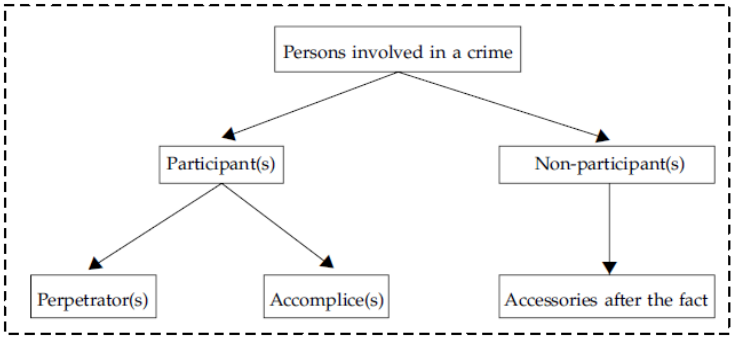
NOTES

Criminal Law 2
CRW201-X

1. PARTICIPATION I: INTRODUCTION AND PERPETRATORS

1.1. Introduction

1.1.1. Classification of persons involved in a crime



A **participant** is anyone who does something, in whatever manner, whereby he furthers the commission of the crime. A **non-participant** is a person being involved in the crime, who does not further the commission of the crime at all.

1.1.2. 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**.

1.1.3. Definition of an accomplice

A person is an accomplice if -

(1) although he does **not comply with** all the requirements for liability set out in the **definition** of the crime, and

(2) although the **conduct** required for a conviction is **not imputed** to him **in terms of the doctrine of common purpose**, he engages in conduct whereby he **furthers** the commission of **the crime** by somebody else.

1.1.4. Distinction

To determine whether someone is a perpetrator, one must look at the definition of the crime and the accused's -

- conduct
- state of mind; and
- characteristics.

If he does not comply with the particular description[1], he cannot be brought within the definition of the crime and is not a perpetrator. He nevertheless committed an act whereby he furthers the commission of the crime by somebody else and is, therefore, an accomplice.

[1] High treason only committed by person owing allegiance (description); medical negligence by a medical doctor (occupation), etc.

1.2. Perpetrators

Only in certain cases a **principal offender** may be identified and he is then referred to as such, but the distinction between a principal offender and other perpetrators is not important for the purposes of liability. It can, however, be of great importance in the assessment of punishment.

1.2.1. Definition of a co-perpetrator

Where several persons commit a crime together and their –

(1) conduct;
(2) state of mind; and
(3) characteristics

all comply with the definition of the crime, each one of them is a **co-perpetrator**.

Direct perpetrator	Indirect perpetrator
Commits the crime with his **own hands or body**.	Makes **use of somebody else** to commit the crime.
Example: X hiring **Z** to murder Y	Example: **X** hiring Z to murder Y
The distinction between a direct and an indirect perpetrator is of no significance for the purposes of determining liability because the conduct of both falls within the definition of murder[2].	

1.2.2. Ground upon which a person may qualify as a perpetrator

(i) Being a perpetrator of murder in terms of the general principles of liability

Persons qualify as (co-)perpetrators simply by applying ordinary principles of liability in that their conduct and culpability must comply with the requirements for liability as set out in the definition of the crime. Following instances is sufficient for purposes of liability as a perpetrator in the commission of murder:

- X standing guard while his partner shoots Y dead (**Mashami**);
- X drives his partner to and from the scene of the crime (**Bradbury**);
- X tells him where he can find Y;
- X stands next to his partner while he assaults Y, ready to help him if required (conduct to assist and encourage principal offender) (**Mbande; Du Randt**); or
- X obtains someone's services to shoot Y (**Nkombani**).

The test for causation is wide enough to lead to the conclusion that all these acts qualify as the cause or co-cause of Y's death as Y would not have died if it were not for their acts, which is ***conditio sine qua non*** (indispensable, essential condition) for Y's death.

(ii) Being a perpetrator of murder by virtue of the doctrine of common purpose

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.

Crucial requirement: If different accused had **same purpose**, **acts** of one is **imputed** on all who **actively associated** themselves with achievement of such purpose, even though one can't construe a **causal connection** between such a party's act and the result. **Culpability isn't imputed** and the other parties' liability is based upon his own culpability

If X throws a stone at Y, which misses, and Z also throws a stone, which struck Y on the head, the act of Z is imputed to X, who had a common purpose with Z to kill Y (**Malinga**).

- Proof of existence of common purpose

  Proved in the following ways:

  - On basis of an express or implied **prior agreement** to commit an offence, which is difficult to prove as people conspire in secret; or if it cannot be proved
  - An active association and participation in a common criminal design (**Thebus**).

[2] The unlawful, intentional causing of another's death

- Why is it necessary to have such a doctrine?

  It prevents criminals from escaping punishment when they act in groups. If a common purpose to kill is proved, the accused can be convicted without proof of causal connection between each one's conduct and Y's death.[3]

- Leading case

  Safatsa 1988 (1) SA 868 (A) → See Cases Summary

- Active association as proof of participation in a common purpose

  If there is no proof of a previous agreement between perpetrators, an accused whose individual act isn't causally related to Y's death can only be convicted of murder on the strength of the doctrine of common purpose if the following requirements have been complied with (**Mgedezi**):

  - he must have been **present** at the scene of the crime;
  - he must have been **aware** of the assault on Y;
  - he must've **intended to make common cause** with those committing the assault;
  - he must have manifested his sharing of a common purpose by himself performing **some act of association** with the conduct of the others; and
  - he must have **intention to kill** Y or to contribute to his death.

  In terms of this doctrine, a passive spectator of the events won't be liable to conviction even though he may have been present at the scene of crime. Other principles which emerged from case law are:

  - In murder cases, active association can only result in liability if 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**).
  - Active association with common purpose shouldn't 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**).

- Liability on the basis of active association declared constitutional

  In **Thebus** 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;
  - the right to freedom and security of a person; and
  - right of an accused person to a fair trial.

  Constitutional Court rejected these arguments and declared it constitutional as:

  - the doctrine of common purpose serves a vital purposes;
  - the object of the doctrine is to criminalise collective criminal conduct and to control crime committed in the course of joint enterprises;
  - insisting on a causal relationship would make prosecution of collective criminal enterprises ineffective;
  - effective prosecution of crime is a legitimate, pressing social need.

- Common purpose and *dolus eventualis*

  To have a common purpose with others to commit murder it is not necessary that X's intention to kill be present in the form of *dolus directus* - *dolus eventualis* is sufficient.

  Person acts with *dolus eventualis* if the causing of the forbidden result isn't his main aim, but

  (a) he subjectively **foresees** the **possibility** that, in striving towards his main aim, his conduct may cause the forbidden result and

  (b) he **reconciles** himself with the possibility.

[3] Example: A group of 5 people charged for murdering Y by stoning him to death had a common purpose and they all shouted "kill him!". It is impossible for the court to find beyond reasonable doubt that any of the accused threw stones which struck Y and even if only one person's stones hit Y, they all had the same intention to kill, and it would be unfair to convict only the one that hit Y

In **Mambo** it was held that by participating in a plan to escape where X1 gripped Y's neck, X2 grabbed his legs and X3 grabbed Y's firearm, X2 can only have common purpose with X1 and X3 who murdered Y, if he could have foreseen the possibility that by holding on to Y's legs in the escaping attempt could result in Y's death and he had reconciled himself with this possibility.

- o Disassociation from the common purpose

  Disassociation or withdrawal from the common purpose may lead to negative liability and the following guidelines are a fair reflection of South African law on the subject:

  - X must have a **clear and unambiguous intention** to withdraw from purpose - If he flees or withdraws because he is afraid of being arrested, being injured or to make good his escape, then it wasn't motivated by a clear intention to withdraw from a common purpose which he was a part of (**Lungile**).
  - X must perform some **positive act of withdrawal** – Mere passivity on his part can't be equated with a withdrawal, because previous association linked him.
  - Type of act required for an effective withdrawal depends upon a number of circumstances – **Musingadi**: Manner and degree of participation; how far commission of crime has proceeded; manner and timing of disengagement; what steps the accused took or could have taken to prevent the commission or completion of the crime – list not exhaustive, but following principle laid down: "The greater the accused's participation and the further the commission of 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."
  - A withdrawal will be effective if it takes place **before** the course of events have reached "**commencement of execution**" - stage when it's no longer possible to abstain from or frustrate the commission of the crime (**Musingadi**).
  - The withdrawal must be voluntary.

1.2.3. Joining in[4]

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.

1.2.4. Most important principles relating to common purpose

- If two or more people act together in order to achieve their common purpose to commit a crime, the acts of each of them in execution of such a purpose are imputed to the others.
- In 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**.
- Conduct by a member of a group of persons having a common purpose which **differs** from the conduct envisaged in the 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.
- Proof of common purpose may be based upon proof of a **prior agreement** or proof of **active association** in the execution of the common purpose.
- On charge of murder, 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 had been inflicted by the person or persons who commenced the assault.
- Just as active association with the common purpose may lead to liability, **dissociation or withdrawal** from the common purpose may, in certain circumstances, lead to **negative liability**.

[4] Example: X1, who together with X2 and X3 had 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.

2. PARTICIPATION II: ACCOMPLICES AND ACCESSORIES AFTER THE FACT

2.1. Accomplices

Interpretation	Meaning	Implication
Popular (Broad)[5]	Anybody who helps "actual" or "principal" perpetrator to commit crime or who furthers the commission in some way or another - no distinction from perpetrators as defined	It is so wide that it may also refer to persons who are, technically, perpetrators.
Technical (Narrow)	Refers only to narrower meaning as in the definition of accomplice.	Accomplice can never include a perpetrator

2.1.1. Requirements for liability as an accomplice

(i) Act

There must be an act[6] by which the commission of a crime by another person is furthered or promoted. Mere spectatorship doesn't amount to the furtherance of a crime (**Mbande**). Examples of conduct for which a person has been held liable as an accomplice:

- **Peerkhan and Lalloo**: the conduct forbidden in definition of the crime was purchasing 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 didn't comply with definition of crime (purchase of gold), but nonetheless constituted furtherance of purchase - accordingly he's an accomplice.
- **Kazi**: the conduct forbidden 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.

(ii) Unlawfulness

Furthering a crime in an unlawful manner or without justification.

(iii) Intention

The crime, committed by another person, must be furthered intentionally (**Quinta**). 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 she knew of the intended housebreaking and she did not close the window properly in order to help the thief, who need not be aware of the assistance. It is sufficient if the accomplice intentionally furthers the crime.

It isn't required that perpetrator must've been conscious of the accomplice's assistance. **Mutual, conscious co-operation is not a requirement** (**Ohlenschlager**).

(iv) Accessory character of liability

Liability as an accomplice is known as "accessory liability". No person can be held liable as an accomplice unless another person is guilty as perpetrator (**Williams**). No person can be an accomplice to his own crime, ie a crime which he committed as perpetrator.

2.1.2. Is it possible to be an accomplice to murder?

In **Williams**[7] it was accepted that a person can be an accomplice to murder, but this aspect of the judgment has been criticised by *Snyman* as follows:

- An accomplice to murder would have to intentionally further somebody else's commission of crime without own conduct qualifying as co-cause of the death, otherwise he will be a co-perpetrator as his conduct falls within definition of murder.
- Is it possible to further a victims' death without simultaneously causing it? **No!**
- X's act was a co-cause of Y's death, thus he's a co-perpetrator, not an accomplice. Court itself admitted there was causal connection between "accomplice's" act and the murder.

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[5] Everyday language

[6] Such as aiding, counselling, encouraging or ordering

[7] See Cases Summary

- If a person may indeed be convicted as an accomplice to murder, one would expect a court to do so where a person furthered death, but no causal connection could be proved between the act and the death (**Safatsa**[8]). The judgment effectively excluded the possibility of being convicted as an accomplice to murder if it is proved that X was a party to a common purpose to kill and death resulted from combined conduct of the group as all persons acting with the group to achieve the common purpose were all convicted as co-perpetrator: no accomplices.

Thus it is impossible to be accomplice to murder as:

- Y's death cannot be "furthered" without "causally furthering" it; and
- If a difference existed between "furthering the death causally" and "furthering the death without causing it" it would be slight and artificial as to lead to difficulties in application.

2.2. Accessories after the fact

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

2.2.1. Requirements for liability

(i) Act or omission

Person must engage in conduct (act/omission) whereby he assists either perpetrator or accomplice to evade liability. Mere approval 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 when there is a legal duty upon such a person to act positively[9].

(ii) After the commission of the crime

The act/omission must take place after commission of the actual crime. If it takes place at a time when the crime is still in the process of being committed, he may qualify as a co-perpetrator or accomplice. Agreement prior to the commission of the crime to render assistance may render him a perpetrator, if his conduct, culpability and personal qualities accord with the definition of the crime or he may be an accomplice (**Maserow**).

(iii) Enabling perpetrator or accomplice to evade liability

The act must assist perpetrator or accomplice to evade liability for his crime or to facilitate such a person's evasion of liability. Success is not required.[10]

(iv) Unlawfulness

The act must be unlawful and there must be no justification for it.

(v) Intention

Assistance must be rendered intentionally and knowing that the person being helped has committed the crime. He must have the intention of assisting perpetrator (or accomplice) to evade liability or to facilitate the evasion of liability (**Morgan**).

(vi) Accessory character of liability

Liability of an accessory after the fact is known as "accessory liability". Only possible if somebody else has committed the crime as perpetrator - one can't be an accessory after the fact to a crime committed by oneself. An exception to this general rule is to be found in **Gani**, which was confirmed in **Jonathan**: It couldn't be determined with certainty which of the accused committed the murder, but it was proved that all disposed of the body and thus all were convicted as accessories after the fact as a result. Even though some were definitely guilty of murder, they were accessories after the fact to their own crimes as none could be proved guilty of committing the murder, but only of disposing the body.

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[8] See Cases Summary

[9] Example: Police officer sees that a crime is committed, but intentionally remains passive because he wants to protect the criminal who has committed the crime from detection. However, a mere failure by an ordinary person to report a crime that has been committed cannot be construed as conduct amounting to being an accessory after the fact to the crime committed (**Barnes**).

[10] Example: One would 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.

2.2.2. **Punishment**

Section 257 of the Criminal Procedure Act ("CPA") stipulates that punishment imposed may not exceed that of the perpetrator's and, as the accessory after the fact didn't participate in the crime, the sentence is usually more lenient that that of the perpetrator.

2.2.3. **Reason for existence questionable**

Being an accessory of the fact completely overlaps with the crime known as defeating or obstructing the course of justice and is, therefore, deemed unnecessary.

3. ATTEMPT, CONSPIRACY AND INCITEMENT

Attempt, conspiracy and incitement are often referred to as "inchoate[11]" or "anticipatory" crimes dealing with forms of punishable conduct which anticipate or precede the actual completion of crime. Law also punish incomplete or anticipatory conduct to prevent commission of the completed crime. If it didn't, the maintenance of law and order would suffer seriously as the police would be powerless to intervene when they happened to become aware of people preparing to commit a crime.

3.1. **General**

Attempts to commit common-law crimes are punishable in terms of common law and an attempt to commit a statutory offence is punishable in terms of Section 18 of the Riotous Assemblies Act ("RAA"), 17 of 1956.

3.2. **Definition of 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.

3.2.1. **Types of attempt**

- Completed
- Interrupted
- Attempt to commit the impossible
- Voluntary withdrawal

3.2.2. **Completed attempt**

X has **done everything he set out to do** in order to commit the crime (his acts = execution, ≠ preparation), **but the crime is not completed**.[12]

3.2.3. **Interrupted attempt**

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[13].

It can be difficult to decide whether X's conduct amounts to punishable attempt as the mere intention to commit a crime is not punishable. A person can be liable only once his resolve to commit a crime has manifested itself in some outward conduct, but not just any outward conduct will qualify as punishable attempt, e.g. murder for buying a revolver. 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. To formulate such a boundary in terms of a general rule is a daunting problem and one must differentiate between three different stages.

- First stage: X's conduct amounts to no more than mere **acts of preparation**, eg intending to kill his enemy Y, he had merely bought 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**.

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[11] Not yet completed or fully developed

[12] Example: (i) X fires at Y but misses; (ii) X fires at Y and strikes him, but Y's life is fortunately saved by timeous medical intervention; (iii) X, intending to infringe Y's dignity (*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.

[13] Example: (i) X pours petrol onto a wooden floor, but is apprehended by a policeman before he strikes the match; (ii) X breaks and bends the bars in the window of his prison cell, but is apprehended by the warden before he can succeed in pushing his body through the opening.

- Second stage: X's 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**, eg after searching for Y, he had found him and had charged at him with the knife in his hand, although a policeman had prevented him from stabbing Y - X is guilty of **attempted murder**.
- Third stage: X had completed his act and all the requirements for liability have been complied with, eg he had stabbed and killed Y - X is guilty of **murder**.

Distinction between	Determines
1st & 2nd stages	Whether or not X has made himself guilty of attempt
2nd & 3rd stages	Whether X has committed merely an attempt or the completed crime

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, by distinguishing between:

- acts of preparation → no attempt.
- acts of execution (or consummation) → guilty of attempt.

This test is often very difficult to apply and the reasons for this are:

- vague concepts: "preparation"[14] (end of beginning) and "consummation"[15] (beginning of 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** it was stated: *"a value judgment of a practical nature is to be brought to bear upon each set of facts as it arises for consideration"*.

Application of rule

Schoombie 1945 AD 541 → See Cases Summary

3.2.4. 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.

Objective test: Consider the facts from the **outside** without considering the aims which X has in mind - X would never be guilt of attempt as what he is trying to do cannot physically result in the commission of an offence.

Subjective test: Consider X's **subjective state of mind** being his belief of what he was doing - X can be convicted of attempt. The rule: X's act must be one of consummation.[16]

Application of these tests: **Davies 1956 (3) SA 52 (A)** → See Cases Summary

In **W 1976**, X had sexual intercourse with what he believed to be a live woman without her consent, where it was a corpse in reality. Court held that he could be convicted of attempted rape as the impossibility resided in the object in respect of which the act was performed and not in the accused's belief.

Committing a "putative crime" is not a punishable attempt

In **Davies** and **W 1976**, X was **mistaken about the facts** and not the contents of the law. This situation should be differentiated from the situation in which X is mistaken about the relevant legal provisions and not about the relevant facts[17].

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[14] Cannot be convicted of attempt

[15] Can be convicted of attempt

[16] Example: X attempts to sell uncut diamond to Y by offering what he believes it to be an uncut diamond to Y, while it really is just a piece of glass: *Objectively* - X cannot be convicted of attempt to sell uncut diamond as selling glass is entirely different; *Subjectively* - X can be convicted as in his mind he believed he was trying to sell an uncut diamond not glass

Thus attempts to commit the impossible are punishable if the impossibility originated from X's mistaken view of the material facts, whereas it does not apply where the impossibility originated from X's mistaken view of the law (putative crime can never be punishable).

3.2.5. 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. Voluntary withdrawal of criminal plans are actions at:

- preparatory stage → not punishable
- start of consummation stage, but before completion of crime → Can't constitute defence against charge of attempt as held in **Hlatwayo**[18], **B 1958**[19] and **Du Plessis**[20].

A person only guilty of attempt if acting with intent to commit particular crime - No such thing as negligent attempt – one cannot attempt to be negligent.

3.3. Conspiracy

A **statutory crime** created in terms of Section 18(2)(a) of the RAA, 17 of 1956:

> "Any person who ... conspires with any other person to aid or procure the commission of or to commit ... any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable."

It doesn't differentiate between a successful conspiracy (followed by actual commission of crime) and an unsuccessful conspiracy (not followed by any further steps towards commission of crime). Theoretically, it is possible to charge and convict people of contravention of this provision even though the crime envisaged was indeed subsequently committed. Our courts have indicated that it should only be utilised if there is **no proof that the envisaged crime was in fact committed** (**Milne and Erleigh; Khoza**).

The charge and conviction must be one of **conspiracy to commit a certain crime** and the **act** in the crime of conspiracy consists of **entering into an agreement** to commit a crime. While still in negotiation, there is not a conspiracy yet. Crime is completed the moment the parties have come to an agreement and it isn't necessary for the state to prove the commission of any further acts in execution of this conspiracy (**Alexander**). The conspiracy need not be express; it may also be **tacit** (**B 1956**) and the parties need not agree about the **exact manner** in which the crime is to be committed (**Adams**).

The mere fact that X and Y both have the same intention doesn't mean that there is a conspiracy between them and there must be a definite agreement between at least two persons to commit a crime (**Alexander; Cooper**) – *"there must be a meeting of the minds"*. Conspirators need not be in direct communication with each other and if two or more persons unite in an organisation with the declared purpose of committing a crime, there is a conspiracy - any person who joins while aware of its unlawful aims or remains a member after becoming aware of them, signifies by his conduct his agreement with organisation's aims, thereby committing conspiracy (**Alexander; Moumbaris**).

The **intention requirement** can be subdivided into two components, namely:

→ the intention to **conspire**; and

→ the intention to **commit a crime** or to **further its commission**.

There can be a conspiracy only if more than one party is involved and a party to an agreement to commit a crime in whose interest, or for the protection of whom the relevant crime has been created, ought not to be convicted of conspiracy to commit the crime concerned[21]. The section

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[17] Example: X believes that to give Y a bottle of brandy is a crime, where in reality it isn't and proceeds to do what he believes to be a crime: Objectively the conduct is lawful and X was attempting to commit impossible crime; Subjectively, even though he believed he was committing a crime, the crime is impossible and he cannot be held liable for attempt because it's not recognised as crime.

[18] 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.

[19] Accepted that it was held in Hlatwayo that voluntary withdrawal was no defence, and that that decision was correct.

[20] The Appeal Court 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."*

[21] Example: The crime created in Section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, namely sexual intercourse (even with consent) between two persons where one (Y) is below the age of sixteen years. It is submitted that if both agree to have sexual intercourse, Y cannot be convicted of conspiracy, because the crime created in Section 15 has been created for the protection of somebody like Y.

which criminalises lays down the maximum punishment which may be imposed for the conspiracy, when in practice a punishment that is less severe would be imposed – reason being that conspiracy is only a preparatory step toward the actual commission of the crime.

3.4. Incitement

A **statutory crime** created in terms of Section 18(2)(b) of the RAA, 17 of 1956:

> "Any person who ... incites, instigates, commands or procures any other person to commit any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable."

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**).

The charge and conviction must be one of incitement to commit a certain crime (such as murder or assault). The purpose of the prohibition of incitement to commit a crime is to discourage people from seeking to influence others to commit crimes (**Zeelie**). In **Nkosiyana**[22] it was held that no element of persuasion is required and an inciter was described as somebody *"who reaches out and seeks to **influence the mind** of another to the commission of a crime"*. Whether other person is capable of being persuaded is immaterial and neither do the means X uses to influence or try to influence Y carry any weight - emphasis is on X's conduct.

The incitement may take place either **explicitly** of **implicitly**. If the incitement doesn't come to Y's knowledge, X cannot be convicted of incitement but may be guilty of **attempted incitement**[23]. The section which criminalises incitement lays down the maximum punishment which may be imposed for the incitement, when in practice a punishment that is less severe would be imposed - reason being that incitement is only a preparatory step towards the actual commission of the crime.

4. SPECIFIC CRIMES – INTRODUCTION & CRIMES AGAINST THE STATE

Crimes are divided according to the object which is sought to be protected by the legal norm reflected in the definition of the crime into four broad categories:

- Crimes against the state and the administration of justice;
- Crimes against the community;
- Crimes against the person; and
- Crimes against property.

4.1. Crimes against the state

Most important crimes against the state:

Common law

→ High treason
→ Sedition[24]
→ Public violence

Statutory crimes

→ Terrorism
→ Sabotage

4.2. Public violence

> 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.

4.2.1. Elements of the crime

- an **act**;
- performed by a **number** of persons;
- which assumes **serious proportions**;

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[22] See Cases Summary

[23] Example: X writes an inflammatory letter to Y, but the letter is intercepted before it reaches Y.

[24] Incitement of discontent/rebellion against a government + any action, esp. speech or writing, promoting such discontent/rebellion.

- which is **unlawful**; and
- **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. **The object or interest protected**

The interest protected in the case of public violence is the public peace and order (**Salie**).

4.2.3. **Joint action**

Cannot be committed by an individual acting alone, it must be a number of persons acting in concert, but it is impossible to specify the **number of persons** required. This will depend on the circumstances of the case (eg seriousness of the threat to peace and order). In **Terblance** five persons were considered sufficient, while in **Nxumalo** ten persons were considered insufficient. Those participating **must act with a common purpose** (**Wilkens; Ndaba; Kashion**). Once it has been established that accused knowingly participated, the prosecution needn't prove precisely what acts were committed by which participant (**Wilkens; Lekoatla; Mashotonga**).

The act can be committed both in a public place and on private property and participants needn't be armed. The act must be accompanied by violence or a threat of violence (**Wilkens; Cele**). It is sufficient if the action is aimed at the disturbance of the peace or the infringement of the rights of another, no actual infringement (**Mvelase; Segopotsi**).

4.2.4. **Examples of conduct**

- faction fights (**Ngubane; Xybele**);
- joint resistance to police action by a group of persons (**Samaai; Segopotsi**);
- rioting (**Dingiswayo**);
- violent coercion of other workers by a group of strikers (**Cele**); and
- disrupting and taking over a meeting by a gang (**Claassens**).

4.2.5. **Serious proportions**

The crime is only committed if the action of the group assumes serious proportions, reason being 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**). The classification as serious will depend on various factors or a combination of them, examples of which would be the following:

- the number of persons involved;
- the time;
- the place;
- the duration of the disturbance;
- the cause of the disturbance;
- the status of the participants;
- whether or not they are armed;
- whether persons or property are injured or damaged; or
- the way in which the disturbance is settled (if it is settled).

It was decided in **Mei 1982** that the mere placing of stones in a road where a group of people assemble doesn't amount to violence and, thus, doesn't constitute public violence. Fact that an individual threw a stone at a police vehicle isn't sufficient to convict that person of public violence.

4.2.6. **Unlawfulness**

Both the actions of the group and of the individual accused must've been unlawful. Participation of the individual may be justified on the ground of compulsion (**Samuel**), while the behaviour of the group may be justified by private defence (**Mathlala**).

4.2.7. **Intent**

The individual accused must've been aware of the nature and purpose of the actions of the group and his participation in the activities of the group must be intentional (**Aaron**). Also, a common purpose of disturbing the public peace and order must exist between the members of the group.

5. CRIMES AGAINST THE ADMINISTRATION OF JUSTICE

5.1. Perjury at common law

Perjury at common law consists of 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.

5.1.1. Elements of the crime

- the making of **a declaration**;
- which is **false**;
- **under oath** or in a form equivalent to an oath;
- in the course of a **legal proceeding**;
- in an **unlawful**; and
- **intentional** manner.

5.1.2. False declaration

- The declaration must be **objectively** false as assumed by Section 101(1) of the CPA.
- The declaration may be **oral or in writing** (in an affidavit).
- The falsehood may be made either **expressly** or **implied**. If made impliedly, the prosecution relies on an **innuendo**. In **Vallabh** 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 based on evidence led at the trial itself and not on extra-judicial declarations (**Matakane**).

5.1.3. Under oath, or in a form substituted for oath

A witness can undertake to speak the truth in the following ways:

- **Taking oath** (swearing);
- **Solemnly confirming** his **evidence** will be true;
- **Warning** by presiding official to witness to tell truth.

A witness who intentionally makes a false statement commits perjury even if his statement isn't under oath but merely made after an affirmation to speak the truth or after being warned to speak the truth. Person who administers the oath or its equivalent must've authority to do so (**McKay**).

5.1.4. In the course of a legal proceeding

The crime is only committed if false declaration is made in course of a legal proceeding (criminal or civil). Extra-judicial false sworn statements are also punishable, but not as common-law perjury. False sworn statements made before an administrative tribunal don't constitute a 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**). In **Beukman** it was decided that perjury can be committed by 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.

Perjury can be committed by making a false affidavit for a civil motion proceeding (mostly in writing) (**Du Toit**), but **not** by making a declaration in which a false criminal charge is lodged or by making extra-judicial sworn statements to police in the course of their investigation into a crime (**Beukman** - extra-judicial statements made to police aren't normally used in the subsequent trial as evidence and consequently they aren't declarations made in the course of a legal proceeding). It is no defence if the false declaration is made in the course of a case, of which the judgment is later set aside on appeal. Position is same if warrant for arrest of accused was invalid (**Vallabh**).

5.1.5. Unlawfulness

It is no excuse if, shortly after making a false statement, the witness acknowledges that it was false and then tells the truth (**Baxter**). Also the fact that the false declaration was made by X in a vain attempt to raise a defence is no excuse.

5.1.6. Intent

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

5.2. Statutory perjury

Created in Section 319(3) of the CPA:

> "If a person has made any statement on oath whether orally or in writing and he thereafter on another oath makes another statement as aforesaid, which is in conflict with such first-mentioned statement, he shall be guilty of an offence and may, on charge alleging that he made the two conflicting statements, and upon proof of those two statements and without proof as to which of the said statements was false, be convicted of such offence and punished with the penalties prescribed by law for the crime of perjury, unless it is proved that when he made each statement he believed it to be true."

5.2.1. Reasons for creation

To overcome the difficulty and embarrassment proving common-law perjury as many persons escaped punishment. The state had to prove that:

- where two conflicting statements were made, one statement was false and that the declarer had intended to lie because he could just allege that he had changed his mind; and
- the statement was made in the course of legal proceedings.

5.2.2. Proving statutory perjury

The state need only to prove that:

- the declarer on 2 different occasions made 2 statements under oath; and
- the statements conflict with each other.

It is immaterial whether one or both of the oaths are in writing or oral and whether it was made during the course of legal proceedings. The conflicting statements must each be contained in different oaths as conflicting statements under same oath doesn't amount to the crime. Evidence given before adjournment of court, which is resumed thereafter, all fall under the same oath.

The state need not prove which of the conflicting statements are false. Whether the statements conflict is a question of fact for the most part. In **Ramdas** it was held that the two statements must not be capable of reconciliation and that the must be mutually destructive. If the second statement merely denies the first, there is no conflict.

5.2.3. The difference between common-law and statutory perjury

Common-law perjury	Statutory perjury
One statement	Two statements
Only committed in the court of legal proceedings	Neither of the statements need be made in the course of legal proceedings

5.3. Defeating or obstructing the course of justice

> The crime of defeating or obstructing the course of justice consists in unlawfully and intentionally engaging in conduct which defeats or obstructs the course or administration of justice.

5.3.1. Elements of the crime

- any **act** which;
- defeats or obstructs the course of justice;
- in an **unlawful**; and
- **intentional** manner.

5.3.2. History and designation

The crime developed from the provisions of the *Roman lex Cornelia de falsis*[25]. The designation of the crime has not always been consistent in practice and the designation will depend upon the nature of the conduct which the accused is alleged to have committed. Reference to *ends* of justice should, however, be avoided as it unduly restricts the scope of the crime, which deals with the interference in the course or administration of justice and can be committed even if justice prevails.

[25] In terms of the Cornelian Laws of Falsity, the penalty of the lex Cornelia was imposed on somebody who altered, suppressed or counterfeited the truth committed with wrongful intent to harm and prejudice another.

5.3.3. **Difference between defeating and obstructing**

Obstructing[26] the course of justice signifies something less than defeating[27] and a person can be found guilty on a charge of defeating only if it is proved that justice was defeated, eg if it can be proved that a guilty person was discharged or an innocent one found guilty. A charge is one of a single offence ("defeating or obstructing") and not one involving two distinct alternative offences.

5.3.4. **Ways in which crime can be committed**

- Unlawfully inducing witness to give false evidence in court (**Zackon**);
- Refusing to give evidence (**Gabriel**);
- Give false information to the police (**Adey**);
- Absconding not to be able to give evidence be at a trai (**Gabriel**);
- Soliciting a complaint by unlawful means to withdraw a charge (**Vittee**);
- Soliciting a prosecutor by unlawful means not to prosecute (**Burger**);
- Improperly influencing a party to a civil case (**Pokan**);
- Improperly seeking to influence the judiciary by exhorting then not to give any credence to certain types of evidence, contrary to their duties (**Van Niekerk**);
- Unlawfully releasing a prisoner (**Nhlapo**).
- A witness demands money for not absconding or to give false or true evidence (**Cowan**);
- Tampering with documents or exhibits in a case in order to prevent true evidence being placed before court (**Mdakani**);
- Misleading the police in order to prevent detection of a crime which may otherwise be revealed to them (**Daniels**);
- Fabricating false evidence (**Tanoa; Daniels; Mdakani**);
- Laying a false criminal charge (**Mene**).

While lying to the police may amount to this crime, refusing to answer their questions or to co-operate in obtaining evidence does not

5.3.5. **No pending case necessary**

The conduct allegedly constituting the crime needn't be committed in relation to specific pending case and a court case needn't be envisaged. It is sufficient that X subjectively foresees the possibility that conduct may, in ordinary course of events, lead to the case being prosecuted or at least being investigated by the police. There must be possibility of a real case (criminal or civil) ensuing as the crime is not committed if X merely plays the fool with police by reporting a crime where there is, in fact, no crime.

5.3.6. **Intention**

X must subjectively foresee that his conduct might constitute this crime and he must have been aware that it might interfere with judicial proceedings to take place in the future or would hamper investigation of an offence. Where his conduct consists of interfering with witnesses, he must be aware that the person he is influencing is a prospective witness (**Maree**).

5.4. **Contempt of court**

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

5.4.1. **Elements of the crime**

- The **violation of the dignity**, etc, of the judicial body or the judicial officer, or the publication of **information or commentary** concerning a pending judicial proceeding, etc;
- in an **unlawful** and **intentional** manner.

[26] To interrupt, hinder, or oppose the passage, progress, course ("belemmer")

[27] To prevent or undo the effectiveness or establishment of ("verydeling")

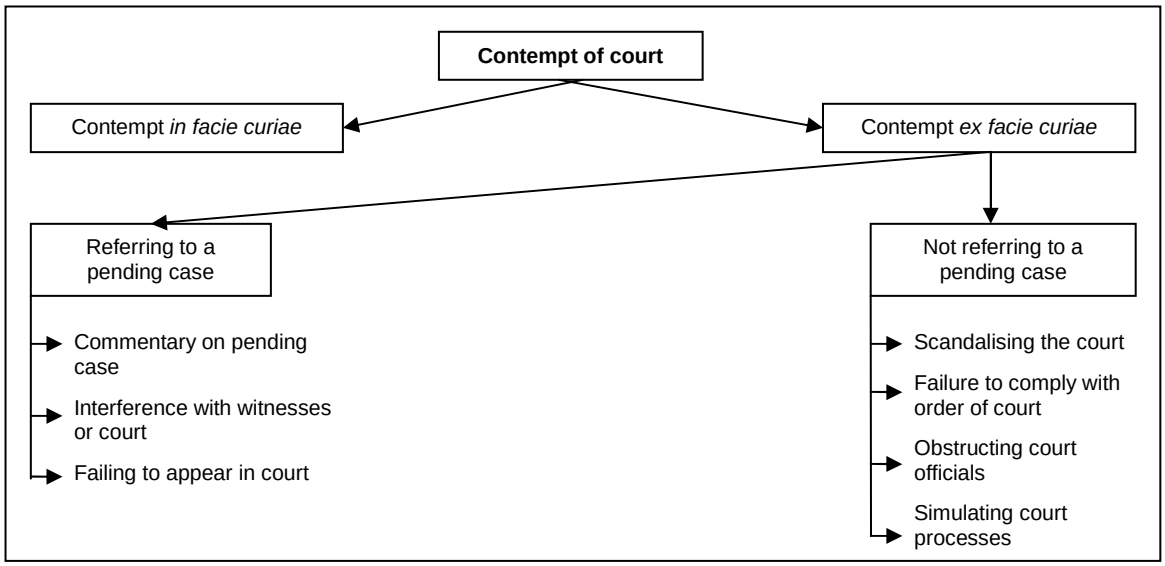
5.4.2. Unusual characteristics

- Acts by which crime committed divisible into various groups having distinctive requirements[28].
- Some cases of contempt of court are treated as civil cases in civil courts and it has been held that these cases can also come before the courts as criminal cases at the same time, if the Attorney-General chooses to bring the case before a criminal court.
- Some cases of contempt of court are heard according to an unusually drastic procedure.

5.4.3. Reasons for the existence of the crime

Contempt of court is punished to protect administration of justice and not to protect the dignity of an individual judicial officer. 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; Van Niekerk**). If 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.

5.4.4. Classification



A distinction is drawn between contempt:

- *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; and
- *ex facie curiae* → occurs through actions or remarks out of court and taking a variety of forms.

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

- pretending to be an officer of court, like an advocate, attorney or deputy-sheriff (**Wessels**);
- intentionally obstructs an officer of court in the execution of his duties (**Phelan**);
- bribing or attempting to bribe a judicial officer, legal representative or witness (**Crockett**);
- where a witness who has been summoned deliberately omits to appear at the trial (**Keyser**);

5.4.5. Unlawfulness

- Statements by members of certain bodies are privileged and cannot amount to contempt, eg the Legislative Assembly, when present in the Assembly – Sections 58 and 71 of Constitution;
- Fair comment on outcome of a case or administration of justice in general doesn’t constitute contempt of court. Public debate on the administration of justice is not only permissible, but desirable to ensure that the law and administration of justice enjoy respect of the population.

Armbard as quoted in **Van Niekerk**: “Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men". For example, there is nothing wrong with a newspaper complaining that certain sentences are too

[28] Example: 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.

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.

5.4.6. **Intent**

Intention is an essential element of the crime (**Van Niekerk**), except in cases where the editor of a newspaper is charged with this crime on ground of 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.

Remarks in a newspaper article must be read in context in order to establish the presence of intent (**Metcalf**). To request a judicial officer, *bona fide* and in courteous language, to withdraw from case on account of his personal knowledge of the event (**Luyt**) doesn't constitute contempt. If X's apparently offensive action is attributable to forgetfulness, ignorance, absent-mindedness or negligence, intent is lacking (**De Bruyn; Nene**).

5.4.7. **Administration of justice by the courts**

The actions or language allegedly constituting contempt must be directed at the judicial officer in his judicial capacity or at administration of justice by the courts. Criticism of the performance of administrative functions doesn't constitute this crime, eg:

- Action of the police;
- Alleged unreasonableness in Acts of parliament.

In **Nyikala**, X said to the 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 and he was found not guilty of contempt.

Actions not constitution contempt:

- Encouraging the public to sign a petition for the reprieve of a person who has already been sentenced (**Van Staden**). In Tromp 1966 (1)
- Criticism of the prosecution in a criminal case (**Tromp**).

5.4.8. **Some forms of the crime**

(i) Contempt *in facie curiae*

In cases of contempt *in facie curiae*, court has the power to convict wrongdoer summarily and sentence him, which is necessary to place the court in a position to maintain its dignity, but this drastic[29] procedure must be applied with great circumspection (**Ashworth; Ngcemu**). Contempt of a lesser nature can best be ignored (**Mngomezulu**) 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**).

There must be intent to violate the dignity of the court (Zungo). In Khupelo , the accused loudly sang a religious song while she was leaving the court room 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 **Lavhenga** court held that punishing accused for contempt of court *in facie curiae* isn't unconstitutional, insofar as the rules relating to this form of the crime infringe upon certain rights of the accused (eg fair trial and legal representation), such infringement is justified.

Examples of such contempt "in the open court" are:

- o shouting at witnesses during cross-examination (**Benson**);
- o a legal representative's conducting a case under the influence of alcohol (**Duffey**);
- o continual changing of one's seat and talking loudly in court (**Lekwati**);
- o grabbing and tearing a court document to pieces (**Mongwe**).

In **Nyalanbisa** court held that merely falling asleep in court doesn't necessarily amount to contempt *in facie curiae* as it merely amounted to "a trivial breach of court etiquette".

[29] 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.

(ii) Commentary on pending cases

The crime is committed by publishing information or commentary on *sub iudice*[30] court cases calculated to influence the outcome thereof. Press is fully entitled to publish the evidence delivered in the course of a trial, but may not publish information relating to the merits of a case which did not form part of the evidence in court, while the case is still in progress. 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;
- 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" and the judge, assessors or magistrate shouldn't be influenced by information or commentary emanating from sources outside the court.

The **test** for ascertaining whether the publication is calculated to influence the outcome of a case is extremely wide. It is immaterial whether or not the publication ever reached the ears of the court, and if indeed it has, whether or not court believes the facts contained in the publication or has allowed itself to be influenced by them. It doesn't even have to be probable that the words may influence the court (**Norrie; Van Niekerk**).

In was held in **Harber** that, where a newspaper editor has been charged with contempt of court on the ground of having published information in his newpaper concerning a pending case, which tends to influence the outcome of the case, it isn't necessary to prove intention in these cases, since 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. This rule 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. It doesn't apply where an individual reporter is charged in his private capacity.

(iii) Scandalising the court

This form of contempt can be committed without there being any pending case and 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. It is immaterial whether administration of justice was in actual fact brought into disrepute and all that is required is that the words or conduct should have the tendency or likelihood to harm.

In **Moila**, M made publications over a period of more than a year levelling accusations of bias, racism, incompetence, intimidation, collusion, lack of integrity and impartiality against judges and also called for the disqualification of the entire Transvaal Provincial Division. He was charged with contempt of court *ex facie curiae* in the form of scandalising the court and he raised the defence that they were made in exercise of his right to freedom of expression. Court held that the comments he made weren't fair and reasonable, made *bona fide*, true and in the public interest. M acted with malice and deliberately abused his right to freedom of expression to savage the character and integrity of judges concerned. Publications were likely to damage administration of justice, was unlawful and M 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.

Examples of this form of the crime are:

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

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

(iv) 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 party isn't criminally prosecuted for contempt, it's left to his successful opponent to apply to 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 request is successful, the sentence is, as a rule, suspended on condition that the court order is carried out (**Knott; Tromp**).

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** court 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. 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 didn't have 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.

6. CRIMES AGAINST PUBLIC WELFARE

6.1. Corruption

6.1.1. Background

Corruption erodes moral values and trust in the authorities and authoritative organs. It leads to malfunctioning of public and private sectors of the community and provides a breeding ground for organised crime. It previously a common-law offence known as "bribery", but is now punishable in terms of the provisions of Prevention and Combating of Corrupt Activities Act, 12 of 2004 ("PCCAA"). PCCAA creates a "general, broad and all-encompassing offence of corruption" and various crimes in which "specific corrupt activities" are criminalised

6.1.2. Definition

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.

6.1.3. Corruption by giver and corruption by recipient

A distinction is usually drawn between the two most important ways in which corruption can be committed:

- corruption committed by the giver; and
- corruption committed by the recipient.

Corruption is committed if one party (giver) gives gratification to another party and the other party (recipient) accepts it as inducement to act in a certain way. Both parties commit corruption.

"**give**" includes the agreement by X to give the gratification to Y or the offering by X to give the gratification to Y.

"**accept**" includes the agreement by Y to accept the gratification or the offering by Y to accept it.

6.1.4. General crime of corruption: the crime committed by the recipient

(i) Elements of the crime

- The **acceptance** by Y (the element of an act);
- of **gratification**;
- in order **to act in a certain way** (the inducement);
- **unlawfully**; and
- **intentional**.

(ii) The acceptance

PCCAA provides for certain conduct by the receiver which precedes the acceptance, namely:

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

to satisfy the element of an act. It follows from this provision that no distinction is made between the main crime, on the one hand, and conspiracy or incitement to commit the main crime, on the other hand. It also provides that “accept”, “agree to accept" and “offer to accept” also have the following broader meanings:

- to demand, ask for, seek, request, solicit, receive or obtain gratification;
- to agree to perform the acts named above;
- to offer to perform the acts named above.

No defence is offered by the following:

- That the receiver didn’t accept the gratification “directly", but “indirectly" by making use of a middle man to accept the gratification.
- That the recipient didn’t actually perform the act which he had been induced to perform. If he accepted the gratification but the scheme was exposed and he was arrested by the police before he could fulfil his part of the agreement with the giver, he is nevertheless guilty of the crime. The crime is completed even if the receiver hasn’t done what he had undertaken to do, expressly or implicitly, yet.
- That the corrupt activity was unsuccessful and affords neither the giver nor the receiver a defence.
- That the state or private enterprise concerned with the transaction didn’t suffer prejudice as a result of the giver or the receiver’s conduct is irrelevant.
- The fact that the receiver accepted the gratification, but that he didn’t have the power or right to do what the giver wished him to do affords neither a defence

(iii) The gratification

The following are words or expressions which, according to the legislature, also mean “gratification":

- money
- a gift
- a loan
- property
- the avoidance of a loss
- the avoidance of a penalty (such as a fine)
- employment, a contract of employment or services
- any forbearance to demand any money
- any “favour or advantage of any description"
- any right or privilege

“gratification" is not limited to tangible or patrimonial benefits and is wide enough to include information and even sexual favours.

(iv) The inducement

Receiver must accept gratification in order to act in a certain manner, thus he must have a certain aim or motive in mind with the acceptance. Some aims are 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;
- 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;
- which amounts to abuse of position of authority, violation of legal duty or breach of trust;
- designed to achieve an unjustified result;
- that amounts to any other improper inducement to do or not to do anything.

The general principles of the aims:

- The legislature provides explicitly that an “act" also includes an omission.
- It is irrelevant whether the receiver plans to achieve this aim personally or whether he plans to achieve this aim by influencing a middle man to act in such a manner.
- Aims apply in the alternative and it is sufficient for the state to prove that the receiver had only one of the aims in mind when he accepted the gratification.
- It is irrelevant whether the receiver accepted the gratification for his own benefit or for the benefit of someone else. Thus, if the money is received with the aim to use it to provide for a sick child, no defence is afforded.
- No defence is afforded to the received if he didn’t have the power to act in the manner in which he was induced to act.

(v) Unlawfulness

Unlawfulness is a requirement or element of all crimes and means “against the good morals or the legal convictions of society". It implies that the receiver's conduct mustn’t be covered by a ground of justification. The following are examples of conduct which fall within the ambit of the definitional elements of corruption, but are **not unlawful**:

- An act which would otherwise amount to corruption, would not be unlawful if the receiver acted under compulsion.
- A person used as a police trap also doesn’t act unlawfully if he agrees to receive gratification from another person in order to trap that person into committing corruption.
- Certain officials or employees, such as porters or waiters, don’t 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
- Same applies to receiving gifts of a reasonable proportion by employees at occasions such as weddings, retirement or completion of a “round number" (eg 20 years) of work.

(vi) Intention

Words such as “accept”, “agree”, “offer” and “inducement” indicate that intention, and not negligence, is required. General principles indicate that intention includes certain knowledge (nature of act, presence of definitional elements and unlawfulness). PCCAA provides that the *dolus eventualis* principle applies to this crime and a person is regarded as having knowledge of a fact, not just if he has actual knowledge of a fact, but also if court is satisfied that he believes that there is a reasonable possibility of the existence of that fact and that he has failed to obtain information to confirm the existence of that fact.

(vii) Penalties

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

- **High Court**: An unlimited fine or “imprisonment up to a period of imprisonment for life” – Section 26(1)(a)(i)). Section 1(1)(b) of Adjustment of Fines Act, 101 of 1991 (“AFA”), provides that imprisonment, as well as a fine, may be imposed.
- **Regional Court**: An unlimited fine or imprisonment of a period not exceeding 18 years – Section 26(1)(a)(ii)). Section 1(1)(a) of AFA provides that the maximum fine that may be imposed by a regional court is R 360,000.00 and that a fine, as well as a sentence of imprisonment, may be imposed.
- **Magistrate's Court**: An unlimited fine or imprisonment of a period not exceeding 5 years – Section 26(1)(a)(iii)). AFA provides that he maximum fine that may be imposed by a Magistrate's Court is R 100,000.00 and Section 1(1)(b) provides that 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 5x the value of the gratification involved in the offence – Section 26(3).

6.1.5. General crime of corruption: the crime committed by the giver

Mirror image of corruption committed by the recipient – most principles are the same

(i) Elements

- The **giving** by X to Y (the requirement of an act);
- of **gratification**;
- in order to induce Y to **act in a certain manner** (the inducement);

- **unlawfully**; and
- **intentional**.

(ii) The giving

Section 3(b) of the PCCAA broadens the meaning of "give" in the following ways:

- Certain conduct by the giver precedes 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.
- 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'
  - offer to lend, grant, confer or procure such gratification.

No defence is offered by the following:

- That the receiver, although perhaps giving the impression that he would accept the offer, in actual fact had no intention of doing what the giver had asked.
- That the receiver didn't do what the giver requested him to do.
- That the receiver didn't have the power to do that which he was requested to do.
- That the receiver rejected the giver's offer.
- That the receiver agreed but thereafter changed his mind.
- That the receiver found it impossible to do that which he had undertaken to do.

(iii) The gratification

See paragraph 6.1.4(iii) above.

(iv) The inducement

See paragraph 6.1.4(iv) above.

(v) Unlawfulness

See paragraph 6.1.4(v) above.

(vi) Intention

See paragraph 6.1.4(vi) above.

(vii) Penalties

See paragraph 6.1.4(vii) above.

6.1.6. **Corruption relating to specific persons**

Section 4 of PCCAA criminalises "corrupt activities relating to specific persons" and most definitions of these crime is worded exactly the general crime of corruption. Some of the specific offences are corruption relating to:

- **Public officials** – Section 4: A state official.
- **Agents** – Section 6: Corruption committed by business people in the private sector.
- **Members of the legislative authority** – Section 7.
- **Judicial officers** – Section 8: Judges and magistrates and is where someone gives or offers a judge money in order to persuade him to give a judgment in favour of a certain party, also punishable as contempt of court.
- **Members of the prosecuting authority** – Section 9: Prosecutor in a criminal case is given money to ensure that prosecution won't succeed, also constitute defeating/ obstructing the course of justice.
- **Employment relationship** – Section 10: Employer accepting gratification as inducement to promote one of his employees.
- **Procuring of tenders** – Section 13: An amount of money is given to person tasked to decide to whom a tender should be awarded to persuade him towards a specific tender.
- **Sporting events** – Section 15: Someone who accepts/gives money to undermine the integrity of any sporting event, for example, paying the referee to ensure the outcome betted on.

6.1.7. Failure to report corrupt acts

Section 34 of the PCCAA creates the crime consisting of a failure by a person in a position of authority, who knows or ought reasonably to have known, to report an offence created in the Act to a police officer. Persons who are regarded as people who hold a position of authority includes any partner in a partnership and any person who is responsible for the overall management and control of the business of an employer. Culpability is in the form of intention or negligence and "wilful blindness"[31] is included.

6.1.8. Extraterritorial jurisdiction

Section 35 of the PCCAA provides that if the act occurred outside the Republic, a court in the Republic shall have jurisdiction, regardless of charged whether the act amounts to an offence in the country in which it was committed, if the accused is:

- A citizen of RSA;
- An ordinary resident in RSA;
- Arrested in RSA;
- A company incorporated or registered in RSA;
- A body of persons in RSA.

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.

6.2. Extortion

6.2.1. 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.

6.2.2. Elements of crime

- The **acquisition** of;
- a **benefit**;
- by applying **pressure**;
- a **causal link** (between the pressure and the acquisition of a benefit);
- **unlawfully** and **intentional**.

6.2.3. The perpetrator

In Roman and Roman-Dutch law the crime was known as *concussio* and could only be committed by a public official. **G 1938**: held that the crime could be committed by any person and not only an official. **Richardson**: held that the accused needn't represent himself as an official.

6.2.4. Exertion of pressure

The perpetrator must acquire a benefit by applying pressure on a person, who gave way under the stress of the pressure. The pressure may take the form of:

- threats;
- the inspiring of fear; or
- intimidation.

A person may be threatened with:

- defamation (**Ngquandu**);
- dismissal from employment (**Farndon**); or
- arrest and prosecution (**Lepheana**).

A threat couched in negative terms will suffice[32] and may also take the form of harm to a third person (**Lepheana**), where the threat was of prosecution of X's wife. It may be either explicit or implicit and, if there's threat of physical injury, extortion and robbery overlap (**Gesa; De Jongh**).

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[31] A person believed that a fact existed but then failed to obtain information to confirm the existence of that fact.

[32] Example: Threat not to return a borrowed item (**Ngquandu**)

6.2.5. The benefit

In **Von Molendorff** court held that the benefit in extortion must be limited to a patrimonial benefit: "which can be converted into or expressed in terms of money or economic value". Legislature, thereafter, enacted the provision that it shall with respect to the object of extortion be sufficient to prove that any advantage was extorted, whether or not it was of a patrimonial nature. Thus, patrimonial or non-patrimonial benefits can be extorted, like sexual satisfaction in **J 1980**. The crime won't be complete until the benefit has been handed over (**Mtirara**).

6.2.6. Causation

Is there causal connection between application of pressure and acquisition of thing (**Mahomed**)? If benefit isn't handed over because of pressure exerted, but because a trap has been set for X and Y wishes her to be apprehended, crime is merely attempted extortion (**Lazarus**).

6.2.7. Unlawfulness

Pressure or intimidation must have been exerted unlawfully. If someone threatens a person with something which he is entitled or empowered to do, the threat can nevertheless be sufficient for extortion. Courts consider the way in which pressure is exercised and what is intended thereby. It is lawful for a police official to inform an accused that he intends to prosecute. It is, however, irregular and unlawful for him to state that he will prosecute the accused unless he pays him a sum of money (**Lutge; Lepheana**).

6.2.8. Intention

The words must be intended as a threat or that they should give rise to fear. The person must intend to acquire the benefit while fully realising that he isn't entitled to it – motives are irrelevant.

6.3. Drug offences

The two most prevalent offences, provided for in terms of the Drugs and Drugs Trafficking Act, 140 of 1992 ("DDTA"), is:

- → the **use or possession** of drugs – single offence; and
- → dealing in drugs – more serious offence.

The DDTA divides drugs into three categories:

- → dependence-producing substances;
- → dangerous dependence-producing substances (coca leaf, morphine and opium);
- → undesirable dependence-producing substances (dagga, heroin and mandrax).

} Punishment more severe

6.3.1. The use or possession of drugs

(i) 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 (Section 4 of the DDTA).

(ii) Elements

- o The **act**, that is possession or use of;
- o a **drug** as described in the Act;
- o **unlawfulness** and **intention**.

(iii) The act - possession or use

- o **Use**: Smoking, inhalation, injection or ingestion of drugs will amount to use of the drug and also involves possession.
- o **Possession**: Consists of two elements:
  - ➢ a **physical or corporeal** element (referred to as *corpus* or *detentio*)[33]
  - ➢ a **mental** element, that is X's intention (the *animus*)[34]

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[33] Consists in a degree of physical control over the thing, which depends upon the nature of the article and may be actual or constructive (through somebody else).

[34] Relates to the intention with which somebody exercises control over an article, being: i) owner of the article; or ii) the intention of keeping it for somebody else.

Section 1 of the DDTA provides that the word "possess" as used in the Act includes keeping, storing or having in custody or under control or supervision[35].

There are two ways in which the state may prove the element of possession:

- by proving that X exercised control over the drug as an owner as opposed to exercising control on behalf of somebody else - *possessio civilis* (narrow);
- by proving that, although he didn't exercise control over it as an owner, X kept it for or on behalf of somebody else - *possessio naturalis* (broad).

Previously, possession could be proved in a third way, namely by relying on a presumption of possession provided for in Section 20 of the DDTA, which stated that if it is proved that any drug was found in the immediate vicinity of X, it shall be presumed that he was found in possession of such drug, unless the contrary is proven. In **Mello** this provision was declared invalid on the ground that it is inconsistent with the constitutional right of the accused to be presumed innocent until proven guilty in terms of Section 35(3)(h) of the Constitution.

In **Prince** the prohibition on use or possession of drugs was argued to be in conflict with the constitutional right to freedom of religion as it didn't grant an exemption to Rastafari to use and possess dagga (cannabis) for religious purposes. Constitutional Court held that such an exemption couldn't be justified because it would undermine the general prohibition against possession of dagga and the relevant legislation was accordingly constitutional.

(iv) The drug

See paragraph 6.3 for categories.

(v) Unlawfulness

Unlawfulness may be excluded, for example, by necessity, but Section 4 of the DDTA explicitly provides the following grounds of justification:

- 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 has bought or collected the drugs in accordance with the Medicines and Related Substances Act, 101 of 1965.

(vi) Intention

Culpability in the form of intention is required for this offence and if X is unaware of his possession, he cannot be found guilty.

(vii) Punishment

Using or possessing a dependence-producing substance:

- **any fine** the court may deem fit to impose; or
- **imprisonment** for a period not exceeding **5 years**; or
- both such fine and such imprisonment.

Using or possessing a dangerous or undesirable dependence-producing substance:

- **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.

6.3.2. Dealing in drugs

(i) 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 (Section 5(b) and 13(f) of the DDTA).

[35] This provision is wide enough to cover situations in which a person has the custody over an article not in order to use it himself, but on behalf of somebody else, as where he looks after it for somebody else.

(ii) Elements

- The **act** (that is to deal in);
- the **drug** as described in the Act;
- **unlawfulness** and **intention**.

(iii) The act - dealing in

Legislation is more concerned with those dealing in drugs, than those using it. Section 1 of the DDTA provides that "deal in" drugs includes the performance of any act in connection with the -

- transhipment;
- importation;
- cultivation;
- collection;
- manufacture;
- supply;
- prescription;
- administration;
- sale;
- transmission; or
- exportation of drugs.

In **Solomon** it was held that it wasn't the intention that a person who purchases drugs for own use performs an act in respect of the "sale" or "supply" of drugs within the extended meaning of the definition of "dealing" and explained that the different offences of "dealing" and "possession or use" was intended to distinguish between:

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

It found that the intention was to punish activities in **furnishing** drugs as "dealing in" drugs and that it didn't intend activities in acquiring drugs to be regarded as "dealing in" drugs, but only as being in possession of the drugs. A person who acts as an agent and who purchases drugs for somebody else performs an act in connection with acquisition of drugs and not an act relating to the supply or furnishing of the drugs, unless the purpose is to on-sell it when it will be dealing in drugs.

See paragraph 6.3.1(iii) above regarding the presumption of possession. Same applies in relation to "dealing in" (**Bhulwana; Gwadiso; Julies; Ntsele; Mjezu**). If, however, the accused was found in possession of large quantities of drugs and unable to furnish a reasonably acceptable explanation of such possession, there might be sufficient circumstantial evidence to make an inference that he had been dealing (**Bhulwana; Gwadiso; Sixaxeni**).

(iv) The drug

See paragraph 6.3 for categories.

(v) Unlawfulness

Unlawfulness may be excluded, for example, by necessity in the form of coercion, but Section 5 of the DDTA explicitly provides the following grounds of justification:

- hat 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 written prescription;
- that X is a medical practitioner, dentist or pharmacist who prescribes, administers, acquires, imports or sells the substance in accordance with legislation.

(vi) Intention

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

(vii) Punishment

Using or possessing a dependence-producing substance:

- **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.

Using or possessing a dangerous or undesirable dependence-producing substance:

- **any fine** the court may deem fit to impose; or
- **imprisonment** for a period not exceeding **25 years**; or
- both such fine and such imprisonment.

6.4. Unlawful possession of firearms or ammunition

The Firearms Control Act, 60 of 2000 ("FCA") 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 FCA draws a distinction between a:

→ "firearm" - a lethal weapon which can be licensed and the maximum sentence is 15 years' imprisonment; and

→ "prohibited firearms" - weapons of war such as cannons and rocket launchers, which cannot be licensed (few exceptions) and the maximum sentence is 25 years' imprisonment.

6.4.1. Unlawful possession of a firearm

(i) Definition

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

(ii) Elements

- the **possession** of;
- a **firearm**;
- **unlawfulness**;
- **culpability**.

(iii) Possession

"possession" includes custody and refers 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*.

This entails 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.

(iv) Firearm

"any device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant".

(v) Unlawfulness

There must be no ground of justification such as necessity for possession to be unlawful. Section 3 of the FCA provides that the crime is not committed by somebody who holds a licence, permit or authorisation issued in terms of the FCA for the firearm and 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.

(vi) Culpability

Culpability in the form of intention or negligence is required.

(vii) Punishment

The punishment for the offence is a **fine** or **imprisonment** for a period not exceeding **15 years**.

6.4.2. **Unlawful possession of ammunition**

Section 90 of the FCA provides that no person may possess any ammunition unless he:

- holds a licence in respect of a firearm capable of discharging that ammunition;
- holds a permit to possess ammunition;
- 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
- is otherwise authorised to do so.

Section 91(1) provides that a firearm licence holder may not possess more than 200 cartridges for each firearm in respect of which he holds a licence. However the 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.

These provisions don't apply to official institutions such as the South African National Defence Force, 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**.

6.4.3. **Certain other offences created in the Act**

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

- To be aware that somebody else possesses a firearm illegally and to fail to report this to the police.
- To cause bodily injury to a person or damage to property by negligently using a firearm.
- To handle a firearm while under the influence of a substance, which has an intoxicating or a narcotic effect.
- To discharge a firearm in a built-up area or a public place.
- To lose a firearm owing to a failure to lock it away in a safe, strongroom or safe-keeping device, 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.

7. SEXUAL CRIMES

7.1. **Rape**

Common-law offence of rape consisted of unlawful, intentional sexual intercourse by a male with a female without her consent. Other forms of sexual penetration without consent didn't amount to rape. The Sexual Offences Act 2007 ("SOA") repeals the common-law offence and expanded the definition of rape and distinguished between rape and compelled rape.

7.1.1. **Rape**

(i) Definition

Any person who unlawfully and intentionally commits an act of sexual penetration with a complainant without his/her consent is guilty of the offence of rape (Section 3 of the SOA).

(ii) Elements

- **Sexual penetration** of another person;
- **without the consent** of the latter person;
- **unlawfully**; and
- **intentional**.

Materially defined crime = causing of a certain situation
≠ formally defined act = commission of certain type of act

(iii) The act

"**Sexual penetration**" is defined **including as any act which causes** penetration to any extent whatsoever by:

- the **genital organs** of one person into or beyond the genital organs, anus, or mouth of another person;
- any **other part of the body** of one person into or beyond the genital organs or anus of another person;
- any **object** (including any part of the body of an animal) into or beyond the genital organs or anus of another person; or
- 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.

"**Consent**" means voluntary or unforced agreement and 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/she is consenting to, and the consent must be based on a true knowledge of the material facts relating to the act. Consent will be invalid in, *inter alia*, the following circumstances in terms of Section 1(3) of the SOA:

- The use of force or intimidation by the accused against the victim or third person(s) or against the property of the victim or third person(s);
- The threat of harm by the accused against the victim or third person(s) or against the property of the victim or third person(s);
- The abuse of power or authority by the accused to the extent that the victim is inhibited from indicating his/her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;
- The act is committed under false pretences or by fraudulent means, including where the victim is led to believe by the accused that –
  - the victim is committing such a sexual act with a particular person who is in fact a different person; or
  - such a sexual act is something other than the committed act; or
- The victim is incapable in law of appreciating the nature of the act, including where he/she is, at the time of the commission of such sexual act –
  - asleep;
  - unconscious;
  - in an altered state of consciousness, including under influence of any alcohol, medicine, drug or other substance, to the extent that consciousness or judgment is adversely affected;
  - a child under the age of 12 years; or
  - a person who is mentally disabled.

Submission as a result of force, intimidation or threats of harm

The force, intimidation or threats of hard can be towards the victim, a third person (a close family member, friend or even a person he/she has never met) or the property of either. **Harm** isn't restricted to physical harm or harm to physical object and can cover monetary loss of whatever nature or even harm to reputation or dignity.

Abuse by the accused of power of authority

Refers to cases where the victim isn't threatened by physical violence, but the accused expressly or tacitly uses the position of power which he/she exercises over the victim to influence him/her to consent. If a policeman threatens a person to lay a charge against him/her of having committed a crime if he/she doesn't consent to intercourse, such ensuing consent is invalid (**Volschenck; Botha**). In **S 1971** it was held that a policeman committed rape after intercourse without threat with the victim, who believed that the policeman had the power to harm him/her and the policeman had been aware of this fear.

Consent obtained by fraud

- In respect of the identity of the accused (*error personae*)[36]
- In respect of the nature of the act to which he/she "agreed" (*error in negotio*)[37].

[36] Example: Where the woman was led to believe that the man was her husband.

Misrepresentation of any circumstance other than these, such as the accused's wealth, age or inability to pay the victim, where he/she is a prostitute, doesn't invalidate consent. 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** – he would cure her of her infertility problem if she had intercourse with him.

Misrepresentation of a person's HIV status should render the victim's consent invalid.

Inability by the victim to appreciate nature of sexual act

A child is unquestionably presumed to be incapable of consenting.

Marital relationship no defence

Section 56(1) provides that whenever an accused person is charged with rape, "it isn't a valid defence for that accused person to contend that a marital or other relationship exists or existed between him/her and the complainant". Thus, a husband can rape his own wife.

(iv) Unlawfulness

Absence of consent isn't a ground of justification, but a definitional element of the crime. Unlawfulness still remains an element of the crime and may be excluded if the accused acted under compulsion. If, for example, someone forced the accused against his will to rape the victim or threatens to him with harm if he doesn't and he consequently continues to rape the victim, the accused may rely on the ground of justification of necessity.

(v) Intention

The accused must know that the victim hadn't consented to the sexual penetration and *dolus eventualis* will suffice. 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, the accused must be aware of the fact that the girl is not yet 12 years old, or at least have foreseen the possibility that she may be under 12. Same applied to intoxication, mental defect, sleeping etc.

(vi) Sentence

Not competent sentences:

- Death sentence (**Makwanyane**); or
- Corporal punishment (**Williams**)
- Fine.

Section 51 of the Criminal Law Amendment Act, 105 of 1997 ("CLAA"), makes provision for certain sentences to be imposed in certain circumstances:

Imprisonment for life

A High or Regional Court must sentence a person convicted of rape to imprisonment for life in the following circumstances:

- where the victim was raped more than once by the accused or by any co-perpetrator or accomplice;
- where the victim was raped by more than one person and such persons acted with a common purpose;
- where the accused is convicted of two or more offences of rape but not yet been sentenced;
- where the accused knows that he has acquired the "immune deficiency syndrome or the human immunodeficiency virus (HIV)";
- where the victim is below the age of 16 years;
- where the victim is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable;
- where the victim is mentally ill as contemplated in Section 1 of the CLAA;
- where the rape involved the infliction of grievous bodily harm.

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[37] Example: Persuasion that the act was not an act of sexual penetration, but some medical operation.

Other minimum periods of imprisonment

If one of the circumstances set out above aren't present, a High or Regional Court is obliged to impose the following minimum periods of imprisonment:

- 10 years in respect of a first offender;
- 15 years in respect of a second offence;
- 20 years in respect of a third or subsequent offence.

Avoidance of minimum sentences

A court is, however, not bound to impose imprisonment for life or for one of the minimum periods of imprisonment if there are **substantial and compelling circumstances** which justify the imposition of a lesser sentence than the prescribed one. The interpretation of the words was considered in **Malgas** and certain guidelines were laid down. 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. The CLAA now stipulates that the following factors aren't substantial and compelling circumstances which justify the imposition of a lesser sentence:

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

In **Dodo** the minimum sentences in Section 51 were declared not unconstitutional.

7.1.2. **Compelled rape**

(i) Definition

Any person who unlawfully and intentionally compels a third person without his/her consent to commit an act of sexual penetration with a complainant without his/her's consent; is guilty of the offence of compelled rape (Section 3 of the SOA).

(ii) Elements

- **Compelling** a person;
- to commit an act of **sexual penetration** with another person;
- **without the consent** of such third person;
- **without the consent** of the complainant;
- **unlawfully** and **intentionally**.

(iii) The act

The act consists in the **compelling of a third person** without his/her consent to commit an act of sexual penetration with the complainant without his/her consent. Thus, the person so compelling may be convicted as a perpetrator of this crime even if he/she didn't perform any act of sexual penetration with his/her own body with the complainant. Furthermore, his/her liability isn't dependent on existence of a perpetrator (not accessory in character).

(iv) Unlawfulness

The unlawfulness of the act may conceivably be excluded if the person so compelling is him/herself compelled to compel the third person to perform the act upon the complainant.

(v) Intention

The person compelling must intend that the third person performs an act of sexual penetration with the complainant knowing or foreseeing (*dolus eventualis*) that the consent of the third person and the complainant is absent. If he/she genuinely believed that the complainant consented, he/she lacks intention.

(vi) Sentence

See paragraph 7.1.1(vi) above.

7.2. Sexual assault, compelled sexual assault and compelled self-sexual assault

The common-law offence of indecent assault was replaced in the SOA by Sexual assault, compelled sexual assault and compelled self-sexual assault.

7.2.1. Sexual assault

(i) Definition

A person who unlawfully and intentionally sexually violates a complainant without the consent of his/her is guilty of the offence of sexual assault (Section 5(1) of the SOA); and

A person who unlawfully and intentionally inspires the belief in a complainant that he/she will be sexually violated is guilty of the offence of sexual assault (Section 5(2) of the SOA).

(ii) Elements

- An act of "**sexual violation**" of another person;
- **without the consent** of the latter person;
- **unlawfully**; and
- **intentionally**.

OR

- the **inspiring of a belief** in another person that he/she will be **sexually violated**;
- **unlawfully**; and
- **intentionally**.

(iii) The act

"**Sexual violation**" is defined as including any act which causes –

≠ memorise definition
= identify an act which complies

- direct or indirect contact between the –
  - ➢ 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;
  - ➢ mouth of one person and –
    - the genital organs or anus of another person or, in the case of a female, her breasts;
    - the mouth of another person;
    - 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;
      - ✧ cause sexual arousal or stimulation; or
      - ✧ be sexually aroused or stimulated thereby; or
    - any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
  - ➢ the mouth of the complainant and the genital organs or anus of an animal;
- the masturbation of one person by another person; or
- 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.

"Subjective indecency" not sufficient and conduct which may be described as "indecent" must be view from an objective point, that is, viewed from the outside, without having regard to the accused's motive or intention.

(iv) Unlawfulness

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

(v) Intention

The accused must know that the complainant hadn't consented to the sexual violation. The same principles as set out in paragraph 7.1.1(v) above apply.

7.2.2. Compelled sexual assault

(i) Definition

A person who unlawfully and intentionally compels a third person to commit an act of sexual violation with a complainant without his/her consent, is guilty of the offence of compelled sexual assault (Section 6 of the SOA).

(ii) Elements

- **Compelling** a third person;
- to commit an act of **sexual violation** with another person (the complainant);
- **without the consent** of such third person; and
- **without the consent** of the complainant;
- **unlawfully**; and **intentionally**.

(iii) 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. A marital or other relationship will not be a valid defence for the accused.

(iv) Unlawfulness

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

(v) Intention

The same principles as set out in paragraph 7.1.1(v) above apply.

7.2.3. Compelled self-sexual assault

(i) Definition

A person who unlawfully and intentionally compels a complainant without his 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 the complainant; or

(c) cause the complainant to penetrate in any manner whatsoever his/her own genital organs or anus,

is guilty of the offence of compelled self-sexual assault (Section 6 of the SOA).

(ii) Elements

- The **compelling** of somebody else;
- to **engage in the conduct** set out in the definition;
- **without the consent** of the other person;
- **unlawfully** and **intentionally**.

(iii) The act

A typical example of conduct punishable under this section is where X tells Z that he will kill him if, for example, he does not self-masturbate, where it is impossible for Z to escape his dilemma and where Z ends up yielding to the pressure and performs the deed (self penetration). A marital or other relationship will not be a valid defence for the accused.

(iv) Unlawfulness

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

(v) Intention

The same principles as set out in paragraph 7.1.1(v) above apply.

7.3. Sexual offences against persons 18 years and older ("Y")

A brief summary of the punishable acts:

- → Unlawful and intentional compelling of Y without his/her consent to witness sexual offences, sexual acts with another or self-masturbation. 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.
- → 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 Y without his/her consent. 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".
- → The unlawful and intention exposure or display (or causing the exposure or display) of Y 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 or display of the child pornography to himself/herself.
- → The engagement of Y in sexual services for financial or other reward, favour or compensation to Y or a third person (Z). For X to be convicted of this offence the act must be performed –
  - o 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
  - o 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, it is clear that Y's conduct furthers or promotes the criminal activity of X, and therefore Y may be convicted of being an accomplice to the crime committed by X (see 2.2 for liability of an accomplice).

7.4. Incest

7.4.1. Definition

Persons who may not lawfully marry each other on account of consanguinity[38], affinity[39] 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 (Section 12(1) of the SOA).

7.4.2. Elements

- An act of **sexual penetration**;
- between **two people who may not lawfully marry each other** on account of consanguinity, affinity or adoptive relationship;
- **unlawfully** and **intentionally**.

7.4.3. The act

Section 12(2) of the SOA provides that:

- the prohibited degrees of consanguinity (blood relationship) are the following:
  - ↳ ascendants and descendants in the direct line *ad infinitum*; or
  - ↳ collaterals, if either of them is related to their common ancestor in the first degree of descent;
- the prohibited degrees of affinity are relations by marriage in the ascending and descending line; and
- an adoptive relationship is the relationship of adoption as provided for in any other law.

7.4.4. Unlawfulness

Intercourse must be unlawful, ie 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.

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[38] Relationship by descent from a common ancestor.

[39] Relationship by marriage or by ties other than those of blood.

7.4.5. Intention

The parties must not only intend to have sexual intercourse with each other, 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.

7.5. Bestiality

7.5.1. 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 (Section 13 of the SOA).

7.5.2. Elements

- Causing penetration of the genital organs of X into genital organs, etc, of an animal or vice versa or committing an act of masturbation of an animal;
- **unlawfully**;
- **intentionally**.

In **M 2004** it was held that the existence of the crime of bestiality is not unconstitutional

7.6. Sexual offences against children

7.6.1. Consensual sexual penetration of children

Usually referred to as "statutory rape", the sexual penetration of a child between the ages of 12 and 16 is criminalised, because such a child isn't mature enough yet to properly appreciate the implications and consequences of sexual acts, especially sexual penetration of a female by a male. 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. If X commits an act of sexual penetration with a child below the age or 12, he or she will be guilty of rape, because any apparent "consent" by such a young child is regarded by the law as invalid.

(i) 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[40] - Section 15 of the SOA.

(ii) Elements

- The commission of an act of **sexual penetration**;
- with a person **between the ages of 12 and 16 years**;
- **unlawfully**; and
- **intentionally**.

(iii) The act

The child must be between the ages of 12 and 16 years at the time of the commission of the act. If both parties are children between the ages of 12 and 16 years, the institution of a prosecution must be authorised in writing by the National Director of Public Prosecutions and both of them must be prosecuted, by reason of the difficulty in deciding whether it is feasible to prosecute if, say, both parties were 14 years of age at the time. X may rely on 2 defences when charged with this crime:

- **Y deceived X about his or her age**

  Section 56(2)(a) of the SOA provides this defence when the child (Y) deceived X into believing that she was 16 years or older at the time and that X reasonably believed her.

[40] "Child" in the definition is defined in Section 1(1) as "a person 12 years or older but under the age of 16 years".

This doesn't apply if the act will amount to incest. The prosecution bears the onus of proving that X wasn't deceived, but that there is an evidential onus on X to raise the defence and lay a factual foundation for the existence of the belief.

- **X and Y both children**

Section 56(2)(b) of the SOA provides this defence where both X and Y were between the ages of 12 and 16 years and the age difference between them wasn't more than 2 years at the time of the alleged commission of the crime.

(iv) Unlawfulness

Certain grounds of justification exist:

- Compulsion;
- Official capacity, ie where a medical doctor examines the child and places his finger in the child's vagina, anus or mouth.

(v) Negligence a sufficient form of culpability

It often happens that X *bona fide* believes female Y to be at least 16 years of age when she isn't. In terms of Section 56(2)(a) of the SOA X can, however, not rely on the defence that he has made a mistake regarding Y's age as his belief must be reasonable. "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 isn't 16 years old. X may be found guilty of the crime if the state proves only negligence.

7.6.2. **Consensual sexual violation of children** – Section 16 of the SOA

The only difference between this crime and that of consensual sexual penetration of children 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, the notes on the elements of unlawfulness and intention, as well as the consent of the Director of Public Prosecutions, as set out in paragraph 7.6.1 above applies.

7.6.3. **Sexual exploitation of children**

Section 17 creates a number of crimes relating to the sexual exploitation of children and the word "child", as used in the section, means a person under the age of 18 years.

(i) Sexual exploitation of a child

Any person who engages the services of a child (with or without his/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.

(ii) Involvement in the sexual exploitation of a child

A person who offers the services of a child (with or without his/her consent) to a third party for financial or other reward, for purposes of the commission of a sexual act with the child by the third person, or by detaining the child 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.

(iii) Furthering the sexual exploitation of a child

Any person who allows or permits the commission of a sexual act by a third person with a child (with or without his/her consent) or permits property which he/or she owns to be used for the commission of a sexual act with a child, is guilty of furthering the sexual exploitation of a child.

(iv) Benefiting from sexual exploitation of a child

A person, who intentionally receives financial or other reward from the commission of a sexual act with a child by a third party, is guilty of benefiting from the sexual exploitation of a child.

(v) Living from the earnings of sexual exploitation of a child

A person who intentionally lives wholly or in part on rewards or compensation for the commission of a sexual act with a child by the third person, is guilty of living from the earnings of the sexual exploitation of a child.

(vi) Promoting child sex tours

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

7.6.4. **Sexual grooming of children** – Section 18 of the SOA

The acts of requesting, influencing, inviting, persuading, encouraging or enticing a child (a person under the age of 18 years) (Y) to indulge in a sexual act or to diminishing his/her resistance to the performance of such acts is criminalised. The crime of sexual grooming of a child is committed if he/she, amongst other things, performs any of the following acts:

- display of an article to Y intended to be used in 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 is specifically aimed at the prevention of grooming of a child over the internet. Punishable acts are the following:

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

7.6.5. **Displaying of pornography to children; the use of children for child pornography and the benefiting from child pornography**

Section 19 of the SOA prohibits a person from unlawfully and intentionally exposing or displaying child pornography to persons younger than 18 years.

Section 20 of the SOA creates the crime of using a child for, or benefiting from child pornography.

It does not matter whether Y consents to the act or not, or receives any benefit or reward from such proposed conduct.

7.6.6. **Compelling children to witness sexual crimes, sexual acts or self-masturbation**

Section 21 creates an offence similar to the offence in paragraph 7.3 above, but it applies to children under the age of 18 years old.

7.6.7. **Exposing or display of genital organs, anus or female breasts to children ("flashing")**

Section 22 creates an offence similar to the offence in paragraph 7.3 above, except for one important difference: if adults, the act must be performed without the consent of the victim; if children, the act is committed even if the child consented.

7.7. **Sexual offences against mentally disabled persons**

"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."

Section 23 to 26 of the SOA deals with sexual offences against persons who are mentally disabled and are similar to the offences created in respect of children in Section 17 to 20 of the SOA.

7.8. **Failure to report sexual offences against children and disabled persons**

Section 54(1) of the SOA provides that a 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 and 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.

7.9. Trafficking in persons for sexual purposes

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

7.10. Attempt, conspiracy and incitement

Section 55 of the SOA 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.

8. BIGAMY AND ABDUCTION

8.1. Bigamy

Entering into a second marriage is impossible and such marriage is void
∆ Marriage ceremony is used

8.1.1. Definition

Bigamy is committed if a person who is already married is unlawfully and intentionally a party to a marriage ceremony purporting to bring about a lawful marriage between himself (or herself) and somebody else.

8.1.2. Elements

- Professing to be a **party to a marriage ceremony** which brings about a lawful marriage;
- one party being **already married**;
- **unlawfully**; and
- **intentionally**.

8.1.3. Party to a marriage ceremony

Entering into what purports to be a second marriage is sufficient to constitute the completed crime: proof of sexual intercourse isn't necessary. It is an abuse of the legal institution of marriage and may be committed by either male or female.

The ceremony must comply with the formal requirements for a marriage officer. To marry within the prohibitions of consanguinity is no defence for this crime. Where person who X is purporting to marry knows he is married and:

- he/she is unmarried → Accomplice
- he/she is also married → Co-perpetrator

8.1.4. Already married

The first marriage must be dissolved by divorce or death of the other spouse. If the first marriage was void *ab initio* (eg prohibited degrees of consanguinity), it will not be valid and the second marriage will be valid. If, however, the first marriage was merely voidable, such marriage will remain valid until annulled.

Section 237 of the CPA requires proof of the existence of a valid marriage for purposes of prosecution of bigamy.

8.1.5. Intention

X must be aware that he is still married at time of the second purported marriage and mustn't be under the impression that his marriage has been dissolved by the death of his spouse or divorce.

8.1.6. Customary and civil marriages

Section 2(1) of Recognition of Customary Marriages Act, 120 of 1998, provides that a valid customary marriage is for all purposes recognised as a valid marriage. X commits bigamy when entering into a civil marriage while in a customary marriage or *vice versa*. The legislature clearly intended civil marriages to remain monogamous**.**

8.1.7. Common-law abduction

The crime dates back to when minors had little freedom and were often regarded as economic assets of their parents. The purpose of the crime was to prevent outsiders from depriving the parents of their rights over the minor and to consent to their daughter's marriage. The purpose of the crime today is to punish unscrupulous persons who entice minors to leave their parental homes in order to make them available for the purposes of engaging in indiscriminate sex.

8.1.8. **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.

8.1.9. **Elements**

- The **removal**;
- of an **unmarried minor**;
- **from the control** of his or her parents or guardian;
- with the intention **to marry or have sexual intercourse** with the minor;
- **without the consent** of the parents or guardian;
- **unlawfully**; and **intentionally**.

8.1.10. **Removal**

The perpetrator may be either male or female and the minor must be removed from her parents' or guardian's control. The removal need not be forcible and it isn't required that X should himself effect the removal or be present at the time thereof. It is sufficient if X and Y arrange to meet at a place away from the house of the parents (**Nel; Jorgenson**).

8.1.11. **Person removed must be an unmarried minor**

The person who is removed must be unmarried and a minor, and may be either male or female.

8.1.12. **There must be a removal from the control of the parents or guardian**

The legal interest protected by this crime is the authority of the parents or guardian over the minor and abduction is committed against them, not the minor. The minor's consent doesn't afford the perpetrator a defence.

If Y has left the parental home to live and work elsewhere or her parents have relinquished all control, her parents not longer have control over her and X cannot commit abduction if he takes her from where she happens to be staying to another place (Bezuidenhout). In such a care the parents legally still have the right to refuse consent to Y's marriage.

8.1.13. **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. 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 X's intention. Temporary removal of a girl from her home to have sexual intercourse with her is not yet abduction. The intention must be to permanently remove Y or for a substantial period.

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**).

8.1.14. **Without the consent of the parents or guardian**

Whether or not the minor has consented to the removal is immaterial. If, however, she doesn't consent, X can also be guilty of the crime of kidnapping. What must be lacking is the consent of the parents or guardian to both the removal and the purpose of the removal.

8.1.15. **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.

8.1.16. **Intention**

X's intention must relate to all the definitional elements of the crime. He must know that Y is an unmarried minor (**Churchill**) and that her parents haven't consented to the removal (**Sita**).

9. CRIMES AGAINST LIFE AND POTENTIAL LIFE

9.1. Murder

9.1.1. **Definition**

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

9.1.2. Elements

- The **causing of the death**;
- of **another person**;
- **unlawfully**; and
- **intentionally**.

9.1.3. Causing the death

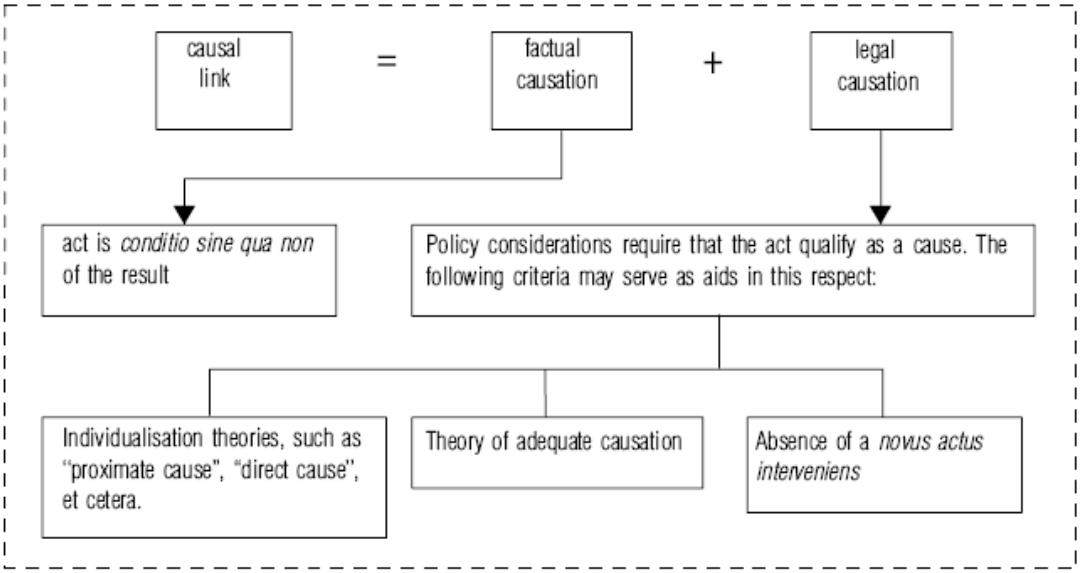
A voluntary act or a voluntary omission (in circumstances in which there is a legal duty to act actively), which causes the death of another human being. Such act or omission will be voluntary if X can subject his bodily movements to his will or intellect and will qualify as the cause of Y's death if it is both the factual and legal cause of the death. Causation is determined as follows:

- **Factual**: ***Conditio sine qua non*** (an indispensable condition) - Act is a *conditio sine qua non* for a situation if act can't be thought away without the situation disappearing at the same time.
- **Legal**: If a court is of the opinion that there are policy considerations for regarding it as the cause of Y's death using one or more of the theories of legal causation such as:
  - The individualistic theories (proximate cause)

    Among all the conditions/factors which qualify as factual causes of the prohibited situation, one must look for that one which is the **most operative** and regard it as the legal cause of the prohibited situation.
  - The theory of adequate causation

    An act is a legal cause of a situation if, according to **human experience**, in the **normal** course of events, the act has the **tendency** to bring about that kind of situation.
  - ***Novus actus interveniens*** (new intervening event)

    An act is a *novus actus interveniens* if it constitutes an **unexpected, abnormal or unusual occurrence** - an occurrence which, according to general human experience, deviates from the normal course of events, or which can't be regarded as a probable result of X's act. X's act is regarded in law as the cause of Y's death if it is a factual cause of the death and there is no *novus actus interveniens* between X's act and Y's death.



9.1.4. Another human being

Suicide or attempted suicide isn't a crime, but assisted suicide may be if conduct can be causally connected with the death (**Grotjohn**). It refers to a live human being that must have been killed. "Killing" an unborn foetus isn't murder, but abortion in our law. Section 239(1) of the CPA holds that the requirement for presumption of live birth is that a child must have breathed. Snyman submits that the presumption is rebuttable as it is merely of procedural importance, it doesn't lay down substantive law and only facilitates the task of the prosecution in cases where the child has breathed

9.1.5. Unlawfulness

Certain grounds of justification exist:

- Private defence;
- Necessity;
- Official capacity;
- Obedience to orders

Consent doesn't exclude the unlawfulness of the killing, neither is euthanasia[41].

9.1.6. Intention

The form of culpability required is intention, not negligence, and may be present as:

- *Dolus directus* (Direct intention); or
- *Dolus eventualis* (X foresees the possibility of death ensuing but reconciles himself with the possibility)

The test in respect of intention is subjective: determining what X thought or willed when he committed the act, never what he or a reasonable person should/ought to have known/thought.

X must be aware of the unlawfulness and a material mistake concerning a material element of the crime (eg hunter mistakes human for an antelope in the dark) X's motive is irrelevant.

9.1.7. Punishment

Not competent sentences:

- Death sentence (**Makwanyane**); or
- Corporal punishment (**Williams**)
- Fine.

Section 51 of the CLAA makes provision for certain sentences to be imposed in certain circumstances:

Imprisonment for life

A High Court must sentence a person convicted of murder to imprisonment for life in the following circumstances:

- if the murder was **planned or premeditated**;
- if Y was a **law enforcement officer** (ie policeman) who was murdered while performing his function as a law enforcement officer, whether he was on duty or not;
- if Y was somebody who had **given, or was likely to give, evidence** in a trial in which somebody had been accused of a serious offence;
- if X committed the murder **in the course of committing rape**;
- if X committed the murder **in the course of committing robbery with aggravating circumstances**;
- if the murder was committed by a person, **group of persons** or syndicate acting in the **execution of a common purpose** or conspiracy.

Other minimum periods of imprisonment

If one of the circumstances set out above aren't present, a High Court is obliged to impose the following minimum periods of imprisonment:

- 15 years in respect of a first offender;
- 20 years in respect of a second offence;
- 25 years in respect of a third or subsequent offence.

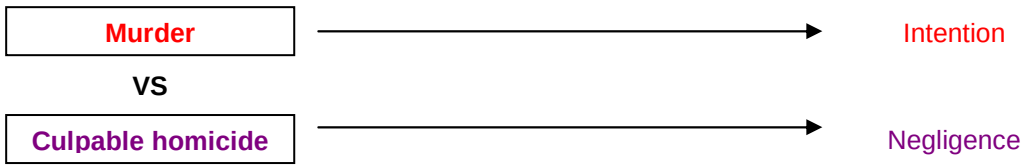
Avoidance of minimum sentences

A court is, however, not bound to impose imprisonment for life or for one of the minimum periods of imprisonment if there are **substantial and compelling circumstances** which justify the

[41] Also called mercy killing: the act of putting to death painlessly or allowing to die, as by withholding extreme medical measures, a person or animal suffering from an incurable, esp. a painful, disease or condition.

imposition of a lesser sentence than the prescribed one. The interpretation of the words was considered in **Malgas** and certain guidelines were laid down. 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. In **Dodo** minimum sentences in Section 51 were declared not unconstitutional.

9.2. Culpable homicide



9.2.1. Definition

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

9.2.2. Elements

- The **causing** of the death;
- of **another person**;
- **unlawfully**; and
- **negligently**.

9.2.3. Causing the death

See paragraph 9.1.3 above.

9.2.4. Another human being

See paragraph 9.1.4 above.

9.2.5. Unlawfulness

See paragraph 9.1.5 above.

9.2.6. Negligence

The test for negligence is objective, which is a measurement of X's conduct against an objective standard, being that which a reasonable person would have known or foreseen or done in the same circumstances. A court will consider of a reasonable person in the same circumstances:

- would have foreseen the possibility of Y's death ensuing from X's conduct;
- would have taken steps to guard against such a possibility; or
- whether X's conduct deviated from what the reasonable person would have done in the circumstances;

Where X is charged with murder and the court finds the he lacked intention (ie due to intoxication or provocation), the crime isn't automatically reduced for murder to culpable homicide as the court must be satisfied that X caused the death negligently. There is no general presumption in assault cases that X should have foreseen that his assault on Y would result in death and that he was, therefore, negligent[42]. Where X lacked awareness of unlawfulness (thus intention) by exceeding the bounds of a ground of justification due to excitement or over-eagerness, he won't be guilty of murder but of culpable homicide where it is found to he has been negligent[43].

There's no such thing as attempted culpable homicide → A person can't intended to be negligent.

10. CRIMES AGAINST BODILY INTEGRITY

10.1. Assault

Assault is nothing other than *iniuria* against the physical integrity (*corpus*) of another.

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[42] Example: The conviction of culpable homicide was set aside in **Van As** as X could not have reasonably foreseen when he slapped Y on the cheek, that Y would fall backward, knock his head and die

[43] Example: In **Ngubane** it was held that the fact that X killed Y intentionally doesn't mean he didn't act negligently and therefore can be guilty of culpable homicide.

10.1.1. Definition

A person commits assault if he unlawfully and intentionally –

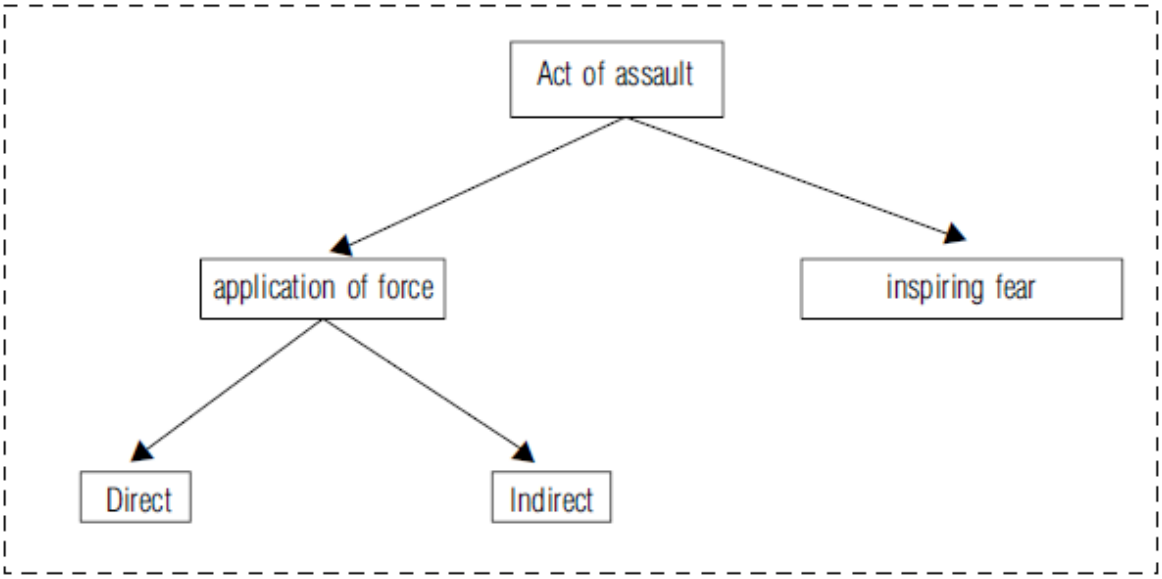
(1) applies force, directly or indirectly, to the person of another, or

(2) inspires a belief in another person that force is immediately to be applied to him.

10.1.2. Elements

- The **application of force** (or the inspiring of a belief that force is to be applied);
- **unlawfully**; and
- **intentionally**.

10.1.3. Application of force



(i) Direct

The direct application of force is the most common way in which the crime can be committed, for example:

- X punches Y with her fist;
- kicks her;
- hits her with a stick; or
- throws a stone at her which strikes her.

The fact that Y doesn't 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.

(ii) Indirect

The indirect application of force is any non-direct act by which X infringes Y's physical integrity, for example:

- X sets a vicious dog on Y;
- 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;
- 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

Two examples from our case law of convictions of assault where the application of force was indirect:

- In **Marx** X gave 3 glasses of wine to drink to each of two children, 5 and 7 years old. They became sick as a result and the younger child couldn't walk at all and was in a semi-conscious condition. X was convicted of assault → The fact that the harm or discomfort was internal rather that external, was held to be irrelevant.

- In **A 1993** 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.

(iii) Inspiring fear of immediate force

Here there is no physical contact with or impact on Y's body and it is an unusual way of committing the crime. Below the rules are set out the preconditions for holding somebody liable for assault in this form:

- The threat must be one of violence to **the person** of Y: threat to property not sufficient.
- The threat must be one of **immediate violence**: threat of some physical harm in the future (ie the next day) would not qualify as assault in this form.
- The threat must be one of **unlawful violence**: If X is entitled by law to threaten Y with violence, he doesn't commit assault, ie X may always threaten Y to use force to defend himself or his property.
- Y must **subjectively believe** that X intends to carry out his threat and is able to do so. The essence of this type of assault is the intentional inculcation of fear into Y. If Y does not in fact fear the threat, no assault is committed.

10.1.4. Unlawfulness

Certain grounds of justification exist:

- **Private defence**: Y threatens to kill/assault X, who uses force to defend herself against Y.
- **Official capacity**: A police official who uses force to arrest Y.
- **Parental authority**: X gives her naughty 7-year-old daughter a moderate hiding for discipline.
- **Consent**: A surgeon who cuts open a patient's body in the course of an operation; or a sportsman who is injured in the course of a sporting contest he voluntarily consented to.

10.1.5. Intention

- May take the form of
  - direct intention;
  - indirect intention; or
  - *dolus eventualis*[44].
- In cases of assault by inspiring fear, X must know that his conduct will inspire such fear in Y.
- X's intention must incorporate the knowledge of unlawfulness, ie if X believes that she is entitled to act in private defence because she fears an imminent unlawful attack by Y, whereas Y doesn't intend to attack her, she lacks the necessary intention to assault.
- Intoxication may lead to X's lacking intention to assault - must be found not guilty (**Chretien**).
- Provocation probably doesn't exclude intention required for ordinary assault. It is, however, recognised to exclude the "special intention" required for qualified assaults, such as assault with intent to do grievous bodily harm.

10.1.6. Attempt

Previously it was assumed that attempted assault was impossible, as a missed blow would nevertheless inspire fear and would, therefore, qualify as completed assault. It is now, however, recognised that this is incorrect and that attempted assault may indeed be committed:

- X's blow at Y, which misses him, may not arouse any fear in Y;
- Y may be unaware of X's words or conduct when he is blind, deaf, unconscious, intoxicated or because he doesn't understand X's threatening words.
- Even where Y is aware of and understands the threat, he may be completely calm as he knows that it is only a toy revolver that X is pointing at him.

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[44] Example: X throws stones at birds around playing children. She foresees the possibility that if she throws a stone at a bird, it may miss the bird and strike a child. She hopes this won't happen and goes ahead, misses the bird she aimed at and strikes a child.

10.1.7. Assault with intent to do grievous bodily harm

A separate, substantive crime where all the requirements of assault apply, but it is qualified by the intention to do grievous bodily harm. It is immaterial if actual grievous bodily harm was in fact inflicted for liability; it is only material for punishment. Such intention is a factual question and can be derived from:

- the nature of the weapon used and how it was used;
- the degree of violence;
- the part of the body aimed at;
- the persistence of the attack; and
- the nature of the injuries inflicted (however slight).

In **Joseph** X drove a truck and deliberately swerved towards Y, intending to hit him, but just failed to hit him. He was convicted of assault with intent to do grievous bodily harm. Conversely, even though serious bodily harm has been inflicted, it may be mere common assault (**Daniels; Bokane**). *Dolus eventualis* is sufficient.

Grievous bodily harm need not be of a permanent or dangerous nature and X may be convicted not only on the ground of actually inflicting violence to Y's body, but also on the ground of a threat to inflict grievous bodily harm.

10.1.8. Assault with intent to commit another crime

A separate, substantive crime where all the requirements of assault apply, but it is qualified by the intention to commit another crime, ie. assault with the intent to commit, rape, robbery or murder. The necessity of these crimes is questioned by Snyman and he holds that they amount to nothing more than an attempt to commit the intended crime.

One of the few instances where assault with intent to murder doesn't overlap with attempted murder is were X wants to murder Y by poisoning him, but Y hasn't swallowed the poison yet – X guilty of attempted murder and not assault with the intent to murder.

10.2. Pointing of a firearm

may overlap with the crime of assault in the form of inspiring fear of immediate personal violence

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.

10.2.2. Elements

- The **pointing** of;
- a **firearm** or other article;
- at **any person**;
- **unlawfully**; and
- **intentionally**.

10.2.3. The pointing'

The prohibited act consists in pointing the firearm or article at somebody else and the state needn't prove any of the following:

- that X fired a shot;
- that the firearm or article was loaded; or
- 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.

"point at" can be interpreted in one of the following ways:

- **Narrowly**: Pointing the firearm at Y that, if discharged, the bullet would hit Y (**Van Zyl**).
- **Broadly**: Pointing the firearm at Y that, if discharged, the bullet would either strike Y or pass in his immediate vicinity (**Hans**).

The broader interpretation is preferred because:

- Assuming that **the legislature intended** to combat the evils surrounding handling of firearms on as broad a front as possible.
- The narrow interpretation would make it unduly difficult for the state to prove, 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 him by millimetres.
- The **harm sought to be combated by the legislature** (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 or just missed him.

10.2.4. **A firearm etc**

"**Firearm**" is "any device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant" and includes the barrel or frame of the device.

The effect of "**or anything which is likely to lead a person to believe that it is a firearm etc**" in the definition of this offence is that X may commit the offence even if he points a toy pistol at Y, provided 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 must be pointed at a person and pointing at an animal cannot lead to a conviction.

10.2.6. **Unlawfulness**

"**without good reason to do so**" in the definition is wide enough to incorporate grounds of justification and it is clear that X will not be guilty of the crime if, for example, he 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**

Since the words "point at" *prima facie* denote intentional behaviour, it is unlikely that mere negligence will be sufficient. This means that X must know that:

- what he 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;
- he is pointing the weapon at another person – if he thinks that he is pointing it at an animal or an inanimate object, he lacks intention;
- there is no "good reason" for his conduct and that it is unlawful. It is submitted that intention in the form of *dolus eventualis* is sufficient.

10.2.8. **Punishment**

The punishment for the offence is a fine or imprisonment for a period not exceeding 10 years.

11. CRIMES AGAINST DIGNITY, REPUTATION AND FREEDOM OF MOVEMENT

The criminal law punishes not only violations of a person's physical ingegrity (under the heading of "assault"), but also violations of certain rights to personality.

11.1. *Crimen iniuria*

11.1.1. **Definition**

Crimen iniuria is the unlawful, intentional and serious infringement of the dignity or privacy of another.

11.1.2. **Elements**

- The **infringement**;
- of another's **dignity or privacy**;
- which is **serious**;
- **unlawfully**; and
- **intentionally**.

11.1.3. **Distinction between crimen iniuria and criminal defamation**

Crimen iniuria: Violations of a person's dignity and privacy are made punishable.

Criminal defamation: Violations of a person's good name or reputation are made punishable.

A person's reputation refers to what others think of him and a violation involves three parties:

- the person who makes the defamatory statement;
- the complainant (Y), that is the person about whom the defamatory statement is made; and
- the so-called third party (one or more other people) to whose knowledge the defamatory statement must come.

In the case of *crimen iniuria*, two parties are involved:

- 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.

11.1.4. **The interests protected by the crime**

(i) Dignity *Dignitas*

The classical description of *dignitas* by Melius de Villiers followed by our courts reads: our

> *"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."*

The gist of the concept of dignity is usually expressed as:

- o "mental tranquillity" (**Holliday**);
- o "self-respect" (**Tanteli**); or
- o "feeling of chastity".

(ii) Privacy

The courts regard privacy as included in the concept of dignity, but privacy cannot be accommodated under the concept of dignity for the following reasons:

- o The right to privacy can be infringed without Y being aware of the infringement (where X watches Y undressing) (**Holliday**);
- o 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**).

Therefore, both dignity and privacy have been designated as the protected interests in the definition of the crime above. A person's rights to dignity (S10) and privacy (S14) are recognised in different sections of the Bill of Rights.

11.1.5. **Infringement of legal interest may lead to both civil claim and criminal prosecution**

It is not unusual to find that a person whose dignity or good name has been infringed:

- To institute a civil claim against the alleged infringer based on *crimen iniuria* or criminal defamation; and
- to also lay a charge of *crimen iniuria* or criminal defamation against the alleged infringer with the police, resulting in criminal prosecution.

11.1.6. **Infringement of interests protected**

- The crime can be committed either by **word or by deed**;
- Although usually the case, the crime is **not confined to insults of sexual impropriety**;
- The perpetrator/victim **can be either male/female**;
- An attack against some group to which X is affiliated[45], and not against him personally, will not constitute a violation of his *dignitas*, unless there are special circumstances from which an attack on his self-respect can be deduced (**Tanteli**).

Subjective element

In instances of infringement of dignity (as opposed to infringement of privacy) Y must –

- **be aware** of X's offending behaviour; and

[45] Example: His language group, his religion, race or nationality.

- **feel degraded or humiliated** by it.

Exception: Where Y is a young child/mentally defective person, he wouldn't be able to understand the nature of X's conduct and consequently wouldn't be able to feel degraded by it → This doesn't afford X a defence (**Payne**).

Proof of the feeling of degradation: Conduct which offends the sensibilities of a reasonable person would also have offended Y's sensibilities. If, for some reason, Y didn't take any offence at X's behaviour, a court won't convict X of the crime.

In instances of infringement of privacy (as opposed to dignity) Y needn't be 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**).

Objective element

Objective standard: X's conduct must be of such a nature that it would offend at least the feelings of a reasonable person – Feelings describing *dignitas* are subjective and emotional concepts. If Y happens to be so timid or hypersensitive that he takes offence at conduct that would not offend a reasonable person, the law does not assume that the crime has been committed.

Examples of infringement of dignity

- **Indecent exposure**: X exposes private parts in public/private to Y without consent (**A 1991**);
- Communicating **a message** containing, expressly or impliedly, an invitation to, or a suggestion of, **sexual immorality** (**Olakawu**): X, unsolicited, sends indecent photos to Y;
- **Humiliation or belittling language**: X calls Y a "pikkenien" (**Mostert**);
- **Acts of assault**: X spits in Y's face (**Ndlangisa**);
- **Vulgar abuse or gross impertinence** in sufficiently serious circumstances such as:
  - **Walton**: A mother asked X to stop making a noise with his motorcycle so that her child could sleep, whereupon X shouted at her: *"Come here lady and I will give you another"*.
  - **Momberg**: 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 damn scoundrel!").

Examples of infringement of privacy

- **"Peeping Tom"**: X peeps through a window or other aperture at Y undressing or taking a bath (**Schoonberg; Holliday**). No defence afforded if the undressing not complete as the mere unwanted intrusion by X into Y's private sphere is enough to constitute the infringement.
- **"Bugging"**: X plants a listening-in device in Y's house, room or office and then listening to his private conversations (**A 1971**). No defence afforded if X didn't hear anything shameful or scandalous as the mere unlawful intrusion by X into Y's private sphere is enough to constitute the infringement.
- **Opening and reading of a confidential postal communication**.

11.1.7. Violation of dignity or privacy must be serious

Violations of dignity or privacy must be serious and may not be of a trifling nature (**Seweya**). If every swear word or scornful remark could result in a criminal prosecution, the courts would be inundated with unnecessary trials. In **Walton** it was held: *"in the ordinary hurly-burly of everyday life a man must be expected to endure minor or trivial insults to his dignity"*. Factors which may, *inter alia*, play a role in deciding whether the behaviour was serious are:

- **The ages of the parties**: Certain conduct towards young persons more serious.
- **The gender of the parties**: Protection of girls and women against insults from men usually more serious than in the case of insults offered by one man to another (**Van Meer**).
- **The nature of the act**: Certain types of conduct are by their nature notoriously serious, ie indecent exposure or the activities of "Peeping Toms".
- **The relationship between the parties**: The violation more serious if by a stranger.
- **The persistence of the conduct**: Persistent repetition of conduct of non-punishable conduct may constitute *crimen iniuria*, ie to stare at a woman is scarcely injurious, but to follow her and rudely stare persistently at her may be (**Van Meer**).
- **Publicity of the conduct**: Impairment may be greater if witness by others/larger audience.
- **Sexual impropriety**: May be viewed in more serious light than conduct without such element.

- **Y's public standing**: 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 to the same behaviour directed at a person in his private capacity (**Momberg**).

11.1.8. **Unlawfulness**

The following grounds of justification exist:

- **Necessity**: Although X appeared naked in Y's presence, it appeared that a fire broke out in Y's house while he was having a bath and that for this reason he had to flee for his life while naked;
- **Consent**: Y gives X permission to look at her while undressing;
- **Official capacity**: 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

11.1.9. **Intention**

The crime can only be committed intentionally, never negligently. X must know that his words or conduct violate Y's dignity or privacy and that there is no ground of justification for his conduct.

11.2. **Criminal defamation**

11.2.1. **Definition**

Criminal defamation consists in the unlawful and intentional publication of matter concerning another which tends seriously to injure his reputation.

11.2.2. **Elements**

- The **publication**;
- of a **defamatory allegation**;
- which is **serious**;
- which is made **unlawfully**; and **intentionally**.

11.2.3. **Publication**

The term “publication” doesn’t necessarily mean that the allegations should be made public in printed form, it must come to the attention of people other than Y either orally or in writing.

11.2.4. **Defamatory allegation**

Words are defamatory if they tend to expose a person to hatred, contempt or ridicule, or if they tend to diminish the esteem in which the person to whom they refer is held by others. Mere vulgar abuse is not likely to amount to defamation.

11.2.5. **Violation of reputation must be serious**

The objective test used to determine the seriousness is similar to the one used for *crimen iniuria* in paragraph 11.1.7 above.

11.2.6. **Unlawfulness**

The following grounds of justification exist:

- that it is the truth and it is for the public benefit that it be made know;
- it amounts to fair comment; or
- the communication is privileged.

11.2.7. **Intention**

X must intend to harm Y’s reputation and for communication to come to attention of somebody other than Y. He must be aware that what he says/writes will tend to detract from Y’s reputation. If he thinks that his words are covered by one of the grounds of justification, he lacks intention.

11.3. **Kidnapping**

Can be committed in respect of man, women and child

11.3.1. **Definition**

Kidnapping consist in unlawfully and intentionally depriving a person of his or her freedom of movement and/or, if such person is a child, the custodians of their control over the child.

11.3.2. **Elements**

- The **deprivation**;
- of **freedom of movement** (or **parental control**);
- which takes place **unlawfully**; and
- **intentionally**.

11.3.3. **Distinguish between kidnapping and abduction**

- Abduction is –
  - committed against parental authority over the minor; and
  - the motive for the crime must be to marry or have sexual intercourse with the child.
- Kidnapping is –
  - committed against a person's freedom of movement; and
  - the motive for the crime is irrelevant for liability.

11.3.4. **Deprivation**

This is usually effected by force, but forcible removal is not a requirement. It is also not required that a person be removed from one place to another. The crime can be committed even though there is no physical removal, for instance where Y is concealed or imprisoned where he happens to be. Duration of deprivation usually irrelevant, except:

- for sentencing purposes; or
- in distinguishing kidnapping from some cases of assault involving a "transient and incidental seizure" of a person for a short period.

The period of deprivation may provide evidence of X's intention. A parent cannot kidnap his/her own child and where a divorced parent/natural guardian removes the child from custody which the court awarded to someone else, he/she will not be guilty of kidnapping but possible contempt of court.

11.3.5. **Freedom of movement**

Where a child has the ability to form an independent judgement and consents to his/her removal from parental control, X will be guilty although not of an infringement of Y's freedom of movement, but of depriving Y's parents of their right over the child (**Lentit** – X was 17 and consent valid). Where the child is too young to consent and the parents haven't consented, X will be guilty of both violation of freedom of movement and of the right to parental control.

11.3.6. **Unlawfulness**

The following grounds of justification exist:

- official capacity, ie police officer lawfully arresting someone;
- consent of the person removed, unless he/she is a child.

11.3.7. **Intention**

X must know Y didn't consent to removal or were Y child, his/her parents didn't. X needn't intend deprivation of freedom to be permanent. X's motive is irrelevant for liability, although relevant for punishment. If a ransom is demanded, X may also be punished for extortion.

12. THEFT

Furtum

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

The crime isn't defined in our legislation and, therefore, one has to rely on provisions of Roman-Dutch law in order to define its contents. Unlike other legal systems, the act of appropriating someone else's property already in the perpetrator's possession or control (known as embezzlement) isn't a separate crime but merely a form of theft. As a result, one cannot define theft in our law merely in terms of the removal of another's property.

Since taking back your own property which is temporarily in another's lawful possession[46] constitutes theft, described as the unlawful arrogation of the possession of a thing, it is incorrect to describe theft in our law exclusively in terms of the appropriation of somebody else's property.

The act of theft was described by the Romans as ***contrectatio*** (a physical handling of the property, which almost always involved touching the property). Today, theft can be committed without *contrectatio* and this word should preferably be avoided when describing the act of stealing, rather describe the act as an appropriation of the property.

The intention required for theft can more accurately be described as an "intention to appropriate", rather than ***animus furandi*** (intention to steal)". ***Invito domino*** (without the owner's consent) refers to the unlawfulness requirement.

12.3. Different forms of theft

The following different forms of theft can be distinguished in our law:

- → **The removal of property**: X removes property belonging to somebody else from that person's possession and appropriates it.
- → **Embezzlement**: X appropriates another's property which he already has in his possession.
- → **Arrogation of possession**: X removes his own property which is in the lawful possession of another (such as a pledgee) and appropriates it.

12.4. Basic requirements to be convicted of theft in any of its forms

- → An **act of appropriation**;
- → in respect of a **certain type of property** (or thing);
- → which takes place **unlawfully**; and
- → **intentionally** (more particularly, with the intention to appropriate).

12.5. Theft in the form of the removal of property

12.5.1. 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**)

An act of appropriation consists of the following two components:

- **Negative**: the exclusion of Y from the property; and
- **Positive**: X's actual exercise of the owner rights in respect of the property in the place of Y.

≠ both component ≠ completed act of appropriation

X does not commit theft in the following two types of situations:

- **The "pointing out" situation**: X points out certain property to Z and tells Z that the property belongs to him, when in fact it belongs to Y. X "sells" the property to Z, but before Z can remove it, Y intervenes and X's fraudulent conduct comes into the open (**Makonie; Strydom**). Postive √ Negative X ≠ completed act of appropriation + theft (= attempted theft.)
- **Apprehended before completion**: X exercises the rights of an owner over the property, but is caught in the act before he can succeed in getting the property under his control. Postive √ Negative X ≠ completed act of appropriation + theft (= attempted theft.)

Distinguishing between attempted and completed theft

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. At the stage when X was apprehended:

[46] Example: X has pledged her watch to Y and then, before paying debt to Y, withdraws it from Y's possession without Y's consent

- had Y lost control of his property; and
- had X gained the control of the property in Y's place.

2 component test

The answer depends upon the particular circumstances of each case, such as the –

- **character** of the property taken;
- way in which a person would normally exercise **control** over property of such a nature; and
- **distance** between the place from which the property was removed and the place where X was apprehended with it.

The precise moment at which the owner loses his control and the thief gains it is a question of fact. In **Tarusika** 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 20m from the line.

Stealing from a self-service shop

In **M** and **Dlamini** it was held that X can be convicted of completed theft where 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.

It cannot be said that the owner of the self-service shop exercises effective control over all the articles in the shop while the shop is open. X needn't exist shop or pass checkout to be guilty of completed theft.

12.5.2. The property

To qualify as property capable of being stolen, the property must comply with the following requirements:

- **Movable**: One cannot steal a part of an immovable property 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[47]
- **Corporeal**: It must be an independent part of corporeal nature, which can be seen or touched. One cannot steal -
  - a mere idea (**Cheeseborough**); or
  - a tune (copyright violation).

  Two exceptions to this rule:
  - An owner may steal his own property from somebody else who is in lawful possession of the property (such as a pledgee). Although the act is directed at a corporeal thing, what is infringed is the possessor's right of retention, which is incorporeal.
  - The theft of money through the "manipulation" of cheques, banking accounts, funds, false entries, etc. The object stolen is not a corporeal thing in the form of individual coins or notes of money, but something incorporeal, namely "credit" or an "abstract sum of money".
- **Available in (or capable of forming part of) commerce - *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 excluded:
  - ***Res communes***: Property belonging to everybody, such as the air, the water in the ocean or in a public stream (**Laubscher**).
  - ***Res derelictae***: Property abandoned by its owners with the intention of ridding themselves of it. ≠ lost property = rubbish.
  - ***Res nullius***: Property belonging to nobody although it can be the subject of private ownership, such as wild animals or birds (**Mafohla; Mnomiya**). However, if it has been reduced to private possession by capture, they can be stolen (**Sefula**).
- **Must belong to somebody else**: One cannot steal one's own property, except the unlawful arrogation of the possession of a thing (***furtum possessionis***).

12.5.3. Unlawfulness

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. Presumed consent (also spontaneous

[47] Example: Mealiecobs separated from mealie-plants (**Skenke**) and trees cut down to be used as firewood (**Williams**).

agency) may also constitute a ground of justification, for example: while his neighbour Y is away on holiday, Y's house is threatened by flood waters and X removes her furniture to his own house in order to protect them – he will not be guilty of theft.

12.5.4. Intention

The form of culpability required for theft is intention, never negligence. The intention must refer to all the requirements or elements of the crime.

(i) The intention in respect of the property

X must know that what he is taking is property as described in the definition of the crime. If X believes his action to be directed at a *res nullius* or a *res derelicta* when it is not, he lacks the intention to steal and cannot be convicted of theft. If X believes that the property he is taking belongs to him, he likewise lacks the intention to steal.

In **Rantsane** X removed a dirty mattress cover from a garbage container in a military camp under the impression that it was a *res derelicta*. However, the quartermaster at the camp hadn't discarded it, possibly one of the recruits had 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.

(ii) The intention in respect of the unlawfulness

X must be aware of the fact that Y hadn't agreed to the removal or handling of the property and that he is acting unlawfully. In **Slabbert** Y invited X for a drink at Christmas and, on arriving at Y's home, X 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 wouldn't object if he helped himself to drinks.

(iii) The intention in respect of the act (ie intention to appropriate)

"Intention to appropriate" is a mirror image of the act of appropriation and X must have both of the following components:

- an intention to exercise the rights of an owner in respect of the property; and
- an intention to exclude the owner from exercising his rights over his property, in other words, to deprive him of his property.

Intention permanently to deprive

X's intention must be to deprive Y **permanently** of her property. If the intention to deprive is only temporary, X still respects and recognises Y's right to his property throughout - contrary to the essence of appropriation[48].

An intention to deprive permanently wasn't required in Roman and common-law, which required an intention to act ***lucri faciendi gratia*** (an intention to derive some benefit from the handling of the property. X could be convicted of theft even if he intended to use the property without Y's consent only temporarily before returning it - this form of theft was known as ***furtum usus*** (theft of the use).

In **Sibiya** the court clearly held that *furtum usus* is no longer a form of theft in our law and that for X to be convicted of theft an intention to permanently deprive Y of his property is required → See Cases Summary.

Intention to appropriate includes intention permanently to deprive

It is better to describe the intention in respect of the act as an **intention to appropriate the property**, which isn't in conflict with the intention to permanently deprive. If all the emphasis is placed on the intention to permanently deprive, there is a danger that X may be convicted of theft where the facts reveal that he actually committed only malicious injury to property[49].

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[48] Example: Taking a friend's car without her consent for a joy ride with the intention of returning it – theft not committed becaused of the lack of the intention to appropriate the property.

[49] Example: If X chases Y's cattle over a cliff 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.

Exceptions to rule that temporary use not theft

- If X removes Y's car intending only to use it and it breaks down or collides with some object before he returns the car. If X simply abandons the car without notifying Y of the situation, he may indeed be guilty of theft as the abandoning adopts an intention which is the opposite of his initial intention: he foresees the possibility that Y may lose his car and behaves recklessly towards this possibility - *dolus eventualis* (**Laforte**).
- If X takes Y's property without Y's consent, not in order to take and use it unreservedly for his own benefit, but only to retain it as a pledge or security for a debt which Y owes him, he lacks the intention to appropriate and isn't guilty of theft. In **Van Coller** X, a "flying doctor" in Botswana, took possession of 4 microscopes belonging to the government without its consent. He intended to return them provided certain criminal charges against him were withdrawn by the Botswana authorities. The court held that this intent couldn't be reconciled with an intent to deprive the owner of the full benefit of his ownership. The court held that X had not committed theft.

Intention to acquire benefit not required

In **Kinsella** X was a major in the Defence Force, who 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've been guilty of theft even if he had intended to donate the proceeds of the sale to a charitable organisation.

12.6. Embezzlement

sometimes "theft by conversion"

12.6.1. Definition

A person commits theft in the form of embezzlement if he commits an act whereby he appropriates another's property which is already in his possession.

12.6.2. Elements

- An **act of appropriation**;
- in respect of **another's property** which is **already in his possession**;
- **unlawfully**; and
- **intentionally**.

12.6.3. Act of appropriation

Differs from theft in the form of the removal of property in that X needn't first remove the property from Y's possession before appropriating it; he only commits an act of appropriation in respect of property already in his possession.

The way in which X had come into possession of the property is immaterial, ie whether the animal that X appropriates accidentally walked onto X's land or whether its owner had entrusted it to him. The following are acts of embezzlement:

- where X **consumes** the property (ie eat food or burn firewood);
- where X **sells** it (**Attia; Markins Motors**);
- **donates** it;
- **exchanges** it for something else (**Van Heerden**);
- uses it to **pay his debts**; or
- **pledges it without intending** to release the pledged property by **paying her debt** to the pledgee, or without having any reason to believe that **she would have enough money in future to pay her debt** and thus release the property (**Viljoen**).

If a person finds or picks up an article knowing the owner thereof or how to trace him, but fails to inform the owner and consumes it himself, his conduct would amount to an appropriation of the article (**Spies and Windt; Luther**). If the value is insignificant, the person will not be charged with theft because of the operation of the maxim ***de minimis non curat lex*** (the law doesn't concern itself with trivialities).

Mere failure or procrastination by X to return the property to Y, or his false denial of possession, cannot be construed as an appropriation of the property (**Kumbe**). It is not inconceivable that X's mere passivity or *omissio* may amount to an appropriation, ie this may happen if X simply refuses to return Y's mantelpiece-clock which she had to look after, but which is now in her lounge room where she can regularly consult it to ascertain the time. X's mere decision not to return the property does not constitute its appropriation; mere thoughts or a mere resolve is not punishable.

12.6.4. **The property**

See paragraph 12.5.2 above.

12.6.5. **Unlawfulness**

See paragraph 12.5.3 above.

12.6.6. **Intention**

See paragraph 12.5.4 above.

12.7. **Arrogation of possession (*furtum possessionis*)**

The owner steals his 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.

A pledgee and somebody who has a right of retention are examples of persons who enjoy such a preferential right of possession. This form of theft is peculiar, in that what X steals is in fact his own property.

In **Roberts** 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** 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.

12.8. **Certain aspects of the theft of money**

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. These are not corporeal things such as tangible coins or notes, it is something incorporeal namely "credit" or an "abstract sum of money".

If someone were to be convicted of theft of one of these, it would mean that he would in fact be convicted of theft of incorporeal property. However, according to our courts, this consideration affords no defence on a charge of theft and such conduct would constitute theft (**Kotze; Verwey**). 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 his actions, ie the reduction of the credit in Y's banking account (**Scoulides**).

12.9. **Theft a continuing crime**

Theft is a ***delictum continuum*** (a continuing crime), which means that the commission of the crime continues for as long as the stolen property remains in the possession of the thief. As a result, our law generally draws no distinction between perpetrators and accessories after the fact in respect of theft. In **Von Elling** X was convicted of theft (as a co-perpetrator) because, at the request of Z, who had stolen a motor car, he drove the car from one garage to another with the intention of concealing it from the owner.

13. ROBBERY AND RECEIVING OF STOLEN PROPERTY

13.1. **Robbery**

Theft by violence

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.

13.1.2. **Elements**

- The **theft of the property**;
- the use of either **actual violence or threats of violence**;
- a **causal connection** between the violence (or threats thereof) and the acquisition of the property;
- **unlawfully**; and **intentionally**.

13.1.3. **Theft of the property**

All the requirements for theft apply to robbery too and just as in theft, only movable, corporeal property that is available in commerce can form the object of robbery. There must not be consent and the robber must have known that consent was lacking.

13.1.4. **Application of force**

Actual application of violence must be aimed at victim's person, ie his bodily integrity (**Pachai**). The violence may be slight and injury is not necessary. If X injures Y and takes property from him while Y is physically incapacitated, X commits robbery if he, at the time of the assault, intended to take it (**Mokoena**).

If X makes a threat of physical violence against Y if he doesn't hand over property, it is sufficient for robbery (**Gesa; De Jongh; Benjamin**). Y could simply submit, through fear, to the taking of property and, therefore, needn't be physically incapacitated. Threats may be express or implied.

13.1.5. **Causal link**

Violence or threats of violence + Acquisition of the property ≠ violence ≠ robbery

In **Pachai**, Y and the police set a trap for X after threatening telephone calls. When X entered Y's shop and demanded money and cigarettes from him aiming a pistol, Y handed over the money and cigarettes to X and the police arrested X. It was held that **Y didn't hand over the property to X as a result of X's threats**, but in the course of a pre-arranged plan with the police aimed at securing X's arrest. Consequently, X was not found guilty of robbery, but of **attempted robbery**.

If X uses violence to **retain the property** or to **avoid being caught**, he doesn't commit robbery, although he may be convicted of the two separate offences of **theft and assault** (**John; Ngoyo**). If X only wanted to assault Y and **later discovers** Y's watch lying in the road and taking it, he does not commit robbery, but the two separate offences of **assault and theft** (**Malinga; Marais**).

In **Yolelo** it was held that it isn't required that the violence 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 be committed. X was busy stealing certain articles from Y's house when caught by Y. X assaulted Y and incapacitated her so that he could continue stealing.

13.1.6. **The "bag and cell phone-snatching" cases'**

Question: Quick, unexpected manoeuvre = robbery?

In **Sithole** it was held that the handbag snatcher commits robbery and not merely theft. 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 or if X intentionally uses force to prevent resistance as Y would ordinarily offer to the taking of the bag if she were aware of X's intentions. Not necessary for Y to offer resistance or to try to retain possession - Followed in **Mofokeng** and **Witbooi**.

In **Salmans** it was held that grabbing a cell phone out of the complainant's hand constituted robbery and not merely theft, because it's a physical act against the person of another. Any force applied to the person of a victim, however slight, was sufficient to constitute robbery and physically grabbing a handbag or a cell phone is a physical intervention necessary for dispossession – Approved in **Mambo**.

If Y does offer resistance, because she clings on to her handbag or cell phone while X pulls it away, it is evident that there is actual violence and the conduct amounts to robbery (**Hlatwayo**).

13.1.7. **Property need not be on the victim's person or in his presence**

In **Seekoei** X violently attacked Y and forced her to hand him the keys to her shop, which was 2km 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. X was not convicted of robbery. On appeal it was held that this

was an error and that there is no requirement that the property should be on the victim's person or in his presence at the time of the theft and that X should have been convicted of robbery.

13.1.8. **Punishment**

Not competent sentences:

- Death sentence (**Makwanyane**); or
- Corporal punishment (**Williams**)
- Fine.

Section 51 of the CLAA provides for certain mandatory minimum periods of imprisonment in an attempt to deter would-be robbers and also perhaps also by exacting more suitable retribution for the commission of this crime (**Montgomery**). In **Dodo** the Constitutional Court rejected the contention that the provisions of Section 51 are unconstitutional.

Minimum periods of imprisonment

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** ("motor 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.

Circumstances in which a court is not bound to impose prescribed minimum sentence

According to Section 51(3)(a), a court is not bound to impose 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. See paragraph 9.1.7 above for an explanation of "**substantial and compelling**" - remember words for examination purposes.

13.2. **Receiving stolen property**

A person who commits this crime renders himself, at the same time, guilty of being an accessory after the fact to theft (**Maserow; Joffe**). Since persons who are accessories after the fact to theft are usually regarded as thieves (ie perpetrators), the crime of receiving overlaps the crime of theft.

13.2.1. **Definition**

A person commits the crime of **receiving stolen goods knowing it to be stolen** if he unlawfully and intentionally receives into his possession property knowing, at the time he does so, that it has been stolen.

13.2.2. **Elements**

- **Receiving**;
- **stolen goods**;
- **unlawfully**; and
- **intentionally** (which includes knowledge of the fact that the goods are stolen).

13.2.3. **Receiving**

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.

13.2.4. **Stolen goods**

≠ Receiving proceeds of sale of stolen goods

It is stolen if obtained by theft, robbery, housebreaking with intent to steal and theft or theft by false pretences. It can only be committed in respect of property capable of being stolen, that is movable corporeal property *in commercio*.

13.2.5. **Unlawfulness**

If the receiver received the property with the consent of the owner or with the intention of returning it to the owner or handing it over to the police, he doesn't commit the crime. In **Sawitz**,

the police handed recovered stolen property back to the thief to trap X in the act of "receiving". X's defence that the police consented to the receiving was rejected and he was convicted.

13.2.6. Intention

X must know:

- that he is receiving the goods into his possession; and
- that the property is stolen or he must foresee the possibility that it may be stolen and reconcile himself to such possibility.

The receiver, like the thief, must have the intention to deprive the owner of the benefits of his ownership permanently.

14. FRAUD AND RELATED CRIMES

14.1. Fraud

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

- **Misrepresentation**;
- which causes or may **cause prejudice** and which is;
- **unlawfully**; and
- **intentionally**.

14.1.3. Misrepresentation

By misrepresentation is meant a deception by means of a falsehood and X must represent to Y that a fact or set of facts exists which in truth doesn't exist. Form that the misrepresentation may take:

- generally writing or speech - conduct such as a nod signifying consent may suffice (**Larkins**);
- be either express or implied[50];
- made by either a *commissio* (act) or an *omissio* (omission) - 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, which may arise from statute or 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[51].
- It has been held that a mere false promise as to the future cannot be compared to a misrepresentation (**Larkins**). It must refer to an existing state of affairs or to some past event, but not to some future event (**Feinberg**).

  However, this contention is misleading – see implied misrepresentation above. An important consequence of this 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**).

14.1.4. The prejudice

Mere lying is not punishable as fraud. The crime is only committed if the lie brings about some sort of harm (prejudice) to another. Actual prejudice is, however, not required; mere potential

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[50] Implicit misrepresentation: Somebody who buys goods on credit implicitly represents that at the time of purchase he is willing to pay for them or intends to pay for them in the future and that he believes he will be able to do so. If at time of purchase he in fact has no such intention or belief, he misrepresents the state of her mind (**Persotam**).

[51] Example: 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 (**Larkins**); X, a member of parliament failed to disclose to parliament a benefit negotiated for himself in breach of a parliamentary code of conduct. 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 (**Yengeni**).

prejudice is sufficient to warrant a conviction. It is also not required that the prejudice be of a patrimonial nature.

Prejudice may be either actual or potential

If X claims an amount of money from his insurance company on the ground that certain articles belonging to him has been stolen when they have in fact not:

- **Actual**: The insurance company pays him the money he claims;
- **Potential**: After the claim, the insurance company discovers that the articles concerned were in fact not stolen and that it was false - they refuse to pay the amount claimed.

"**Potential prejudice**" means:

- the misrepresentation, looked at objectively, involved some risk of prejudice, or that it was likely to prejudice[52];
- the possibility of prejudice should not be too remote or fanciful (Kruger);
- the prejudice needn't necessarily be suffered by the victim; prejudice to a third party, or even to the state or the community in general, is sufficient (**Myeza**);
- It isn't relevant that the victim wasn't misled by the misrepresentation; it's representation's potential which is the crucial issue[53]. It follows that it makes no difference whether or not Y reacts to misrepresentation, or whether X's fraudulent scheme is successful or not (**Isaacs**);
- 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.

Prejudice may be either proprietary or non-proprietary 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. A few examples of fraud involving **non-proprietary** prejudice are the following:

- writing an examination for another – at the very least, this holds potential prejudice for the education authorities (**Thabetha**);
- submitting a forged driver's licence to a prosecutor during the trial of a traffic offence (**Jass**);
- making false entries in a register reflecting the sale of liquor – prejudices state in its control of the sale of liquor (**Heyne**);
- laying a false charge with, or making a false statement to the police (**Van Biljon**);
- failing to disclose to parliament a benefit negotiated for oneself in breach of a parliamentary code of conduct (**Yengeni**) – 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 any fraudulent misrepresentation is obviously unlawful, unlawfulness does not play an important role in this crime.

14.1.6. Intent

X's intent must relate to all the requirements of the crime:

- he must be aware of the unlawfulness;
- he must know (or *dolus eventualis*) that the representation he is making to Y is untrue;
- he must know (or *dolus eventualis*) that Y or some other party may suffer actual or potential prejudice as a result of his misrepresentation (**Bougarde**).

There is a distinction between an intention to deceive and an intention to defraud:

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[52] "Likely to prejudice" doesn't mean that there should be a probability of prejudice, but only that there should be a possibility of prejudice (**Heyne**) - prejudice can be, not will be, caused.

[53] Example: 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 ..." (**Dyonta**).

- **Deceive**: Intention to make somebody believe that something, which is in fact false, is true.
- **Defraud**: Intention to induce somebody to embark, as a result of the misrepresentation, on a course of action prejudicial to herself (**Isaacs**).

Deceive → Misrepresentation

Defraud → Misrepresentation + Prejudice

Mere telling of lies which the teller thereof doesn't believe will cause the person to whom they are told to act upon them to his prejudice, is not fraud (**Harvey**).

14.1.7. Attempt

It's been held that there can be no attempted fraud, since even if the misrepresentation is not believed or even if Y doesn't act on the strength of the representation, potential prejudice is present and consequently fraud is committed (**Nay; Smith**). In **Heyne**, however, it was held that attempted fraud is indeed possible and 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 → See Cases Summary.

14.2. Forgery and uttering

2 separate crimes = English Law

14.2.1. Forgery

Misrepresentation takes place by way of the falsification of a document – rest of the requirements the same as for fraud. Difference between:

Fraud: Completed only when misrepresentation has come to the notice of the representee.

Forgery: Completed the moment the document is falsified.

When the document is brought to the attention of others a separate crime is committed: uttering. Known as different forms of *falsitas* in common law.

(i) Definition

Forgery consists of unlawfully and intentionally making a false document to the actual or potential prejudice of another.

(ii) Elements

- **Making a document**;
- which is **false**;
- **prejudicial**;
- **unlawfully**; and
- **intentionally**.

(iii) Document

Our courts interpret the term "document" more broadly than held in **Swanepoel** and have held that forgery can be committed in respect of these types of documents:

- a testimonial (**Letsoela**);
- a written request to the military authorities for a pass (**Slater**);
- a certificate of competence to repair watches (**Motete**);
- cheques (**Joffe**);
- receipts (**Vilakazi**);
- promissory notes (**Sedat**);
- bonds (**Pepler**);
- general dealers' licences (**Kolia**); and
- documents setting out educational qualifications (**Macatlane**).

(iv) Falsification

Untrue statements contained in a document don't render it forged or false. A document is false when it **purports to be something other** than it is, such as:

- an imitation of another document;
- purporting to have been drawn up by a person other than its author;

- containing information (eg figures or dates) not originally contained therein, which is of material interest for the purposes of the transaction forming the basis of the charge.

Falsification can be achieved in may ways, for example:

- Alteration (**De Beer**);
- Erasure;
- Substitution (**Leibrandt**);
- Addition or particulars on the document (**Muller**); or
- Endorsement (**Joffe**).

(v) Prejudice

Same as fraud – except, potential prejudice can be inferred much earlier, namely once the document has been completed. Forgery does not automatically imply prejudice. A clumsy or unsuccessful forgery doesn't eliminate potential prejudice.

(vi) Intention

X must have the intention to defraud and not merely to deceive, such as in the case of fraud. He must know that he is falsifying a document.

14.2.2. **Uttering**

Uttering consists of unlawfully and intentionally passing off a false document to the actual or potential prejudice of another.

The only element in the definition of this crime which doesn't also form part of the definition of forgery is the "**passing off**" of the document, which means that the **document is communicated to another person** by, for example, offer, deliver or attempt to make use of it in some or other way and it is immaterial whether the person was in fact misled. The document must be **represented as genuine**.

14.3. **Theft by false pretences**

14.3.1. **Definition**

A person commits theft by false pretences if he unlawfully and intentionally obtains movable, corporeal property belonging to another, with the consent of the person from whom he obtains it, such consent being given as a result of a misrepresentation by the person committing the offence, and he appropriates it.

14.3.2. **Elements**

- A **misrepresentation** by X to Y;
- **actual prejudice**[54];
- a **causal connection** between the misrepresentation and the prejudice;
- an **appropriation** of the property by X;
- **unlawfully**; and
- **intentionally**.

14.3.3. **General character of crime**

Regarded both as a form of theft and as a form of fraud: i) X commits fraud by making a misrepresentation to Y; ii) Y, as a result of this misrepresentation, "voluntarily" hands over movable, corporeal property to X; and iii) X appropriates this property[55].

In these circumstances, "consent" isn't regarded by the law as valid consent. Strictly speaking, this crime is unnecessary as in every case in which X is convicted of this crime, he could equally well be convicted of fraud and it, therefore, completely overlaps with fraud.

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[54] Harm or loss suffered by Y, in that he parts with his property by allowing X to take possession of it.

[55] 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.

15. CRIMES RELATING TO DAMAGE TO PROPERTY

15.1. Malicious injury to property

15.1.1. Definition

> Malicious injury to property consists of 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.

15.1.2. Elements

- **Damaging**;
- **property**;
- **unlawfully**; and
- **intentionally**.

15.1.3. The property

The property must be corporeal and may be either movable or immovable. The crime cannot be committed in respect of property that belongs to nobody (*res nullius*) and, in principle, one cannot commit the crime in respect of one's own property as the owner of property is free to do with his property what he likes. However, the courts have held that the owner can also commit the crime if he sets fire to his own insured property in order to claim its value from the insurer (**Gervais; Mavros; Van Zyl**).

15.1.4. Damage

Damage includes for instance:

- total or partial destruction of property, eg where an animal is killed or wounded (**Laubscher**);
- loss of property or substance, eg the draining of petrol from a container; and
- 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 in **Bowden** where a statue was painted. 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.

15.1.5. Unlawfulness

Otherwise unlawful injury to property may be justified by –

- statutory provisions giving X the right to destroy, wound or catch trespassing animals (**Oosthuizen**);
- necessity, eg where X defends himself against an aggressive animal (**Jaffet**) or his property against an attack by an animal (**Dittmer**);
- official capacity, eg where a policeman breaks open a door to gain access to a house in which a criminal is hiding;
- consent by the owner of the property; and
- obedience to orders (**Stewart**).

15.1.6. Intention

Damaging the property need not be the principal aim, *dolus eventualis* is sufficient. Negligence is never sufficient. Motive is not a relevant consideration for intention (**Mnyanda**).

15.2. Arson

It overlaps with the crime of malicious damage to property. It can only be committed in respect of immovable property and if the property is movable it will amount to malicious damage to property. Intention to damage the property by setting fire to it is required.

15.2.1. Definition

> Arson consists of unlawfully and intentionally setting fire to –
>
> (1) immovable property belonging to another; or

(2) his own immovable insured property with the intention of claiming the value of the property from the insurer.

15.2.2. **Elements**

- **Setting fire** to;
- **immovable property**;
- **unlawfully**; **and**
- **intentionally**.

16. HOUSEBREAKING WITH INTENT TO COMMIT A CRIME

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**

→ **Breaking and entering**;
→ a **building or structure**;
→ **unlawfully**; and
→ **intentionally**.

16.3. **Breaking and entering**

16.3.1. **Breaking**

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**).

The following acts qualify as a "breaking in":

- breaking a door, window, wall or roof of a building;
- merely pushing open a closed (even though not locked) door or window (**Faison**);
- merely pushing open a partially closed door or window (**Moroe**).

The following acts do not qualify to a "breaking in":

- walking through an open door into a building;
- climbing through an open window into a building; or
- stretching one's arm through an open hole in a wall of a building.

No displacement of an obstacle forming part of the building – See **Makoelman** and **Rudman**.

Borderline cases which qualify as a "breaking in":

- Pushing a blind in front of an open window to one side in order to gain entry, because the blind is attached to the window and therefore forms part of the building (**Lekute**).

Borderline cases which do not qualify as a "breaking in":

- Shifting a flower pot which is placed in the window sill to one side, because the flower pot does not form part of the building or structure itself.
- Pushing a curtain in an open window to one side in order to gain entry (**Hlongwane**).

To break out of a building after having entered it without a breaking in cannot lead to a conviction of housebreaking (**Tusi**)[56].

16.3.2. **Entering**

"Breaking" without "entering" isn't sufficient to constitute the crime (**Maruma**), although it may amount to an attempt to commit the crime. Technical meaning: entry is complete the moment X has inserted any part of his body or any instrument he is using for that purpose, into the opening,

[56] Example: 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 - no "breaking into" for the purposes of this crime.

with the intention of thereby exercising control over some of the contents of the building or structure (**Melville**).

16.4. **Building or structure**

House, structure or premises in respect of which crime is committed can be **any structure which is or might ordinarily be used for human habitation or for storage or housing of property**.

The following principle should be followed in this respect if the structure or premises is used for –

→ **storage of goods** = it must be immovable;
→ **human habitation** = it does not matter whether it is movable or immovable.

The following immovable structures will always qualify:

→ a house;
→ a store-room;
→ a factory;
→ business premises.

The following do not qualify as structures:

→ a motor car;
→ a tent which is used only for the storage of goods (**Abrahams**);
→ a railway truck used for conveying goods (**Johannes**);
→ a fowl-run made of tubes and wire netting (**Charlie**);
→ an enclosed backyard (**Makoelman**).

The courts accepted 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; Temmers**), but that it does not qualify if, although it can be moved, it is used merely for the purpose of storing goods (**Jecha**).

16.5. **Unlawfulness**

Unlawfulness may be excluded on grounds of justification such as necessity, presumed consent, superior orders and official capacity. One cannot break into and enter one's own house or a room which is shared with someone else or if one has permission to enter (**Faison; Mashinga**).

16.6. **Intention**

The intention required for this crime comprises the following two distinct components:

→ The intention of unlawfully breaking into and entering the house or structure[57].
→ The intention of committing some other crime inside.

Housebreaking without such an intention may amount to malicious injury to property and in principle charges of housebreaking with intent to commit any crime are competent.

[57] Example: Believing that he is breaking into his own house or is committed with the consent of owner of house – intention absent.