

SCHOOL OF LAW

DEPARTMENT OF CRIMINAL AND PROCEDURAL LAW

**CRIMINAL LAW
CRW101-U**

Tutorial Letter 103/3/2005

Dear student

- 1 FORMAT OF EXAMINATION PAPER FOR THE MAY AND OCTOBER EXAMINATIONS**
- 2 NO GROUP VISITS**
- 3 COMMENTARY ON THE EXAMINATION PAPER WRITTEN IN OCTOBER/NOVEMBER 2004**

1 FORMAT OF THE EXAMINATION PAPER FOR THE MAY AND OCTOBER EXAMINATIONS

The format of the examination paper for the **May/June examination** and in the **October/November examination** this year will be materially the same as that of the October/November 2004 paper. The only difference is that the papers for the examinations in both semesters in 2005 will count a total of **90** marks and not 100 marks as in the examinations in 2004. In the two examinations in 2005 there will be a part A consisting of multiple-choice questions counting **21 marks** (7 questions, each for 3 marks), and a part B consisting of direct or problem-type questions and counting **69 marks**.

The 2005 examination papers count only 90 marks because the assignment counts 10 marks. See Tutorial Letter 102/1/2005, in which this new system is explained. However, students who write supplementary examinations, or who for some or other reason are exempted from re-registering for 2005, need not be concerned about this. Because they are not required to do the assignment, their marks will be adjusted to count out of a total of 100 marks.

2 NO GROUP VISITS

There will be no group visits (ie lectures given by lecturers) in any of the modules in Criminal Law this year - not even in Pretoria.

3 COMMENTARY ON THE EXAMINATION PAPER WRITTEN IN OCTOBER/NOVEMBER 2004

We shall now give you the correct answers to the multiple-choice question in part A of the October/November 2004 examination, and the references to the relevant parts of the study guide and the prescribed book (ie where you will find the answers). We shall also comment briefly on the questions in part B of the examination paper.

If you have enrolled for this module for the first time you will be unable to properly understand the answers and the commentary on the examination paper before you have studied the different topics dealt with in the examination paper. Indeed, it may be better if you do not read the commentary before you study the relevant topics later on in the semester. However, if you studied this course last year you will find the commentary valuable, since you will have studied most of the work already. If you wrote this paper in October 2004, but failed and are now repeating the module, you should read both the answers and the commentary carefully, to see where you went wrong in the examination.

To enable you to follow our discussion of the answers, we have reprinted the examination paper.

OCTOBER/NOVEMBER 2004

CRIMINAL LAW FIRST MODULE (CRW-101-U)

Duration: 2 hours

100 marks

This paper consists of nine (9) pages plus instructions for completion of a mark reading sheet.

THIS PAPER IS TO BE WRITTEN BY STUDENTS WHO WRITE THE EXAMINATION IN THIS MODULE FOR THE FIRST TIME, STUDENTS WHO NOW WRITE A RE-EXAMINATION OR AEGROTAT, AS WELL AS BY STUDENTS WHO, FOR WHATEVER REASON, HAVE OBTAINED PERMISSION TO WRITE THE EXAMINATION NOW.

THE QUESTIONS IN THIS PAPER COUNT A HUNDRED MARKS. THE PAPER CONSISTS OF TWO PARTS , MARKED A AND B. YOU MUST ANSWER BOTH PART A AND PART B. PART A CONSISTS OF TEN MULTIPLE CHOICE QUESTIONS. A CORRECT ANSWER TO EACH OF THESE QUESTIONS COUNTS THREE MARKS, WHICH MEANS THAT THE QUESTIONS IN PART A COUNT A TOTAL OF THIRTY MARKS. IN PART B, THE ANSWERS TO THE QUESTIONS MUST BE WRITTEN IN THE EXAMINATION ANSWER BOOK. THE QUESTIONS IN PART B COUNT SEVENTY MARKS.

PART A

IMPORTANT NOTICE. THE QUESTIONS IN THIS PART HAVE TO BE ANSWERED ON THE MARK READING SHEET, WHICH WILL BE ISSUED WITH YOUR EXAMINATION ANSWER BOOK. YOU HAVE TO READ THE INSTRUCTIONS IN CONNECTION WITH THE USE OF THE MARK READING SHEET CAREFULLY. FAILURE TO DO SO MAY MEAN THAT YOUR ANSWERS CANNOT BE MARKED BY THE COMPUTER.

Ten questions (marked 1 - 10) follow. Each question contains three statements (marked (a)- (c)). Some of the statements are correct and some are incorrect. You must decide which of these statements is/are correct. The three statements are followed by five allegations (marked (1)-(5)). Each of them alleges that a certain statement or combination of statements is correct. You must decide which allegation accurately reflects the conclusion to which you have come.

Question 1

- (a) In the decision of *Zinn* 1969 (2) SA 537 (A) the court held that, in determining an appropriate sentence, the courts must take into consideration **only** the interests of society.
- (b) According to the **relative** theories of punishment, punishment is a means to a secondary end or purpose for example, prevention, deterrence or reformation.
- (c) The confiscation of a driver's licence is an example of punishment which strives to prevent crime.
- (1) Only statement (a) is correct.
(2) Only statements (a) and (b) are correct.
(3) Only statements (b) and (c) are correct.
(4) All these statements are correct.
(5) Only statements (a) and (c) are correct.

Question 2

- (a) The investigation into the presence of the four elements of liability follows a certain sequence. This sequence is: (i) act (ii) culpability (iii) unlawfulness (iv) compliance with the definitional elements of the crime.
- (b) The definitional elements of a crime is the concise definition of the type of conduct and the circumstances in which that conduct must take place in order to constitute an offence.
- (c) The state prosecutes a perpetrator of crime irrespective of the desires of a complainant.
- (1) Only statements (b) and (c) are correct.
(2) Only statement (b) is correct.
(3) None of these statements is correct.
(4) Only statements (a) and (b) are correct.
(5) Only statements (a) and (c) are correct.

Question 3

- (a) Conduct is voluntary if X is capable of subjecting his bodily movements to his will or intellect.
 - (b) Sane automatism is a defence which excludes the voluntariness of conduct.
 - (c) There is a legal duty upon a person to act positively if the legal convictions of the community require him/her to do so.
- (1) Only statement (a) is correct.
 - (2) Only statements (a) and (b) are correct.
 - (3) None of the statements is correct.
 - (4) Only statements (b) and (c) are correct.
 - (5) All the statements are correct.

Question 4

- (a) An act which complies with the definitional elements of a crime is necessarily also unlawful.
 - (b) The Constitution of the Republic of South Africa 108 of 1996 provides that no member of any security service may obey a manifestly unlawful order.
 - (c) Physical harm inflicted on a person with his/her consent is **never** regarded by the criminal law as unlawful conduct.
- (1) None of the statements is correct.
 - (2) Only statement (b) is correct.
 - (3) Only statements (b) and (c) are correct.
 - (4) Only statement (a) is correct.
 - (5) Only statements (a) and (c) are correct.

Question 5

- (a) For a plea of necessity to succeed, it is immaterial whether the situation of emergency is the result of human action (eg coercion) or chance circumstances (eg famine or a flood).
- (b) *Goliath* 1972 (3) SA 1 (A) is authority for the statement that the killing of an innocent person in a situation of necessity may in certain circumstances constitute a complete defence.
- (c) According to the South African Constitution, a husband who imposes corporal punishment on his wife, may successfully rely on the ground of justification known as “the right of chastisement”.

- (1) Only statement (c) is correct.
- (2) Only statements (b) and (c) are correct.
- (3) None of the statements is correct.
- (4) All the statements are correct.
- (5) Only statements (a) and (b) are correct.

Question 6

- (a) Youth is a ground of justification which excludes the unlawfulness of conduct.
 - (b) The term “criminal capacity” refers to the mental ability which a person must have in order to be liable for a crime.
 - (c) The **conative** component of criminal capacity refers to X’s ability to appreciate the wrongfulness of his/her act or omission.
- (1) Only statement (c) is correct.
 - (2) Only statement (b) is correct.
 - (3) All the statements are correct.
 - (4) Only statements (b) and (c) are correct.
 - (5) Only statements (a) and (c) are correct.

Question 7

- (a) Mental illness is a defence which may exclude criminal capacity.
 - (b) In *Kavin* 1978 (2) SA 731 (W) X’s defence that he suffered from a mental illness was accepted on the ground that he had acted on an irresistible impulse.
 - (c) For the defence of mental illness to succeed, it must be proved that the illness is of a permanent nature.
- (1) Only statements (b) and (c) are correct.
 - (2) Only statement (c) is correct.
 - (3) Only statement (a) is correct.
 - (4) Only statements (a) and (c) are correct.
 - (5) All the statements are correct.

Question 8

- (a) If the accused relies on the defence of mental illness, the court must decide upon the issue with the aid of expert evidence given by psychiatrists.
- (b) The **cognitive** leg of the test for criminal capacity refers to persons’s ability to act in accordance with his/her insight into right or wrong.
- (c) The defence of mental illness is also referred to as the defence of non-pathological criminal incapacity.

- (1) Only statement (a) is correct.
- (2) Only statement (c) is correct.
- (3) Only statements (a) and (c) are correct.
- (4) Only statements (a) and (b) are correct.
- (5) None of the statements is correct.

Question 9

- (a) When determining whether the accused had intention, the question is whether he/she should have foreseen the result of his conduct.
- (b) The motive of the accused for committing the crime is essential in determining whether he/she had intention.
- (c) Mistake relating to the chain of causation may exclude intention provided that the actual chain of events differed materially from that envisaged by the perpetrator.

- (1) All the statements are correct.
- (2) Only statement (c) is correct.
- (3) Only statements (b) and (c) are correct.
- (4) Only statement (a) is correct.
- (5) Only statement (b) is correct.

Question 10

- (a) In *Mtshiza* 1970 (3) SA 747 (A) the court favoured the concrete culpability approach in *aberratio ictus* situations.
 - (b) Provocation can never serve as a ground for the mitigation of punishment.
 - (c) Strict liability is found in statutory crimes only.
- (1) Only statement (c) is correct.
 - (2) Only statement (b) is correct.
 - (3) Only statement (a) is correct.
 - (4) Only statements (a) and (c) are correct.
 - (5) All the statements are correct.

PART B

THIS PART CONSISTS OF THREE QUESTIONS. EACH QUESTION HAS A NUMBER OF SUBDIVISIONS. YOU MUST ANSWER ALL THREE QUESTIONS WITH THEIR SUBDIVISIONS. NOTE THE CHOICES YOU HAVE IN CERTAIN SUBDIVISIONS. SUBSTANTIATE YOUR ANSWERS AND REFER TO DECIDED CASES WHERE RELEVANT. IN DETERMINING THE LENGTH OF YOUR ANSWERS YOU SHOULD BE GUIDED BY THE MARKS ALLOCATED TO EACH QUESTION.

Question 1

- (a) Section 35 (3)(l) of the Constitution of the Republic of South Africa, Act 108 of 1996 provides:

“Every accused person has a right to a fair trial which includes the right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted.”

or

Merely explain in about one sentence the meaning of each of the following rules relating to the principle of legality: *ius acceptum*; *ius praevium*; *ius strictum* and *ius certum*. Then indicate whether s 35(3)(l) of the Constitution may be interpreted as covering each of these rules. (8)

- (b) Briefly explain the difference between relative and absolute compulsion. (4)

(c) **NOTE THE CHOICE THAT YOU HAVE IN THIS QUESTION**

Name, without discussing, the requirements for a successful reliance on the ground of justification known as private defence

OR

Discuss the criminal liability of corporate bodies. (7)

- (d) Define the following different forms of intention:

- (i) direct intention (*dolus directus*)
- (ii) indirect intention (*dolus indirectus*)
- (iii) *dolus eventualis*

(6)
[25]

Question 2

- (a) X decides to rob a small branch of a bank in a remote area. As he enters the bank, he is apprehended by Y, the security guard of the bank. X shoots Y with a pistol in his (Y's) chest. X succeeds in robbing the bank without causing physical harm to anybody else. Because an ambulance is not readily available, Y is taken to hospital only three hours after he had been wounded. Y dies while being transported by ambulance to the hospital. X is charged with the murder of Y. At the trial, the state pathologist who had done a post-mortem examination on Y, testifies that the bullet wound inflicted upon Y was fatal and that he would have died in any event regardless of whether he had received medical attention at an earlier stage. The court accepts this evidence. In view of these facts, discuss whether X's act can be regarded as the **factual** as well as the **legal** cause of Y's death. (10)
- (b) Discuss **ONE** of the following cases:
- (1) *Minister van Polisie v Ewels* 1975 (3) SA 590 (A)
 (2) *Bernardus* 1965 (3) SA 287 (A)
 (3) *Goosen* 1989 (4) SA 1013 (A)
 (7)
- (c) Briefly explain the meaning and legal effect of the following:
- (1) an *error in objecto* which is material
 (2) mistake relating to a ground of justification (8)

[25]**Question 3**

- (a) X shoots A and B with his pistol. A dies as a result of the shot. B is wounded but survives. X is charged with murder in respect of A and attempted murder in respect of B. At the trial it is proved that, at the time of the shooting, X had been under the influence of alcohol to such an extent that, although he had criminal capacity, he lacked the intention to kill A and B. Discuss the criminal liability of X in respect of both A and B. In your answer you must also consider whether the provisions of section 1 of the Criminal Law Amendment Act 1 of 1988 would be applicable. (8)

(b) NOTE THE CHOICE THAT YOU HAVE IN THIS QUESTION

The required form of culpability for the crime of culpable homicide is negligence. Define the test for negligence in materially defined crimes such as culpable homicide.

OR

- Although the test for negligence is objective, subjective factors are taken into account in three instances. Merely name these three instances. (3)
- (c) The law cannot expect of somebody to do the impossible. Name and discuss the requirements for the defence of impossibility to succeed. (5)

- (d) According to the retributive theory, punishment is justified because it is X's **just desert**. Explain the philosophy underlying retribution (or "just desert"). (4)
[20]

TOTAL: [100]

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COMMENTARY ON EXAMINATION PAPER

In the discussion that follows, the following abbreviations are used:

SG - Study guide

Criminal Law - CR Snyman *Criminal Law* 4th ed (2002)

Case Book - CR Snyman *Criminal Law Case Book* 3rd ed (2003)

ANSWERS TO PART A (MULTIPLE-CHOICE QUESTIONS)

Question 1

- (a) This statement is incorrect. In *Zinn*, the Appellate Division held that, apart from the interests of the community, the gravity of the offence and the personal circumstances of the offender should also be taken into account. See SG 1.2.7.
- (b) Correct. See SG 1.2.1.
- (c) Correct. See *Criminal Law* p 18.

Option (3) is therefore correct.

Question 2

- (a) Incorrect. The sequence is: (i) act, (ii) compliance with the definitional elements of the crime, (iii) unlawfulness and (iv) culpability. See SG 1.7.2.
- (b) Correct. See SG 1.7.2.
- (c) Correct. See *Criminal Law* pp 5-7.

Option (1) is therefore correct.

Question 3

- (a) Correct. See SG 3.3.3.
- (b) Correct. See SG 3.3.3.2 (c).

- (c) Correct. See SG 3.4.1. This principle was laid down by the court in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A).

Option (5) is therefore correct.

Question 4

- (a) Incorrect. See SG 5.2.
- (b) Correct. See *Criminal Law* pp 132-135.
- (c) Incorrect. The infliction of bodily harm cannot be justified by consent if the act was in conflict with the *boni mores*. Such an act is still unlawful. See SG 6.3.3.

Option (2) is therefore correct.

Question 5

- (a) Correct. See 6.2.2 (1). Make sure that you understand the difference between private defence and necessity.
- (b) Correct. See SG 6.2.6 and *Case Book* p 93.
- (c) Incorrect. There is no such provision in the Constitution. As regards the ground of justification known as “disciplinary chastisement”, see *Criminal Law* pp 135-137.

Option (5) is therefore correct.

Question 6

- (a) Incorrect. Youth (or immature age) is considered in the context of the element of culpability and it may exclude criminal capacity. See *Criminal Law* pp 176-179.
- (b) Correct. See SG 7.2.4.
- (c) Incorrect. The **cognitive** component of criminal capacity refers to a person’s ability to appreciate the wrongfulness of his/her act or omission. The **conative** component, on the other hand, refers to the ability of a person to control his/her behaviour in accordance with his/her insights. See SG 7.3.3 and make sure that you understand the difference between these two components of the concept of “criminal capacity”.

Option (2) is therefore correct.

Question 7

- (a) Correct. Criminal capacity may be excluded if X suffered from a mental illness at the time of the act. See SG 8.2.
- (b) Incorrect. In *Kavin*, X’s defence of mental illness was upheld because he had lacked criminal capacity at the time of the act as a result of gradual disintegration of his personality through reactive depression. See SG 8.2.5 *Case Book* p 112.

- (c) Incorrect. It can be of a permanent as well as a temporary nature as long as it existed at the time of the act. See SG 8.2.4 (4).

Option (3) is therefore correct.

Question 8

- (a) Correct. See SG 8.2.4 (2).
- (b) Correct. See again the commentary on question 6 (c) above.
- (c) Incorrect. The word “mental illness” refers to a pathological (sick) disturbance of X’s mental faculties. See SG 8.2.4 and 7.4.1.

Option (4) is therefore correct.

Question 9

- (a) Incorrect. Intention requires that the accused had, in actual fact, foreseen the result of his/her conduct. Whether he/she should have foreseen the result is relevant to determining negligence. See SG 9.5.
- (b) Incorrect. In determining whether X acted with intention, the motive behind the act is immaterial. See SG 9.10.
- (c) Correct. See SG 10.4 and the decision in *Goosen* discussed in *Case Book* p 141.

Option (2) is therefore correct.

Question 10

- (a) Correct. See the discussion of the decision in *Case Book* p 160 as well as SG 10.5.2, 10.5.3 and 10.5.4.
- (b) Incorrect. See *Criminal Law* p 239.
- (c) Correct. See SG 14.1.2.

Option (4) is therefore correct.

ANSWERS TO PART B

Note that the comments that follow should not be regarded as model answers. The commentary includes, on the whole, just the outlines of the answers and we have also given you the references to the relevant parts of the study guide.

Question 1**(a) See SG 2.3**

Ius acceptum rule: A court may find an accused guilty of a crime only if the kind of act performed is **recognised by the law** as a crime. This rule is not referred to expressly in section 35(3)(l). However, the rule is implied in the provision.

Ius praeivium rule: A court may find an accused guilty of a crime only if the kind of act performed is recognised as a crime **at the time of its commission**. The rule is recognised expressly in section 35(3)(l). (See the words “...at the time it was committed or omitted”.)

Ius certum rule: Crimes ought not to be formulated vaguely. The rule is not referred to expressly in section 35(3)(l). However, it is suggested that the provision will be interpreted in the sense that it includes the rule.

Ius strictum rule: A court must interpret the definition of a crime narrowly, rather than broadly. The principle is not referred to expressly but it will also probably be interpreted to include the rule.

(b) SG 3.3.3.2 and 6.2.4

In the case of absolute compulsion, X does not commit a voluntary act. For example, Z grabs X's hand which is holding a knife and stabs Y. Because X did not perform a voluntary act, he cannot be held liable. In the case of relative force X indeed performs a voluntary act. An example is where Z threatens X to kill him (X) if he does not kill Y. X still has a choice - to kill Y, or to die instead. However, if he/she decides to rather kill Z, he/she may rely on the ground of justification known as “necessity”.

(c) First option**SG 5.3.1**

You were required to name, without discussion, the requirements for a successful reliance on private defence. This was a direct question in which you could earn easy marks. The answer is not repeated here. You will find it in the grey block in SG p 63.

Second option**SG 14.2.2**

First, you should have stated that the liability of corporate bodies (juristic persons) is governed by legislation, namely section 332 (l) of the Criminal Procedure Act. A discussion of the content of the provision should have followed.

According to the section, an act by a director or servant of a corporate body is deemed to be an act of the corporate body itself, provided the act was performed in exercising powers or in the performance of duties as a director or servant, or if the director or servant was furthering or endeavouring to further the interests of the corporate body.

A juristic person can be found guilty on this basis of any crime, irrespective of whether it is a common law crime or a statutory crime. The form of culpability for the crime may be either intention or negligence.

You also had to give at least one example of the application of the section, for example the decision in *Mtshumayeli*. (See SG 14.2.2.)

(d) **SG 9.4**

The three different forms of intention are set out in the grey blocks in SG 9.4.1 and 9.4.3. They are not repeated here. Make sure that you know the exact definitions of all these different forms of intention.

Question 2

(a) **SG 4.3**

When dealing with materially defined crimes the question arises whether there is a causal connection between X's conduct and the prohibited result. This question deals with the requirement of causation in materially defined crimes. You were asked specifically to consider whether X's act could be viewed as the **factual** as well as the **legal** cause of Y's death.

X's act is the factual cause of Y's death if it is a *conditio sine qua non* for Y's death. (See the decision in *Daniëls* 1983 (3) SA 275 (A).) *Conditio sine qua non* means an indispensable condition. Therefore, an act is a *conditio sine qua non* for a situation if the act cannot be "thought away" without the situation disappearing at the same time. Application of this theory leads to the conclusion that X's act is indeed the factual cause of Y's death. If X did not shoot Y in the chest, he would never have died at that particular moment in time.

However, the mere fact that an act is regarded as *conditio sine qua non* and the factual cause of a specific result is not sufficient. The act must also be the legal cause of the result. There are various theories or tests which the courts use to determine whether an act is also the legal cause of a result. The first of these theories is the **individualisation theory**. According to this theory one must, among all the conditions which qualify as factual causes, look for that one which is the **most operative** and regard it as the legal cause of the prohibited situation.

However, in *Daniëls* the Appeal Court held that this test is not the only way to determine legal causation. Another test or theory is the theory of **adequate causation**. According to this theory, an act is the legal cause of a situation if, according to **human experience, in the normal course of events**, the act has the **tendency** to bring about that kind of situation. In other words, it must be typical of the act to bring about the specific result.

A further theory, which is actually only a different formulation of the theory of adequate causation, is the **novus actus interveniens theory**. According to this approach, X's act can be regarded as the legal cause of Y's death if there is no *novus actus interveniens* (an **unexpected, abnormal or unusual occurrence** between X's act and Y's death).

You also had to discuss that our courts do not regard one particular theory as the only correct theory which should be applied in all circumstances. In the important decisions of *Daniëls* and *Mokgethi* (see SG 4.3.7.2 and 4.3.7.3 for a discussion of these cases) the Appeal Court held that, when dealing with legal causation, the courts should have regard to policy considerations

of what is reasonable and fair. In other words, the specific theories are mere aids to determine whether it is reasonable and fair to regard X's act as the cause of Y's death. (See in particular the decision in *Mokgethi* in *Case Book* p 62.)

Finally, students should have applied the criteria discussed above on the facts. Because it is clear from the facts that the delay of the ambulance cannot be regarded as a *novus actus interveniens*, X's act is also the legal cause of Y's death. By shooting X in the chest, his act also has the tendency, according to human experience in the normal course of events, to bring about this type of result (the death of a person). Moreover, X's act is the proximate cause of Y's death. Therefore, one can argue on the basis of all these considerations that it is reasonable and fair to regard X's act as the legal cause of Y's death.

You had to spot the similarities between the facts in this question and those in the *Daniëls* case. Once you have studied the decision, the similarities will become more obvious. (See *Case Book* p 51.)

(b) Case Book pp 38, 181 and 141

These are all prescribed cases which you were required to study. To get good marks in the examination, you should have

- briefly stated the facts of the case
- stated the relevant legal question in the case
- briefly discussed the conclusion reached by the court
- the reason for that conclusion

(c) SG 10.1, 10.3 and 10.5.5

(1) *Error in objecto* is form of mistake in that the perpetrator believes the object against which he/she directs his/her action to be something or somebody different from what it in fact is. If the mistake is material, it can exclude intention and afford X a defence. The requirement that the mistake must be "material" before it can exclude intention merely means that the mistake must concern an **element** or requirement of the crime other than the culpability requirement itself. Therefore, X should have made an error concerning the

- requirement of an act
- the requirement(s) contained in the definitional elements
- the requirement of unlawfulness

Whether, in a specific set of facts, *error in objecto* affords a person a valid defence will depend upon the elements of the specific crime with which he/she is charged. For example, the crime of "murder" is defined as the "unlawful, intentional causing of the death of another human being". Therefore the object of the crime is "another human being". Suppose for instance that X goes hunting one evening at dusk. He fires a shot at a figure which he thinks is a buck. The object in fact is a human being who was walking in the bush. The person dies as a result of the shot and X is charged with murder. X can rely on the defence that his mistake excluded intention. Because he did not have the intention to kill a "human being" (as required for the crime of murder) his mistake concerning the object of the crime was material. However, X may still be convicted of culpable homicide if the state can prove that he/she was negligent.

However, as explained in 10.3 (SG p 122), if X intended to shoot Y, but it subsequently transpired that he/she mistook his/her victim's identity and in fact shot Z, his mistake is not material. He only made a mistake concerning the identity of the victim. The definition of murder requires merely the unlawful and intentional killing of "another human being". The identity of the human being is irrelevant.

Many students confuse the defence of mistake regarding the object of the crime (*error in objecto*) with *aberratio ictus*. This question did not deal with this issue but you must make sure that you also understand the difference between these different factual situations.

(2) SG 10.6

We mentioned above that intention (more particularly, X's "knowledge") must be directed at the act, the circumstances contained in the definitional elements and the element of unlawfulness. The last-mentioned means that X must have been aware of the fact that his/her conduct was unlawful. This aspect of *dolus* is known as **knowledge of unlawfulness**. It means, amongst other things, that X must have been aware of the fact that his/her conduct was not covered by a **ground of justification**.

The following example illustrates this kind of mistake. X hears the sound of a door opening in the middle of the night. He/she thinks it is a burglar who threatens his/her life. X fires a shot in the direction of the "burglar" and "he" is killed instantly. It appears afterwards that it was X's daughter who had unlocked the door and whom X had killed. X is charged with murder. X can rely on the absence of intention because he was under the impression that he had acted in a situation of **private defence** (a ground of justification). If X's defence is upheld, he can of course still be found guilty of culpable homicide, provided that the state proves that he/she was negligent.

A discussion of the *De Oliveira* decision was important in this question. See *Case Book* 178.

Question 3

(a) SG study unit 12

This question deals with the effect of intoxication on criminal liability. Unless you have already mastered the general requirements for criminal liability, this is a difficult topic to understand. Therefore make sure first that you understand these general requirements before you study the defence.

You were expected to discuss X's liability for A's death as well as his liability for the attempt on B's life. Therefore the crimes which are relevant in this question, are murder, culpable homicide, attempted murder assault and the statutory offence created in section 1 of Act 1 of 1988. X's liability in respect of A and B respectively are discussed below.

X's liability for A's death: According to the facts, X was, at the time of the event, drunk to such an extent that he did not have the intention to kill A. Therefore he cannot be convicted of murder. However, he may be convicted of culpable homicide if the state can prove that he was negligent. According to the facts X had criminal capacity and a conviction of culpable homicide is, therefore, possible. The relevant decision is *Chretien*. You had to discuss this important decision.

X **cannot** be convicted of a contravention of section 1 of Act 1 of 1988. For a conviction of this crime it is required that X **lacked criminal capacity** at the time of the offence and that he was acquitted of the crime charged (ie murder) on this ground. According to the facts, X had criminal capacity. The intoxication only had the effect of excluding X's intention. If intoxication did not have the effect that a person lacked criminal capacity, he/she cannot be convicted of this offence.

X's liability for B's injuries: X cannot be found guilty of attempted murder in respect of B. According to the given facts it is stated clearly that X, as a result of intoxication, did not have the intention to kill B. Because the Appeal Court had rejected the specific-intent theory in the decision of *Chretien*, he can also not be charged with a lesser crime such as assault. Therefore you also had to discuss the decision in this context.

X can also not be convicted of a contravention of section 1 of Act 1 of 1988. According to the facts, he had criminal capacity and only lacked intention. Therefore X must be acquitted completely. As indicated above, the statutory offence only applies if X lacked criminal capacity as a result of intoxication.

(b) **First option**

SG 11.3

The definition of negligence appears in a grey block in study unit 11. We do not repeat it here but emphasise that you must be able to give this precise definition in the examination.

Second option

SG 11.6

These three instances concern children, experts and if the accused had knowledge superior to the knowledge which a reasonable person would have had on the matter.

(c) **SG 3.4.2**

This was another direct question which was easy if you knew the work.

The defence of impossibility is relevant if a person is charged with an omission. In the case of an omission, the requirement that conduct must be voluntary means that it must have been **possible** to perform the voluntary act. There are three requirements for successful reliance on the defence:

- * The legal provision infringed must place a positive duty on X. You had to illustrate this requirement by means of a court decision, for instance the decision in *Canestra* (see SG p 42).
- * It must be objectively impossible for X to comply with the relevant legal provision. The decision in *Leeuw*, one of the prescribed decisions, is relevant here. Therefore you had to discuss this decision (see SG p 41 and *Case Book* p 44).
- * X must not himself be responsible for the situation of impossibility.

(d) **SG 1.2.2**

According to the retributive theory, punishment is justified because it is X's **just desert**. The underlying idea can be explained as follows: the legal order offers every member of society certain advantages, while at the same time burdening him/her with certain obligations. The advantages are that the law protects him because it prohibits other people from infringing upon his basic rights or interests, such as his life, physical integrity and property. However, these advantages can only exist if each member of society fulfils his obligations, namely refrains from infringing upon other members' rights. If a person commits an act whereby he/she gets an unjustifiable advantage above other members of society, he/she disturbs the legal balance in society. He/she must be punished to restore the legal balance in society. Therefore, punishment can be described as the paying of a debt which the offender owes society as a result of his/her crime.

You also got marks if you discussed the requirement that there should be a proportional relationship between harm and punishment and that retribution presupposes moral guilt (see SG 1.2.2.3 and 1.2.2.5).

We wish you success with your studies.

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