- Today male rape can only be charged as indecent assault

#### Without Consent

- The words “without consent” are very controversial
- Criticism is that it means that the rape trial focuses on the woman and not the problem (the accused)
- The problem is the force that is used and not consent



- While the words “in coercive circumstances” could replace “without consent” it does not deviate from the issue of consent which is likely to be raised by the accused under the former rather than the latter.
- There is English and Canadian authority in favour of the view that where you do not tell you partner of HIV status then could be guilty of some kind of assault

### **S v Nyalungu –**

- Guilty of rape for having sexual intercourse with a woman knowing that the accused had HIV
- Depends on whether the other elements are satisfied including dolus Eventualis.

### **Mens Rea**

- Mens rea is intention
- Criticisms that we should have a negligent crime of rape
  - However, it allows attackers to rely on any number of misconceptions about how people dress etc.
  - How would you determine reasonableness? Against a woman’s or a man’s standards?

### **Exam:**

- 3 compulsory questions each for 20 marks
- Problem type questions
- May be a theory question
- Leave out all self-study sections
- First half of the year’s work not examinable (just read through)
- Grounds of Justification (study general, private defence and necessity, duress and compulsion, leave out impossibility, consent is examinable)
- No euthanasia and defences available to battered women (S v Engelbrecht must know)
- Criminal liability under s332 (learn)
- Degrees of participation (leave out accessories after the fact)
- Inchoate attempts (leave out incitement and conspiracy)
- Theft (learn)
- Robbery (learn)
- Fraud (learn)
- Rape (learn)
- Assault (learn)
- Assault with intent (learn)
- Other Assaults (learn)

- Indecent assault (not examinable)