

SCHOOL OF LAW

DEPARTMENT OF CRIMINAL AND PROCEDURAL LAW

**CRIMINAL LAW
CRW101-U**

Tutorial Letter 102/2006

Dear Student

- 1 FORMAT OF EXAMINATION PAPER FOR THE OCTOBER/NOVEMBER EXAMINATIONS**
- 2 NO GROUP VISITS**
- 3 COMMENTARY ON THE EXAMINATION PAPER WRITTEN IN OCTOBER/NOVEMBER 2005**

1 FORMAT OF THE EXAMINATION PAPER FOR THE OCTOBER EXAMINATIONS

The format of the examination paper for the **October/November 2006 examination** will be materially the same as that of the October/November 2005 paper. The only difference is that the examinations in 2006 will count a total of 75 marks and not 90 marks as in 2005. Part A will consist of multiple-choice questions, counting **21 marks** (7 questions of 3 marks each), and part B will consist of direct or problem-type questions counting **54 marks**.

The reason why the examination only counts out of 75 marks instead of 90 marks is because students have to submit two assignments in 2006, the first one contributing 10 marks and the second 15 marks towards the final mark out of a 100. See Tutorial Letter 101/3/2006, in which this new system is explained.

2 NO GROUP VISITS

There will be no group visits (i.e. 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 2005

Below we provide you with the correct answers to the multiple-choice question in part A of the October/November 2005 examination, as well as 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.

Students who have enrolled for this module for the first time will not be able to fully understand the answers and the commentary on the examination paper before they have studied the different topics dealt with in the examination paper. We recommend that these students do not read the commentary until they study the relevant topics later on in the semester. However, students that have already studied this course last year will find the commentary valuable, since they will have dealt with most of the work already. Students who wrote this paper in October 2005, but failed and are now repeating the module, should read both the answers and the commentary carefully, to see where they went wrong in the examination.

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

**October/November 2005
CRIMINAL LAW FIRST MODULE**

(CRW101-U)

Duration: 2 hours

90 marks

This paper consists of 8 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 AN AEGROTAT, AS WELL AS STUDENTS WHO, FOR WHATEVER OTHER REASON, HAVE OBTAINED PERMISSION TO WRITE THE EXAMINATION NOW.

THE QUESTIONS IN THIS PAPER COUNT NINETY MARKS. THE PAPER CONSISTS OF TWO PARTS, MARKED A AND B. YOU MUST ANSWER BOTH PARTS A AND B. PART A CONSISTS OF SEVEN MULTIPLE CHOICE QUESTIONS. EACH QUESTION COUNTS THREE MARKS, WHICH MEANS THAT THE QUESTIONS IN PART A COUNT A TOTAL OF 21 MARKS. IN PART B, THE ANSWERS TO THE QUESTIONS MUST BE WRITTEN IN THE EXAMINATION ANSWER BOOK. THE QUESTIONS IN PART B COUNT 69 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.

Seven questions (marked 1-7) 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 conclusions to which you have come.

Question 1

- (a) The retributive theory is the only theory of punishment which insists on there being a direct proportion between the extent of the harm or damage caused and the extent of the punishment.
 - (b) In the decision of *Zinn* the court held that, in determining an appropriate sentence, the court must take into account only the interests of the society.
 - (c) The efficacy of the theory of general deterrence depends only upon the severity of the punishment that might be imposed, and not upon the degree of probability that the criminal will be caught and convicted.
- (1) Only statement (a) is correct.
 - (2) Only statements (b) and (c) are correct.
 - (3) Only statements (a) and (c) are correct.
 - (4) Only statement (b) is correct.
 - (5) None of these statements is correct.

Question 2

- (a) The mere fact that an act corresponds to the definitional elements of an offence means that the act is unlawful.
 - (b) A person may act in private defence in order to protect a third person even if there is no family or protective relationship between himself and the third person.
 - (c) The judgement in *Goliath* is authority for the statement that one may kill an innocent person in a case of a relative compulsion.
- (1) Only statement (a) is correct.
 - (2) Only statement (b) is correct.
 - (3) Only statements (a) and (c) are correct.
 - (4) Only statements (b) and (c) are correct.
 - (5) All of these statements are correct.

Question 3

- (a) Putative private defence is not actual private defence and can therefore not exclude X's culpability.
 - (b) For X to succeed with a defence of private defence, his defensive act must have been directed at an attack that has already been completed.
 - (c) The test to determine necessity is an objective test.
- (1) Only statement (a) is correct.
 - (2) Only statement (c) is correct.
 - (3) Only statement (b) is correct.
 - (4) Only statements (a) and (c) are correct.
 - (5) All these statements are correct.

Question 4

- (a) In *Chretien* 1981 (1) SA 1097 (A) the court rejected the "specific intent theory" with regard to intoxication.
 - (b) If X is charged with murder and the court finds that he was so intoxicated that he lacked the intention at the time of the commission of the crime, he cannot be convicted of any crime.
 - (c) One of the requirements for a conviction of a contravention of section 1 of Act 1 of 1988 is that X should have lacked criminal capacity at the time of the commission of the act.
- (1) Only statement (b) is correct.
 - (2) Only statement (c) is correct.
 - (3) Only statement (a) is correct.
 - (4) All these statements are correct.
 - (5) Only statements (a) and (c) are correct.

Question 5

- (a) The cognitive component of criminal capacity is present if X has the ability to appreciate the wrongfulness of his act.
 - (b) In *Kavin* 1978 (2) SA 731 (W) the defence of mental illness was raised successfully.
 - (c) The test for mental illness comprises both a pathological and biological test.
- (1) Only statement (a) is correct.
 - (2) Only statement (c) is correct.
 - (3) Only statements (a) and (b) are correct.
 - (4) All these statements are correct.
 - (5) Only statements (a) and (c) is correct.

Question 6

- (a) The *ius certum* principle, which forms part of the principle of legality, implies that nobody ought to be convicted of a crime, unless the kind of act performed by him had been recognised by the law as a crime already at the time of its commission.
 - (b) Before one can assume that a provision in a statute had created a crime, it must be clear that the provision contains a criminal norm.
 - (c) The *ius strictum* principle implies that a court is not authorised to extend an crime's field of application by analogy to the detriment of the accused.
- (1) Only statement (a) is correct.
 - (2) Only statement (c) is correct.
 - (3) Only statements (a) and (b) are correct.
 - (4) Only statements (b) and (c) are correct.
 - (5) All the statements are correct.

Question 7

- (a) Evidence of provocation may sometimes serve to confirm the existence of intention to commit the crime with which X is charged.
 - (b) If X is charged with assault with intent to do grievous bodily harm and it appears from the evidence that he was provoked, the provocation may have the effect that X will not be found guilty of assault with intent to do grievous bodily harm but only of common assault.
 - (c) In the decision of *Ngubane* the court held that it is wrong to assume that proof that X acted intentionally excludes the possibility of a finding that he acted negligently.
- (1) Only statements (a) and (b) are correct.
 - (2) Only statements (a) and (c) are correct.
 - (3) Only statements (b) and (c) are correct.
 - (4) Only statement (b) is correct.
 - (5) All these statements are correct.

[7 X 3 = 21]

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) X attends a soccer match between Orlando Pirates and Mamelodi Sundowns. X is a guest of company A and he is accommodated in the company's hospitality box. He drinks steadily throughout the match. During half-time Pirates is leading Sundowns with four goals. Y, a Pirates supporter, taunts X. X gets involved in an exchange of blows with Y, and stabs him with a knife, killing him. Discuss the question whether X can be convicted of murder or any other crime in respect of Y's death if the court finds that as a result of his intoxication. X, at the time of the stabbing.
- (i) did not act voluntarily
(ii) acted with criminal capacity, but lacked the intention to kill Y. (8)
- (b) Consider whether X's act in the following set of facts is the **cause** of Y's death:
- (i) X tries to stab Y, intending to murder her. Y ducks and receives only a minor cut on the arm. However, infection sets in and Y visits a doctor. The doctor gives her an injection and tells her to come back the following week for two more injections. The doctor warns Y that she may die if she fails to come back for the two other injections. Y fails to go back to the doctor, reasoning that her body is strong enough to fight infections. She dies as a result of the infection.
- (ii) Y feels depressed and threatens to commit suicide. X, who harbours a grudge against Y, hands her a loaded firearm, stating that she may shoot and kill herself if she so wishes. Y takes the firearm and shoots and kills herself. (8)
- (c) **[NOTE THE CHOICE YOU HAVE IN THIS QUESTION]**

Discuss the concept of a "reasonable person" as applied in the test for negligence.

OR

Write short notes on the contents of the concept of "unlawfulness". You must also discuss the decision in *Fourie* 2001 (2) SACR 674 (c). (6)

- (d) Name, without discussing, three factors exclude the voluntary nature of the act. (3)
(25)

Question 2**(a) [NOTE THE CHOICE YOU HAVE IN THIS QUESTION]**

In order for consent to be considered valid, certain requirements must be complied with. Merely name these requirements.

OR

Discuss **ONE** of the following cases. In your answer you must state the facts of the case, the legal question the court had to answer, the decision of the court and the reason the court gave for arriving at that decision.

1. *De Oliveira* 1993 (2) SACR 59 (A).
2. *Dlamini* 1955 (1) SA 120 (T).
3. *C* 1952 (4) SA 117 (O). (6)

(b) Distinguish between “sane” and “insane” automatism. (6)

(c) Discuss the term “strict liability.” Also discuss the principles to be applied in determining whether culpability is required when the legislature failed to specify whether intention or negligence is the required form of culpability for an offence. (10)

(d) Merely state three differences between crimes and delicts. (3)
(25)

Question 3**(a) [NOTE THE CHOICE YOU HAVE IN THIS QUESTION]**

Explain the meaning of the expression *aberratio ictus*. Name and explain the two opposing approaches to cases of *aberratio ictus*. Indicate which approach ought, in your opinion, to be followed, stating the reasons for why you think such an approach is the correct one. Also name the most important decision of the Appellate Division dealing with *aberratio ictus*.

OR

Explain the meaning of the “principle of contemporaneity” in culpability. Refer also to case law. (8)

(b) Name the subjective factors which the court may take into account to determine negligence. (3)

(c) An omission is punishable only if there is a legal duty to act positively. Mention the instances where the legal convictions of the community require that there is a legal duty to act positively. (8)

(19)**TOTAL: [69]****TOTAL: [90]**

ANSWERS TO PART A OF EXAMINATION PAPER- MULTIPLE CHOICE QUESTIONS

The following abbreviations are used:

SG- Study Guide.

Criminal Law- CR Snyman's –Criminal Law 4th edition 1999 (the prescribed textbook).

QUESTION 1

- (a) This statement is correct. The retributive theory insists on a direct proportion between the punishment and the extent of the harm imposed. All the other theories of punishment see punishment as a means to an end. See SG 1.2.2.3.
- (b) This statement is incorrect. In the decision in *Zinn* the court applied the “triad” principle, which refers to the crime, the criminal and the interest of society in determining an appropriate sentence. See SG. 1.2.7.
- (c) This statement is incorrect. The efficacy of the theory of general deterrence does not only depend on the severity of the punishment that might be imposed but also on the probability that the perpetrator will be caught, convicted and will serve out his/her sentence. See SG 1.2.5.2.

Students should therefore have chosen option (1), since only statement (a) is correct.

QUESTION 2

- (a) This statement is incorrect. Even if an act corresponds with the definitional elements of a crime it will not necessarily be unlawful. Various grounds of justification, such as private defence, exist that will have the effect that an ostensible unlawful act will not be unlawful. See SG 1.7.2 (3).
- (b) This statement is correct. It is not a requirement that the attack be directed at the person acting in private defence. One can act in defence of a person where no particular family or protective relationship exists, a person can even act in defence of an unknown third party. See SG 5.3.2.(1).
- (c) This statement is correct. See SG 6.2.2.(2).

Students should therefore have chosen option (4), since only statements (b) and (c) are correct.

QUESTION 3

- (a) This statement is incorrect. There are two reasons why this statement is incorrect:
- (1) Putative private defence is an ostensible private defence. It is not a real defence and only exists in the mind of X. Private defence excludes the **unlawfulness** of an act and does not deal with **culpability**. Thus the statement is wrong for stating that putative private defence is not an actual private defence and it will therefore not exclude X's **culpability**.
 - (2) A person that acts in terms of a putative private defence makes a subjective mistake that can possibly lead to the exclusion of culpability.

See SG 5.3.4.

- (b) This statement is incorrect. To succeed with private defence the defensive action had to take place while the unlawful attack was imminent but not yet completed. See SG 5.3.2 (3).
- (c) This statement is correct. See SG 6.2.7.

Students should have chosen option (2), since only statement (c) is correct.

QUESTION 4

- (a) This statement is correct. See SG 8.3.
- (b) This statement is incorrect. X can still be found guilty of a crime where negligence is the required form of culpability. See SG 12.6.
- (c) This statement is correct. See SG 12.5.3.

Students should have chosen option (5), since only statements (a) and (c) are correct.

QUESTION 5

- (a) This statement is correct. See SG 8.2.3.
- (b) This statement is correct. See SG 8.2.5.
- (c) This statement is incorrect. The test for mental illness consists of a pathological and a **psychological** test. See SG 8.2.3.

Students should have chosen option (3), since only statements (a) and (b) are correct.

QUESTION 6

- (a) This statement is incorrect. The *ius certum* principle requires that crimes ought not be defined vaguely. See SG 2.6.
- (b) This statement is correct. See SG 2.4.2.
- (c) This statement is correct. See SG 2.7.

Students should have chosen option (4), since only statements (b) and (c) are correct.

QUESTION 7

- (a) This statement is correct. See SG study-unit 13. In *Criminal Law* p 239 par (c) Snyman refers to the case of *Mokonto* where the evidence of provocation clearly provided the necessary proof of the existence of intent.
- (b) This statement is correct. See SG study-unit 13. In *Criminal Law* p 238 par (b) Snyman indicates that this is the approach that our courts follow, even though it boils down to the use of “the specific intent” theory.
- (c) This statement is correct. See SG 11.7.

Students should have chosen option (5), since all the statements are correct.

PART B**QUESTION 1**

The answer to this question can be found in your SG study unit 12. This question deals with the effect of intoxication on criminal liability. Students who have not yet studied the general requirements for criminal liability, and more specifically the culpability requirement, will find this concept difficult to understand. It is suggested that you acquaint yourself first with the general liability requirements before studying this defence.

- (a) (i) In terms of the *Chretien* case X cannot be found guilty of either murder or culpable homicide since no voluntary act exists (a voluntary act is an important element for criminal liability) . X can however be found guilty of section 1 of Act 1 of 1988, as the reason for X’s non-liability falls within the ambit of section 1 of the Act. You further had to explain that a person who is so drunk that he/she cannot act, will automatically be so drunk that he/she lacks criminal liability and this will therefore also fall within the ambit of this Act.

(ii) X cannot be convicted of murder as he lacked the necessary intent because of his intoxication. He can however be found guilty of culpable homicide, as in the case of *Chretien*, if the state is successful in proving that his act was negligent. X cannot be convicted of contravening section 1 of Act 1 of 1988 either, since he possessed criminal capacity at the time of the commission of the crime. In order to be convicted of the crime enacted in section 1 of Act 1 of 1988, it is actually required that X must have been acquitted of the original charged crime due to a lack of criminal capacity.

(b) The answer to this question can be found in SG 4.3.

(i) You should have stated that the test for causality consists of a factual and a legal component. The facts in this question are analogous to the case of *Mokgethi*, and you should have discussed this case briefly. Even though X is the factual cause of Y's death in terms of the *conditio sine qua non* theory, he is not the legal cause of Y's death. Our courts apply policy considerations to determine whether it is fair and reasonable to conclude that a person is the legal cause of an unlawful action. In arriving at this conclusion our courts apply one or more of the various theories on legal causation, such as the "proximate cause" and "novus actus" tests. In this scenario the court will, according to the *Mokgethi* judgement, find Y's refusal to return for further treatment to be unreasonable and will thus find that no sufficient nexus exist between Y's injury and his death. See SG 4.3.7.3.

(ii) The facts of the question are analogous to the case of *Grotjohn*. The core of the answer deals with assisted suicide. X's action is a *conditio sine qua non* for Y's death. If X didn't give the firearm to Y, she would not have been able to shoot herself. Similar to the decision in *Grotjohn*, the mere fact that the act was the victim's own voluntary act did not mean that it constituted a *novus actus interveniens*. Y's final act was merely the realisation of what X had previously planned. See SG 4.3.7.1.

(c) **Option 1**

These six points are clearly set out in SG 11.5.2.

Option 2

The answer to this question can be found in SG 5.2.

In your answer you had to discuss the concept of unlawfulness. An action is unlawful if it conflicts with the legal convictions (*boni mores*) of society. Furthermore, various grounds of justification exist, such as private defence, necessity, consent, etc, which will render an otherwise unlawful action lawful. You should also have briefly discussed the case of *Fourie*, where the court confirmed that (1) the question of unlawfulness is only to be considered once it has been proven that an action complies with the definitional elements of the crime; and (2) that the test for unlawfulness is based on the *boni mores* or legal convictions of society. You could also have mentioned that the Bill of Rights, contained in the Constitution, plays an important role in the determination of the *boni mores*.

- (d) The three factors that needed to be stated can be found in SG 3.3.4.2 and are:
- (i) *vis absoluta*- absolute force
 - (ii) natural forces
 - (iii) automatism

QUESTION 2

(a) **Option 1**

The six requirements for a valid plea of consent that you had to state are clearly set out in the grey area in SG 6.3.4.

Option 2

Students had to discuss the cases as required. See your *Criminal Law Casebook*.

- (b) The answer to this question can be found in SG 3.3.4.2 (c) ii.
In your answer you had to describe both sane and insane automatism. It was important to state that, in the case of sane automatism, conduct is excluded because X momentarily acted “like an automaton”. In the case of insane automatism a voluntary act exists, but a defence of mental illness is advanced. Students further had to state the difference in the onus of proof: in the case of sane automatism the onus of proof lies with the state, and in the case of insane automatism it lies with the accused. Should X be successful with his defence of sane automatism, he will leave the court a free man, but if X’s defence was based on insane automatism, he will most likely be sentenced to a psychiatric institution, which will result in X losing his freedom.
- (c) The answer to this question can be found in SG 14.1.2.
Strict liability arises in statutory crimes where culpability is not required. Strict liability is never an issue in common law crimes, as culpability is always a requirement in such crimes. Students had to state that strict liability can only be found in statutory crimes. Where the legislature is silent about the culpability requirement it is the duty of the court to determine whether culpability should be excluded or not.

The guidelines that the courts use to determine whether culpability is required or not are clearly stated in SG 14.1.2.2 and you should have discussed these briefly.
- (d) The answer to this question can be found in the column in SG 1.8.
You could have named any three of the six differences mentioned.

QUESTION 3

(a) **Option 1**

The answer to this question can be found in SG 10.5.

Aberratio Ictus means the going astray of the blow. It is not a form of mistake. The perpetrator X has pictured what he was aiming at correctly, but through lack of skill, clumsiness or other factors, he misses his aim, and the blow or shot strikes something or somebody else.

The two opposing approaches are the transferred culpability and the concrete culpability approaches. The **transferred culpability** approach. X intends to shoot and kill Y. The bullet strikes a pole, ricochets and strikes Z fatally. In terms of this approach, X will be guilty of murder because he had the intention to kill a person. The fact that X didn't kill the person that he intended awards him no defence, since the intention he directed towards Y is transferred to the killing of Z.

The **concrete culpability** approach. In terms of this approach X can only be guilty of murder if he was able to foresee the possibility that the bullet could go astray and kill Z and have reconciled himself with this possibility. X's intention to kill Y cannot serve as a substitute for the intention to kill Z. In order to determine whether X had the intention to kill the person who was actually struck by the blow, the question is not simply whether he had the intention to kill a person, but whether he had the intention to kill the particular person whose death he caused.

Our courts apply the concrete culpability approach, (1) because it is in line with the subjective approach for the test of culpability; and (2) because the transferred culpability approach results in the *versari in re illicita* doctrine, that has already been rejected by our courts. The relevant case is *Mtshiza*.

Option 2

The answer to this question can be found in SG 7.2.5.

The core of this answer is the principle that culpability should be present on the part of X at the very moment the unlawful act is committed. There is no crime if culpability only exists prior to the commission of the unlawful act, but not at the moment when the act was committed, or if it came into being only after the commission of the unlawful act. A proper discussion of the *Masilela* case was required to obtain a good mark for this question. You also had to indicate that this decision is an exception to the normal principles of contemporaneity in culpability.

- (b) The answer to this question can be found in SG 11.6.
The three subjective factors are:
- (i) children
 - (ii) experts
 - (iii) a person who has more knowledge of a particular situation than the reasonable person
- (c) The answer to this question can be found in SG 3.4.
- (i) a statute;
 - (ii) the common law;
 - (iii) in terms of an agreement;
 - (iv) if a person accepts responsibility for the control of a dangerous or potentially dangerous object;
 - (v) if a person stands in a protective relationship to somebody else;
 - (vi) a previous positive act;
 - (vii) by means of his/her office;
 - (viii) in terms of an order of court.

Regards

Prof L Jordaan
Prof K Alheit
Adv L C Coetzee
Ms L Adendorff
Mr P Stevens

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