

Department of Criminal and Procedural Law



Module 2

Criminal Law

Only study guide for CRW/2602

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INTRODUCTION

Literature and methods of study



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1

GENERAL

Welcome to the second module in Criminal Law. We trust that you will enjoy your study of this module. Whereas the first module (CRW2601) deals only with the general principles of criminal law, this second module deals mainly with the specific crimes. **It is important to note that a study of this module (CRW2602) presupposes knowledge of the content of the CRW2601 module. Therefore, if you have registered for both these modules, you should first master the general principles of criminal law (as set out in CRW2601) before you make a study of the specific crimes discussed in this module. This is also why the assignment that you have to do for this module must be handed in a little later in the semester than for the CRW2601 module.**

Although the first module deals only with the general principles of criminal law, there are two topics dealing with the general principles which were not discussed in the first module. These topics are participation in crime and liability for attempt. There was not enough room in the first module to discuss these two

topics as well. These topics will accordingly be discussed in the second module. The rest of the second module will be devoted to a discussion of the most important specific crimes in our law.

2 COURSE OUTCOMES

This course ought to enable you to

- classify, and distinguish between, the various categories of persons who may be involved or implicated in the commission of a crime
- determine whether a person has committed one or more specific crimes (complete or incomplete) by measuring the person's conduct and state of mind against the various elements of the specific crime or crimes

3 LITERATURE

● *Prescribed books*

There are two prescribed books for this course, namely:

- (1) Snyman CR *Criminal Law* 5 ed (2008) Butterworths LexisNexis
- (2) Snyman CR *Strafreg-vonnisbundel/Criminal Law Case Book* 4 ed (2008) Juta

The same books that are prescribed for the first module in Criminal Law are prescribed for this module.

● *Use of prescribed books*

We wish to emphasise the fact that students are expected to read more than merely the study guide and that they should **consult the prescribed book on a specific topic**. When reading this study guide, you may find that you do not clearly understand certain aspects of a particular topic. It is then essential that you consult the prescribed textbook on the matter.

For the purposes of the examination, you should, however, use the study guide as your primary source, except in respect of those topics which are not discussed in the study guide but only in the prescribed work.

Take note that certain topics that you must know for the examination are not discussed in the study guide, but only in the prescribed book. The topics which are not discussed in the study guide, but which we expect you to study from the prescribed book, will be pointed out to you. A serious warning, though: Do not think that, because these crimes are not discussed in the study guide, you can afford to ignore them (ie, not study them from the prescribed book). You should know the topics to be studied only from the prescribed book just as well as the topics that are discussed in the study guide. In the examination, we may ask questions on the topics which have to be studied from the prescribed book.

When studying a topic from the prescribed book, you need take note only of the text itself, that is, you need not also consult, study or read the footnotes as well, unless we draw your attention to one or more footnotes.

● *Other works on criminal law*

Apart from the works already mentioned above, there are also a number of other

works on criminal law. We merely draw your attention to the following four works:

- (1) Burchell J & Milton J *Principles of Criminal Law* 3 ed by J Burchell (2005) Juta (Revised 2008)
- (2) Milton JRL *South African Criminal Law and Procedure Vol II: Common-Law Crimes* 3 ed (1997) Juta
- (3) Burchell EM & Hunt PMA *South African Criminal Law and Procedure Vol I: General Principles of Criminal Law* 3 ed by Burchell JM (1997) Juta
- (4) De Wet JC & Swanepoel HL *Strafreg* 4 ed (1985) by De Wet JC Butterworths

You need not buy any of these books. Neither are they recommended works.

4

METHOD OF STUDY

● *Subdivision of study material in study guide*

You will notice that the discussion of the material in the study guide is subdivided into 16 study units. A study unit is a unit or part of the syllabus which deals with a certain topic. You can divide the time you have at your disposal for studying this module into 16 time units and then study one study unit per such time unit.

● *Contents of study units*

Every study unit is normally subdivided into:

- (1) a table of contents of the material discussed in the study unit
- (2) a list of study objectives you should keep in mind when studying the study unit
- (3) a short paragraph serving as an introduction or background to the discussion which follows
- (4) the actual exposition of the topic covered in the study unit
- (5) a concise summary of the most important principles as set out in the topic of that particular study unit
- (6) a number of “test yourself” questions

Apart from the above you may, in the course of the discussions, find diagrams setting out certain subdivisions of the material, as well as illustrations of certain situations or sets of facts dealt with in the discussions.

The short list of study objectives mentioned under (2) above contain some of the most important aims you should keep in mind when studying that particular study unit. **However, it is important to remember that, for the examination, you must know the whole contents of the study guide, as well as the discussions of those topics not dealt with in the study guide but only in the prescribed book.** Although the “study objectives” refer to the most important aspects of a particular topic, it is not always possible to refer in this list to **each and every** statement, rule, principle or application of a rule found in the exposition of the particular topic. It is therefore perfectly possible that we may ask a question in the examination which is not covered in every respect by one of the study objectives listed. You should therefore ensure that you know everything in the study guide (or in the relevant portions of the prescribed book) for the examination.

- *What the icons represent*

An icon is a small picture or other graphic symbol which conveys a certain message. We use the following icons in this study guide:



This icon means: “Beware of the following typical mistake often made by students!”

HINT...

This icon means: “Note the following hint or advice on how to study a certain part of the material or how to answer a question in the examination!”



This icon means: “Read the judgment in the following court case which appears in your case book (one of the prescribed books you must buy).”



If a sentence or sentences are printed against a grey (“coloured”) square background (also called a “screened block”), the sentence or sentences contain a definition which you should know so well that you will be able to write it down in the examination.

As far as the third icon above (the open book) is concerned, you must bear in mind that the reading of certain cases (judgments) forms part of your studies. (As a matter of fact, it forms part of the study of all legal subjects.) In the course of our discussion of criminal law we will draw your attention to the cases you must read. In *Tutorial Letter 101* you will also find a list of the cases you must read.

The last icon (the screened block) refers to the definitions you should know for the examination because we expect you to know the definitions of certain concepts and crimes for the examination. These definitions usually consist of only one sentence (although the sentence may, admittedly, sometimes be rather long). By “know” we mean that you must be able to give us the definition in the examination substantially as it appears in the study guide. The best way would be to try and memorise the definition, but you are free to give us your own version of it. However, experience has taught us that students who do not memorise the definition but who paraphrase it, often lose marks because of deficiencies in their version of the definition.

To assist you in identifying the definitions which you should know for the examination (as explained above), we have “screened” them so that they “stand out”.

We shall therefore not warn you repeatedly that you should know certain definitions well for the examination. You should just watch out for the “screened frame”: you must be aware that you should know the definition appearing in the frame so well that you will be able to give it in the examination.

- *Important advice on how to study*

At the risk of preaching to the converted we are taking the liberty of giving you a short “curtain lecture”.

- Students of criminal law are sometimes inclined to underestimate the subject, because it deals with human actions which are concrete and often spectacular, such as stealing, killing, raping, kidnapping, destroying. We wish to **warn you against underestimating the subject**. Some of the concepts of criminal law are among the most difficult in the field of law. Do not think that because you happen to read regularly of murder, rape, robbery or other crimes in the newspapers, you can afford to read the study guide only superficially, and to rely in the examination only on the type of broad general knowledge which the

person in the street who regularly reads newspapers would have of criminal law.

- Try to **understand** the principles of criminal law, such as retribution, causation, private defence, intention or accomplice liability, so that you can apply them to concrete cases. Merely memorising page upon page of the study guide without understanding the principles underlying the topics discussed, is of little use. Only a proper understanding of the basic principles will enable you to answer the so-called “problem-type” questions satisfactorily in the examination. (A “problem-type” question is one in which you are not asked directly to discuss a particular topic, but in which we give you a set of facts and expect you to state whether one of the persons mentioned in the set of facts has committed a particular crime or whether he or she can rely on a particular defence. You must also be able to substantiate your answers.)
- Furthermore, an old but sound piece of advice is that you do not move on to a new principle before you have mastered the preceding one on which it is based.
- We advise you to **make your own notes** or summaries (perhaps even in “telegram” style) while studying the specific topics.
- Although it is important that you understand the principles underlying a particular topic, a knowledge of the principles (or framework of a topic) **only** is insufficient if you are unable also to state **some particulars** regarding the principle (such as **illustrations of its application**, the **authority** on which these principles are based, or possible **exceptions** thereto).
- Students often ask us how important it is to remember the **names of cases**. Let us clarify this matter: It would be an impossible task to memorise the names of all cases referred to in your lectures, and we do not expect you to do so. However, it is a fact that decisions count among a law student’s best friends, and since it is a good policy not to forget the names of one’s best friends, we would advise you to concentrate on remembering the names of the **most important, leading** cases. As we progress through the course, we shall draw your attention to some of the most important decisions. You are also advised to underline the names of cases when referring to them in the examinations. This will help the examiner to follow your submissions.



However, please do **not** waste any valuable time attempting to memorise the case references (eg 1966 (2) SA 259 (A)). This is absolutely unnecessary. Even if you fail to remember the name of an important case in the examination, you can simply state: “It has been decided” or “According to a decision”, et cetera. Our primary aim in the examination is not to test your memory, but your comprehension and insight – but do bear in mind that proper comprehension and insight are also based on a knowledge of facts.

- In the course of the year, we will be issuing a number of **tutorial letters**. Please bear in mind that these tutorial letters form an important part of the study material which you are required to master and, in fact, may even amend the study guide. Therefore do not ignore tutorial letters.
- We wish to warn you not to neglect the **last portions of the study guide**. We often find that in the examination, students do reasonably well in questions dealing with topics which are discussed in the first part of the study guide, but often prove to have only a very superficial knowledge, or none at all, of topics discussed towards the end of the study guide. You must study the **whole** of the study guide – including topics which are discussed at the end. Crimes such as theft, robbery and fraud, which are discussed towards the end of the study guide, are amongst the most important specific crimes. Your knowledge of some of these last topics may make the difference between failing and passing the examination!

- **Remarks concerning the specific crimes**

There are so many specific crimes that we shall eventually study only a few of them. Most of them are **common-law crimes**, that is, those crimes that are not created by statute but that have existed for countless centuries and have been recognised as crimes from generation to generation to the present day. Examples of such crimes are murder, culpable homicide, assault, robbery and theft. We shall, however, also deal with certain **statutory** crimes. Owing to the very broad scope of our subject, we are sometimes obliged to deal very concisely with some of the doctrines and crimes.

Later in this module the crimes of murder and culpable homicide will be dealt with. In the first parts of this module, these two crimes are referred to at times as examples, to illustrate the general principles. The particular reason for this is that the distinguishing factors between these two crimes are intention and negligence, and these two crimes are used to illustrate the difference between crimes requiring intention, and those crimes for which negligence is required. To follow the discussion of the general principles from the beginning, it is therefore necessary to know what the definitions of these two crimes are.

Murder is the unlawful, intentional causing of the death of another human being.

Culpable homicide is the unlawful, negligent causing of the death of another human being.

The only difference between these two crimes is therefore that, whereas intention is required for the one, negligence is required for the other.

- **Abbreviations**

- When, in the course of this study guide, we refer to your prescribed textbook, that is Snyman's *Criminal Law*, we shall identify this book merely as *Criminal Law*. If we refer to the prescribed case book, we shall indicate this book merely as *Case Book*. In this study guide all references to *Criminal Law* are to the *fifth* edition of this book (2008).
- With regard to the **mode of citation of cases**, the following method is applied. In accordance with modern usage, we do not cite the full official names of cases, for example *S v Williams en 'n Ander* 1970 (2) SA 654 (A), but simply the name, followed by the case reference *Williams* 1970 (2) SA 654 (A). This is the modern "streamlined" method.
- In the discussions which follow, we shall often refer to the perpetrator or accused simply as X, and to the complainant or victim of the crime as Y.
- We may use the words "supra" and "infra". "Supra" means "above" and "infra" means "below".

- **Language: equal treatment of genders**

In our discussions in the guide, we try to adhere to the principle of equal treatment of the genders. We do this in the following way: In study units beginning with even numbers, the female form is used, while in all study units beginning with odd numbers, the male form is used. There are necessarily certain exceptions to the rule. In cases such as the following, we do not change the genders: *first*, in the descriptions of sets of facts in reported decisions; *secondly*, where we quote legislation (which is mostly drawn up in the masculine form) directly; and, *thirdly*, in the explanatory notes to existing drawings (which, for practical reasons, unfortunately cannot be changed) depicting males.

PART 1

REMAINING TOPICS
FROM GENERAL
PRINCIPLES



STUDY UNIT **1**

Participation I: Introduction and perpetrators



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to demonstrate your understanding of the principles relating to participation by

- distinguishing between a perpetrator and an accomplice
- expressing an informed opinion whether an accused can be held liable as a perpetrator, be it according to the general principles of criminal liability or by virtue of the operation of the doctrine of common purpose
- recognising a joining-in situation and determining the liability of the joiner-in

1.1 BACKGROUND

In the discussion thus far, we have assumed that only one person has acted. However, it is well known that criminals do not always act on their own, but often together with others. In this study unit, we are going to set out the principles applicable where more than one person is involved in the commission of a crime.

Consider the following set of facts: two people, whom we will call X and Z, decide to rob a café. X walks into the café, threatens the owner with a revolver, and, in this way, succeeds in getting possession of the money in the till. Z never goes into the café, but stands guard outside, in order to warn X should he see the police coming. Nobody will deny that X has committed robbery. The question, however, is whether Z can also be convicted of the robbery. If Z is charged with robbery, can he allege that he cannot be convicted of the crime because he was never even inside the café, never handled the revolver and never even touched the money? It is questions such as these that we will discuss in this study unit.

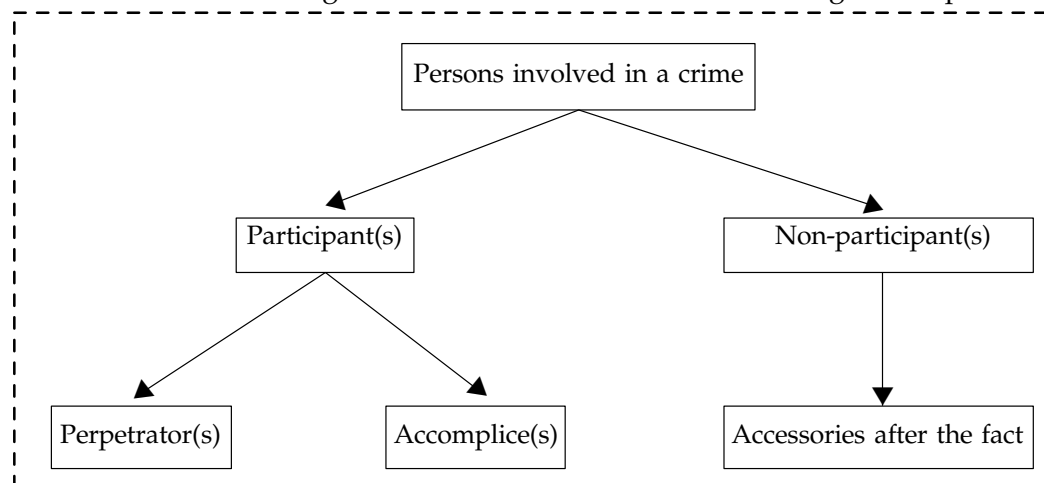
Since the subject of participation is too long to discuss in one study unit, we will spread it over two study units. In this study unit, we will discuss the classification of the different persons involved in a crime, as well as perpetrators. In the next study unit, we discuss accomplices and accessories after the fact.

1.2 INTRODUCTION

1.2.1 Classification of persons involved in a crime

(*Criminal Law 257–260*)

We begin by classifying, into various categories, those persons who may be involved with, or implicated in, the commission of a crime. We shall first set out the classification in a diagram and then discuss the different categories of persons.



The term “persons involved in a crime” is used as a general, collective denominator for all the persons, or groups of persons, involved in the commission of the crime (whether they furthered the commission of the crime or not) and who, consequently, can be charged in connection with the commission of the crime. “Person involved in a crime” is not a legal term at all. No-one is charged or convicted as a “person involved” in the commission of a crime. It is merely a convenient phrase which we use in order to explain our classification of criminals into different groups.

Persons involved in the crime can be subdivided into two broad categories, namely persons who participate and persons who do not participate. A person involved who participates is briefly described as a “participant”.

A **participant** is anyone who does something, in whatever manner, whereby he **further**s the commission of the crime. On the other hand, a person involved who does not participate is someone who, although he can be described as being involved in the crime, does not **further** the commission of the crime at all.

There is only one group of persons that will fall into this category, namely accessories after the fact. An accessory after the fact is someone who, after the crime has already been completed, learns about the crime for the first time and then does something to protect the perpetrators of the crime or to help them to escape criminal liability for their acts. The best example of an accessory after the fact is the person who, after a murder has been committed, helps the murderers to dispose of the body by, for instance, throwing it in a river with a stone tied around its neck. An accessory after the fact cannot be a participant, because his act does not amount to a **furthering** of the commission of the crime. After all, one cannot further a crime if the crime (like the murder in the above-mentioned example) has already been committed. In the next study unit, we shall return to the accessory after the fact and shall deal with his liability in greater detail. First, however, we shall consider the participant and note the various kinds of participants.

The category of persons known as “participants” can, in turn, be divided into two subcategories, namely **perpetrators** and **accomplices**. The distinction which is drawn between perpetrators and accomplices is of the utmost importance and you must make sure that you understand it properly.

1.2.2 Definitions of a perpetrator and an accomplice

Definition of a perpetrator

A person is a perpetrator if

- (1) his conduct, the circumstances in which it takes place (including, where relevant, a particular description with which he as a person must, according to the definition of the offence, comply), and the culpability with which it is carried out are such that he satisfies all the requirements for liability contained in the definition of the offence

OR

- (2) if, although his own conduct does not comply with that required in the definition of the crime, he acted together with one or more persons and the

conduct required for a conviction is imputed to him by virtue of the principles relating to the doctrine of common purpose

Do not feel discouraged if you do not understand these definitions immediately. When reading them for the first time, they will probably strike you as very involved. However, as you proceed with your study of this study unit, these definitions will become clearer. The doctrine of common purpose mentioned in part (2) above will be discussed in some detail below. The crucial words in the definition (ie, the words which an examiner is always looking for when he marks the examination papers!) are, in part (1), **conduct, circumstances and culpability ... satisfies all requirements in definition**, and, in part (2), **imputed ... doctrine of common purpose**.

Definition of an accomplice

A person is an accomplice if,

- (1) although he does not comply with all the requirements for liability set out in the definition of the crime, and
- (2) although the conduct required for a conviction is not imputed to him in terms of the doctrine of common purpose,

he engages in conduct whereby he unlawfully and intentionally **further**s the commission of the crime by somebody else.

The crucial words in this definition are: **not comply with definitions, conduct not imputed in terms of the doctrine of common purpose, furthers crime**.

1.2.3 Distinction between perpetrator and accomplice explained

To determine whether someone is a perpetrator, one must first look at the definition of the particular crime and, secondly, consider whether the accused's conduct, state of mind and characteristics comply in all respects with the definition. Murder is the unlawful, intentional causing of the death of another person and anyone who, in whatever manner, unlawfully and intentionally causes the death of another person is a perpetrator of the crime of murder.

Some crimes can only be committed by people complying with a certain description. For example, high treason can only be committed by a person **owing allegiance to the Republic of South Africa**. A crime may also be defined in such a way that it can only be committed by a person who has a **certain occupation** (eg a medical doctor) or only by somebody who is the holder of a **certain licence**. What is the position if somebody does not comply with such a description (ie, to owe allegiance, to be a medical doctor or to be the holder of a certain licence), but nevertheless commits an act whereby he furthers the commission of a crime by somebody who does comply with such a description? The answer is that such a person is an **accomplice**, for the following reason: because he does not comply with the particular description, he cannot be brought within the definition of the crime, but he nevertheless commits an act whereby he furthers the commission of the crime by somebody else.

If a court convicts somebody of a crime without explicitly specifying that he is convicted of being an accomplice to the crime, it normally means that he is convicted as a perpetrator (or co-perpetrator).

1.3 PERPETRATORS

(*Criminal Law 260–272*)

1.3.1 Co-perpetrators: where there is more than one perpetrator, it is unnecessary to identify a principal perpetrator

We have seen that a person is a perpetrator if (briefly stated) he complies with all the requirements for liability in the definition of the crime, or if the act of somebody else who is a perpetrator is imputed to him in terms of the common-purpose doctrine.

There is no rule in our law stipulating that, where more than one person jointly commit a crime, there can only be a single perpetrator, and that the others who aid in the commission of the crime invariably belong to another category. Where there is more than one participant or perpetrator, it is not always possible to select one as the principal offender. There is no criterion by which one can in every case satisfactorily identify such a principal offender. In certain cases, a principal offender may be identified, and such a person is then referred to in our legal terminology as a **principal offender**, but the distinction between a principal offender and other perpetrators is not important for the purposes of liability. (However, it can be of great importance in the assessment of punishment.)

Where several persons commit a crime together, and their conduct, state of mind and characteristics all comply with the definition of the crime, each one of them is a co-perpetrator. A co-perpetrator does not belong to any category other than that of a perpetrator. Two persons may act in such a way that each contributes equally to the crime, as where A takes the victim by the arms, B takes him by the legs, and, together, they throw him over a precipice. One co-perpetrator's contribution may be more or less than that of the other, as where A enters a house and shoots and kills Y while B merely keeps guard outside the house. (This happened in *Bradbury 1967 (1) SA 387 (A)*.) Both are nevertheless co-perpetrators in the commission of the murder, if the conduct of both can be described as the unlawful, intentional causing of the death. That one is a perpetrator in no way detracts from the fact that the other is also a perpetrator.

1.3.2 Co-perpetrators: difference between direct and indirect perpetrator irrelevant

Sometimes, a distinction can be drawn between a **direct** and an **indirect** perpetrator.

- A **direct perpetrator** is a perpetrator who commits the crime with his **own hands or body**.
- An **indirect perpetrator** does not commit the crime with his body, but **makes use of somebody else** to commit the crime.

For instance, X hires Z to murder Y. If Z executes the assignment and he himself fires the shot at Y, killing Y, Z is the direct perpetrator, whereas X is the indirect perpetrator.

The distinction between a direct and an indirect perpetrator is of no significance for the purposes of determining liability. Both X and Z in the above example are guilty of murder as (co-)perpetrators, because the conduct of both falls within the definition of murder: the conduct of both amounts to the (unlawful and intentional) causing of another's death. In the eyes of the law, Z is nothing but an instrument with which X commits the crime.



In the examinations, students are sometimes asked to explain the difference between a perpetrator and an accomplice. In answering this question, students often make the mistake of writing that a perpetrator is a person who commits the crime **with his own hands**, whereas an accomplice is somebody who does not commit the crime with his own hands. Such a statement is wrong, because a person can be a perpetrator even if he uses another to do his "dirty work" for him, as explained in the above example of the hired assassin.

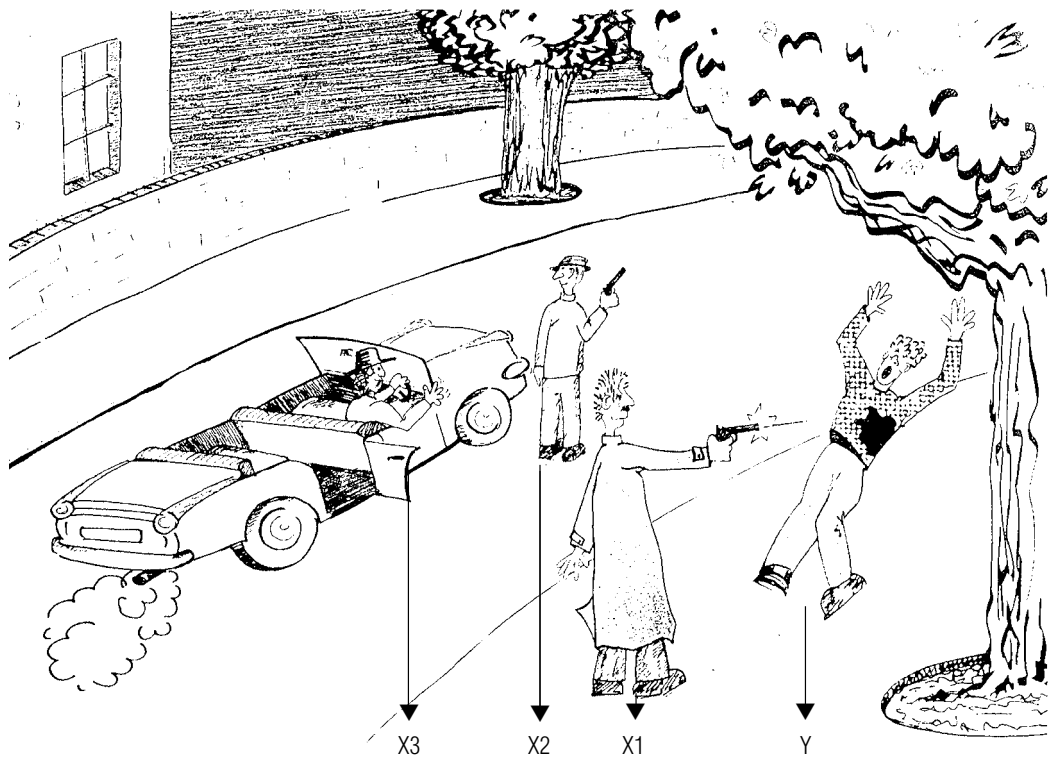
1.3.3 Being a perpetrator of murder in terms of the general principles of liability

It is clear from the above definition of a perpetrator that there are two possible grounds upon which a person may qualify as a perpetrator. The first ground is set out in part (1) and the second in part (2) of that definition. We now consider the first ground. One may refer to this first ground as "being a perpetrator in terms of the general principles of criminal liability", because the question here is merely whether X's act, the circumstances in which it takes place and his culpability are such that they all comply with the definition of the crime. When applying part (2) of the definition, which we shall explain later, one in fact applies a special, additional doctrine, that is a doctrine or rule additional to the ordinary principles of liability.

If two or more persons decide to murder Y, it is unnecessary, in order to hold all of them liable as co-perpetrators, that each of them must have stabbed or shot Y. They do not even each have to touch Y or even be present at the scene of the murder.

People such as the person who stands guard, who issues the order or who drives the motorcar may qualify as (co-)perpetrators simply by applying the ordinary principles of liability. Their conduct and culpability comply with the requirements for liability set out in the definition of the crime. (The definition of murder is: the unlawful, intentional causing of another's death.) Their conduct is, of course, unlawful (ie, not covered by a ground of justification) and intentional, but what is important to bear in mind is that their acts also amount to a **causing** of Y's death. The test for causation is wide enough to lead to the conclusion that the acts of all of them qualify as a cause or co-cause of Y's death. But for their acts, Y would not have died, and therefore the act of each of them – like the act of the person who presses the knife into Y's chest or who pulls the gun's trigger – is a *conditio sine qua non* for Y's death. As far as the general principles of criminal liability are concerned, causation will be established if both factual causation and legal causation are proved.

It goes without saying that a passive spectator to a deed of murder cannot be held liable as a co-perpetrator (compare the position of accused number 4 in *Williams* 1980 (1) SA 60 (A) and see *Mbanyaru* 2009 (1) SACR 631 (C)).



Being a perpetrator by applying the ordinary principles of liability. X1 shoots and kills Y. X2 assists X1 by merely standing guard (in other words, preventing others from hindering X1 in the execution of his evil deed). X3 is behind the steering wheel of the “getaway car”: he has transported X1 and X2 to the scene of the crime and lets the car idle so that all three of them (X1, X2 and X3) can speed away as fast as possible after the completion of the crime. All three can be convicted of murder by merely applying the ordinary principles of criminal liability, as explained above.

1.3.4 Being a perpetrator of murder by virtue of the doctrine of common purpose

(*Criminal Law 263–272; Case Book 201–206, 212–219, 225–240*)

1.3.4.1 General

If a number of people acting together kill Y, it is often very difficult to find with certainty that the acts committed by each of them contributed causally to Y’s death. The facts may be such that there is no doubt that at least one of the group, namely the one who actually shot and killed Y, caused his death, but there are also situations in which not even the conduct of a single one of the group can without doubt be described as a cause (at least in the sense of *conditio sine qua non*) of Y’s death. The latter situation occurs especially if there is a large number of people who together kill Y. It may then be difficult to base their liability for the joint murder merely on an application of the general principles of liability. There is usually no difficulty in finding that everybody’s conduct was unlawful and that each member of the group entertained the intention to kill. What is, however, often difficult to find is that the individual conduct of each member satisfied the requirement of causation.

In order to overcome difficulties such as these, the courts apply a special doctrine to facilitate the conviction of murder of each separate member of the group. This doctrine is known as the doctrine of common purpose.

Definition of doctrine of common purpose

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

Although the doctrine is couched in general terms, in our law it has been applied mostly to the crime of murder.

The crucial requirement of the doctrine is that the different accused should have had the same purpose. Once this is proven, the act of Z, who, for example, threw a heavy stone at Y which struck him on the head, is imputed to X, who had a common purpose with Z to kill Y, but who threw a stone at Y which missed him. In fact, Z's act is imputed to everyone who had the same purpose as himself, and who actively associated himself with the achievement of the common purpose, even though one cannot construe a causal connection between such a party's act and Y's death. It is, however, only Z's act which is imputed to the other party (X), not Z's culpability. X's liability is based upon his own culpability (*Malinga* 1963 (1) SA 692 (A) 694).

The common-purpose doctrine as applied to cases of murder may indeed be regarded as nothing other than a mechanism applied to overcome the difficulties inherent in proving causation where a number of people together kill somebody else. If it is possible to base each participant's conviction for murder on an application of the general rules of liability (and, more particularly, on the ordinary principles of causation), it is, in our view, preferable to follow this option rather than resort to the common-purpose doctrine in order to secure a conviction. The reason for this predilection is the fear expressed in certain quarters that the latter doctrine, with its wide definition and scope, may in certain circumstances lead to inequitable results, in that somebody who played only a comparatively minor role in the events may also be convicted for murder (*Mshumpa* 2008 (1) SACR 126 (EC)).

1.3.4.2 Proof of existence of common purpose

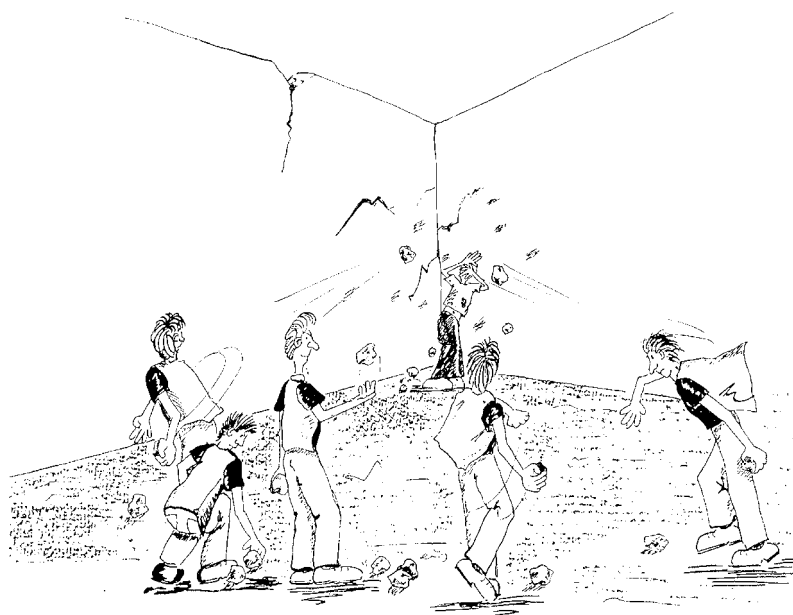
The existence of a common purpose between two or more participants is proved in the following ways:

- On the basis of an express or implied **prior agreement** to commit an offence. Since people mostly conspire in secret, it is very difficult for the state to prove a common purpose based on a prior agreement. (See *S v Mbanyaruru* 2009 (1) SACR 631 (C) where it was held that common purpose based on prior agreement was not proved in this case.)
- Where no prior agreement can be proved, the liability arises from an **active association and participation in a common criminal design** (*Thebus* 2003 (2) SACR 319 (CC) 336).

The concept of active association is very important. We shall say something more about this shortly.

1.3.4.3 Why it is necessary to have such a doctrine

Is this doctrine really necessary? Is it not possible for our law to dispense with this doctrine? The answer to the first question is "Yes", and to the second "No". To prove the correctness of these answers, we would like to discuss the following practical problem.



Why the common purpose doctrine is necessary. X1, X2, X3, X4 and X5 stone Y to death. See the discussion below.

Assume that a group of five people, whom we shall refer to as X1, X2, X3, X4 and X5, throw stones at Y. Y cannot run away from them, since he is trapped in a corner between two high walls. All the assailants (X1 to X5) have the intention of killing Y. This can be gathered from the fact that they shout loudly, within hearing distance of one another, "Kill him!" Some stones strike Y and some miss him. (See illustration.) Y dies as a result of the stoning. X1 to X5 are all charged with having murdered Y. During the trial, it is impossible for the court to find which of the accused persons threw stones that struck Y, and which of them threw stones that missed Y, because the events took place very quickly. Stated differently, it is impossible for the court to find beyond reasonable doubt that any of the accused threw a stone that struck Y.

Let us assume for a moment that the doctrine of common purpose did not exist. Would it then have been possible for the court to convict any of the accused of murder? Certainly not, because a court would then be able to convict an accused of murder only if it is proved that such accused threw a stone which, separately or together with other stones, struck Y, with lethal consequences. However, the court finds it impossible to find beyond reasonable doubt that any of the accused threw a stone that struck Y.

Let us proceed one step further. Let us assume that the events were filmed with a video camera and that the slow-motion portrayal of the events shows that the stone thrown by X3 did indeed strike Y, whereas the stone thrown by X4 happened to miss Y by just about an inch. Would it be fair for a court to find, on the ground of this evidential material, that X3 is guilty, but X4 is not? Common sense dictates that it would be grossly unfair not to convict X4 of murder as well: it is in all probability merely coincidental that the one stone struck Y and that the other one missed him by just an inch (or, one might add, that a stone thrown by (say) X5 struck Y only on his small toe, without any serious consequences to his life). Apart from this consideration, it is clear that X1 to X5 all shared the same intention, namely to kill Y.

It would therefore be unfair to assume that a court may convict an accused only upon proof that the stone, or stones, he threw himself, struck Y. If this were the law, criminals would be able to escape the clutches of the law by merely ensuring that they never acted alone, but always in a group. This would lead to absurd

results. This is the reason why it is necessary to have the doctrine of common purpose.



1.3.4.4 *The judgment in Safatsa*

Read the following decision in the Case Book: *Safatsa* 1988 (1) SA 868 (A).

The leading case on the doctrine of common purpose is *Safatsa* 1988 (1) SA 868 (A). In this case, the facts were the following: A crowd of about 100 people attacked Y, who was in his house, by pelting the house with stones, hurling petrol bombs through the windows, catching him as he was fleeing from his burning house, stoning him, pouring petrol over him and setting him alight. The six appellants formed part of the crowd. The Court found that their conduct consisted, *inter alia*, of grabbing hold of Y, wrestling with him, throwing stones at him, exhorting the crowd to kill him, forming part of the crowd which attacked him, making petrol bombs, disarming him and setting his house alight.

In a unanimous judgment delivered by Botha JA, the Appellate Division confirmed the six appellants' convictions of murder by applying the doctrine of common purpose, since it was clear that they all had the common purpose to kill Y. It was argued on behalf of the accused that they could be convicted of murder only if a causal connection had been proved between each individual accused's conduct and Y's death, but the Court held that where, as in this case, a common purpose to kill had been proved, each accused could be convicted of murder without proof of a causal connection between each one's individual conduct and Y's death.

If there is no clear evidence that the participants had agreed beforehand to commit the crime together, the existence of a common purpose between a certain participant and the others may be proven by the fact that he **actively associated** himself with the actions of the other members of the group.

1.3.4.5 *Active association as proof of participation in a common purpose*

The existence of a common purpose between a certain participant and the other members of the group may be based upon a finding that the participant actively associated with the actions of the other members of the group. This happens frequently in practice. In *Mgedezi* 1989 (1) SA 687 (A) 705I–706C, the Appellate Division held that, if there is no proof of a previous agreement between the perpetrators, an accused whose individual act is not causally related to Y's death can only be convicted of murder on the strength of the doctrine of common purpose if the following five requirements have been complied with:

- first, he must have been **present** at the scene of the crime
- second, he must have been **aware** of the assault on Y
- third, he must have **intended to make common cause** with those committing the assault
- fourth, he must have manifested his sharing of a common purpose by himself performing **some act of association** with the conduct of the others
- fifth, he must have had the **intention to kill Y** or to contribute to his death

Thus, somebody who was merely a **passive spectator** to the events will not, in terms of this doctrine, be liable to conviction, even though he may have been present at the scene of the action.

Other principles which emerge from the case law are the following:

- In murder cases, active association can only result in liability if the act of association took place **whilst Y was still alive and at a stage before the lethal**

wound had been inflicted by one or more other persons (*Motaung* 1990 (4) SA 485 (A)).

- Active association with the common purpose should not be confused with **ratification** or approval of another's criminal deed which has already been completed. Criminal liability cannot be based on such ratification (*Williams* 1970 (2) SA 654 (A) 658-659).



1.3.4.6 Liability on the basis of active association declared constitutional

Read the following decision in the *Case Book: Thebus* 2003 (2) SACR 319 (CC).

In *Thebus* 2003 (2) SACR 319 (CC), liability for murder on the basis of active association with the execution of a common purpose to kill was challenged on the grounds that it unjustifiably limits the constitutional right to dignity (s 10 of the Constitution), the right to freedom and security of a person (s 12(1)(a)) and the right of an accused person to a fair trial (s 35(3)).

The Constitutional Court rejected these arguments and declared constitutional the common law principle which requires mere "active association" instead of causation as a basis of liability in collaborative criminal enterprises. One of the Court's main arguments was the following:

The doctrine of common purpose serves vital purposes in our criminal justice system. The principal object of the doctrine is to criminalise collective criminal conduct and thus to satisfy the need to control crime committed in the course of joint enterprises. In consequence crimes such as murder it is often difficult to prove that the act of each person, or of a particular person in the group, contributed causally to the criminal result. Insisting on a causal relationship would make prosecution of collective criminal enterprises ineffectual. Effective prosecution of crime is a legitimate, pressing social need. Thus, there was no objection to the norm of liability introduced by the requirement of "active association", even though it bypassed the requirement of causation (par [40] at 343f-344b).



1.3.4.7 Common purpose and *dolus eventualis*

Read the decision in the *Case Book: Lungile* 1999 (2) SACR 597 (A).

For X to have a common purpose with others to commit murder, it is not necessary that his intention to kill be present in the form of *dolus directus*. It is sufficient if his intention takes the form of *dolus eventualis*; in other words, if he foresees the possibility that the acts of the participants with whom he associates himself may result in Y's death, and reconciles himself to this possibility.

Assume that X is charged with murder. The evidence brings to light that a number of persons, among them X, took part in a robbery or housebreaking, and that Z, one of the members in the group, killed Y in the course of the action. The question that arises is whether X and Z had a common purpose to kill Y. The mere fact that they all had the intention to steal, to rob or to break in is not necessarily sufficient to warrant the inference that all of them also had the common purpose to kill. One can steal, rob or break in without killing anybody. Whether X also had the intention to murder must be decided on the facts of each individual case.

The case of *Mambo* 2006 (2) SACR 563 (SCA) provides a practical illustration. Three awaiting-trial prisoners planned to escape from their court cells. The plan included the forceful dispossession (robbery) of a court orderly's firearm. When the orderly unlocked the gate of the cell so that the accused could enter, X1 gripped the orderly around his neck, X2 reached for the orderly's lower legs and tugged at them, causing him to lose his balance, and X3 reached for the orderly's

firearm in his holster on his right hip and grabbed it with both hands. As the orderly wrestled to free himself from the clutches of X1 and X2, X1 uttered the word "Skiet" ("Shoot"). X3 cocked the firearm and fatally shot the orderly.

They were convicted in the High Court on charges of murder, robbery, and escape from lawful custody. The Supreme Court of Appeal upheld the convictions of all three on the robbery and escape charges, because these were part of their prior agreement or mandate, but held that the killing of the orderly did not form part of this mandate [par 16]. It therefore had to determine whether the initial mandate had extended to include the murder of the orderly. The Court held that, by his conduct and culpability, X3 satisfied the requirements for liability on the murder charge [par 16]. However, for his conduct (the killing of the orderly) to be imputed to X1 and X2, the Court had to establish that each of them foresaw the killing of the orderly as a possibility arising from conduct of one of their number, and had reconciled themselves to that possibility. The Court held that, by uttering the word "Skiet", X1 had proved that he shared a common purpose with X3 in relation to the murder of the orderly [par 17]. However, the Court noted that all that X2 had done in the process of overpowering the orderly was to grab hold of his legs.

The State reasoned that, by participating in the plan to escape, which involved the robbery of the orderly's firearm, X2 must have foreseen the possibility that this could result in the death of the orderly, and that he had reconciled himself thereto (ie, he had *dolus eventualis*). The Court rejected this argument on the basis that the mere fact that the three accused intended to rob the orderly in the execution of their plan to escape did not warrant the inference that X2 had *dolus eventualis* in relation to the shooting [par 18]. X2 was therefore acquitted on the murder charge.



Read the following decision in the *Case Book: Molimi 2006 (2) SACR 8 (SCA)*.

In *Molimi 2006 (2) SACR 8 (SCA)*, the Supreme Court of Appeal held that conduct by a member of a group of persons which differs from the conduct envisaged in their initial mandate (common purpose) may not be imputed to the other members, unless each of the latter knew (*dolus directus*) that such conduct would be committed, or **foresaw the possibility** that it might be committed and **reconciled** themselves to that possibility (*dolus eventualis*).

X1, X2 and Z were co-conspirators to a planned robbery of a big retail store (Clicks) in a shopping mall. X1, the store manager, informed X2 about the exact time at which a security officer (in the employ of Fidelity Guards) would arrive at the store to collect money. X1 encouraged X2 to employ the services of four armed men, who would confront the security guard and, once they had acquired possession of the money, to rob him of the money. On the day in question, Z and three armed men dispossessed the security officer of the money and fled with the loot. As they fled, there was an exchange of gunfire between one of the robbers and the store's security guard. They were both fatally wounded in the exchange.

The gunfire attracted the attention of a bystander in the shopping mall. As the three other robbers ran in his direction towards the exit of the mall, they pointed their firearms at him, but did not shoot. He then drew his firearm and shouted at them to drop theirs. He pursued one of the armed men (Z) who had the loot in a bag. Z dropped the bag he was carrying and ran into another store for refuge. Once in the store, Z turned around and pointed the gun at the bystander, who reacted by shooting at him (Z). The bullet missed Z, but wounded an employee in the store. Z retreated further into the store and took a young man hostage. While holding the hostage, with a firearm pointed at the hostage's head, he ordered the bystander to surrender his firearm. The bystander responded by firing at him, but fatally wounded the hostage. Z eventually surrendered.

X1, X2 and Z were all convicted in the High Court on seven counts. These were:

robbery; the murder of the security guard of the store in which the robbery took place (Clicks); the attempted murder of the employee who was wounded in the other store; the kidnapping of the hostage; the murder of the hostage held by Z in the other store; and two counts of the unlawful possession of firearms.

X1 and X2 appealed to the Supreme Court of Appeal against their convictions. They conceded the existence and proof of a common purpose (between X1, X2 and Z) to rob the store, but argued that the actions of the bystander which resulted in the kidnapping and death of the hostage and injury to an employee in the other store were not foreseeable by them (X1 and X2) as part of the execution of the common purpose. The Court held that the attempted murder of the employee in the other store was foreseeable, for, once all the participants in a common purpose foresaw the possibility that anybody in the immediate vicinity of the crossfire could be killed – regardless of who actually shot the fatal bullet – then *dolus eventualis* was present. It held, however, that the kidnapping of the hostage by Z and the hostage's eventual murder were acts which were so unusual and so far removed from what was foreseeable in the execution of the common purpose that these acts could not be imputed to X1 and X2. They were acquitted on these charges (murder and kidnapping in respect of the hostage).

1.3.4.8 Dissociation from the common purpose

Just as association with the common purpose leads to liability, dissociation or withdrawal from the common purpose may, in certain circumstances, lead to negative liability. South African courts have not yet developed very specific rules relating to the circumstances in which withdrawal will effectively terminate X's liability. The following guidelines are a fair reflection of South African law on this subject:

- (1) In order to escape conviction on the grounds of a withdrawal from a common purpose – whether by prior agreement or active association – X must have a **clear and unambiguous intention** to withdraw from such purpose. If X flees or withdraws because he is afraid of being arrested, or being injured, or aims to make good his escape, then his withdrawal will not have been motivated by a clear intention to withdraw from a common purpose which he was a part of (*Lungile* 1999 (2) SACR 603 (SCA) at 603h–j).
- (2) In order to succeed with a defence of withdrawal, X must perform **some positive act of withdrawal**. Mere passivity on his part cannot be equated with a withdrawal, because, by his previous association with the common purpose, he linked his fate and guilt with that of his companions.
- (3) The **type of act required for an effective withdrawal depends on a number of circumstances**. In *Musingadi* 2005 (1) SACR 395 (SCA) at 407h–j, the Court listed the following factors: “the manner and degree of the accused's participation; how far the commission of the crime has proceeded; the manner and timing of disengagement; and, in some instances, what steps the accused took or could have taken to prevent the commission or completion of the crime”. The Court added that the list was not exhaustive, but laid down this principle:

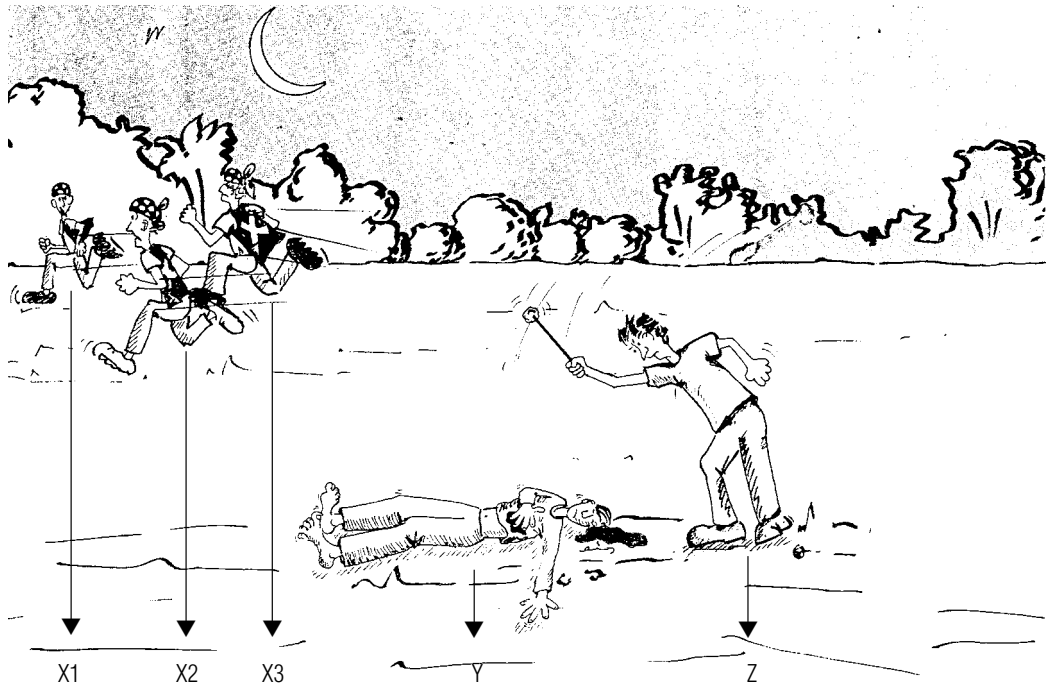
“The greater the accused's participation, and the further the commission of the crime has progressed, then much more will be required of an accused to constitute an effective disassociation. He may be required to take steps to prevent the commission of the crime or its completion. It is in this sense a matter of degree and in a borderline case calls for a sensible and just value judgment” (409 g–h).
- (4) Much like the principles relating to the voluntary withdrawal of an attempt (SG 3.2.7), a withdrawal will be effective if it takes place **before the course of events has reached the “commencement of the execution”** – the stage when

it is no longer possible to desist from, or frustrate, the commission of the crime. It is "a matter of degree and ... calls for a sensible and just value judgment" (*Musingadi supra*).

(5) The withdrawal must be **voluntary**.

1.3.5 Joining in

(*Criminal Law 272; Case Book 219–225*)



The joiner-in. X1, who, together with X2 and X3, has already inflicted a lethal wound upon Y, runs away from the scene of the crime. While Y is still alive, Z, who has not previously agreed with X and his two associates to kill Y, appears on the scene. Because he himself harbours a grudge against Y, he inflicts a wound on Y with a club. This wound does not, however, hasten Y's death. Y dies shortly thereafter. May Z also be convicted of having murdered Y? See the discussion below.

Assume that X, acting either alone or together with others in the execution of a common purpose, has already wounded Y lethally. Thereafter, while Y is still alive, Z (who has not previously (expressly or tacitly) agreed with X to kill) inflicts a wound on Y, which, however, does not hasten Y's death. Thereafter, Y dies as a result of the wound inflicted by X. The person in Z's position is referred to as a "joiner-in", because he associated himself with others' common purpose at a stage when Y's lethal wound had already been inflicted, although Y was then (ie, when Z joined the assault) still alive.

In order to characterise the joining-in situation properly, it is important to bear the following in mind:

- First, if the injuries inflicted by Z in fact **hastened Y's death**, there can be no doubt that there is a causal connection between Z's acts and Y's death, and that Z is therefore guilty of murder. (Therefore, Z is then not a joiner-in.)
- Secondly, if Z's assault on Y takes place **after Y has already died** from the injuries inflicted by X or his associates, it is similarly beyond doubt that Z

cannot be convicted of murder, since the crime cannot be committed in respect of a corpse. (Therefore, Z is then not a joiner-in.)

- Thirdly, if the evidence reveals a **previous conspiracy** between X (or X and his associates) and Z to kill Y, Z is guilty of murder by virtue of the doctrine of common purpose, since X's act in fatally wounding Y is then imputed to Z. (Therefore, Z is then not a joiner-in.) The joining-in situation presupposes the **absence of a common purpose** between X and Z.

Thus, to summarise: The joiner-in is a person

- whose attack on Y did **not hasten Y's death**
- whose blow was administered at a time **when Y was still alive**
- who **did not act with a common purpose** together with the other persons who also inflicted wounds on Y

Note that the joiner-in is not a description of a category of participants other than perpetrators and accomplices. It is merely a convenient term to use when referring to person Z as described in the set of facts mentioned above.

Nobody denies that the conduct of the joiner-in is punishable. The question is merely the following: Of what crime must he be convicted? Before 1990, there was great uncertainty in our law regarding the answer to this question. According to certain decisions and writers, the joiner-in had to be convicted of murder, but, according to other decisions and writers, he could at most be convicted of attempted murder.

In 1990, in *Motaung* 1990 (4) SA 485 (A), the Appellate Division considered the different views on the matter and, in a unanimous judgment delivered by Hoexter JA, ruled that the joiner-in could not be convicted of murder, but only of attempted murder. The judgment in *Motaung* is now the authoritative judgment on the liability of a joiner-in.

One of the reasons advanced by the Court for its ruling was the following argument:

To hold an accused liable for murder on the basis of an association with the crime only after all the acts contributing to the victim's death have already been committed would involve holding him responsible *ex post facto* for such acts. The criminal law is firmly opposed to liability based on *ex post facto* or retrospective responsibility and does not recognise it in any other situation. It would therefore be contrary to accepted principle to recognise it here.

(The expression "*ex post facto*" means "after the event".)

1.3.6 The most important principles relating to common purpose

We now proceed to summarise the most important principles relating to the doctrine of common purpose as well as the liability of the joiner-in. Try to study these principles well. If you know them well and are able to reproduce them all, you have a key to all the principles relating to common purpose.

- (1) If two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the acts of each of them in the execution of such a purpose are imputed to the others.
- (2) In the case of a charge of having committed a crime which involves the causing of a certain result (such as murder), the **conduct imputed includes the causing of such result**.

- (3) **Conduct by a member of the group of persons having a common purpose which differs** from the conduct envisaged in the said common purpose may **not be imputed** to another member of the group, unless the latter **knew** that such other conduct would be committed, or **foresaw the possibility** that it might be committed and **reconciled** himself to that possibility.
- (4) A finding that a person acted together with one or more other persons in a common purpose may be based upon proof of a prior agreement or proof of **active association** in the execution of the common purpose.
- (5) On a charge of murder, the rule that liability may be based on active association applies only if the active association took place **while the deceased was still alive and before a mortal wound**, or mortal wounds, **had been inflicted** by the person or persons who commenced the assault.
- (6) Just as active association with the common purpose may lead to liability, so **dissociation or withdrawal from the common purpose** may, in certain circumstances, lead to negative liability.

ACTIVITY

X1, X2 and X3 are members of a criminal gang. Their main activities are to steal motor vehicles at shopping centres. X1, the leader, is not involved in the actual stealing of cars. He only tells X2 and X3 what to do. X2 and X3 always carry firearms and knives with them when they embark upon their criminal activities. Because of the dangerous nature of their activities, all the members of the gang realise that somebody may get killed. In fact, the gang leader (X1) has instructed them to kill anyone who interferes with their activities. One evening, while X2 and X3 attempt to steal a car parked in an underground parking garage, Y, the owner of the car, arrives on the scene. Upon seeing the robbers, she screams for help, but X2 and X3 force her into the boot of her car. They drive 20 kilometres out of the city to a desolate area in the bush. X2 rapes Y. Thereupon, X2 cuts Y's throat. During all these events, X3 holds Y down. They (X2 and X3) then leave the scene of the crime. Y, who is mortally wounded, screams for help. X4, a passer-by, hears her screams. X4 is not a member of the gang. He has never even met any of the members of the gang. He also rapes Y and, intending to kill her, hits her with a stick over the head. Fifteen minutes after being raped and assaulted by X4, Y dies. The autopsy report reveals that Y had died as a result of blood loss incurred by the throat-cutting. In the report, it is also stated that the head injury did not hasten her death.

You are the state prosecutor. Explain which crimes (if any) X1, X2, X3 and X4 have committed and the legal grounds upon which the liability of each will be based.

FEEDBACK

We will first deal with the murder of Y. X1, X2 and X3 are guilty of having murdered Y in terms of the general principles of liability. The actions of each of them qualify as the **cause** of Y's death. There is no doubt that the act of X2 was the direct cause of Y's death. Because the definition of the crime of murder is very wide, the acts of the gang leader, X1, as well as those of X2 and X3, are the cause (*conditio sine qua non* and legal cause) of Y's death. X1 instructed the members of the gang to kill anybody who interfered with their activities, and X3 held Y down so that X2 could cut her throat. All three of them are perpetrators of murder. X1 is an indirect perpetrator and X2 and X3 are direct perpetrators. See the discussion in 1.3.2 above. All three accused (X1, X2 and X3) had at least foreseen the

possibility of an innocent person being killed during the course of their criminal activities. In other words, all of them had at least *dolus eventualis* in respect of Y's death.

The alternative basis upon which X1, X2 and X3 may be convicted of having murdered Y, is to rely on the doctrine of common purpose. In terms of this doctrine, the state need not prove the element of causation in respect of each accused. Instead, the acts of each of the participants in the execution of the common purpose are imputed to the others. The leading cases in this regard are *Safatsa* and *Mgedezi*. Keep in mind, however, that the state still has to prove that each accused acted with intention. Since, according to the autopsy report, X4's act did not causally contribute to Y's death, X4 cannot be convicted of murder.

As regards Y's rape, X2 may also be convicted of this crime. X2 is the perpetrator of rape and X3 is an accomplice to rape. The reason why X3 cannot be convicted of rape as a co-perpetrator is that he never performed an act of sexual penetration on Y. His conduct does not fall within the definition of rape. By holding Y down to the ground, X3 nevertheless furthered the commission of the crime by somebody else (X2), and, therefore he (X3) is an accomplice to rape. X1 cannot be convicted of rape, because he never performed an act of sexual penetration on Y, and did nothing to further the crime. Presumably, he never even anticipated that X2 and X3 would have sexually penetrated a woman without her consent.

X4 is guilty of rape and attempted murder in respect of Y. As regards the crime of attempted murder, X4 is a typical example of a joiner-in. The leading case in this regard is *Motaung*.

SUMMARY

- (1) Persons involved in the commission of a crime are divided into two groups, namely participants and nonparticipants.
- (2) Participants further the commission of the crime, whereas nonparticipants do not further the commission of the crime. An accessory after the fact is a nonparticipant, since he comes into the picture only after the crime has already been completed, and then helps the perpetrator or accomplice to escape liability.
- (3) Participants are divided into two groups, namely perpetrators and accomplices. The distinction drawn between these two groups is the most important distinction relating to participation in crime. Consult the definitions of a perpetrator and an accomplice given above.
- (4) Unlike a perpetrator, an accomplice does not, through his conduct, state of mind or personal description, fall within the definition of the crime, but nevertheless commits an act whereby he furthers the commission of the crime by somebody else.
- (5) If one considers the definition of a perpetrator, it is clear that there are two grounds upon which a person can qualify as perpetrator, namely either on the ground that he complies with the definition of the crime, in which case one merely applies the ordinary principles of liability (and in murder more particularly: only the ordinary principles relating to causation), or by virtue of the operation of the doctrine of common purpose.
- (6) As far as the doctrine of common purpose as well as the liability of the joiner-in are concerned, consult the summary above under 1.3.6 of the most important principles applicable to this topic.

TEST YOURSELF

- (1) Distinguish between a participant and a non-participant in a crime.
- (2) Distinguish between a perpetrator and an accomplice, and give an example of each of these groups.
- (3) Give a definition of each of the following: a perpetrator, an accomplice, and the doctrine of common purpose.
- (4) Explain in one sentence why an accessory after the fact does not qualify as a participant in a crime. (Write the answer here.).....
.....
.....
.....
- (5) If more than one perpetrator is involved in the commission of a crime, is it necessary to identify one of them as the principal perpetrator?
- (6) Explain the meaning of “direct perpetrator” and “indirect perpetrator”. Is there any difference between these two categories of perpetrators as far as their liability for the crime is concerned?
- (7) Summarise the rules pertaining to the doctrine of common purpose.
- (8) Discuss the judgment in *Safatsa* 1988 (1) SA 868 (A). Briefly mention the facts in this case, as well as the points of law decided by the Court.
- (9) Briefly discuss the judgment of the Constitutional Court in *Thebus* 2003 (2) SACR 319 (CC).
- (10) (a) What do you understand by the term “joiner-in”?
(b) Explain whether there is any difference between a joiner-in and a co-perpetrator, and give reasons for your answer.
(c) What crime does the joiner-in commit?
(d) What is the leading case on the liability of the joiner-in and what was decided in this case?
- (11) Discuss the circumstances in which our courts may find that a person has dissociated himself or has withdrawn from a common purpose.

STUDY UNIT **2**

Participation II: Accomplices and Accessories after the fact



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to demonstrate further your understanding of the principles relating to participation by

- expressing an informed opinion whether an accused can be held liable as an accomplice
- expressing an informed opinion whether an accused can be held liable as an accessory after the fact

2.1 BACKGROUND

In the previous study unit, we started our discussion of participation in a crime. In that study unit, we explained the difference between participants and nonparticipants, as well as between perpetrators and accomplices. You should ensure that you understand these differences well before embarking upon a study of this study unit. We have already discussed liability as perpetrators in the previous study unit. In this study unit, we discuss accomplices and accessories after the fact.

2.2 ACCOMPLICES

(Criminal Law 273–278; Case Book 207–212)

2.2.1 Introduction

Where a person does not participate in the commission of a crime as a perpetrator, she may nevertheless participate in, and be liable as an accomplice. The definition of each crime is directed primarily at the perpetrator, and the perpetrator is the person whose conduct conforms to all the elements contained in the definition of the crime in question, or who qualifies as a perpetrator in terms of the common-purpose doctrine. The accomplice is a person whose conduct does not conform to all the requirements in the definition of the crime, but which is nonetheless punishable because she has intentionally **furthered** the commission of the crime by another person. Liability as an accomplice is therefore something less than liability as a perpetrator. See our discussion above on the distinction between perpetrators and accomplices.

2.2.2 Definition

See the definition of an accomplice given in the previous study unit.

2.2.3 Technical and popular meaning of the word “accomplice”

Confusion can easily arise about the meaning of the word “accomplice”. The reason for this is that the word can have two meanings, namely a technical (or narrow) and a popular (or broad) meaning. The popular meaning is the meaning the word has in the everyday layperson’s language; according to this meaning, the word refers to anybody who helps the “actual” or “principal” perpetrator to commit the crime or who furthers the commission in some way or another, without distinguishing between persons who qualify as perpetrators as defined

above (ie, who comply with the definition of the crime or who qualify in terms of the doctrine of common purpose) and those who do not qualify as perpetrators. The popular meaning of this word is accordingly so wide that it may also refer to persons who are, technically speaking, perpetrators.

The technical meaning of the word refers only to its narrower meaning as stated in the definition of “accomplice” above. According to this narrower meaning, an accomplice can never include a perpetrator, that is, somebody who complies with all the requirements for liability set out in the definition of the crime. **In the discussion which follows, as well as every time the word “accomplice” is used in legal terminology, it bears the technical (narrow) meaning as explained above.**

2.2.4 Requirements for liability as an accomplice

In order to be liable as an accomplice, the following four requirements must be complied with.

(1) Act

There must be an act (in the criminal law sense of the word) by which the commission of a crime by another person is furthered or promoted. Furtherance can take place by way of **aiding, counselling, encouraging or ordering** (*Jackelson* 1920 AD 486). Merely to be a spectator at the commission of a crime naturally does not amount to furtherance thereof (*Mbande* 1933 AD 382, 392–393).

The following are examples of conduct for which a person has been held liable as an accomplice:

- (1) In *Peerkhan and Lalloo* 1906 TS 798, the conduct forbidden in the definition of the crime was the purchasing of unwrought gold. Lalloo bought the gold and was thus a perpetrator. Peerkhan bought no gold, but acted as interpreter, adviser and surety in connection with the transaction. Consequently, his conduct did not comply with the definition of the crime (the purchase of gold), but nonetheless constituted furtherance of the purchase; accordingly, he was an accomplice.
- (2) In *Kazi* 1963 (4) SA 742 (W), the forbidden conduct was the **holding or organising** of a meeting without the necessary permission. K did not hold or organise the meeting, but nonetheless addressed it. It was held that his conduct rendered him guilty as an accomplice.

(2) Unlawfulness

The act of furthering as described above must be unlawful. In other words, there must not be any justification for it.

(3) Intention

The crime, committed by another person, must be furthered **intentionally** (*Quinta* 1974 (1) SA 544 (T) 547). Negligence is not sufficient. The shop assistant who inadvertently fails to close the shop window is not an accomplice to the housebreaking which follows. She will only be an accomplice if, knowing of the intended housebreaking and in order to help the thief, she does not close the window properly. In such a case, the thief need not be aware of the shop clerk’s assistance. It is therefore sufficient if the accomplice intentionally furthers the crime.

It is not required that the perpetrator must have been conscious of the

accomplice's assistance. **Mutual, conscious cooperation is therefore not a requirement** (*Ohlenschlager* 1992 (1) SACR 695 (T) 768g–h).

(4) *Accessory character of liability*

A crime must have been committed by some other person. Liability as an accomplice is known as “accessory liability”. No person can be held liable as an accomplice unless some other person is guilty as a perpetrator (*Williams* supra 63; *Maxaba* supra 1155). This implies that a person cannot be an accomplice to her own crime, that is, to a crime which she committed as a perpetrator.

2.2.5 Is it possible to be an accomplice to murder?

You must study the discussion in *Snyman* (276–277) of this important and interesting topic on your own.



You must also read the following judgment, dealing with this topic, in the *Case Book: Williams* 1980 (1) SA 60 (A).

You must know what the objection is to convicting a person of being an accomplice (as opposed to co-perpetrator) to murder. In the *Williams* case, which you must read, it was accepted that a person can be an accomplice to murder, but this aspect of the judgment has been criticised by *Snyman* (*Criminal Law*). You must ensure that you know what the criticism is.

In the light of the above-mentioned discussion, we are of the opinion that it is not possible to be an accomplice to murder.

2.3

ACCESSORIES AFTER THE FACT

(*Criminal Law* 278–281; *Case Book* 240–249)

2.3.1 Introduction

As was pointed out above, an accessory after the fact is not a participant, because she does not further the crime. She comes into the picture only after the crime has been completed, and then helps the perpetrator (or perhaps the accomplice) to escape justice.

Examples of the conduct of an accessory after the fact are the following:

- X helps the real murderer by throwing the corpse into a river (*Mlooi* 1925 AD 131).
- Z murdered Y. After the murder, X and Z removed certain parts of Y's body, and thereafter disposed of the body by leaving it in a lonely spot at the top of a mountain. X had nothing to do with the murder itself, but was convicted of being an accessory after the fact in respect of the murder (*Mavhungu* 1981 (1) SA 56 (A)).

2.3.2 Definition

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

2.3.3 Requirements for liability of accessory after the fact

In order to be convicted of being an accessory after the fact, the following six requirements must be complied with:

(1) *Act or omission*

The accessory after the fact must engage in **some conduct (act or omission)** whereby she assists either the perpetrator or the accomplice to evade liability. Mere approval or condonation of the crime is not enough.

It is possible for a person to be an accessory after the fact on the ground of an **omission**. This will be the case if there is a legal duty upon such a person to act positively. An example in this respect is where a police officer sees that a crime has been committed, but intentionally remains passive because she wants to protect the criminal who has committed the crime from detection. The mere **approval or ratification** of a crime after its commission is insufficient to construe a person as being an accessory after the fact to its commission.

(2) *After the commission of the crime*

X's act or omission must **take place after the commission of the actual crime**. If X's act takes place at a time when the crime is still in the process of being committed, she may qualify as a co-perpetrator or accomplice. If X had agreed prior to the commission of the crime to render assistance, X may, depending upon the circumstances, be a perpetrator herself if her conduct, culpability and personal qualities accord with the definition of the crime, or else she may be an accomplice (*Maserow* 1942 AD 164, 170).

(3) *Enabling perpetrator or accomplice to evade liability*

The act must be of a certain nature. It must be such that it **assists the perpetrator or accomplice to evade liability** for her crime, or to facilitate such a person's evasion of liability.

It is **not required that the protection or assistance given be successful**. One would therefore be guilty as an accessory after the fact even though the corpse which one helped to conceal by submerging it in a river is discovered by the police and fished out of the river, and the murderer is brought to justice.

(4) *Unlawfulness*

The act must be **unlawful**, which means that there must be no justification for it.

(5) *Intention*

The accessory after the fact must render assistance **intentionally**. She must know that the person she is helping has committed the crime. She must have the **intention of assisting the perpetrator (or accomplice) to evade liability** or to facilitate the evasion of liability (*Morgan* 1992 (1) SACR 134 (A) 174).

(6) *Accessory character of liability*

The liability of the accessory after the fact, like that of an accomplice, is **accessory** in character. There can only be an accessory after the fact if somebody else has

committed the crime as perpetrator. As a result, one cannot be an accessory after the fact to a crime committed by oneself.

This rule leads to problems in the following kind of situation:

A, B and C are charged with murder. The evidence reveals that one or more of them committed the murder, but the court cannot find beyond reasonable doubt which of them committed the murder. In other words, there is a reasonable possibility that one, or possibly two, of them might not have committed the murder, but the court cannot determine which one of them might probably not have committed the crime. As a result of this reasonable doubt as to the identity of the actual murderer(s), the court cannot find one of them guilty of murder. However, the evidence reveals that, after the murder had been committed, all three of the accused assisted one another to dispose of the body of the deceased by throwing it into a river with a stone tied around its neck. The question now arises: can A, B and C be convicted as accessories after the fact to murder?

The answer would seem to be "No", for the following reason: the possibility cannot be excluded that A would then be an accessory after the fact in respect of a crime (the murder) which she herself committed, and the same applies to B and C. Stated differently: since it is certain that one of the three persons committed the murder, it would seem to be incorrect to convict them of also being accessories after the fact to the murder, because this would mean that the person who is convicted would then be both a perpetrator and an accessory after the fact in respect of the same crime – a conclusion which is irreconcilable with the basic rule stated above that you cannot be an accessory after the fact in respect of a crime which you have committed yourself.

However, our courts are not satisfied with the idea that A, B and C should escape even a conviction of being accessories after the fact. In *Gani* 1957 (2) SA 212 (A), the facts were identical to those described above. The Appellate Division convicted all three of the crime of being accessories after the fact to the murder, on the strength of the following argument:

If all three committed the murder, they are all three accessories after the fact, because all three of them disposed of the corpse; if the murder was not committed by all of them, those who did not commit the murder are accessories after the fact in respect of the murder committed by the other(s), and the latter are accomplices to the crime of being an accessory after the fact.

In *Jonathan* 1987 (1) SA 633 (A), the Appellate Division was invited to hold that *Gani's* case was wrongly decided, but the Court confirmed *Gani's* case, adding that the "rule in *Gani's* case" may be regarded as an **exception to the general rule that one cannot be an accessory after the fact in respect of a crime committed by oneself.**

2.3.4 Punishment

In terms of section 257 of the Criminal Procedure Act, the punishment of an accessory after the fact may not be heavier than that imposed on the perpetrator. As the accessory after the fact did not participate in the crime, she is usually sentenced more leniently than the perpetrator.

2.3.5 Reason for existence questionable

In conclusion, it may be asked whether the crime of being an accessory after the fact is really necessary in our law. In our opinion, it is not. Being an accessory

after the fact completely overlaps with the crime known as defeating or obstructing the course of justice – a crime which we will discuss briefly further on in this guide. Even the Appellate Division admitted this: see *Gani* supra 220A; *Pakane* 2008 (1) SACR 518 (SCA).

SUMMARY

- (1) Definition of accomplice: see definition in previous study unit.
- (2) The conduct of an accomplice amounts to a furthering of the crime by somebody else. “Furthering” includes rendering assistance, giving advice, encouraging, and so forth.
- (3) An accomplice is guilty only if she furthers the crime unlawfully and intentionally.
- (4) A person cannot be an accomplice unless somebody else is a perpetrator.
- (5) It is not possible to be an accomplice to murder. Persons who render assistance in the commission of the murder are co-perpetrators.
- (6) An accessory after the fact is not a participant, because she does not further the crime.
- (7) Definition of an accessory after the fact: see the definition above.
- (8) In order to be liable as an accessory after the fact, a person must render assistance intentionally to somebody who has already committed the crime as a perpetrator or as an accomplice.
- (9) The liability of an accessory after the fact, like that of an accomplice, is accessory in character. This means that there can only be an accessory after the fact if somebody else has committed the crime as perpetrator. It also means that one cannot be an accessory after the fact to a crime committed by oneself. In *Gani*, the Appellate Division created an exception to the rule just mentioned.

TEST YOURSELF

- (1) Name and discuss the requirements for liability as an accomplice (as opposed to a perpetrator).
- (2) Discuss the accessory character of accomplice liability.
- (3) Is it possible to be an accomplice to murder? Give reasons for your answer.
- (4) Define an accessory after the fact.
- (5) Discuss the requirements for liability as an accessory after the fact.
- (6) Discuss the decision in *Gani* relating to the accessory character of the liability of an accessory after the fact.

STUDY UNIT 3

Attempt, conspiracy and incitement



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to demonstrate your understanding of the principles relating to anticipatory crimes by

- expressing an informed opinion whether or not certain conduct amounts to a punishable attempt to commit a specific crime
- expressing an informed opinion whether or not an accused can be convicted of conspiracy or incitement

3.1 BACKGROUND

Until now, we have dealt with completed crimes and have explained when a person would be guilty of a crime on account of his involvement in the commission of the crime before, during or after its commission. In this study unit, we will explain that a person may be guilty of an offence even though the crime that he wanted to commit, was never completed. The instances that we are referring to are those where X

- **attempts** (tries) to commit a crime, but does not succeed in completing it
- agrees (**conspires**) with another to commit a crime
- does something to influence (**incites**) another to commit a crime

Attempt, conspiracy and incitement are often referred to as “**inchoate**” or “**anticipatory**” crimes, since they deal with forms of punishable conduct which **anticipate** or **precede** the actual completion of the crime.

Why does the law punish not only the completed crime, but also the above-mentioned anticipatory forms of conduct? One of the reasons is to be found in the **preventive** theory of punishment. The law seeks to prevent the commission of the completed crime. If these anticipatory forms of conduct were not punishable, the maintenance of law and order would suffer seriously, because the police would then be powerless to intervene when they happen to become aware of people preparing to commit a crime.

Imagine the police hearing that a group of persons is preparing to rob a bank with the use of firearms. They know who the would-be robbers are, and they watch them get into their car and drive, armed, to the bank. If such anticipatory conduct were not punishable, one would have the ludicrous position that the police would first have to wait till the completion of the crime (involving perhaps the shooting of innocent people) before they could catch the robbers.

3.2 ATTEMPT

On attempt generally, see: *Criminal Law* 283–294; *Case Book* 249–257.

3.2.1 General

Attempts to commit common law crimes are punishable in terms of common law. Initially, it was uncertain whether attempts to commit a statutory crime were also punishable, but this uncertainty has now been removed by section 15(1) of Act 27 of 1914 (subsequently replaced by s 18(1) of Act 17 of 1956) which clearly provides that an attempt to commit a statutory offence is also punishable.

3.2.2 Definition of rules relating to attempt

We begin by giving a definition of the rules relating to attempt.

- (1) A person is guilty of attempting to commit a crime if, intending to commit that crime, he unlawfully engages in conduct that is not merely preparatory but has reached at least the commencement of the execution of the intended crime.
- (2) A person is guilty of attempting to commit a crime, even though the com-

mission of the crime is impossible, if it would have been possible in the factual circumstances which he believes exist or will exist at the relevant time.

If you find these rules somewhat difficult to comprehend at the first reading, do not get discouraged. We shall explain them in the discussion which follows.

3.2.3 Four different types of attempt

One can distinguish four different types of attempt. They correspond to four different reasons why, despite having embarked upon the commission of a crime, X has not completed the crime. These four types of attempt are the following:

- (1) **Completed attempt.** In this type of situation, **X does everything he can to commit the crime**, but, for some reason, the crime is not completed, for example
 - where X fires at Y, but misses
 - where X fires at Y and strikes Y, but Y's life is fortunately saved by timeous medical intervention

This type of situation is impliedly contained in the first paragraph of the definition of the rules relating to attempt given above.

- (2) **Interrupted attempt.** In this type of situation, X's actions have reached the stage when they are **no longer merely preparatory**, but are in effect **acts of execution**, when they are **interrupted**, so that the crime cannot be completed. For example:
 - X, intending to commit arson, pours petrol onto a wooden floor, but is apprehended by a policeman just before he strikes a match.
 - X, a prisoner intending to escape from prison, breaks and bends the bars in the window of his cell, but is apprehended by a warder before he can succeed in pushing his body through the opening.

This type of situation is described in the first paragraph of the definition of the rules relating to attempt given above.

- (3) **Attempt to commit the impossible.** In this type of situation, it is impossible for X to commit or complete the crime, either
 - because the **means** he uses **cannot bring about the desired result**, as where X, intending to murder Y, administers vinegar to him in the firm, but mistaken, belief that the vinegar will act as a poison and kill Y, or
 - because it is impossible to commit the crime in respect of the **particular object** of his actions, as where X, intending to murder Y while he is asleep in bed, shoots him through the head, but Y has in fact died of a heart attack an hour before.

This type of situation is described in the second paragraph of the definition of the rules relating to attempt given above.

- (4) **Voluntary withdrawal.** In this type of situation, X's actions have already reached the stage when they qualify as **acts of execution**, when X, **of his own accord, abandons** his criminal plan of action, for example
 - where, after putting poison into Y's porridge, but before giving it to Y, X has second thoughts and decides to throw the porridge away

This type of situation is impliedly contained in the first paragraph of the definition of the rules relating to attempt given above.

We shall now proceed to discuss these four forms of attempt one by one.

3.2.4 Completed attempt

(Criminal Law 286–287; Case Book 251–253)

As a general rule, it may be assumed that **if X has done everything he set out to do in order to commit the crime, but the crime is not completed, he is guilty of attempt**. The following are examples:

- where X fires at Y, but the bullet misses him
- where X fires at Y and strikes Y, but Y's life is fortunately saved by timeous medical intervention
- where X, intending to infringe Y's dignity (conduct which, in principle amounts to the commission of the crime known as *crimen iniuria*), writes a letter to Y containing abusive allegations about Y and posts it, but the letter is intercepted by the authorities before it can reach Y

This type of attempt is impliedly contained in the first paragraph of the definition of the rules relating to attempt given above. In that paragraph, conduct that has reached the "commencement of the execution" stage is required. If, as is the case in this type of attempt, X has done everything he set out to do in order to commit the crime, there can be no doubt that his acts are acts of execution, as opposed to preparation. (The difference between acts of preparation and acts of execution will be explained in the discussion of the next type of attempt.)

3.2.5 Interrupted attempt

(Criminal Law 287–289; Case Book 251–253)

3.2.5.1 General

The majority of reported cases on attempt deal with this form of attempt. Whereas there is, as a rule, no difficulty in holding X liable for attempt in situations of so-called "completed attempt" (described above), in cases of interrupted attempt it can often be difficult to decide whether X's conduct amounts to punishable attempt.

Mere intention to commit a crime is not punishable. Nobody can be punished merely for his thoughts. A person can be liable only once he has committed an act; in other words, once his resolve to commit a crime has manifested itself in some outward conduct. However, it is not just any outward conduct which qualifies as a punishable attempt. If X intends to commit murder, he is not guilty of attempted murder the moment he buys the revolver, and, if he intends to commit arson he is not guilty of attempted arson the moment he buys a box of matches.

On the other hand, it stands to reason that there does not have to be a completed crime before a person may be guilty of attempt. Somewhere between the first outward manifestation of his intention and the completed crime there is a boundary which X must cross before he is guilty of attempt. How to formulate this boundary in terms of a general rule is one of the most daunting problems in criminal law.

In cases of this nature, one must in fact differentiate between three different stages:

- **In the first stage**, X's conduct amounts to no more than mere **acts of preparation**. For example, intending to kill his enemy, Y, he merely buys a knife at a shop. If this act of preparation is the only act that can be proved against him, he **cannot be convicted of any crime**.
- **In the second stage**, his acts have proceeded so far that they no longer amount to mere acts of preparation, but in fact qualify as **acts of execution or consummation**. For example, after searching for Y, he finds him and charges at him with the knife in his hand, although a policeman prevents him from stabbing Y. In this case, X is guilty of **attempted murder**.
- **In the third stage**, X has completed his act and all the requirements for liability have been complied with. For example, he has stabbed and killed Y. In this case, he is **guilty of murder** (the completed crime).

The distinction between the first and the second stages is crucial in determining whether or not X has rendered himself guilty of attempt. Again, the distinction between the second and third stages is crucial in determining whether X has committed merely an attempt or whether he has committed the completed crime.

3.2.5.2 *The rule applied in cases of interrupted attempt*

Liability for attempt in this type of situation is determined by the courts with the aid of an **objective criterion**, namely by distinguishing between

- **acts of preparation** and
- **acts of execution** (or consummation)

If what X did amounted merely to preparation for a crime, there is no attempt. If, however, his acts were more than acts of preparation and were in fact acts of consummation, he is guilty of attempt.

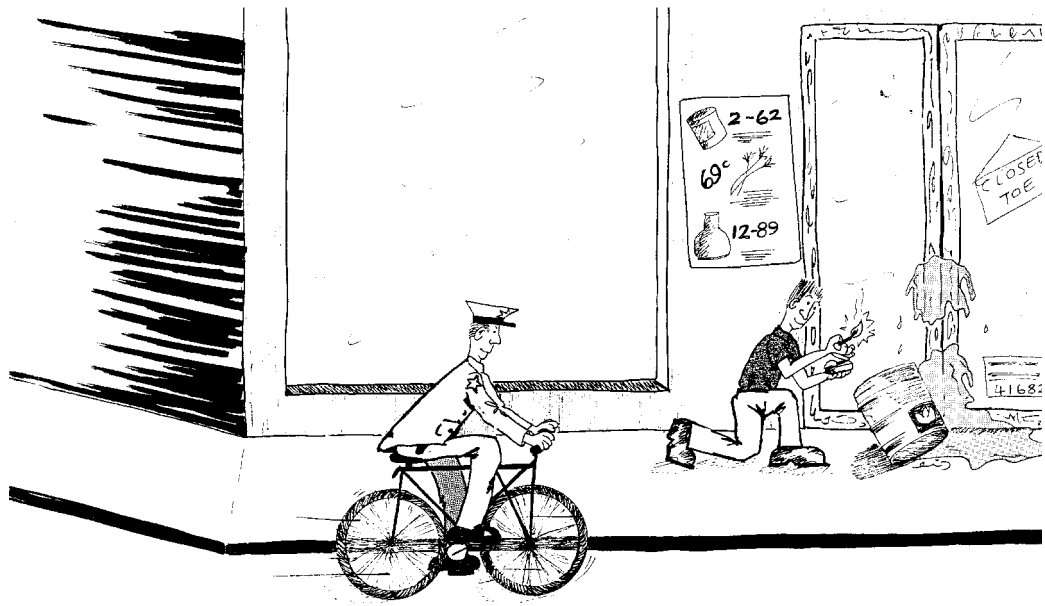
Although this test (namely to distinguish between acts of preparation and acts of consummation) may seem simple in theory, in practice it is often very difficult to apply. The reason for this is the vagueness of the concepts "preparation" and "consummation". In applying it, a court has to distinguish between "the end of the beginning and the beginning of the end". Each factual situation is different and the test as applied to one set of facts may be no criterion in a different factual situation. In *Katz* 1959 (3) SA 408 (C) 422, it was stated that "a value judgment of a practical nature is to be brought to bear upon each set of facts as it arises for consideration".

3.2.5.3 *Examples of the application of rule*

The most important cases in which the courts have enunciated this test (namely to differentiate between acts of preparation and acts of consummation) are *Sharpe* 1903 TS 868 and *Schoombie* 1945 AD 541. In the latter case, X had gone to a shop in the early hours of the morning and had poured petrol around and underneath the door, so that the petrol flowed into the shop. He placed a tin of inflammable material against the door, but his whole scheme was thwarted when, at that moment, a policeman appeared. The Appellate Division confirmed his conviction of attempted arson and, in the judgment, authoritatively confirmed that **the test to be applied in these cases was to distinguish between acts of preparation and acts of consummation**.



Read the following decision in the *Case Book*: *Schoombie* 1945 AD 541.



The facts in Schoombie's case. Just before X can light the match to set fire to the building, a policeman arrives on a bicycle and prevents him from doing so.

The following are some further examples of the application of the test:

- (1) **Mere acts of preparation** (ie, acts in respect of which X cannot be convicted of attempt)
 - X, intending to murder Y, merely prepares the poison which he means to use to poison Y later, when he is caught.
 - X, intending to buy goods which he knows to be stolen goods (conduct which would render him guilty of the crime of possessing stolen goods), merely inspects the goods which the real burglar has stolen, when he is apprehended (*Croucamp* 1949 (1) SA 377 (A)).
- (2) **Acts of consummation** (ie, acts in respect of which X can be convicted of attempt)
 - X, trying to rape Y, has as yet only assaulted her when he is apprehended (*B* 1958 (1) SA 199 (A) 204; *W* 1976 (1) SA 1 (A)).
 - X, trying to steal from a woman's handbag, has opened the handbag hoping that its contents will fall out, when he is apprehended.

3.2.6 Attempt to commit the impossible

(Criminal Law 289–290; Case Book 253–257)

3.2.6.1 The subjective and objective approaches

Before 1956, there was no certainty in our law whether this type of attempt was punishable or not. In particular, it was uncertain whether one should, in deciding whether X's conduct amounted to a punishable attempt, employ an objective or a subjective test.

If one employs an **objective test**, one considers the facts only from the outside, that is, without considering the subjective aims which X has in mind when he performs the act. If one follows this approach, X would never be guilty of attempt because what he is trying to do in cases falling within this category cannot physically (ie, objectively) result in the commission of an offence.

Consider, for example, the situation where X tries to sell uncut diamonds to Y. (It is a statutory offence to sell uncut diamonds.) He offers a stone to Y which he (X) believes to be an uncut diamond, whereas it is in reality merely a piece of worthless glass. (Some uncut diamonds sometimes resemble a piece of glass.) If one employs an objective test, X cannot be convicted of an attempt to sell an uncut diamond, because, objectively, the sale, or offering for sale, of a piece of glass is something entirely different from the sale, or offering for sale, of an uncut diamond.

If, however, one employs a **subjective test**, X can be convicted of attempt, because, according to this test, **what is decisive is X's subjective state of mind**, that is, his belief that what he was doing was selling an uncut diamond and not a piece of glass.

3.2.6.2 *The decision in Davies*

In 1956, the uncertainty whether the test was objective or subjective was settled by the Appellate Division in *Davies* 1956 (3) SA 52 (A). In this case, the Court had to decide whether X was guilty of an attempt to commit the former crime of abortion if the foetus which he had caused to be aborted was already dead, although he had believed the foetus to be still alive. (The crime of abortion could, in terms of its definition, be committed only in respect of a live foetus.) The Appellate Division adopted the subjective test and held that X was guilty of attempt. It further held that X would have been guilty of attempt even if the woman had not been pregnant, provided, of course, that X had believed that she was pregnant and had performed some act intending to bring about an abortion.

The Court further held that it is immaterial whether the impossibility of achieving the desired end is attributable to the wrong **means** employed by X, or to the fact that the **object in respect of which the act is committed** is of such a nature that the crime can never be committed in respect of it.

In cases of attempt to commit the impossible, the **test according to this decision is therefore subjective**, and not objective. What the law seeks to punish in cases of this nature is not any harm which might have been caused by X's conduct (because such harm is non-existent), but X's "evil state of mind" which manifested itself in outward conduct which was not merely preparatory, but amounted to an act of execution.

Note that the rule that, in order to be convicted of attempt, X's act must be an act of consummation also applies to this form of attempt.



Read the following decision in the *Case Book*: *Davies* 1956 (3) SA 52 (A).

The crime of rape can only be committed in respect of a human being who is alive. In *W* 1976 (1) SA 1 (A), X had sexual intercourse with what he believed to be a live woman, whereas the woman was in fact already dead. X also believed that the woman did not consent to the intercourse. The Court held that he could be convicted of attempted rape. This is an example of impossible attempt, where the impossibility resided in the object in respect of which the act was performed.

3.2.6.3 *Committing a "putative crime" is not a punishable attempt*

In the *Davies* case, as well as the case of *W*, discussed above, X was **mistaken about the facts**. (In *Davies*, X wrongly believed that the foetus was still alive, and, in *W*, he wrongly believed that the woman was still alive. These are not mistakes concerning the contents of the law, but mistakes concerning the presence of certain material facts.) The situation in which this type of mistake is made should

be contrasted with the situation in which X is **mistaken not about the relevant facts, but about the relevant legal provisions**.

Consider the following example:

X thinks that there is a law which makes it an offence for one person to give another a bottle of brandy. (In reality, there is no law stipulating that such conduct is a crime.) X gives Y a bottle of brandy as a present in the mistaken belief that, by performing this act, he is committing a crime. Although X subjectively believes that he is committing a crime, objectively (ie, viewed from the outside) his conduct is in reality perfectly lawful. What he is attempting to do is to commit something (a crime) which is impossible to commit, because there is no law stating that such conduct is punishable.

The question now is: Does X's conduct in this example also fall within the ambit of punishable attempt to commit the impossible? The answer to this question is in the **negative**. The reason for this is that, in *Davies supra*, the Court specifically stated that there is an exception to the rule that impossible attempt is punishable. This exception was formulated as follows by Schreiner JA (at 64):

If what the accused was aiming to achieve was not a crime, an endeavour to achieve it could not, because by a **mistake of law** he thought that his act was criminal, constitute an attempt to commit a crime.

What the judge was actually saying was that, although the general rule is that attempts to commit the impossible are punishable, **this rule is limited to cases where the impossibility originated from X's mistaken view of the material facts, and that it does not apply where the impossibility originated from X's mistaken view of the law**. Thus, if, because of a mistake concerning the contents of the law, X thinks that the type of act he is committing is punishable (ie, that there is a legal provision stating that the type of act he is committing constitutes a crime), whereas the law in fact does not penalise that type of act, X's conduct does not qualify as punishable attempt, despite the fact that it may be described as an attempt to commit the impossible.

This type of situation (ie, impossible attempt originating in X's mistake of law) is sometimes referred to as a "**putative crime**". The word "putative" is derived from the Latin word *putare*, which means "to think". **A putative crime is therefore a crime which does not actually exist** (because there is no rule of law stating that that particular type of conduct constitutes a crime), **but which X thinks does exist**. The crime only "exists" in X's mind, that is, in what he thinks. A putative crime can never be punishable.

ACTIVITY 1

X thinks that to commit adultery is a crime. In reality, it is not criminal. (It may only result in certain civil law or private law consequences, in that it may give the spouse of the other adulterous party a ground for suing for divorce.) Believing adultery to be a crime, he commits adultery. Does X commit any crime?

FEEDBACK

X does not commit any crime. More particularly, he cannot be convicted of an attempt to commit adultery. The impossibility "lies in the law, not in the facts".

ACTIVITY 2

X is charged with theft. The crime of theft cannot be committed in respect of *res derelictae* (ie, property abandoned by its owners with the intention of ridding themselves of it). X, a tramp, sees an old mattress lying on the pavement. The mattress was left by its owner next to his garbage container in the hope that the garbage removers would remove it. X appropriates the mattress for himself. X knows that the owner had meant to get rid of the mattress. However, X erroneously believes that the crime of theft is defined by law in such a way that it can be committed even in respect of property that has been abandoned by its owner (a *res derelicta*). Does X commit attempted theft?

FEEDBACK

Since the mattress was in fact a *res derelicta*, it was impossible for X to steal it. The set of facts therefore describes a situation of an attempt to commit the impossible. X was not mistaken about any facts, but only about the contents of the law. This is a case of a putative crime, that is, a crime that exists only in X's mind. The "rule in *Davies*" (ie, the rule that impossible attempts are punishable) does not apply to putative crimes. Therefore, X cannot be convicted of attempted theft.

3.2.7 Voluntary withdrawal

(*Criminal Law 292–294; Case Book 249–250*)

To begin with, it is generally accepted that there is no punishable attempt if X voluntarily abandons his criminal plan of action at a stage when his actions can only be described as preparations; in other words, before his conduct constitutes the commencement of the consummation. The question is simply whether a withdrawal after this stage (the commencement of the consummation stage), but before completion of the crime, constitutes a defence to a charge of attempt. The courts have answered this question negatively.

- In *Hlatwayo* 1933 TPD 441, X was a servant who put caustic soda into her employers' porridge, intending to poison them. She noticed that the caustic soda discoloured the porridge and so threw the mixture away. She was nevertheless convicted of attempted murder. The Court held that her acts had already reached the stage of consummation and that her change of heart did not exclude her liability for attempt.
- In *B* 1958 (1) SA 199 (A), the Appellate Division accepted that it was held in *Hlatwayo* that voluntary withdrawal was no defence, and that that decision was correct.
- In *Du Plessis* 1981 (3) SA 382 (A) 410 AB, the Appellate Division stated: "If that change of mind occurred before the commencement of the consummation, then the person concerned cannot be found guilty of an attempt, but if it occurred after the commencement, then there is an attempt and it does not avail the person concerned to say that he changed his mind and desisted from his purpose."

(In *Criminal Law 293–294*, the author, Snyman, criticises the courts' decisions relating to voluntary withdrawal and argues that X's conduct in this type of situation ought not to be punishable. Although, if you wish, you may read Snyman's arguments as a matter of interest, for the purposes of this module we shall not expect of you to be able to set them out in the examination.)

3.2.8 Intention

A person can be found guilty of attempt only if he had the intention to commit the particular crime towards which he strove. Negligent attempt is notionally impossible: one cannot attempt, that is, intend, to be negligent. There is therefore no such thing as an attempt to commit culpable homicide (*Ntanzi* 1981 (4) SA 477 (N)), because the form of culpability required for culpable homicide is not intention, but negligence.

3.3 CONSPIRACY

(*Criminal Law* 294–297)

- (1) In South Africa, conspiracy to commit a crime is not a common law crime, but a **statutory crime**. **Section 18(2)(a) of the Riotous Assemblies Act 17 of 1956** criminalises conspiracies to commit crimes. The relevant parts of this section read as follows:

Any person who ... conspires with any other person to aid or procure the commission of or to commit ... any offence ... shall be guilty of an offence ...
- (2) This provision does not differentiate between a successful conspiracy (ie, one followed by the actual commission of the crime) and one not followed by any further steps towards the commission of the crime. Theoretically, it is possible to charge and convict people of a contravention of this provision even though the crime envisaged was indeed subsequently committed. Our courts have, however, quite correctly indicated that this provision should be utilised only if there is **no proof that the envisaged crime was in fact committed** (*Milne and Erleigh* (7) 1951 (1) SA 791 (A) 823; *Khoza* 1973 (4) SA (O) 25; *Mshumpa* 2008(1) SACR 126 (EC)).
- (3) Nobody is ever charged with or convicted of **simply “conspiracy” and no more**. The charge and conviction must be one of conspiracy to commit a certain crime (such as murder or assault).
- (4) The **act** in the crime of conspiracy consists in the **entering into an agreement** to commit a crime or crimes (*Moumbaris* 1974 (1) SA 681 (T) 687).
- (5) While the parties are still **negotiating** with one another, there is not yet a conspiracy.
- (6) The crime is **completed** the moment the parties have come to an **agreement**, and it is **not necessary for the state to prove the commission of any further acts in execution of this conspiracy** (*Alexander* 1965 (2) SA 818 (C) 822).
- (7) The conspiracy need not be express; it may also be **tacit** (*B* 1956 (3) SA 363 (EC) 365).
- (8) The parties need not agree about the **exact manner** in which the crime is to be committed (*Adams* 1959 (1) SA 646 (Sp C)).
- (9) The mere fact that X and Y both have the **same intention does not mean that there is a conspiracy** between them. There must be a **definite agreement** between at least two persons to commit a crime (*Alexander* 1965 (2) SA 818 (K) 821; *Cooper* 1976 (2) SA 875 (T) 879). This idea is often expressed by the statement that “there must be a **meeting of the minds**”. Thus, if X breaks into a house and Y, completely unaware of X’s existence and therefore of his plans, breaks into the same house on the same occasion, neither of them is guilty of conspiracy, even though they both have the same intention.
- (10) The conspirators need **not be in direct communication** with each other. If two or more persons unite in an organisation with the declared purpose of committing a crime or crimes, there is a conspiracy. Any person who joins

such an organisation while aware of its unlawful aims, or remains a member after becoming aware of them, signifies, by his conduct, his agreement with the organisation's aims, thereby committing conspiracy (*Alexander* supra 822; *Moumbaris* supra 687).

- (11) The **intention requirement** can be subdivided into two components, namely
 - (a) the intention to **conspire**
 - (b) the intention to **commit a crime or to further its commission**
- (12) It goes without saying that there can be a conspiracy only if **more than one party** is involved. One cannot conspire with oneself to commit a crime.
- (13) As far as the **punishment** for conspiracy is concerned, the section which criminalises conspiracy (ie, s 18(2)(a) of Act 17 of 1956) provides that somebody convicted of conspiracy **may be punished with the same punishment as the punishment prescribed for the commission of the actual crime** envisaged. However, this provision must be interpreted as **only laying down the maximum punishment** which may be imposed for the conspiracy. In practice, somebody convicted of conspiracy to commit a crime normally receives a punishment that is **less severe** than the punishment which would have been imposed had the actual crime been committed. The reason for this is that conspiracy is only a preparatory step toward the actual commission of the (main) crime. In the case of conspiracy, the harm which would have been occasioned by the commission of the actual completed crime has not materialised. (For the same reason, the punishment for an attempt to commit a crime is, as a rule, less severe than that for the completed crime.)

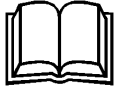
3.4

INCITEMENT

(Criminal Law 298–305; Case Book 257–261)

- (1) In South Africa, incitement to commit a crime is not a common law crime, but a **statutory crime**. **Section 18(2)(b) of the Riotous Assemblies Act 17 of 1956** criminalises incitement to commit crimes. The relevant parts of this section read as follows:

Any person who ... incites, instigates, commands or procures any other person to commit any offence ... shall be guilty of an offence
- (2) As in the case of conspiracy, X ought to be charged with, and convicted of, incitement **only if there is no proof that the crime to which he incited Y has indeed been committed**. If the main crime has indeed been committed, X is a co-perpetrator or accomplice in respect of such crime (*Khoza* 1973 (4) SA 23 (O) 25).
- (3) Nobody is ever charged with or convicted **simply of "incitement" and no more**. The charge and conviction must be one of incitement to commit a certain crime (such as murder or assault).
- (4) The **purpose** of the prohibition of incitement to commit a crime is to discourage people from seeking to influence others to commit crimes (*Zeelie* 1952 (1) SA 400 (A) 405).
- (5) In some older decisions, the view was expressed that X can be guilty of incitement only if the incitement contains an element of persuasion; in other words, there must be an initial unwillingness on the part of Y which is overcome by argument, persuasion or coercion (C 1958 (3) SA 145 (T) 147). However, in *Nkosiyana* 1966 (4) SA 655 (A), the Appellate Division held that **no such element of persuasion is required**.



Read the following decision in the *Case Book: Nkosiyana* 1966 (4) SA 655 (A)

- (6) In *Nkosiyana* supra, X had suggested to Y that they murder Mr Kaiser Matanzima of the Transkei. However, Y was in fact a policeman who suspected X of trying to murder Mr Matanzima, and wanted to trap X. X was unaware of the fact that Y was a policeman. X was charged with incitement to commit murder. The Appellate Division held that the fact that Y was a policeman who at no time was susceptible to persuasion did not stand in the way of a conviction for incitement. Incitement can therefore be committed **even in respect of a police trap** in which the police officer involved has no intention of ever committing the actual crime, but who simply wants to trap the inciter.
- (7) In *Nkosiyana* supra, an inciter was described as somebody “who reaches out and **seeks to influence the mind of another to the commission of a crime**”. Whether the other person (Y) is **capable of being persuaded is immaterial**. Neither do the means X uses to influence, or try to influence, Y carry any weight. The emphasis is therefore on X’s conduct, and not that of Y.
- (8) The incitement may take place either **explicitly or implicitly**.
- (9) If the incitement does **not come to Y’s knowledge**, X cannot be convicted of incitement, but may be guilty of **attempted incitement**, as in the case where X writes an inflammatory letter to Y, but the letter is intercepted before it reaches Y.
- (10) As far as the **punishment** for incitement is concerned, the section which criminalises incitement (ie, s 18(2)(b) of Act 17 of 1956) provides that somebody convicted of incitement is **punishable with the same punishment as the punishment prescribed for the commission of the actual crime** envisaged. However, this provision must be interpreted as **only laying down the maximum punishment** which may be imposed for the incitement. In practice, somebody convicted of incitement to commit a crime normally receives a punishment that is **less severe** than the punishment which would be imposed had the actual crime been committed. The reason for this is that incitement is only a preparatory step towards the actual commission of the (main) crime. In the case of incitement, the harm which would be occasioned by the commission of the actual completed crime has not yet materialised.

SUMMARY

Attempt

- (1) Definition of the rules relating to attempt – see definition above.
- (2) There are four forms of attempt, namely completed attempt, interrupted attempt, attempt to commit the impossible, and voluntary withdrawal.
- (3) In cases of completed attempt, X has done everything he set out to do in order to commit the crime, but the crime is not completed, for example where X fires a gunshot at Y, but misses.
- (4) In interrupted attempt, X’s actions are interrupted so that the crime cannot be completed. In these cases, X is guilty, provided that his actions are no longer mere acts of preparation, but in fact constitute acts of consummation.
- (5) In cases of attempt to commit the impossible, it is impossible for X to complete the crime, because either the means he uses cannot bring about the

desired result or the object in respect of which the act is committed is factually impossible to attain.

- (6) In *Davies* 1956 (3) SA 52 (A), it was held that a subjective approach towards attempts to commit the impossible should be followed, and that a person is guilty of attempted abortion if he aborts a dead foetus in circumstances in which he believes that it is still alive, even though an abortion can only be committed in respect of a live foetus.
- (7) There is an exception to the general rule laid down in *Davies*: A person cannot be guilty of an attempt to commit the impossible where such person is, as a result of a mistake of law, under the erroneous impression that the type of conduct he is engaging in is declared criminal by the law, whereas in fact it is not criminal. In legal terminology, such a situation is known as a "putative crime".
- (8) In cases of voluntary withdrawal, X, of his own accord, abandons his criminal plan of action. According to our courts, such withdrawal is no defence to a charge of attempt if it occurs after the commencement of the consummation.
- (9) Intention is always a requirement for a conviction of attempt.

Conspiracy

- (10) Conspiracy to commit a crime is punishable in terms of section 18(2) of Act 17 of 1956.
- (11) The act of conspiracy consists in entering into an agreement to commit a crime.
- (12) The crime is completed the moment the parties have come to an agreement, and it is not necessary for the state to prove the commission of any further acts in execution of the conspiracy.
- (13) The intention requirement consists in the intention to conspire as well as the intention to commit a crime or to further its commission.

Incitement

- (14) Incitement to commit a crime is punishable in terms of section 18(2) of Act 17 of 1956.
- (15) X ought to be charged with, and convicted of, incitement only if there is no proof that the crime to which he incited another has indeed been committed.
- (16) A person may be convicted of incitement even though there is no proof that he had persuaded the incitee to commit the crime.

TEST YOURSELF

Attempt

- (1) Define the most important rules relating to the crime of attempt.
- (2) Name the four forms of criminal attempt and explain briefly what each entails.

- (3) Discuss, with reference to examples and decisions, the difference drawn in the case of an interrupted attempt between acts of preparation and acts of consummation.
- (4) Explain the rules relating to an attempt to commit the impossible.
- (5) What is meant by a "putative crime"? Explain.
- (6) Is voluntary withdrawal a defence to a charge of attempt? Explain.

Conspiracy

- (7) Discuss the crime of conspiracy.

Incitement

- (8) Discuss the crime of incitement.

PART 2

SPECIFIC
CRIMES



Crimes against
the state and
the adminis-
tration
of justice



 STUDY UNIT **4**

- Specific crimes – Introduction
- Crimes against the state



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LEARNING OUTCOMES

- When you have finished this study unit, you should be able to
- demonstrate your understanding of the requirements for one of the crimes against the state by considering the possible criminal liability of an accused for the crime of public violence

4.1 SPECIFIC CRIMES – INTRODUCTION

Having discussed the general principles of criminal law, we now proceed to have a closer look at some of the most important specific crimes. At the outset, we wish to stress that we shall not – indeed **cannot** – discuss every specific crime known in our law. There are literally hundreds, and perhaps thousands, of offences, most of them of statutory origin. It is not even possible to discuss every common law crime. It is not uncommon for a practitioner to learn of the existence of a statutory offence for the first time when her client walks into her office with a summons in her hand.

For the sake of convenience, crimes are divided into broad categories according to the object which is sought to be protected by the legal norm reflected in the definition of the crime. We shall divide the specific crimes into four broad categories, namely crimes against the state and the administration of justice, crimes against the community, crimes against the person, and crimes against property. The exact classification of the crimes will become clear to you if you consult the table of contents at the beginning of the study guide.

4.2 CRIMES AGAINST THE STATE

4.2.1 Background

The most important common law crimes against the state are high treason, sedition and public violence. There are also various statutory crimes against the state, most of them created by the Internal Security Act 74 of 1982. Examples are terrorism and sabotage. Our discussion will be limited to the crime of public violence. We have selected this particular crime for study, since it features often in practice.

4.2.2 Public violence

(Criminal Law 321–323)

4.2.2.1 Definition

Public violence is the unlawful and intentional performance of an act, or acts, by a number of persons which assumes serious proportions and is intended to disturb the public peace and order by violent means, or to infringe the rights of another.

4.2.2.2 Elements of the crime

The elements of the crime are the following:

- (1) an **act**
- (2) performed by a **number** of persons

- (3) which assumes **serious proportions**
- (4) which is **unlawful**, and
- (5) **intentional**, and, more specifically, includes an intention to disturb the public peace and order by violent means, or to infringe the rights of another

4.2.2.3 *The object or interest protected*

The interest protected in the case of public violence is the **public peace and order** (*Salie* 1938 TPD 139). A certain measure of overlapping may occur between this interest and the interests protected by the other crimes against the state. A watertight division is not always possible.

4.2.2.4 *Joint action*

The crime cannot be committed by an individual acting alone. The public peace and order must be disturbed by a **number of persons** acting in concert. It is impossible to specify the number of persons required; this will depend on the circumstances of the case, taking into account factors such as the seriousness of the threat to peace and order. In *Terblanche* 1938 EDL 112, 5 persons were considered sufficient, while, in other cases where the disturbance of peace and order was not serious, for example as a result of the limited scope and duration of the disturbance, 6, 8 and 10 persons were considered insufficient for the commission of the crime (*Mcunu* 1938 TPD 229, *Salie* supra and *Nxumalo* 1960 (2) SA 442 (T) respectively).

Those participating in the disturbance of the peace **must act in concert, that is, with a common purpose** (*Wilkens* 1941 TPD 276, 289; *Ndaba* 1942 OPD 149; *Kashion* 1963 (1) SA 723 (R) 149; *Whitehead* 2008 (1) SACR 431 (SCA)). Once it has been established that the accused knowingly participated in an uprising with the aim of threatening the public peace and order, the prosecution need not prove precisely what acts were committed by which of the participants (*Wilkens* supra 289; *Lekoatla* 1946 OPD 6, 10; *Mashotonga* 1962 (2) SA 321 (SR) 327)).

The crime can be committed both in a public place and on private property (*Cele* 1958 (1) SA 144 (N) 152F; *Segopotsi* 1960 (2) SA 430 (T) 435–437). The participants need not be armed.

The act must be **accompanied by violence or a threat of violence** (*Wilkens* supra 289; *Cele* supra 152G). The crime is committed even if there is no actual disturbance of the public peace and order, or no actual infringement of the rights of another. It is sufficient if the action is **aimed** at the disturbance of the peace or the infringement of the rights of another (*Mvelase* 1938 NPD 239; *Segopotsi* supra 433 (E)).

4.2.2.5 *Examples of conduct*

The following are examples of behaviour amounting to public violence:

- faction fights (*Ngubane* 1947 (3) SA 217 (N); *Xybele* 1958 (1) SA 157 (T))
- joint resistance to police action by a group of persons (*Samaai* 1986 (4) SA 860 (C); *Segopotsi* supra)
- rioting (*Dingiswayo* 1985 (3) SA 175 (Ck))
- violent coercion of other workers by a group of strikers (*Cele* supra)
- disrupting and taking over a meeting by a gang (*Claassens* 1959 (3) SA 292 (T))

4.2.2.6 *Serious proportions*

The crime is only committed if (in addition to the other requirements) the action of the group assumes serious proportions. One of the reasons for the existence of

the crime is that the safety of persons not involved in the disturbance is threatened, and this will only be the case if the disturbance is serious (*Tshayitsheni* 1918 TPD 23, 2930). Although this requirement may be somewhat vague, it is nonetheless essential to distinguish public violence from cases of, for example, rowdy behaviour and family feuds which do not threaten public peace and order.

Whether or not the act can be classified as serious will depend on various factors, or a combination of them, examples of which would be the following:

- (1) the number of persons involved
- (2) the time
- (3) the place
- (4) the duration of the disturbance
- (5) the cause of the disturbance
- (6) the status of the participants
- (7) whether or not they are armed
- (8) whether persons or property are injured or damaged
- (9) the way in which the disturbance is settled (if it is settled)

It was decided in *Mei* 1982 (1) SA 301 (O) that the mere placing of stones in a road at a spot where a group of people assemble does not amount to violence, and therefore does not constitute public violence. The fact that an individual threw a stone at a police vehicle is not sufficient to convict that person of public violence.

4.2.2.7 Unlawfulness

Both the actions of the group of persons or crowd as such and the actions of the individual accused must have been unlawful. The participation of the individual may, for example, be justified on the ground of compulsion (*Samuel* 1960 (4) SA 702 (SR)), while the behaviour of the group may be justified, for example, by private defence (*Mathlala* 1951 (1) SA 49 (T) 57–58).

4.2.2.8 Intent

Intent is the form of culpability required. The individual accused must have been aware of the nature and purpose of the actions of the group, and her participation in the activities of the group must have been intentional (*Aaron* 1962 (2) PH H 177 (SR)). Furthermore, a common purpose of disturbing the public peace and order must exist between the members of the group.

ACTIVITY

A political party holds a meeting in a hall. The leader of the party, Y, opposes abortion, is in favour of the death sentence and has, on numerous occasions, made derogatory remarks about gay people. A large number of gay-rights activists decide to break up his meeting. Almost 150 members of this group are gathered in front of the hall on the evening the meeting is held. As people arrive for the meeting, the activists obstruct the entrance of the hall. Y (the leader of the political party) calls the police on his cellphone. The police arrive with dogs and tear-gas. They request the protesters to disperse peacefully. One woman shouts that the police will have to remove her forcefully. The others all agree with her. Because the crowd refuses to disperse, the police throw tear-gas-canisters and the protesters run away.

The protesters are charged with public violence. Their legal representative argues that the actions of the protesters were not serious enough to justify a conviction of the crime. You are the state prosecutor. What should your response be to this reasoning?

FEEDBACK

You will rely on the *Segopotsi* case, arguing that actual disturbance of the peace is not required for a conviction of this crime. All that is required is that the actions of the protesters be intended to disturb the public peace and order. You will argue that there is ample evidence before the court in this respect. You could also argue that, because the entrance of the hall was obstructed by the protesters, and tear-gas was used to disperse the crowd, the actions were serious enough to justify a conviction of public violence (*Salie and Ngubane*).

SUMMARY

- (1) Definition of public violence – see definition above.
- (2) The interest protected in public violence is the public peace and order.
- (3) Public violence can only be committed by a number of people acting in concert; in other words, a number of people acting with a common purpose.
- (4) The act must be accompanied by violence or threats of violence.
- (5) The action of the group must assume serious proportions. Whether this is the case, will depend upon a number of factors or combination of factors.

TEST YOURSELF

- (1) Can public violence be committed by a single person? Substantiate your answer.
- (2) The following statements refer to public violence. Indicate whether these statements are correct or incorrect:
 - (a) The participants in public violence must act in concert; in other words, with a common purpose.
 - (b) Public violence can only be committed in a public place.
 - (c) Once it has been established that the accused knowingly participated in a disturbance with the aim of threatening the public peace and order, the prosecution need not prove precisely which acts were committed by which of the participants.
 - (d) Public violence can only be committed if there is an actual disturbance of the public peace and order, or an actual infringement of the rights of another.
- (3) Explain what is meant by the requirement for public violence that the acts of the group must assume serious proportions.

STUDY UNIT **5**

Crimes against the administration of justice



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- demonstrate your understanding of the requirements for certain crimes relating to the administration of justice by considering the possible liability of an accused for the crimes of common law perjury, statutory perjury, defeating or obstructing the course of justice, and contempt of court

5.1 PERJURY AT COMMON LAW

(*Criminal Law 343–346*)

5.1.1 Definition

Perjury at common law consists in the unlawful, intentional making of a false declaration under oath (or in a form allowed by law to be substituted for an oath) in the course of a legal proceeding.

5.1.2 Elements of the crime

The elements of this crime are

- (1) the making of a **declaration**
- (2) which is **false**
- (3) **under oath or in a form** equivalent to an oath
- (4) in the course of a **legal proceeding**
- (5) in an **unlawful** and
- (6) **intentional** manner

5.1.3 False declaration

This requirement comprises the following:

- (1) The declaration must be **objectively** false. In English law, only **subjective** falsity is required. Subjective falsity means that the crime is committed even when someone speaks the truth, while believing that he is telling a lie. Our courts, however, have never yet decided that the crime can be committed in this manner. Section 101(1) of the Criminal Procedure Act assumes that an objectively false declaration is required.
- (2) The declaration may be **oral or in writing** (in an affidavit).
- (3) The falsehood may be made either **expressly** or **impliedly**. If it is made impliedly, the prosecution relies on an **innuendo**. In *Vallabh* (1911) 32 NLR 9, for example, it was decided that the words of a witness, “I have already stated what I heard”, implied that the witness had heard nothing more. If the prosecution relies on an innuendo, the implication that it relies on must be a necessary implication and it must be based on evidence led at the trial itself and not on extrajudicial declarations (*Matakane* 1948 (3) SA 384 (A)).

5.1.4 Under oath, or in a form substituted for oath

The declaration must be **under oath** or in one of the forms allowed to be

substituted for an oath, namely an **affirmation to tell the truth** or a **warning** by the presiding official to the witness to tell the truth.

For the benefit of those students who have not yet passed a course in Criminal Procedure or who are unacquainted with court procedure, we would like to explain the previous statement:

There are three ways in which, before commencing his evidence, a witness can undertake to speak the truth:

- (1) The most common method is taking an **oath** (ie, swearing) that he will speak the truth (s 162 of the Criminal Procedure Act).
- (2) A person may declare that he **solemnly confirms** that his evidence will be the truth (s 163 of the Criminal Procedure Act). This happens when an intended witness objects to taking the oath (perhaps on religious grounds) or indicates that he does not regard the oath as binding on his conscience.
- (3) Young children are merely **warned** (usually after a “friendly little sermon” by the magistrate or judge) to speak the truth (s 164 of the Criminal Procedure Act).

For the purposes of criminal law, it is important to bear in mind that a witness who intentionally makes a false statement commits perjury even if his statement is not under oath, but merely made after an affirmation (in terms of s 163) to speak the truth or after being warned (in terms of s 164) to speak the truth. (This rule is specifically set out in s 163(2) and 164(2) of the Act.)

Because only a declaration under oath or its equivalent can form the basis of perjury, the crime cannot be committed, for example, in the course of argument to the court by a legal representative. The person who administers the oath or its equivalent (eg the magistrate) must have the authority to do so (*McKay* 14 CLJ 205; *Hossain* 1913 CPD 841–844).

5.1.5 In the course of a legal proceeding

The crime is only committed if the false declaration is made in the course of a legal proceeding. Extrajudicial, false sworn statements are also punishable, but not as common law perjury (they can be punishable in terms of s 9 of Act 16 of 1963). (An extrajudicial statement is a statement made outside the court concerning a matter which has nothing to do with the dispute decided in court.) The legal proceeding can be either a criminal or a civil case. False sworn statements made before an administrative tribunal do not constitute the crime; thus it was held that such a declaration at a meeting of creditors in terms of the Insolvency Act cannot amount to perjury (*Carse* 1967 (2) SA 659 (C)).

In *Beukman* 1950 (4) SA 261 (O), it was decided that perjury can be committed by the making of a declaration outside the court or before a case has begun, provided that

- such declaration be permissible as evidence at the subsequent trial
- the maker of the declaration foresees the possibility that it may be used subsequently in a trial

According to this test, therefore, perjury can be committed by making a false affidavit for the purposes of a civil motion proceeding (which is mostly in writing) (*Du Toit* 1950 (2) SA 469 (A)), but not by making a declaration in which a false criminal charge is lodged, or by making extrajudicial sworn statements to the police in the course of their investigation into a crime (*Beukman* supra 265–266). In the *Beukman* case, it was decided that extrajudicial statements made to a

police official are not normally used in the subsequent trial as evidence, and, consequently, they are not declarations made in the course of a legal proceeding.

The fact that the false declaration is made in the course of a case, the judgment of which is later set aside on appeal, is no defence. The position is the same if the warrant for the arrest of the accused was invalid (*Vallabh* (1911) 32 NLR 9, 14–15).

5.1.6 Unlawfulness

The fact that, shortly after making a false statement (eg in cross-examination), the witness acknowledges that the statement was false and then tells the truth, is no excuse (*Baxter* 1929 EDL 189, 193). Also, the fact that the false declaration was made by X in a vain attempt to raise a defence, is no excuse. This happens in our courts daily, but, for practical reasons, not every accused whose evidence is rejected as false is afterwards charged with perjury (*Malianga* 1962 (3) SA 940 (SR) 943).

5.1.7 Intent

X must know, or at least foresee the possibility, that his declaration is false. Mere negligence or carelessness is not sufficient (*Mokwena* 1984 (4) SA 772 (T) 773).

5.2 STATUTORY PERJURY

You must study the discussion of this crime in *Criminal Law* 347–349 on your own. This crime is set out in section 319(3) of Act 56 of 1955.

For examination purposes you must be able to

- describe the contents of this section briefly
- state the reasons why the legislature created this crime
- state what the State has to prove when prosecuting a person for contravention of this subsection
- state the points of difference between common-law perjury and this crime

5.3 DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

You must study the discussion of this crime in *Criminal Law* 338–343 on your own.

The elements of the crime are

- (1) any **act** which
- (2) **defeats or obstructs the course of justice**
- (3) in an **unlawful** and
- (4) **intentional** manner

Note

- the different names given to this crime
- the difference between “defeating” and “obstructing” (the course of justice)
- the various and interesting ways in which this crime can be committed (par 6 on pp 340–341)

- the rule that the crime may be committed even though there is no pending case (par 7 on p 341)
- the intention requirement
- the meaning of the expression “administration of justice”
- the fact that a person can be charged with an attempt to commit this crime, and that charges of attempt are in fact more common than charges of having committed the completed crime

5.4 CONTEMPT OF COURT

(*Criminal Law 325–338*)

5.4.1 Definition

Contempt of court consists in the unlawful and intentional

- (1) violation of the dignity, repute or authority of a judicial body or a judicial officer in his judicial capacity, or
- (2) the publication of information or comment concerning a pending judicial proceeding, which has the tendency to influence the outcome of the proceeding or to interfere with the administration of justice in that proceeding

5.4.2 Elements of the crime

The elements of the crime are the following:

- (1) (a) the **violation of the dignity**, etcetera, of the **judicial body** or the **judicial officer**, or
 (b) the **publication of information** or **commentary concerning a pending judicial proceeding**, etcetera
- (2) in an **unlawful** and
- (3) **intentional** manner

5.4.3 Unusual characteristics

The crime manifests the following unusual characteristics:

- (1) The acts by which the crime is committed can be divided into various groups, some of which have very distinctive requirements (eg the requirement that a case must be *sub iudice* (ie, the legal process has not yet been completed) in the case of the publication of information which is potentially prejudicial to the just trial of a case). The crime can, therefore, be subdivided to a certain extent into a number of “subcrimes”, each of which has certain distinctive requirements. These particular forms of the crime will be dealt with in 5.4.9 below.
- (2) As a rule, some cases of contempt of court are not even treated as criminal cases, but as civil cases in the civil courts. However, it has been held that these cases can also come before the courts as criminal cases at the same time, if the Director of Public Prosecutions chooses to bring the case before a criminal court. These cases are discussed in 5.4.9.3 below.

- (3) Some cases of contempt of court are heard according to an unusually drastic procedure. See 5.4.9.1 (contempt *in facie curiae*) below.

5.4.4 Reasons for the existence of the crime

Contempt of court is punished not to protect the dignity of an individual judicial officer, but to protect the administration of justice. The violation of the dignity and repute of a judicial officer undermines the respect of the public for the court and the administration of justice and, consequently, the whole legal order (*Tromp* 1966 (1) SA 646 (N); *Van Niekerk* 1972 (3) SA 711 (A) 720).

In the case of contempt committed by the publication of information or comments on a pending case, the reason for the crime is that the court should come to a decision only on the grounds of permissible evidence before it, and ought not to be influenced by the disclosure of facts or comments from outside, such as those in the press.

5.4.5 Acts

A distinction is drawn between contempt *in facie curiae* and contempt *ex facie curiae*.

In facie curiae literally means “in the face of the court”, and contempt in this form is contempt in the presence of the judicial officer during a session of the court.

Contempt *ex facie curiae* occurs through actions or remarks out of court, and can take a variety of forms, such as

- scandalising the court by the publication of allegations which, objectively speaking, are likely to bring judges or magistrates or the administration of justice through the courts generally into contempt, or unjustly to cast suspicion on the administration of justice (*Mamabolo* 2001 (1) SACR 686 (CC))
- the failure to comply with a court order

Some of these acts will be discussed in greater detail below.

Examples of a few other circumstances in which the crime can be committed are

- where a person falsely pretends to be an officer of the court, like an advocate, attorney or deputy sheriff (*Incorporated Law Society v Wessels* 1927 TPD 592)
- where someone intentionally obstructs an officer of the court, like a messenger of the court, in the execution of his duties
- where someone bribes, or attempts to bribe, a judicial officer, legal representative or witness (*Attorney-General v Crockett* 1911 TPD 893, 927)
- where a witness who has been summoned deliberately omits to appear at the trial (*Keyser* 1951 (1) SA 512 (A)).

5.4.6 Unlawfulness

- (1) Statements by members of certain bodies such as the Legislative Assembly, when present in the Assembly, are **privileged** and cannot amount to contempt (see, for example, ss 58 and 71 of the Constitution of the Republic of South Africa).
- (2) Of importance is the rule that **fair comment** on the outcome of a case, or on the administration of justice in general does not constitute contempt of court. Public debate on the administration of justice is, in fact, not only permissible but also desirable in a community such as ours so as to ensure that the law and administration of justice enjoy the respect of the population.

The famous words of Lord Atkin in *Armbard v A-G of Trinidad* (1936) 1 AER 704 (PC) 709 have been quoted with approval by our own courts (eg *Van Niekerk* 1970 (3) SA 655 (T) 657): “Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.” There is, for example, nothing wrong with a newspaper complaining that certain sentences are too light or too heavy, provided that the comments are made bona fide, in reasonable terms and in the interests of the proper administration of justice. (On fair comment as a ground of justification, see *Torch Printing and Publishing Co (Pty) Ltd* 1956 (1) SA 815 (C) 821–822, *Tromp* 1966 (1) SA 646 (N) 653, *Van Niekerk supra* 656–657.)

5.4.7 Intent

In general, **intention** is an essential element of the crime (*Van Niekerk supra*), except in cases where the editor of a newspaper is charged with this crime on the ground of the publication in his newspaper of information concerning a pending case, which tends to influence the outcome of the case. Culpability in the form of **negligence** will be sufficient to establish contempt of court in such circumstances. See the discussion below of contempt of court in the form of commentary on a pending case (5.4.9.2).

However, remarks in a newspaper article, for example, must be read in context in order to establish the presence of intent (*Metcalf* 1944 CPD 266–267). To request a judicial officer, bona fide and in courteous language, to withdraw from the case for example on account of his personal knowledge of the event (*Luyt* 1927 AD 1) – does not constitute contempt. If X’s apparently offensive action is attributable to forgetfulness, ignorance, absent-mindedness or negligence, intent is lacking (*De Bruyn* 1939 NPD 1; *Nene* 1963 (3) SA 58 (N)).

5.4.8 Administration of justice by the courts

The language complained of must be directed at a judicial officer in his judicial capacity, or at the administration of justice **by the courts**. Criticism of the performance of a mere administrative function, like the actions of the police, or criticism of alleged unreasonableness in Acts of parliament, is not contempt of court (*Sacks* 1932 TPD 201, 203; *Dhlamini* 1958 (4) SA 211 (N)). In *Nyikala* 1931 EDL 175, X said to a magistrate: “Because I am a native, I am always considered guilty.” On closer investigation it appeared, however, that his words referred to the methods of the police. He was found not guilty of contempt. Encouraging the public to sign a petition for the reprieve of a person who has already been sentenced is not contempt (*Van Staden* 1973 (1) SA 70 (SWA)). In *Tromp* 1966 (1) SA 646 (N) 655–656, the Court declared that mere criticism of the prosecution in a criminal case is not contempt of court either.

5.4.9 Some forms of the crime

5.4.9.1 Contempt in facie curiae

Examples of such contempt “in the open court” are

- shouting at witnesses during cross-examination (*Benson* 1914 AD 357)
- a legal representative’s conducting of a case under the influence of alcohol (*Duffey v Munnik* 1957 (4) SA 390 (T))
- continual changing of one’s seat and talking loudly in court (*Lekwati* 1960 (1) SA 6 (O))
- grabbing and tearing a court document to pieces (*Mongwe* 1974 (3) SA 326 (O))

On the other hand, in *Nyalanbisa* 1993 (1) SACR 172 (Tk), the Court held that merely falling asleep in court does not necessarily amount to contempt *in facie curiae*, since it merely amounts to “a trivial breach of court etiquette”.

There must be intent to violate the dignity of the court (*Zungo* 1966 (1) SA 268 (N)). In *Khupelo* 1961 (1) PH H92 (E), for example, X loudly sang a religious song while she was leaving the courtroom after the conclusion of her trial. Her conviction for contempt of court was set aside on review, because it appeared that she had behaved in such a way merely out of joy that she had been acquitted, and not to insult the magistrate or the court.

In cases of contempt *in facie curiae*, the court has the power to convict the wrongdoer summarily and sentence him. This power is undoubtedly necessary to place the court in a position to maintain its dignity, but our courts have frequently stressed that this drastic procedure must be applied with great circumspection (*Ashworth* 1934 GWL 53–55; *Ngcemu* 1964 (3) SA 665 (N)). The judicial officer in these cases is complainant, witness and judge all at the same time, the accused is normally undefended, and the trial usually takes place in an emotionally charged atmosphere. Contempt of a lesser nature can best be ignored (*Mngomezulu* 1972 (2) PH H96 (N)), and a request to a wrongdoer to offer his apologies to the court, followed by such an apology, can often maintain the dignity of the court without the person being sentenced for contempt (*Tobias* 1966 (1) SA 656 (N)).

In *Lavhenga* 1996 (2) SASV 453 (W), the Court held that punishing accused for contempt of court *in facie curiae* is not unconstitutional. In so far as the rules relating to this form of the crime infringe upon certain rights of the accused (such as his right to a fair trial and his right to legal representation), such infringement is, according to the Court, justified.

5.4.9.2 Commentary on pending cases

a Discussion of this form of the crime

The crime is also committed by publishing information or commentary calculated to influence the outcome of a case that is still *sub iudice* (the expression means that the matter is still under consideration by the court).

Of course, the press is fully entitled to publish the evidence delivered in the course of a trial (or portions thereof). However, the press may not, while the case is still in progress, publish information relating to the merits of a case which did **not** form part of the evidence in court. A journalist may not, for example, publish information or opinions concerning the case which he heard outside the court during an adjournment of the court for tea. Neither may he give his own opinion regarding the guilt or otherwise of the accused, or draw his own inferences from the evidence before the case has been concluded. The underlying reason for prohibiting the publication of such information is to avoid so-called “trial by newspaper”. The judge, assessors or magistrate should not be influenced by information or commentary emanating from sources outside the court.

A case is *sub iudice* from the moment that it commences (with the issue of a summons or with an arrest) until it has reached its final conclusion in the judicial process, and that includes the last possible appeal.

The test for ascertaining whether the publication is calculated to influence the outcome of a case is extremely wide. It does not matter whether or not the publication has ever reached the ears of the court, and, if indeed it has, whether or not the court believes the facts contained in the publication or has allowed itself to be influenced by them. It does not even have to be probable that the words may influence the court (*In re Norrie v Consanie* 1932 CPD 313, *Van Niekerk* 1972 (3) SA 711 (A) 724).

b Liability of a newspaper editor

The administration of justice may not be prejudiced or interfered with, or else the crime of contempt of court is committed. A publication will be unlawful if there is a real risk that the prejudice will occur if publication takes place and substantial prejudice may be caused. Mere speculation is insufficient. In *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (2) SACR 493 (SCA), it was held that “the exercise of press freedom has the potential to cause prejudice to the administration of justice in various ways”. This prejudice can be caused through the conducting of trials through the media, prejudging issues or the application of pressure on judicial officers or witnesses. It has to be determined whether the risk of prejudice is such that it will interfere with the administration of justice. The court would also have to evaluate and be satisfied that, by limiting the publication of information, the advantage in so doing would outweigh the disadvantage. The “extent of the limitation” imposed on the right and the “purpose, importance and effect of the intrusion” would need to be weighed.

For some time, there has been uncertainty in our law whether intention is required for a conviction where an editor of a newspaper has been charged with contempt of court on the ground of having published information in his newspaper concerning a pending case, which tends to influence the outcome of the case. In *Harber* 1988 (3) SA 396 (A), the Appellate Division removed this uncertainty by holding that it is not necessary to prove intention in these cases, since, in cases such as these, the culpability may consist of either intention or negligence. The editor would be negligent if the reasonable person in his position could foresee that the information which he publishes might deal with a pending case or that it might scandalise the court.

The rule that negligence may be a sufficient form of culpability is based on the consideration that, since the press influences public opinion to such an extent, it correspondingly shoulders a heavier responsibility than the ordinary individual to control the correctness of what it publishes. However, the rule that, in these cases, proof of intention is dispensed with and that proof of negligence is sufficient, applies only if the editor or proprietor of a newspaper or a magazine, or the company which owns it, is charged with the crime. The rule does not apply where an individual reporter is charged in his private capacity.

(You should note that culpable homicide and this form of contempt of court are the only two exceptions to the rule that the form of culpability required for all common law crimes, is intention. In the case of the two exceptions, negligence is required.)

ACTIVITY

Y, a well-known politician, appears in court on charges of corruption. A reporter at a daily newspaper, X, attends the trial on a daily basis. He reports on the trial, but also undertakes his own investigation by interviewing previous employers of Y. He writes in the newspaper that Y was previously in the employment of a company where he had embezzled money. He writes the article in such a way that it looks as if this piece of information was presented as evidence before the court. In actual fact, a previous employer, B, had told him (X) about the embezzlement incident. This piece of information was never put before the court as evidence in the trial. The newspaper editor (Z) and the reporter (X) are both charged with contempt of court, in that they had published information which had the tendency to influence the outcome of the trial. The legal representative of the newspaper editor argues that the editor (Z) was unaware of the unlawfulness of the conduct in question; the reporter (X) had misled him by telling him that the

State had called B as a witness and that he (B) had testified about the alleged embezzlement incident. Z's legal representative argues that, because Z (the editor) lacked the intention to influence the outcome of the case, he should be acquitted. However, in cross-examination, the editor told the court that the specific reporter (X) had on numerous occasions in the past embarrassed him by not disclosing his true sources. Z (the editor) had to publish many apologies in the newspaper to avoid legal action being taken by aggrieved parties. You are the state prosecutor. Discuss how you would go about proving that both X and Z had the required culpability to be convicted of the offence.

FEEDBACK

The form of culpability required for contempt of court differs depending on whether a reporter, a newspaper editor or a proprietor of a newspaper is charged with the crime. Whereas intention is the required form of culpability for the liability of a reporter, mere negligence is a sufficient form of culpability in the case of an editor or proprietor of a newspaper. The reasoning behind this is that the press is such a powerful instrument to influence people that the owner of a newspaper or the person in charge of the newspaper, that is, the editor, has a heavier responsibility than the individual reporter to control the correctness of what is published.

X (the reporter) may be convicted of the offence if you as state prosecutor prove beyond reasonable doubt that he (X) intended to create the impression in this report that the alleged embezzlement was presented as evidence in the trial and that he knew or foresaw that the publication could have tended to influence the outcome of the trial.

As regards the liability of the editor of the newspaper (Z), you should have relied on the case of *Harber*, arguing that the State only has to prove that he was negligent. You would point out that the editor himself has stated in cross-examination that X (the reporter) had previously misled him about his sources of information. In other words, you would argue that the editor was negligent, because a reasonable editor in his position would have realised that X, being an unreliable reporter, may once again have lied about his source of information, that a reasonable editor would have taken steps to control the correctness of X's reporting, and that Z had failed to take such steps.

5.4.9.3 Scandalising the court

You must study the discussion of this form of the crime in *Criminal Law* 333-336 on your own.

Note that

- this form of contempt can be committed without there being any pending case
- the crime is committed by publication, either in writing or orally, of allegations which, objectively speaking, are likely to bring judges, magistrates or the administration of justice through the courts generally into contempt, or unjustly to cast suspicion on the administration of justice
- whether the administration of justice was in actual fact brought into disrepute is irrelevant (All that is required is that the words or conduct should have the tendency or likelihood to harm.)

Examples of this form of the crime are

- the imputing of corrupt or dishonest motives or conduct to a judge in the execution of his or her judicial duties
- the improper arousing of suspicion regarding the integrity of such administration of justice

In *Moila* 2005 (2) SACR 517 (T), the accused (X) made publications in press releases and letters to all and sundry over a period of more than a year, levelling accusations of bias, racism, incompetence, intimidation, collusion, lack of integrity and impartiality against judges. He also called for the recusal of the entire Transvaal Provincial Division. The accused raised the defence that the publications were made in exercise of his right to freedom of expression. He was charged with contempt of court *ex facie curiae* in the form of scandalising the court and was convicted of this offence. The Court held that the comments that he had made were not fair and reasonable, were not made bona fide, were not true and were not in the public interest. The accused acted with malice and deliberately abused his right to freedom of expression to savage the character and integrity of the judges concerned, in their capacities as judges. The Court further held that the publications were really likely to damage the administration of justice, were unlawful and that X had acted with *dolus eventualis*, in that he subjectively appreciated that he might cause harm to the administration of justice, but he continued to do so, reckless as to whether or not such harm eventuated.

5.4.9.4 Failure to comply with a court order

A party to a civil case against whom the court has issued an order, and who deliberately fails to obey the court order, commits contempt of court. As a rule, such a party is not criminally prosecuted for contempt, but it is left to his successful opponent, if he so chooses, to apply to the court to sentence the party who fails to carry out the court order for contempt. Such an application is usually only a method of enforcing the court order, because, if the request is successful, the sentence is, as a rule, suspended on condition that the court order is carried out (*Knott v Tuck* 1968 (2) SA 495 (D); *Tromp v Tromp* 1956 (3) SA 664 (N) 667). (These cases are known as “civil contempt”.) In practice, this procedure is regularly followed by a person who has been divorced and who wants to force the other party to the divorce to comply with the order of court relating to the payment of maintenance.

In *Beyers* 1968 (3) SA 70 (A), the Appellate Division decided that, in such cases, there is nothing preventing the attorney general himself from charging and prosecuting the party who fails to carry out a court order. The Court decided that, in “civil contempt”, it is still a crime that is committed, even though the case is heard by a civil court, because, in these cases, a **sentence** is always imposed, and no sentence can be imposed if no crime is committed. Moreover, if the attorney general had not had the power to interfere, it would have meant that the most far-reaching contempt of court would remain unpunished if the successful litigant decided for some reason or other not to request enforcement of the order.

GLOSSARY

in facie curiae
ex facie curiae
sub iudice

in the court, or in the face of the court
 outside the court
 still under consideration by the court

SUMMARY

General

- (1) The definitions and elements of common law perjury, statutory perjury, defeating or obstructing the course of justice, and contempt of court are to be found above or in the relevant portions of the prescribed book.

Perjury

- (2) In common law perjury, there must be a false declaration. The declaration must be objectively false. The declaration may be oral or in writing.
- (3) In common law perjury, the declaration must be
 - (a) under oath
 - (b) after an affirmation to tell the truth, or
 - (c) (in the case of children) after a warning to tell the truth
- (4) In common law perjury, the declaration must be made in the course of a legal proceeding.
- (5) There are two differences between common law perjury and statutory perjury (see *Criminal Law* 349).

Defeating or obstructing the course of justice

- (6) There is a difference between defeating and obstructing the course of justice. The last-mentioned is something less than the first-mentioned.
- (7) The following acts constitute some of the many ways in which the course of justice may be defeated or obstructed: persuading a witness not to give evidence in a trial; misleading the police in order to prevent them from catching a criminal; and laying a false criminal charge against someone.
- (8) It is not a requirement for this crime that a case must be pending.
- (9) Charges of attempt to defeat or obstruct the course of justice are more common than charges of actual defeat or obstruction.

Contempt of court

- (10) One of the unusual characteristics of this crime is that it can be subdivided into several “subcrimes”, each with requirements of its own.
- (11) A distinction is drawn between contempt *in facie curiae* (committed in court) and contempt *ex facie curiae* (committed outside court).
- (12) One of the many ways in which contempt of court can be committed is by scandalising the court.
- (13) Remarks amounting to fair comment on the administration of justice or on the outcome of a case are not unlawful and do not constitute contempt of court.
- (14) Contempt of court *in facie curiae* takes place when X behaves in such a way in court as to violate the dignity or authority of the judge or magistrate, for

example by singing loudly in court. In such a case, the judge or magistrate can summarily convict and punish X.

- (15) Commentary on pending cases constitutes contempt of court if it is calculated to influence the outcome of a case.
- (16) As a general rule, culpability in the form of intention is required for a conviction of contempt of court. There is, however, the following exception to this rule: If a newspaper editor is charged with contempt of court in that his newspaper has published commentary or information relating to a case which is pending, it is not necessary to prove intention on his part; culpability in the form of negligence is sufficient.

TEST YOURSELF

- (1) Define common law and statutory perjury, defeating or obstructing the course of justice, and contempt of court.
- (2) Discuss the following requirements of common law perjury:
 - (a) the requirement of a false declaration
 - (b) the requirement that the declaration must be under oath or in a form allowed to be substituted for an oath
 - (c) the requirement that the declaration be made in the course of a legal proceeding
- (3) Name the requirements of statutory perjury.
- (4) Discuss the difference between defeating and obstructing the course of justice.
- (5) Name five ways in which the crime of defeating or obstructing the course of justice can be committed.
- (6) Is it necessary on a charge of defeating or obstructing the course of justice to prove that there is a pending case? Discuss.
- (7) Complete the following sentence: In the case of it was held that, if X, a motorist, flick his lights to warn oncoming motorists about the presence of a speed trap, he commits the crime of, but in the case of *Perera*, where the facts were almost identical, it was held that the motorist in such a case could only be guilty of this offence if
- (8) Discuss the reason for the existence of the crime of contempt of court.
- (9) Name three ways in which contempt *ex facie curiae* can be committed.
- (10) Name and discuss two special grounds which can exclude the unlawfulness of an act which would otherwise constitute contempt of court.
- (11) Discuss contempt of court *in facie curiae*.
- (12) Discuss contempt *ex facie curiae* in the form of commentary on pending cases.
- (13) Discuss contempt *ex facie curiae* in the form of scandalising the court.

Crimes against the community



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against public
welfare****Contents**

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LEARNING OUTCOMES

■ When you have finished this study unit, you should be able to

demonstrate your understanding of the requirements for certain crimes against public welfare by

- considering the possible liability of an accused for the crimes of corruption, extortion, use or possession of drugs, dealing in drugs, and unlawful possession of arms or ammunition

6.1 INTRODUCTION

In this section we discuss a number of offences against the public welfare. Included in our discussion are the common-law crime of extortion and various statutory offences. The latter include the most important offences relating to substance abuse (so-called drug offences), corruption and offences relating to the unlawful possession of arms or ammunition.

6.2 CORRUPTION

(Criminal Law 409–426)

6.2.1 General

Even if a country has the most wonderful Acts and legal rules, it will fail in its endeavour to create a just and prosperous dispensation for its citizens if corruption reigns. Corruption erodes moral values as well as trust in the authorities and authoritative organs. It leads to the malfunctioning of the public and private sectors of the community and provides a breeding ground for organised crime.

Corruption was previously a common law offence known as “bribery”. From 1992, corruption was punished in terms of the provisions of the Corruption Act 94 of 1992. In 2004, this Act was replaced by the Prevention and Combating of Corrupt Activities Act 12 of 2004.

6.2.2 General and specific crimes of corruption

The current 2004 Act creates

- a “general, broad and all-encompassing offence of corruption” (as it is described in the Act)
- various crimes in which “specific corrupt activities” are criminalised

The Act is very long and comprehensive, and it is impossible to set out in detail all the provisions of the Act. In the discussion that follows, emphasis will be placed on the general offence of corruption.

In writing this Act, the legislature followed a style according to which large parts of the formulation of the general offence have been repeated in the formulation of specific offences. In order to make it easier to apply the relevant section to a specific class of persons or a specific issue, the legislature then just added certain provisions. There is thus a great deal of repetition in the Act. If one understands the elements of the general crime, it should not be difficult to follow the line of thought of the legislature when creating the specific offences.

6.2.3 The general crime of corruption: definition in the Act

Section 3 of the Act contains the formulation of the general offence of corruption. The section provides as follows:

“Any person who directly or indirectly –

- (a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
- (b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person,

in order to act, personally or by influencing another person so to act, in a manner

- (i) that amounts to the –

- (aa) illegal, dishonest, unauthorised, incomplete, or biased; or

- (bb) misuse or selling of information or material acquired in the course

of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

- (ii) that amounts to –

- (aa) the abuse of a position of authority;

- (bb) the breach of trust; or

- (cc) the violation of a legal duty or a set of rules;

- (iii) designed to achieve an unjustified result; or

- (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corruption.”

6.2.4 Shortened definition of the general crime of corruption

If one applies the rules for analysing sentences by provisionally cutting out the conjunctive words or phrases, the main sentence of the definition quoted above reads as follows:

Anyone that

- (a) accepts any gratification from any other person, or

- (b) gives any gratification to any other person,

in order to act in a manner that amounts to the illegal exercise of any duties, is guilty of the offence of corruption.

It is not necessary for you to memorise the definition of the general crime in section 3 quoted above. In the examination, we will not expect you to know the exact content of this section. However, you must know the shortened version of the section set out in the grey background for the examination.

6.2.5 Corruption by giver and corruption by recipient

Corruption can be committed in various ways. If one attempts to make statements about corruption which are applicable to all instances of the offence, you become entangled in long and diffuse formulations that are not easily

understandable. In order to overcome this problem, discussions on the crime usually distinguish between the two most important ways in which the offence can be committed. These two main categories are corruption committed by the giver and corruption committed by the recipient.

Corruption is committed if one party gives gratification to another party and the other party accepts it as inducement to act in a certain way. Both parties – the giver and the recipient – commit corruption. **The expression “corruption by a giver” refers to the conduct of the giver, and “corruption committed by a recipient” to the conduct of the party who accepted it.** In the discussion of the crime that follows, the party who gives the gratification is referred to as “X”, and the party who accepts the gratification is referred to as “Y”.

As will be discussed later, it must be kept in mind that the word “give” also includes the following: the **agreement** by X to give the gratification to Y, or the **offering** by X to give the gratification to Y. The word “accept”, on the other hand, includes the following: the **agreement** by Y to accept the gratification or the **offering** by Y to accept it.

In the Act currently under discussion, the legislature not only distinguished between these two forms of corruption in the definition of the general crime, but also in the definitions of the specific crimes. In section 3 (quoted above), in which the general crime is defined, corruption committed by the recipient is discussed in the section marked “(a)”, while corruption committed by the giver is discussed in the section marked “(b)”.

In principle, corruption committed by the giver is only a mirror image of corruption committed by the recipient. In order to avoid duplication, emphasis will be placed on corruption committed by the recipient in the discussion that follows. In the discussion of this form of the crime, the different requirements of the elements of the crime will be identified and explained.

6.2.6 General crime of corruption: the crime committed by the recipient

(Criminal Law 412–420)

6.2.6.1 Elements of the crime

The elements of the general crime of corruption by the recipient are the following:

- (1) the **acceptance** by Y (the element of an act)
- (2) of **gratification**
- (3) **in order to act in a certain way** (the inducement)
- (4) **unlawfulness**
- (5) **intention**

Each of these elements will now be discussed.

6.2.6.2 The acceptance (element of an act)

The word “accept” has a technical meaning, because it includes a number of other acts that are not normally regarded as synonyms of “accept”. The legislature employs two ways to broaden the meaning of “accept”:

- The Act also provides (in s 3(a)) for certain conduct by Y which precedes the acceptance, namely

- to **agree** to accept a gratification or
- to **offer** to receive

satisfies the element of an act.

It follows from this provision that, in this crime, no distinction is made between the stem crime (main crime) on the one hand, and conspiracy or incitement to commit the main crime on the other.

The Act provides (in s 2(3)(a)) that the words or expressions “accept”, “agree to accept” and “offer to accept”, as used in the Act, also have the following broader meanings:

- (1) to demand, ask for, seek, request, solicit, receive or obtain gratification
- (2) to agree to perform the acts named under (1)
- (3) to offer to perform the acts named under (1)

The following considerations afford Y **no defence**:

- (1) The fact that Y did not accept the gratification “directly”, but only “indirectly” (s 3). Y does not have to accept the gratification personally. The fact that Y makes use of a middleman to accept the gratification affords her no defence.
- (2) The fact that **Y did not in actual fact later perform the act which X had induced her to perform** (s 25(c)). If Y had accepted the gratification, but the entire evil scheme was exposed and Y was arrested by the police before she could fulfil her part of the agreement with X, Y is nevertheless guilty of the crime. Therefore, the crime is completed even if Y has not yet done what she had undertaken to do, expressly or implicitly.
- (3) The fact that the corrupt activity between X and Y **was unsuccessful**. This consideration affords neither X nor Y a defence.
- (4) For the purpose of liability, it is irrelevant that the state or the private enterprise concerned with the transaction did not **suffer prejudice** as a result of X or Y’s conduct.
- (5) The fact that Y accepted the gratification, but that she, in actual fact, did **not have the power** or right to do what X wished her to do, affords neither X nor Y a defence (s 25(a)). Therefore, if X gives gratification to Y in the belief that Y will give her a driver’s licence, which she is not entitled to do, as Z rather than Y is empowered to make such a decision, this fact can afford neither X nor Y a defence.

6.2.6.3 *The gratification*

The definitions set out in section 1 contain a long definition for the word “gratification”. For the purposes of this course, you do not have to be able to quote this long section. You are not expected to know this section. The following are highlighted words or expressions which, according to the legislature, also mean “gratification”:

- (1) money
- (2) a gift
- (3) a loan
- (4) property
- (5) the avoidance of a loss
- (6) the avoidance of a penalty (such as a fine)
- (7) employment, a contract of employment or services
- (8) any forbearance to demand any money

- (9) any “favour or advantage of any description”
- (10) any right or privilege

It is evident that “gratification” has a very broad meaning in terms of the Act. It is clear that “gratification” is **not limited to tangible or patrimonial benefits**. It is suggested that the word “gratification”, as used in the Act, is wide enough to include information and even sexual favours (eg when a traffic officer, Y, who has caught a woman X for a traffic offence, agrees or offers not to prosecute X for her offence if he and X can engage in sexual intercourse with each other (see *W 1991 (2) SACR 642 (T)*)).

6.2.6.4 *The element of inducement (“in order to act ... in a manner”)*

a General

Y must accept the gratification in order to act in a certain manner. Stated differently, she must accept the gratification as an inducement to act in a certain manner. In other words, she must have a certain aim or motive in mind with the acceptance.

b The aims

The legislature names a number of aims in considerable detail. We give an abbreviated version of these aims. For the purposes of the examination, it is sufficient to know the abbreviated version. The aims are the following:

- (1) in order to act in a manner that amounts to the **illegal, dishonest, unauthorised, incomplete, or biased ... exercise of any powers, duties or functions** arising out of a legal obligation
- (2) in order to act in a manner which amounts to the **misuse or selling of information** acquired in the course of the exercise of any duties arising out of a legal obligation
- (3) in order to act in a manner which amounts to the **abuse of a position of authority, the violation of a legal duty or a breach of trust**
- (4) in order to act in a manner designed to achieve an **unjustified result**
- (5) in order to act in a manner that amounts to any other **improper inducement to do or not to do anything**

It is clear that these aims are defined broadly and that they cover a very wide field. The fourth aim (to act in a manner to achieve an unjustified result) is formulated so broadly that it includes almost all the other aims.

c General principles of the aims

- (1) In each instance, the expression “to act” appears. The legislature provides explicitly that an “act” also **includes an omission** (s 2(4)).
- (2) It is irrelevant whether Y plans to achieve this aim personally or whether she plans to achieve this aim by influencing another person to act in such a manner (see the phrase in s 3 between (b) and (i)). Therefore, Y may make use of a **middle-man** to achieve the aim.
- (3) The aims apply in the **alternative**. It is sufficient for the state to prove that Y had only one of these aims in mind when she accepted the gratification.
- (4) It is irrelevant whether Y accepted the gratification **for her own benefit or for the benefit of someone else** (s 3(a) and (b)). Therefore, the fact that Y

receives money from X in a corrupt way with the aim to use the money to provide for her sick child, affords her no defence.

- (5) The fact that **Y did not in actual fact have the power to act** in the manner in which she was induced to act, affords Y no defence (s 25(a)). Therefore, if Y receives money from X as inducement to give X a particular licence, but it seems that a person in a higher position in the relevant state department or enterprise is actually empowered to decide who should be issued with licences, Y is still guilty of the crime.

6.2.6.5 Unlawfulness

The element of unlawfulness is not expressly provided for in the definition of the crime, but must nevertheless be read into it. Unlawfulness, or, rather, the requirement that the act should be “unjustified”, is a requirement or element of all crimes. The general meaning of “unlawful” is “against the good morals or the legal convictions of society”. It implies that Y’s conduct must not be covered by a ground of justification. The following are examples of conduct which, ostensibly, fall within the ambit of the definitional elements of corruption, but are, nevertheless, not unlawful:

- (1) An act which would otherwise amount to corruption would most definitely not be unlawful if Y acted **under compulsion**.
- (2) **A person used as a police trap** also does not act unlawfully if she agrees to receive gratification from another person in order to trap that person into committing corruption (*Ernst* 1963 (3) SA 666 (T) 668A–B; *Ganie* 1967 (4) SA 203 (N)).
- (3) It is suggested that certain officials or employees, such as porters or waiters, do not act unlawfully when they receive small amounts of money from the public as “**tips**” for services which they performed satisfactorily. Such conduct is socially adequate; it is not against the good morals or legal convictions of the community.
- (4) The same applies as regards the receiving of **gifts** of a reasonable proportion by employees at occasions such as **weddings or retirement** or completion of a “round number” (eg 20 years) of work. (A “golden handshake” which may involve a substantial amount of money may, depending on the circumstances, be another case.)

6.2.6.6 Intention

It cannot be said that the legislature intended to create strict liability. As regards the form of culpability required for this crime, it is clear that **intention, and not negligence**, is required. Words or expressions such as the following used in the section suppose the requirement of intention: “accept”, “agree”, “offer”, “inducement”, “in order to ...” and “designed”.

According to general principles, intention always includes a certain knowledge, namely knowledge of the nature of the act, the presence of the definitional elements and the unlawfulness. Someone has knowledge of a fact not only if she is convinced of its existence, but also if she foresees the possibility of the existence of the fact, but is reckless towards it; in other words, if she is not deterred by the possibility of the existence of the fact and goes ahead with the forbidden conduct regardless. Then her intention is present in the form of *dolus eventualis*.

The Act contains a provision which expressly applies the principle (of *dolus eventualis*) to this crime. Section 2(1) provides that, for the purposes of the Act, a person is regarded as having knowledge of a fact, not just if the person has actual knowledge of a fact, but also if the court is satisfied that the person believes that

there is a reasonable possibility of the existence of that fact and that the person has failed to obtain information to confirm the existence of that fact. This provision is merely an application of the general rule that intention in respect of a circumstance (as opposed to a consequence) can also exist in the form of *dolus eventualis*; more specifically, that “wilful blindness” amounts to knowledge of a fact and, accordingly, intention. These principles have previously been accepted in our case law. (See *Meyers* 1948 (1) SA 375 (A) 382; *Bougarde* 1954 (2) SA 5 (C) 7–9.)

The fact that Y accepted the gratification **without intending to perform the act which she was induced to perform, affords Y no defence** (s 25(b)). If Y, who is somebody who can decide to whom a tender should be awarded, receives money from X as inducement to award the tender to X, the fact that Y received the money without having had the intention to actually use her influence in X’s favour, and accepted the money only to enrich herself, affords her no defence.

6.2.6.7 Penalties

Any person who is convicted of the general crime of corruption may be sentenced as follows:

- (1) If she is sentenced by a **High Court, an unlimited fine** or “imprisonment up to a period of **imprisonment for life**” (s 26(1)(a)(i)). In terms of the provisions of section 1(1)(b) of the Adjustment of Fines Act 101 of 1991, **imprisonment as well as a fine** may be imposed.
- (2) If she is sentenced by a **regional court**, a sentence of a fine which is **unlimited or imprisonment of a period not exceeding 18 years** (s 26(1)(a)(ii)). If the provisions of section 1(1)(a) of the Adjustment of Fines Act 101 of 1991 are taken into account, the **maximum fine** that may be imposed by a regional court is $18 \times R20\,000 = R360\,000$. In terms of the provisions of section 1(1)(b) of the same Act, **a fine as well as a sentence of imprisonment may be imposed**.
- (3) If she is sentenced by a **magistrate’s court**, an **unlimited fine** or imprisonment of a period not exceeding **five years** (s 26(1)(a)(iii)). If the provisions of the Adjustment of Fines Act 101 of 1991 are taken into account, the maximum fine that may be imposed by a magistrate’s court is $5 \times R20\,000 = R100\,000$. In terms of the provisions of section 1(1)(b) of the same Act, **a fine as well as a sentence of imprisonment may be imposed**.

In addition to any fine a court as mentioned above may impose, a court may also impose a **fine equal to five times the value of the gratification involved** in the offence (s 26(3)).

6.2.7 General crime of corruption: corruption by the giver (*Criminal Law* 421–423)

6.2.7.1 General

Corruption by the recipient discussed above deals with **acceptance** by Y of gratification given by X. Conversely, corruption committed by the giver deals with the **giving** by X of gratification to Y. Corruption committed by the giver is but only a mirror image of corruption committed by the recipient. Instead of “accept” (which describes Y’s conduct in corruption as recipient), the word “give” (which describes X’s conduct in corruption by the giver) should be used. Because corruption committed by the giver is but a mirror image of corruption committed by the recipient, it is unnecessary to repeat once again in the discussion of corruption by the giver all the rules dealing with the offence

discussed above, namely corruption by the recipient. Therefore, the discussion of corruption by the giver which follows can be summarised very briefly. Except if indicated otherwise, all the principles applicable to corruption committed by the recipient are, *mutatis mutandis* (in other words, by replacing the word “accept” with the word “give” in each instance), applicable also to corruption committed by the giver. It is more or less just in the requirement of the act that corruption by the giver is structured differently from corruption by the recipient.

6.2.7.2 *Elements of the crime*

The elements of the general crime of corruption are the following:

- (1) the **giving** by X to Y (the requirement of an act)
- (2) of **gratification**
- (3) **in order to induce Y to act in a certain manner** (the element of inducement)
- (4) **unlawfulness**
- (5) **intention**

6.2.7.3 *The giving of gratification*

The act consists of X giving gratification to Y. The word “gives” has a technical meaning, because, apart from “give” as in the ordinary meaning of the word, other acts are included which are not normally regarded as synonyms of “give”. The legislature uses two ways to broaden the meaning of “give”:

- (1) The Act provides (in s 3(b)) that certain conduct by X preceding the giving of the gratification, namely to merely agree to give gratification or to **offer** to give it, also satisfies the requirement of an act.
- (2) The Act provides (in s (3)(b)) that the words “give or agree or offer to give any gratification”, as used in the Act, also have the following broader meanings:
 - to promise, lend, grant, confer or procure the gratification
 - to agree to lend, grant, confer or procure the gratification
 - to offer to lend, grant, confer or procure such gratification

It is not a requirement for the offence committed by the giver that X should have succeeded with her plan of action. Therefore, considerations such as the following afford X no defence:

- the fact that Y, although she perhaps gave the impression that she would accept the offer, in actual fact **had no intention** of doing what X had asked her to do (s 25(b))
- the fact that **Y did not do what X requested her to do** (s 25(c))
- the fact that **Y did not have the power** to do that which she was requested to do (s 25(a))
- the fact that **Y rejected X’s offer**
- the fact that Y agreed, but thereafter **changed her mind**
- the fact that **Y found it impossible** to do that which she had undertaken to do

6.2.7.4 *The gratification*

This requirement is the same as the corresponding requirement for corruption committed by the recipient and has already been set out above in the discussion on that form of corruption.

6.2.7.5 *In order to act in a certain manner (the element of inducement)*

This requirement is the same as the corresponding requirement for corruption committed by the recipient. The wording of the section dealing with this element of corruption committed by the giver is not very lucid, but it is nevertheless clear that the legislature intended to say: “[a]nyone who ... gives any gratification ... in order to *induce the recipient to act ... in a manner that ...*”. The words printed in italics, which express the meaning of the provision more clearly, do not appear in the text of the section, but are implied.

In *Shaik and Others* 2007 (1) SACR 142 (D) and 2007 (1) SACR 247 (SCA), the accused was convicted of corruption in terms of the predecessor of section 3 of Act 12 of 2004 (s 1 of the Corruption Act 94 of 1992). There is no substantial difference between the wording of the previous section and that of the current section 3 of Act 12 of 2004. The elements of the previous offence (s1(1)(a)(i)), in relevant part, were:

- (i) the giving (includes **offer to give** and **agree to give**)
- (ii) of a benefit that is not legally due
- (iii) to a person who is vested with the carrying out of any duty, by virtue of her holding of an office, etc
- (iv) with the aim of influencing that person to do an act (or omit to do some act) in the performance of that duty
- (v) unlawfulness
- (vi) intention

X was charged on two counts of contravening the Act in that, from October 1995 to September 2002, he had made numerous payments to Y with the object of inducing the latter to use his (Y’s) name or political influence in favour of X’s businesses, or as a reward for having done so. It was also alleged that X was party to an agreement in terms of which a French arms company would pay R500 000 a year to Y, in return for Y’s involvement in shielding the French company from a probe into aspects of an arms deal and later promotion of the company’s business interests in South Africa.

There was no dispute about the actual payments made by X to Y. The only issue that arose was whether or not these payments were made by X **with the intention of influencing Y** to use the weight of his political office (he was the MEC for Economic Affairs in KZN and deputy president of the ANC) to protect or further X’s business interests. The Court found on the facts that there were several instances in which Y had intervened to protect, assist or further the interests of X’s business enterprises and concluded that these showed both a readiness on X’s part to turn to Y for help in his business affairs, and Y’s willingness to give it. The Court concluded that the payments were made by X with the intention of influencing Y to act in X’s interests. They were made at a time when X’s businesses could not afford to issue such payments owing to their financial position. Since Y could not repay the money, he could only satisfy the sense of obligation placed upon him by the payments by using his name and political office. Also, X blatantly advertised his association with Y to his business partners, being confident of the political support he would gain from the latter. The payments could also not be regarded as loans, because the arrangements surrounding them were too flexible and made no business sense from the point of view of a lender. The Court found that the arrangement was *prima facie* contrary to the good morals or legal convictions of society and that there was no justification (ie, that the requirement of unlawfulness was satisfied). X had also foreseen the possibility that Y would feel obligated, through these payments, to help him in his businesses, and continued to make these payments, aware that Y would respond this way. He therefore was found to have had intention in the form of *dolus eventualis*.

X was convicted on both counts of corruption (and one of fraud) and appealed to the Supreme Court of Appeal (SCA). It dismissed his appeals on all counts and confirmed his conviction.

6.2.7.6 *Unlawfulness*

This requirement is the same as the corresponding requirement for corruption committed by the recipient, and has already been discussed above.

6.2.7.7 *Intention*

This requirement is the same as the corresponding requirement for corruption committed by the recipient, and has already been discussed above.

6.2.7.8 *Penalties*

The penalty prescribed for the commission of corruption by the recipient is the same as those prescribed for corruption by the giver. These penalties are discussed above.

6.2.8 **Corruption relating to specific persons**

(Criminal Law 423–425)

From section 4, “corrupt activities relating to specific persons” are criminalised. As already mentioned, it is impossible to discuss in detail each of the specific offences created from section 4 onwards. Considerable parts of the definitions of these crimes – in particular the “element of inducement”, that is, the part of the definition that starts with the words “in order to act ... in a manner” – are worded exactly the same as the general crime of corruption in section 3, which has already been discussed in some detail above. We will just give a brief overview of some of these specific offences.

- (1) *Corruption relating to public officials.* Section 4 creates an offence limited to corruption of public officials. “Public officials” is defined exhaustively in section 1. A typical example of such an official is a state official.
- (2) *Corruption in relation to agents.* Section 6 creates an offence limited to corruption of agents. Corruption committed by businesspeople in the private sector is criminalised in this section.
- (3) *Corruption in relation to members of the legislative authority.* See section 7.
- (4) *Corruption in relation to judicial officers.* Section 8 creates a crime limited to the corruption of judicial officers. The expression “judicial officer” is defined in section 1 and includes judges and magistrates. The conduct which the judicial officer is induced to perform is also further defined in section 8(2). A typical example of this form of corruption is where someone gives a judge money or offers her money, in order to persuade her to give a judgment in favour of a certain party – conduct on the part of the judge that amounts to her not giving a judgment according to objective evaluation on the merits of the facts before the court. If someone corrupts a judicial officer, the conduct can also be punished as contempt of court.
- (5) *Corruption relating to members of the prosecuting authority.* Section 9 creates an offence limited to corruption of the members of the prosecuting authority. The act that Y is induced to perform is further defined. An example of a case resorting under this heading is when X gives Y, the prosecutor in a criminal case, money in order to persuade Y to destroy or hide the docket in which the particulars of the prosecution’s case are contained so that it can be reported missing and that the prosecution will consequently not be successful. The

type of conduct criminalised under this heading can overlap with the common law offence of defeating or obstructing the course of justice.

- (6) *Receiving or offering of unauthorised gratification by a party to an employment relationship.* Section 10 creates an offence which is limited to corruption committed in an employment relationship. If an employer, for instance, accepts gratification as inducement to promote one of her employees, she can be charged with a contravention of this section.
- (7) *Corruption relating to procuring of tenders.* Section 13 creates an offence limited to corruption committed in order to procure a tender. An example in this context is where X gives an amount of money to Y, whose task it is to decide to whom a tender should be awarded, in order to persuade Y to accept X's tender.
- (8) *Corruption relating to sporting events.* Section 15 creates an offence limited to corruption committed in the context of sporting events. Someone who accepts or gives money in order to undermine the integrity of any sporting event, contravenes this section. The word "sporting event" is further defined in section 1. An example here is when X, who bets money on the outcome of sporting events, gives money to Y, who is a sportsman or sportswoman or a referee, in order to persuade Y to manipulate the game in such a way that the match has a certain outcome.

6.2.9 Failure to report corrupt acts

(Criminal Law 425)

Section 34 creates an important crime which consists of a failure **by a person in a position of authority**, who knows, or ought reasonably to have known, that certain crimes named in the Act have been committed, to report an offence created in the Act to a police officer. Subsection (4) gives a long list of persons who are regarded as people who hold a position of authority. It includes any partner in a partnership and any person who is responsible for the overall management and control of the business of an employer. **The form of culpability required is either intention or negligence (as a result of the use of the words "who knows or ought reasonably to have known").** In interpreting the word "knows", the expanded meaning given to the word "knowledge" in section 2 should be kept in mind: apart from actual knowledge, it also includes the case where a person believed that a fact existed, but then failed to obtain information to confirm the existence of that fact ("wilful blindness").

6.2.10 Extraterritorial jurisdiction

(Criminal Law 425–426)

Section 35 provides that, if the act alleged to constitute an offence under the Act occurred outside the Republic, a court in the Republic shall have jurisdiction in respect of that offence. It is irrelevant whether the act with which the accused is charged amounts to an offence in the country in which it was committed. However, the accused must be a citizen of the Republic, or ordinarily resident in the Republic, or must have been arrested in the Republic, or should be a company incorporated or registered in the Republic, or any body of persons in the Republic. Therefore, if a South African sportswoman participated in a sporting event in Japan and tried to influence the outcome of the match because a gambler offered her a sum of money to act in this manner, she can be charged in South Africa with one of the offences created in this Act.

6.3 EXTORTION

(*Criminal Law 426–428*)

6.3.1 Definition

Extortion is the unlawful and intentional acquisition of a benefit from some other person by applying pressure to that person which induces her to part with the benefit.

6.3.2 Elements of the crime

The elements of this crime are

- (1) the **acquisition** of
- (2) a **benefit**
- (3) by applying **pressure**
- (4) a **causal link** (between the pressure and the acquisition of a benefit)
- (5) **unlawfulness**
- (6) **intention**

6.3.3 The perpetrator

In Roman and Roman-Dutch law, the crime was known as *concussio*, and, according to some of our old authorities, could only be committed by a public official. In G 1938 AD 246, the Appellate Division held that the crime could be committed **by any person and not only an official**; X need not even represent herself as an official (*Richardson* 1913 CPD 207).

6.3.4 Exertion of pressure

X must acquire the benefit by bringing pressure to bear on Y; Y must give way under the stress of the pressure. The pressure may take the form of threats, the inspiring of fear, or intimidation. Where there is a threat of physical injury to Y herself, extortion and robbery overlap (*Ex Parte Minister of Justice: In re R v Gesa, R v De Jongh* 1959 (1) SA 234 (A) 240). Y may also be threatened with defamation (*Ngqandu* 1939 EDL 213); dismissal from her employment (*Farndon* 1937 EDL 180); or arrest and prosecution (*Lepheana* 1956 (1) SA 337 (A)). Even a threat couched in negative terms is sufficient, for example where X threatens not to return something she borrowed (*Mntonintshi* 1970 (2) SA 443 (E); *Ngqandu* supra). The threat may also take the form of harm to a third person, as in *Lepheana* supra, where the threat was the prosecution of Y's wife. The threat may be either explicit or implicit.

6.3.5 The benefit

Before 1989, there were conflicting decisions on the question whether or not the benefit in extortion should be limited to patrimonial benefit. "Patrimonial" in this connection means "which can be converted into or expressed in terms of money or economic value". In *Ex parte Minister van Justisie: In re S v J en S v Von Molendorff* 1989 (4) SA 1028 (A), the Appellate Division thoroughly analysed this question and, after an extensive investigation of the common law authorities, held that the benefit in this crime must be limited to a patrimonial one.

However, the state was obviously not satisfied with this judgment, because, shortly afterwards, the legislature enacted the following provision in section 1 of the General Law Amendment Act 139 of 1992:

At criminal proceedings at which an accused is charged with extortion it shall with respect to the object of the extortion be sufficient to prove that any advantage was extorted, whether or not such advantage was of a patrimonial nature.

Thus according to the present state of our law *any* advantage or benefit – patrimonial or non-patrimonial – can be extorted.

An example of a benefit that is not of a patrimonial nature, but can nevertheless lead to a conviction of extortion, is the following type of “benefit” which figured in the case of *J 1980 (4) SA 113 (E)*. In this case, Y was threatened by X that, unless she had sexual intercourse with him, he would show photographs of her in the nude to her parents. The Court found X guilty of attempted extortion, as it was of the opinion that the benefit in extortion need not be of a patrimonial or financial nature. The “benefit” which X sought to obtain in this case was sexual satisfaction.

The crime will not have been completed until the benefit has been handed to X (*Mtirara 1962 (2) SA 266 (E)*).

6.3.6 Causation

Just as in the case of robbery where a causal connection between the violence and the acquisition of the thing must exist, so, too, in the case of extortion there must be a causal connection between the application of pressure and the acquisition of the thing (*Mahomed 1929 AD 58, 67, 69–70*). If the benefit is handed over not because of pressure exerted by X, but because a trap has been set for X and Y wishes her to be apprehended, the crime is merely attempted extortion (*Lazarus 1922 CPD 293*).

6.3.7 Unlawfulness

The pressure or intimidation must have been exerted unlawfully. However, this does not imply that, if Y is threatened with something which X is entitled or empowered to do, the threat can never be sufficient for extortion. The correct approach advocated by the courts is to note the way in which X exercised the pressure and what she intended thereby. Although it is perfectly in order for a police official to inform an accused that she intends prosecuting her, it is both irregular and unlawful for the police official to state that she will prosecute the accused **unless** she pays her a sum of money (*Lepheana supra*).

6.3.8 Intention

Intent is required. X must intend her words as a threat or intend that they should give rise to fear. She must have the intention of acquiring the benefit, while fully realising that she is not entitled to it. Her motive is totally irrelevant.

ACTIVITY

Consider whether the crime of extortion is committed by X in the following instances:

- (1) X threatens Y to sue him if he does not pay back the money he owes her.

Y does in fact owe X the money and has already, for a considerable time, refrained from paying his debt, despite demands by X. Y, afraid of the legal costs that he may incur, immediately pays his debts to X.

- (2) X tells Y that she will hire somebody to break into his house and steal his property if he does not pay back the money he owes her. Y, being afraid, pays her immediately.
- (3) X is Y's boss at work. She tells Y that he will not get promotion unless he has sexual intercourse with her. Y refuses and lays a charge with the police.

FEEDBACK

- (1) X cannot be convicted of extortion, since her conduct is not unlawful. It is not against the legal convictions of society to obtain a perfectly legitimate advantage (payment of a debt) by means of a threat of legal action.
- (2) X can be convicted of extortion. It is undoubtedly against the legal convictions of society to use this type of pressure (ie, to threaten to hire somebody to break into someone else's house and violate his property rights) to obtain a benefit. Although the benefit obtained is legitimate, the illegitimate pressure used to obtain the benefit makes X's conduct unlawful.
- (3) X may only be convicted of attempted extortion. Extortion is a materially defined crime. This means that there must be a causal link between the pressure and the acquisition of the benefit, and that the crime is not completed unless the perpetrator has received the benefit. Because X has not as yet obtained the "advantage", she may not be convicted of the completed crime, but only of an attempt to commit extortion.

6.4 DRUG OFFENCES

(*Criminal Law 428–434*)

6.4.1 General

The most important offences relating to drugs are found in the Drugs and Drug Trafficking Act 140 of 1992 (hereinafter called "the Act"). We will focus only on the two most prevalent offences:

- (1) **the use or possession** of drugs
- (2) **dealing** in drugs

The Act divides drugs into three categories, namely

- (1) dependence-producing substances
- (2) dangerous dependence-producing substances
- (3) undesirable dependence-producing substances

The drugs or substances falling under each of these categories are listed in great detail in schedule 2 of the Act. The punishment prescribed for the possession of, use of or for dealing in the substances listed under (2) and (3) is more severe than the punishment prescribed for the possession of, use of or for dealing in the substances listed under (1). Substances listed under (2) are, for instance, coca leaf, morphine and opium. Among the substances listed under (3) are cannabis (dagga), heroin and mandrax.

Dealing in drugs is a more serious offence than possessing or using drugs. It is

important to note that “possession” and “use” are not treated in the Act as two separate offences, but as one single offence.

6.4.2 The use or possession of drugs

(*Criminal Law 429–431*)

6.4.2.1 Definition

It is an offence for any person unlawfully and intentionally to use or have in her possession any dependence-producing substance or any dangerous dependence-producing substance or any undesirable dependence-producing substance (s 4 of the Act).

6.4.2.2 Elements of the offence

The elements of this offence are

- (1) the **act**, that is possession or use of
- (2) a **drug** as described in the Act
- (3) **unlawfulness**
- (4) **intention**

6.4.2.3 The act – possession or use

a Use

The word “use” is self-explanatory. Clearly, the smoking, inhalation, injection or ingestion of drugs will amount to use of the drug. It is not clear why the legislature prescribed not only the possession but also the use of drugs, since any instance of **use** of a drug also involves its possession and, as such, amounts to an offence under the Act. It is probably for this reason that, in practice, it seldom happens that X is accused only of using a drug.

b Possession

(i) General meaning of “possession”

In law, possession consists of two elements, namely

- a **physical or corporeal element** (referred to as *corpus* or *detentio*)
- a **mental element**, that is, X’s intention (the *animus*)

The **physical element** consists in an appropriate degree of physical **control** over the thing. The precise degree of control required depends upon the nature of the article and the way in which control is ordinarily exercised over such a type of article. The control may be actual or constructive. Constructive control means control through somebody else, such as a representative or servant (*Singiswa* 1981 (4) SA 403 (C)).

The **mental element** (*animus*) of possession relates to the intention with which somebody exercises control over an article. In this respect, there may be more than one possibility:

- X may exercise control over the article **as if she is the owner of the article**. This type of possession is possession in the **ordinary juridical meaning of the term**. It is also known as *possessio civilis*. This is the **narrow** meaning of possession.
- X may exercise control over the article with the intention of **keeping it for somebody else**. This type of possession is known as *possessio naturalis*. This is the **broader** type of possession.

(ii) *Meaning of “possession” in the Act*

In various Acts, the legislature has created crimes penalising the possession of certain types of articles, such as drugs, unlicensed firearms, stolen goods, dangerous weapons or housebreaking implements. The meaning of the word “possession” may vary between the different Acts, depending upon the intention of the legislature. What is the meaning of the word “possession” in the present Act?

Section 1 of the Act provides that the word “possess” as used in the Act **includes**

- **keeping**
- **storing or**
- **having in custody or under control or supervision**

Although it is not expressly stated in the section, this provision is wide enough to cover situations in which a person has the custody over an article not in order to use it herself, but **on behalf of somebody else**, as where she looks after it for somebody else.

It follows that the meaning of this important provision is the following: The use of the word “includes” in section 1 means that the meaning ascribed to “possession” in this section (ie, keeping, storing, etc) is **not the only meaning** that the word can have in the Act. Apart from the meaning ascribed to the word in section 1, the word also has another meaning. This other meaning can be nothing else than *possessio naturalis* described above.

From this it follows that, if the state charges X with having possessed a drug, there are **two ways** in which the state may prove the element of possession.

- The **first** is by proving that X exercised control over the drug **as an owner**, that is, for herself, as opposed to exercising control over the drug on behalf of somebody else. This type of possession (ie, possession as an owner) is *possessio civilis*.
- The **second** way of proving possession is by proving that, although X did not exercise control over it as an owner (ie, to use it for herself), she nevertheless **kept it for or on behalf of somebody else**. This type of possession is *possessio naturalis* – the extended or broad meaning of the term.

ACTIVITY

Z possesses a quantity of mandrax tablets. She goes to her friend, X, and asks X whether she may leave the mandrax tablets in X’s care while she (Z) goes overseas, because she is afraid that the police might find the tablets in her (Z’s) house while she is overseas. X agrees. X and Z place the tablets in a box under the floorboards of X’s house. While Z is overseas, the police search X’s house and find the mandrax tablets. X is charged with having possessed the tablets. Her defence is that she never intended to use the tablets herself, but only allowed Z to store the tablets temporarily in her (X’s) house. Can X be convicted of having possessed the tablets?

FEEDBACK

X can be convicted of having possessed the tablets. The fact that she did not intend to use the tablets herself, but only looked after them temporarily on Z's behalf, does not afford her a defence. The term "possession" as used in the Act is not confined to *possessio civilis* (possession as an owner), but includes *possessio naturalis*. The latter type of possession refers to possession or the exercising of control over the article on behalf of somebody else.

(iii) Presumption of possession no longer valid

Finally, as far as possession is concerned, note the following: Previously, there was even a third way in which possession could be proved by the state, namely by relying on a **presumption of possession** provided for in section 20 of the Act. The section stated that, if it is proved that any drug was found in the **immediate vicinity of X**, it shall be presumed that she was found in possession of such drug, unless she proves the contrary. However, in *Mello* 1998 (7) BCLR 908 (CC), the Constitutional Court declared this provision **invalid** on the ground that it is inconsistent with the constitutional right of the accused to be presumed innocent until proven guilty (s 35(3)(h) of the Constitution). Therefore, this presumption can no longer assist the state in showing that the accused was actually found in possession of drugs.

(iv) Prohibition upon use or possession of dagga declared constitutional

In *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC), it was argued that section 4(b) of the Act (which prohibits the use or possession of drugs) was in conflict with the constitutional right to freedom of religion, because it did not grant an exemption to Rastafarians to use and possess dagga (cannabis) for religious purposes. The Constitutional Court held that such an exemption could not be justified, because it would undermine the general prohibition against possession of dagga (para 141G–H). The relevant legislation was accordingly declared constitutional.

6.4.2.4 *The drug*

As indicated above, the offence is committed if what is possessed or used is a dependence-producing substance, a dangerous dependence-producing substance or an undesirable dependence-producing substance.

6.4.2.5 *Unlawfulness*

Unlawfulness may be excluded, for example, by necessity.

However, quite apart from grounds of justification flowing from general principles, section 4 of the Act explicitly mentions a number of grounds of justification for the purposes of this offence. These are, inter alia,

- that X was a patient who acquired or bought the drug from a medical practitioner, dentist, veterinarian or pharmacist, or
- that X was a medical practitioner, dentist, veterinarian, pharmacist or wholesale dealer in pharmaceutical products who bought or collected the drugs in accordance with the Medicines and Related Substances Act 101 of 1965.

6.4.2.6 *Intention*

Culpability in the form of intention is required for this offence. Thus a person who was unaware that dagga was in her possession cannot be found guilty of the offence.

6.4.2.7 *Punishment*

The punishment for using or possessing a **dependence-producing substance** is

- any **fine** the court may deem fit to impose, or
- **imprisonment** for a period not exceeding **five years**, or
- **both such fine and such imprisonment**

The punishment for using or possessing a **dangerous or undesirable dependence-producing substance** (such as dagga) is

- any **fine** the court may deem fit to impose, or
- **imprisonment** for a period not exceeding **15 years**, or
- **both such fine and such imprisonment**

6.4.3 **Dealing in drugs** (*Criminal Law 431–434*)

6.4.3.1 *Definition*

It is an offence unlawfully and intentionally to deal in any dependence-producing substance or any dangerous dependence-producing substance or in any undesirable dependence-producing substance (s 5(b) and 13(f) of the Act).

6.4.3.2 *Elements of the offence*

The elements of this offence are

- (1) the **act** (that is, to deal in)
- (2) the **drug** as described in the Act
- (3) **unlawfulness**
- (4) **intention**

6.4.3.3 *The act – dealing in*

In creating the offence of dealing in drugs, the legislature was not so much concerned with punishing those who use drugs as punishing those who make drugs available to users. In order to suppress the supply of drugs to users, the legislature has prohibited not merely the sale of drugs, but also all aspects of the production, manufacture, distribution and provision of drugs.

In terms of section 1 of the Act, to “deal in” drugs is defined as including the performance of any act in connection with the

- transshipment
- importation
- cultivation
- collection
- manufacture
- supply
- prescription
- administration
- sale

- transmission or
- exportation

of drugs.

In *Solomon* 1986 (3) SA 705 (A), the Appellate Division held that it was not the legislature's intention that a person who purchases drugs **for her own use** thereby performs an act in respect of the "sale" or "supply" of drugs within the extended meaning of the definition of "dealing". The Court explained that the legislature, by creating the different offences of "dealing" and "possession or use", intended to draw a distinction between

- activities relating to the **furnishing** of drugs
- activities relating to the **acquisition** of drugs

The Court found that the legislature intended to punish **activities in furnishing drugs** as "dealing in" drugs and that it did not intend **activities in acquiring drugs** to be regarded as "dealing in" drugs, but only as being in **possession** of the drugs. More particularly, the Court held that, if X commits an act which consists merely in her obtaining the drug for her own personal use, she can only be convicted of possession or use of the drug, and not of dealing in the drug.

This means, further, that a person (X) who acts as an agent for somebody else (Z), and who purchases drugs for Z's own use, performs an act in connection with the acquisition of drugs and not an act relating to the supply or furnishing of the drugs. If somebody like X in this example is found in possession, she can only be convicted of the offence of "possession or use" (as opposed to "dealing in drugs") (*Solomon* supra 710; *Jackson* 1990 (2) SACR 505 (E)). Keep in mind, however, that a person who purchases drugs for **the purpose of selling them** can be held to be dealing in the drugs, since she will possess drugs "for purposes of sale".

Previously, there was also a third way in which "dealing" could be proved, namely by relying on a number of presumptions created in the Act. For instance, the Act provided that anyone found in possession of prohibited or dangerous drugs, or dagga exceeding 115 grams, was presumed to have dealt in the drug or dagga. The onus was then on the accused to prove that she had not dealt in the drug. These, and other provisions which created presumptions, were declared unconstitutional on the ground that they were inconsistent with the accused's constitutional right to be presumed innocent until proven guilty (see *Bhulwana*; *Gwadiso* 1995 SACR 748 (CC); *Julies* 1996 (2) SACR 108 (CC); *Ntsele* 1997 (2) SACR 740 (CC); and *Mjezu* 1996 (2) SACR 594 (NC)).

Note, however, that the fact that certain statutory presumptions have fallen away does not mean that basic legal principles and a common-sense approach to proving guilt have also been abandoned. Our courts have held that where a person has been found in possession of large quantities of dagga and she has been unable to furnish a reasonably acceptable explanation for such possession, there might nevertheless be sufficient circumstantial evidence to make an inference that she has also been dealing in the drugs (see *Bhulwana*; *S v Gwadiso* supra 796G–H; and *Sixaxeni* 1994 (2) SACR 451 (C) at 455g–j). In *Mathe* 1998 (2) SACR 225 (O), the police found X alone in a motor vehicle which contained approximately 131 kilograms of dagga. Because he failed to give an explanation for his possession of the dagga, and raised a "spurious" defence in the trial court, his conviction of possession was replaced on appeal by a conviction of dealing in dagga.

6.4.3.4 The drug

As in the case of possession, the offence is committed if what is dealt in is either a dependence-producing substance or a dangerous or undesirable dependence-producing substance as these terms are defined in the Act.

6.4.3.5 *Unlawfulness*

Unlawfulness may be excluded by, for example, necessity in the form of coercion.

However, quite apart from grounds of justification flowing from general principles, section 5 of the Act also explicitly mentions a number of grounds of justification relating to this offence. These are, *inter alia*,

- that X has acquired or bought the particular substance for medicinal purposes from a medical practitioner, veterinarian or dentist, or from a pharmacist in terms of a written prescription
- that X is a medical practitioner, dentist or pharmacist who prescribes, administers, acquires, imports or sells the substance in accordance with legislation

6.4.3.6 *Intention*

Culpability in the form of **intention** is required for this offence. X must know that the substance is a substance described in the Act, that her conduct amounts to dealing and that it is unlawful.

6.4.3.7 *Punishment*

The punishment for dealing in a **dependence-producing substance** is

- **any fine** the court may deem fit to impose, or
- **imprisonment** for a period not exceeding **10 years**, or
- **both such fine and such imprisonment**

The punishment for dealing in either a **dangerous or an undesirable dependence-producing drug** (which includes dagga) is

- **imprisonment** for a period not exceeding **25 years**, or
- **both such imprisonment** (not more than 25 years) and **such fine as the court may deem fit to impose**

6.5

UNLAWFUL POSSESSION OF FIREARMS OR AMMUNITION

(*Criminal Law 434–439*)

6.5.1 **General**

The Firearms Control Act 60 of 2000 (hereafter called “the Act”) regulates the control of firearms and ammunition and creates a number of offences relating to, *inter alia*, the unlawful possession of firearms and ammunition.

The Act draws a distinction between a “**firearm**” and a “**prohibited firearm**”. Whereas a firearm is a lethal weapon, the arms and devices falling under the heading of “**prohibited firearm**” are even more ominous and destructive, amounting to what may be described as weapons of war, such as a cannon and a rocket launcher. Whereas a firearm can be licensed, a prohibited firearm cannot (barring a few exceptions) be licensed. A heavier sentence (namely a maximum of 25 years’ imprisonment) is prescribed for the offence of possessing a prohibited firearm than for the possession of a firearm which is not a prohibited firearm. (The maximum sentence for the latter offence is 15 years’ imprisonment.)

For the purposes of our present study, we shall only consider the unlawful possession of a “firearm” (as opposed to a “prohibited firearm”).

6.5.2 Unlawful possession of a firearm

Any person who possesses a firearm without a licence, permit or authorisation issued in terms of the Act for that firearm, commits an offence (s 3 of the Act).

The elements of this offence are as follows:

- (1) the **possession** of
- (2) a **firearm**
- (3) **unlawfulness**
- (4) **culpability**

6.5.2.1 Possession

The word “possess” is not defined in the Act. In the previous Act, which dealt with arms and ammunition (and which was replaced by the present Act), the word “possession” was defined as **including custody**. Accordingly, under the previous Act, the word “possession” referred to physical control over the arm with the intention of possessing it

- either as if the possessor were the owner (*possessio civilis*) or
- merely to keep or guard it on behalf of, or for the benefit of, somebody else (*possessio naturalis*)

It is submitted that, considering the purpose of the Act set out in the preamble, the meaning which the term had in the previous Act still applies to the term as used in the present Act. This means that even possession by a person who merely keeps or guards the firearm temporarily for or on behalf of somebody else (*possessio naturalis*) is punishable.

6.5.2.2 Firearm

Section 1 gives a very long, technical definition of the word “firearm”. For the purpose of our present study, it is not necessary to know this definition. It is sufficient merely to know what may be described as the gist of the definition, namely “**any device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant**”, and to keep in mind that this definition **includes the barrel or frame of the device**.

6.5.2.3 Unlawfulness

The possession must be unlawful, that is, not covered by a ground of justification such as necessity. In terms of section 3, the crime is not committed by somebody who holds a licence, permit or authorisation issued in terms of the Act for the firearm. Official institutions, such as the South African National Defence Force, the South African Police Service and the Department of Correctional Services, are exempt from the prohibition of possession of firearms.

6.5.2.4 *Culpability*

The legislature does not specify whether intention or negligence is required for liability. If X had the **intention**, she would certainly be guilty, but the question is whether she can also be convicted if the form of culpability proved against her is not intention, but merely **negligence**. Under the previous Act, which dealt with this matter, proof of negligence was sufficient for a conviction, and it is submitted that the same applies under the present Act. It is well known that the unlawful possession of firearms is one of the greatest evils besetting South African society and that the legislature's intention was clearly to spread the net against the unlawful possession of firearms as widely as possible.

6.5.2.5 *Punishment*

In terms of section 121, read with schedule 4, the punishment for the offence is a **fine** or imprisonment for a period not exceeding **15 years**.

6.5.3 **Unlawful possession of ammunition**

Section 90 provides that **no person may possess any ammunition unless** she

- (1) holds a **licence** in respect of a firearm capable of discharging that ammunition
- (2) holds a **permit** to possess ammunition
- (3) holds a **dealer's licence**, manufacturer's licence, gunsmith's licence, import, export or in-transit permit or transporter's permit issued in terms of this Act, or
- (4) is **otherwise authorised** to do so.

Section 91(1) provides that the holder of a licence to possess a firearm may not possess more than **200 cartridges** for each firearm in respect of which she holds a licence. However, in terms of subsection (2) this limitation does not apply to:

- a **dedicated hunter or dedicated sports-person** who holds a licence, or
- the holder of a licence to possess a firearm in respect of ammunition bought and discharged at an **accredited shooting range**

The above provisions do not apply to official institutions such as the South African National Defence Force, the South African Police Service and the Department of Correctional Services.

The punishment for the unlawful possession of ammunition is a **fine** or imprisonment for a period not exceeding **15 years**.

6.5.4 **Certain other offences created in the Act**

The following are certain other offences relating to firearms and ammunition (briefly defined) created in the Act:

- (1) to be aware that somebody else possesses a firearm illegally and to **fail to report** this to the police
- (2) to **cause bodily injury** to a person or damage to property by **negligently** using a firearm
- (3) to handle a firearm while **under the influence** of a substance which has an **intoxicating** or a narcotic effect
- (4) to discharge a firearm in a **built-up area or a public place**

- (5) to **lose** a firearm owing to a **failure to lock it away in a safe**, strongroom or safe-keeping device, or owing to failure to take reasonable steps to prevent its loss or owing to failure to keep the keys to the safe, strongroom or device in safe custody

GLOSSARY

<i>animus</i>	the mental element of possession, ie, the intention with which somebody exercises control over an article
<i>corpus</i>	the physical element of possession, ie, physical control over something
<i>detentio</i>	the physical element of possession, ie, physical control over something
<i>possessio civilis</i>	possession as if one is an owner, ie, possession for oneself
<i>possessio naturalis</i>	possession not for oneself, but on behalf of somebody else

SUMMARY

Corruption

- (1) Corruption is currently punishable in terms of the provisions of the Prevention and Combating of Corrupt Activities Act 12 of 2004.
- (2) The Act creates a general offence of corruption in section 3. A number of specific offences of corruption applicable to specific persons or circumstances are created in further sections.
- (3) The following is a concise synopsis of the definition of the general offence of corruption: "Anyone who (a) accepts any gratification from anybody else, or (b) gives any gratification to any other person, in order to act in a manner that amounts to the illegal exercise of any duties, is guilty of the offence of corruption."
- (4) There are always two parties involved in corruption, namely the party who gives the gratification and the party who accepts the gratification. Both parties – the giver and the recipient – commit corruption.
- (5) The elements of the offence committed by the recipient are the following:
 - (1) the acceptance by Y (the element of an act)
 - (2) of **gratification**
 - (3) **in order to act in a certain manner** (the element of inducement)
 - (4) **unlawfulness**
 - (5) **intention**
- (6) The requirement of an act for the crime committed by the recipient is not limited to "accept" only, but also includes to agree to accept, to offer to receive or to demand or ask for gratification.
- (7) The concept "gratification" includes a variety of meanings, such as a monetary meaning, the meaning of avoiding a loss, and the meaning of a favour or an advantage of any nature.

- (8) The element of inducement refers to a wide variety of aims which the parties may have in mind, for example that the recipient should act in a manner which amounts to the unauthorised exercise of power, the abuse of a position of authority or achieving an unjustified result.
- (9) Corruption committed by the giver is only a mirror image of corruption committed by the recipient. The concept “give” includes to agree to give, to offer to give or to promise gratification.
- (10) Apart from the general crime of corruption created in section 3, the Act creates a number of other specific crimes of corruption applicable to specific classes of persons, such as members of the legislative authority, judicial officers, and officials in relation to the procurement of tenders and in relation to sporting events.

Extortion

- (11) Definition of extortion – see definition above.
- (12) In extortion, X must apply pressure to Y to do, or to omit to do, something, and Y must yield to the pressure.
- (13) The benefit which Y obtains need not be of a patrimonial nature.
- (14) There must be a causal link between the pressure and the acquisition of the benefit.
- (15) The act must be unlawful. Although it is perfectly in order for a police official to inform an accused that she intends prosecuting her, it is both irregular and unlawful for the police official to state that she will prosecute the accused **unless she pays her a sum of money.**
- (16) The act must be intentional.

Possession of drugs

- (17) Definition of offence – see definition above.
- (18) There are two ways in which the prosecution may prove that X **possessed** a drug. The first is by proving possession in the ordinary juridical sense of the word, and the second is by relying on the extended meaning given in section 1 of the Act.
- (19) Possession in the ordinary juridical sense requires a physical element of control (*corpus* or *detentio*) and a mental element of intention (*animus*).
- (20) Physical control may be actual or constructive.
- (21) The *animus* element is complied with if X possessed the drugs with the intention of either keeping or disposing of them **as if she were the owner, or exercising control over them on behalf of somebody else.** The latter broad interpretation of “possession” is the result of the extended meaning of “possession” in the Act, namely the “keeping, storing or having in custody or under control or supervision” of drugs.
- (22) Unlawfulness may be excluded by necessity, as well as by a number of grounds of justification mentioned in the Act.
- (23) Culpability in the form of intention is required.
- (24) In the case of *Mello*, the Court declared the presumption of possession created in section 20 of the Act, namely that a person found in the immediate

vicinity of drugs is presumed to have “possessed” the drugs until she proves the contrary, unconstitutional on the ground of inconsistency with the right of the accused to be presumed innocent until proven guilty.

Dealing in drugs

- (25) In creating the offence of “dealing”, the concern of the legislature was to punish those who make drugs available to users rather than to punish those who merely acquire drugs for the purpose of using them themselves.
- (26) Definition of offence – see definition above.
- (27) The concept “deal in” in relation to a drug is explained in section 1 of the Act as the performance of any act in connection with the transshipment, importation, manufacture, collection, prescription, supply, cultivation, administration, sale, transmission or exportation of a drug.
- (28) Because the legislature created the offence of dealing with the intention of punishing those who make drugs available to others, the **acquisition** of drugs by a person for her own use, or by an agent for her principal’s own use, does not amount in dealing (*Solomon*).
- (29) Unlawfulness may be excluded by, for example, necessity as well as by a number of grounds of justification set out in the Act.
- (30) Culpability in the form of intention is required for the offence.
- (31) Previously, the state could rely on a number of presumptions created in the Act in order to prove the offence of dealing. All of these presumptions have been declared unconstitutional by our courts (*Bhulwana; Julies; Ntsele; and Mjezu*).

Unlawful possession of a firearm

- (32) Definition of the offence – see definition above.
- (33) The possession is not unlawful if there is a ground of justification for the possession, such as necessity. The crime is furthermore not committed by somebody who holds a licence, permit or authorisation issued in terms of the Act, for the firearm.
- (34) The form of culpability required for this offence is intention or probably also negligence.

Unlawful possession of ammunition

- (35) Definition of the offence in section 90 of the Act – see definition above.
- (36) The holder of a licence to possess a firearm may not possess more than 200 cartridges for each firearm in respect of which she holds a licence.

TEST YOURSELF

- (1) Give a concise definition of the general crime of corruption appearing in section 3 of the current legislation on corruption.

- (2) Name the elements of the offence of corruption committed by the recipient.
- (3) In the crime of corruption, the concept "accept" has an expanded meaning. Describe this expanded meaning.
- (4) Discuss the question of what is understood by the concept "gratification" as this word is used in the definition of corruption.
- (5) Discuss the element of "inducement" for corruption committed by the recipient.
- (6) Discuss the requirement of unlawfulness for corruption committed by the recipient.
- (7) Discuss the requirement of intention for corruption committed by the recipient.
- (8) Explain the expanded meaning of the word "give" for the crime of corruption committed by the giver.
- (9) Define extortion.
- (10) Discuss the act which is required in order to constitute extortion and refer to decided cases in this regard.
- (11) Discuss the nature of the benefit which can be extorted.
- (12) Discuss the requirement of unlawfulness in extortion.
- (13) Discuss the concept "possession or use" of drugs.
- (14) Discuss the concept "to deal in" drugs.
- (15) The Act divides drugs into three categories. Name these categories.
- (16) X buys 120 grams of dagga from a dealer, Y. She is caught in possession of the dagga. She is charged with the offence of "dealing in drugs", as well as with the lesser offence of "possession of drugs". X's defence is that she bought the dagga for her own recreational use. Consider whether X may succeed with this defence as far as both the charges are concerned.
- (17) X buys drugs on behalf of her sister, Y, for the sole purpose of use by Y. Discuss whether it can be said that X had "supplied" drugs for the purpose of the offence "dealing in drugs".
- (18) Discuss the form of culpability required for the offences of "possession or use of drugs" and "dealing in drugs".
- (19) For the purposes of the offence of unlawful possession of a firearm, what does the word "possession" mean?
- (20) What is the gist of the definition of a firearm for the purposes of the offence of unlawfully possessing a firearm?
- (21) What is meant by "unlawfully" in the offence of unlawfully possessing a firearm?
- (22) What form (or forms) of culpability is required for a conviction of the offence of unlawfully possessing a firearm?
- (23) Section 90 of the Firearms Control Act 60 of 2000 provides that no person may possess any ammunition unless she ... (four exceptions are then mentioned in the section). Name these four exceptions.
- (24) Name five other offences created in the Act in connection with firearms and ammunition.

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LEARNING OUTCOMES

When you have finished this study unit, you should be able to demonstrate your understanding of the requirements for liability for the sexual crimes created in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 by considering the possible liability of an accused for

- rape
- compelled rape (including the sentence that may be imposed for rape)

- sexual assault, compelled sexual assault and compelled self-sexual assault
- exposing genital organs, the anus or female breasts (“flashing”) to persons 18 years or older, displaying child pornography to persons 18 years or older, and engaging sexual services for reward of persons 18 years or older
- incest
- bestiality
- the various sexual offences against **children**, namely: consensual sexual penetration of children; consensual sexual violation of children; sexual exploitation of children; sexual grooming of children; displaying pornography to children; and compelling children to witness sexual crimes, sexual acts or self-masturbation
- sexual offences against mentally disabled persons
- failure to report sexual offences against children and mentally disabled persons
- trafficking in persons for sexual purposes
- attempt, conspiracy and incitement to any of the sexual offences in the Act

7.1

INTRODUCTION

(Criminal Law 353–355)

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 was introduced because of the prevalence of sexual offences in the Republic of South Africa. It was felt that the South African common law and statutory law did not deal adequately and effectively in a nondiscriminatory manner with many aspects relating to the commission of sexual offences. For instance, children were not adequately protected against sexual exploitation and the common law crime of rape was gender-specific.

The Act amends all aspects of the laws relating to sexual offences and deals with all legal aspects relating to sexual offences in a single statute by, *inter alia*,

- repealing the common law offence of **rape** and replacing it with a new, expanded statutory offence of rape applicable to all forms of sexual penetration without consent, **irrespective of gender** – “sexual penetration” is widely defined to include various acts of a sexual nature which were previously not criminalised
- repealing the common law offence of **indecent assault** and replacing it with a new statutory offence of sexual assault, applicable to all forms of sexual violation without consent
- creating new statutory offences relating to certain **compelled acts of penetration or violation**
- creating new statutory offences for **adults**, by criminalising the compelling or causing the witnessing of certain sexual conduct and of certain parts of the human anatomy, the exposure or display of child pornography, and the engaging of the sexual services of an adult
- repealing the common law offences of **incest, bestiality and the violation of a corpse, as far as such violation is of a sexual nature**, and enacting corresponding new statutory offences
- creating new, comprehensive sexual offences against **children** and persons who are **mentally disabled**, including offences relating to **sexual exploitation or grooming, exposure to or display of pornography, and the creation of**

child pornography (Some of these offences are similar to offences created in respect of adults. However, these offences aim to address the particular vulnerability to sexual abuse and exploitation of children and persons who are mentally disabled.)

The Act also eliminates the differentiation drawn between the age of consent for different consensual sexual acts and provides for special provisions relating to the **prosecution of consensual sexual acts between children older than 12 years, but younger than 16 years.**

Finally, the Act creates a duty to report sexual offences committed with or against children or persons who are mentally disabled. Failure to report knowledge of the commission of sexual offences amounts to an offence.

7.2 RAPE

7.2.1 General

(Criminal Law 355–369)

The Sexual Offences Act 2007 repeals the common law offence of rape. The common law offence of rape consisted in unlawful, intentional sexual intercourse by a male with a female without her consent. The offence could only be committed by a male, and the unlawful and intentional sexual penetration of the female genital organ (the vagina) by the male genital organ (the penis) without the female's consent was required for a conviction of the offence. Other forms of sexual penetration without consent did not amount to rape.

Chapter 2 of the Sexual Offences Act 2007 expanded the definition of rape by creating **two** new statutory offences of rape. The object of the provisions which introduced these offences is to punish **all** forms of **sexual penetration** without consent, **irrespective of gender**. This means that a male can also commit the offence in respect of another male person, and a female may commit the offence in respect of a male or a female.

The Act distinguishes between two specific offences of rape, that is, **rape** and **compelled rape**. For the crime of rape, an "**act of sexual penetration**" is required by X before he/she can be convicted of the offence. For the crime of compelled rape, however, X need not perform an "act of sexual penetration". In order to be convicted as a **perpetrator** of this offence, it is sufficient if X merely **compelled another person** unlawfully and intentionally to commit "an act of sexual penetration", provided that the person so compelled, as well as the complainant, did **not** consent to the act.

There is no age prescription for the crime of rape. This means that the crime may be committed by a person of any age in respect of a person of any age.

7.2.2 Rape

7.2.2.1 Definition

Section 3 of the Act provides that any person (X) who unlawfully and intentionally commits an **act of sexual penetration** with a complainant (Y) without his/her consent is guilty of the offence of rape.

The **elements** of the crime are the following: (a) sexual penetration of another person; (b) without the consent of the latter person; (c) unlawfulness; and (d) intention.

7.2.2.2 *The act*

- a. The prohibited act consists in the act of **sexual penetration** by any person with another person without his/her consent. "Sexual penetration" is defined as **including any act which causes penetration to any extent whatsoever by**
- (i) the **genital organs** of one person into or beyond the **genital organs, anus, or mouth** of another person
 - (ii) **any other part of the body** of one person into or beyond the genital organs or anus of another person; or
 - (iii) **any object** (including any part of the body of an animal) into or beyond the **genital organs or anus** of another person; or
 - (iv) the **genital organs of an animal**, into or beyond the mouth of another person.

"Genital organs" is defined as including the whole or part of the male or female genital organs, as well as surgically constructed or reconstructed genital organs.

Examples of prohibited conduct in terms of (i)–(iv) above are the following:

- (i) X inserts his penis into the anus or mouth of a woman or X (a female) places her genital organ into the mouth of Y (a male or a female).
 - (ii) X (a male or a female) puts his/her finger into the anus of Y (a male or a female).
 - (iii) X puts the tail of an animal into the vagina of Y or X puts a sex toy into the anus of Y.
 - (iv) X inserts the genital organ of a dog into the mouth of Y. (This act also amounts to the new statutory crime of bestiality – discussed below in 7.6).
- b. The use of the words "including any act which **causes** penetration" in the first line of the definition means that the crime of rape created in the Act is no longer, as used to be the case in common law, a formally defined crime, that is, a crime consisting merely in the commission of a certain type of act. It is now a **materially defined crime**, that is, a crime consisting in the **causing of a certain situation**, namely sexual penetration.
- The use of the word "causes" means, *inter alia*, that an act of "sexual penetration" is performed also where X causes **another** person or an **object** to perform the act of penetration. (The word "causes" should be read together with the word "includes" in the beginning of the definition.) Read thus, and also considering the wide import of the word "causes", it is clear that sexual penetration includes **all** the situations in which X performs the penetration of Y himself or herself, that is, with his or her own body, or causes another person or some object to perform the penetration.
- c. The act must be performed **without the consent** of Y (the complainant). **The absence of consent is a definitional element of the offence.**

Consent means **voluntary or uncoerced agreement** (s 1(2)). Section 1(3) contains a provision dealing with the interpretation of the words "voluntary or uncoerced". Circumstances in respect of which Y does not voluntarily or without coercion agree to an act of sexual penetration include, but are not limited to, the following:

Where Y submits or is subjected to such a sexual act as a result of

- (a) the **use of force or intimidation** by X against Y or Z (a third person) or W (another person) or **against the property** of Y, Z or W or **a threat of**

- harm** by X against Y, Z or W or **against the property** of Y, Z or W (s 1–(3)(a));
- (b) where there is **an abuse of power or authority** by X to the extent that Y is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act (s 1–(3)(b));
- (c) where the sexual act is committed **under false pretences or by fraudulent means, including** where Y is led to believe by X that
- (i) Y is committing such a sexual act with a **particular person** who is in fact a different person; or
 - (ii) such a sexual act is **something other than that act** (s 1(3)(c)); or
- (d) where Y is incapable in law of appreciating the nature of the sexual act, **including** where Y is, at the time of the commission of such sexual act —
- (i) asleep;
 - (ii) unconscious;
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that Y's consciousness or judgment is adversely affected;
 - (iv) a child under the age of 12 years; or
 - (v) a person who is mentally disabled (s 1(3)–(d)).

The provisions relating to consent in section 1(2) and (3) may all be summarised as follows: For consent to succeed as a defence, it must have been given **consciously** and **voluntarily**, either expressly or tacitly, by a person who has the mental ability to understand what he or she is consenting to, and the consent must be based on a **true knowledge of the material facts** relating to the act.

There are various factors that result in the law not deeming consent to be valid, despite the fact that at first glance, one may perhaps think there had indeed been consent. These factors are all set out in section 1(3).

(i) Submission as a result of force, intimidation or threats (s 1(3)(a))

The first factor which leads the law not to recognise ostensible consent by Y as valid consent for the purposes of rape is the existence of **force, intimidation or threats of harm** emanating from X in respect of Y. Thus if Y ostensibly “consents” to sexual penetration, but such “consent” is in fact the result of force, intimidation or threats of harm emanating from X in respect of Y, the law does not regard such consent as valid consent.

The provisions of section 1(3)(a) go further and stipulates that even force, intimidation or threats of harm not against Y, but against some **third party**, may render the ostensible consent invalid. It matters not whether the third party is a close family member of Y, such as his or her child or spouse, or a close friend. In fact, the subsection is so widely worded that it may even include threats against somebody whom Y has never even met.

Furthermore, the subsection makes it clear that force or threat of harm not against some person, but **against property** belonging to a person, may result in the ostensible consent being regarded as invalid. It matters not whether the property belongs to Y personally, to some family member or friend of his or hers, or to some other person whom Y has never even met.

The word “harm” in section 1(3)(a) is not qualified, and is accordingly not restricted to physical harm or harm to physical objects. It is wide enough to cover **monetary loss of whatever nature or even harm to reputation or dignity**. If X tells Y that an earlier act of infidelity by her against her husband will be revealed

to her husband if she does not submit to an act of sexual penetration with him (X), and Y, not wanting her husband to know about the infidelity, submits, her submission cannot be construed as valid consent. This is a case of intimidation of Y by X.

(ii) Abuse by X of power of authority (s 1(3)(b))

Section 1(3)(b) speaks of cases “where there is an abuse of power or authority by (X) to the extent that (Y) is inhibited from indicating his or her unwillingness or resistance to the sexual act ...”. This provision refers to cases where Y is not threatened by physical violence, but X expressly or tacitly uses the position of power which he or she exercises over Y to influence Y to consent.

It has been held that if X, a policeman, threatens to lay a charge against Y of having committed a crime if she does not consent to intercourse, and as a result of the threat Y then does “consent”, such consent is invalid (*Volschenck* 1968 2 PH H283 (D); *Botha* 1982 2 PH H112 (E)). In *S* 1971 (1) SA 591 (A), it was even held that X, a policeman, committed rape when he had intercourse with Y in circumstances in which he had not threatened Y with some or other form of harm, but **Y believed that X had the power to harm her and X had been aware of this fear**. It is therefore clear that if X is somebody like a policeman who is in a position of power over Y, Y’s “consent” will not be regarded as valid if the evidence reveals that she apprehended some form of harm other than physical assault upon her.

(iii) Consent obtained by fraud (s 1(3)(c))

Section 1(3)(c) refers to cases in which “consent” is obtained by **fraud**.

In the common law crime of rape, in which X was always a male and Y always a female, fraud which vitiated consent was either fraud in respect of the identity of the man (*error personae*), as where the woman was led to believe that the man was her husband, or fraud in respect of the nature of the act to which she “agreed” (*error in negotio*), as when she was persuaded that the act was not an act of sexual penetration, but some medical operation. These principles still apply under the new Act, although X and Y may now be either male or female.

Misrepresentation of any circumstance other than that mentioned above, such as X’s wealth, his or her age or, where Y is a prostitute, X’s ability to pay for Y’s “services”, does not vitiate consent. Thus if X falsely represents to Y that he/she is a multimillionaire and Y believes X’s story and, on the strength of such a misrepresentation, he/she agrees to sexual penetration by X, his/her consent is **valid** and rape is not committed. In particular, consent is deemed to be valid where the person is misled **not about the nature of the act of sexual intercourse but about the results which will follow on such intercourse** (*K* 1966 (1) SA 366 (RA) 368. Here, X represented to Y that intercourse with him would cure her of her infertility problem.).

What is the position if X is HIV-infected, but Y is not HIV-infected and would never give consent to intercourse with a man who is HIV-infected, yet X acquires Y’s consent by misrepresenting to her that he is not HIV-infected? It is submitted that, in the light of the severe consequences of such a misrepresentation, Y’s consent should **not** be regarded as valid consent.

(iv) Inability by Y to appreciate the nature of the sexual act (s 1(3)(d))

Section 1(3)(d) deals with cases in which Y is “incapable in law of appreciating the nature of the sexual act”.

There is no valid consent if X performs an act of sexual penetration in respect of Y if Y is **asleep**, unless, of course, Y has previously, whilst awake, given consent (C 1952 (4) SA 117 (O) 120). The same applies to a situation where Y is **unconscious**. Paragraph (iii) of subsection (3)(d) provides, further, that consent is not valid if Y is “in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that Y’s consciousness or judgement is adversely affected”.

Paragraph (iv) of subsection (3)(d) contains a provision which is very important in practice: If at the time of the commission of the sexual penetration **Y is a child under the age of 12 years**, any ostensible “consent” by him or her is in law invalid. Such a child is **irrebuttably presumed** to be incapable of consenting to the act of sexual penetration.

Paragraph (v) of subsection (3)(d) provides that the consent is not valid if Y is “a person who is mentally disabled”. The expression “person who is mentally disabled” is discussed in 7.8.2.

(d) Marital relationship no defence

Section 56(1) provides that, whenever an accused person is charged with rape, “it is not a valid defence for that accused person to contend that a marital or other relationship exists or existed between him or her and the complainant”. It is therefore perfectly possible for a husband to rape his own wife.

7.2.2.3 *Unlawfulness*

Absence of consent by Y is not a ground of justification, but a **definitional element of the crime**. If it were merely a ground of justification, the definitional elements of this crime would simply have consisted in sexual penetration between two persons. This, however, is not recognisable as a crime. However, this does not mean that unlawfulness is therefore not an element of the crime. Unlawfulness may be excluded if X acted under **compulsion**. Therefore, if Z forces X to rape Y, or threatens X with harm if he or she does not rape Y and X in actual fact rapes Y, X may rely on the ground of justification of necessity.

7.2.2.4 *Intention*

Intention is specifically mentioned in the definition of the crime in section 3 as a requirement for a conviction. X must know that Y had not consented to the sexual penetration. *Dolus eventualis* suffices, so that it is sufficient to prove that X foresaw the possibility that Y’s free and conscious consent, as described above, might be lacking, but nevertheless continued with the act of sexual penetration. Where, as proof of the absence of consent, reliance is placed on the fact that the girl is under 12 years of age at the time of the commission of the act, X must be aware of the fact that the girl is not yet 12 years old, or at least foresee the possibility that she may be under 12. Similarly, where, in order to establish the absence of consent, reliance is placed upon the woman’s intoxication or her mental defect, or the fact that she was sleeping or was defrauded, it must be established that X was aware of such a factor vitiating consent.

7.2.2.5 *Sentence*

- (a) *General*. After the decision of the Constitutional Court in *Makwanyane* (1995 (2) SACR 1 (CC)), the death sentence is no longer a competent sentence to be imposed upon a conviction of rape. It is similarly no longer possible for a court to order corporal punishment to be imposed upon X (*Williams* 1995 (2)

SACR 251 (CC)). Since the imposition of a fine is not an apt type of sentence for this crime, the only type of sentence which remains is imprisonment. Before 1997, the courts had a free discretion as to the length of the period of imprisonment. It is well known that the incidence of rape in South Africa is alarmingly high.

As a reaction to the high crime level, section 51 of the Criminal Law Amendment Act 105 of 1997 was enacted. This makes provision for minimum sentences to be imposed for certain crimes, such as rape, in certain circumstances. It is clear from section 68(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, read with the schedule to this Act, that the provisions of section 51 of Act 105 of 1997 apply also to the newly defined statutory crime. (This section was recently replaced by the new section 1 in the Criminal Law (Sentencing) Amendment Act 38 of 2007.)

Subsection (6) of section 51 of Act 105 of 1997 provides that the minimum sentences (to be set out below) are not applicable in respect of a child who was under the age of 16 years at the time of the commission of the offence.

- (b) Imprisonment for life must sometimes be imposed. Section 51(1) of the above-mentioned Act provides that a High Court or a regional court must sentence a person convicted of rape to imprisonment for life in the following circumstances:
- (1) where Y was raped more than once by X or by any co-perpetrator or accomplice
 - (2) where Y was raped by more than one person and such persons acted with a common purpose
 - (3) where X is convicted of two or more offences of rape, but has not yet been sentenced
 - (4) where X knows that he has acquired the “immune deficiency syndrome or the human immunodeficiency virus”
 - (5) where Y is below the age of 16 years
 - (6) where Y is a physically disabled woman who, owing to her physical disability, is rendered particularly vulnerable
 - (7) where Y is mentally ill as contemplated in section 1 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007*
 - (8) where the rape involved the infliction of grievous bodily harm
- (c) *Other minimum periods of imprisonment must sometimes be imposed.* If one of the circumstances set out immediately above is not present, X does not qualify for mandatory imprisonment for life. However, section 51(2) provides that, in such a situation, a High Court or regional court is nevertheless obliged to impose the following minimum periods of imprisonment:
- (1) 10 years in respect of a first offender
 - (2) 15 years in respect of a second offence
 - (3) 20 years in respect of a third or subsequent offence
- (d) *Avoidance of minimum sentences.* There are always cases where a court is of the opinion that the imposition of one of the above minimum periods of imprisonment would, considering the specific circumstances of the case, be very harsh and unjust. In terms of subsection (3)(a) of section 51, a court is not bound to impose imprisonment for life or for one of the minimum periods of imprisonment set out above if there are **substantial and compelling circumstances** which justify the imposition of a lesser sentence than the prescribed one.

In *Malgas* 2001 (1) SACR 469 (SCA), the Supreme Court of Appeal considered the

interpretation of the words and laid down certain guidelines to be kept in mind by courts when interpreting the words. These guidelines are not discussed in detail. The most important guideline provides that, if a court is satisfied that the circumstances of the case render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence. (See rule I in par 25 of the judgment (482e–f).)

However, the Criminal Law (Sentencing) Amendment Act 2007 now stipulates that the following factors are not substantial and compelling circumstances which justify the imposition of a lesser sentence:

- (i) the previous sexual history of the complainant;
- (ii) an apparent lack of physical injury of the complainant;
- (iii) an accused's cultural or religious beliefs about rape; or
- (iv) any relationship between the accused and the complainant prior to the commission of the offence.

In *Dodo* 2001 (1) SACR 594 (CC), the Constitutional Court held that the introduction by the legislature of minimum sentences in section 51 is not unconstitutional.

ACTIVITY

Y is an administrative assistant at a law firm that is owned by X. She has been employed on a temporary basis, but may be appointed in a permanent position if she performs to X's satisfaction. Unfortunately, X has given her two written warnings as a result of failing to meet important internal deadlines. Just before the close of business one Thursday afternoon, X gives Y typing responsibilities which forces Y to work overtime. During that evening, when nobody else is around, X tells Y that he is prepared to excuse Y for her previous transgressions if she agrees to have sexual intercourse with him. He also tells Y that he recently became aware of a transgression she committed that was serious enough to warrant her dismissal, and that, if she refused to have sex with him, he would have no choice but to dismiss her in the light of her previous transgressions. Realising that her job is at risk, Y consents and has sexual intercourse with X. A week later, Y becomes aware of news that a former employee of the firm had experienced the same treatment from X and, after meeting with her, she decides to lay a charge of rape against him. At the trial, X's lawyer argues that the act of sexual penetration between X and Y was consensual. As the state prosecutor, what would you argue in response to this submission?

FEEDBACK

You would argue that section 1 of the Sexual Offences Act 2007 defines "consent" as "voluntary or uncoerced agreement". One of the circumstances in respect of which Y does not voluntarily or without coercion agree to an act of sexual penetration is where there is an abuse of power or authority by X to the extent that Y is inhibited from indicating her unwillingness or resistance to the sexual act, or unwillingness to participate in a sexual act. X abused his position of authority and took advantage of Y's vulnerable position to the extent that Y was inhibited from indicating her unwillingness to the sexual act. The ostensible "consent" was therefore not uncoerced within the meaning of section 1.

7.2.3 Compelled rape

(Criminal Law 369–371)

7.2.3.1 Definition

Section 3 of the Act provides that

Any person (X) who unlawfully and intentionally **compels a third person (Z) without his/her (Z's) consent** to commit an act of sexual penetration with a complainant (Y) without Y's consent; is guilty of the offence of compelled rape.

The **elements** of this crime are the following: (a) compelling a person; (b) to commit an act of sexual penetration with another person; (c) without the consent of such third person; (d) without the consent of the complainant; (e) unlawfulness; and (f) intention.

7.2.3.2 The act

The act consists in the **compelling of a third person without his/her consent** to commit an act of sexual penetration with Y (the complainant) **without Y's consent**. Therefore, X may be convicted as a perpetrator of the crime even if he himself/she herself did **not** perform any actual act of sexual penetration with the complainant, for example if X unlawfully and intentionally compels Z to put his penis in Y's anus without Y (the complainant) and Z's consent, he/she (X) commits the crime of compelled rape.

The new offence of compelled rape changed the common law in terms of which rape was regarded as a crime which could only be committed by X personally, namely with his own body. Under the common law, if X compelled Z to rape Y, X could only be liable as an accomplice to the crime of rape. It was even possible that X could be acquitted as an accomplice if Z (the perpetrator) could not be held liable for lack of criminal capacity or *mens rea*. (See the discussion of the principle of accessoriness in study unit 2 above in 2.2.4 (4).) By enacting a crime of "compelled rape", the unacceptable position has now been addressed.

However, it is doubtful whether it was at all necessary to create this crime. Its provisions coincide with the wide formulation of the crime of rape in section 3. In particular, the words "**any act which causes** penetration" in the definition of "sexual penetration" in section 1(1) are wide enough to include conduct by X whereby he or she compels a third party to perform the sexual penetration. Presumably, section 3 was inserted by the legislature to make sure that compelled sexual penetration is indeed criminalised.

It is not a defence on a charge of compelled rape that there was a marital or any other relationship between the parties (s 56(1)).

7.2.3.3 Unlawfulness

The unlawfulness of the act may conceivably be excluded if X is himself or herself compelled to compel Z to perform the act upon Y.

7.2.3.4 Intention

X must have the intention that Z performs an act of sexual penetration with Y knowing or foreseeing that the consent of Z as well as that of Y is absent; in other

words, *dolus eventualis* is a sufficient form of intention for the crime. If X genuinely believed that Y (the complainant) consented, then he/she lacks intention.

7.2.3.5 Sentence

The sentence for compelled rape is the same as prescribed for rape (see 7.2.2.5 above).

ACTIVITY

As part of his initiation as a member of a gang, Z is instructed to have sexual intercourse with a young woman (Y), whom the gang had taken hostage. Realising that Z was unwilling to do so, the leader (X) points a pistol at him and threatens to kill him if he doesn't obey the instruction. Z proceeds to have intercourse with Y in the gang's presence. Two days later, Y manages to escape and reports her ordeal to the police. The police conduct a raid and successfully capture certain members of the gang, including X and Z. They are both charged with the rape of Y. Their trials are separated. Z successfully raises the defence of necessity and is acquitted on the rape charge. In his defence, X argues that he did not perform any act of sexual penetration with Y, and that, at most, he could only be liable as an accomplice. However, since there is no perpetrator (because Z had been acquitted), he cannot be an accomplice to the crime of rape and thus has to be acquitted. As a state prosecutor, what will be your response to these submissions?

FEEDBACK

You would argue that a person can be convicted as a **perpetrator** on a charge of compelled rape despite the fact that he/she did not perform any actual act of sexual penetration with the complainant. All that is required is evidence that he/she unlawfully and intentionally compelled a third person, without his/her consent, to commit such act of penetration with the complainant, without his/her consent. X unlawfully and intentionally compelled Z, without his consent (any ostensible consent that existed was not "uncoerced" within the meaning of section 1 owing to the threat of harm to his life), to commit an act of sexual penetration with Y, without her consent (likewise, any ostensible consent that existed was not "uncoerced"). It is no defence for him to say that he did not commit the act of sexual penetration himself. Nor is it a defence for him to say that his liability depended on the liability of Z as a perpetrator. He satisfies the definitional elements of the crime himself.

7.3

SEXUAL ASSAULT, COMPELLED SEXUAL ASSAULT AND COMPELLED SELF-SEXUAL ASSAULT

7.3.1 General

(Criminal Law 371–381)

Apart from the two specific offences of rape, the Act repeals the common law crime of **indecent assault** and replaces it with new statutory offences of **sexual assault**, **compelled sexual assault** as well as **compelled self-sexual assault**. These various offences relate to the nonconsensual sexual violation of another person either by the perpetrator himself or herself, or by another person who is

compelled by the perpetrator to perform the prohibited act. The compelled person may also be the complainant himself or herself.

7.3.2 Sexual assault

7.3.2.1 Definition

Section 5(1) of the Act provides that

A person (X) who unlawfully and intentionally **sexually violates** a complainant (Y) without the consent of Y; is guilty of the offence of sexual assault.

Section 5(2) furthermore provides that

A person (X) who unlawfully and intentionally **inspires the belief in a complainant (Y) that Y will be sexually violated;** is guilty of the offence of sexual assault.

The **elements** of the crime are the following:

(a) an act of “sexual violation” of another person; (b) without the consent of the latter person; (c) unlawfulness; and (d) intention; or

(a) the inspiring of a belief in another person that he/she will be sexually violated; (b) unlawfully; and (c) intentionally.

7.3.2.2 The act

The discussion that follows deals first with the **first** way in which the crime can be committed, namely the actual sexual violation.

(a) Definition of “sexual violation”

The purpose of this crime is to criminalise sexual acts which fall short of actual penetration of Y. If there is actual penetration (as the word is defined in the Act), the crime of rape is committed.

“Sexual violation” is broadly defined in section 1 as **including any act which causes**

(a) direct or indirect contact between the

(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;

(ii) mouth of one person and

(aa) the genital organs or anus of another person or, in the case of a female, her breasts;

(bb) the mouth of another person;

(cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could

(aaa) be used in an act of sexual penetration;

- (bbb) cause sexual arousal or stimulation; or
- (ccc) be sexually aroused or stimulated thereby; or
- (dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
- (iii) the mouth of the complainant and the genital organs or anus of an animal;
- (b) the masturbation of one person by another person; or
- (c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person,

but does not include an act of sexual penetration, and “**sexually violates**” has a corresponding meaning.

The word in the definition, namely “includes”, is important. The implication of this word is that the punishable acts included in this crime are not limited to those expressly mentioned in the definition, but that it is possible that other acts, not expressly mentioned in the definition, may also amount to the commission of the crime. However, in the light of the extensive enumeration of acts in the definition, it is unlikely that a court will decide that other acts, not mentioned in the definition, also amount to the commission of the crime.

You are not required to memorise the definition of “sexual violation” set out above. However, you must be able to identify an act which complies with the definition of sexual violation.

(b) Discussion of definition of “sexual violation”

(i) “... any act which causes ...”

As in the statutory crime of rape, the present crime is defined widely so as to include not only the actual act of X whereby he or she for example makes contact with the body of another, but also any act whereby he or she **causes** such contact.

(ii) *The causing of contact instead of the causing of penetration*

At the outset it is important to note that whereas the expression “sexual penetration”, which describes the act in the crime of rape is defined as “any act which causes penetration ...”, the expression “sexual violation”, which describes the act in the crime of sexual assault is defined in terms of “any act which causes ... contact between ...”. Sexual assault, in other words, does not deal with penetration, but with “contact” between two persons.

(iii) *Direct or indirect contact*

The definition speaks of “any act which causes ... direct or indirect contact between ...”. **“Contact” means the physical touching of two parts of the different bodies or of a body and an object. “Indirect contact” refers to such contact through the agency of another person or the use of an instrument, such as a stick.**

In the discussion below, the different types of act included in the definition of “sexual violation” are listed. They are numbered and set out in the sequence in which they are referred to in the definition of “sexual violation”. When reading the different acts listed below, it should be assumed throughout that the acts take place **without Y’s consent**.

The following paragraphs give examples of conduct which may amount to the offence of “sexual violation”. These are included so that you can better

understand the ambit of the offence. **You do not have to learn these examples for examination purposes. However, you may be required, in a problem-type question, to identify acts which comply with the provisions of the section.**

(iv) *The wording of paragraph (a)(i)*

The wording of paragraph (a)(i) of the definition is wide enough to cover the following acts:

1. X (male or female) effects a contact between his or her genital organ and any part of the body of Y (male or female). In this situation it is X's genital organ which touches Y's body.
2. X (male or female) effects a contact between his or her anus and any part of the body of Y (male or female). In this situation, it is X's anus which touches Y's body.
3. Female X effects a contact between her breasts and any part of the body of Y (male or female). In this situation, it is female X who is the active party.
4. X (male or female) effects a physical contact between the genital organs or anus of Y (or the breast(s) of female Y) and any part of the body of an animal.
5. X (male or female), effects a physical contact between the genital organs or anus of Y (male or female) or the breast(s) of female Y and any object, including any object resembling or representing the genital organs or anus of a person or an animal. Thus, if X causes female Y's breasts to touch a piece of furniture, X's act falls within the definition.

(v) *The wording of paragraph (a)(ii) – the use of the mouth*

The wording of paragraph (a)(ii) of the definition is wide enough to cover the following acts:

1. X (male or female) places his or her mouth on female Y's vagina.
2. X (male or female) places his or her mouth on female Y's breast.
3. X (male or female) places his or her mouth **on the mouth of Y**, (male or female). This means that if one person kisses another without the latter's consent, he or she commits the crime of sexual assault.
4. X (male or female) places his or her mouth on "any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could be used in an act of sexual penetration" (par (a)(ii)(cc)(aaa) of the definition of "sexual violation"). Examples of "part(s) of the body of another person ... which could be used in an act of sexual penetration" are a person's fingers or toes. Thus, if X sucks Y's toes (without Y's consent) his or her conduct also falls within the definition of the act constituting the present crime.
5. X (male or female), licks the abdomen of Y (male or female). This act qualifies as long as that part of Y's body which is licked or touched with the mouth is such that the licking or touching "could ... cause sexual arousal or stimulation". (See par (a)(ii)(cc)(bbb)). What is intended in the phrase just quoted is sexual arousal or stimulation **of X, and not of Y**. (Cf the difference in wording between par (a)(ii)(cc)(bbb) and par (a)(ii)(cc)(ccc).) In terms of the last-mentioned paragraph, X, (male or female) performs the same act as that described immediately above, but the licking or touching is in respect of "any other part of (Y's) body ... which could ... be sexually aroused or stimulated thereby". The sexual stimulation referred to here is **not that of X, but of Y (the victim)**.
6. X places Y's mouth against the genital organs or anus of an animal.

(vi) *The wording of paragraph (b) – causing masturbation*

According to paragraph (b) of the definition of "sexual violation", the crime

can also be committed by any act which causes “the masturbation of one person by another person”. An example of such conduct is if X uses his own hands to cause masturbation by Y.

(vii) *The wording of paragraph (c)*

According to paragraph (c) of the definition of “sexual violation”, the crime can also be committed by “the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person”. Examples in this respect are the following:

1. X, who may be either a male or a female, places a plastic representation of a penis into Y’s mouth.
2. X coerces or forces Y to place such a representation of a penis into his or her (Y’s) own mouth.

(viii) *“Subjective indecency” not sufficient*

The wording of the definition of the crime refers to conduct which may be described as “indecent” from an **objective point of view**, that is, viewed from the outside, without having regard to X’s motive or intention.

(c) *Inspiring a belief that sexual violation will take place*

The **second** way in which the crime of sexual assault may be committed is by X inspiring a belief in Y that Y will be sexually violated (s 5(2)). The name of the present crime is “sexual assault”, and from this one may deduce that the legislature intended this crime to be some species of the common law crime of assault. As will be pointed out below in the discussion of that crime, assault can be committed in two ways, namely

- (i) by an act which infringes Y’s bodily integrity – something which usually takes the form of the actual application of force to Y; and
- (ii) by the inspiring of a belief in Y that Y’s bodily integrity is immediately to be infringed.

The legislature obviously wanted a similar principle to apply to the crime of sexual assault. It is submitted that the same principles applying to the form of assault known as the inspiring of a belief that Y’s bodily security is about to be infringed also apply to this way in which sexual assault may be committed (see the discussion in 10.1.7 below).

X may be either a male or a female, and the same applies to Y.

The act of sexual violation must take place **without the consent of the complainant**. See 7.2.2.2c above for a discussion of the meaning of “absence of consent”.

Section 56(1) provides that, whenever an accused person is charged with sexual assault, “it is not a valid defence for that accused person to contend that a marital or other relationship exists or existed between him or her and the complainant”. It is therefore perfectly possible for a husband to commit sexual assault in respect of his own wife.

7.3.2.3 *Unlawfulness*

X may rely on compulsion as a ground of justification excluding unlawfulness.

7.3.2.4 *Intention*

Intention is specifically mentioned in the definition of the crime in section 3 as a

requirement for a conviction. X must know that Y had not consented to the sexual violation. The same principles as those set out above in the discussion of the corresponding element in the crime of rape also apply to the element of intention in this crime.

7.3.3 Compelled sexual assault

7.3.3.1 Definition

Section 6 of the Act provides that a person (X) who unlawfully and intentionally **compels a third person (Z) to commit an act of sexual violation** with a complainant (Y) without his or her consent, is guilty of the offence of compelled sexual assault.

The **elements** of the crime are the following: (a) compelling a third person; (b) to commit an act of sexual violation with another person (the complainant); (c) without the consent of such third person; and (d) without the consent of the complainant; (e) unlawfulness; and (f) intention.

7.3.3.2 The act

A typical example of the commission of this crime is where X tells Z that he will kill him if he does not commit some act of sexual violation in respect of Y, where it is impossible for Z to escape his dilemma and where Z ends up by yielding to the pressure and performs the deed.

The definition of the expression “sexual violation” and “without the consent of either the third party or the complainant” has already been quoted and discussed in detail above in the discussion of the corresponding element in the crime of sexual assault.

Section 56(1) provides that, whenever an accused person is charged with this crime, “it is not a valid defence for that accused person to contend that a marital or other relationship exists or existed between him or her and the complainant”.

7.3.3.3 Unlawfulness

The unlawfulness of the act may conceivably be excluded if X is himself or herself compelled to compel Z to perform the act upon Y.

7.3.3.4 Intention

The contents of this element have already been set out above in the discussion of the corresponding element in the crime of rape.

7.3.4 Compelled self-sexual assault

7.3.4.1 Definition

Section 7 of the Act provides that a person (X) who unlawfully and intentionally compels a complainant (Y) without Y’s consent to –

- (a) engage in
 - (i) masturbation;

- (ii) any form of arousal or stimulation of a sexual nature of the female breasts; or
 - (iii) sexually suggestive or lewd acts
- with Y himself or herself;
- (b) engage in any act which has or may have the effect of sexually arousing or degrading Y; or
 - (c) cause Y to penetrate in any manner whatsoever her own genital organs or his or her anus,
- is guilty of the offence of compelled self-sexual assault.

The **elements** of this crime are the following: (a) the compelling of somebody else; (b) to engage in the conduct set out in the definition; (c) without the consent of the other person; (d) unlawfulness; and (e) intention.

Note that the crime created in section 7 deals with situations in which there are only **two** persons, namely **the perpetrator (X)** and **the victim (Y)**. X compels Y to perform the “indecent” act upon Y himself or herself.

7.3.4.2 *The act*

A typical example of conduct punishable under this section is where X tells Y that he will kill him or her if, for example, he or she does not self-masturbate, where it is impossible for Y to escape his or her dilemma and where Y ends up yielding to the pressure and performs the deed.

The act described in paragraph (c) refers to situations where Y is forced to penetrate himself or herself, such as to insert his or her finger into his or her own anus or her vagina.

The requirement of “absence of consent” is the same as for the crime of rape. It has already been discussed in detail above in the discussion of the corresponding element of the crime of rape. Section 56(1) provides that, whenever an accused person is charged with this crime, “it is not a valid defence for that accused person to contend that a marital or other relationship exists or existed between him or her and the complainant”.

7.3.4.3 *Unlawfulness*

The unlawfulness may conceivably be excluded if X is himself or herself compelled to compel Y to perform the act.

7.3.4.4 *Intention*

The contents of this element have already been set out above in the discussion of the corresponding element in the crime of rape.

7.4

SEXUAL OFFENCES AGAINST PERSONS 18 YEARS OR OLDER

7.4.1 **General**

The Act creates various offences which may be committed in respect of **persons**

18 years or older. These offences are not discussed in detail. A brief summary of the punishable acts follows:

- (i) The unlawful and intentional **compelling** of a person 18 years or older **without his/her consent to witness sexual offences, sexual acts with another or self-masturbation** (s 8(1)–(3)). It is irrelevant whether the act is performed for the sexual gratification of the perpetrator (X) or for a third person (Z). The word “sexual act” is defined as either sexual penetration or sexual violation (s 1–(1)).
- (ii) The unlawful and intentional **exposure or display** (or causing of exposure or display) **of the genital organs, the anus or female breasts of X or Z** to a person 18 years or older **without his/her consent** (s 9). It is irrelevant whether the act is performed for the sexual gratification of the perpetrator (X) or for a third person (Z). This offence is generally referred to as “**flashing**”.
- (iii) The unlawful and intentional **exposure or display** (or causing of exposure or display) of persons 18 years or older to **child pornography**. It is irrelevant whether the act is performed for the sexual gratification of the perpetrator (X) or for a third person (Z). **Of importance is that the crime is committed even if Y consented to the exposure of display of the child pornography to himself or herself** (s 10).
- (iv) The **engagement** of persons 18 years or older in **sexual services** for financial or other reward, favour or compensation to Y or a third person (Z) (s 11). For X to be convicted of this offence the act must be performed
 - (a) **for the purpose of engaging in a sexual act with Y** (irrespective of whether the sexual act is in actual fact committed or not) (s 11(a)); or
 - (b) **by committing a sexual act with Y** (s 11(b)).

Note that the conduct of X is punishable even if Y consented to the act. Therefore, a person who engages the services of a prostitute (18 years or older, male or female) may be convicted of this offence. The section does not expressly criminalise the activity of Y, the prostitute. However, if it is clear that Y’s conduct furthers or promotes the criminal activity of X, Y may be convicted of being **an accomplice** to the crime committed by X (see 2.2 for liability of an accomplice).

7.5 INCEST

(Criminal Law 387–390)

7.5.1 Definition

Section 12 (1) provides:

Persons who may not lawfully marry each other on account of consanguinity, affinity or an adoptive relationship and who unlawfully and intentionally engage in an act of sexual penetration with each other; are, despite their mutual consent to engage in such act, guilty of the offence of incest.

The expressions “consanguinity”, “affinity” and “adoptive relationship” are further circumscribed in subsection (2). These definitions are discussed in 7.5.2.

The **elements** of the crime are the following: (a) an act of sexual penetration; (b) between two people who may not lawfully marry each other on account of consanguinity, affinity or an adoptive relationship; (c) unlawfulness; and (d) intention.

7.5.2 The act

The expression “sexual penetration” is defined in section 1(1) and has already been quoted and discussed in some detail above in the discussion of rape (see 7.2.2.2). The crime is committed if the **sexual penetration takes places between people who may not lawfully marry each other on account of consanguinity, affinity or an adoptive relationship.**

Section 12(2) reads as follows:

- (2) For the purposes of subsection (1)
 - (a) the prohibited degrees of consanguinity (blood relationship) are the following:
 - (i) Ascendants and descendants in the direct line; or
 - (ii) collaterals, if either of them is related to their common ancestor in the first degree of descent;
 - (b) the prohibited degrees of affinity are relations by marriage in the ascending and descending line; and
 - (c) an adoptive relationship is the relationship of adoption as provided for in any other law.”

The Act does not spell out in detail what is meant by consanguinity, affinity and adoptive relationship for the purposes of incest. The courts will probably consult previous authoritative case law in this regard. These cases are discussed in Snyman (387–390). You are advised to read these parts in Snyman in order to get more clarity on the circumstances in which such relationships indeed exist. **It is not expected of you to study this section in Snyman for examination purposes.**

7.5.3 Unlawfulness

The sexual penetration must be unlawful, for example not committed under duress. Consent by the other party is no defence; where both parties have consented, both parties are in fact guilty of the crime.

7.5.4 Intention

Intention is an element of the crime. The parties must not only intend to have sexual intercourse with each other, but they must also be aware of the fact that they are related to each other within the prohibited degrees of consanguinity, affinity or adoptive relationship.

7.6

BESTIALITY

(Criminal Law 390–391)

7.6.1 Definition

A person who unlawfully and intentionally commits an act

- (a) which causes penetration to any extent whatsoever by the genital organs of –
 - (i) X into or beyond the mouth, genital organs or anus of an animal; or
 - (ii) an animal into or beyond the mouth, genital organs or anus of X; or

(b) of masturbation of an animal, unless such act is committed for scientific reasons or breeding purposes, or of masturbation with an animal, is guilty of the offence of bestiality (s 13).

The **elements** of the crime are the following: (a) causing penetration of the genital organs of X into genital organs, etcetera, of an animal or vice versa, or committing an act of masturbation of or with an animal; (b) unlawfulness; and (c) intention.

You are not required to know this crime in detail. You only have to know the definition of this crime and take note that the court in *M 2004 (1) SACR 228 (O)* held that the existence of such a crime is not unconstitutional. The decision of the court is discussed by Snyman on page 391. **You are required to study the discussion by Snyman of this case for examination purposes.**

7.7

SEXUAL OFFENCES AGAINST CHILDREN

7.7.1 General

(Criminal Law 392–398)

Chapter 3 of the Act, comprising sections 15 to 22, deals with sexual offences against children. Perhaps the most important of these crimes is the first one, namely **sexual penetration of children below the age of 16 years even with their consent**. Some of the other crimes will be discussed in outline only.

7.7.2 Consensual sexual penetration of children

7.7.2.1 Definition

A person (X) who commits an act of sexual penetration with a child (Y) is, **despite the consent of Y** to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child (s 15). The word “child” in the definition is defined in section 1(1) as “**a person 12 years or older but under the age of 16 years**”.

The **elements** of this crime are the following: (a) the commission of an act of sexual penetration; (b) with a person between the ages of 12 and 16 years of age; (c) unlawfulness; and (d) intention.

This crime is usually referred to as “statutory rape”. If X commits an act of sexual penetration with a child below the age of 12, he or she will be guilty of this crime, because any ostensible “consent” by such a young child is regarded by the law as invalid. Sexual penetration of a child between the ages of 12 and 16 is criminalised, because such a child is not yet mature enough to properly appreciate the implications and consequences of sexual acts, especially sexual penetration of a female by a male. They should therefore be specially protected. **Consent by the child to the commission of the act is no defence.** If the act takes place without any consent by the child, X commits the more serious crime of rape.

7.7.2.2 The act

The child must be **between the ages of 12 and 16 years** of age at the time of the commission of the act. The definition of the crime in subsection (1) does not require X to be above a certain age. However, subsection (2) provides that if X is also a child (a person 12 years or older, but under the age of 16 years), the

institution of a prosecution must be authorised in writing by the national director of public prosecutions. What is more, both X and Y must then be prosecuted. The reason for this is that it is difficult to decide whether a prosecution is feasible if, say, both parties were 14 years of age at the time. Such cases occur regularly. A prosecution may sometimes cause more harm than good, and some form of educational treatment by, for example, the welfare authorities may prove to be more beneficial than the institution of criminal proceedings.

The conduct punishable under the section presently under discussion is “**sexual penetration**” as defined in the Act (s 1). For examples of sexual penetration, see again the discussion of the act required for rape in 7.2.2.2 above.

There are, however, **two defences** which X may rely on when charged with this crime (s 56(2)).

- *First defence: Y deceived X about his or her age*

According to section 56(2)(a), it is a valid defence for somebody charged with this crime to contend that the child (Y) deceived X into believing that he or she was 16 years or older at the time of the alleged commission of the crime, and that X **reasonably believed** that Y was 16 years or older. However, this provision does not apply if X is related to Y within the prohibited degrees of blood, affinity or an adoptive relationship as set out in the definition of incest.

It is submitted that the prosecution bears the onus of proving that X was not deceived into believing that Y was 16 years or older, but that there is an evidential onus on X to raise the defence and lay a factual foundation for the existence of the belief.

- *Second defence: X and Y both children*

According to section 56(2)(b), it is a valid defence for somebody charged with this crime to contend that both X and Y were “children” (between the ages of 12 and 16 years) **and** the age difference between them was not more than two years at the time of the alleged commission of the crime. Thus if X was 15 years old at the time of the act, he/she will have a valid defence if Y was 13 years old at that time, but not if Y was 12 years old at that time.

7.7.2.3 *Unlawfulness*

The act must be unlawful. Compulsion may conceivably exclude the unlawfulness. The unlawfulness can furthermore be excluded by official capacity, as where a medical doctor who examines the child places his or her finger in the child’s vagina, anus or mouth.

7.7.2.4 *Negligence a sufficient form of culpability*

Whereas intention is specifically mentioned as a requirement for a conviction in most of the crimes created in the Act, it is not mentioned as a requirement for a conviction of the present crime.

It often happens that X bona fide believes female Y to be at least 16 years of age, whereas she is in fact just below the age of 16 at the time of the commission of the act. In terms of section 56(2)(a), X can, however, not rely on the defence that he has made a mistake as regards Y’s age. The section provides that X’s belief that Y was already 16 years old, must be **reasonable**. The use of the word “reasonable” brings an **objective element** into the inquiry, which means that X can be held liable if the reasonable person would have realised that Y was not yet 16 years old. In other words, X may be found guilty of the crime if the state proves only **negligence**.

ACTIVITY

Y is a 14-year-old female and a grade 10 student at a high school in Johannesburg. She and her high school friends decide to go to a house party whose host is a 19-year-old male (X) in his first year at university. X is a close friend of some of Y's friends. These friends introduce Y to X, who immediately develops an interest in her. At his request, Y's friends arrange for X and Y to be together for a moment. Y's friends have always been putting pressure on Y to get a boyfriend and to stop being "old-fashioned" about commitment and sex. After a while, X takes Y to his bedroom and the two have consensual sex. After some months, Y is told by her doctor that she is pregnant, and this news comes to the attention of her parents. Not wanting to lose respect in the eyes of their neighbours (because the family is known to be devoutly religious), they put pressure on Y to lay a charge against X. X is charged with a contravention of section 15 of the Sexual Offences Act 2007. X raises the defence that Y deceived him into believing that she was 16 years old at the time when the offence was committed. Consider the merits of his defence.

FEEDBACK

Section 56(2)(a) of the Sexual Offences Act 2007 provides that an accused on such a charge is entitled to contend that a child (a person who is 12 years or older, but under 16 years of age) deceived him into believing that she was 16 years or older at the time of the alleged commission of the offence. In order for this contention to be a valid defence, the accused must have **reasonably believed** that the child was 16 years or older at the relevant time. This means that it is not enough that the accused subjectively believed that the complainant was 16 years or older (lack of intention is insufficient). His belief must be one that would be shared by the reasonable person in his position. In other words, the state must prove beyond reasonable doubt that a reasonable person would have realised that Y was not yet 16 years old. What would count against X in this matter is the fact that he was close to some of Y's friends, who are high school students themselves. A reasonable person in his position would have sought more information about Y from her friends before deciding to have sexual intercourse with her.

7.7.3 Consensual sexual violation of children

You are not required to know the exact provisions of section 16. The only difference between this crime and that of consensual sexual penetration of children in contravention of section 15 discussed immediately above is that, whereas the latter crime relates to situations where a child between the ages of 12 and 16 years was sexually penetrated, in the present crime such a child **is not sexually penetrated, but only sexually violated**.

The two special defences created in section 56, and which have already been quoted and discussed, also apply to this crime. The same remarks apply to the elements of unlawfulness and intention, as well as to the consent of the national director of public prosecutions which must be obtained if X is below the age of 16 years. As in the other crime, X may be either male or female, and the same applies to Y.

7.7.4 Sexual exploitation of children under the age of 18 years

7.7.4.1 Definition

Section 17 creates a number of crimes relating to the **sexual exploitation** of children. What follows is only a summary of the section's provisions. **The word "child", as used in the section, means a person under the age of 18 years.**

(a) *Sexual exploitation of a child*

In essence, section 17(1) provides that any person who engages the services of a child (**with or without his or her consent**) for sexual favours, for any type of reward, irrespective of whether the sexual act is committed or not, is guilty of the crime of sexual exploitation of a child. For example, X commits the crime if he obtains the services of Y for sex for reward, even if Y is a consenting 17-year-old person.

(b) *Involvement in the sexual exploitation of a child*

Subsection (2) provides that a person (X) who offers the services of a child complainant (Y) to a third party (Z), **with or without the consent of Y**, for financial or other reward, for purposes of the commission of a sexual act with Y by Z, or by detaining Y by threats for purposes of the commission of a sexual act, is guilty of the crime of being involved in the sexual exploitation of a child.

(c) *Furthering the sexual exploitation of a child*

According to subsection (3), any person who allows or permits the commission of a sexual act by Z with a child Y, **with or without the consent of Y**, or permits property which he or she (X) owns to be used for the commission of a sexual act with a child Y, is guilty of furthering the sexual exploitation of a child.

(d) *Benefiting from sexual exploitation of a child*

Subsection (4) provides that a person, who intentionally receives financial or other reward from the commission of a sexual act with a child complainant by a third party, is guilty of benefiting from the sexual exploitation of a child.

(e) *Living from the earnings of sexual exploitation of a child*

According to subsection (5), a person who intentionally lives wholly or in part on rewards or compensation for the commission of a sexual act with a child (Y) by the third person (Z), is guilty of living from the earnings of the sexual exploitation of a child.

(f) *Promoting child sex tours*

According to subsection (6), a person who organises any travel arrangements for a third person (Z) with the intention of facilitating the commission of any sexual act with a child (Y), or who prints or publishes information intended to promote such conduct, is guilty of promoting child sex tours.

7.7.5 Sexual grooming of children under the age of 18 years

Section 18 criminalises a long list of acts which all amount to requesting, influencing, inviting, persuading, encouraging or enticing a child (Y), that is, a **person under the age of 18 years**, to indulge in a sexual act or to diminishing his or her resistance to the performance of such acts. **It is irrelevant whether the child consented to the act.**

In terms of section 18(2), a person commits the crime of **sexual grooming** of a child if he/she, among other things, performs any of the following acts:

- display of **an article to Y intended to be used in the performance of a sexual act**, or the display of pornography or a publication or film which is intended to encourage the child to commit a sexual act
- commission of any act with or in the presence of Y with the intention to **encourage the child** to commit a sexual act with him/her or a third person or **to reduce unwillingness on the part of Y to perform such act.**

Further acts which amount to the offence are specifically aimed at the prevention of grooming of a child over the internet. Punishable acts are the following:

- to arrange a meeting with the child (in any part of the world) in order to commit a sexual act with the child
- to invite the child to travel to meet X in order to commit a sexual act with the child

7.7.6 Displaying of pornography to children, the use of children for child pornography and the benefiting from child pornography

The following crimes which may be committed in respect of children **younger than 18 years old** are discussed only briefly.

Section 19 prohibits a person from unlawfully and intentionally exposing or displaying child pornography to persons younger than 18 years. (Section 1(1) sets out what is understood in terms of “pornography” or “child pornography”. You are not required to know the provisions of this section.)

Section 20 creates the crime of using a child for, or benefiting from, child pornography. The section targets different roleplayers that are actively involved in obtaining children and using them in order to create child pornography.

It does not matter whether Y consents to the act or not, or receives any benefit or reward from such proposed conduct. Subsection (2) is aimed at punishing all roleplayers who benefit in any manner from their involvement in child pornography.

7.7.7 Compelling children to witness sexual crimes, sexual acts or self-masturbation

Section 21 creates an offence similar to the offence in s 8 (“Sexual offences against person 18 years or older”) discussed in 7.4.1 above. The offence, however, applies to children under the age of 18 years old.

7.7.8 Exposing or display of genital organs, anus or female breasts to children (“flashing”)

The offence is the same as the offence in respect of adults (see the discussion of s 9 in 7.4.1), except for **one important difference**. In respect of adults, the act must be performed **without** the consent of the victim. In respect of children, the offence is committed **even if the child consented**. In other words, the offence is committed **with or without the consent of the child**.

7.8 SEXUAL OFFENCES AGAINST MENTALLY DISABLED PERSONS

7.8.1 General

(Criminal Law 398–400)

Mentally disabled persons constitute a group of persons who are particularly vulnerable to sexual exploitation. Consequently, mentally disabled people need particular protection by the law.

7.8.2 Definition

Chapter 4 of the Act, comprising sections 23 to 26, deals with sexual offences against persons who are mentally disabled. The expression “**person who is mentally disabled**” is defined as follows in section 1(1):

a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act.

The offences created in respect of mentally disabled persons are similar to the offences created in respect of children (see the discussion of sections 17 to 20 in 7.7.4–7.7.6 above). Therefore, they are not discussed here again.

7.9 FAILURE TO REPORT SEXUAL OFFENCES AGAINST CHILDREN AND MENTALLY DISABLED PERSONS

Section 54(1) provides that any person who has **knowledge** that a sexual offence has been committed against a child, must report such knowledge immediately to a police official. Section 54 (2) provides that a person who fails to report such knowledge is guilty of an offence. Section 54(2) places a similar obligation on any person to report **knowledge, reasonable belief or suspicion** that a sexual offence has been committed against a person who is **mentally disabled**. Failure to comply with these obligations amounts to an offence.

7.10 TRAFFICKING IN PERSONS FOR SEXUAL PURPOSES

The Act also provides that a person who traffics in any person (Y) for sexual purposes without that person's consent is guilty of the offence of trafficking in persons for sexual purposes (s 71(1)). The mere encouraging, incitement, instigation and other preparatory actions amount to the offence of involvement in trafficking in persons for sexual purposes (s 71(2)).

7.11 ATTEMPT, CONSPIRACY AND INCITEMENT

Section 55 provides that any person who is involved in the commission of a sexual offence by way of attempt, conspiracy, aiding or abetting, inducement, incitement, instigation, instruction, commanding, counselling or procurement is also guilty of an offence.

SUMMARY

General

- (1) The Sexual Offences Act 32 of 2007 amends all aspects of the laws relating to sexual offences and addresses them in a single statute by, among others, repealing the common law offence of rape and replacing it with two new statutory offences of rape and compelled rape. The Act also repeals the common law offence of indecent assault and replaces it with a statutory offence of sexual assault.
- (2) The definitions of the statutory offences of rape are **gender-neutral**. The statute targets all forms of **sexual penetration** committed without consent, irrespective of gender.
- (3) "Sexual penetration" is defined broadly in section 1 in the Act and includes "any act which causes penetration".
- (4) Consent is defined in section 1 of the Act as "voluntary or uncoerced agreement". A list of circumstances in respect of which Y does not voluntarily or without coercion agree to an act of sexual penetration is provided in the Act.
- (5) Absence of consent is a **definitional element** of most of the offences in the Act. The interpretation of this element is determined by the definition of "consent" in section 1 of the Act.

Rape

- (6) Definition of rape (s 3).
- (7) Definition of "sexual penetration" (s 1).
- (8) Definition of "absence of consent" (s 1(2) and (3)).
- (9) Sentence that may be imposed for rape.

Compelled Rape

- (10) Definition of compelled rape (s 4).

(11) X may be convicted as a perpetrator of this crime even if he/she did not perform any act of sexual penetration with his or her own body with the complainant. Furthermore, his/her liability is not dependent on the existence of a perpetrator (it is not accessory in character).

(12) Sentence that may be imposed for compelled rape.

Sexual assault

(13) Definition of sexual assault (s 5(1)).

(14) Definition of sexual violation (s 1).

(15) The act required for the offence of sexual assault includes the inspiring of a belief in the complainant that he/she will be sexually assaulted (s 5(2)).

Compelled sexual assault

(16) Definition of compelled sexual assault (s 6).

Compelled self-sexual assault

(17) Definition of compelled self-sexual assault (s 7).

Sexual offences in respect of person 18 years or older

Compelling another to witness sexual crimes or sexual acts

(18) Definition (s 8). Included in these offences are the compelling or causing of a **person 18 years or older without his/her consent**, to witness sexual offences, sexual acts or self-masturbation.

“Flashing”

(19) Definition (s 9). The crime is committed **without the consent of the victim**.

Displaying child pornography

(20) Definition (s 10). The crime is committed **irrespective of whether Y consents to the displaying or not**.

Engaging sexual services for reward

(21) Definition (s 11). Both parties consent to the act. Meaning of “engaging” – no actual sexual act required.

Incest

(22) Definition (s 12).

Bestiality

(23) Definition (s 13).

(24) Such crime held to be constitutional (Case of *M*).

Sexual offences against children

Consensual sexual penetration of children 12 years and older but under the age of 16 years

(25) Definition (s 15).

(26) These crimes are committed regardless of the consent of the child concerned.

(27) Section 56(2)(a) provides that an accused person charged with either one of these offences may contend that the child deceived him/her into believing that he/she was 16 years old, or older, at the time when the offence was committed. To be a valid defence, the accused's belief must have been **reasonable**, namely one shared by a reasonable person in his or her position. Section 56(2)(b) provides a defence if both parties were children.

Consensual sexual violation of children

(28) Section 16. The crime is committed irrespective of whether the child consented. Same defences as above are applicable.

Sexual exploitation of children under the age of 18 years

(29) Offence that is widely defined, and includes acts of **involvement** in sexual exploitation; **furthering** of sexual exploitation; benefiting from sexual exploitation; **living** from the earnings of sexual exploitation; and **promoting** child sex tours (s 17).

Sexual grooming of children under the age of 18 years

(30) An offence comprising a number of subcrimes (s 18): acts of **promoting or facilitating** the grooming of a child; and acts amounting to **active grooming** of children. Further acts which amount to the offence are, *inter alia*, aimed at **preventing the grooming of a child over the internet**.

Display of child pornography to children under 18 years, the use of children for child pornography, or benefiting from child pornography (s 19 and s 20)

Compelling children under 18 to witness sexual acts (s 21)

"Flashing" (s 22) to children under the age of 18 years

(31) The offences (sections 17 to 22) are committed irrespective of whether the child consented to the act.

Sexual offences against mentally disabled persons

(32) Definition of a mentally disabled person (s 1).

Failure to report sexual offences against children and mentally disabled persons (s 54(1) and (2)).

Trafficking in persons for sexual purposes (s 71)

TEST YOURSELF

- (1) Discuss the changes that have been brought about by the *Sexual Offences Act 2007*, relating to the common-law crime of rape.
- (2) Discuss the statutory crime of rape.
- (3) Discuss the statutory crime of compelled rape.
- (4) Discuss in detail the meaning of the requirement of “consent” in terms of the Act.
- (5) Discuss the minimum sentences that may be imposed for the crime of rape and compelled rape.
- (6) Can a person who did not perform an act of sexual penetration with the complainant with his/her own body be convicted as a perpetrator on a charge of compelled rape?
- (7) Name four prohibited types of conduct which constitute “acts of sexual penetration”.
- (8) Define the crime of sexual assault.
- (9) Define the crime of compelled sexual assault.
- (10) Give examples of conduct which amounts to “sexual violation”.
- (11) Explain the differences between the concepts “sexual penetration” and “sexual violation”.
- (12) Define the crime of compelled sexual assault and compelled self-sexual assault.
- (13) Discuss the elements of the crimes of “compelled sexual assault” and “compelled self-sexual assault”.
- (14) Define the crime of “engaging sexual services for reward”.
- (15) Define the crime known as “flashing” in respect of adults.
- (16) Define the crime of incest.
- (17) Name the three prohibited degrees of relationship through which the crime of incest can be committed.
- (18) Consider whether the crime of bestiality can be regarded as constitutional.
- (19) Discuss the crime of consensual sexual penetration of children.
- (20) Discuss the crime of consensual sexual violation of children.
- (21) Discuss the two defences that an accused may rely on if charged with any of the offences mentioned in (19) and (20).
- (22) Name five ways in which the crime of sexual exploitation of children can be committed.
- (23) Briefly discuss the crime of sexual grooming of children.
- (24) Briefly discuss the crime known as “flashing” in respect of children.
- (25) Discuss the sexual offences that may be committed against mentally disabled people.
- (26) Discuss whether a person who fails to report knowledge of the commission of a sexual offence against a child or a mentally disabled person may be held criminally liable.
- (27) Discuss the offence of trafficking in persons for sexual purposes.

STUDY UNIT **8****Bigamy and
abduction****Contents**

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LEARNING OUTCOMES

- When you have finished this study unit, you should be able to
- demonstrate your understanding of the principles relating to certain crimes against family life by considering the possible liability of an accused for the crimes of bigamy and common-law abduction

8.1 BACKGROUND

In this section, we discuss bigamy and abduction. These two crimes are related to the protection of family life.

8.2 BIGAMY

You must study the discussion of this offence in *Criminal Law* (401–403) on your own.

The elements of this crime are the following:

- (1) purporting to be a **party to a marriage ceremony** which would bring about a valid marriage between that party and someone else
- (2) the perpetrator must **already be married**
- (3) **unlawfulness**
- (4) **intention**

Read the discussion on the definition of the offence in footnote 1 on page 401 of *Criminal Law*.

8.3 ABDUCTION

(Criminal Law 403–407)

In our law, abduction is regulated only by common law.

8.3.1 Definition

A person commits abduction if he or she unlawfully and intentionally removes an unmarried minor from the control of his or her parents or guardian, without their consent, intending that he or she, or somebody else, may marry or have sexual intercourse with the minor.

8.3.2 Origin and character of the crime

The crime of abduction dates from a period in history when women – especially minors – played a very subordinate role in society. Their parents or guardians exercised considerable authority over them. They had little freedom of movement, and were often regarded as economic assets of their parents. The purpose of the crime was to prevent outsiders from removing the minor from the authority of the parents and from depriving the parents of their rights – economic and otherwise – over the minor. In particular, the crime protected the parents' right to consent to their daughter's marriage. The scope of the crime was later extended to protect parents' rights in respect of their sons as well.

Nowadays, minors are, of course, more independent of parental authority. Nevertheless, the crime still exists and protects the rights of parents to consent to the marriage of their minor children, as well as to exercise control over where they stay. Although the importance of the crime has diminished, it still serves a purpose, especially in so far as it punishes unscrupulous persons who entice

minors to leave their parental homes in order to make them available for the purposes of engaging in indiscriminate sex (often with the minor's consent and for remuneration).

8.3.3 Elements of the crime

The elements of the crime are the following:

- (1) the **removal**
- (2) of an **unmarried minor**
- (3) **from the control of his or her parents or guardian**
- (4) **with the intention to marry or have sexual intercourse with the minor**
- (5) **without the consent of the parents or guardian**
- (6) **unlawfulness**
- (7) **intention**

8.3.4 Removal

The perpetrator (X) must remove the minor (Y) from one place to another. X may be either a male or a female. In the vast majority of reported cases, X is a male and Y (the minor) a female. This is the reason why, in the discussion which follows, the masculine form will be used to refer to the wrongdoer (X) and the feminine form to refer to Y. The removal need not be forcible – in fact, in almost all cases of abduction Y consents to the removal. It is not required that X should himself effect the removal or be present at the time of removal. It is sufficient if X and Y arrange to meet at a place away from the house of the parents (*Nel* 1923 EDL 82; *Jorgenson* 1935 EDL 219).

8.3.5 Person removed must be an unmarried minor

The person who is removed (Y) must be unmarried and a minor, and may be either male or female. (In practice, Y is usually a female.)

8.3.6 There must be a removal from the control of the parents or guardian

Y must be removed from the control of his or her parents or guardian. The legal interest protected by this crime is the authority of the parents or guardian over the minor. Abduction is committed against them, and not against the minor, because, as will be pointed out later, Y's consent to the removal does not afford X a defence.

It is possible that the parents no longer exercise any authority or control over Y, for example where Y has left the parental home to go and live and work elsewhere, and the parents no longer even know where Y finds herself and no longer even care what she does. If this is the case, X does not commit abduction if he takes Y from where she happens to be staying to another place – *Bezuidenhout* 1971 (4) SA 32 (T). Although, in such a case, the parents de jure (legally) still have the right to refuse consent to Y's marriage, de facto (in actual fact) they no longer exercise any authority over Y.

8.3.7 Intention to marry or have sexual intercourse with the minor

The crime is only committed if X removes Y with a certain aim in mind. This aim

must be that somebody (usually X himself) either marries Y or has sexual intercourse with her. For the crime to be complete, it is not required that the marriage or sexual intercourse should actually have taken place. All that is required is an intention on the part of X to achieve one of these aims.

The mere temporary removal of a girl from her home in order to have sexual intercourse with her is not yet abduction. X must intend to remove Y from her home either permanently or for a substantial period. If a man wishes to have sexual intercourse with a girl, but it is impractical for him to do so at her parents' home where she lives, and the couple then drive to another place for the purpose of sexual intercourse, whereafter he immediately brings her back to her home, he does not commit abduction. Such conduct may amount to seduction, but mere seduction is not the same as abduction. (Seduction does not even constitute a crime.) In order to distinguish between seduction and abduction, the removal must last at least a substantial period – *L* 1981 (1) SA 499 (B). In *Ismail* 1943 CPD 418, it was held that a period of 24 hours was sufficient, and, in *Killian* 1977 (2) SA 31 (C), a period of only eight hours was regarded as sufficient.

The intention to marry Y or have sexual intercourse with her must exist at the time of the removal. If the removal is for an innocent purpose, and X only decides thereafter to have sexual intercourse, the crime is not committed – *Sashi* 1976 (2) SA 446 (N).

It is important to note that the crime is also committed if it is X's intention that **someone other** than himself/herself should marry Y or have sexual intercourse with him/her (*Adams* 1911 CPD 863). This draws attention to an important and sinister aspect of the crime, namely the situation where unscrupulous persons entice minors to leave their homes in order to engage in indiscriminate sex with strangers (often for remuneration payable to the minor).

8.3.8 Without the consent of the parents or guardian

The removal must take place without the consent of the parents or guardian. Whether or not Y has consented to the removal, is immaterial. In practice, Y most often consents to her removal, yet the crime is committed even if she does not consent. If Y does not consent, then, apart from abduction, X can also be guilty of the more serious crime of kidnapping – a crime which (in cases in which the victim is no longer a child) is only committed if the victim does not consent to his or her removal.

What must be lacking is the consent of the parents or guardian to both the removal and the purpose of the removal.

8.3.9 Unlawfulness

There must be no ground of justification for X's conduct. The removal may conceivably be justified by necessity, for example where X acts under compulsion.

8.3.10 Intention

The form of culpability in this crime is intention. In terms of the general principles relating to intention, X's intention must relate to all the elements of the crime. X must therefore know that Y is an unmarried minor (*Churchill* 1959 (2) SA 575 (A)) and that Y's parents have not consented to the removal (*Sita* 1954 (4) SA 20 (C) 23).

ACTIVITY

X, a 40-year-old female, entices Y, a 12-year-old girl, to leave her home and work as a prostitute for X and her husband. Y leaves her home voluntarily, but without her parents' consent. What crime does X commit?

FEEDBACK

X commits either statutory or common-law abduction.

SUMMARY**Bigamy**

- (1) Definition of bigamy – see definition in *Criminal Law* (401).
- (2) Proof of sexual intercourse is not required for a conviction of bigamy. What is required are the four requirements or elements of the crime set out above.

Abduction

- (3) Seven different elements can be identified in the crime of abduction. They were all mentioned above and, thereafter, each of them was explained.

TEST YOURSELF

- (1) Define bigamy.
- (2) Write short notes on the following requirements for a conviction of bigamy:
 - (a) that the perpetrator was already married
 - (b) that there should have been a second “marriage ceremony”
 - (c) that the perpetrator’s conduct was unlawful
 - (d) that the perpetrator acted intentionally
- (3) Define abduction.
- (4) Write short notes on the following requirements for a conviction of abduction:
 - (a) that the minor was “removed” from the control of the parents or guardian
 - (b) with what intention the removal must take place

Crimes against the person



STUDY UNIT 9

Crimes against life and potential life



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to demonstrate your understanding of the requirements for certain crimes against life and potential life by

- considering the possible liability of an accused for the crimes of murder and culpable homicide
- considering the possible punishment to be imposed for murder

9.1 BACKGROUND

In this section, we will discuss crimes against life and potential life. The two crimes which will be discussed in this study unit are murder and culpable homicide.

9.2 MURDER

9.2.1 General

You must study the discussion of this crime in *Criminal Law* (447–451) on your own.

The elements of this crime are

- (1) the **causing** of the death
- (2) of **another person**
- (3) **unlawfully**
- (4) **intentionally**

Elements (1), (3) and (4) are not discussed in detail in *Criminal Law*, since the concepts “causation”, “unlawfulness” and “intention” have been dealt with in detail in the discussion of the general principles of criminal law, both in your study guide and in *Criminal Law*. The only new element which has not yet been discussed, and to which you should pay particular attention, is the requirement that “another person” must be killed (and, more particularly, that the object of this crime must be a **living** human being).



Read the following judgment in the *Case Book: Mshumpa* 2008 (1) SA 126 (E).

This interesting case deals mainly with the requirement that the victim of the crime of murder must be a **living human being**. However, it is also a good illustration of the application of the principles of participation in the crimes of attempted murder, robbery and assault. Other crimes that featured in this judgment are incitement to commit attempted murder and the crime of defeating or obstructing the course of justice.

9.2.2 The punishment for murder

Imprisonment the only type of sentence

In *Makwanyane* 1995 (2) SACR 1 (CC) the Constitutional Court held that the death sentence for murder is unconstitutional, because it amounts to an unjustifiable violation of, inter alia, the right to life, the right to dignity and the right not to be subjected to cruel, inhuman or degrading punishment. Neither may a court order corporal punishment to be imposed upon X. This follows from the decision of the Constitutional Court in *Williams* 1995 (2) SACR 251 (CC). Since the imposition of a fine for murder is not normally an appropriate punishment for the crime, the **only type of sentence which remains is imprisonment**.

9.2.3 Imprisonment for life must sometimes be imposed

As far as the period of imprisonment which must be imposed upon a conviction of murder is concerned, before 1997 the courts used to have a free discretion. However, section 51 of the Criminal Law Amendment Act 105 of 1997 now

provides for certain **mandatory minimum periods of imprisonment** to be imposed by a court upon convicting X of murder. The reason for the creation of these mandatory minimum periods of imprisonment is an attempt by the legislature to combat murder more effectively by **detering would-be murderers**, and perhaps also by exacting more suitable **retribution** for the commission of this crime (*Montgomery* 2000 (2) SACR 318 (N) 332*h-i*). In *Dodo* 2001 (1) SACR 594 (CC), the Constitutional Court rejected the contention that the provisions of section 51 are unconstitutional.

In the following circumstances a court is now bound, in terms of section 51, to sentence a person found guilty of murder to *imprisonment for life*:

- (1) if the murder was **planned or premeditated**
- (2) if Y was a **law enforcement officer** (such as a member of the police) who was murdered while performing his or her function as a law enforcement officer
- (3) if Y was somebody who had **given evidence** (or was likely to give evidence) in a trial in which somebody had been accused of a serious offence (in actual fact, the Act speaks of an offence referred to in schedule 1 of the Criminal Procedure Act; this schedule contains a list of offences which may be described as serious)
- (4) if X committed the murder **in the course of committing rape**
- (5) if X committed the murder **in the course of committing robbery with aggravating circumstances**
- (6) if the murder was committed by a **group of persons** acting in the execution of a **common purpose**

9.2.4 Other minimum periods of imprisonment must sometimes be imposed

If none of the circumstances set out immediately above is present, X does not qualify for mandatory imprisonment for life. However, section 51 referred to above provides that, in such a situation, a court is then nevertheless obliged to impose the following **minimum periods of imprisonment**:

- (1) **15 years** in respect of a **first** offender
- (2) **20 years** in respect of a **second** offender
- (3) **25 years** in respect of a **third** or subsequent offender

9.2.5 Circumstances in which a court is not bound to impose a prescribed minimum sentence

There are always cases where a court is of the opinion that the imposition of one of the above minimum periods of imprisonment would, considering the specific circumstances of the case, be very harsh and unjust. In subsection 3(a) of section 51, the legislature has created a mechanism whereby a court may be freed from the obligation of imposing a minimum sentence.

According to subsection 3(a) of section 51, a court is not bound to impose imprisonment for life, or for one of the **minimum** periods of imprisonment set out above, if there are "**substantial and compelling circumstances**" which justify the imposition of a lesser sentence than the prescribed one. If such circumstances exist, a court may then impose a period of imprisonment which is less than the period prescribed by the legislature.



Note that the words “substantial and compelling” are **crucially important** words when applying subsection 3(a). Ensure that you remember these words for examination purposes. Do not endeavour to use any other words which may connote more or less the same idea.

In *Malgas* 2001 (1) SACR 496 (SCA), the Supreme Court of Appeal laid down a number of guidelines to be used in order to determine whether, in a given case, there are “substantial and compelling circumstances” justifying the imposition of a lesser sentence than the prescribed one. We do not intend setting out the whole list of guidelines, except to draw attention to what is possibly the most important one of them all. This was formulated as follows by the Court (at 482e–f our emphasis):

If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence **unjust** in that it would be **disproportionate to the crime, the criminal and the needs of society**, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

9.3

CULPABLE HOMICIDE

You must study the discussion on this crime in *Criminal Law* (451–453) on your own.

The elements of this crime are

- (1) the **causing** of the death
- (2) of **another person**
- (3) **unlawfully** and
- (4) **negligently**

You will notice that the only difference between murder and culpable homicide lies in the form of culpability required for each. In the case of murder, intention is required, while in the case of culpable homicide X must have acted negligently in causing the death of the deceased.

SUMMARY

- (1) Murder is the unlawful and intentional causing of the death of another person, while culpable homicide is the unlawful and negligent causing of the death of another person.
- (2) For murder and culpable homicide it is required that “another person” be killed.

TEST YOURSELF

- (1) Define murder and culpable homicide and distinguish between the two.
- (2) Write short notes on the requirement that the death of “another person” must be caused in order to constitute murder.

- (3) Discuss the judgment in *Mshumpa* 2008 (1) SACR 126 (E).
- (4) Name the requirements for a conviction of culpable homicide.
- (5) Discuss in which circumstances a court is bound, in terms of section 51 of the Criminal Law Amendment Act 105 of 1997, to sentence a person found guilty of murder to imprisonment for life.

STUDY UNIT 10

Crimes against bodily integrity



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to demonstrate your understanding of the requirements for certain crimes against bodily integrity by considering the possible criminal liability of an accused for

- the crime of assault (in the form of the direct or indirect application of force, or in the form of the inspiring of fear that force is immediately to be applied)
- the crime of attempted assault
- the crime of assault with intent to do grievous bodily harm, or to commit another crime
- the pointing of a firearm

10.1 ASSAULT

(Criminal Law 455–463; Case Book 265–267)

10.1.1 Definition

A person commits assault if she unlawfully and intentionally

- (1) applies force, directly or indirectly, to the person of another, or
- (2) inspires a belief in another person that force is immediately to be applied to her.

10.1.2 Elements of the crime

The elements of this crime are the following:

- (1) the **application of force** (or the **inspiring of a belief that force is to be applied**)
- (2) **unlawfulness**
- (3) **intention**

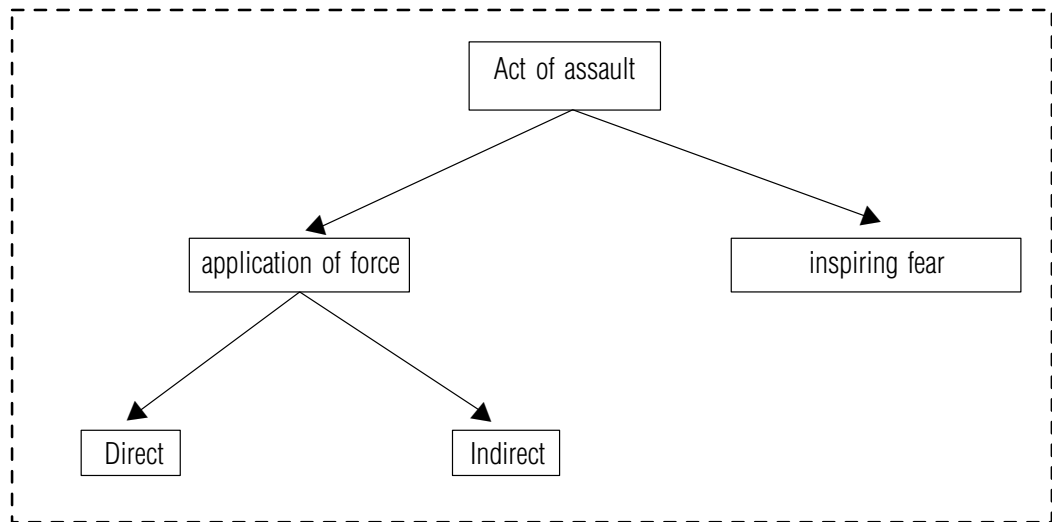
10.1.3 Historical overview

In our common law, assault in the sense of an attack or threat of attack to the person of another was not known as an independent crime. There was a comprehensive crime, known as *iniuria*, which included all kinds of violations of the rights of personality. Under the influence of English law, assault in our law developed into an independent crime. An *iniuria* committed against another's dignity (*dignitas*) is punished in our law as *crimen iniuria*; an *iniuria* against another's good name (*fama*) is punished by us as criminal defamation. **Assault is nothing other than *iniuria* against the physical integrity (*corpus*) of another.**

10.1.4 Ways in which the crime can be committed

The act of assault may take different forms. First, it may consist in the application

of force to the person (body) of another. Secondly, it may consist in inspiring fear in Y, and, more particularly, a belief in Y that force is immediately to be applied to her. The first possibility may, in turn, be subdivided into direct and indirect application of force. The different ways in which the crime can be committed may thus be illustrated as follows in a diagram:



We shall now discuss each way of committing the crime separately.

10.1.5 Application of force – direct

The first way in which the crime can be committed is through the application of force. Here, one must distinguish between direct and indirect application of force. We first consider the direct application of force.

The direct application of force is the most common way in which the crime can be committed. This is the form of the crime which corresponds most closely to the ordinary lay-person's idea of assault. For example:

- X punches Y with her fist, or
- kicks her, or
- slaps her in the face

The fact that Y does not feel much or any physical pain, is irrelevant. Thus X may commit the crime even if she only spits in Y's face or trips her so that she stumbles.

10.1.6 Application of force – indirect

The application of force may also be indirect. In this form of the crime, X commits some act which results in Y's physical integrity being infringed, as in the following examples:

- X sets a vicious dog on Y, or
- X snatches away a chair from under Y just as she is about to sit on it, resulting in Y's falling to the ground, or
- X derails a train on which Y is travelling, or
- X frightens a horse on which Y is riding so that Y falls from the horse

Note the following two examples from our case law of convictions of assault where the application of force was indirect:

- (1) In *Marx* 1962 (1) SA 848 (N), X gave three glasses of wine to drink to each of two children, aged five and seven years. The children drank the wine and became sick as a result. The younger child, for example, could not walk at all and was in a semiconscious condition. X was convicted of assault. The fact that the harm or discomfort was internal rather than external, was held to be irrelevant.
- (2) In *A* 1993 (1) SA 600 (A), X, a policeman, forced Y, whom he had just arrested and taken to the police station, to drink his own urine. X was convicted of assault. The Court rejected the proposition that, since urine was not poisonous or dangerous, the forced drinking of it could not constitute assault, holding that the forced drinking of **any** substance constitutes assault.

10.1.7 Inspiring fear of immediate force

Inspiring fear **or a belief** in Y that force is immediately to be applied to her also constitutes an act of assault. Here, there is no physical contact with, or impact on, Y's body.

This is a rather unusual way of committing the crime – one which, in certain ways, departs from the layperson's conception of what constitutes assault. You should therefore take good note of the rules below setting out the preconditions for holding somebody liable for assault in this form.

For a person to be convicted of assault in this form, the following rules apply:

- (1) The threat must be one of violence to the **person** of Y. Thus a threat by X to damage Y's property is not sufficient.
- (2) The threat must be one of **immediate** violence. Thus a threat by X to cause Y some physical harm in the future (eg the next day) would not qualify as assault in this form.
- (3) The threat must be one of **unlawful violence**. If X is entitled by law to threaten Y with violence should Y not behave in a certain manner (such as to leave X's house or premises), she does not commit assault if she threatens Y. Thus X may always threaten Y to use force to defend herself or her property.
- (4) Y (the complainant) must **subjectively believe** that X intends to carry out her threat, and that she is able to do so. The essence of this type of assault is the intentional inculcation of fear upon Y. If Y does not in fact fear the threat, no assault is committed.

ACTIVITY

X threatens to shoot Y, but the object X is holding in her hand is not a real pistol, but only a toy pistol. Y knows that the object X is brandishing is only a toy pistol. Consequently, Y is not put in any fear. Does X commit assault upon Y?

FEEDBACK

X does not commit assault, because Y did not fear any immediate bodily harm. Even if X happens to believe that the object she is holding in her hand is a real, loaded pistol, whereas it is in fact only a toy pistol, but Y knows that the object is only a toy pistol, X does not commit assault, because Y does not fear any immediate bodily harm.

- (5) In previous descriptions of this type of assault, it was required that X's conduct should contain some "act or a gesture", and that the crime could accordingly not be committed by words alone. However, the general consensus of opinion among modern writers is that X commits this form of assault **even though she does not perform any act or gesture, but merely threatens Y verbally**. Thus, if Y turns a corner to be confronted by a motionless X who, with a gun in her hand, commands "Hands up!", X commits assault.

10.1.8 Unlawfulness

The use of force or the inspiring of fear must be unlawful. This means that there must be no ground of justification for X's act. The following are examples of instances in which X's act would be justified (ie, not unlawful):

- (1) *Private defence*. Y threatens to kill or assault X. In order to defend herself, X uses force against Y.
- (2) *Official capacity*. X is a police official who uses force to arrest Y, who has committed a crime in her presence.
- (3) *Parental authority*. X gives her naughty seven-year-old daughter a moderate hiding in order to discipline her.
- (4) *Consent*.
 - (a) X is a surgeon who cuts open Y's body in the course of the performance of an operation upon Y to which Y has consented.
 - (b) Y is a sportswoman (netball or hockey player) who is injured by X in the course of a sporting contest in respect of which Y has voluntarily consented to take part.

10.1.9 Intention

X must have intention to apply force to the body of another or to inspire in her fear of the application of force. This implies the following:

- (1) The intention may take the form of direct intention, indirect intention or *dolus eventualis*.

An example of an assault in which X has intention in the form of *dolus eventualis* is the following: X throws stones at birds. There are children around playing. She foresees the possibility that, if she throws a stone at a bird, the stone may miss the bird and strike one of the children. Although she hopes this will not happen, she nevertheless decides to go ahead, unperturbed by the possibility of her injuring a child. She throws a stone, which misses the bird she aimed at and strikes a child.
- (2) In cases of assault which take place by means of the inspiring of fear (as opposed to the application of force), X **must know that her conduct will inspire fear in Y**. This means that X must believe that her threats will inspire fear in Y.
- (3) According to the ordinary principles relating to intention, X's intention must **incorporate knowledge of unlawfulness**. This means that X must know that her conduct is not covered by a ground of justification. Thus if X believes that she is entitled to act in private defence because she fears an imminent unlawful attack by Y upon herself, whereas she is in fact not entitled to private defence because Y does not intend to attack her, she lacks the necessary intention to assault.
- (4) According to *Chretien* 1981 (1) SA 1097 (A), **intoxication** may lead to X lacking the intention to assault, in which case X must be found not guilty.

- (5) It seems doubtful whether our courts would be prepared to recognise **provocation** as a ground for excluding the intention required for ordinary assault. (They do recognise that provocation may exclude the “special intention” required for the qualified assaults, such as assault with intent to do grievous bodily harm.)

10.1.10 Attempt

Is it possible to commit attempted assault? Consider the following example: X strikes at Y’s head with her fist, but, because Y moves her head, the blow just misses Y. Previously, it was assumed that attempted assault was impossible, for the following reason: Every time X attempts to assault Y, but her blow misses Y (as in the above example), X has nevertheless inspired a belief in Y that force is immediately to be applied to her, and therefore X is guilty of completed assault even in these cases which, at first glance, would appear to constitute attempted assault only.

It is now recognised that the above argument is fallacious, and that there may indeed be cases in which only attempted assault is committed. Although it may be granted that, where X has indeed inspired fear in Y, she commits completed assault, it must be remembered that, in exceptional cases, it is possible that X’s blow at Y which misses her may not arouse any fear in Y. In such cases, only attempted assault is committed. Y may, for example, be unaware of X’s words or conduct in instances where she is blind or deaf or unconscious or under the influence of liquor, or because she does not understand X’s threatening words. Even where she is aware of, and understands, the threat, she may be completely unperturbed, for instance when she knows that it is only a toy revolver that X is pointing at her.

10.1.11 Assault with intent to do grievous bodily harm

You must study the discussion of this crime in *Criminal Law* 461–462 on your own.

ACTIVITY

X and Y are arguing over a girl. X becomes angry and draws a knife from his pocket. X tells Y to forget the girl and to go home. Y refuses. X tries to stab Y with the knife. Y manages to avert the attack and X misses Y more than 10 times. Y flees and runs to the police station to lay a charge of assault with the intent to cause grievous bodily harm. X is charged with this offence. X’s defence is that, although he had tried to stab Y, Y had not been injured at all. Therefore, he could not be found guilty of the crime. Can X succeed with this defence?

FEEDBACK

X’s defence will not succeed. For a conviction of assault with the intent to cause grievous bodily harm, it is not required that Y had in actual fact suffered serious bodily harm. It is only required that X had the intention to impose serious bodily harm.



Assault with intent to do grievous bodily harm. This crime can be committed even though no grievous bodily harm is in fact inflicted upon Y, and even though no actual physical injuries are inflicted upon him. In *Joseph* 1964 (4) SA 54 (RA), for example, X drove a truck and deliberately swerved towards Y, intending to hit him, but just failed to hit him. He was nevertheless convicted of assault with intent to do grievous bodily harm.

10.1.12 Assault with intent to commit another crime

You must study the discussion of this crime in *Criminal Law* (462–463) on your own.

10.2 POINTING OF A FIREARM

(*Criminal Law* 466–468)

10.2.1 Definition

Section 120(6) of the Firearms Control Act 60 of 2000 provides that it is an offence to point:

- (a) any firearm, an antique firearm or an airgun, whether or not it is loaded or capable of being discharged, at any other person, without good reason to do so; or
- (b) anything which is likely to lead a person to believe that it is a firearm, an antique firearm or an airgun at any other person, without good reason to do so.

Although the subsection creates two different offences, these offences are so closely related that it is convenient to discuss them as a single offence.

10.2.2 Elements of the offence

The elements of the offence are the following:

- (1) the **pointing** of
- (2) a **firearm** or other article
- (3) at **any person**
- (4) **unlawfully** and
- (5) **intentionally**

The offence created in this subsection may overlap with the crime of assault in the form of inspiring fear of immediate personal violence.

10.2.3 The act: “To point ... at”

The proscribed act consists simply in pointing the firearm or article described in the subsection at somebody else. In order to secure a conviction, the state need not prove any of the following:

- (1) that X fired a shot
- (2) that the firearm or article was loaded
- (3) that the firearm or article was of such a nature that it could be discharged; in other words, that it was capable of firing a shot

The expression “point at” is capable of being interpreted in more than one way:

- First, it may be interpreted **narrowly** as meaning the pointing of the firearm at Y in such a way that, if discharged, the bullet would **hit** Y (this interpretation was adopted in *Van Zyl* 1993 (1) SACR 338 (C) 340g).
- Secondly, it may be interpreted **broadly** as meaning the directing of the firearm towards Y in such a way that, if it were discharged, the bullet would **either strike Y or pass in her immediate vicinity** (this wider interpretation was adopted in *Hans* 1998 (2) SACR 406 (E) 411–412).

Although support for both interpretations can be found in the case law, it is submitted that the latter, broader interpretation is the correct one. The reasons for following the broader interpretation are the following:

- (1) One can assume that the **intention of the legislature** was to combat the evils surrounding the handling of firearms on as broad a front as possible.
- (2) The narrow construction of the expression would make it **unduly difficult for the state to prove** the commission of the offence, since it would be extraordinarily difficult to prove beyond reasonable doubt that, if the bullet had been fired, it would actually have hit Y, and not merely have missed her by millimetres.
- (3) The **harm sought to be combated by the legislature**, namely the arousal of fear in the mind of Y of being struck by the bullet, would exist irrespective of proof that the bullet would have actually struck her or just missed her.

10.2.4 A firearm, etcetera

What must be pointed is a firearm, an antique firearm or an airgun or anything which is likely to lead a person to believe that it is a firearm, an antique firearm or an airgun.

The Act gives long, technical definitions of the words “firearm”, “antique firearm” and “airgun”. For present purposes, it is sufficient to know the gist of the definition of a firearm, namely “**any device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning**

propellant", and also to bear in mind that, according to the definition of the word in section 1, a firearm **includes the barrel or frame of the device**.

The effect of the words "or **anything which is likely to lead a person to believe that it is a firearm, etcetera**" in the definition of this offence is that X may commit the offence even if she points a toy pistol at Y, provided that the toy pistol is such that it is likely to lead a person to believe that it is a real pistol.

10.2.5 "Any other person"

The firearm or article as described in the Act must be pointed at a **person**. Thus to point it at, for example, an **animal**, cannot lead to a conviction.

10.2.6 Unlawfulness

The requirement of unlawfulness is not specifically mentioned in the definition of the offence, but the words "without good reason to do so" in the definition are wide enough to incorporate grounds of justification. It is clear that X will not be guilty of the crime if, for example, she points a firearm at another while acting in private defence, or if X is a police officer lawfully effecting an arrest.

10.2.7 Intention

Intention is not expressly required in the definition of the offence in subsection (6). It is, however, highly unlikely that the legislature intended to create a strict liability offence. It is also unlikely that it could have intended mere negligence to be a sufficient form of culpability, since the words "point at" prima facie denote intentional behaviour. The corresponding offence in the previous legislation, which was replaced by the present Act, required that the firearm be "wilfully" pointed. It is therefore submitted that the form of culpability required for a conviction under the subsection is intention.

This means that X must know that

- (1) **what she is handling is an object described in the Act**, namely a firearm, antique firearm, airgun or anything which is likely to lead a person to believe that it is such an article
- (2) she is pointing the weapon **at another person** – thus, if she thinks that she is pointing it at an animal or an inanimate object, she lacks intention
- (3) there is **no "good reason"** for her conduct and that it is unlawful, that is, not covered by a ground of justification

Mere negligence is not sufficient. It is submitted that, according to general principles, intention in the form of *dolus eventualis* is sufficient.

10.2.8 Punishment

According to section 121, read with Schedule 4, the punishment for the offence is a fine or imprisonment for a period not exceeding **10 years**.

ACTIVITY

X takes a gun and points it at herself. Whilst X is pointing the gun at herself, the police arrive at the scene. X is charged with "pointing of a firearm". Can X be convicted of this offence?

FEEDBACK

X cannot be convicted of this offence. Section 120(6)(a) and (b) of the Firearms Control Act 60 of 2000 provides that the pointing of a firearm must be directed at “any other person”.

SUMMARY

Assault

- (1) Definition of assault – see definition above.
- (2) The act of assault may consist in either the application of force to the body of another person or in the inspiring of fear or a belief in Y that force is immediately to be applied to her. The application of force may be direct or indirect.
- (3) Grounds of justification which may possibly be raised on a charge of assault are private defence, official capacity, parental authority and consent.
- (4) Intention is the required form of culpability for the crime of assault. Negligence is not a sufficient form of culpability for this crime.
- (5) It is possible to commit attempted assault.

Assault with the intention to do grievous bodily harm

- (6) All the requirements for an ordinary assault apply to this crime, but, in addition, there must be intent to do grievous bodily harm.
- (7) Whether grievous bodily harm is in fact inflicted on the victim is immaterial in determining liability. It is only the intention to do such harm that is in question.
- (8) Important factors which may indicate that a person had such an intention are, for example, the nature of the weapon or instrument, the way in which it was used, the degree of violence used, and the part of the body aimed at.

Assault with intent to commit another crime

- (9) All the requirements for ordinary assault are also applicable to these offences. In addition, there must be an intention to commit the further crime, for example rape, robbery or murder.

Pointing of a firearm

- (10) Definitions of the offence – see definition above.
- (11) The expression “point at” should be interpreted as directing the firearm towards Y in such a way that, if it were discharged, the bullet would either strike Y or pass in her immediate vicinity.
- (12) The gist of the definition of a firearm is any device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of a burning propellant.

TEST YOURSELF

- (1) Define assault.
- (2) Set out briefly the different ways in which assault can be committed.
- (3) Give two illustrations from our case law of assault committed by the indirect application of force.
- (4) Discuss the principles relating to assault in the form of inspiring fear in another that force is immediately to be applied to her.
- (5) Give examples of grounds of justification that exclude the unlawfulness of an assault.
- (6) Discuss the requirement of intention in assault.
- (7) Is the following statement correct? Give reasons for your answer. "It is impossible for somebody to be convicted of attempted assault, because, if one strikes at another and misses the other, the conduct will always amount to the inspiring of a belief in the other that force is immediately to be applied to her."
- (8) If X is charged with assault with intent to do grievous bodily harm, is it incumbent upon the prosecution to prove that grievous bodily harm has in fact been inflicted upon the victim?
- (9) Discuss the meaning of "grievous bodily harm" in the crime of assault with intent to do grievous bodily harm.
- (10) Discuss the crime of assault with intent to commit another crime.
- (11) Define the offence of pointing a firearm.
- (12) As far as proof of the requirement of an act (ie, "point at ...") in the offence of pointing a firearm is concerned, the state need not prove certain circumstances. Name these circumstances.
- (13) The requirement of an act in the offence of pointing a firearm consists simply in pointing the firearm at somebody else. However, the expression "pointing at" is capable of being interpreted in more than one way. Describe the different interpretations of this expression, indicate which interpretation should be followed, and give reasons why such an interpretation should be followed.
- (14) What is the gist of the definition of "firearm" as this expression is used in the offence of pointing a firearm?
- (15) Give two examples of instances in which the pointing of a firearm is not unlawful.
- (16) What is it that X must know in order to have the intention required for the offence of pointing a firearm? Explain.
- (17) What is the punishment for this offence?

STUDY UNIT **11**

Crimes against dignity, reputation and freedom of movement



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- demonstrate your understanding of the requirements for certain crimes against dignity, reputation and freedom of movement by considering the possible liability of an accused for the crimes of *crimen iniuria*, criminal defamation and kidnapping

11.1 *CRIMEN INIURIA*

(*Criminal Law 469–475*)

11.1.1 Definition

Crimen iniuria is the unlawful, intentional and serious infringement of the dignity or privacy of another.

11.1.2 Elements of the crime

The elements of this crime are the following:

- (1) the **infringement**
- (2) of another's **dignity** or **privacy**
- (3) which is **serious**
- (4) **unlawfulness**
- (5) **intentional**

11.1.3 Introduction

A person values not only his physical integrity (ie, freedom from physical attacks by others), but also his **personality rights**, which include his right to dignity and privacy. It is well known that insults to a person's dignity are regarded by him in just as serious a light as insults to his physical integrity. The criminal law punishes not only violations of a person's physical integrity (under the heading of "assault"), but also violations of certain rights to personality. The last-mentioned violations are punished under the headings of "*crimen iniuria*" and "criminal defamation".

11.1.4 Distinction between *crimen iniuria* and criminal defamation

The two crimes, *crimen iniuria* and criminal defamation, should not be confused with each other.

- In the case of *crimen iniuria*, violations of a person's *dignity and privacy* are made punishable.
- In the case of **criminal defamation**, violations of a person's **good name or reputation** are made punishable.

In order to distinguish between *crimen iniuria* and criminal defamation, it is

therefore important to keep in mind the distinction between dignity and privacy on the one hand and reputation (or “good name”) on the other.

A person’s **reputation** refers to what others think of him. A **violation of reputation** always involves **three parties**, namely

- the **person who makes the defamatory statement**
- the **complainant** (Y), that is the person about whom the defamatory statement is made
- the so-called **third party** (one or more other people) to whose knowledge the defamatory statement must come

In the case of *crimen iniuria* on the other hand, there are only **two parties** involved, namely

- the **wrongdoer** (X), who says or does something which violates the dignity or privacy of
- the **complainant** (Y),

as where X insults or degrades Y over the telephone (remarks which nobody other than Y can hear), or where he watches Y undressing.



Students regularly confuse the interests protected by the crime of *crimen iniuria* with the interests protected by the crime of criminal defamation. They regularly make the mistake of writing in the examination that *crimen iniuria* is committed if (*inter alia*) a person’s reputation is violated. This is incorrect. Concentrate on avoiding this common mistake!

11.1.5 The interests protected by the crime

We now proceed to discuss the elements of the crime. (In order to explain them logically we shall discuss the second element identified above before discussing the first one.) First we consider the interest protected by the crime, namely a person’s *dignitas* (dignity) and privacy.

11.1.5.1 Dignity

The crime first protects a person’s dignity, or as this term is often described in legal literature, his *dignitas*.

What does *dignitas* mean? Melius de Villiers (*The Roman and Roman-Dutch Law of Injuries* (1899) 24) gave a classical description of the concept which our courts have followed. It reads as follows:

That valued and serene condition in his social or individual life which is violated when a person is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt.

(This description was quoted with approval in, *inter alia*, *Umfaan* 1908 TS 62, 67; *Jana* 1981 (1) SA 671 (T).) Other expressions used by the courts to describe *dignitas* include “mental tranquillity” (*Holliday* 1927 CPD 395, 400) and “his proper pride in himself” (*Tanteli* 1975 (2) SA 772 (T) 775). The gist of the concept of dignity is usually expressed as “**mental tranquillity**”, “**self-respect**” or “**feeling of chastity**”.

11.1.5.2 *Privacy*

Crimen iniuria protects not only a person's dignity, but also his privacy. The courts regard privacy as something which is included in the concept of dignity, but, as a number of commentators have observed, properly viewed, privacy cannot be accommodated under the concept of dignity. One of the reasons for this view is the following:

The right to privacy can be infringed **without Y being aware of the infringement** (as where X watches Y undressing) (*Holliday supra*). On the other hand, an infringement of Y's dignity or right to self-respect is only conceivable if Y is aware of X's insulting words or conduct (*Van Tonder 1932 TPD 90*).

This is the reason why both terms, "dignity" and "privacy", have been designated as the protected interests in the definition of the crime above.

The Bill of Rights in the South African Constitution recognises a person's right to dignity and his right to privacy in different sections. Section 10 recognises a person's right to dignity and section 14 his right to privacy.

11.1.6 **Infringement of legal interest may lead to both civil claim and criminal prosecution**

If X's dignity or privacy is unlawfully and intentionally violated by Y's conduct, X may also institute a **civil claim** against Y, in which he claims an amount of money for damages or compensation from Y for the unlawful infringement of his interests. The same applies if it is X's good name or reputation which has been violated by Y. In this latter case, it is a claim for defamation which X institutes against Y. These civil claims are something entirely different from criminal prosecution for *crimen iniuria* or defamation. It is nothing unusual to find that a person whose dignity or good name has been infringed

- not only institutes a **civil claim** against the alleged infringer, but also
- lays a charge of *crimen iniuria* or criminal defamation against the alleged wrongdoer with the police, resulting in a **criminal prosecution** for one of these crimes.

11.1.7 **Infringement of interests protected**

11.1.7.1 *General*

- (1) The crime can be committed either by **word or by deed**.
- (2) Although many, or perhaps most, cases of *crimen iniuria* involve some taint of **sexual impropriety**, the crime is **not confined to insults of such a nature**.
- (3) Although many instances of *crimen iniuria* involve conduct by a male towards a female, **X may be either male or female, and the same applies to Y**.

11.1.7.2 *Subjective and objective aspects of infringement*

The infringement of the interests protected contains **both a subjective and an objective element**.

The **subjective element** is the following:

In instances of **infringement of dignity** (as opposed to infringement of privacy), Y must

- **be aware** of X's offending behaviour and
- **feel degraded or humiliated** by it.

There is, however, the following **exception to this rule**: where Y is a **young child** or a **mentally defective** person, he would not be able to understand the nature of X's conduct and, consequently, would not be able to feel degraded by it. This, however, does not afford X a defence. For this reason, the crime can be committed even in respect of a young child or a mentally defective person (*Payne* 1934 CPD 301).

As far as **proof** of the fact that Y felt degraded is concerned, it is usually assumed that conduct which offends the sensibilities of a reasonable person would also have offended Y's sensibilities. If, however, it comes to light that, for some or other reason, Y did not take any offence at (ie, he did not in any way feel aggrieved or humiliated by) X's behaviour, a court will not convict X of the crime.

In cases of **infringement of privacy** (as opposed to dignity), however, a different rule applies: here it **need not be established that Y was aware** of X's offensive conduct. Thus if X watches Y undressing, X is taken to have infringed Y's privacy irrespective of whether Y is aware of being watched or not (*Daniels* 1938 TPD 312).

The **objective element** is the following:

Since feelings such as "mental tranquillity" and "self-esteem" (which describe *dignitas*) are highly subjective and emotional concepts, their existence and intensity may vary from person to person. A certain person may be hypersensitive and easily take affront, whereas another may be more robust or broadminded and not feel degraded if the same conduct is directed at him.

For this reason, the law must of necessity apply the following objective standard: X's conduct must be of such a nature that **it would offend at least the feelings of a reasonable person**. If Y happens to be so timid or hypersensitive that he takes affront at conduct that would not affront a reasonable person, the law does not assume that the crime has been committed.

11.1.7.3 Examples of infringement of dignity

The following are examples of conduct constituting an infringement of Y's dignity:

- (1) **Indecent exposure**, such as where X exposes his private parts to Y (without Y's consent) (*A* 1991 (2) SACR 257 (N)). It matters not whether this takes place in public or in private. (This type of conduct may arguably also be categorised as an instance of invasion of privacy.)
- (2) Communicating to Y (in practice, usually a woman) a **message containing**, expressly or impliedly, an **invitation to**, or a suggestion of, **sexual immorality** (*Olakawu* 1958 (2) SA 357 (C)), such as where X, unsolicited, sends indecent photos to Y.
- (3) To address another in **language which humiliates or disparages** him, such as calling him a "pikkenien" – *Mostert* 2006 (1) SACR 561 (N).
- (4) Acts which constitute **assault** may also constitute *crimen iniuria*, such as where X spits in Y's face (*Ndlangisa* 1969 (4) SA 324 (E)).
- (5) The uttering of words constituting **vulgar abuse** or gross impertinence may constitute the crime, provided that the circumstances are sufficiently serious. Examples of such cases in which X was convicted of *crimen iniuria* are the following:

- In *Walton* 1958 (3) SA 693 (R), Y, a mother, asked X to stop making a noise with his motorcycle so that her child could sleep, whereupon X shouted at Y, "Come here lady and I will give you another".
- In *Momberg* 1970 (2) SA 68 (C), X swore at a traffic officer who issued him with a ticket for a traffic offence, shouting at him, "Jou lae donnerse bliksem!" ("You low-down damn scoundrel!").

11.1.7.4 Examples of infringement of privacy

The following are examples of the infringement of privacy:

- (1) A person's privacy may be infringed by a "**Peeping Tom**", that is, someone who peeps through a window or other aperture at somebody else (usually a woman) undressing or taking a bath, for example. Cases involving "Peeping Toms" are the most common instances of criminal invasion of privacy which come before the courts (eg *Schoonberg* 1926 OPD 247; *Holliday* supra). The fact that Y, at the time she was being watched by X, had not yet undressed, offers X no defence, because the mere unwanted intrusion by X into Y's private sphere is enough to constitute the infringement of the interests protected by the crime.
- (2) A person's privacy may be infringed by "**bugging**", that is, by someone planting a listening-in device in Y's house, room or office and then listening to his private conversations (A 1971 (2) SA 293 (T)). The fact that the contents of the overheard conversation happen not to reveal anything shameful or scandalous does not afford X a defence, because the mere unlawful intrusion by X into Y's private sphere is enough to constitute the infringement of the interests protected by the crime.
- (3) A person's privacy may conceivably be infringed in a variety of other ways, for example by the **opening and reading of a confidential postal communication** (including e-mail) addressed to him, or by prying into his private life in an unwarranted manner by means of apparatus such as cameras, telescopes and other "bugging devices".

11.1.8 Violation of dignity or privacy must be serious

In order to constitute *crimen iniuria*, violations of dignity or privacy **must be serious**, or, as the same requirement is sometimes expressed, may **not be of a trifling nature** (*Seweya* 2004 (1) SACR 387 (T)).

Although this requirement is vague, it is nevertheless necessary. In everyday life, it is common that people argue with each other and that, in the course of argument, one person may say something to the other which technically amounts to an infringement of the other's dignity (as where X swears at Y). Again, ill-mannered drivers may snarl at other road users or make uncouth gestures at them. The law cannot possibly regard all these relatively small and unfortunate episodes that occur in everyday life as crimes. If every swearword or scornful remark could result in a criminal prosecution, the courts would be inundated with unnecessary trials. In short, as was said in *Walton* supra 695, "in the ordinary hurly-burly of everyday life a man must be expected to endure minor or trivial insults to his dignity".

Whether the words, or behaviour, are serious enough to qualify, depends on the circumstances of each case. Factors such as the following may play a role in deciding whether the behaviour was serious (note, the list is not exhaustive):

- (1) The **ages of the parties**. Certain conduct towards young persons is sometimes viewed in a more serious light than it would be if it were directed at mature people.

- (2) The **gender of the parties**. In *Van Meer* 1923 OPD 77 at 80, the Court stated that "[t]he law would naturally be always more studious to protect girls and women against insults from men than it would be in the case of insults offered by one man to another". There is, however, no rule stipulating that the crime can only be committed by a man towards a woman. It can also be committed by a man towards a man, a woman towards a woman or a woman towards a man.
- (3) The **nature of the act**. Certain types of conduct are by their nature notoriously serious, for instance indecent exposure or the activities of "Peeping Toms".
- (4) The **relationship between the parties**. The violation of X's dignity is more serious if she is insulted by a stranger than when she is insulted by her husband or boyfriend in the course of, for example, a domestic argument.
- (5) The **persistence of the conduct**. The persistent repetition of conduct may push it over the borderline between nonpunishable conduct and *crimen iniuria*. Thus, to stare at a woman is scarcely injurious, but to follow her and rudely stare persistently at her may be (*Van Meer supra*).
- (6) The **publicity** with which the conduct is accompanied. The degree of impairment of dignity may be greater where X's words are heard not only by Y, to whom they are addressed, but by others as well, or when they are otherwise made known to a larger audience.
- (7) **Sexual impropriety**. If X makes unwanted overtures towards Y which contain an element of sexual impropriety, the conduct will be viewed in a more serious light than when the overtures do not contain such an element. It should, however, be remembered that the crime can be committed even if there is no suggestion of sexual impropriety in X's advances towards Y.
- (8) **Y's public standing**. Although the dignity of all people is protected by the crime, attacks upon the dignity of a person occupying a public office and related to such a person's performance of his duties may be viewed in a more serious light compared with the same behaviour directed at a person in his private capacity. Thus, to swear at a police or traffic officer for merely performing his duties may be more serious than swearing at a private person in his private capacity (*Momberg supra*). The reason for this is that offensive words directed at a person occupying a public office may be viewed as an expression of contempt not only towards the individual person at whom the words are directed, but also towards the very institutions which such persons represent. These institutions are often necessary to maintain law and order and to secure public peace and security.

11.1.9 Unlawfulness

Conduct which would otherwise amount to a violation of dignity or privacy may be justified by grounds of justification such as

- **necessity**, for example where, although X appeared naked in Y's presence, it appeared that a fire broke out in X's house while he was having a bath and that for this reason, he had to flee for his life while naked
- **consent**, as where Y gives X permission to look at her while undressing
- **official capacity**, as where X is a policeman who, in the course of the performance of his duties as a detective, enters Y's house without Y's permission and searches the house in an effort to find evidence of the commission of a crime he is investigating

11.1.10 Intention

The crime can only be committed intentionally. Negligence is an insufficient

ground upon which to base a conviction. X must know that his words or conduct violate Y's dignity or privacy, and he must know that there is no ground of justification for his conduct.

11.2 CRIMINAL DEFAMATION

You must study the discussion of this crime in *Criminal Law* (475–477) on your own.

You are not required to study the part in *Criminal Law* which deals with the origin of the crime (par 3), for examination purposes. Only read through this part.

The elements of this crime are

- (1) the **publication**
- (2) of **defamatory matter**
- (3) which is **serious**, and
- (4) which takes place **unlawfully** and
- (5) **intentionally**

As far as the requirement of publication (*Criminal Law* 476 par 5) is concerned, you must take note of the following: The term “publication” as used here does not necessarily mean that the allegations should be made public in printed form. It only means that the allegations must come to the attention of people other than Y. The publication can therefore take place orally or in writing. If they come to the attention of Y only, they can at most constitute *crimen iniuria* if they are of such a nature that Y's dignity is injured.

In *Hoho* 2009 (1) SACR 276 (SCA), X was convicted of 22 charges of criminal defamation stemming from his having published various leaflets defaming certain political office bearers and officials in the Eastern Cape. On appeal to the Supreme Court of Appeal, the following matters were considered: whether the crime had been abrogated by disuse; whether a degree of seriousness of the conduct was an element of the offence and whether the offence was constitutional. The Court held that the crime still existed and that there was no proof that it had been repealed through disuse by silent consent of the whole community or by a paucity of prosecutions (281c–h). The Court also held that the practice of confining criminal proceedings for defamation to serious cases was not a legal rule. If a prosecution were instituted for a nonserious defamation, the lack of seriousness would be reflected in the sentence. It could be concluded, therefore, that the crime of defamation consisted only in the unlawful and intentional publication of matter concerning another which tended to injure his reputation (286a–c).

The Court held that the crime was also constitutional, arguing as follows (290 a–e):

Although freedom of expression was fundamental to a democratic society, it was not of paramount value and had to be considered in the context of other values, such as that of human dignity. The law of defamation, both civil and criminal, was designed to protect the reputation of people. Although the criminal remedy was much more drastic than the civil remedy, the requirements for succeeding in criminal proceedings were much more onerous than in civil proceedings. The state had to prove all the elements of the crime beyond reasonable doubt. To expose a person to a criminal conviction if it is proved beyond reasonable doubt that he acted unlawfully, and also knew that he acted unlawfully, was a reasonable limitation on the

right to freedom of expression. There is also no reason why the state should prosecute in the case of a complaint in respect of an injury to a person's physical integrity (as in assault), but not in the case of a complaint in respect of an injury to reputation.

11.3 KIDNAPPING

You must study the discussion of this crime in *Criminal Law* (479–482) on your own

The elements of this crime are

- (1) the **deprivation**
- (2) of **freedom of movement** (or **parental control**)
- (3) which takes place **unlawfully**, and
- (4) **intentionally**

The crime is a crime against a person's freedom of movement or against a parent's or a custodian's control over a child.

GLOSSARY

dignitas dignity

SUMMARY

Crimen iniuria

- (1) Definition of *crimen iniuria* – see definition above.
- (2) The crime of *crimen iniuria* protects both a person's **dignity and privacy**.
- (3) The gist of the concept of dignity (or *dignitas*) is usually expressed as “**mental tranquillity**”, “**self-respect**” or “**feeling of chastity**”.
- (4) Although many, or perhaps most, cases of *crimen iniuria* involve some measure of **sexual impropriety**, the crime is **not confined to insults of such a nature**.
- (5) In instances of **infringement of dignity** (as opposed to infringement of privacy), Y must **be aware** of X's offending behaviour and **feel degraded or humiliated** by it.
- (6) Examples of conduct which infringes Y's dignity are **indecent exposure**, communicating to Y (in practice, usually a woman) a **message containing an invitation to**, or a suggestion of, **sexual immorality**, and vulgar abuse.
- (7) Examples of conduct which infringes Y's privacy are the activities of “**Peeping Toms**”, planting a listening-in device in Y's house, room or office, and **opening and reading a confidential postal communication** addressed to Y without his consent.
- (8) In order to qualify as *crimen iniuria*, the infringement of dignity or privacy must be **serious**.
- (9) The required form of culpability for this crime is **intention**.

Criminal defamation

- (10) Definition of crime – see *Criminal Law* 475.
- (11) The crime protects the reputation of a person.
- (12) A person's good name or reputation can be harmed only if the conduct or words complained of come to the notice of someone other than Y; in other words, if publication takes place. If the conduct comes to the notice of Y only, it can at most amount to *crimen iniuria*.
- (13) Grounds of justification are the same as the defences available to the defendant in a civil defamation action, namely truth and public benefit, fair comment and privilege.
- (14) X must intend to harm Y's reputation by the unlawful publication of defamatory matter concerning him. X must also know that his words are not covered by any ground of justification. In other words, X must have the necessary knowledge of unlawfulness.

Kidnapping

- (15) Definition of crime – see definition in *Criminal Law* 479.
- (16) The interest protected is, in principle, the freedom of movement of a person. If the person is a child, the interest which is infringed is the control of a parent or guardian over the child.
- (17) X's motive in depriving Y of his or her freedom of movement need not necessarily be to demand a ransom for his or her release. However, if a ransom is demanded, X may also be punished for extortion.
- (18) Childstealing is merely a form of kidnapping.
- (19) Forcible removal is not a requirement for the crime. The removal may also be effected by cunning or craft.
- (20) It is also not required that a person be removed from one place to another. The crime can also be committed even though there is no physical removal, for instance where Y is concealed or imprisoned where he happens to be.
- (21) There is no such requirement for kidnapping that the perpetrator must intend to deprive Y permanently of his freedom of movement.

TEST YOURSELF

- (1) Define *crimen iniuria*.
- (2) Distinguish between *crimen iniuria* and criminal defamation.
- (3) Discuss the meaning of the term *dignitas* in the crime of *crimen iniuria*.
- (4) Discuss the following statement: "The infringement of the legal interests protected by *crimen iniuria* contains both a subjective and objective element."
- (5) Give examples of
 - (a) the infringement of dignity
 - (b) the infringement of privacy

- (6) Name and discuss the factors which may play a role in deciding whether the infringement of dignity or privacy was serious.
- (7) Define the crime of criminal defamation.
- (8) Distinguish between the interests protected by the crimes of criminal defamation and *crimen iniuria*.
- (9) Name the grounds of justification which may be relied upon on a charge of criminal defamation.
- (10) Discuss the intention required for the crime of criminal defamation.
- (11) Discuss the decision of the Supreme Court of Appeal in *Hoho* 2009 (1) SACR 276 (SCA).
- (12) Define the crime of kidnapping.
- (13) Is child stealing a separate crime in our law or merely a form of kidnapping?
- (14) Distinguish between kidnapping and abduction.
- (15) Does X commit kidnapping if he removes Y, a 15-year-old boy, with his (Y's) consent from his parents' home, but without the boy's parents' consent?
- (16) Y is a clerk who works in an office. X, who has a grievance against Y, locks the door of Y's office while Y is inside. In doing this, he makes it impossible for Y to leave his office, because the office is on the fifth floor of a building and Y therefore cannot escape through a window. X refuses to open Y's office unless Y complies with certain demands. Y refuses to agree to, or yield to, X's demands. X only lets Y free 24 hours after Y has been locked up in his office. Did X commit kidnapping? Give reasons for your answer.

Crimes against property



STUDY UNIT 12

Theft



(Criminal Law 483–511; Case Book 267–273)

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LEARNING OUTCOMES

When you have finished this study unit, you should be able to demonstrate your understanding of the requirements for the crime of theft by

— considering the possible liability of an accused for the crime of

- theft (in any of its forms, ie, theft in the form of removal of property, embezzlement or arrogation of possession)
- recognising someone who assists X, who has stolen property and is still in possession of the property, to hide or sell it, as being not only an accessory after the fact to theft, but also a co-perpetrator

12.1 DEFINITION

Theft is the unlawful, intentional appropriation of movable, corporeal property which

- (1) belongs to, and is in the possession of, another
- (2) belongs to another but is in the perpetrator's own possession, or
- (3) belongs to the perpetrator but is in another's possession and such other person has a right to possess it which legally prevails against the perpetrator's own right of possession

provided that the intention to appropriate the property includes an intention permanently to deprive the person entitled to the possession of the property, of such property.

12.2 GENERAL CHARACTERISTICS OF THE CRIME

Because of the absence of legislation defining the crime, one has to rely on the provisions of Roman-Dutch law in order to define its contents. In Roman-Dutch law, the crime comprised an exceptionally large number of acts.

It covered the appropriation not merely of another's property in the possession of such other person, but also of another's property which was already in the perpetrator's own possession. The following is an example of the last-mentioned form of theft:

Fearing that her house may be burgled while she is away on holiday, my neighbour requests me to keep a bottle of precious wine belonging to her in my house and to look after it while she is away. I agree to do so, receive the bottle of wine and put it away in my house. However, before my neighbour returns from holiday, I drink all the wine myself.

This type of conduct, which consists in appropriating someone else's property already in the perpetrator's possession or control, is known as **embezzlement**.

In our law, unlike other legal systems, embezzlement is not a separate crime, but merely a form of theft. In the above definition of theft, instances of embezzlement are covered by the words in subparagraph (2), which read "belongs to another but is in the perpetrator's own possession". Since acts of embezzlement amount to theft, one cannot define theft in our law merely in terms of the **removal** of another's property. When, in the above example, I drank my neighbour's wine, I did not first **remove** the wine from her possession – I already possessed it myself!

Another unusual characteristic of the crime in our law is that it can be committed even if X takes back her own property which is temporarily in another's lawful

possession, for instance where X has pledged her watch to Y and then, before paying her debt to Y, withdraws it from Y's possession without Y's consent. In the above definition of the crime, this type of conduct is covered by the words in subparagraph (3). This form of theft may be described as the unlawful **arrogation of the possession of a thing**. Since such conduct also amounts to theft, it is incorrect to describe theft in our law exclusively in terms of the appropriation of **somebody else's** property.

12.3 LATIN TERMINOLOGY

Since the most important concepts relating to theft are derived from Roman law, some of the original Latin terminology is still used today to describe certain concepts relating to the crime. We would like to explain certain of these terms briefly.

The Latin word for theft is *furtum*.

The act of theft was described by the Romans as *contrectatio*. Generally speaking, *contrectatio* meant a physical handling of the property, which almost always involved touching the property. Today, it is clear that one may commit theft without necessarily touching the stolen property, for example where I drive somebody else's sheep from her land onto my own land. Since, in our present law, the act by which theft is committed is much broader than that conveyed by the meaning of the word *contrectatio*, this word should preferably be avoided when describing the act of stealing. The courts sometimes still use the word *contrectatio*, but then the term is nothing more than an "erudite-sounding" synonym for "the act of stealing". We prefer to describe the act as an **appropriation of the property**: not only is the word "appropriation" understandable to the layperson, but it is also flexible enough to encompass the wide variety of acts amounting to theft.

The object of the crime, that is, the property or thing stolen, is described in Latin as *res*.

Animus furandi means the "intention to steal". In our opinion, one can express the crux of the intention required for theft better by describing it as an "**intention to appropriate**". The meaning of the terms "appropriation" and "intention to appropriate" will be analysed in the course of the discussion of the crime which follows.

The expression *invito domino* means "without the owner's consent", and therefore refers to the unlawfulness requirement.

12.4 DIFFERENT FORMS OF THEFT

It is clear from the discussion above that theft can be committed in a variety of ways. Depending upon the way in which it is committed, it is possible to speak of, and distinguish between, the following different forms of theft in our law:

- (1) **The removal of property.** Here, X removes property belonging to somebody else from that person's possession and appropriates it. This is the most common form of theft.
- (2) **Embezzlement.** Here, X appropriates another's property which she already has in her possession.
- (3) **Arrogation of possession.** Here, X removes her own property which is in the lawful possession of another (such as a pledgee) and appropriates it.

It is also possible to distinguish further forms of theft, such as certain instances of the theft of money in the form of credit, which are governed by certain rules applicable only to such cases.

We shall arrange the discussion of the crime as follows: First, we shall discuss theft in the form of the removal of property. It is in the course of the discussion of this form of theft that we shall analyse the four basic requirements of the crime which (in principle) must always be complied with – no matter what form of theft one is dealing with. Thereafter, we shall consider the other forms of theft, placing the emphasis on those particular rules applicable only to such forms of theft.

12.5 FOUR BASIC REQUIREMENTS

Four basic requirements must be complied with before a person can be convicted of theft in any of its forms. These four requirements are the following:

- (1) an **act of appropriation**
- (2) in respect of a **certain type of property** (or thing)
- (3) which takes place **unlawfully** and
- (4) **intentionally** (more particularly, with the intention to appropriate)

12.6 THEFT IN THE FORM OF THE REMOVAL OF PROPERTY

In this form of theft, X removes Y's property from Y's or somebody else's possession and appropriates it. It is the most common form of theft. The four basic requirements for liability for this form of theft are the following:

12.6.1 Act of appropriation

A person commits an act of appropriation if she commits an act whereby

- (1) she deprives the lawful owner or possessor of her property, and
- (2) she herself exercises the rights of an owner in respect of the property.

(*Tau* 1996 (2) SACR 97 (T) 102)

She thus behaves as if she is the owner or person entitled to the property, whereas she is not, and, in so doing, exercises control over the property.

12.6.1.1 *Act of appropriation consists of two components*

An act of appropriation consists of the following two components:

- a **negative** component, namely the exclusion of Y from the property
- a **positive** component, namely X's actual exercise of the rights of an owner in respect of the property in the place of Y

If only the second component has been complied with, but not the first, there is no completed act of appropriation. This explains why X does not commit theft in the following two types of situation:

- (1) **The “pointing out” situation.** X points out certain property (eg a cow) to Z and tells Z that the property belongs to her (X). The property in fact belongs not to X, but to Y. X then “sells” the property to Z, but, before Z can remove it, Y, the true owner, intervenes and X’s fraudulent conduct comes into the open. (The facts in *Makonie* 1942 OPD 164 and *Strydom* 1952 (2) SA 397 (T) are examples of such a type of situation.) In a set of facts such as this, one can argue that there has been compliance with the positive component (because X professed to exercise the rights of an owner). However, it is clear that the negative component has not been complied with, because the real owner, Y, has not yet been excluded from the control over her property. There has therefore been no completed act of appropriation, and X cannot be convicted of theft. (She may, however, be convicted of attempted theft.)
- (2) **The situation where X is apprehended before she can complete the taking of the property.** In this type of situation, X exercises the rights of an owner over the property, but is caught before she can succeed in getting the property under her control. For example, X sets out to steal a motorcar. She gets into Y’s car and starts tampering with the electrical wiring below the steering column of the car, but, before she can succeed in starting the car, she is caught by a police officer. In this type of situation, the positive component of appropriation is present (X acted as if she were the owner), but the negative component is absent (because Y, the real owner, has not been excluded from her property). For this reason, there has not been a completed appropriation of the property. X can, at most, be convicted of attempted theft.

12.6.1.2 *Border between attempted and completed theft*

If X carries away Y’s thing, but is apprehended shortly thereafter, before she has succeeded in removing the property to the exact locality she has in mind, the question arises whether she should be convicted of completed theft or attempted theft only.

The test employed to distinguish between attempted and completed theft is the same as that employed to distinguish between an uncompleted and a completed act of appropriation: the crucial question is whether, at the stage when X was apprehended, Y had lost control of her property and X had gained control of the property in Y’s place.

The answer to this question depends upon the particular circumstances of each case, such as the character of the property taken, the way in which a person would normally exercise control over property of such a nature, and the distance between the place from which the property was removed and the place where X was apprehended with it. Since the thief and the owner have opposing claims to the property, they cannot simultaneously exercise control over it. The precise moment at which the owner loses her control and the thief gains it is a question of fact.

In *Tarusika* 1959 (1) R and N 51, for example, it was held that X had already gained control of the property and had consequently committed completed theft when he had removed a blanket from a washing line, had placed it under his arm and had been caught in possession of it 20 metres from the line.

12.6.1.3 *Stealing from a self-service shop*

If X, intending to steal, conceals in her clothing an article offered for sale in a self-service shop and is apprehended with the article before leaving the shop, the courts accept that she can be convicted of completed theft (*M* 1982 (1) SA 309 (A); *Dlamini* 1984 (3) SA 196 (N)).

One would be inclined to think that the owner of the shop exercises control over all the articles as long as they are still in the shop and that X could consequently be guilty of completed theft only if she is caught after having moved past the checkout point or perhaps after having left the shop itself. The fact that the courts accept that X can be convicted of completed theft in such circumstances may, in our view, be explained as follows: Because the public is invited to help themselves in the shop, and because even security personnel who have to try to trace the thieves in the shop find it well-nigh impossible to keep all clients continually under surveillance while they are in the shop, it cannot be said that, practically speaking, the owner of the self-service shop exercises effective control over all the articles in the shop while the shop is open.

12.6.2 The property

In principle, theft can be committed only in respect of a certain type of property (or thing). However, as we shall see, there are specific exceptions to this rule. To qualify as property capable of being stolen, the property must comply with the following requirements:

- (1) The property must be **movable**. An example of immovable property is a farm. Therefore, one cannot steal a part of a farm by moving its beacons or fences. If part of an immovable property is separated from the whole, it qualifies as something that can be stolen; examples in this respect are mealie cobs separated from mealie plants (*Skenke* 1916 EDL 225) and trees cut down to be used as firewood (*Williams* HCG 247).
- (2) The property must be **corporeal**. This means that it must be an independent part of corporeal nature. In principle, one must be able to see or touch it. One cannot therefore steal a mere idea (*Cheeseborough* 1948 (3) SA 756 (T)), nor a tune (although, in the last-mentioned case, X might be liable for damages in terms of the legal provisions relating to copyright). The rule that only corporeal property is capable of being stolen should, however, be viewed circumspectly. This requirement has already been considerably watered down in our law. Note the following two exceptions to the rule:

First, from Roman times, the law has recognised that an owner may steal her own property from somebody else who is in lawful possession of the property (such as a pledgee). (This form of theft is known as “the arrogation of possession”.) Yet, in reality, it is not the property that is stolen. While it is true that, here, the act is directed at a corporeal thing, what is infringed is the possessor’s **right of retention**, which is a right and therefore something incorporeal.

A *second* clear exception to the rule is the following: In the case of certain types of conduct recognised by the courts as theft, namely the theft of money through the “manipulation” of cheques, banking accounts, funds, false entries, etcetera, the object stolen is not a corporeal thing in the form of individual coins or money notes, but something incorporeal, namely “credit” or an “abstract sum of money”. (See the discussion below of certain aspects of the theft of money.)

- (3) The property must be **available in** (or capable of forming part of) **commerce**. (In Latin phraseology, the property must be *in commercio*.) Property is available in commerce if it is capable of being sold, exchanged or pledged, or generally of being privately owned. The following types of property are **not** capable of forming part of commercial dealings and are therefore not susceptible to theft:
 - (a) *Res communes*, that is, property belonging to everybody, such as the air, the water in the ocean or water in a public stream (*Laubscher* 1948 (2) PH H146 (C)). In *Mostert* 2010 (1) SACR 223 (SCA), the accused, two sugar

cane farmers, were charged, *inter alia*, with various offences under the National Water Act 1998, as well as with the common law offence of theft. Allegedly, they had pumped more water from a river than legally permitted as riparian owners. The Supreme Court of Appeal held that water flowing in a river or stream (a water resource as envisaged in the legislation) was incapable of being stolen, so that the accused could be convicted of the statutory offences, but not of the common law offence of theft.

- (b) *Res derelictae*, that is, property abandoned by its owners with the intention of ridding themselves of it. Property which a person has merely lost, such as money which has fallen out of a person's pocket, is not a *res derelicta*, because such a person did not have the intention to get rid of it. It can normally be accepted that articles thrown out by householders in garbage containers or dumped onto rubbish heaps are *res derelictae*.
 - (c) *Res nullius*, that is, property belonging to nobody, although it can be the subject of private ownership, such as wild animals or birds (*Mafohla* 1958 (2) SA 373 (R) (wild kudu); *Mnomiya* 1970 (1) SA 66 (N) (honey of wild bees)). However, if such animals or birds have been reduced to private possession by capture, for example birds in a cage or animals in a zoo, they can be stolen (*Sefula* 1924 TPD 609).
- (4) In principle, the property must **belong to somebody else**. One cannot, therefore, steal one's own property. The exception to this rule is the case of the unlawful arrogation of the possession of a thing (*furtum possessionis*), which will be explained below.

12.6.3 Unlawfulness

By far the most important ground of justification excluding the unlawfulness of the act is consent by the owner to the removal or handling of the property. The requirement that the owner should not have consented to the taking is often expressed in legal literature by the statement that X should have acted *invito domino*; this Latin expression means "without the owner's consent".

Presumed consent (also called "spontaneous agency") may also constitute a ground of justification, as in the following example:

While my neighbour Y is away on holiday, her house is threatened by flood waters; I remove her furniture to my own house in order to protect it. I am then not guilty of theft.

12.6.4 Intention

The form of culpability required for theft is intention. The crime can never be committed negligently. According to the general principles relating to intention, the intention (and, more particularly, X's knowledge) must refer to all the requirements or elements of the crime. We have already discussed the three basic requirements for the crime, other than the requirement of intention itself, namely an act of appropriation, the property requirement and the requirement of unlawfulness. In the discussion which follows, we shall consider the intention in respect of each of these three basic requirements separately. Chronologically, one ought first to discuss the intention in respect of the act, but, because this aspect of the requirement of intention is characterised by some unusual features and therefore requires a more lengthy explanation, we shall postpone the discussion of this till after a discussion of the intention in respect of the property and unlawfulness requirements.

12.6.4.1 *The intention in respect of the property*

This aspect of the requirement of intention means that X must know that what she is taking, or that at which her conduct is directed, is a movable corporeal property which is available in commerce and which belongs to somebody else or (in cases of theft in the form of the arrogation of possession) which belongs to herself, but in respect of which somebody else has a right of possession which prevails against her (X's) right of possession.

If X believes that her action is directed at a *res nullius* or a *res derelicta*, whereas the particular piece of property is in fact not a *res nullius* or a *res derelicta*, she lacks the intention to steal and cannot be convicted of theft.

In *Rantsane* 1973 (4) SA 380 (O), for example, X removed a dirty mattress cover from a garbage container in a military camp. He was under the impression that the owner (ie, the defence force authorities at the camp) had thrown it away – in other words, that it was a *res derelicta*. It appeared, however, that the quartermaster at the camp had not discarded it, but that one of the conscripts had possibly dumped it in the garbage container because he regarded it as too dirty to sleep on. X was found not guilty of theft, because he had acted mistakenly and therefore lacked the intention to steal.

If X believes that the property she is taking belongs not to another, but to herself, she likewise lacks the intention to steal.

12.6.4.2 *The intention in respect of the unlawfulness*

X must be aware of the fact that she is acting unlawfully, that is, that Y had not agreed to the removal or handling of the property.

In *Slabbert* 1941 OPD 109, Y invited X for a drink at Christmas. On arriving at his host's home, he found no-one there and helped himself to drinks. He was found not guilty on a charge of stealing some of Y's drinks, because he lacked awareness of unlawfulness: he thought that Y would not object if he helped himself to drinks.

12.6.4.3 *The intention in respect of the act (ie intention to appropriate)*

As pointed out above, the act of stealing consists in an appropriation of the property. It follows that the intention in respect of the act consists in the intention to appropriate the property.

a Meaning of intention to appropriate

In the discussion of the act, it was also pointed out that the concept "appropriation" comprises two components, a positive and a negative one. The positive component consists in X exercising the rights of an owner over the property, while the negative one consists in X excluding the owner from her property. Since the intention to appropriate is a mirror image of the act of appropriation, it must reflect both the above components of the concept "appropriation". As a result, X must have

- (1) **an intention to exercise the rights of an owner in respect of the property, as well as**
- (2) **an intention to exclude the owner from exercising her rights over her property; in other words, to deprive her of her property**

b Intention permanently to deprive

The intention to deprive the owner (Y) of her property (ie, intention (b) immediately above) must, however, be qualified in a very important respect: X's intention must be to deprive Y **permanently** of her property. If X wishes to deprive Y only temporarily of her property, she still respects and recognises Y's right to her property throughout. This is contrary to the essence of appropriation. Let us assume that I take my friend's car without her consent, not intending to deprive her of it permanently, but intending merely to take a joyride in it and then to return it to her. If this is my intention when I take and use the car, I do not commit theft, because I lack the intention to appropriate the property.

In the past, it was not always very clear whether an intention permanently to deprive Y of her property was required for a conviction of theft. This particular intention was not required in Roman and Roman-Dutch law (ie, in our common law). Instead of this requirement, the common law required an intention to act *lucri faciendi gratia*, – that is, with an intention to derive some benefit from the handling of the property. (The concept "benefit" was very widely interpreted in our common law.)

Because the common law did not require an intention permanently to deprive Y of her property, X could be convicted of theft even if she intended to use the property without Y's consent only **temporarily** before returning it to Y. This form of theft in common law was known as *furtum usus*, – that is, theft of the **use** (of the property). In legal literature, this type of conduct is also sometimes referred to as "unlawful borrowing" or the "arrogation of the use of a thing". Before 1955, there was uncertainty in our law whether *furtum usus* (the temporary use of property without the owner's consent) still amounted to theft.

In 1955, the Appellate Division in *Sibiya* 1955 (4) SA 274 (A) removed the uncertainty by clearly holding that *furtum usus* is no longer a form of theft in our law and that, for X to be convicted of theft, an intention permanently to deprive Y of her property is therefore required.

In this case, X removed Y's car without his consent and took a joyride in it, intending to return it to Y. However, the car overturned and landed in a donga. When the police arrived at the scene, X (who was apparently unscathed) was still standing near the car. The Appellate Division held that he had not committed theft.



Read the following judgment in the *Case Book: Sibiya* 1955 (4) SA 274 (A).

c Intention to appropriate includes intention permanently to deprive

Although *Sibiya* and other later judgments emphasised the intention permanently to deprive Y of her property, we are of the opinion that it is better to describe the intention in respect of the act as an intention to appropriate the property. The intention to appropriate is not in conflict with the intention permanently to deprive. As explained above, the intention to appropriate is wide enough to encompass the intention permanently to deprive. If one places all the emphasis on the intention permanently to deprive Y of her property, and neglects the intention to appropriate (and, more particularly, the intention directed at the positive component of the concept of appropriation), there is a danger that X may be convicted of theft where the facts reveal that she actually committed only malicious injury to property (a crime that will be discussed hereunder). Thus if, for example, X chases Y's cattle over a precipice to their death, without performing any further acts in respect of the cattle, or if X merely sets Y's furniture alight, X certainly has the intention permanently to deprive Y of her

property, but it is questionable whether she also has the intention to appropriate the property.

It is clear from the judgment in *Sibiya* that the mere temporary use of another's property does not constitute theft. This, however, does not mean that such conduct is not punishable. After the judgment in *Sibiya*, the legislature passed legislation aimed at preventing X from escaping criminal liability in such a situation. In section 1 of Act 50 of 1956, the legislature created an offence penalising the unlawful removal of another's property for temporary use in certain circumstances. This in fact amounts to a statutory form of unlawful borrowing. However, we shall not discuss this statutory offence in this course.

d Exceptions to the rule that temporary use is not theft

Note the following important qualification to the rule that the mere temporary use of another's property is not theft:

- (1) If X removes Y's car intending to use it only temporarily, but, before she returns the car, it breaks down or for example collides with some object, and X simply abandons it without notifying Y of the situation, she may indeed be guilty of theft. By abandoning the car without caring whether Y will ever find it again, X adopts an intention which is the opposite of an intention of returning the car to Y: she foresees the possibility that Y may lose her car and behaves recklessly towards this possibility. Her state of mind amounts to intention in the form of *dolus eventualis* to deprive Y permanently of her car. The facts in *Laforte* 1922 CPD 487 are similar; in this case, X was convicted of theft.
- (2) If X takes Y's property without Y's consent, not in order to take and use it unreservedly for her own benefit, but only to retain it as a pledge or security for a debt which Y owes her, she lacks the intention to appropriate and is therefore not guilty of theft. The intention to appropriate is absent, because X does not wish to deprive Y of the full benefit of her ownership: she is prepared to return the property to Y as soon as Y has paid her the debt. In *Van Coller* 1970 (1) SA 417 (A), for example, X, a "flying doctor" in Botswana, took possession of four microscopes belonging to the Botswana government without its consent. He intended returning the microscopes, provided that certain criminal charges against him were withdrawn by the Botswana authorities as undertaken by them. The Court held that this intent could not be reconciled with an intent to deprive the owner of the full benefit of his ownership. The Court therefore held that X had not committed theft.

e Intention to acquire benefit not required

Unlike common law, in our law an intention to acquire some form of gain or advantage from the acquisition or handling of the property is no longer a requirement for theft.

The judgment in *Kinsella* 1961 (3) SA 520 (C) illustrates this principle. In this case, X was a major in the Defence Force. He removed property belonging to the Defence Force without its permission and sold it, not with the intention of converting the proceeds of the sale for his own personal benefit, but in order to use the proceeds to acquire certain facilities for the residents of the military camp of which he was in charge. His defence that he never intended to acquire any personal advantage from the transaction was rejected. The Court stated that he would have been guilty of theft even if he had intended to donate the proceeds of the sale to a charitable organisation.

It follows from the above that, in order to be convicted of theft, it is not required that X should intend to "keep the property for herself". If X were to remove Y's

property without consent and minutes later give it to Z as a present, she would still be guilty of theft.

12.7 EMBEZZLEMENT

(Criminal Law 499–501)

As pointed out above, theft can be committed in a variety of ways. Thus far we have considered the form of theft most often incurred in practice, namely the removal by X of somebody else's property and the appropriation of the property. We next consider certain other ways in which the crime can be committed.

X commits theft in the form of embezzlement (sometimes also called "theft by conversion") if she appropriates another's (Y's) property which is already in her (X's) possession. The only difference between this form of theft and theft in the form of the removal of property is to be found in the way in which the act of appropriation takes place: unlike theft in the form of the removal of property, in the case of embezzlement X need not first remove the property from Y's possession before appropriating it; she only commits an act of appropriation in respect of property already in her possession. The other requirements for the crime apart from the act, that is, the property, the unlawfulness and the intent requirements, are the same as those in the case of theft in the form of the removal of property. In the following discussion of embezzlement, we shall, accordingly, not again discuss these last three requirements. We shall consider certain aspects of the requirement of the act only.

In embezzlement, the way in which X comes into possession of the property is immaterial. For example, it is immaterial whether the animal that X appropriates accidentally walked onto X's land or whether its owner had entrusted it to her.

The following are examples of acts amounting to X's appropriation of Y's property, which is already in X's possession:

- where X **consumes** the property (eg she eats Y's food or burns Y's firewood)
- where she **sells** it (*Attia* 1937 TPD 102; *Markins Motors (Pty) Ltd* 1958 (4) SA 686 (N))
- where she **donates** it
- where she **exchanges** it for something else (*Van Heerden* 1984 (1) SA 666 (A))
- where she uses it to **pay her debts**

The conduct of somebody who **finds** or **picks up** an article which somebody else has lost and who then keeps it for herself, or, for example, uses, consumes or sells it, may in certain circumstances amount to theft. Thus, if the finder knows who the owner of the article is or how to trace her, but fails to inform the owner and, for example, consumes it herself, her conduct would amount to an appropriation of the article (*Spies and Windt* (1908) CTR 348; *Luther* 1962 (3) SA 506 (A)). (A person who picks up a single coin or other article of small value and appropriates it would normally not be charged with or convicted of theft, because of the operation of the maxim *de minimis non curat lex*.)

The mere failure or procrastination by X to return the property to Y, or her mere false denial of possession, cannot without more ado be construed as an appropriation of the property (*Kumbe* 1962 (3) SA 197 (N)). One would have to investigate all the circumstances of the case before assuming that X's mere failure amounts to an appropriation. However, it is not inconceivable that X's mere passivity or *omissio* may amount to an appropriation; this may, for example, happen if X simply refuses to return Y's mantelpiece clock which she had to look after, but which is now in her lounge where she can regularly consult it to

ascertain the time, but X's mere decision not to return the property does not constitute its appropriation; mere thoughts or a mere resolve are not punishable.

12.8 ARROGATION OF POSSESSION (*FURTUM POSSESSIONIS*)

Although, today, *furtum usus* is no longer regarded as a crime in our law, *furtum possessionis* is. In this case, the owner steals her own thing by removing it from the possession of a person who has a right to possess it which legally prevails over the owner's own right of possession. The pledgee and somebody who has a right of retention are examples of persons who enjoy such a preferential right of possession.

Consider the following example: X wishes to borrow money from Y. Y is only prepared to lend X the money if X gives her (Y) her (X's) watch as security for the repayment of the debt. X gives Y her watch and Y lends X the money. In terms of the agreement, X will get her watch back only after she has repaid Y the amount of money owing. However, before she has paid Y the money, X takes the watch into her own possession without Y's consent. This constitutes theft in the form of the arrogation of possession.

This form of theft is peculiar, in that what X steals is in fact her own property.

In *Roberts* 1936 (1) PH H2 (C), X took his car to a garage for repairs. The garage had a lien (a "right to retain") over the car until such time as the account for the repairs had been paid. X removed his car from the garage without permission. He was convicted of theft.

In *Janoo* 1959 (3) SA 107 (A), X, the owner of a carton of soft goods which he had ordered by post, removed the carton from the station without the permission of the railway authorities. He was entitled to receive the goods only against signature of a receipt and certificate of indemnification. His intention in removing the goods was later to claim the loss from the railway. He was found guilty of theft.

ACTIVITY

- (1) X's neighbour, Y, owes X R800, but fails for more than two years to pay back the money. One day, X goes to Y's house, takes Y's television set and puts it in her (X's) storeroom. She tells Y that he will get his television back only after he has paid her (X) the R800 which he owes her. X does not use the television set, but merely keeps it in order to induce Y to pay his debt.
- (2) X intentionally removes a large quantity of food and clothing from a millionaire's house without his consent. She does not use any of the booty herself, but distributes it among the poor.
- (3) A stray horse comes walking onto land belonging to X, a farmer. X does not know who the owner of the horse is and allows it to graze on her property. Three months later, she ascertains that it belongs to Y. A month thereafter, X, who is in financial difficulty, sells the horse and uses the money to pay her debts.

FEEDBACK

- (1) X did not commit theft, because she did not intend to deprive Y of all the benefits of his ownership. X intended throughout to give the television set back to Y as soon as Y had paid her the debt. She intended to deprive Y only temporarily of his property. This cannot be equated to an intention to appropriate it, for the last-mentioned intention presupposes an intention permanently and fully to exclude Y from his property. The leading case in this regard is *Van Colter*.
- (2) X committed theft despite the fact that she did not use or consume the goods herself. She intended to appropriate the articles unlawfully. She disposed thereof as if she were the owner and, in so doing, excluded the owner from exercising his rights to the articles. The fact that X did not acquire any benefit for herself is no defence in our law. See the decision in *Kinsella*, discussed above.
- (3) X committed theft in the form of embezzlement. The fact that she sold the horse which had come into her possession, is clear evidence of an appropriation.

12.9 CERTAIN ASPECTS OF THE THEFT OF MONEY

(*Criminal Law 503–509*)

No-one will deny that money can be stolen, and where cash (banknotes, coins) are unlawfully removed from the owner by a person who appropriates it for herself, there are generally no problems. In the modern business community, however, cash is seldom used. Money generally changes hands by means of cheques, negotiable instruments, credit or debit entries in books, or registration in the electronic “memory” of a computer.

Suppose that X, an attorney, undertakes to administer the financial affairs of Y, an aged widow who is growing senile. As trustee of Y’s money, X has an obligation to receive all cheques made out to Y or representing funds to which she is entitled, and then to deposit them into her banking account or invest them for her at a favourable rate of interest. X receives the cheques, but, contrary to her (X’s) duties, she deposits them into her (ie, X’s) own banking account in order to enable her (X) to pay her own private debts.

In such a set of facts, X does not handle any tangible coins or notes, that is, corporeal things. What she is dealing with and converting to her own use is something incorporeal, namely mere “credit” or an “abstract sum of money”. If she were to be convicted of theft, it would mean that she would in fact be convicted of theft of incorporeal property. However, according to our courts, this consideration affords her no defence on a charge of theft: the conduct described above constitutes theft (*Kotze* 1965 (1) SA 118 (A); *Verwey* 1968 (4) SA 682 (A)). The courts emphasise that what is important is not so much the particular mechanisms employed by X to acquire money, but rather the economic effect of her actions, namely the reduction of the credit in Y’s banking account (*Scoullides* 1956 (2) SA 388 (A)).

The position would be the same if, in the above example, X had undertaken to write out cheques on behalf of Y in order to pay her creditors, but, contrary to her undertaking, X wrote out cheques enabling her to withdraw money from Y’s banking account and to channel this money into her own banking account in order to pay her (ie, X’s) own private debts. X would then be guilty of theft of the money. The fact that, as a trustee, she has the right to write out cheques on Y’s behalf does not afford X a defence, because, according to the courts, Y has a so-

called “special interest or property” in the money or funds in her account; by writing out cheques contrary to her duties, X infringes Y’s “special interest or property” (*Manuel* 1953 (4) SA 523 (A)).

12.10 THEFT A CONTINUING CRIME

Theft is a *delictum continuum* or a continuing crime. This means that the commission of the crime continues for as long as the stolen property remains in the possession of the thief.

The result of this rule is that, generally, our law draws no distinction between perpetrators and accessories after the fact in respect of theft. If X has stolen property and thereafter Y assists X, who is still in possession of the property, to hide or sell it, Y is guilty not merely of being an accessory after the fact to the theft, but also of theft as a co-perpetrator, because, at the time she assisted X, the theft was not yet completed, but still in the process of taking place.

In *Von Elling* 1945 AD 234, X was convicted of theft (as a co-perpetrator) because, at the request of Z, who had stolen a motorcar, he drove the car from one garage to another with the intention of concealing it from the owner.

GLOSSARY

<i>animus furandi</i>	the intention to steal
<i>contrectatio</i>	the act of stealing (handling or touching of the property)
<i>delictum continuum</i>	a continuing crime
<i>furtum</i>	theft
<i>furtum possessionis</i>	theft of the possession of the property (arrogation of possession)
<i>furtum usus</i>	theft of the use of the property (no longer a form of theft in our law)
<i>invito domino</i>	without the consent of the owner
<i>lucri faciendi gratia</i>	the intention of gaining some gain or advantage
<i>res</i>	the thing or property
<i>res communes</i>	things belonging to everybody
<i>res derelictae</i>	abandoned things
<i>res in commercio</i>	things that are capable of forming part of commerce
<i>res nullius</i>	things belonging to nobody

SUMMARY

- (1) Definition of theft: see the definition above.
- (2) The act of stealing consists in the appropriation of the property.
- (3) The act of appropriation consists in any act whereby X
 - (a) deprives the lawful owner or possessor of her property, and
 - (b) exercises the rights of an owner herself in respect of the property
- (4) A person can commit theft of another’s property either in circumstances in which the property is in the owner’s possession or in circumstances in which it is in the perpetrator’s own possession. The former form of theft is known as the **removal of property** and the latter as **embezzlement**.

- (5) It is possible for the perpetrator (X) to commit theft even in respect of property belonging to herself. This happens if she removes her own property from the possession of a person (such as a pledgee) who has a right to possess it which legally prevails over the owner's own right of possession. This form of theft is known **as the arrogation of possession**.
- (6) For property to be capable of being stolen, it must
- (a) be **movable**
 - (b) be **corporeal**
 - (c) be **capable of forming part of commerce** (which means that it should not fall into one of the following categories:
 - (i) *res communes* – things belonging to **everybody**
 - (ii) *res derelictae* – **abandoned** property
 - (iii) *res nullius* – things belonging to **nobody**
 - (d) **belong to somebody else** (except in cases of the arrogation of possession)
- (7) In order to be unlawful, the act of stealing must take place, *inter alia*, **without the permission** of the person who has a right to possess it.
- (8) In order to have the intention required for theft, X's intention (which includes her knowledge) must
- (a) relate to the **act**
 - (b) relate to **the nature of property**
 - (c) relate to the **unlawfulness**, and,
 - (d) furthermore, she must have the intention **permanently** (and not merely temporarily) to deprive the person entitled to the possession of the property, of such property.
- The intention relating to the **act** means that X must intend to appropriate the property. The intention relating to the nature of the property (ie, the **property requirement**) means that she must know that the thing she is appropriating is a movable, corporeal thing belonging (in principle) to another. The intention in respect of the **unlawfulness** requirement comprises, *inter alia*, a knowledge on the part of X that the person who is entitled to the possession of the property has not consented to the taking of the property.
- (9) The intention permanently to deprive the person entitled to the possession of such property means that X does not commit theft if she takes the property with the intention merely of using it temporarily and then of returning it to the person entitled to its possession.
- (10) In theft in the form of embezzlement, X appropriates another's property which already happens to be in her (X's) possession. Here it is not necessary for X first to remove the property from another's possession, since she is already in possession of it.

- (11) In theft in the form of the arrogation of possession, the owner steals by removing her own property from the possession of the person who has a right to possess it and whose right legally prevails over the owner's own right of possession.

TEST YOURSELF

- (1) Define theft.
- (2) Distinguish between the following forms of theft:
 - (a) the removal of property
 - (b) embezzlement, and
 - (c) the arrogation of possession
- (3) Define and discuss the meaning of "the act of appropriation".
- (4) Discuss fully the question of which types of property are capable of being stolen.
- (5) Discuss the intention to appropriate.
- (6) Discuss the form of theft known as embezzlement.
- (7) Discuss the form of theft known as the arrogation of possession.
- (8) X visits a self-service shop. She takes a piece of soap from a shelf and hides it in her clothing, intending to steal it. When she reaches the till, a security guard, who has watched her the whole time, arrests her. With reference to the requirement of an act in theft, discuss the question whether X should be convicted of theft or merely of attempted theft.
- (9) Is it required, in order to satisfy the intention requirement in theft, that X should have intended to derive some benefit from the acquisition of the property? Discuss.
- (10) X takes Y's motorcar without Y's consent and drives a few kilometres in it just for pleasure. Thereafter, she brings it back to Y. Already, when she switched on the car, she intended to use it only temporarily and then to restore it to Y. Has X committed theft? Discuss with reference to case law.
- (11) What is the meaning of the following?
 - (a) *contrectatio*
 - (b) *animus furandi*
 - (c) *furtum usus*

STUDY UNIT 13

Robbery and receiving of stolen property



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- demonstrate your understanding of the requirements for certain crimes against property by

- considering the possible liability of an accused for the crime of robbery
- identifying the crime of which the “bag-snatcher” can be convicted
- considering the possible punishment to be imposed for robbery
- considering the possible liability of an accused for the crime known as receiving stolen property, knowing it to have been stolen
- demonstrate your understanding of the punishment prescribed for robbery.

13.1 ROBBERY

(Criminal Law 517–521; Case Book 274–277)

13.1.1 Definition

Robbery consists in theft of property by unlawfully and intentionally using

- (1) violence to take the property from another or
- (2) threats of violence to induce the other person to submit to the taking of the property.

It is also customary to describe robbery briefly as “theft by violence”. Though incomplete, such a description does reflect the essence of the crime.

13.1.2 Elements of the crime

The elements of the crime are the following:

- (1) the **theft of the property**
- (2) the use of either **actual violence or threats of violence**
- (3) a **causal connection** between the violence (or threats thereof) and the acquisition of the property
- (4) **unlawfulness**
- (5) **intention**

13.1.3 General character of the crime

All the requirements for theft apply to robbery too. We are not going to repeat all of them. It is sufficient to point out the following: Just as in theft, only movable, corporeal property that is available in commerce can form the object of robbery. The possessor or person who is entitled to the property must not, of course, have consented to the taking, and X must have known that consent was lacking.

13.1.4 Application of force

As appears from the definition of the crime, robbery can be committed in two

ways, namely either by the application of actual violence or by threats of violence. (The crime of assault, likewise, can be committed in these two ways.)

As far as the actual application of violence is concerned, the violence must be aimed at Y's person, that is his bodily integrity (*Pachai* 1962 (4) SA 246 (T) 249). The violence may be slight, and Y need not necessarily be injured. Robbery is likewise committed if X injures Y and thereupon takes the property from him while he (Y) is physically incapacitated, provided that X already at the time of the assault intended to take it (*Mokoena* 1975 (4) SA 295 (O); *L* 1982 (2) SA 768 (ZH)).

13.1.5 Threats of violence

Robbery is committed even if there is no actual violence against Y: a threat of physical violence against Y if he does not hand over the property, is sufficient (*Ex parte Minister of Justice: In re R v Gesa, R v De Jongh* 1959 (1) SA 234 (A); *Benjamin* 1980 (1) SA 950 (A) 958–959). In such a case, Y simply submits, through fear, to the taking of the property. Thus Y need not necessarily be physically incapacitated. The threats of violence may be express or implied.

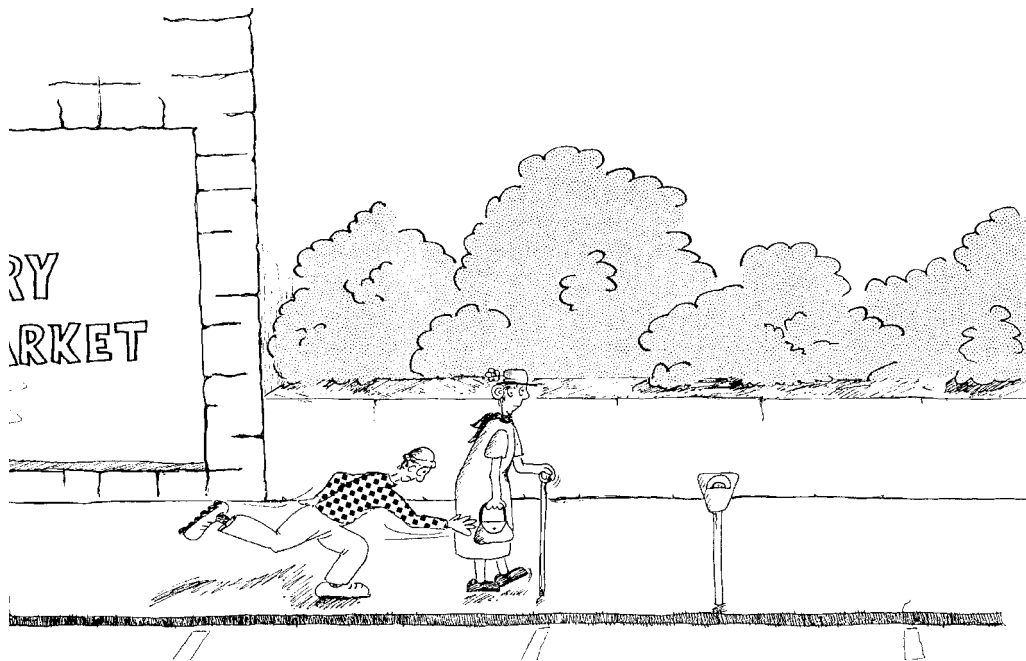
13.1.6 Causal link between violence (or threats thereof) and the acquisition of the property

There must be a causal link between the violence or threats of violence on the one hand and the acquisition of the property on the other. If X acquires the property not as a result of the violence (or threats), but as a result of some other consideration or event, he does not commit robbery.

The judgment in *Pachai* 1962 (4) SA 146 (T) illustrates this rule. In this case, X made telephone calls to Y in the course of which he threatened Y. Y reported the telephone calls to the police, who then set a trap for X in Y's shop. X entered the shop, demanded money and cigarettes from Y, and aimed a pistol at Y. Y then handed over the money and cigarettes to X. At that stage, the police were hiding in the shop and, immediately after the handing over of the property, arrested X. The Court held that Y did not hand over the property to X **as a result of X's threats**, but in the course of a prearranged plan together with the police which was aimed at securing X's arrest. Consequently, X was not found guilty of robbery. He was, however, found guilty of attempted robbery.

If X steals something from Y, and then uses violence to retain the property (ie, to prevent Y from regaining his property), or to avoid being caught by the police (or someone else), he does not commit robbery, although he may be convicted of the two separate offences of theft and assault (*John* 1956 (3) SA 20 (SR); *Ngoyo* 1959 (2) SA 461 (T)). The converse is also true: if X only wanted to assault Y, and, after having knocked him unconscious for the first time, discovers his (Y's) watch lying in the road and then only hits on the idea of taking it, and in fact does so, he does not commit robbery, but the two separate offences of assault and theft (*Malinga* 1962 (3) SA 589 (T); *Marais* 1969 (4) SA 532 (NC)).

Usually, the violence or threats of violence precede the acquisition of the property. However, in *Yolelo* 1981 (1) SA 1002 (A), the Appellate Division held that there is no absolute rule that requires the violence to precede the acquisition. **If there is such a close connection between the theft and the violence that these can be seen as connecting components of one and the same course of action, robbery may, according to this decision, be committed, even though the violence does not precede the taking of the property.** In this case, X was in the process of stealing certain articles from Y's house, when Y caught him red-handed in the house. X assaulted Y and incapacitated her by gagging her with a napkin, tying her arms and locking her up in the bathroom. X then continued to search



the house for money and arms. If one considers all the facts of this case, it is, however, difficult to assume that the assault on Y took place only after X had already completed the theft.

13.1.7 The “bag- and cellphone-snatching cases”

Does X commit robbery if, with a quick, unexpected manoeuvre, he snatches Y’s handbag, which she is clutching under her arm, and runs away with it without Y offering, or being able to offer, any resistance? (See illustration.)

In *Sithole* 1981 (1) SA 1186 (N), the Natal Court held that the handbag-snatcher commits robbery, and not merely theft. In this case, Y was carrying her handbag clutched under her armpit. X was behind her and suddenly grabbed it and ran off with it. In this case, the Court expressed the view that, for handbag-snatching to amount to robbery, **it is sufficient if X intentionally uses force in order to overcome the hold which Y has on the bag for the purpose of carrying it or if X intentionally uses force to prevent or forestall such resistance as Y would ordinarily offer to the taking of the bag, if she were aware of X’s intentions.** The judge emphasised that it is not necessary for Y to offer resistance or to try to retain possession of the bag. In *Mofokeng* 1982 (4) SA 147 (T) and *Witbooi* 1984 (1) SA 242 (C), the judgment in *Sithole* was followed by other divisions of the Supreme Court.

In *Salmons* 2006 (1) SACR 333 (C), the question before the Court was whether the grabbing of a cellphone out of the complainant’s hand, constituted robbery or merely theft. Upon an extensive review of the case law and academic opinion, the Court concluded that **any force applied to the person of a victim**, however slight, was sufficient to constitute robbery. The Court argued that the physical grabbing of a handbag or a cellphone out of a complainant’s hand is a physical intervention necessary for dispossession. To “grab” is, in the Court’s words, “to seize suddenly and roughly” (at 340e). It does not matter whether such an act is labelled “force” or “violence”. Because it is a physical act against the person of another, it complies with the definition of robbery and does not merely amount to theft.

The decision in *Salmons* was cited with approval in *Mambo* 2006 (2) SACR 563 (SCA).

If Y does offer resistance, because, for example, she clings on to her handbag or cellphone while X pulls it away from her or drags her, it is self-evident that there is actual violence and, consequently, that X's conduct amounts to robbery (*Hlatwayo* 1980 (3) SA 425 (O)).

13.1.8 Property need not be on the victim's person or in his presence

In *Ex parte Minister van Justisie: In re S v Seekoei* 1984 (4) SA 690 (A), X violently attacked Y and forced her to hand him the keys to her shop which was two kilometres away. He then tied her to a pole, using barbed wire, and drove her car to the shop, where he stole money and other property. The trial judge refused to convict X of robbery, for he was of the opinion that it was a requirement for robbery that the property should be on the victim's person or in his presence at the time of the theft. The Appellate Division held that the trial judge had erred in this regard, that, for robbery, no such requirement in fact existed, and that X should have been convicted of robbery.

ACTIVITY

Discuss whether X may be convicted of robbery in the following instances:

- (a) X threatens Y that he will hurt her physically if she does not hand over her handbag to X. Y, fearing that X will carry out his threat, gives her bag to X.
- (b) In a quick, unexpected movement from behind, X snatches Y's handbag which she is holding under her arm. X runs away with the handbag. Y sustains no injuries as a result of the incident.

FEEDBACK

- (a) X may be convicted of robbery. A mere threat of physical violence against Y if she does not hand over the property may lead to a conviction of the completed crime.
- (b) X may be convicted of robbery. He intentionally used force in order to forestall the resistance which Y would normally have offered had she known beforehand what X had in mind. See the decision in *Sithole* and *Salmons* supra.

13.1.9 Punishment

13.1.9.1 General

In the discussions above of the punishment for rape and murder, the prescribed minimum sentences for those crimes were set out. Prescribed minimum sentences are also applicable to robbery. In the discussions above of the punishment for rape and murder, it was pointed out that capital punishment and corporal punishment may no longer be imposed. This principle also applies to robbery. Since a fine is not a suitable form of punishment for so serious a crime as robbery, the only type of punishment that comes into the picture for this crime is imprisonment.

13.1.9.2 Prescribed minimum periods of imprisonment

As far as the period of imprisonment which must be imposed upon a conviction of robbery is concerned, before 1997 the courts used to have a free discretion. However, section 51 of the Criminal Law Amendment Act 105 of 1997 now provides for certain **mandatory minimum periods of imprisonment** to be imposed by a court upon convicting X of certain types of robbery. The reason for the creation of these mandatory minimum periods of imprisonment is an attempt by the legislature to combat robbery more effectively by **detering would-be robbers** and perhaps also by exacting more suitable **retribution** for the commission of this crime (*Montgomery* 2000 (2) SACR 318 (N) 332*h-i*). In *Dodo* 2001 (1) SACR 594 (CC) the Constitutional Court rejected the contention that the provisions of section 51 are unconstitutional.

Section 51 provides that if a person has been **convicted of robbery**

- when there are **aggravating circumstances** or
- involving the **taking of a motor vehicle** (“motorcar hijacking”)

a court must impose the following **minimum sentences**:

- 15 years in respect of a **first** offender
- 20 years in respect of a **second** offender
- 25 years in respect of a **third** or **subsequent** offender

13.1.9.3 Circumstances in which a court is not bound to impose a prescribed minimum sentence

There are always cases where a court is of the opinion that the imposition of one of the above minimum periods of imprisonment would, considering the specific circumstances of the case, be very harsh and unjust. In subsection 3(a) of section 51, the legislature has created a mechanism whereby a court may be freed from the obligation of imposing a minimum sentence.

According to subsection 3(a) of section 51, a court is not bound to impose one of the minimum periods of imprisonment set above if there are “**substantial and compelling circumstances**” which justify the imposition of a lesser sentence than the prescribed one. If such circumstances exist, a court may then impose a period of imprisonment which is less than the period prescribed by the legislature.



Note that the words “substantial and compelling” are **crucially important** words when applying subsection 3(a). Ensure that you remember these words for examination purposes. Look again at 9.2.5 for an explanation of these words.

13.2 RECEIVING STOLEN PROPERTY

You must study the discussion of the crime in *Criminal Law* (521–523) on your own.

13.2.1 Elements of the crime

The elements of this crime are the following:

- (1) **receiving**
- (2) **stolen goods**

- (3) **unlawfully** and
- (4) **intentionally** (which includes knowledge of the fact that the goods are stolen)

SUMMARY

Robbery

- (1) Definition of robbery: see definition above.
- (2) Robbery can be defined very succinctly as theft by violence. The violence may be either actual or in the form of a threat of violence.
- (3) There must be a causal connection between the violence and the obtaining of the property. This means, *inter alia*, the following: X merely wishes to assault Y, and in fact does so. After the assault, Y lies unconscious on the ground. At that stage, X discovers for the first time that Y is wearing a valuable watch. X takes the watch for himself. X is then not guilty of robbery, but of assault and theft.
- (4) If X snatches Y's handbag, which she is clasping under her arm, away from her and runs away with it, he does not, according to the courts, commit only theft, but in fact robbery, because he intentionally forestalls any possibility of Y offering any resistance.
- (5) It is not required for robbery that the property should necessarily be on the person of the victim or in his presence when the violence takes place.

Receiving stolen property

- (6) The correct, complete name of this crime is "receiving stolen property, knowing it to have been stolen".
- (7) Definition of this crime: see definition in *Criminal Law* (521).
- (8) A person who commits this crime renders himself, at the same time, guilty of being an accessory after the fact to theft. Since persons who are accessories after the fact to theft are usually regarded as thieves (ie perpetrators of theft), the crime of receiving overlaps the crime of theft.
- (9) The crime can be committed only in respect of property that is capable of being stolen.
- (10) X need not necessarily touch the property when he receives it. Neither is it necessary for him to receive the property with the intention of keeping it for himself; he also commits the crime if he receives it with the intention of keeping it temporarily for somebody else.
- (11) X must know that the property is stolen, or he must foresee the possibility that it may be stolen and reconcile himself to such possibility.

TEST YOURSELF

- (1) Define (a) robbery and (b) receiving stolen property, knowing it to have been stolen.
- (2) Can a person commit robbery if he obtains property not by means of actual violence, but only by means of threats of violence? Discuss with reference to case law.
- (3) With reference to case law, discuss the requirement for robbery that there should be a causal connection between the violence and the obtaining of the property.
- (4) Does X commit theft or robbery if, in a quick, unexpected movement, he snatches a handbag from Y, who is clutching it under her arm, and runs away with it?
- (5) Can somebody who has received property knowing it to have been stolen be convicted also of theft or of being an accessory to theft?
- (6) Discuss the requirement for the crime of receiving stolen property that X must have received the property.
- (7) Discuss the culpability requirement in the crime of receiving stolen property.

STUDY UNIT **14****Fraud and
related crimes****Contents**

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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- demonstrate your understanding of the requirements for certain crimes against property by

- considering the possible liability of an accused for the crimes of fraud, attempted fraud, forgery and uttering, and theft by false pretences

14.1 FRAUD

(Criminal Law 531–540; Case Book 277–279)

14.1.1 Definition

Fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial.

14.1.2 Elements of the crime

The elements of the crime are

- (1) **misrepresentation**
- (2) which causes or may **cause prejudice**, and which is
- (3) **unlawful** and
- (4) **intentional**

14.1.3 The misrepresentation

The first requirement for fraud is that there must be a misrepresentation. This is the conduct requirement of the crime. By misrepresentation is meant **a deception by means of a falsehood**. X must, in other words, represent to Y that a fact, or set of facts, exists which in truth does not exist.

- (1) **Form that the misrepresentation may take:** Although the misrepresentation will generally take the form of writing or speech, conduct other than writing or speech may sometimes be sufficient, such as a nod of the head signifying consent (*Larkins* 1934 AD 91).
- (2) The misrepresentation may furthermore be **either express or implied**. Note the following rule relating to implicit misrepresentation: In the general course of events, somebody who buys goods, not by paying cash, but on credit, implicitly represents that, at the time of purchase, she is willing to pay for them or intends to pay for them in the future, and that she believes she will be able to do so. If, at the time of purchase, she in fact has no such intention or belief, she misrepresents the state of her mind (*Persotam* 1938 AD 92).
- (3) The misrepresentation may be made by **either a commissio (positive act) or an omissio (omission)**. In most cases, the misrepresentation is made by means of a *commissio*. A mere omission by X to disclose a fact may, in the eyes of the law, amount to the making of a misrepresentation, if there is a legal duty on X to disclose the fact. (Compare the discussion above of the liability for an omission.) The legal duty may arise –
 - (a) specifically by **statute**. Thus, in terms of section 137(a) of the Insolvency Act 24 of 1936, an insolvent person is obliged to disclose the fact that she is insolvent to any person from whom she receives credit for more than a certain amount during the sequestration of her estate.

- (b) from considerations **other than the terms of a statute**, such as where a court is of the opinion that X should have acted positively to remove a misconception which would, in the natural course of events, have existed in Y's mind. The following is an example of such a case: In *Larkins supra*, X informed Y on 24 August that his salary for the month would be deposited in his banking account on 30 August. On the strength of this, Y lent him money. However, X failed to mention that, prior to 24 August, he had ceded his entire salary for the month to some other person. He was convicted of fraud on the strength of his omission.

In *Yengeni* 2006 (1) SACR 405 (T), X, a member of parliament, failed, in breach of a parliamentary code of conduct, to disclose to parliament a benefit negotiated for himself. The Court held that, although the breach of the parliamentary code of conduct in itself did not amount to fraud, X could nevertheless be convicted of fraud because he was under a legal obligation to speak and had, by his deliberate failure to disclose the benefit, intended to mislead parliament.

- (4) It has sometimes been stated (eg in *Larkins supra* 92) that a **mere false promise as to the future cannot be equated to a misrepresentation**. From this it follows that the misrepresentation must refer to an existing state of affairs or to some past event, but not to some future event (*Feinberg* 1956 (1) SA 734 (O) 736). However, this contention is misleading, as a person who promises to do something at some future stage implies when making the promise that she intends fulfilling it. If this is not in fact her intention, she is guilty of a falsehood regarding an existing state of affairs, in that she implies that she has a certain belief or intention which she in fact does not have (*Persotam supra*).

An important consequence of the above is the rule which has developed that a person writing out a cheque and handing it to another is generally deemed to have implied that, at that stage, she believes there are sufficient funds in her banking account to cover payment of the cheque when it is presented to the bank (*Deetlefs* 1953 (1) SA 418 (A)).

- (5) A misrepresentation may also be made in respect of a **computer**. For example, if X uses Y's pin number without Y's consent to transfer credit from Y's account to her own account, she (X) may be convicted of fraud, because she falsely presents that it is Y who is transferring the money or that Y has consented to the transfer.

14.1.4 The prejudice

14.1.4.1 General

We now come to the second element of the crime, namely the requirement that the misrepresentation must **cause actual prejudice or be potentially prejudicial**. Mere lying is not punishable as fraud. The crime is only committed if the lie brings about some sort of harm to another. For the purposes of this crime, the harm is referred to as "prejudice".

In many instances of fraud, the person to whom the false representation is made is in fact prejudiced. For example, X falsely represents to Y that the painting she is selling to Y is an original painting by a famous artist and therefore worth a great amount of money, whereas it is in fact merely a copy of the original and worth very little (if any) money. Actual prejudice is, however, not required; mere potential prejudice is sufficient to warrant a conviction. Nor is it required that the prejudice be of a patrimonial nature. We shall now examine these last two propositions (which incorporate important principles) in more detail.

14.1.4.2 *Prejudice may be either actual or potential*

Even if the prosecution has not proved that the misrepresentation resulted in actual prejudice, X may still be convicted if it is proved that her misrepresentation was potentially prejudicial.

Assume X has insured with an insurance company all articles belonging to her, against theft. She subsequently claims an amount of money from the insurance company on the ground that certain articles belonging to her have been stolen. Her allegation that the articles have been stolen is, however, false. If the insurance company pays her the money she claims, the company would have suffered actual prejudice. Assume, however, that, after she puts in her claim, the company discovers that the articles concerned were in fact not stolen and that X's claim was therefore false. It accordingly refuses to pay X the amount of her claim. Can X nevertheless be convicted of fraud? The answer is "Yes", because, although the company has not suffered any actual prejudice, X's misrepresentation resulted in **potential** prejudice.

What is the meaning of "potential prejudice"?

- (1) "Potential prejudice" means that the misrepresentation, looked at objectively, involved some **risk** of prejudice, or that it was **likely** to prejudice. In *Mngqibisa* 2008 (1) SACR 92 (SCA), X falsely represented to Y, who acted on behalf of an insurance company, that, at the time of a collision, he had been the driver of his motor vehicle, whereas in fact his wife (Z) had been the driver. At the time of the collision, Z was still a learner driver. In terms of the insurance policy, an additional excess was payable in the event of a claim where the driver was only in possession of a learner driver's licence. After having made the misrepresentation to Y, X told A, the claims assessor, the truth, namely that his wife (Z) was actually the driver of the vehicle at the time of the collision. The claim was never paid out. X was charged with fraud, in that he had caused potential prejudice to the insurance company. It was argued by the state that the insurance company was potentially prejudiced because it might have been induced to pay out under the policy on the basis that the statement was true. The Supreme Court of Appeal confirmed that only potential prejudice is required for the crime of fraud, and that this approach has consistently been followed through the years (93i). The fact that X had subsequently told the truth to A (the claims assessor) was not regarded as a factor exonerating him. He was convicted of fraud on the basis that potential prejudice is occasioned **at the time of making the false representation** (95e).
- (2) "Likely to prejudice" does not mean that there should be a probability of prejudice, but only that there should be a **possibility** of prejudice (*Heyne* 1956 (3) SA 604 (A)). This means that what is required is that prejudice **can** be, not **will** be, caused.
- (3) On the other hand, the possibility of prejudice should **not be too remote or fanciful** (*Kruger* 1961 (4) SA 816 (A) 832).
- (4) The prejudice need **not necessarily be suffered by the representee** (the party to whom the misrepresentation is directed); prejudice to a third party, or even to the state or the community in general, is sufficient (*Myeza* 1985 (4) SA 30 (T) 32C).
- (5) **It is not relevant that Y, the victim, was not misled by the misrepresentation**; it is the representation's potential which is the crucial issue. Thus, in *Dyonta* 1935 AD 52, X attempted to sell glass as diamonds to Y. Both X and Y knew that the articles were glass and not diamonds. X was nevertheless convicted, since the "representation that the stones were diamonds was capable in the ordinary course of events of deceiving a person with no knowledge of diamonds and, that being so, the misrepresentation was calculated to prejudice" It follows that it makes no difference whether or

not Y reacts to the misrepresentation, or whether X's fraudulent scheme is successful or not (*Isaacs* 1968 (2) SA 187 (D) 191).

- (6) Since potential prejudice is sufficient, it is **unnecessary to require a causal connection** between the misrepresentation and the prejudice. Even where there is no causal connection, there may still be fraud, provided that one can say that the misrepresentation holds the potential for prejudice. After all, a successful misrepresentation is not required for fraud.

14.1.4.3 *Prejudice may be either proprietary or non-proprietary in nature*

The prejudice may be either proprietary or nonproprietary in nature. Prejudice may be described as proprietary if it has to do with a person's property or material possessions; in other words, if it consists in money, or something which can be converted into money. In other instances of prejudice, the prejudice is nonproprietary in nature.

Although, in most cases, the prejudice or potential prejudice is of a proprietary nature, this need not necessarily be the case. A few examples of fraud involving nonproprietary prejudice are the following:

- (1) writing an examination for another – at the very least, this holds potential prejudice for the education authorities (*Thabetha* 1948 (3) SA 218 (T))
- (2) submitting a forged driver's licence to a prosecutor during the trial of a traffic offence (*Jass* 1965 (3) SA 248 (E))
- (3) making false entries in a register reflecting the sale of liquor – this prejudices the state in its control of the sale of liquor (*Heyne supra*)
- (4) laying a false charge with, or making a false statement to, the police (*Van Biljon* 1965 (3) SA 314 (T))
- (5) Failing to disclose to parliament, in breach of a parliamentary code of conduct, a benefit negotiated for oneself (*Yengeni supra* 423). The prejudice, or potential prejudice, suffered is that parliament and its individual members cannot function properly without correct information and accurate knowledge of a particular matter before it which has to be considered.

14.1.5 Unlawfulness

Compulsion or obedience to orders may conceivably operate as grounds of justification. The fact that Y is aware of the falsehood is no defence, as we saw above. As any fraudulent misrepresentation is obviously unlawful, unlawfulness does not play an important role in this crime.

14.1.6 Intent

According to the general principles relating to intent (and set out above in the discussion of intent), X's intent must relate to all the requirements of the crime other than the intent requirement. This means that, apart from the intention relating to unlawfulness (ie, awareness of unlawfulness), X's intent must cover the following:

The intent relating to the requirement of **misrepresentation** means that X must know, or at least foresee the possibility, that the representation she is making to Y is untrue.

The intent relating to the requirement of **prejudice** means that X must know, or at least foresee the possibility, that Y or some other party may suffer actual or potential prejudice as a result of her misrepresentation (*Bougarde* 1954 (2) SA 5 (C)).

There is a distinction between an **intention to deceive** and an **intention to defraud**. The former means an intention to make somebody believe that something which is in fact false, is true. **The latter means the intention to induce somebody to embark, as a result of the misrepresentation, on a course of action prejudicial to herself** (*Isaacs* supra 191). The former is the intention relating to the misrepresentation, and the latter is the intention relating to both the misrepresentation and the prejudice. It is this latter intention which must be established in order to convict somebody of fraud. **This means that the mere telling of lies which the teller thereof does not believe will cause the person to whom they are told to act upon them to his prejudice, is not fraud** (*Harvey* 1956 (1) SA 461 (T) 464).

14.1.7 Attempt

As potential prejudice is sufficient to constitute fraud, the view has long been held that there can be no such crime as attempted fraud, since, even if the misrepresentation is not believed, or even if Y does not act on the strength of the representation, potential prejudice is present and consequently fraud is committed (*Nay* 1934 TPD 52; *Smith* 1952 (2) PH H105 (O)). In *Heyne* 1956 (3) SA 604 (A), the Appellate Division, however, held that attempted fraud is indeed possible. This will arise in the case where the misrepresentation has been made, but has not yet come to Y's attention, for example where a letter containing a misrepresentation is lost in the post or intercepted.



Read the following decision in the *Case Book*: *Heyne* 1956 (3) SA 604 (A).

ACTIVITY

Consider whether X may be convicted of fraud in the following circumstances:

- (i) X tells his wife, Y, that he is going on a business trip. In the meantime, he is going with his friends to a rugby test match.
- (ii) X goes to a very smart restaurant. She orders a bottle of champagne and an expensive meal. She tells the restaurant owner that she is waiting for her boyfriend. The truth is that she has neither an appointment with a boyfriend nor an intention to pay for the meal. After having finished her meal, she tells the restaurant owner that her boyfriend, who did not arrive, was supposed to pay for the meal and that she has no money. Accordingly, she fails to pay for her meal.
- (iii) X is caught by a traffic officer for speeding. Y asks X for her particulars. She gives him a false name, ID number and address.

FEEDBACK

- (i) It is clear that X made a misrepresentation to Y. However, the mere telling of a lie does not amount to fraud. There must be prejudice, or at least potential prejudice, involved. One may argue that, even if there is potential prejudice in this case, it is remote and fanciful, and therefore not sufficient to sustain a conviction of fraud.
- (ii) X may be convicted of fraud. By ordering a meal, X represented by her conduct that she was able and willing to pay for it. Since she had no honest belief in her ability and willingness to pay, she commits fraud.

- (iii) This is a straightforward example of fraud. Keep in mind that the prejudice need not necessarily be suffered by the representee. Prejudice to the state or the community in general is sufficient.

14.2 FORGERY AND UTTERING

You must study the discussion of this crime in *Criminal Law* (540–543) on your own.

14.3 THEFT BY FALSE PRETENCES

(*Criminal Law* 543–544)

14.3.1 Definition

A person commits theft by false pretences if she unlawfully and intentionally obtains movable, corporeal property belonging to another, with the consent of the person from whom she obtains it, such consent being given as a result of a misrepresentation by the person committing the offence, and she appropriates it.

14.3.2 Elements of the crime

The elements of the crime are the following:

- (1) a **misrepresentation** by X to Y
- (2) **actual prejudice** (ie, harm or loss) suffered by Y, in that she parts with her property by allowing X to take possession of it
- (3) a **causal connection** between the misrepresentation and the prejudice
- (4) an **appropriation** of the property by X
- (5) **unlawfulness**
- (6) **intention**

14.3.3 General character of crime

This crime can be regarded both as a form of theft and as a form of fraud. What happens when X commits this crime is the following: First, she commits fraud by making a misrepresentation to Y; secondly, Y, as a result of this misrepresentation, “voluntarily” hands over movable, corporeal property to X; and, thirdly, X appropriates this property. In short, it is fraud followed by a theft. For example, X goes to Y’s house and falsely represents to Y, who is a housewife, that she (X) repairs and services television sets, and that her (Y’s) husband has requested her (X) to fetch their television set for servicing. On the strength of this misrepresentation, Y allows X to remove the set from their home. X disappears with it and appropriates it to herself. X thus makes use of a misrepresentation to obtain Y’s consent to her taking of the property, thereby excluding any resistance by Y to the taking.

Cases such as these are treated as theft, because it is assumed that, although Y seemingly consented to part with the property and to allow X to take it, Y’s “consent” is not regarded by the law as valid consent: consent induced by fraud

or misrepresentation is not regarded as valid consent (compare the discussion above of consent as a ground of justification).

The crime of theft by false pretences is, strictly speaking, unnecessary, because in every case in which X is convicted of this crime, she could equally well be convicted of fraud. It therefore completely overlaps with fraud. Thus if the crime were to disappear, it would always still be possible to charge X with, and convict her of, fraud. Note, however, that although every case of theft by false pretences also involves fraud, the opposite is not the case: every case of fraud does not involve theft by false pretences, since X can commit fraud without obtaining or appropriating movable, corporeal property (eg where X writes an examination in Y's place, misrepresenting to the examination authorities that she is Y).

SUMMARY

FRAUD

- (1) Definition of fraud – see definition above.
- (2) The misrepresentation in fraud is the presentation of a fact which does not exist, and
 - (a) may be made in speech, writing or in conduct
 - (b) may be made expressly or tacitly
 - (c) may consist in either a *commissio* or an *omissio*
 - (d) is not made through a mere false promise as to the future
- (3) The misrepresentation in fraud must cause actual prejudice or be potentially prejudicial to another.
- (4) The prejudice required for fraud may be
 - (a) either actual or potential, and
 - (b) either proprietary or non-proprietary in nature
- (5) Because of the wide interpretation of prejudice, there need not be an actual causal connection between the misrepresentation and the prejudice required.
- (6) In fraud, X's intent must relate to both the misrepresentation and the requirement of prejudice.
- (7) In the case of *Heyne* 1956 (3) SA 604 (A), the Appellate Division decided that attempted fraud can be committed if the misrepresentation has not yet come to the complainant's attention.

Forgery and uttering

- (8) Forgery is a form of fraud in which the misrepresentation takes place by means of forgery.
- (9) The crime of uttering takes place when the forgery is brought to the attention of someone else.
- (10) In the crimes of forgery and uttering, our courts give a wide interpretation to the concept "document".

- (11) In forgery, the document is regarded as false if it purports to be something other than it is.

Theft by false pretences

- (12) Theft by false pretences always involves fraud, which is then followed by theft of the property concerned.
- (13) In cases of theft by false pretences, Y seemingly consents to part with her property in favour of X, but this consent is not regarded by the law as valid consent.

TEST YOURSELF

- (1) Define fraud, forgery and uttering, and theft by false pretences.
- (2) Discuss the nature of the misrepresentation in fraud.
- (3) Discuss the element of prejudice in fraud.
- (4) Discuss the requirement of intention in fraud.
- (5) Is attempted fraud possible? Discuss in the light of *Heyne* 1956 (3) SA 604 (A).
- (6) X forges a document unlawfully and shows it to Y with the intention of defrauding her. Of which crime or crimes can X be convicted? Discuss.
- (7) Will it make a difference to your answer in the previous question if X did not forge the document herself, but nevertheless passed off the forged document to Y with the intention of defrauding her?
- (8) Is there a **forgery** of a document in the following instances?
 - (a) X only writes a falsehood on a piece of paper.
 - (b) X only changes the date which already appears on the document.
 - (c) X draws up a document which falsely purports to be a copy of a non-existing document.
- (9) Compare **theft by false pretences** with ordinary theft.
- (10) Explain why theft by false pretences can be regarded as a form of **fraud**.

STUDY UNIT 15

Crimes relating to damage to property



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- demonstrate your understanding of the requirements for certain crimes relating to damage to property by considering the possible criminal liability of an accused for the crimes of malicious injury to property and arson

15.1 BACKGROUND

Criminal law protects interests in property by punishing those who damage property. The general crime used for this purpose is malicious injury to property. Malicious injury to property overlaps with the crime of arson, which is merely a particular form of malicious injury to property (*Motau* 1963 (2) SA 521 (T) 523).

15.2 MALICIOUS INJURY TO PROPERTY

(*Criminal Law* 545–548)

15.2.1 Definition

Malicious injury to property consists in unlawfully and intentionally

- (1) damaging property belonging to another person or
- (2) damaging one's own insured property with the intention of claiming the value of the property from the insurer.

15.2.2 Elements of the crime

The elements of the crime are the following:

- (1) **damaging**
- (2) **property**
- (3) **unlawfully** and
- (4) **intentionally**

15.2.3 The property

The property must be corporeal and **may be either movable or immovable**.

In principle, one cannot commit the crime in respect of one's own property, because it stands to reason that the owner of property is free to do with his property what he likes. For example, if I no longer like my old rickety table, I commit no crime if I chop it to pieces and use it as firewood. It is for this reason that it is required in the first part of the above definition of the crime that the property should belong to another. **However, the courts have held that X also commits the crime if he sets fire to his own insured property in order to claim its value from the insurer of the property** (*Gervais* 1913 EDL 167; *Mavros* 1921 AD 19; *Van Zyl* 1987 (1) SA 497 (O)).

15.2.4 Damage

Damage, as understood in the definition of the crime, is difficult to define in abstract terms. It includes the total or partial destruction of the property, for instance where an animal is killed or wounded (*Laubscher* 1913 CPD 123), or the loss of the property or substance (eg the draining of petrol from a container), and

the causing of any injury (whether permanent or temporary) to property. There can be damage even where the original structure of the property is not changed, for example where a statue is painted (*Bowden* 1957 (3) SA 148 (T)). It will usually be assumed that there is damage if the property has been tampered with in such a way that it will cost the owner money or at least some measure of effort or labour to restore it to its original form (*Bowden* supra 150).

15.2.5 Unlawfulness

Otherwise, unlawful injury to property may be justified by

- (1) statutory provisions giving X the right to destroy, wound or catch trespassing animals (*Oosthuizen* 1974 (1) SA 435 (C))
- (2) necessity, for instance where X defends himself against an aggressive animal (*Jaffet* 1962 (2) PH H220 (R))
- (3) official capacity, for example where a policeman breaks open a door to gain access to a house in which a criminal is hiding
- (4) consent by the owner of the property

15.2.6 Intention

The crime can only be committed intentionally. In practice, the crime is described as “malicious” injury to property. However, the use of the word “malicious” may be misleading, because it creates the impression that X has to act with an evil or malicious motive. X’s motive is in fact not a relevant consideration (*Mnyanda* 1973 (4) SA 603 (N) 605).

15.3 ARSON

You must study the discussion of this crime in *Criminal Law* (548) on your own.

ACTIVITY

X sets fire to his house and his car, intending to claim the value of the property from his insurer. X, in fact, gets paid by the insurer for the “damage” that he has suffered. Of which crimes can X be convicted?

FEEDBACK

X may be convicted of arson in respect of the immovable property (his house) and of malicious injury to property in respect of the movable property (his car). He may also be charged with fraud. He unlawfully and intentionally made a misrepresentation to the insurer which prejudiced the company inasmuch as the company compensated him financially.

SUMMARY

Malicious injury to property

- (1) Definition of malicious injury to property – see definition above.
- (2) The property must be corporeal and may be either movable or immovable.
- (3) It will usually be assumed that there is damage if the property has been tampered with in such a way that it will cost the owner money or at least some measure of effort or labour to restore it to its original form.
- (4) Intention is a requirement for the offence. The perpetrator's conduct need not be accompanied by an evil or malicious motive.

Arson

- (5) Definition of arson – see definition in *Criminal Law* 548.
- (6) Arson can only be committed in respect of immovable property. If a movable thing is set on fire, it amounts to malicious injury to property.
- (7) Intention, and more, particularly, intention to damage the property by setting fire to it, thereby causing patrimonial harm to somebody, is required.

TEST YOURSELF

Malicious injury to property

- (1) Define malicious injury to property.
- (2) Complete the following statement: In malicious injury to property, the property must be corporeal and may be either or
- (3) Explain whether someone may commit malicious injury to property in respect of his own property.
- (4) Explain the meaning of the concept “damage” in this crime.
- (5) Name and illustrate the grounds of justification which may be raised on a charge of malicious injury to property.

Arson

- (6) Define arson.
- (7) Complete the following statement: The crime of arson can be committed only in respect of property.
- (8) Which crime is committed if movable property is set on fire?
- (9) Can a person commit arson in respect of his or her own property? Refer to authority.

STUDY UNIT 16

Housebreaking with intent to commit a crime



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- demonstrate your understanding of the requirements for certain crimes against property by considering the possible liability of an accused for the crime of housebreaking with intent to commit a crime

(On this crime in general, see *Criminal Law* 549–555.)

16.1 DEFINITION

Housebreaking with intent to commit a crime consists in unlawfully and intentionally breaking into and entering a building or structure, with the intention of committing some crime in it.

16.2 ELEMENTS OF THE CRIME

The elements of the crime are the following:

- (1) **breaking and entering**
- (2) **a building or structure**
- (3) **unlawfully** and
- (4) **intentionally**

16.3 BREAKING AND ENTERING

The requirement of an act in this crime consists of two components, namely

- (1) **breaking into** the structure
- (2) **entering it**

16.3.1 Breaking

When one uses the word “breaking”, one is inclined to think of an act which causes damage to the building or structure. Although in most cases in which this crime is committed there may be some degree of damage to the building caused by X, **it is not a requirement for liability for this crime that actual damage be inflicted to the building or structure.**

All that is required for an act to amount to a **breaking** is the **removal or displacement of an obstacle which bars entry to the building and which forms part of the building itself.**

(*Meyeza* 1962 (3) SA 386 (N); *Ngobeza* 1992 (1) SACR 610 (T)). The word “breaking” is therefore a so-called “term of art”, that is, an artificial concept.

If one applies the above criterion to concrete facts, one finds that acts such as the following do **not amount to a “breaking in”** (since there is no displacement of an obstacle forming part of the building):

- walking through an **open door** into a building
- climbing through an **open window** into a building
- stretching one’s arm through an **open hole** in a wall of a building

(*Makoelman* 1932 EDL 194; *Rudman* 1989 (3) SA 368 (E))

The most obvious **act which does qualify as a breaking in** is, of course,

physically **breaking a door, window, wall or roof** of a building (in order to gain entry into the building). However, even acts which are on the face of it more innocuous than those described, **qualify as a breaking**. Examples of such acts are the following:

- merely pushing open a **closed (even though not locked) door** or window (*Faison* 1952 (2) SA 671 (R))
- merely pushing open a **partially closed door** or window (*Moroe* 1981 (4) SA 897 (O))

(The reason why these last-mentioned acts qualify is because X displaces an obstacle which bars entry into the building and which forms part of the building itself.)

If, in her effort to gain entry into the house through an open window, X merely shifts a flower pot which is placed on the windowsill to one side, her act does not qualify as a breaking in, because the flower pot does not form part of the building or structure itself. However, if she pushes a blind in front of an open window to one side in order to gain entry, her act does qualify as a breaking in, because the blind is attached to the window and therefore forms part of the building (*Lekute* 1991 (2) SACR 221 (C)). It has been held that a curtain in a window is not an "obstruction", and that X therefore does not "break into" a house if she merely pushes a curtain in an open window to one side in order to gain entry (*Hlongwane* 1992 (2) SACR 484 (N) 486).

In conclusion, it must be stressed that the breaking in must be **into** the building. To break **out** of a building after having entered it without a breaking in cannot lead to a conviction of housebreaking (*Tusi* 1957 (4) SA 553 (N) 556). Thus if X walks through an open door into the building, and while inside the wind blows the door shut and X has to open the door (or even break it down) in order to get out of the building, there is no "breaking into" for the purposes of this crime.

16.3.2 Entering

Mere "breaking" without "entering" is not sufficient to constitute the crime (*Maruma* 1955 (3) SA 561 (O)), although it may amount to an attempt to commit the crime. Like the concepts "building" and "breaking", "entering" also has a technical meaning. The entry is complete the moment X has **inserted any part of her body, or any instrument she is using for that purpose, into the opening**, with the intention of thereby exercising control over some of the contents of the building or structure (*Melville* 1959 (3) SA 544 (E)). In *Mavela* 2008 (2) SACR 608 (Ck), X had broken a window and was about to enter with his body, when he was seen by someone and desisted. Because it was not clear that he had already inserted a part of his body or his hand into the premises, he was convicted only of attempted housebreaking with intent to steal.

16.4 BUILDING OR STRUCTURE

The house, structure or premises in respect of which the crime is committed can be **any structure which is or might ordinarily be used for human habitation or for the storage or housing of property**. It is difficult, from the cases, to deduce a general principle that can be applied in order to decide whether a particular premise or structure qualifies as a premise or structure in respect of which the crime can be committed. We submit that the following principle, which is advocated in both De Wet and Swanepoel *Strafreg* 4 ed (1985) 351 and Snyman *Criminal Law* 5 ed (2008) 550, should be followed in this respect: **If the structure or**

premises is used for the storage of goods, it must be immovable, but if it is used for human habitation, it does not matter whether it is movable or immovable.

This explains why structures such as the following (which are all immovable) always qualify as structures in respect of which the crime can be committed:

- a house
- a storeroom
- a factory
- business premises

This also explains why structures such as the following (which are either movable or not used for human habitation) do **not** qualify as structures in respect of which the crime can be committed:

- a motorcar
- a tent which is used only for the storage of goods (*Abrahams* 1998 (2) SACR 655 (C))
- a railway truck used for conveying goods (*Johannes* 1918 CPD 488)
- a fowl run made of tubes and wire netting (*Charlie* 1916 TPD 367)
- an enclosed backyard (*Makoelman* 1932 EDL 194)

A caravan is a “house on wheels”, and therefore a movable thing that can be used for either human habitation or the storage of goods, or both. It is accordingly a structure which does not readily fit into the classification set out in the principle advanced and applied above. The position in our law, as far as the question whether a caravan can be broken into, may be summarised as follows: Generally speaking, the courts accept that a caravan does qualify as a structure, even if the breaking in takes place at a time when nobody is living in it (*Madyo* 1990 (1) SACR 292 (EC); *Temmers* 1994 (1) SACR 357 (C)), but that it does not qualify if, although it can be moved, it is used merely for the purpose of storing goods (*Jecha* 1984 (1) SA 215 (Z)).

(In *Temmers* supra, the Court rejected the criterion which we advanced above, but we submit that the alternative, very vague criterion applied by the Court in this case, should not be followed. You may, if you wish, read the criticism of the criterion advanced in *Temmers*, yourself, in *Criminal Law* 550–551.) In *Mavungu* 2009 (1) SACR 425 (T), X had broken into a brand-new caravan which was the property of a caravan business. He did not steal anything, but intended only to sleep there. The Court held that a caravan was a “house” for the purpose of housebreaking and also a “building” for the purposes of trespassing. X was convicted of housebreaking with the intent to commit the statutory crime of trespassing (s 1–(1)–(b) of the Trespass Act 6 of 1959).

16.5 UNLAWFULNESS

The breaking into and entering of the building or structure must be unlawful. Thus the crime is not committed if one breaks into and enters one’s own house, or a room which one shares with someone else, or if one has permission to enter (eg as a servant) (*Faison* supra; *Mashinga* 1976 (2) PH H210 (A)).

16.6 INTENTION

The intention required for this crime comprises the following two completely distinct components:

- (1) **X must have the intention of unlawfully breaking into and entering the house or structure.** Such intention will be absent if, for example, she believes that she is breaking into her own house, or that she is committing the act of housebreaking with the consent of the owner of the house.
- (2) **Furthermore, X must have the intention of committing some other crime inside.** Mere housebreaking without such an intention does not amount to the crime. However, housebreaking without such an intention may, of course, depending on the circumstances, be punishable as malicious injury to property. The further crime which X intends to commit must be a different one from the housebreaking itself (*Melville supra*). In practice, housebreaking is mostly committed with the intention to steal, but, in principle, charges of housebreaking with intent to commit any crime are competent. The legislature has even sanctioned charges of housebreaking with the intention of committing a crime unknown to the prosecutor (see s 95(12) read with ss 262 and 263 of the Criminal Procedure Act 51 of 1977).

SUMMARY

- (1) Definition of the crime – see definition above.
- (2) The act consists in the (a) housebreaking and (b) entering of a building or structure.
- (3) The “breaking” consists in the removal or displacement of any obstacle which bars entry to the structure and which forms part of the structure itself.
- (4) The entering is complete the moment X has inserted any part of her body, or any instrument she is using for that purpose, into the opening, with the intention of thereby exercising control over some of the contents of the building or structure.
- (5) The building or structure may be any movable or immovable structure which is or might ordinarily be used for human habitation, or any immovable structure which is or might be used for storage or housing of property.
- (6) The intention required for housebreaking comprises the following two distinct components, which must both be present:
 - (a) X must have the intention of unlawfully breaking into and entering the building or structure.
 - (b) X must have the intention of committing some other crime inside of the building or structure.

TEST YOURSELF

- (1) Define the crime of housebreaking with the intention to commit a crime.
- (2) Insert the missing words: The “breaking” consists in the
or of any obstacle which bars entry to the structure and
which forms part of the structure itself.
- (3) Which of the following acts amount to an act of “breaking”?
 - (a) X pushes open a partially closed window or door.
 - (b) X stretches her hand through an open window in order to steal a radio standing on the windowsill.
 - (c) X walks through an open door or climbs through an open window.
 - (d) X opens an unlocked door.
- (4) At what stage is the entering complete?
- (5) Name and explain the two components of the intention required for the crime of housebreaking.