

Department of Criminal and Procedural Law

# SPECIFIC CRIMES



Only study guide for **CRW2602**

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PRETORIA

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# Introduction



## Literature and methods of study

### 1. GENERAL

Welcome to the second module in Criminal Law. We trust that you will enjoy your study of this module. Whereas the first module (CRW2601) deals only with the general principles of criminal law, this second module deals mainly with specific crimes.

**It is important to note that a study of this module (CRW2602) presupposes knowledge of the content of the CRW2601 module. Therefore, if you have registered for both these modules, you should first master the general principles of criminal law (as set out in CRW2601) before you study the specific crimes discussed in this module. This is why the assignments for this module must be handed in a little later in the semester than those for the CRW2601 module.**

### 2. COURSE OUTCOMES

This course should enable you to:

- determine whether a person has committed one or more specific crimes (complete or incomplete) by measuring the person's conduct and state of mind against the various elements of the specific crime or crimes

### 3. LITERATURE

#### • Prescribed texts

There are two prescribed texts for this module, namely:

- (1) Snyman CR *Criminal Law* 6 ed (LexisNexis, Durban 2014)
- (2) *Case Law Reader for CRW2602*

The same book that is prescribed for the first module in Criminal Law is prescribed for this module. An Afrikaans edition of Snyman's work, entitled Snyman CR *Strafreg* 6 ed (2012), published by LexisNexis, is also available for Afrikaans-speaking students.

The *Case Law Reader* contains all the prescribed cases and is provided to you upon registration.

- **Recommended books**

There are no recommended books for this module.

- **Use of prescribed texts**

We wish to emphasise the fact that we expect you to read more than merely the study guide and that you should **consult the prescribed text on specific topics**. When reading this study guide, you may find that you do not clearly understand certain aspects of a particular topic. It is then essential that you consult the prescribed textbook on the matter. When studying a topic from the prescribed book, you need take note only of the text itself, that is, you need not also consult, study or read the footnotes as well, unless we draw your attention to one or more footnotes. For the purposes of the examination, you should, however, use the study guide as your **primary source**.

- **Other works on criminal law**

Apart from the works already mentioned above, there are also a number of other works on criminal law. We merely draw your attention to the following works:

- (1) Burchell *Principles of Criminal Law* 5 ed (Juta 2016)
- (2) Kemp, Walker, Palmer, Baqwa, Gevers, Leslie & Steynberg *Criminal Law in South Africa* 3 ed (Oxford University Press 2018)
- (3) Hoctor *Coopers Motor Law* 2 ed (2008, revised 2012) B9-8-B11-77

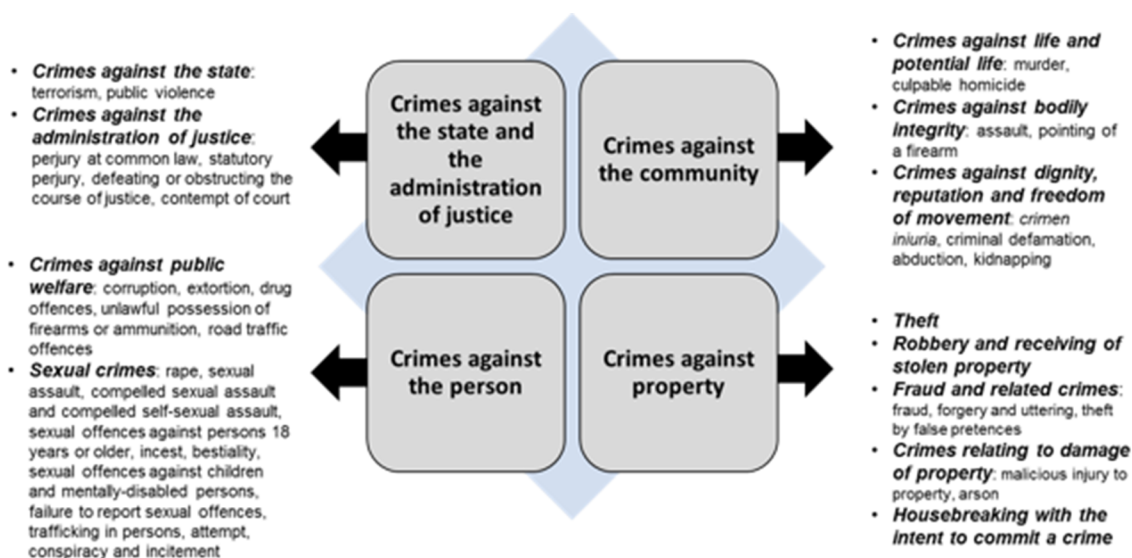
You need not buy any of these books. Although Burchell and Hoctor's textbooks will be used in the section on road traffic offences, these excerpts will be provided to you online in electronic format.

## 4. METHOD OF STUDY

- **Subdivision of study material in study guide**

You will notice that the discussion of the material in the study guide is subdivided into 12 learning units. A learning unit is a unit or section of the syllabus which deals with a certain topic. You can divide the time you have at your disposal (from the time you enrol until the time you write your examination) into 12 time units and then study one unit per such time unit.

Please find below the entire course contents at a glance. As you will see, there are four parts in the course. Under each part, various topics with crimes listed under them appear in the different units.



### • Contents of learning units

Every learning unit is normally subdivided as follows:

- (1) a table of contents of the material discussed in the learning unit
- (2) a list of learning outcomes you should keep in mind when studying the learning unit
- (3) a short paragraph serving as an introduction or background to the discussion which follows
- (4) the actual exposition of the topic covered in the learning unit
- (5) activities and feedback on the activities
- (6) hot topics to consider and discuss
- (7) a concise summary of the most important principles as set out in the topic of that particular learning unit
- (8) a number of "test yourself" questions

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

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

### • What the icons represent

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



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



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



This icon means: "Read the judgment in the following court case which appears in your *Reader*".

The reading of certain cases (judgments) forms an important part of your studies. As a matter of fact, it forms part of the study of all legal subjects. In the course of our discussion of criminal law we will draw your attention to the cases you must read. In Tutorial Letter 101 you will also find a list of the cases you must read.



This icon means: "Focus your attention on this important fact or information".



This icon means: "Consider this interesting discussion. What is your opinion?"



This icon means: "Here are some interesting texts for further reading on the specific crime". Please note that these texts are not prescribed, and merely provided as a matter of interest.



This icon means: "Study this definition".

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

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

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

We shall therefore not warn you repeatedly that you should know certain definitions well for the examination. You should just watch out for the "screened frame", and be aware that you should know the definition appearing in the frame well enough to write it down in the examination.

### ● Important advice on how to study

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

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



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



- However, please do **not** waste any valuable time attempting to memorise the case references. A case reference is the set of dates, letters and numbers following the name of the case, for example 1966 (2) SA 269 (A). In this reference, 1966 refers to the year in which the judgment was reported (i.e. published), the (2) to the volume number of the particular year, and the 269 to the page in the book where the judgment begins. It is unnecessary, and also a waste of time, to try to memorise these numbers and letters. We do not expect you to know them. Even if you fail to remember the name of an important case in the examination, you can simply state: "It has been decided" or "According to a decision", et cetera. Our primary aim in the examination is not to test your memory, but your comprehension and insight – but do bear in mind that proper comprehension and insight are also based on a knowledge of facts.



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

- **Remarks concerning specific crimes**

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

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

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

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

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

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

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

#### • Abbreviations

- When in the course of this study guide we refer to your prescribed handbook, that is Snyman's *Criminal Law*, we shall identify this book merely as *Criminal Law*. If we refer to the prescribed case reader, we shall indicate this book merely as *Reader*. In this study guide all references to *Criminal Law* are to the 6th edition of this book (2014).
- With regard to the **mode of citation of cases**, the following method is applied. In accordance with modern usage, we do not cite the full official name of cases, for example *S v Williams en 'n Ander* 1970 (2) SA 654 (A), but simply the name, followed by the case reference –*Williams* 1970 (2) SA 654 (A). This is the modern "streamlined" method.
- In the discussions which follow, we shall often refer to the perpetrator or accused simply as X, and to the complainant or victim of the crime as Y.
- We often use the Latin words *supra* and *infra*. *Supra* means "above" and *infra* means "below".

#### • Language: equal treatment of genders

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





# PART A

## Crimes against the state and the administration of justice

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# Learning unit 1

## Crimes against the state



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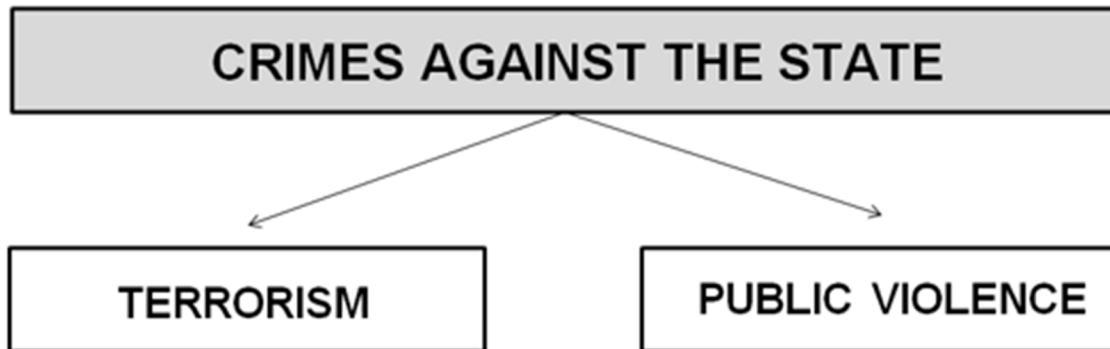
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### LEARNING OUTCOMES

When you have finished this learning unit, you should be able to:

- demonstrate your understanding of the requirements for the two crimes against the state by considering the possible criminal liability of an accused for the crimes of terrorism and public violence.



## 1.1 BACKGROUND

The most important common-law crimes against the state are high treason and sedition. There are also various statutory crimes against the state. Since it is impossible to discuss all the offences in detail, our discussion will be limited to a very brief discussion of the crimes of terrorism and a more detailed discussion of the crime of public violence. We have chosen these two offences because they occur fairly regularly in practice.

## 1.2 TERRORISM

### 1.2.1 Introduction

The most important statutory offence is that of terrorism in terms of the *Protection of Constitutional Democracy against Terrorist and Related Activities Act* 33 of 2004, which came into operation in 2005. The Act seeks to prevent acts of terror, to protect the civilian population from acts of terror, and to bring terrorists to justice. It also prohibits South Africa from being used as a haven for terrorism, and obliges the government to cooperate with and support the international community in preventing and combating terrorism.

### 1.2.2 Definition

The *Protection of Constitutional Democracy against Terrorist and Related Activities Act* 33 of 2004 provides a broad definition of "terrorist activities". The main "terrorist activities" prohibited in section 1 of the Act are summarised below:

- (a) **Any act** committed in or outside the Republic which
- (i) **involves the use of violence** by any means or method;
  - (ii) **involves the release into the environment of**, or distributing or exposing the public to any **dangerous or harmful substance** or organism; any toxic chemical or microbial or other biological agent or toxin;
  - (iii) **endangers the life, or violates the physical integrity of any person** or causes serious bodily injury or the death of any person or a number of persons;
  - (iv) **causes serious risk to the health or safety of the public** or any segment of the public;
  - (v) **causes** the destruction or **substantial damage to any property**, natural resource or the environmental heritage whether private or public

- (vi) **is designed or calculated to cause serious interference with or serious disruption of an essential service**, facility or system, including an electronic system; telecommunication system; banking or financial service or financial system; an essential infrastructure facility or any essential emergency services, such as police, medical or civil defence services;
- (vii) causes any **major economic loss or extensive destabilisation of an economic system of a country; or**
- (viii) creates a serious **public emergency situation** or a **general insurrection** in the Republic.

It is further provided that the **harm** contemplated in (i) to (vii) above may be suffered **in or outside the Republic** and that the "activity" referred to in paragraphs (ii) to (viii) can be committed by **any means or method**.



The case of *S v Okah* [2018] ZACC 3 illustrates harm suffered outside the Republic. The accused – a Nigerian citizen but a permanent South African resident – was the leader of the militant group Movement for the Emancipation of the Niger Delta (MEND). He masterminded and bankrolled four car bombings in Nigeria. The bombs killed nine people, injured many others and caused extensive damage to property. Mr Okah was in South Africa when he planned and executed some of the bombings. The Supreme Court of Appeal ruled that, under section 15(2) of the Terrorist Act, there was a close nexus between the terrorist acts committed or the accused and South Africa, and convicted Mr Okah of terrorism.

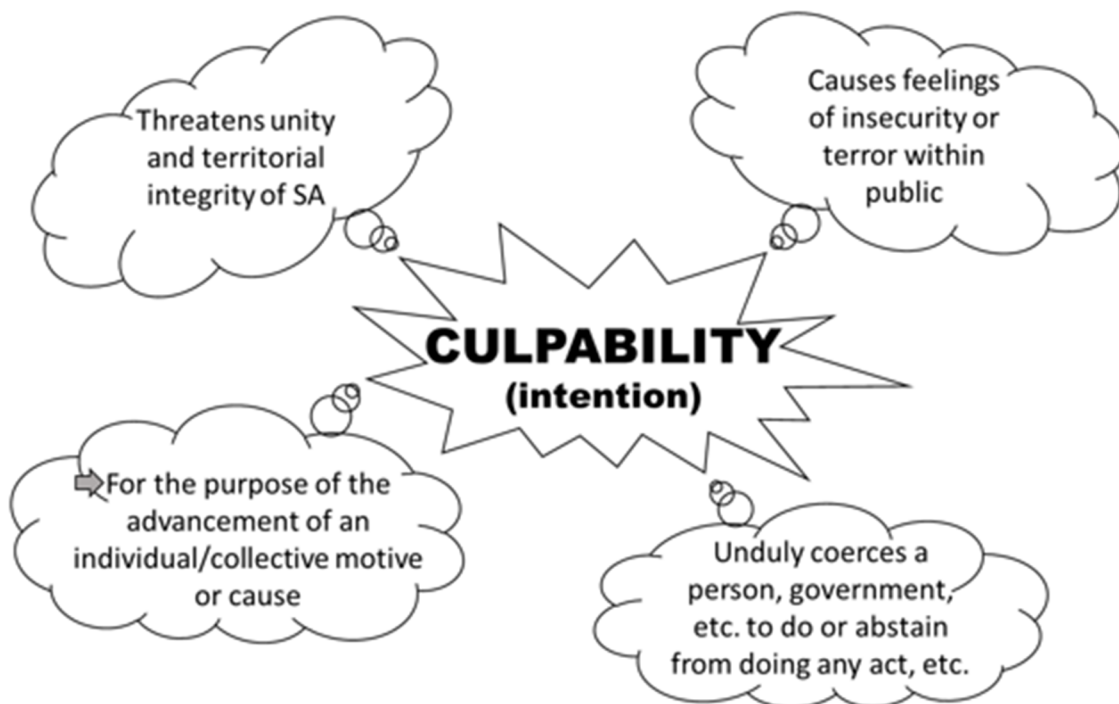
The acts described above must be performed with a **defined culpability**. The culpability that must accompany any of the abovementioned acts is described as follows:

- (a) An act which is **intended, or by its nature and context, can reasonably be regarded as being intended**, directly or indirectly, to
  - (i) threaten the **unity and territorial integrity** of the Republic;

- (ii) **intimidate or cause feelings of insecurity** within the public or a segment of the public with regard to its security, including its economic security, or to **cause feelings of terror, fear or panic in a civilian population**; or
- (iii) **unduly compel, intimidate, force, coerce, induce or cause a person, a government, the public or a segment of the public or a domestic or an international organisation or intergovernmental organisation to do or to abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles.**

It is irrelevant whether the public or the person, government, body or organisation or institution referred to in (ii) and (iii) is inside or outside the Republic. **It is further required that**

- (b) the act be committed, directly or indirectly, in whole or in part, for the **purpose of the advancement of an individual or collective political, religious, ideological or philosophical motive, objective, cause or undertaking.**



**NB**

**You do not have to memorise the complete definition above. However, you must read it carefully and be able to identify a set of facts in an assignment or in the examination which amount to an act of terrorism.**



The definition of terrorism is extremely long and complex. Please do not try to memorise it word for word. Know the elements of the offence as set out below, and try to memorise the core words in the definition, specifically for use in an application when provided with a specific scenario. Remember that not all the different acts are always applicable to a terrorist scenario. Only apply those acts which are applicable to the scenario provided.

### 1.2.3 Elements of the crime

- (1) **an act**
- (2) **unlawfulness**
- (3) **a specific intention**

### 1.2.4 The object or interest protected

The interests protected are the safety and security of the Republic, its institutions and people.

### 1.2.5 The act

The conduct prohibited comprises, inter alia, the use of violence; release of toxic or harmful substances; conduct which endangers the life or physical integrity of any person; the causing of serious risk to health and safety of the public; causing damage to property; an act *calculated to cause* serious interference with services; causing destabilisation of the economy and the creation of a public emergency or insurgency.

### 1.2.6 Unlawfulness

Where an act is performed under **compulsion**, this may justify its performance. It is also provided in the Act itself that an act which forms part of a protest, dissent or industrial action and which does not intend the harm contemplated in paragraph (a)(i) to (iv) of the definition is excluded from the prohibition. This is in accordance with the right to freedom of speech and the right to strike (ss 10 and 23(2)(c) of the Constitution).

### 1.2.7 Intention

A specific intention is required for the crime and the intention has **two** components. It is required that the act should be performed with an intention, or an act which by its nature and context, can reasonably be regarded as being intended, directly or indirectly to –

#### FIRST COMPONENT

- threaten the **unity and territorial integrity** of the Republic;
- **intimidate or cause feelings of insecurity** within the public or a segment of the public with regard to its security, including its economic security, or to **cause feelings of terror, fear or panic in a civilian population**; or
- unduly compel, intimidate, force, coerce, induce or cause a person, a government, the public or a segment of the public or a domestic or an international organisation or intergovernmental organisation **to do or to abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles**;

and

#### SECOND COMPONENT

It is required that the act be committed, directly or indirectly, in whole or in part, for the **purpose of the advancement of an individual or collective political, religious, ideological or philosophical motive, objective, cause or undertaking**.

*Dolus eventualis* is a sufficient form of intention. The words “can reasonably be regarded as being intended” seem to import an objective test to determine intention. However, it is submitted that these words only refer to the recognised practice of our courts of drawing an inference of a subjective intention from the perpetrator’s outward conduct at the time of the commission of his act as well as the circumstances surrounding the event, in cases where there is no direct evidence of intention.

Apart from the offence of terrorism, there are other offences created in the Act of which you must be aware. These are:

- Offences relating to **harbouring and concealment** of a person committing acts of terrorism (s 11)
- **Failure to report** the presence of persons suspected of intending to commit or having committed an offence (s 12)
- Offences relating to **"hoaxes"** (s 13)



#### ACTIVITY

X, Y and Z have all been retrenched by the mining company for which they worked. They have been looking for jobs for six months without success. They bear a grudge against the government because they have lost their jobs. They are of the view that the government does not properly enforce immigration laws; that millions of people enter the country illegally and that the citizens of the country are unemployed because these illegal immigrants are employed by the mines as they are prepared to work for very low salaries. X, Y and Z feel that the government ought to be encouraged to deport all illegal immigrants. They decide that this can only be achieved by violent means. They plan an attack on a certain neighbourhood which they know is inhabited by illegal immigrants. In the early hours of the morning, they set alight the homes of these people. Many are injured and some die as a result of the attack. Can X, Y and Z be charged with the crime of terrorism?



#### FEEDBACK

Yes, they can be charged with terrorism. It would be fairly easy to prove that they carried out a "terrorist activity". At the very least, they have committed acts involving the use of violence, endangering the lives or physical integrity of other persons, and causing substantial damage to property inside the Republic of South Africa. They performed these acts with the **intention of intimidating a segment of the public (illegal immigrants) so that they would leave the country or of compelling the government to adopt a policy of deporting all illegal immigrants (the first component of the requirement of intention)**. But the state will also have to prove the **second component** of the intention requirement, namely that these acts were performed with the **purpose** of the advancement of a political, religious, ideological or philosophical motive, objective, cause or undertaking. One may argue that X, Y, and Z had a **collective political motive**, namely to force the government to arrest and deport illegal immigrants.



#### Terrorist or freedom fighter?

Now that you know the definition of terrorism, how would you differentiate between terrorists and freedom fighters? Both groups have political objectives and commit violent, destructive crimes in the eyes of the governments of the countries they reside in; However, freedom fighters claim to be the liberators of the oppressed, and many countries only came into existence after long struggles for freedom. Is the difference between the two concepts simply a matter of perception, in other words, do the labels depend on the one doing the labelling? Or is it a difference in motive? Do freedom fighters fight for a noble cause while terrorists' acts are purely destructive? What is your opinion?



### 1.3 PUBLIC VIOLENCE (*Criminal Law 311–314*)

#### 1.3.1 Definition

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

#### 1.3.2 Elements of the crime

The elements of the crime are the following:

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

#### 1.3.3 The object or interest protected

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

#### 1.3.4 Joint action

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

Those participating in the disturbance of the peace **must act in concert, that is, with a common purpose** (*S v Whitehead* 2008 (1) SACR 431 (SCA)). Once it has been established that the accused knowingly participated in an uprising with the aim of threatening the public peace and order, the prosecution need not prove precisely what acts were committed by which of the participants (*Mashotonga* 1962 (2) SA 321 (SR) 327). However, in *S v Le Roux* 2010 2 SACR 11 (SCA), the Supreme Court of Appeal emphasised that in the absence of proof of a prior agreement or plan to commit transgressions, the state must prove **active association with the acts of public violence of each individual accused**. Therefore, proof of mere presence at the scene of the crime is not sufficient.

The crime can be committed both in a **public place and on private property** (*Segopotsi* 1960 (2) SA 430 (T) 435-437). The participants need not be armed.

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



Please remember that the difference between public violence and terrorism is not only that public violence must consist of a joint action, while terrorism can be committed by one or more individuals, but also that terrorism requires a specific intent, which is not a requisite in the crime of public violence.

### 1.3.5 Examples of conduct

The following are examples of behaviour amounting to public violence:

- faction fights (*Xybele* 1958 (1) SA 157 (T))
- joint resistance to police action by a group of persons (*Samaai* 1986 (4) SA 860 (C))
- rioting (*Dingiswayo* 1985 (3) SA 175 (Ck))
- violent coercion of other workers by a group of strikers (*Cele* 1958 (1) SA 144 (N))
- disrupting and taking over a meeting by a gang (*Claassens* 1959 (3) SA 292 (T))

### 1.3.6 Serious proportions

The crime is only committed if (in addition to the other requirements) the action of the group assumes **serious proportions**. One of the reasons for the existence of the crime is that the safety of persons not involved in the disturbance is threatened, and this will only be the case if the disturbance is serious. Although this requirement may be somewhat vague, it is nonetheless essential to distinguish public violence from cases of, for example, rowdy behaviour and family feuds which do not threaten public peace and order.

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

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

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

### 1.3.7 Unlawfulness

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



In *S v Mlungwana and Others* 2019 (1) SACR 429 (CC), the Constitutional Court ruled that no notice is required for a demonstration, making section 12(1)(a) of the *Regulation of Gatherings Act* of 1993 an unconstitutional limitation of the section 17 right to freedom of assembly in the Constitution. However, demonstrations should be peaceful and unarmed.

### 1.3.8 Intent

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



#### ACTIVITY

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

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



#### FEEDBACK

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



#### Do public brawls constitute public violence?

If a group of individuals visiting a restaurant start assaulting restaurant patrons and damaging restaurant furniture and utensils, will their acts constitute the crime of public violence? What about a group of soccer supporters who run onto the field after their team has lost, and damage television equipment and assault the opposing team's supporters? To answer this question, you need to consider the definition of public violence. The conduct was clearly unlawful and intentional, and performed by a number of persons. The act also assumed serious proportions as assault is a violent crime, and they did infringe the rights of the other restaurant patrons. However, did they act with a common purpose? If no prearranged plan to, for instance, assault, can be established, is there active association? Here, each particular accused person must be held liable on the ground of active participation in the achievement of a common purpose that developed at the scene. What would your answer be?

## SUMMARY

### Terrorism

- (1) Various types of conduct are prohibited, for example, the use of violence; conduct that endangers the life or physical integrity of any person; conduct causing substantial damage to property; major economic loss or destabilisation of an economic system or, even an act that is merely *calculated* to cause serious interference with essential services or systems.
- (2) The conduct may be committed inside or outside the Republic.
- (3) The acts must be unlawful and performed with a **defined intention**. The state must prove **two** components of the intention: The intention to:

#### First component

- threaten the **unity and territorial integrity of the Republic**; or
- **intimidate or cause feelings of insecurity** within the public with regard to its security, including its economic security; or
- **intimidate or compel a government or the public or an organisation** to do or refrain from doing an act;

and

## Second component

- the prohibited acts must be committed **with the purpose of advancement of an individual or collective political, religious, ideological or philosophical motive, objective, cause or undertaking.**

## Public violence

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



### FURTHER READING

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For more information on terrorism and public violence, read:

- (1) Burchell *Principles of Criminal Law* (2016) 777–782.
- (2) Kemp, Walker, Palmer, Baqwa, Gevers, Leslie & Steynberg *Criminal Law in South Africa* (2018) 477–479; 662–668.

## TEST YOURSELF

- (1) Name four types of activity that amount to "terrorist activities" in terms of section 1 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004.
- (2) Broadly define the two components of the requirement of intention for the crime of terrorism.
- (3) Can public violence be committed by a single person? Substantiate your answer.
- (4) The following statements refer to public violence. Indicate whether these statements are correct or incorrect:
  - (a) Explain what is meant by the requirement for public violence that the acts of the group must assume serious proportions.
  - (b) The participants in public violence must act in concert; in other words, with a common purpose.
  - (c) Public violence can only be committed in a public place.
  - (d) Once it has been established that the accused knowingly participated in a disturbance with the aim of threatening the public peace and order, the prosecution need not prove precisely which acts were committed by which of the participants.
- (5) Public violence can only be committed if there is an actual disturbance of the public peace and order, or an actual infringement of the rights of another.

# Learning unit 2

## Crimes against the administration of justice



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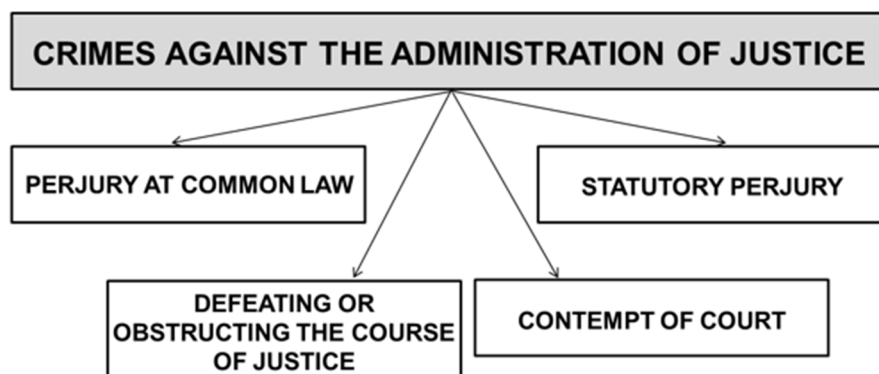
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### LEARNING OUTCOMES

When you have finished this learning unit, you should be able to:

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



## 2.1 PERJURY AT COMMON LAW (*Criminal Law 332–335*)

### 2.1.1 Definition

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

### 2.1.2 Elements of the crime

The elements of this crime are:

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

### 2.1.3 False declaration

This requirement comprises the following:

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

### 2.1.4 Under oath, or in a form substituted for oath

The declaration must be **under oath** or in one of the forms allowed to be substituted for an oath, namely an **affirmation to tell the truth** or a **warning** by the presiding official to the witness to tell the truth.

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

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

- (1) The most common method is taking an **oath** (i.e. swearing) that he will speak the truth (s 162 of the Criminal Procedure Act).
- (2) A person may declare that he **solemnly confirms** that his evidence will be the truth (s 163 of the Criminal Procedure Act). This happens when an intended witness objects to taking the oath (perhaps on religious grounds) or indicates that he does not regard the oath as binding on his conscience.





(3) Young children are merely **warned** (usually after a "friendly little sermon" by the magistrate or judge) to speak the truth (s 164 of the Criminal Procedure Act).

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

Because only a declaration under oath or its equivalent can form the basis of perjury, the crime cannot be committed, for example, during argument to the court by a legal representative. The person who administers the oath or its equivalent (e.g. the magistrate) must have the authority to do so.

### 2.1.5 In the course of a legal proceeding

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

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

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

According to this test, therefore, perjury can be committed by making a false affidavit for the purposes of a civil motion proceeding (which is mostly in writing), but not by making a declaration in which a false criminal charge is lodged, or by making extrajudicial sworn statements to the police during their investigation into a crime (*Beukman supra* 265-266). In the *Beukman* case, it was decided that extrajudicial statements made to a police official are not normally used in the subsequent trial as evidence, and, consequently, they are not declarations made during a legal proceeding.

The fact that the false declaration is made during a case, the judgment of which is later set aside on appeal, is no defence. The position is the same if the warrant for the arrest of the accused was invalid.

### 2.1.6 Unlawfulness

The fact that, shortly after making a false statement (e.g. in cross-examination), the witness acknowledges that the statement was false and then tells the truth, is no excuse. Also, the fact that the false declaration was made by X in a vain attempt to raise a defence, is no excuse. This

happens in our courts daily, but, for practical reasons, not every accused whose evidence is rejected as false is afterwards charged with perjury (*Malianga* 1962 (3) SA 940 (SR) 943).

### 2.1.7 Intent

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

## 2.2 STATUTORY PERJURY (*Criminal Law 336–338*)

### 2.2.1 Definition

Statutory perjury at common law consists in the unlawful, intentional making of two conflicting declarations under two different oaths (or in any form allowed by law to be substituted for an oath).

### 2.2.2 Elements of the crime

The elements of this crime are:

- (1) the making of **two declarations**
- (2) which are **conflicting**
- (3) **under two different oaths or in any form** equivalent to an oath
- (4) **in an unlawful** and
- (5) **intentional** manner

### 2.2.3 Content of section

This crime is set out in section 319(3) of Criminal Procedure Act 56 of 1955 as follows:

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 a 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.

This statutory offence was specifically created for persons who have escaped convictions of perjury even though they made false declarations under oath. If X made two made conflicting statements under two different oaths, he could only be convicted if the state proved that one of the statements was false, and that X knew that it was false. This is often very difficult to prove. When prosecuting a person for contravention of this subsection, the state only has to prove that:

- (a) X on two different occasions made two statements under oath, and
- (b) the statements conflict with each other.

### 2.2.4 Two statements under oath on two different occasions

It is immaterial whether one or both oaths are in writing or oral; neither does it matter whether either was made in the course of a legal proceeding (although at least one of them usually is) (*Mahomed* 1951 1 SA 439 (T) 441G–H). The crime is also committed if the conflicting statements are made in any form allowed by law to be substituted for an oath, such as an affirmation or declaration to speak the truth. Making conflicting statements under the same oath does not

constitute the crime. The state must also prove that the oath was administered in accordance with all regulations, and that the person administering the oath had the necessary authority to do so.

### 2.2.5 The statements conflict with each other

The state need not prove which statement is false, only that they conflict (*Mahomed supra* 442). In *Ramdas* 1994 (2) SACR 37 (A) 192, the Appellate Division held that the conflict in the two statements must be clear, taking into account the context and surrounding circumstances. The two statements must not be reconcilable, and must be mutually exclusive. If the second statement consists in only a denial that the first statement was made, there are not two conflicting statements.

Remember that the difference between perjury and statutory perjury is that for the crime of perjury to be committed, ONE false declaration must be provided under oath in a legal proceeding, while in statutory perjury, the accused made TWO different statements under oath on TWO different occasions, and these statements conflict with one another.

### 2.2.6 Onus on accused

The onus falls upon X to prove on a balance of probability that he believed in the truth of each statement at the time when he made each one. It is submitted that this reverse onus is unconstitutional, since it conflicts with section 35(3)(h) of the Constitution, which grants X the right to be presumed innocent.

## 2.3 DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE (*Criminal Law 327–331*)

### 2.3.1 Definition

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.

### 2.3.2 Elements of the crime

The elements of this crime are:

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

### 2.3.3 Defeating or obstructing the course of justice

This is a very important crime which is often committed in South Africa, and may overlap with many other crimes, such as contempt of court, perjury, fraud or forgery, extortion, obstructing the police in the course of their duties, and being an accessory after the fact to another crime. Although there has been confusion as to the naming of the crime in practice, it is submitted that defeating or obstructing the course of justice represents the most correct designation.

There is a difference between the terms "defeating" and "obstructing". "Obstructing" means something less than "defeating". X can only be found guilty on a charge of defeating the ends of justice if it is proved that justice has in fact been defeated, as for instance, where an innocent person was wrongfully convicted. As it is usually difficult to prove that the course of justice has in fact been defeated, it is common to charge conduct falling within the ambit of this crime as

defeating or obstructing the course of justice (or attempting to do so). This crime consequently consists of a single offence, and not two distinct alternative offences.

### 2.3.4 Examples of conduct

The following are examples of behaviour amounting to defeating or obstructing the course of justice:

- unlawfully inducing (or attempting to induce) a witness to give false evidence
- refusing to give evidence
- giving false information to the police
- soliciting a complainant by unlawful means to withdraw a charge
- soliciting a prosecutor by unlawful means not to prosecute
- trying to influence the judiciary by pressuring them not consider certain types of evidence
- tampering with court documents in order to prevent true evidence being placed before court

If a motorist warns other motorists of the presence of a speed trap by flashing his lights, he commits an attempt to defeat the course of justice, as decided in *Naidoo* 1977 2 SA 123 (N). However, in *Perera* 1978 3 SA 523 (T), a case with identical facts, it was held that X will be guilty only if he has reason to believe that the vehicle approaching him is exceeding the speed limit, or that the driver of this vehicle has the intention of exceeding the speed limit. It is submitted that the latter approach is preferable.

### 2.3.5 Possibility of court case ensuing

The crime may be committed even though there is **no pending case**, however, there must be the **possibility** of a real court case ensuing. For example, where X makes a false complaint at a police station, accusing Y of having committed an offence, there is the possibility that Y may be charged with the alleged offence and X has therefore committed the crime.

The concept "course or administration of justice" which must be obstructed refers to a process which is **destined to end in a court case** between parties, or between the state and its subjects. In *Bazzard* 1992 (1) SACR 303 (NC), the accused phoned the police and declared that he had kidnapped an unknown girl, and that he would kill her if a certain amount of money was not paid as a ransom for her. Because of the call, the police conducted a search, and located the accused who informed them that the report was false; and that no girl was in fact kidnapped. The accused was subsequently charged with defeating or obstructing the course of justice. The court held that X's conduct in making a false report to the police to the effect that he had kidnapped another person was not punishable as obstruction of justice because it amounted to mere wasting of the time of police officers, and therefore did not interfere with the "course or administration of justice". The accused did not attempt to bring another innocent party into trouble, or commit the conduct in order to conceal another already committed crime. He merely wasted the police's time and energy. In this case, no real court case was destined to ensue, as no actual kidnapping had in fact taken place.

The facts in *Bazzard* must be distinguished from a factual situation such as the following: X, who was intoxicated while driving a motor car, collided with a child who was playing in the street. He drove away without having reported the incident to the police. Instead, he went to the police station and reported that his car had been stolen. The police investigated the matter and found out the truth. X can be convicted of the crime of obstruction of justice because the hit-and-run incident could have led to an actual court case (X could be charged with an offence for failing to report the accident).

### 2.3.6 Intention

X must subjectively have foreseen the possibility that his conduct might defeat or obstruct the administration of justice. He must have been aware of the fact that it might interfere with judicial

proceedings which were to take place in the future, or would at least hamper the investigation of an offence.

### 2.3.7 Attempt to defeat or obstruct the course of justice

If X intentionally gives the police or a witness false information which is, however, immediately disbelieved and not acted upon, he neither defeats nor obstructs the course of justice, but his conduct will constitute an attempt to defeat or obstruct the course of justice. Charges of attempting to defeat or obstruct the course of justice are in fact more common than charges of having committed the completed crime.

## 2.4 CONTEMPT OF COURT (*Criminal Law 315-327*)

### 2.4.1 Definition

Contempt of court consists in the unlawful and intentional

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

### 2.4.2 Elements of the crime

The elements of this crime are the following:

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

### 2.4.3 Unusual characteristics

The crime manifests the following unusual characteristics:

- (1) The acts by which the crime is committed can be divided into various groups, some of which have very distinctive requirements (e.g. the requirement that a case must be *sub iudice* (i.e. the legal process has not yet been completed in the case of the publication of information which is potentially prejudicial to the just trial of a case). The crime can, therefore, be subdivided to a certain extent into several "sub-crimes", each of which has certain distinctive requirements. These particular forms of the crime will be dealt with in 2.4.9 below.
- (2) As a rule, some cases of contempt of court are not even treated as criminal cases, but as civil cases in the civil courts. However, it has been held that these cases can also come before the courts as criminal cases at the same time, if the Director of Public Prosecutions chooses to bring the case before a criminal court. These cases are discussed in 2.4.9.2b below.
- (3) Some cases of contempt of court are heard according to an unusually drastic procedure. See 2.4.5 (contempt *in facie curiae*) below.

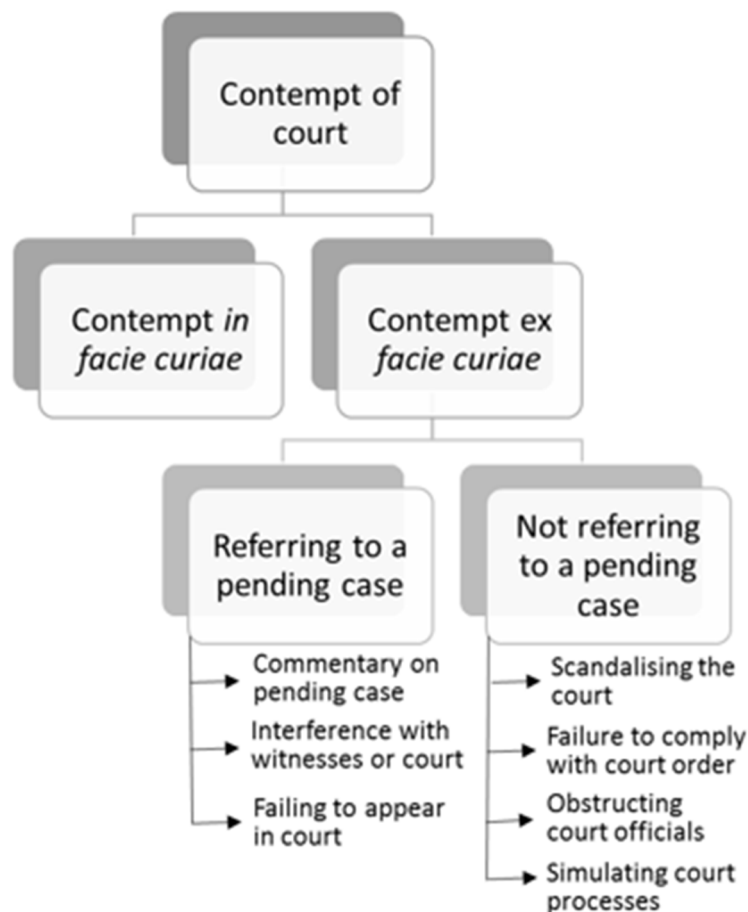
#### 2.4.4 Reasons for the existence of the crime

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

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

#### 2.4.5 Acts

**We distinguish between contempt *in facie curiae* and contempt *ex facie curiae*.**



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

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

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

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

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

#### 2.4.6 Unlawfulness

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

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

#### 2.4.7 Intent

In general, **intention** is an essential element of the crime (*Van Niekerk supra*), except in cases where the editor of a newspaper is charged with this crime on the ground of the publication in his newspaper of information concerning a pending case, which tends to influence the outcome of the case. Culpability in the form of **negligence** will be sufficient to establish contempt of court in such circumstances. See the discussion below of contempt of court in the form of commentary on a pending case (2.4.9.2a).

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

#### 2.4.8 Administration of justice by the courts

The language complained of must be directed at a judicial officer in his judicial capacity, or at the administration of justice **by the courts**. Criticism of the performance of a mere administrative function, like the actions of the police, or criticism of alleged unreasonableness in Acts of parliament, is not contempt of court (*Dhlamini* 1958 (4) SA 211 (N)). In *Nyikala* 1931 EDL 175, X said to a magistrate: "Because I am a native, I am always considered guilty". On closer investigation it appeared, however, that his words referred to the methods of the police. He was found not guilty of contempt. Encouraging the public to sign a petition for the reprieve of a person who has

already been sentenced is not contempt. In *Tromp* 1966 (1) SA 646 (N) 655–656, the court declared that mere criticism of the prosecution in a criminal case is not contempt of court either.

## 2.4.9 Some examples of the crime

### 2.4.9.1 Contempt in facie curiae

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

- shouting at witnesses during cross-examination
- a legal representative's conducting of a case under the influence of alcohol
- continual changing of one's seat and talking loudly in court
- grabbing and tearing a court document to pieces

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

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





In S v Meiring 2019 (1) SACR 227 (GJ), the court held that audibly uttering swear words in court does not amount to contempt of court *in facie curiae*. When his case was postponed for a third time, the accused audibly uttered obscenities, expressing his frustrations. In these circumstances, the court did not find his conduct unseemly behaviour.

#### 2.4.9.2 Contempt *ex facie curiae*

Examples of a few circumstances in which contempt *ex facie curiae* can be committed are:

- where someone pretends to be an officer of the court, such as an advocate, attorney or deputy sheriff
- where someone intentionally obstructs an officer of the court, such as a messenger of the court, in the execution of his duties
- where someone bribes, or attempts to bribe, a judicial officer, legal representative or witness
- where a witness who has been summoned deliberately fails to appear at the trial
- commentary on pending cases
- scandalising the court
- failure to comply with a court order

##### (a) Discussion of commentary on pending cases

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

Of course, the press is fully entitled to publish the evidence delivered in the course of a trial (or portions thereof). However, the press may not, while the case is still in progress, publish information relating to the merits of a case which did not form part of the evidence in court. A journalist may not, for example, publish information or opinions concerning the case which he heard outside the court during an adjournment of the court for tea. Neither may he give his own opinion regarding the guilt nor otherwise of the accused, or draw his own inferences from the evidence before the case has been concluded. The underlying reason for prohibiting the publication of such information is to avoid so-called "trial by newspaper". The judge, assessors or magistrate should not be influenced by information or commentary emanating from sources outside the court.

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

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



### Is contempt of court *ex facie curiae* still applicable in modern times?

The rules pertaining to contempt of court *ex facie curiae* are being challenged by the rapidly changing media environment. Think, for example, about the highly publicised case of *S v Pistorius* (CC113/2013) [2014] ZAGPPHC 793 (12 September 2014). In *Multichoice (Proprietary) Limited and Others v National Prosecuting Authority and Another, In Re; S v Pistorius, In Re; Media 24 Limited and Others v Director of Public Prosecutions North Gauteng and Others* 2014 (1) SACR 589 (GP), the Pretoria High Court had to decide whether the entire Pistorius criminal trial would be broadcasted. Taking into consideration the constitutional right to freedom of speech as well as sections 34 and 35(3)(c) of the Constitution, which require that legal proceedings (i. e. criminal proceedings) be accountable, transparent and open to the public, it was held that broadcasting must be allowed. In the light of this decision, do you think that commentary on pending cases is still a crime?

#### (i) Liability of a newspaper editor

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

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

The rule that negligence may be a sufficient form of culpability is based on the consideration that, since the press influences public opinion to such an extent, it correspondingly shoulders a heavier responsibility than the ordinary individual to control the correctness of what it publishes. **However, the rule that, in these cases, proof of intention is no longer necessary and that proof of negligence is sufficient, applies only if the editor or proprietor of a newspaper or a magazine, or the company which owns it, is charged with the crime. The rule does not apply where an individual reporter is charged in his private capacity.**



Please remember that for a conviction of contempt of court *ex facie curiae* of a journalist, proof of intention is required. However, for a newspaper editor, negligence is a sufficient form of culpability. Also note that culpable homicide and this form of contempt of court are the only two exceptions to the rule that intention is the form of culpability required for all common-law crimes. In the case of the two exceptions, negligence is required.



### ACTIVITY

Y, a well-known politician, appears in court on charges of corruption. A reporter at a daily newspaper, X, attends the trial on a daily basis. He reports on the trial, but also undertakes his own investigation by interviewing previous employers of Y. He writes in the newspaper that Y was previously in the employ of a company where he embezzled money. He writes the article in such a way that it looks as if this piece of information was presented as evidence before the court. In actual fact, a previous employer, B, had told him (X) about the embezzlement incident. This piece of information was never put before the court as evidence in the trial. The newspaper editor (Z) and the reporter (X) are both charged with contempt of court, in that they published information that had the tendency to influence the outcome of the trial. The legal representative of the newspaper editor argues that the editor (Z) was unaware of the unlawfulness of the conduct in question; the reporter (X) had misled him by telling him that the State had called B as a witness and that he (B) had testified about the alleged embezzlement incident. Z's legal representative argues that, because Z (the editor) lacked the intention to influence the outcome of the case, he should be acquitted. However, in cross-examination, the editor told the court that the specific reporter (X) had on numerous occasions in the past embarrassed him by not disclosing his true sources. Z (the editor) had to publish many apologies in the newspaper to avoid legal action being taken by aggrieved parties. You are the state prosecutor. Discuss how you would go about proving that both X and Z had the required culpability to be convicted of the offence.



### FEEDBACK

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

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

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

*(b) Scandalising the court*

**(Criminal Law 322–324)**

This form of contempt can be committed **without there being any pending case**. The crime is committed by publication, either in writing or orally, of allegations which, **objectively speaking, are likely** to bring judges, magistrates or the administration of justice through the courts generally into contempt, or unjustly to cast suspicion on the administration of justice (*Mamabolo* 2001 (1) SACR 686 (CC)). Whether the administration of justice was in actual fact brought into disrepute is irrelevant. All that is required is that the words or conduct should have **the tendency or likelihood to harm**.

It does not matter whether the attack is directed at a particular judicial officer or at the administration of justice through the courts generally. To constitute contempt, an attack on an individual judge need not necessarily be made in public. It is also committed if the judge is slandered in his judicial capacity in a private communication to him (e.g. a letter), even though no third party is aware of the communication.

Examples of this form of the crime are:

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

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

*(c) Failure to comply with a court order*

**(Criminal Law 325)**

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

In *Beyers* 1968 (3) SA 70 (A), the Appellate Division decided that, in such cases, there is nothing preventing the attorney general himself from charging and prosecuting the party who fails to carry out a court order. The court decided that, in "civil contempt", it is still a crime that is committed, even though the case is heard by a civil court, because, in these cases, a **sentence** is

always imposed, and no sentence can be imposed if no crime is committed. Moreover, if the attorney general had not had the power to interfere, it would have meant that the most far-reaching contempt of court would remain unpunished if the successful litigant decided for some reason or other not to request enforcement of the order.

In failing to comply with a court order, intent must be present. In *S v Samuels* 2016 (2) SACR 298 (WCC), the accused admitted that she disobeyed a court order evicting her from an informal dwelling on state land, but stated that she had nowhere else to go. The court concluded that she did not have the necessary intention, deliberately and *mala fide*, to disobey the court order.

## GLOSSARY

|                        |                                           |
|------------------------|-------------------------------------------|
| <i>in facie curiae</i> | in the court, or in the face of the court |
| <i>ex facie curiae</i> | outside the court                         |
| <i>sub iudice</i>      | still under consideration by the court    |

## SUMMARY

### General

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

### Perjury

- (2) In common-law perjury, there must be a false declaration. The declaration must be objectively false. The declaration may be oral or in writing.
- (3) In common-law perjury, the declaration must be
  - (a) under oath
  - (b) after an affirmation to tell the truth, or
  - (c) (in the case of children) after a warning to tell the truth
- (4) In common-law perjury, the declaration must be made in the course of a legal proceeding.
- (5) There are two differences between common-law perjury and statutory perjury (see Criminal Law 338).

### Defeating or obstructing the course of justice

- (6) There is a difference between defeating and obstructing the course of justice. The last-mentioned is something less than the first-mentioned.
- (7) The following acts constitute some of the many ways in which the course of justice may be defeated or obstructed: persuading a witness not to give evidence in a trial; misleading the police in order to prevent them from catching a criminal; and laying a false criminal charge against someone.
- (8) It is not a requirement for this crime that a case must be pending. Note, however, that there must be the possibility of a real court case ensuing, for example, where X makes a false complaint to the police to the effect that Y has committed rape, there is the possibility that Y may be charged with rape and X has therefore committed the crime of attempt to obstruct the course of justice.
- (9) In *Bazzard* 1992 (1) SACR 303 (NC), the court held that the mere wasting of the time of police officials does not amount to the crime.
- (10) Charges of attempt to defeat or obstruct the course of justice are more common than charges of actual defeat or obstruction.

### Contempt of court

- (11) One of the unusual characteristics of this crime is that it can be subdivided into several "sub-crimes", each with requirements of its own.
- (12) We distinguish between contempt in facie curiae (committed in court) and contempt ex facie curiae (committed outside court).
- (13) One of the many ways in which contempt of court can be committed is by scandalising the court.
- (14) Remarks amounting to fair comment on the administration of justice or on the outcome of a case are not unlawful and do not constitute contempt of court.
- (15) Contempt of court in facie curiae takes place when X behaves in such a way in court as to violate the dignity or authority of the judge or magistrate, for example by singing loudly in court. In such a case, the judge or magistrate can summarily convict and punish X.
- (16) Commentary on pending cases constitutes contempt of court if it is calculated to influence the outcome of a case.
- (17) As a general rule, culpability in the form of intention is required for a conviction of contempt of court. There is, however, the following exception to this rule: If a newspaper editor is charged with contempt of court in that his newspaper has published commentary or information relating to a case which is pending, it is not necessary to prove intention on his part; culpability in the form of negligence is sufficient.
- (18) Scandalising the court 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.
- (19) 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.



### FURTHER READING

For more information on crimes against the administration of justice, read:

- (1) Burchell Principles of *Criminal Law* (2016) 857–881.
- (2) Kemp, Walker, Palmer, Baqwa, Gevers, Leslie & Steynberg *Criminal Law in South Africa* (2018) 524–532.

### TEST YOURSELF

- (1) Define each of the following offences: common-law perjury; statutory perjury; defeating or obstructing the course of justice and contempt of court.
- (2) Discuss the following requirements of common-law perjury:
  - (a) the requirement of a false declaration
  - (b) the requirement that the declaration must be under oath or in a form allowed to be substituted for an oath
  - (c) the requirement that the declaration be made in the course of a legal proceeding
- (3) Name the requirements of statutory perjury.
- (4) Discuss the difference between defeating the course of justice and obstructing the course of justice.
- (5) Name five ways in which the crime of defeating or obstructing the course of justice can be committed.
- (6) Is it necessary on a charge of defeating or obstructing the course of justice to prove that there is a pending case? Discuss.
- (7) Complete the following sentence: In the case of ....., it was held that, if X, a motorist, flicked his lights to warn oncoming motorists about the presence of a speed trap, he committed the crime of ....., but in the case of *Perera*, where the facts were

almost identical, it was held that the motorist in such a case could only be guilty of this offence if .....

- (8) Consider whether the following acts amount to the crime of attempting to defeat or obstruct the course of justice. Also explain why the particular act is punishable or is not punishable, depending on the circumstances of the case.
  - (i) the laying of a false charge against somebody else with the police
  - (ii) mere refusal to answer questions by the police regarding the commission of a crime
  - (iii) helping another person who has committed a murder to hide the body
- (9) Briefly discuss the decision of the court in *Bazzard* 1992 (1) SACR 303 (NC).
- (10) Discuss the reason for the existence of the crime of contempt of court.
- (11) Name three ways in which contempt *ex facie curiae* can be committed.
- (12) Name and discuss two special grounds which can exclude the unlawfulness of an act which would otherwise constitute contempt of court.
- (13) Discuss contempt of court *in facie curiae*.
- (14) Discuss contempt *ex facie curiae* in the form of commentary on pending cases.
- (15) Discuss contempt *ex facie curiae* in the form of scandalising the court.





# PART B

## Crimes against the community

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# Learning unit 3

## Crimes against public welfare



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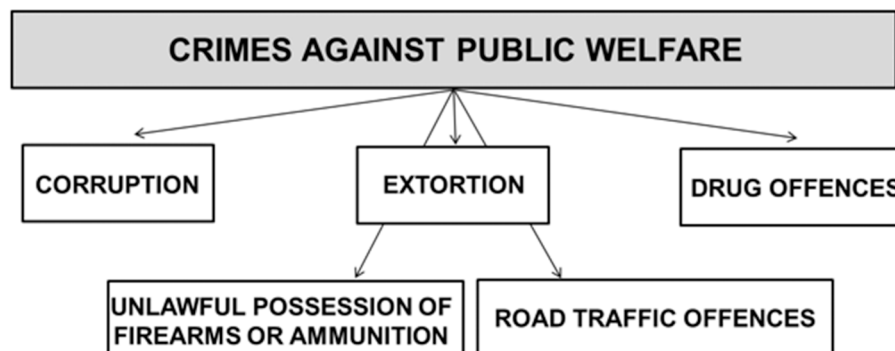
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### LEARNING OUTCOMES

When you have finished this learning unit, you should be able to:

- demonstrate your understanding of the requirements for certain crimes against public welfare by
  - considering the possible liability of an accused for the crimes of corruption, extortion, use or possession of drugs, dealing in drugs, unlawful possession of arms or ammunition and road traffic offences



### 3.1 INTRODUCTION

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

### 3.2 CORRUPTION

**(Criminal Law 401–417)**

#### 3.2.1 General

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

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

#### 3.2.2 General and specific crimes of corruption

The current 2004 Act creates

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



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

#### 3.2.3 The general crime of corruption: definition in the Act

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

Any person who directly or indirectly –

- accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
- gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner
  - that amounts to the –
    - illegal, dishonest, unauthorised, incomplete, or biased; or
    - misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
  - that amounts to –

- (aa) the abuse of a position of authority;
- (bb) the breach of trust; or
- (cc) the violation of a legal duty or a set of rules;
- (iii) designed to achieve an unjustified result; or
- (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corruption.



**NB** It is not necessary for you to memorise the definition of the general crime in section 3 quoted above. In the examination, we will not expect you to know the exact content of this section.

### 3.2.4 Shortened definition of the general crime of corruption

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

Anyone that

- (a) accepts any gratification from any other person, or
- (b) gives any gratification to any other person, in order to act in a manner that amounts to the illegal exercise of any duties, is guilty of the offence of corruption.



As you have noted, the definition in section 3 of the Act is very long and comprehensive. We have shortened the definition for you, and you only need to memorise this shortened version of the section set out above in the grey background for the examination. The definition basically consists of the acceptance or giving of a gratification as an inducement.

### 3.2.5 Corruption by giver and corruption by recipient

Corruption can be committed in various ways. If one attempts to make statements about corruption that are applicable to all instances of the offence, you become entangled in long and diffuse formulations that are not easily understandable. In order to overcome this problem, discussions on the crime usually distinguish between the two most important ways in which the offence can be committed. These two main categories are corruption committed by the giver and corruption committed by the recipient.

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

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

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

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

### 3.2.6 General crime of corruption: the crime committed by the recipient

#### 3.2.6.1 Elements of the crime

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

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

Each of these elements will now be discussed.

#### 3.2.6.2 The acceptance (element of an act)

The word "accept" has a technical meaning, because it includes a number of other acts that are not normally regarded as synonyms of "accept". The legislature broadens the meaning of "accept" in two ways:

- The Act also provides (in s 3 (a)) for certain conduct by Y which precedes the acceptance, namely:
  - to **agree** to accept a gratification or
  - to **offer** to receivesatisfies the element of an act.

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

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

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

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

- (1) The fact that Y did not accept the gratification "directly", but only "indirectly" (s 3). Y does not have to accept the gratification personally. The fact that Y made use of a middleman to accept the gratification affords him no defence.
- (2) The fact that **Y did not in actual fact later perform the act which X had induced him to perform** (s 25(c)). If Y had accepted the gratification, but the entire evil scheme had been exposed and Y had been arrested by the police before he could fulfil his part of the agreement with X, Y would nevertheless be guilty of the crime. Therefore, the crime has been completed even if Y has not yet done what he undertook to do, expressly or implicitly.
- (3) The fact that the corrupt activity between X and Y **was unsuccessful**. This consideration affords neither X nor Y a defence.
- (4) For the purpose of liability, it is irrelevant that the state or the private enterprise concerned with the transaction did not **suffer prejudice** as a result of X's or Y's conduct.
- (5) The fact that Y accepted the gratification, but that he, in actual fact, did **not have the power** or right to do what X wished him to do, affords neither X nor Y a defence (s 25(a)). Therefore,

if X gives a gratification to Y in the belief that Y will give him a driver's licence, which he is not entitled to do, as Z rather than Y is empowered to make such a decision, this fact can afford neither X nor Y a defence.

### 3.2.6.3 *The gratification*

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

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

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

### 3.2.6.4 *The element of inducement ("in order to act ... in a manner")*

#### *(a) General*

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

#### *(b) The aims*

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

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

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



*(c) General principles of the aims*

- (1) In each instance, the expression "to act" appears. The legislature provides explicitly that an "act" also **includes an omission** (s 2(4)).
- (2) It is irrelevant whether Y plans to achieve this aim personally or whether he plans to achieve this aim by influencing another person to act in such a manner (see the phrase in s 3 between (b) and (i)). Therefore, Y may make use of **a middleman** to achieve the aim.
- (3) The aims apply in the **alternative**. It is sufficient for the state to prove that Y had only one of these aims in mind when he accepted the gratification.
- (4) It is irrelevant whether Y accepted the gratification **for his own benefit or for the benefit of someone else** (s 3(a) and (b)). Therefore, the fact that Y receives money from X in a corrupt way with the aim of using the money to provide for his sick child affords him no defence.
- (5) The fact that **Y did not in actual fact have the power to act** in the manner in which he was induced to act affords Y no defence (s 25(a)). Therefore, if Y receives money from X as an inducement to give X a particular licence, but it appears that a person in a higher position in the relevant state department or enterprise is actually empowered to decide who should be issued with licences, Y is still guilty of the crime.

*3.2.6.5 Unlawfulness*

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

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

*3.2.6.6 Intention*

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

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

The Act contains a provision which expressly applies the principle (of *dolus eventualis*) to this crime. Section 2(1) provides that, for the purposes of the Act, a person is regarded as having knowledge of a fact, not just if the person has actual knowledge of a fact, but also if the court is satisfied that the person believes that there is a reasonable possibility of the existence of that fact and that the person has failed to obtain information to confirm the existence of that fact. This provision is merely an application of the general rule that intention in respect of a circumstance (as opposed to a consequence) can also exist in the form of *dolus eventualis*; more specifically, that "wilful blindness" amounts to knowledge of a fact and, accordingly, intention. These principles have previously been accepted in our case law. (See *Bougarde* 1954 (2) SA 5 (C) 7–9)

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

### 3.2.7 General crime of corruption: corruption by the giver

#### 3.2.7.1 General

Corruption by the recipient discussed above deals with **acceptance** by Y of gratification given by X. Conversely, corruption committed by the giver deals with the **giving** by X of gratification to Y. Corruption committed by the giver is but only a mirror image of corruption committed by the recipient. Instead of "accept" (which describes Y's conduct in corruption as recipient), the word "give" (which describes X's conduct in corruption by the giver) should be used. Because corruption committed by the giver is but a mirror image of corruption committed by the recipient, it is unnecessary to repeat once again in the discussion of corruption by the giver all the rules dealing with the offence discussed above, namely corruption by the recipient. Therefore, the discussion of corruption by the giver which follows can be summarised very briefly. Except if indicated otherwise, all the principles applicable to corruption committed by the recipient are, *mutatis mutandis* (in other words, by replacing the word "accept" with the word "give" in each instance), applicable also to corruption committed by the giver. It is more or less just in the requirement of the act that corruption by the giver is structured differently from corruption by the recipient.

#### 3.2.7.2 Elements of the crime

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

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

#### 3.2.7.3 The giving of gratification

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

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

- to promise, lend, grant, confer or procure the gratification
- to agree to lend, grant, confer or procure the gratification
- to offer to lend, grant, confer or procure such gratification

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

- the fact that Y, although he may have given the impression that he would accept the offer, in actual fact **had no intention** of doing what X had asked him to do (s 25(b))
- the fact that **Y did not do what X requested him to do** (s 25(c))
- the fact that **Y did not have the power** to do what he was requested to do (s 25(a))
- the fact that **Y rejected X's offer**
- the fact that **Y agreed, but subsequently changed his mind**
- the fact that **Y found it impossible** to do what he had undertaken to do

#### 3.2.7.4 The gratification

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



*Corruption.* The giving and receiving of a gratification in order to act in a certain manner.

#### 3.2.7.5 In order to act in a certain manner (the element of inducement)

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

In *Shaik* 2007 (1) SACR 142 (D) and 2007 (1) SACR 247 (SCA), the accused was convicted of corruption in terms of the predecessor of section 3 of Act 12 of 2004 (s 1 of the Corruption Act 94 of 1992). There is no substantial difference between the wording of the previous section and that

of the current section 3 of Act 12 of 2004. The elements of the previous offence (s1 (1)(a)(i)), in relevant part, were:

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

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

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

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

#### 3.2.7.6 Unlawfulness

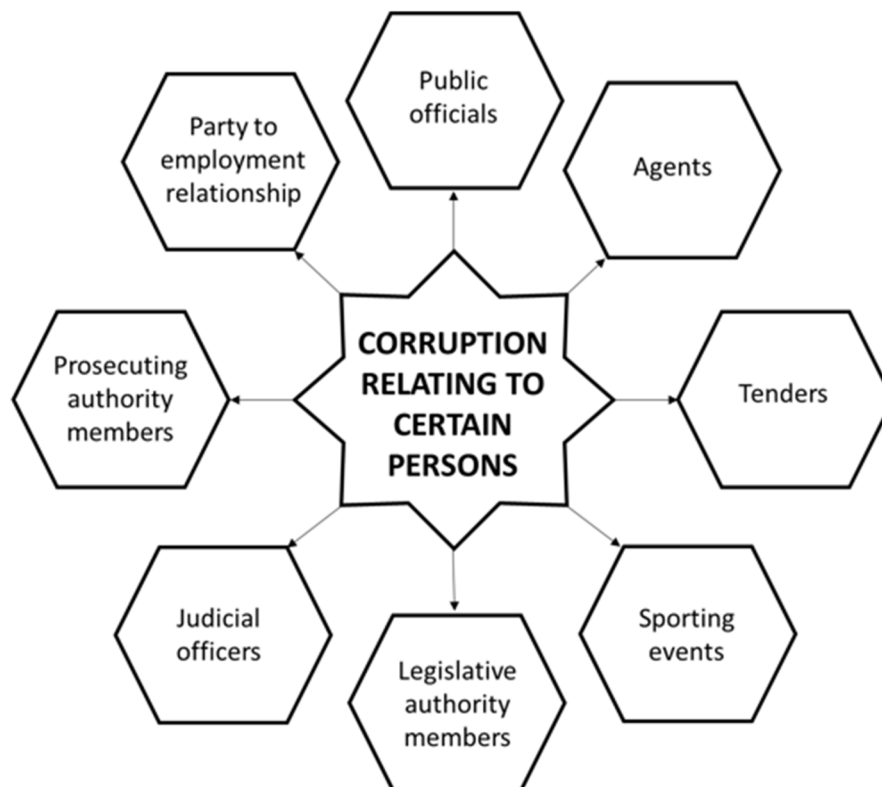
This requirement is the same as the corresponding requirement for corruption committed by the recipient, and has already been discussed above.

#### 3.2.7.7 Intention

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

### 3.2.8 Corruption relating to specific persons

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



- (1) *Corruption relating to public officials.* Section 4 creates an offence limited to corruption of public officials. "Public officials" is defined exhaustively in section 1. A typical example of such an official is a state official such as a police officer.

In *S v Selebi* 2012 (1) SACR 209 (SCA), the former National Commissioner of Police and former Head of Interpol was convicted for corruption in contravention of section 4(1)(a) of the Prevention and Combating of Corrupt Activities Act 12 of 2004. The provisions of section 4(1)(a) are exactly the same as the general offence of corruption (set out in s 3(1)(a) above), except for the use of the words at the beginning of the section, namely "Any public officer ..." instead of "Any person ...". In issue in the appeal were two matters: whether Selebi had received payment from a person (Agliotti) and whether he had provided Agliotti with any *quid pro quo* (a favour given in return for another) as a result of such payment as required in terms of section 4 of the Act. The court explained that the question whether Selebi received payments and/or other benefits "requires a consideration of whether he received such gratification with a corrupt intention" (at para 6). The indictment alleged that at the relevant time **a corrupt relationship existed between Selebi and Agliotti and that Selebi had received sums of money and clothing from Agliotti**. It was also alleged that Selebi had received the payment **in order to act in a manner as set out** in section 4(1)(a)(i) – (iv) of the Act and that Selebi did so act by way of *quid pro quo*. The details in the indictment were that Selebi had, inter alia, shared secret information with Agliotti with regard to investigations conducted against him (Agliotti) in the United Kingdom and also in South Africa, and protected him from criminal investigation.

In his judgment, Mthiyane DP pointed out (at para 8) that the facts pertain to the general crime of corruption committed by a recipient and that the essential elements of this offence as set out in section 4(1)(a) of the PCCA Act are: (1) the acceptance of (2) gratification (3) in order to act in a certain way (the inducement) (4) unlawfully and (5) intentionally. Whereas the first element is self-explanatory, the second element is elucidated in section 1 of the Act itself and includes "money whether in cash or otherwise". The element of "inducement" **depends on whether the receipt of the gratification is directed at procuring the recipient to act in one or more of the ways** set out in section 4(1)(a)(i) – (iv), which include **the abuse of a position of authority** (s 4(1)(ii)(aa)). The elements of unlawfulness and intention are not expressly set out in the specific provision, but the court held that it should be construed as requiring these elements (at para 9). The court then considered the question whether the State had succeeded in proving beyond reasonable doubt that the payments were received from Agliotti and any *quid pro quo* was given by Selebi with the requisite *mens rea*. Mthiyane DP reiterated that intention is not specifically referred to, but that the words "in order to act ..." in s 4(1)(a)(i) of the PCCA Act "import some 'intention' element". He also pointed out that section 24 of the Act makes it easier for the State to prove the element of intention. The section provides that once the prosecution has been able to show that, despite having taken reasonable steps, it could not link the acceptance of the gratification to a lawful authority or excuse on the part of the person charged, and in the absence of evidence to the contrary which raises reasonable doubt, it is sufficient evidence that the person accepted such gratification "in order to act" in a manner envisaged. But the Supreme Court of Appeal did not find it necessary to invoke the presumption. It concluded that once it had been proved that Selebi had received payments from Agliotti, "the inference was irresistible that it was for an illegal purpose and with knowledge of that illegal purpose" (at para 42). The court concluded that the trial court was justified in convicting the appellant of corruption as charged because it had succeeded in establishing that the payments had been accepted by Selebi with the **requisite corrupt intention**.

The judgment of Mthiyane DP did not address the issue whether a *quid pro quo* is in fact required for the crime of corruption to have been committed in terms of section 4(1)(a) of the Act. In her separate judgment, Snyders JA (Leach JA concurring) focused specifically on this issue. She pointed out that the factual findings and conviction of the trial court consisted of an acceptance of a gratification on the one hand, and the giving of a *quid pro quo* by the appellant on the other hand on the basis of an inferred agreement between Selebi and Agliotti. **However, in her view, this does not mean that section 4 of the Act requires an agreement between the corruptor and the corruptee or that it requires a *quid pro quo* from the corruptee.** Snyders JA emphasised at paragraph 97: "It must be plainly understood that the conviction, in this case on the evidence that established an agreement and the giving of a *quid pro quo*, is not the low-water mark of the section." She pointed out that section 25 supports her wide interpretation of section 4. Section 25 of the PCCA provides, *inter alia*, that whenever an accused person is charged with an offence (including a contravention of s 4), it is not a valid defence for that accused person to contend, *inter alia*, that he or she did not have the power, or did not intend, or failed to perform the act in relation to which the gratification was given, accepted or offered (s 25(a) – (c)). We submit that the judgment of Snyders JA on this point is correct.

- (2) *Corruption in relation to agents*. Section 6 creates an offence limited to corruption of agents. Corruption committed by businesspeople in the private sector is criminalised in this section.
- (3) *Corruption in relation to members of the legislative authority*. See section 7.
- (4) *Corruption in relation to judicial officers*. Section 8 creates a crime limited to the corruption of judicial officers. The expression "judicial officer" is defined in section 1 and includes judges and magistrates. The conduct which the judicial officer is induced to perform is also further defined in section 8(2). A typical example of this form of corruption is where someone gives a judge money or offers him money, in order to persuade him to give a judgment in favour of a certain party – conduct on the part of the judge that amounts to him not giving a

judgment according to objective evaluation on the merits of the facts before the court. If someone corrupts a judicial officer, the conduct can also be punished as contempt of court.

- (5) *Corruption relating to members of the prosecuting authority.* Section 9 creates an offence limited to corruption of the members of the prosecuting authority. The act that Y is induced to perform is further defined. An example of a case resorting under this heading is when X gives Y, the prosecutor in a criminal case, money in order to persuade Y to destroy or hide the docket in which the particulars of the prosecution's case are contained. Subsequently, if the docket is reported missing, the prosecution will not be successful. The type of conduct criminalised under this heading can overlap with the common-law offence of defeating or obstructing the course of justice.
- (6) *Receiving or offering of unauthorised gratification by a party to an employment relationship.* Section 10 creates an offence which is limited to corruption committed in an employment relationship. If an employer, for instance, accepts a gratification as inducement to promote one of her employees, she can be charged with a contravention of this section.
- (7) *Corruption relating to procuring of tenders.* Section 13 creates an offence limited to corruption committed in order to procure a tender. An example in this context is where X gives an amount of money to Y, whose task it is to decide to whom a tender should be awarded, in order to persuade Y to accept X's tender.
- (8) *Corruption relating to sporting events.* Section 15 creates an offence limited to corruption committed in the context of sporting events. Someone who accepts or gives money in order to undermine the integrity of any sporting event contravenes this section. The word "sporting event" is further defined in section 1. An example here is when X, who bets money on the outcome of sporting events, gives money to Y, who is a sportsman or sportswoman or a referee, in order to persuade Y to manipulate the game in such a way that the match has a certain outcome.

### 3.2.9 Failure to report corrupt acts

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

## 3.3 EXTORTION

**(Criminal Law 417–419)**

### 3.3.1 Definition

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

### 3.3.2 Elements of the crime

The elements of this crime are:

- (1) the **acquisition** of
- (2) a **benefit**

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

### 3.3.3 The perpetrator

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

### 3.3.4 Exertion of pressure

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

### 3.3.5 The benefit

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

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

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

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

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

The crime will not have been completed until the benefit has been handed to X.



### 3.3.6 Causation

Just as in the case of robbery where a causal connection between the violence and the acquisition of the thing must exist, so, too, in the case of extortion there must be a causal connection between the application of pressure and the acquisition of the thing. If the benefit is handed over not because of pressure exerted by X, but because a trap has been set for X and Y wishes her to be apprehended, the crime is merely attempted extortion.



Please note the importance of a causal link in this crime. You need to mention this causal link between the application of pressure and the acquisition of the benefit when discussing the crime of extortion.

### 3.3.7 Unlawfulness

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

### 3.3.8 Intention

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



#### ACTIVITY

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

- (1) X threatens to sue Y if he does not pay back the money he owes him. Y does in fact owe X the money and has failed to pay his debt for a considerable time, despite demands by X. Y, afraid of the legal costs that he may incur, immediately pays his debts to X.
- (2) X tells Y that he will hire somebody to break into his house and steal his property if he does not pay back the money he owes him. Y, feeling afraid, pays him immediately.
- (3) X is Y's boss at work. He tells Y that she will not get promotion unless she has sexual intercourse with him. Y refuses and lays a charge with the police.



#### FEEDBACK

- (1) X cannot be convicted of extortion, since his conduct is not unlawful. It is not against the legal convictions of society to obtain a perfectly legitimate advantage (payment of a debt) by means of a threat of legal action.
- (2) X can be convicted of extortion. It is undoubtedly against the legal convictions of society to use this type of pressure (i.e. to threaten to hire somebody to break into someone else's house and violate his property rights) to obtain a benefit. Although the benefit obtained is legitimate, the illegitimate pressure used to obtain the benefit makes X's conduct unlawful.

- (3) X may only be convicted of attempted extortion. Extortion is a materially defined crime. This means that there must be a causal link between the pressure and the acquisition of the benefit, and that the crime is not completed unless the perpetrator has received the benefit. Because X has not as yet obtained the "advantage", he may not be convicted of the completed crime, but only of an attempt to commit extortion.

### 3.4 DRUG OFFENCES

(*Criminal Law 420–426*)

#### 3.4.1 General

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

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

The Act divides drugs into three categories, namely

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

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



Although it may be difficult to memorise the three types of drugs, please remember that all three are dependence-producing substances (something which makes you become reliant or hooked on it). The second type of drugs is more serious than the first, as it is dangerous, while the third type is even more severe than the first two as it is undesirable. Similarly, dealing in drugs is a more serious offence than possessing or using drugs. It is important to note, though, that "possession" and "use" are not treated in the Act as two separate offences, but as one single offence.

#### 3.4.2 The use or possession of drugs

##### 3.4.2.1 Definition

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

##### 3.4.2.2 Elements of the offence

The elements of this offence are:

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

### 3.4.2.3 The act – possession or use

#### (a) Use

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

#### (b) Possession

##### (i) General meaning of "possession"

In law, **possession** consists of two elements, namely:

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

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

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

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

##### (ii) Meaning of "possession" in the Act

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

Section 1 of the Act provides that the word "possess" as used in the Act **includes**:

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

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

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

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

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



#### ACTIVITY

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



#### FEEDBACK

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

#### (iii) Prohibition upon use or possession of dagga declared unconstitutional

In *Prince v Minister of Justice and Constitutional Development and Others* (Western Cape Division, Cape Town) Case No: 8760/2013, the court considered the constitutionality of the prohibition on the use of cannabis and the possession, purchase or cultivation thereof **for personal or communal consumption**. The key sections which were the subject of this dispute were sections 4 (b) and 5(b) of the *Drugs and Drug Trafficking Act* 140 of 1992 (*Drugs Act*) and section 22A of the *Medicines and Related Substances Act* 101 of 1965 (*Medicines Act*). In essence, section 4(b) of the *Drugs Act* provides that no person shall use or have in his possession any dangerous dependence-producing substance or any undesirable dependence-producing substance unless he is a patient who has acquired or bought any such substance in a lawful manner, as specifically provided for in the Act. Cannabis is listed as such a substance under Schedule 7 of the Medicines Control Council: Schedules. Section 22A (9) (a) (i) of the *Medicines Act* prohibits the acquisition, use, possession, manufacture or supply of cannabis. Subsection (10) provides an overriding prohibition on the sale or administration of cannabis other than for medicinal business.

The applicants applied to the court that these sections be declared invalid on the grounds that the criminal prohibition on the use and possession of cannabis in their own homes and "properly designated places" was unconstitutional (para [11]). In particular, they contended that, pursuant to the impugned legislation, fundamental rights such as equality, dignity and freedom of religion and **most importantly, the right to privacy** were breached (para [11]). After considering all the evidence, the court found that the respondents did not provide credible evidence about the uniquely harmful effects of dagga. The respondents did not prove that the criminalisation of cannabis served an important purpose and that there was no way to achieve this purpose other than to criminalise the use and possession of dagga. Davis J concluded that: "The evidence as set out in this judgment supports the argument that the legislative response to the personal

consumption and use (of dagga) is disproportionate to the social problems caused as a result thereof" ([para 102]).

The court declared the disputed provisions (sections 4(b) and 5(b) of the *Drugs Act* read with Part III of Schedule 2 to the *Drugs Act*; and section 22A(9)(a)(i) of the *Medicines Act* and section 22A(10) thereof read with schedule 7 of GN R509 of 2003, published in terms of section 22A(2) of the *Medicines Act*) inconsistent with the Constitution of the Republic of South Africa 108 of 1996 and invalid, only to the extent that they prohibit the use of cannabis by an adult in a private dwelling where the possession, purchase or cultivation of cannabis is for personal consumption by an adult.

The declaration of invalidity was, however, suspended for a period of 24 months to allow Parliament to correct the defects in the legislation, as envisaged in this judgment. It was declared further that until Parliament has made the amendments contemplated by the court, or the period of suspension has expired, it would be considered a defence to a charge under the relevant provisions that the possession or cultivation of cannabis in a private dwelling is for the personal consumption of the adult accused. In *Minister of Justice and Constitutional Development and Others v Prince* CCT108/17 [2018] ZACC 30, the Constitutional Court held in a unanimous judgment that –

- (a) section 4(b) of the *Drugs Act* was unconstitutional and, therefore, invalid to the extent that it prohibits the use or possession of cannabis by an adult in private for that adult's personal consumption in private (which is a violation of section 14 of the Constitution);
- (b) section 5(b) of the *Drugs Act* was constitutionally invalid to the extent that it prohibits the cultivation of cannabis by an adult in a private place for that adult's personal consumption in private; and
- (c) section 22A(9)(a)(i) of the *Medicines Act* was constitutionally invalid to the extent that it renders the use or possession of cannabis by an adult in private for that adult's personal consumption in private a criminal offence.

The Constitutional Court disputed the High Court's limitation of its order to the use, cultivation or possession of cannabis "at home or in a private dwelling". It held that the right to privacy extends beyond the boundaries of a home.

The effect of the judgment is two-fold: (a) it decriminalises the use or possession of cannabis by an adult in private for that adult person's personal consumption in private; and (b) it decriminalises the cultivation of cannabis by an adult in a private place for that adult's personal consumption in private. However, the use or possession of cannabis by a child anywhere, or by an adult in public, is not decriminalised.

#### 3.4.2.4 The drug

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

#### 3.4.2.5 Unlawfulness

Unlawfulness may be excluded, for example, by necessity. However, quite apart from grounds of justification flowing from general principles, section 4 of the Act explicitly mentions a number of grounds of justification for the purposes of this offence. These are, inter alia, that X was a –

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

#### 3.4.2.6 *Intention*

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

### 3.4.3 Dealing in drugs (*Criminal Law 423–426*)

#### 3.4.3.1 *Definition*

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

#### 3.4.3.2 *Elements of the offence*

The elements of this offence are:

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

#### 3.4.3.3 *The act – dealing in*

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

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

- transshipment
- importation
- cultivation
- collection
- manufacture
- supply
- prescription
- administration
- sale
- transmission or
- exportation of drugs

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

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

The Court found that the legislature intended to punish **activities in furnishing drugs** as "**dealing in**" drugs and that it did not intend **activities in acquiring drugs** to be regarded as "dealing in" drugs, but only as being in **possession** of the drugs. More particularly, the Court held

that, if X commits an act which consists merely in him obtaining the drug for his own personal use, he can only be convicted of possession or use of the drug, and not of dealing in the drug.

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

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

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

#### 3.4.3.4 The drug

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

#### 3.4.3.5 Unlawfulness

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

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

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

#### 3.4.3.6 Intention

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

### 3.5 UNLAWFUL POSSESSION OF FIREARMS OR AMMUNITION (*Criminal Law 426-431*)

#### 3.5.1 General

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

The Act distinguishes between a "**firearm**" and a "**prohibited firearm**". Whereas a firearm is a lethal weapon, the arms and devices falling under the heading of "prohibited firearm" are even more ominous and destructive, amounting to what may be described as weapons of war, such as a cannon and a rocket launcher. Whereas a firearm can be licensed, a prohibited firearm cannot (barring a few exceptions) be licensed. A heavier sentence (namely a maximum of 25 years' imprisonment) is prescribed for the offence of possessing a prohibited firearm than for the possession of a firearm which is not a prohibited firearm. (The maximum sentence for the latter offence is 15 years' imprisonment.) For the purposes of our present study, we shall only consider the unlawful possession of a "firearm" (as opposed to a "prohibited firearm").

A gun owner is obliged to renew his gun licence before the licence expires. If this is not done, he has committed a criminal offence and is subject to penalties. This was confirmed by the Constitutional Court in the case of *Minister of Safety and Security v SA Hunters and Game Conservation Association* (CCT177/17) [2018] ZACC 14, where it was ruled that sections 24 and 28 of the *Firearms Control Act*, under which gun owners must renew their firearm licences or forfeit guns for which licences have expired to the state, are constitutional.

#### 3.5.2 Unlawful possession of a firearm

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

The elements of this offence are as follows:

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

##### 3.5.2.1 Possession

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

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

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



### 3.5.2.2 Firearm

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

### 3.5.2.3 Unlawfulness

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

### 3.5.2.4 Culpability

The legislature does not specify whether intention or negligence is required for liability. If X had the **intention**, she would certainly be guilty. In *Majikazana* 2012 (2) SACR 107 (SCA), the court pointed out that if the state avers (or states) that the accused intentionally possessed a firearm without a licence, the state must also prove that the accused had knowledge of unlawfulness (para 22). Therefore, if there is a reasonable possibility that the accused believed that he was holding the weapon innocently, he should receive the benefit of the doubt. This case dealt with the provisions of the previous Act (Arms and Ammunition Act 75 of 1969). However, this ruling is also valid with regard to the new Act.

In *Kwanda* 2013 (1) SACR 137 (SCA), X was a driver of a vehicle that was conveying him and two others to rob a bank. A man carrying an AK47 rifle and ammunition was seated next to him. They were arrested before the robbery could be carried out. The question before the court was whether X could be convicted of unlawful possession of a firearm in terms of the provisions of the Arms and Ammunition Act 75 of 1969. There was insufficient evidence before the court to indicate that X was aware of the firearm in his companion's possession. The court ruled that even if it were accepted that X had conspired with his companions to commit robbery, **and that he was aware that some of his co-accused possessed firearms for the purpose of committing the robbery**, such knowledge on his part was **not sufficient** to support the inference that he had **the intention of jointly possessing the firearm** (para 6). The court explained that such an inference can only be drawn if the state has established facts from which it can properly be inferred by a court that **the group had the intention of exercising possession of the guns through the actual detentor(s) and the actual detentors had the intention of holding the guns on behalf of the group**. (Note that this ruling is also valid in respect of the interpretation of the provisions of the new Act).

The question also arises whether a person can be convicted if the form of culpability proved against him is not intention, but merely **negligence**. Under the previous Act, which dealt with this matter, proof of negligence was sufficient for a conviction, and it is submitted that the same should apply under the present Act. It is well known that the unlawful possession of firearms is one of the greatest evils besetting South African society and that the legislature's intention was clearly to spread the net against the unlawful possession of firearms as widely as possible.

### 3.5.3 Unlawful possession of ammunition

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

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

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

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

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

### 3.5.4 Certain other offences created in the Act

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

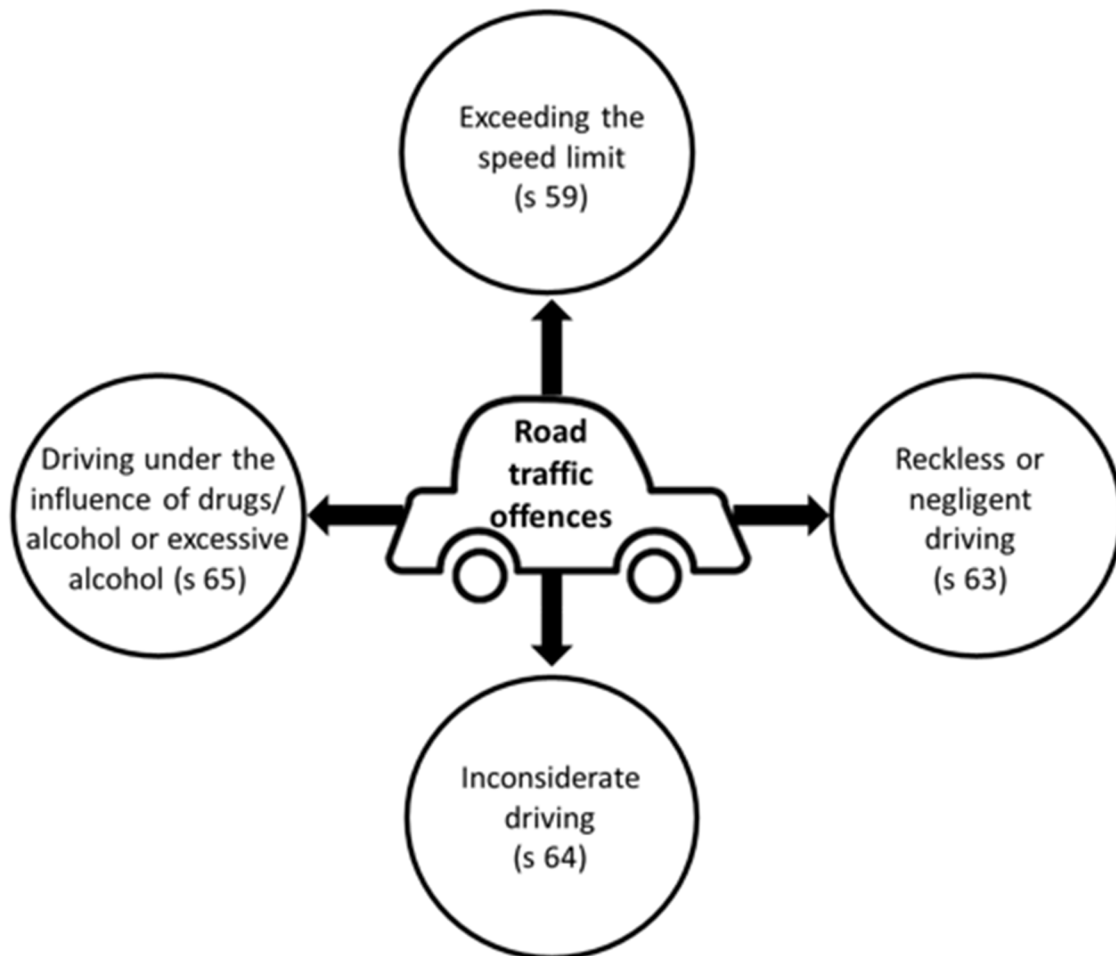
- (1) to be aware that somebody else possesses a firearm illegally and to **fail to report** this to the police
- (2) to **cause bodily injury** to a person or damage to property by **negligently** using a firearm
- (3) to handle a firearm while **under the influence** of a substance which has an **intoxicating** or a narcotic effect
- (4) to discharge a firearm in a **built-up area or a public place**
- (5) to **lose** a firearm owing to a **failure to lock it away in a safe**, strong-room or safekeeping device, or owing to failure to take reasonable steps to prevent its loss or owing to failure to keep the keys to the safe, strong-room or device in safe custody



Handling a firearm with reckless regard to the safety of any person.

### 3.6 ROAD TRAFFIC OFFENCES

(Burchell *Principles of Criminal Law* 786–796; Hectors *Coopers Motor Law* (2008 revised 2012) B9-8-B11-77)



#### 3.6.1 Introduction

Various offences relating to the regulation of road traffic are created in terms of the Road Traffic Act 93 of 1996. A number of these offences have been selected for study in this module. Road traffic offences fall under crimes against public welfare. The most important source of road-traffic legislation is the **National Road Traffic Act 93 of 1996** (hereinafter "the NRTA"). The Act makes it an **offence for any person to exceed the speed limit, engage in reckless, negligent or inconsiderate driving or to drive while under the influence of alcohol or drugs or while having an excess of alcohol in one's blood or on one's breath.**

There are several definitions in the Act which you should know in order to understand the application of these offences. These definitions are discussed below.



**NB** You are not required to memorise all these definitions. However, you should be able to recognise a factual situation which involves any of these definitions. You are also required to know the cases in which these definitions were applied and interpreted.

### 3.6.2 Driving in excess of the speed limit

#### 3.6.2.1 Definition

Section 59 of the NRTA provides that:

- (1) The general speed limit in respect of –
  - (a) every public road or section thereof, other than a freeway, situated within an urban area;
  - (b) every public road or section thereof, other than a freeway, situated outside an urban area; and
  - (c) every freeway, shall be as prescribed.
- (2) An appropriate road traffic sign may be displayed on any public road in accordance with section 57, indicating a speed limit other than the general speed limit which applies in respect of that road in terms of subsection (1): Provided that such other speed limit shall not be higher than the speed limit prescribed in terms of subsection (1)(c).
- (3) The Minister may, after a decision has been taken in the Shareholders Committee, in respect of any particular class of vehicle prescribe a speed limit which is lower or higher than the general speed limit prescribed in terms of subsection (1)(b) or (c): Provided that the speed limit so prescribed shall not replace a lower speed limit indicated in terms of subsection (2) by an appropriate road traffic sign.
- (4) No person shall drive a vehicle on a public road at a speed in excess of –
  - (a) the general speed limit which in terms of subsection (1) applies in respect of that road;
  - (b) the speed limit indicated in terms of subsection (2) by an appropriate road traffic sign in respect of that road; or
  - (c) the speed limit prescribed by the Minister under subsection (3) in respect of the class of vehicle concerned.

#### 3.6.2.2 Elements of the offence

The elements of speeding are:

- (1) driving
- (2) vehicle
- (3) public road
- (4) in excess of speed limit
- (5) unlawfulness
- (6) culpability



**NB** Note that you are not required to memorise this definition. However, you must be able to set out and discuss the elements of the offence as set out below.

#### 3.6.2.3 Act

##### (a) Driving

"Driver" means any person who drives or attempts to drive any vehicle or who rides or attempts to ride any pedal cycle or who leads any draught, pack or saddle animal or herd or flock of animals, and "drive" or any like word has a corresponding meaning. Drive is not defined, so where it is associated with a vehicle it bears its ordinary meaning.

The driving must constitute a voluntary act, which means that the offence would not be committed if a person acts involuntarily from an act of automatism or from an epileptic fit. Intoxication may cause involuntary conduct although the *actio libera in causa* does not apply to drunken driving.

In *Rooyen* 1968 (1) SA 641 (T), the word "drive" was examined. X, who was under the influence of alcohol, had pushed his vehicle by exercising control over the steering wheel and handbrake from outside the vehicle. The court held that the accused had driven the vehicle as he had **control of the movements** of the vehicle. Whether the vehicle moves forward by force of gravity or as a result of being pushed by a person is irrelevant. In *Ekstraal* 1981 (4) S 406 (C), it was held that if **someone sits behind the steering wheel of a vehicle**, or controls the movements of the steering wheel of a vehicle which is being towed by another vehicle, this situation **also qualifies as driving**. In the contrasting case of *Makhubela* 1981 (4) SA 210 (B), where the accused drove without a valid driver's licence, it was held that the word "drive" must be considered in the context of licensed drivers. **"To drive" means to have control of a vehicle which is propelled by its own mechanical power.** A charge of attempting to drive is impossible, as is evident from the definition above, because "driver" includes persons who attempt to drive a vehicle.

#### (b) Vehicle

"Vehicle" means a device designed or adapted mainly to travel on wheels or crawler tracks and includes such a device which is connected with a draw-bar to a breakdown vehicle and is used as part of the towing equipment of a breakdown vehicle to support any axle or all the axles of a motor vehicle which is being salvaged other than such a device which moves solely on rails.

The definition is broad and may also cover a pedal cycle (*Gertse* 1972 (3) SA 59 (C); *Van Wyk* 1965 (2) SA 158 (C)). It is further clear that a device that travels on rails will be excluded from the definition and a train is therefore not a vehicle in terms of this Act.

**NOTE: EXCEPT FOR THE DEFINITION OF A PUBLIC ROAD BELOW, YOU DO NOT HAVE TO KNOW THE OTHER DEFINITIONS SET OUT ABOVE BY HEART. HOWEVER, YOU MUST BE ABLE TO IDENTIFY A SITUATION WHICH INVOLVES A "VEHICLE" AS DEFINED IN THE ACT OR "DRIVING" AS INDICATED IN THE ACT.**

#### (c) Public road

"Public road" means any road, street or thoroughfare or any other place (whether a thoroughfare or not) which is commonly used by the public or any section thereof or to which the public or any section thereof has a right of access, and includes –

- (a) the verge of any such road, street or thoroughfare;
- (b) any bridge, ferry or drift traversed by any such road, street or thoroughfare; and
- (c) any other work or object forming part of or connected with or belonging to such road, street or thoroughfare.

There are two requirements for a road, street or thoroughfare to qualify as a public road, namely:

- (1) It must be commonly used by the public or a section of the public; **OR**
- (2) The public or a section of the public must have a right of access to it (*Dillon* 1983 (4) SA 877 (N)).

For example, in *Coetzee* 1970 (2) SA 445, it was held that a parking lot that was reserved for roadhouse customers did not qualify as a public road. In *Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA), the court held that the word "driving" does not include terrain driven over, such as "unmade roads, slippery or steep terrain", and the implication is therefore that such a path does not qualify as a public road.

#### 3.6.2.4 Speed limit

There are three general speed limits set out in section 59(1) of the NRTA, read with Regulation 426 under RTA 29 of 1989, which apply and which may be exceeded in terms of sections 89(1) and 89 (3) of the NRTA. These speed limits apply on the following roads:

- (1) **A public road within an urban area (60 km/h)**
- (2) **A public road outside an urban area (100 km/h)**
- (3) **A freeway (120 km per hour)**

The Act does not stipulate what type of evidence is necessary to prove that the speed limit has been exceeded. The general principle would be that the **onus rests on the state** to prove that the vehicle exceeded the speed limit and that the **timing device** used to measure speed was **accurate** (*Meaker* 1998 (2) SACR 73 (W) 80). The interest protected by the prosecution of this crime is the physical safety of the general public. In *S v Joseph* 2013 (1) SACR 183 (GSJ), the accused exceeded the speed limit of 60 km per hour by driving at a speed of 102 km per hour. He received a suspended sentence but had to attend the Nicro Adult Life Skills programme.

#### 3.6.2.5 Unlawfulness

Despite the restrictions imposed by the speed limit, one needs to bear in mind that there are certain drivers who are permitted to exceed the general speed limit in terms of section 60 of the Act. The **exceptions are the drivers of an ambulance, fire-fighting vehicle or response vehicle, a rescue vehicle and an emergency medical response vehicle who are carrying out their duties, or a traffic officer or SAPS member or any other authorised persons who drive a vehicle in the execution of their duties**, subject to the condition that they should drive such vehicle with **due regard** to the safety of other road users and that certain vehicles are equipped with a lamp or sound device that must be operated when the general speed limit is exceeded. In the case of *S v Groep* 2002 (1) SACR 538 (E), for example, the appellant was a police officer who was convicted of negligent driving of a police vehicle. She was responding to an emergency and drove through a traffic-light-controlled intersection while the traffic lights were against her. It was held that she had not driven with "due regard" for the safety of other road users.

In *Fourie* 2001 (2) SACR 674 (C), a regional magistrate raised a defence of official capacity as a ground of justification when he was charged with exceeding the speed limit. He stated that he was acting in the interests of the administration of justice because he would have been late for court proceedings. The court held that the respondent's actions were unlawful and that he should have considered alternative measures to ensure that the speed limit would not be exceeded. Necessity may also be raised as a defence.

#### 3.6.2.6 Culpability

Burchell (at 795–796) is of the view that this crime may be one of strict liability. However, he also points out that, arguably, the defence of reasonable mistake with regard to a contravention of the speed limit could still perhaps be raised.

### 3.6.3 Reckless or negligent driving

#### 3.6.3.1 Definition

Section 63 of the NRTA reads as follows:

- (1) No person shall drive a vehicle on a public road recklessly or negligently.
- (2) Without restricting the ordinary meaning of the word "recklessly" any person who drives a vehicle in wilful or wanton disregard for the safety of persons or property shall be deemed to drive that vehicle recklessly.
- (3) In considering whether subsection (1) has been contravened, the court shall have regard to all the circumstances of the case, including, but without derogating from the generality of subsection (1) or (2), the nature, condition and use of the public road upon which the contravention is alleged to have been committed, the amount of traffic which at the relevant time was or which could reasonably have been expected to be upon that road, and the speed at and manner in which the vehicle was driven.



**You are expected to know this definition for examination purposes.**

#### 3.6.3.2 Reckless driving

(Burchell 792)

Section 63(1) provides that it is an offence for any person to drive a vehicle recklessly upon a public road.

##### (a) The elements of the offence

The elements of reckless driving may be divided into:

- (1) driving
- (2) vehicle
- (3) public road
- (4) recklessly
- (5) unlawfulness
- (6) culpability

##### (b) The act

The act consists in driving a vehicle recklessly on a public road. The meaning of the terms "driving", "vehicle" and "public road" has already been discussed above. It remains to consider the meaning of the concepts "recklessly" and "negligently".

A person will be deemed to have driven recklessly if such person drives "**in wilful and wanton disregard for the safety of persons or property**". Reckless driving includes **inconsiderate driving** which might give rise to a **risk of harm** to others. If a person drives inconsiderately, such driving could be considered to be reckless as there is a disregard for the safety of other road users (*Van Zyl* 1969 (1) SA 553 (A)). **Recklessness and negligence are distinct concepts and are treated separately in the sentencing phase.** Intention in the form of *dolus eventualis* may also be present in acts of recklessness where there is an appreciation or acceptance of risk (*Van Zyl supra* at 557). In determining whether a person has driven recklessly or negligently, the manner in and speed at which the vehicle was driven will be considered, together with the amount of traffic on the road.

In **Van Zyl** it was held that the accused was guilty of gross negligence as the facts of the case revealed that his eyes had been focused elsewhere for such a long period of time that his car wandered over to the wrong side of the road, causing a collision with an oncoming vehicle. The court held that apart from *dolus eventualis*, the word "reckless" includes gross negligence. The appellant was convicted of reckless driving by a magistrate's court. On appeal it was held that gross negligence had been proved and that the accused's conduct was reckless.

*(c) Unlawfulness*

The element of unlawfulness may be excluded by grounds of justification such as necessity and official capacity, depending on the objective circumstances.

*(d) Culpability*

As pointed out above, the element of culpability may consist in intention (*dolus eventualis*), and gross negligence.

3.6.3.3 *Negligent driving*  
(Burchell 790ff)

Section 63(1) of the NRTA also provides that it is an offence for any person to drive negligently upon a public road.

*(a) The elements of the offence*

The elements of negligent driving may be divided into:

- (1) driving
- (2) vehicle
- (3) public road
- (4) negligently
- (5) unlawfulness
- (6) culpability

*(b) The act*

The act consists in driving a vehicle negligently on a public road. The meaning of the terms "driving", "vehicle" and "public road" have already been discussed above. It remains to consider the meaning of the concept "negligently".

The interest protected by the crime of negligent driving is the safety of the **public** using the roads. Negligence is present where a **reasonable person in the same circumstances would have foreseen that the driving could create a risk of harm to other persons and should have guarded against such risk and failed to do so** (*Kruger v Coetzee* 1966 (2) SA 428 (A)). Such risk should not be remote. **A person drives negligently** if he does **not drive with the degree of care and skill a reasonable man would exercise in the same circumstances** (*Naik* 1969 (2) SA 231 (N)). As Burchell says (790–791), a reasonable person would not drive like a racing driver or with excessive caution and timidity. Because our law does not recognise degrees of negligence, the slightest deviation from the reasonable-person standard will be regarded as negligent driving.





In *Erwin* 1974 (3) SA 438 (C), while the accused was overtaking another vehicle, a bee flew into his car and stung him on the cheek. He instinctively pulled his head away and bumped his glasses against the window and one of the lenses broke. He released the steering wheel to protect his eyes from the splinters and his vehicle collided with the car he was overtaking. The court set a high standard for the test of the reasonable man and held that he made an error of judgment during an emergency, but that a reasonable driver would not have made this error and that a reasonable driver must be able to cope with unexpected situations. He was accordingly convicted of negligent driving.

Automatism may be raised as a defence to the conduct requirement where a motorist claims to have had, for example, a mental blackout or an epileptic attack.

*R v Victor* 1943 TPD 77

X was charged with reckless or negligent driving as he had a collision with another vehicle and a pedestrian as a result of an epileptic fit. He had had prior seizures and had insufficient reason to assume he would not have another seizure on that day. It was foreseeable that a seizure could have happened, and he knew what the consequences could be. He was found guilty of negligent driving. This is also known as antecedent liability which you studied in the CRW2601 course, where X performs a voluntary act knowing that he may suffer from an epileptic fit, but hopes it will not occur, and proceeds to drive the car while conscious. In such instances a person will be held liable.

### (c) Unlawfulness

The requirement of unlawfulness must also be complied with, which means that no ground of justification should be present, such as necessity or official capacity. Some of the defences that may also be raised are mechanical failure, skidding or sudden emergency.

### (d) Culpability

Aside from the possibility of being found guilty of reckless or negligent driving discussed above, a number of other common-law crimes can also be committed, like murder, attempted murder or culpable homicide.

In *Humphreys* 2013 (2) SACR 1 (SCA) ZASCA 20, the accused, who was 55 years old, was the driver of a mini-bus which collided with a train. Ten of the 14 children being transported by the mini-bus were killed and he was charged and convicted of ten counts of murder and four counts of attempted murder. On appeal, the ten convictions of murder were set aside. The Supreme Court of Appeal held that the accused did not have intention in the form of *dolus eventualis*. However,

he was found guilty of culpable homicide on the basis that he was negligent. The attempted murder charges were set aside. In *S v Qeqe* 2012 (2) SACR 41 (ECG), the accused was trying to evade the police in a stolen vehicle and drove onto the sidewalk, killing three pedestrians who were children. The accused was charged with theft, reckless and negligent driving and murder. He pleaded guilty to the first two charges but was also found guilty of three counts of murder, as it was held that he had intention in the form of *dolus eventualis*.



Please take note that even though the Act has grouped reckless and negligent driving together in one provision, these are two separate crimes, each requiring different culpability. If you must ascertain one of the crimes in a set of facts provided, please make sure that you have identified the correct crime. Ask yourself: is intention or negligence sufficient in this scenario?



#### ACTIVITY

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X, a police officer, is in hot pursuit of a criminal who has allegedly committed a robbery. He drives through a red traffic light and collides with another vehicle which is crossing the intersection from the side for which the traffic light is green. Can X be found guilty of reckless or only of negligent driving?



#### FEEDBACK

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If there is a wilful and wanton disregard for the "safety of persons or property" or gross negligence, then recklessness could be present. If a reasonable person would have acted differently, then the officer could be found guilty of negligent driving. There are far less dangerous methods of apprehending alleged criminals, such as by noting down their licence plates, the use of video cameras on the dashboard, utilising helicopters or even other SAPS vehicles that are patrolling the area towards which the vehicle is travelling and that could be alerted. In the case of *S v Groep* 2002 (1) SACR 538 (E), for example, the appellant was a police officer who was convicted of negligent driving of a police vehicle. She was responding to an emergency and drove through a traffic-light-controlled intersection while the traffic lights were against her.

### 3.6.4 Inconsiderate driving

#### 3.6.4.1 Definition

Section 64 of the NRTA provides that:

No person shall drive a vehicle on a public road without reasonable consideration for any other person using the road.

#### 3.6.4.2 Elements of the offence

The elements of this offence are:

- (1) driving
- (2) vehicle
- (3) public road
- (4) without reasonable consideration
- (5) culpability

#### 3.6.4.3 Act

The act consists in driving a vehicle on a public road without reasonable consideration of other road users. The meaning of the terms "driving", "vehicle" and "public road" have already been discussed above. This offence can only be committed if other road users are present on the road at the time. In *Killian* 1973 (2) SA 696 (T), it was held that "without reasonable consideration" means without the consideration that **"a reasonable man would have shown in the situation and circumstances prevailing at the time"**. This offence is even applicable where driving is calculated to embarrass or inconvenience other road users. It does not include situations of negligent driving and other road users must be present for this offence to be committed.

#### 3.6.4.4 Unlawfulness

The requirement of unlawfulness must also be complied with, which means that no ground of justification should be present.

#### 3.6.4.5 Culpability

This offence can be committed with intention or negligence.

### 3.6.5 Driving under the influence of intoxicating liquor or drugs with a narcotic effect

#### 3.6.5.1 Definition

Section 65(1) of the NRTA provides that:

No person shall on a public road –  
(a) drive a vehicle; or  
(b) occupy the driver's seat of a motor vehicle the engine of which is running, while under the influence of intoxicating liquor or a drug having a narcotic effect.

#### 3.6.5.2 Elements of the offence

The elements of driving under the influence of alcohol or drugs are:

- (1) driving
- (2) vehicle
- (3) public road
- (4) under the influence of intoxicating alcohol/drugs with a narcotic effect
- (5) culpability

#### 3.6.5.3 Act

The act consists in driving a vehicle on a public road while under the influence of intoxicating alcohol or drugs with a narcotic effect. The meaning of the terms "driving", "vehicle" and "public road" have already been discussed above.

There are two offences created by this section, which is aimed at the protection of the public, and these are

- (1) the driving of a vehicle while under the influence and
- (2) occupying the driver's seat while the engine of the motor vehicle is running, while under the influence.

Where a person is sitting behind the steering wheel of a stationary vehicle which has its engine running, he cannot be said to be "driving" the vehicle in terms of the offence in (1), but he may be found guilty of a contravention of the offence in (2) above.

It must be proved that the driver was affected by the intoxicating liquor or drug to such a degree that the **skill and judgment normally required of a driver was diminished or impaired as a result**. "**Skill**" refers to the **driver's physical powers**, and is diminished or impaired when the driver's vision, judgment or muscular coordination is affected. "**Judgment**" refers to the **driver's mental powers**, which are deemed to be impaired or diminished if the intoxicating liquor or drug causes him to be euphoric or over-optimistic. The driver must have been **under the influence at the time** of driving the vehicle. Alcohol usually refers to ethyl alcohol and the drug referred to should have a **narcotic effect and need not be a narcotic drug *per se*** (*Whitehead* 1970 (1) SA 25 (T)). Any substance or remedy which has an effect resembling that of a narcotic drug is included and not merely pharmaceutical narcotics.



*Driving under the influence of intoxicating liquor or drugs with a narcotic effect.* Although the personal use of marijuana has been legalised, it is still unlawful to drive while under the influence of intoxicating drugs with a narcotic effect.

#### 3.6.5.4 Unlawfulness

The requirement of unlawfulness must also be complied with, which means that no ground of justification should be present.

#### 3.6.5.5 Culpability

This offence can be committed with intention or negligently. Culpability will also be present where the accused foresees or ought to have foreseen that he or she would drive a vehicle while under the influence. Voluntary intoxication will therefore not operate as a defence as this section provides for antecedent liability. Where an accused did not know that he was under the influence of alcohol, for example in a situation where a drug or alcohol was administered without an accused's knowledge, such as where somebody put alcohol into his soda drink ("spikes his drink"), he would lack culpability. Another defence that could perhaps be raised is that an accused was ignorant of the combined effects of intoxicating liquor and narcotic drugs.

### 3.6.6 Driving with excessive alcohol in the blood

#### 3.6.6.1 Definition

Section 65(2) of the NRTA provides that:

No person shall on a public road –

- (a) drive a vehicle; or
- (b) occupy the driver's seat of a motor vehicle the engine of which is running, while the concentration of alcohol in any specimen of blood taken from any part of his or her body is not less than 0,05 grams per 100 millilitres, or in the case of a professional driver referred to in section 32, not less than 0,02 grams per 100 millilitres.

#### 3.6.6.2 Elements of the offence

The elements of the crime of driving with excessive alcohol may be divided into:

- (1) driving
- (2) vehicle
- (3) public road
- (4) blood alcohol
- (5) culpability

#### 3.6.6.3 Blood alcohol

The act consists of driving a vehicle on a public road while having consumed excessive amounts of alcohol which is present in the blood. The meaning of the terms "driving", "vehicle" and "public road" has already been discussed above. Two offences are created by this section, namely (1) the driving of a vehicle and (2) occupying the driver's seat while the engine of the motor vehicle is running, where the alcohol in any specimen of blood taken is not less than 0,05 grams per 100 millilitres, or in the case of a professional driver the amount is not less than 0,02 grams per 100 millilitres.

Where the blood alcohol level is concerned, in terms of section 65(9) one may not refuse to provide a specimen of one's breath or blood. The state must prove using expert evidence, such as that of a district surgeon, a registered medical practitioner, a medical officer of a prison or a registered nurse, that the concentration of alcohol exceeded 0.049 grams **at the time the accused was driving** the vehicle, by means of a **chemical analysis** and that the blood sample is the blood of the accused (*Ross* 2013 (1) SACR 77 (WCC)). The blood alcohol specimen must not be contaminated. The limits are strictly applied, and even minor transgressions are punishable (*Director of Public Prosecutions v Klue* 2003 (1) SACR 389 (E)). There is a **presumption** that if the blood sample was taken **within two hours** after the alleged offence and if it was not less than 0.05 grams per 100 millilitres, that the alcohol content exceeded the prescribed limit **at the time of the offence**.

#### 3.6.6.4 Unlawfulness

The requirement of unlawfulness must also be complied with, which means that no ground of justification should be present.

#### 3.6.6.5 Culpability

This offence can be committed with intention or negligently. In *Kelder* 1967 (2) SA 644 (T), it was held that if an accused, while driving, is under the influence of alcohol to such a degree that he is not criminally responsible, he will still have the necessary *mens rea* if while sober he should have foreseen that he might need to drive in his drunken state. Automatism caused by voluntary

intoxication does not constitute a valid defence on a charge of drunken driving should the accused comply with the requirement of negligence.

### 3.6.7 Additional offences relating to driving

#### 3.6.7.1 *Driving or occupying a driver's seat while under the influence of alcohol if the breath specimen exceeds the limit*

Section 65(5) also provides for an offence where (1) a person drives a vehicle or (2) occupies the driver's seat if the level exhaled by breath is not less than 0.24 milligrams per 1000 millilitres. The onus rests on the state to prove that the analyst's findings are reliable (*Price v Mutual and Federal Insurance Co Ltd* 2007 (1) SACR 501 (E)). This offence can be committed with intention or negligently.

#### 3.6.7.2 *Duty to report an accident*

Section 61(1) of the NRTA partly provides that:

- (1) The driver of a vehicle at the time when such vehicle is involved in or contributes to any accident in which any person is killed or injured or suffers damage in respect of any property, including a vehicle, or animal shall—
- (a) immediately stop the vehicle and report the accident on the prescribed form and in the prescribed manner, the officer concerned shall deal with the report in the prescribed manner and the chief executive officer must ensure that the accident is recorded in the register of accidents in the prescribed manner and within the prescribed period;
  - (b) ascertain the nature and extent of any injury sustained by any person;
  - (c) if a person is injured, render such assistance to the injured person as he or she may be capable of rendering;
  - (d) ascertain the nature and extent of any damage sustained;
  - (e) if required to do so by any person having reasonable grounds for so requiring, give his or her name and address, the name and address of the owner of the vehicle driven by him or her and, in the case of a motor vehicle, the licence number thereof.

It is therefore clear that section 61(1) of NRTA requires a driver of a vehicle who is **involved in or contributes to an accident where another person is injured or killed or suffers damage**, for such driver to stop their vehicle immediately in order to provide assistance and assess damage (*Mutobvu* 2013 (2) SACR 366 (GNP)). Such person is also required to report the accident to the police within a reasonable time.

In *S v Taute* 2018 (2) SACR 263 (ECG), the court confirmed that failure to render assistance to injured persons at scene of accident was an offence, contravening section 61(1)(c) of NRTA. In this case, X stopped after an accident and discovered damage to the vehicle involved. However, he proceeded to a police station to report the matter – instead of first rendering assistance to the person injured in the accident.

## GLOSSARY

|                            |                                                                                                                       |
|----------------------------|-----------------------------------------------------------------------------------------------------------------------|
| <i>animus</i>              | the mental element of possession, i.e. the intention with which somebody exercises control over an article            |
| <i>corpus</i>              | a physical object or a physical requirement; the physical element of possession, i.e. physical control over something |
| <i>detentio</i>            | the physical element of possession, i.e. physical control over something                                              |
| <i>possessio civilis</i>   | possession as if one is an owner, i.e. possession for oneself                                                         |
| <i>possessio naturalis</i> | possession not for oneself, but on behalf of somebody else                                                            |

## SUMMARY

### Corruption

- (1) Corruption is currently punishable in terms of the provisions of the *Prevention and Combating of Corrupt Activities Act* 12 of 2004.
- (2) The Act creates a general offence of corruption in section 3. A number of specific offences of corruption applicable to specific persons or circumstances are created in further sections.
- (3) The following is a concise synopsis of the definition of the general offence of corruption: "Anyone who (a) accepts any gratification from anybody else, or (b) gives any gratification to any other person, in order to act in a manner that amounts to the illegal exercise of any duties, is guilty of the offence of corruption."
- (4) There are always two parties involved in corruption, namely the party who gives the gratification and the party who accepts the gratification. Both parties –the giver and the recipient – commit corruption.
- (5) The elements of the offence committed by the recipient are the following:
  - (a) the **acceptance** by Y (the element of an act)
  - (b) of **gratification**
  - (c) **in order to act in a certain manner** (the element of inducement)
  - (d) **unlawfulness**
  - (e) **intention**
- (6) The requirement of an act for the crime committed by the recipient is not limited to "accept" only, but also includes "to agree to accept", to "offer to receive" or to "demand or ask for gratification".
- (7) The concept "gratification" includes a variety of meanings, such as a monetary meaning, the meaning of avoiding a loss, and the meaning of a favour or an advantage of any nature.
- (8) The element of inducement refers to a wide variety of aims which the parties may have in mind, for example that the recipient should act in a manner which amounts to the unauthorised exercise of power, the abuse of a position of authority or achieving an unjustified result.
- (9) Corruption committed by the giver is only a mirror image of corruption committed by the recipient. The concept "give" includes to agree to give, to offer to give or to promise gratification.
- (10) Apart from the general crime of corruption created in section 3, the Act creates a number of other specific crimes of corruption applicable to specific classes of persons, such as members of the legislative authority, judicial officers, and officials in relation to the procurement of tenders and in relation to sporting events.

### Extortion

- (11) Definition of extortion – see definition above.
- (12) In extortion, X must apply pressure to Y to do, or to omit to do, something, and Y must yield to the pressure.
- (13) The benefit which Y obtains need not be of a patrimonial nature.

- (14) There must be a causal link between the pressure and the acquisition of the benefit.
- (15) The act must be unlawful. Although it is perfectly in order for a police official to inform an accused that he intends prosecuting her, it is both irregular and unlawful for the police official to state that he will prosecute the accused **unless she pays him a sum of money**.
- (16) The act must be intentional.

### Possession of drugs

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

### Dealing in drugs

- (24) In creating the offence of "dealing", the concern of the legislature was to punish those who make drugs available to users rather than to punish those who merely acquire drugs for the purpose of using them themselves.
- (25) Definition of offence – see definition above.
- (26) The concept "deal in" in relation to a drug is explained in section 1 of the Act as the performance of any act in connection with the transshipment, importation, manufacture, collection, prescription, supply, cultivation, administration, sale, transmission or exportation of a drug.
- (27) Because the legislature created the offence of dealing with the intention of punishing those who make drugs available to others, the **acquisition** of drugs by a person for his own use, or by an agent for his principal's own use, does not amount to dealing (*Solomon*).
- (28) Unlawfulness may be excluded by, for example, necessity as well as by a number of grounds of justification set out in the Act.
- (29) Culpability in the form of intention is required for the offence.

### Unlawful possession of a firearm

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

### Unlawful possession of ammunition

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



### Road traffic offences

- (35) Definition of driving in excess of the speed limit – see above.
- (36) There are three speed limits relevant to driving that relate to:
  - A public road within an urban area (60 km per hour)
  - A public road outside an urban area (100 km per hour)
  - A freeway (120 km per hour)
- (37) Definition of reckless driving – see above.
- (38) One will be deemed to have driven recklessly if one drives "in wilful and wanton disregard for the safety of persons or property. "Reckless" also includes gross negligence.
- (39) Definition of negligent driving – see above.
- (40) A person will be guilty of negligent driving if he **does not drive with the degree of care and skill a reasonable man would exercise in the same circumstances.**
- (41) Definition of inconsiderate driving – see above.
- (42) A person will be considered to be driving inconsiderately if he or she drives without the consideration that **a reasonable man would have shown in the situation and circumstances prevailing at the time.**
- (43) Definition of driving under the influence of alcohol with an intoxicating effect or drugs with a narcotic effect – see above.
- (44) The person who consumes the alcohol or drugs should be affected by the substance to the degree that the **skill and judgment normally required of a driver were diminished or impaired** as a result.
- (45) Definition of driving with excessive alcohol in the blood – see above.
- (46) There is a duty to report an accident if one is driving a vehicle and is involved in a motor vehicle accident where another person is injured or killed, or their property is damaged.



### FURTHER READING

For more information on crimes against the public welfare, read:

- (1) Burchell *Principles of Criminal Law* (2016) 736–741; 804–833.
- (2) Kemp, Walker, Palmer, Baqwa, Gevers, Leslie & Steynberg *Criminal Law in South Africa* (2018) 468–475; 488–516.

### TEST YOURSELF

- (1) Give a concise definition of the general crime of corruption appearing in section 3 of the current legislation on corruption.
- (2) Name the elements of the offence of corruption committed by the recipient.
- (3) In the crime of corruption, the concept "accept" has an expanded meaning. Describe this expanded meaning.
- (4) Discuss the question of what is understood by the concept "gratification" as this word is used in the definition of corruption.
- (5) Discuss the element of "inducement" for corruption committed by the recipient.
- (6) Discuss the requirement of unlawfulness for corruption committed by the recipient.
- (7) Discuss the requirement of intention for corruption committed by the recipient.
- (8) Explain the expanded meaning of the word "give" for the crime of corruption committed by the giver.
- (9) Define extortion.
- (10) Discuss the act which is required in order to constitute extortion and refer to decided cases in this regard.
- (11) Discuss the nature of the benefit which can be extorted.
- (12) Discuss the requirement of unlawfulness in extortion.
- (13) Discuss the concept "possession or use" of drugs.
- (14) Discuss the concept "to deal in" drugs.
- (15) The Act divides drugs into three categories. Name these categories.

PART B: CRIMES AGAINST THE COMMUNITY

- (16) X buys 120 grams of dagga from a dealer, Y. He is caught in possession of the dagga and is charged with the offence of "dealing in drugs", as well as with the lesser offence of "possession of drugs". X's defence is that he bought the dagga for his own recreational use. Consider whether X may succeed with this defence as far as both the charges are concerned.
- (17) X buys drugs on behalf of his sister, Y, for the sole purpose of use by Y. Discuss whether it can be said that X had "supplied" drugs for the purpose of the offence "dealing in drugs".
- (18) Discuss the form of culpability required for the offences of "possession or use of drugs" and "dealing in drugs".
- 19. For the purposes of the offence of unlawful possession of a firearm, what does the word "possession" mean?
- (20) What is the gist of the definition of a firearm for the purposes of the offence of unlawfully possessing a firearm?
- (21) What is meant by "unlawfully" in the offence of unlawfully possessing a firearm?
- (22) What form (or forms) of culpability is required for a conviction of the offence of unlawfully possessing a firearm?
- (23) Section 90 of the *Firearms Control Act* 60 of 2000 provides that no person may possess any ammunition unless she ... (four exceptions are then mentioned in the section). Name these four exceptions.
- (24) Name five other offences created in the Act in connection with firearms and ammunition.
- (25) Define the terms "drive", "driver", "public road" and "vehicle".
- (26) Distinguish between negligent and inconsiderate driving.
- (27) Write short notes on the meaning of reckless driving.
- (28) Explain what is meant by driving under the influence.
- (29) Discuss the duty to report in the event of an accident.

# Learning unit 4

## Sexual crimes



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PART B: CRIMES AGAINST THE COMMUNITY

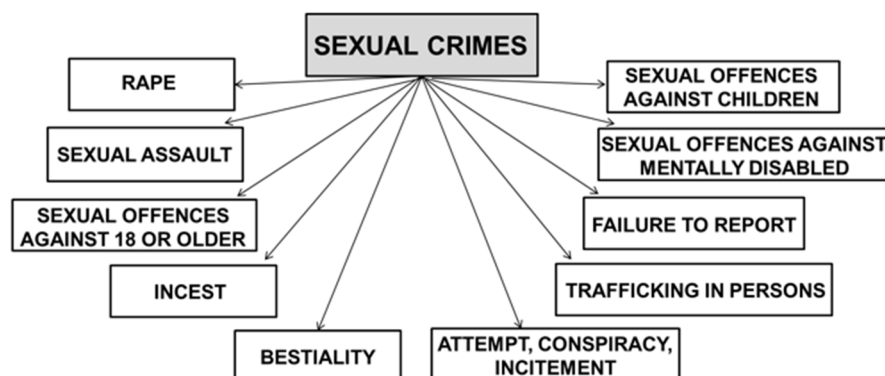
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## LEARNING OUTCOMES

When you have finished this learning unit, you should be able to:

- demonstrate your understanding of the requirements for liability for the sexual crimes created in the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*, by considering the possible liability of an accused for
  - rape
  - compelled rape (including the sentence that may be imposed for rape)
  - sexual assault, compelled sexual assault and compelled self-sexual assault
  - exposing genital organs, the anus or female breasts ("flashing") to persons 18 years or older, displaying child pornography to persons 18 years or older, and engaging sexual services for reward of persons 18 years or older
  - incest
  - bestiality
  - the various sexual offences against **children**, namely: consensual sexual penetration of children; consensual sexual violation of children; sexual exploitation of children; sexual grooming of children; displaying pornography to children; and compelling children to witness sexual crimes, sexual acts or self-masturbation
  - sexual offences against mentally disabled persons
  - failure to report sexual offences against children and mentally disabled persons
  - trafficking in persons
  - attempt, conspiracy and incitement to any of the sexual offences in the Act



### 4.1 INTRODUCTION (*Criminal Law 341–343*)

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

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

- repealing the common-law offence of **rape** and replacing it with a new, expanded statutory offence of rape applicable to all forms of sexual penetration without consent, **irrespective of gender** – "sexual penetration" is widely defined to include various acts of a sexual nature which were previously not criminalised

- repealing the common-law offence of **indecent assault** and replacing it with a new statutory offence of sexual assault, applicable to all forms of sexual violation without consent
- creating new statutory offences relating to certain **compelled acts of penetration or violation**
- **creating new statutory offences for adults**, by criminalising the compelling or causing the witnessing of certain sexual conduct and of certain parts of the human anatomy, the exposure or display of child pornography, and the engaging of the sexual services of an adult
- repealing the common-law offences of **incest, bestiality and the violation of a corpse, as far as such violation is of a sexual nature**, and enacting corresponding new statutory offences
- creating new, comprehensive sexual offences against **children** and persons who are **mentally disabled**, including offences relating to **sexual exploitation or grooming, exposure to or display of pornography, and the creation of child pornography**. (Some of these offences are similar to offences created in respect of adults. However, these offences aim to address the vulnerability to sexual abuse and exploitation of children and persons who are mentally disabled.)

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

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

## 4.2 RAPE

### 4.2.1 General

#### **(Criminal Law 343–358)**

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

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

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

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



Read the following judgment: ***S v MD and NM*** (Eastern Cape Local Division, Bhisho) Case No: CC55/2016.

The case of *S v MD and NM* (Eastern Cape Local Division, Bhisho) Case No: CC55/2016 exemplifies the terrible scourge of rape in South African society. X, the father of a nine-year-old girl, Z, expressed his wish to have sexual intercourse with this daughter to his wife, Y. Although his wife maintained that she had objected at first, she had assisted her husband with the rape of their daughter by placing a cloth in her mouth "to prevent her from screaming and being noisy" ([para 30]). It was alleged that X raped his daughter on more than 50 occasions with the aid of his wife, Y. Y's uncle caught the father in the act of having sexual intercourse with the daughter and reported this to the police. X was sentenced to life imprisonment for rape in contravention of section 3 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* (*Sexual Offences Act*) and Y to 10 years' imprisonment for aiding or abetting another person to commit a sexual offence in contravention of section 55(c) of Act 32 of 2007.

## 4.2.2 Rape

### 4.2.2.1 Definition

Section 3 of the Act provides that:

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

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

- (a) **sexual penetration** of another person
- (b) **without the consent** of the latter person
- (c) **unlawfulness**
- (d) **intention**

### 4.2.2.2 The act

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

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

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

- (i) X inserts his penis into the anus or mouth of a woman, or X (a female) places her genital organ into the mouth of Y (a male or a female).
- (ii) X (a male or a female) puts his/her finger into the anus of Y (a male or a female).
- (iii) X puts the tail of an animal into the vagina of Y or X puts a sex toy into the anus of Y.
- (iv) X inserts the genital organ of a dog into the mouth of Y. (This act also amounts to the new statutory crime of bestiality – discussed below in 7.6).

- (b) The use of the words "including any act which **causes** penetration" in the first line of the definition means that the crime of rape created in the Act is no longer, as used to be the case in common law, a formally defined crime, that is, a crime consisting merely in the commission of a certain type of act. It is now a **materially defined crime**, that is, a crime consisting in the **causing of a certain situation**, namely sexual penetration.

The use of the word "causes" means, *inter alia*, that an act of "sexual penetration" is performed also where X causes **another** person or an **object** to perform the act of penetration. (The word "causes" should be read together with the word "includes" in the beginning of the definition.) Read thus, and also considering the wide meaning of the word "causes", it is clear that sexual penetration includes **all** the situations in which X performs the penetration of Y himself or herself, that is, with his or her own body, or causes another person or some object to perform the penetration.

- (c) The act must be performed **without the consent** of Y (the complainant). **The absence of consent is a definitional element of the offence.**

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

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

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

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

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



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

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

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

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

The word "harm" in section 1(3)(a) is not qualified, and is accordingly not restricted to physical harm or harm to physical objects. It is wide enough to cover **monetary loss of whatever nature or even harm to reputation or dignity**. If X tells Y that an earlier act of infidelity by her against her husband will be revealed to her husband if she does not submit to an act of sexual penetration with him (X), and Y, not wanting her husband to know about the infidelity, submits, her submission cannot be construed as valid consent. This is a case of intimidation of Y by X.

### **(2) Abuse by X of power of authority (s 1(3)(b))**

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

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

### **(3) Consent obtained by fraud (s 1(3)(c))**

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

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

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

What is the position if X is HIV-infected, but Y is not HIV-infected and would never give consent to intercourse with a man who is HIV-infected, yet X acquires Y's consent by misrepresenting to her that he is not HIV-infected? It is submitted that, in the light of the severe consequences of such a misrepresentation, Y's consent should **not** be regarded as valid consent because even if it relates to the results of the act, one cannot consent to one's own death as it is *contra bonos mores*.

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

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

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

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

Paragraph (v) of subsection (3)(d) provides that the consent is not valid if Y is "a person who is mentally disabled". The expression "person who is mentally disabled" is discussed in 4.8.2.

#### **(d) Marital relationship no defence**

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

#### **4.2.2.3 Unlawfulness**

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

#### **4.2.2.4 Intention**

Intention is specifically mentioned in the definition of the crime in section 3 as a requirement for a conviction. X must know that Y had not consented to the sexual penetration. *Dolus eventualis* suffices, so that it is sufficient to prove that X foresaw the possibility that Y's free and conscious

consent, as described above, might be lacking, but nevertheless continued with the act of sexual penetration. Where, as proof of the absence of consent, reliance is placed on the fact that the girl is under 12 years of age at the time of the commission of the act, X must be aware of the fact that the girl is not yet 12 years old, or at least foresee the possibility that she may be under 12. Similarly, where, in order to establish the absence of consent, reliance is placed upon the woman's intoxication or her mental defect, or the fact that she was sleeping or was defrauded, it must be established that X was aware of such a factor vitiating consent.



**Does failing to disclose your HIV/AIDS status in a consensual relationship constitute rape?**

Can a person who has HIV/AIDS and who does not inform his sexual partner of his condition, be convicted of rape? As consent is one of the elements of the crime of rape, is true consent really given if the one partner is not informed about the life-threatening disease? If the partner is not informed, there is obviously no informed consent. But there is also no valid consent, even if the victim consented to unprotected sex knowing the accused had HIV/AIDS. This is because our law does not allow us to consent to serious injury or being killed. What do you say – is it rape? Should new criminal laws be written to deal with harmful HIV/AIDS-related behaviour, for example, deliberately exposing another person to HIV/AIDS?



**ACTIVITY**

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



**FEEDBACK**

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

### 4.2.3 Compelled rape (*Criminal Law 358–360*)

#### 4.2.3.1 Definition

Section 4 of the Act provides that

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

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

- (a) **compelling** a person
- (b) to commit an act of **sexual penetration with another person**
- (c) **without the consent** of such **third person**
- (d) **without the consent** of the **complainant**
- (e) **unlawfulness**
- (f) **intention**



Please note that wherever the Act makes use of the word “compelled”, it refers to three persons: X, the perpetrator, who compels another person (Z) to rape or sexually assault a third person (Y). Rape and compelled rape are thus two different crimes.

#### 4.2.3.2 The act

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

The new offence of compelled rape changed the common law in terms of which rape was regarded as a crime which could only be committed by X personally, namely with his own body. Under the common law, if X compelled Z to rape Y, X could only be liable as an accomplice to the crime of rape. It was even possible that X could be acquitted as an accomplice if Z (the perpetrator) could not be held liable for lack of criminal capacity or *mens rea*. (See the discussion of the principle of accessoriness in CRW2601.) By enacting a crime of “compelled rape”, the unacceptable position has now been addressed.

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

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

#### 4.2.3.3 Unlawfulness

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

#### 4.2.3.4 Intention

X must have the intention that Z performs an act of sexual penetration with Y, knowing or foreseeing that the consent of Z as well as that of Y is absent; in other words, *dolus eventualis* is a sufficient form of intention for the crime. If X genuinely believed that Y (the complainant) consented, then he/she lacks intention.



#### ACTIVITY

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



#### FEEDBACK

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

### 4.3 SEXUAL ASSAULT, COMPELLED SEXUAL ASSAULT AND COMPELLED SELF-SEXUAL ASSAULT

#### 4.3.1 General

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

### 4.3.2 Sexual assault (*Criminal Law 360–368*)

#### 4.3.2.1 Definition

Section 5(1) of the Act provides that

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

Section 5(2) furthermore provides that

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

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

- (a) an act of "**sexual violation**" of another person
- (b) **without the consent** of the latter person
- (c) **unlawfulness**
- (d) **intention**

or

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

#### 4.3.2.2 The act

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

##### (a) Definition of "sexual violation"

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

"Sexual violation" is broadly defined in section 1 as **including any act which causes–**

- (a) direct or indirect contact between the
  - (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;
  - (ii) mouth of one person and
    - (aa) the genital organs or anus of another person or, in the case of a female, her breasts;
    - (bb) the mouth of another person;
    - (cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could
      - (aaa) be used in an act of sexual penetration;
      - (bbb) cause sexual arousal or stimulation; or
      - (ccc) be sexually aroused or stimulated thereby; or
    - (dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
  - (iii) the mouth of the complainant and the genital organs or anus of an animal;

- (b) the masturbation of one person by another person; or
- (c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person,

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

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



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



When studying the definition of sexual assault, please remember that sexual violation is a definitional element of sexual assault, and not a crime on its own. There is consequently no crime such as sexual violation.

#### *(b) Discussion of definition of "sexual violation"*

- (i) "... any act which causes ..."

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

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

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

- (iii) Direct or indirect contact

The definition speaks of "any act which causes ... direct or indirect contact between ...".

**"Contact" means the physical touching of two parts of the different bodies or of a body and an object. "Indirect contact" refers to such contact through the agency of another person or the use of an instrument, such as a stick.**

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

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

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

The legislature obviously wanted a similar principle to apply to the crime of sexual assault. It is submitted that the same principles applying to the form of assault known as the inspiring of a belief that Y's bodily security is about to be infringed also apply to this way in which sexual assault may be committed (see the discussion in 4.2.2.2(1) above, and 6.1.7 below).

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

The act of sexual violation must take **place without the consent of the complainant**. See 4.2.2.2 (3) above for a discussion of the meaning of "absence of consent".

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

#### 4.3.2.3 *Unlawfulness*

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

#### 4.3.2.4 *Intention*

Intention is specifically mentioned in the definition of the crime in section 3 as a requirement for a conviction. X must know that Y had not consented to the sexual violation. The same principles as those set out above in the discussion of the corresponding element in the crime of rape also apply to the element of intention in this crime.

### 4.3.3 *Compelled sexual assault* (**Criminal Law 368–369**)

#### 4.3.3.1 *Definition*

Section 6 of the Act provides that:

A person (X) who unlawfully and intentionally **compels a third person (Z) to commit an act of sexual violation** with a complainant (Y) without Z's or Y's consent is guilty of the offence of compelled sexual assault.

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

- (a) **compelling a third person**
- (b) to commit an act of **sexual violation with another person** (the complainant)
- (c) **without the consent of such third person**
- (d) **without the consent of the complainant**
- (e) **unlawfulness**
- (f) **intention**

#### 4.3.3.2 *The act*

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

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

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



#### 4.3.3.3 Unlawfulness

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

#### 4.3.3.4 Intention

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

### 4.3.4 Compelled self-sexual assault (**Criminal Law 369–371**)

#### 4.3.4.1 Definition

Section 7 of the Act provides that:

A person (X) who unlawfully and intentionally compels a complainant (Y) without Y's consent to –

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



**NB** You are not required to memorise this definition. However, you must know the elements of the offence set out below and be able to identify an act of compelled self-sexual assault.

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

- (a) the compelling of somebody else
- (b) to engage in the conduct set out in the definition
- (c) without the consent of the other person
- (d) unlawfulness
- (e) intention

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

#### 4.3.4.2 The act

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

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

The requirement of "absence of consent" is the same as for the crime of rape. It has already been discussed in detail above in the discussion of the corresponding element of the crime of rape. Section 56(1) provides that, whenever an accused person is charged with this crime, "it is not a

valid defence for that accused person to contend that a marital or other relationship exists or existed between him or her and the complainant".

#### 4.3.4.3 *Unlawfulness*

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

#### 4.3.4.4 *Intention*

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

### 4.4 SEXUAL OFFENCES AGAINST PERSONS 18 YEARS OR OLDER

#### 4.4.1 General

##### **(Criminal Law 371–377)**

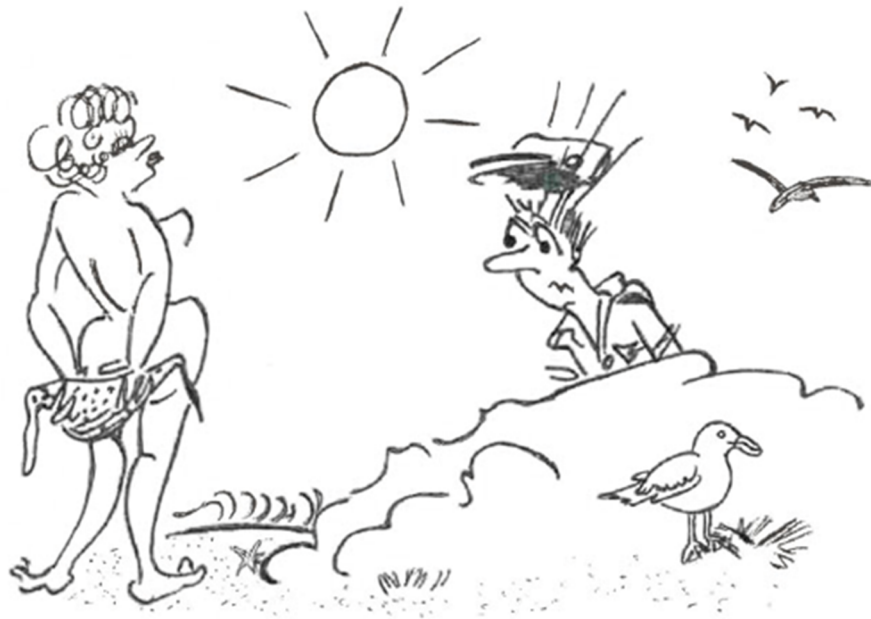
The Act creates various offences which may be committed in respect of **persons 18 years or older**. These offences are not discussed in detail. A brief summary of the punishable acts follows:

- (i) The unlawful and intentional **compelling** of a person 18 years or older **without his/her consent to witness sexual offences, sexual acts with another or self-masturbation** (s 8(1)–(3)). It is irrelevant whether the act is performed for the sexual gratification of the perpetrator (X) or for a third person (Z). The word "sexual act" is defined as either sexual penetration or sexual violation (s 1 - (1)).

In *S v Pretorius* 2013 1 SACR 261 (WCC), the accused performed an act of self-masturbation in the lounge of his house in front of the domestic servant. He then asked her if she would like to help him to masturbate and she replied that she would not. He continued to masturbate in front of her, finally moving to the bathroom but leaving the door open in full view of the complainant. He was charged with a contravention of s 8(3) in that he had unlawfully and intentionally compelled or caused the complainant to witness his act of self-masturbation. The accused argued that because the domestic servant had the opportunity not to witness it she must have effectively consented thereto. He was convicted of the offence and appealed against his conviction. The court of appeal confirmed the conviction on the basis that the accused had **caused** her to witness the act. The court pointed out that the ordinary meaning of the word "cause" is to "bring about" (at 265d). It was further found that the conduct of the accused was unlawful because the complainant had **not consented** to witnessing the act. The court found that the appellant had **abused his position of power or authority** in self-masturbating in the complainant's presence and in attempting to induce the complainant to participate in his act of self-masturbation. Because the complainant was dependent on the income from the job to support her children, she did not expressly indicate her objection to the appellant's conduct (at 266d). The court therefore rejected the argument that her failure to expressly object or indicate her unwillingness or resistance amounted to voluntary or uncoerced consent.

- (ii) The unlawful and intentional **exposure or display** (or causing of exposure or display) **of the genital organs, the anus or female breasts of X or Z to Y**, a person 18 years or older, **without Y's consent** (s 9). It is irrelevant whether the act is performed for the sexual gratification

of the perpetrator (X) or for a third person (Z). This offence is generally referred to as "**flashing**".



*Flashing.* The unlawful display of female breasts must be performed by the perpetrator herself, and must be intentional.

- (iii) The unlawful and intentional **exposure or display** (or causing of exposure or display) of persons 18 years or older to **child pornography**. It is irrelevant whether the act is performed for the sexual gratification of the perpetrator (X) or for a third person (Z). **Of importance is that the crime is committed even if Y consented to the exposure or display of the child pornography to himself or herself** (s 10).
- (iv) The **engagement** of persons 18 years or older in **sexual services** for financial or other reward, favour or compensation to Y or a third person (Z) (s 11). For X to be convicted of this offence the act must be performed
  - (a) **for the purpose of engaging in a sexual act with Y** (irrespective of whether the sexual act is in actual fact committed or not) (s 11(a)); or
  - (b) **by committing a sexual act with Y** (s 11(b)).

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



**NB** You are not required to memorise all the various ways in which crimes can be committed against persons 18 years and older. However, you must be able to identify an act which amounts to an offence in a given set of facts.

## 4.5 INCEST

**(Criminal Law 378–381)**

### 4.5.1 Definition

Section 12 (1) provides:

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

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

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

- (a) an act of **sexual penetration**
- (b) **between two people** who may **not lawfully marry each other** on account of **consanguinity, affinity** or an **adoptive relationship**
- (c) **unlawfulness**
- (d) **intention**

### 4.5.2 The act

The expression "sexual penetration" is defined in section 1(1) and has already been quoted and discussed in some detail above in the discussion of rape (see 4.2.2.2). The crime is committed if the **sexual penetration takes places between people who may not lawfully marry each other on account of consanguinity, affinity or an adoptive relationship.**

Section 12(2) reads as follows:

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



**NB** You are not required to memorise this section. However, you must be able to identify a factual situation involving people who may not lawfully marry each other on account of consanguinity, affinity or an adoptive relationship.

### 4.5.3 Unlawfulness

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

#### 4.5.4 Intention

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

#### 4.6 BESTIALITY

**(Criminal Law 381–382)**

##### 4.6.1 Definition

A person who unlawfully and intentionally commits an act

- (a) which causes penetration to any extent whatsoever by the genital organs of –
  - (i) X into or beyond the mouth, genital organs or anus of an animal; or
  - (ii) an animal into or beyond the mouth, genital organs or anus of X; or
- (b) of masturbation of an animal, unless such act is committed for scientific reasons or breeding purposes, or of masturbation with an animal, is guilty of the offence of bestiality (s 13).



**NB You are not required to know this crime or the definition in detail. However, you must be able to identify an act prohibited in terms of this provision.**

Take note that the court in *M* 2004 (1) SACR 228 (O) held that the existence of such a crime is not unconstitutional. **Snyman discusses the court's decision on pages 381 to 382 and you must study it for examination purposes.**

#### 4.7 SEXUAL OFFENCES AGAINST CHILDREN

##### 4.7.1 General

**(Criminal Law 383–390)**

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

##### 4.7.2 Consensual sexual penetration of children

###### 4.7.2.1 Definition

A person (X) who commits an act of sexual penetration with a child (Y) is, despite the consent of Y to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child (s 15).

**TAKE NOTE: For the purpose of sections 15 and 16, "child" is defined in section 1(1) as "a person 12 years or older but under the age of 16 years".**

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

- (a) the commission of an **act of sexual penetration**
- (b) **with a person 12 years or older but under the age of 16 years**
- (c) **unlawfulness**
- (d) **intention**

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

In *Sheldon-Lakey* 2016 (2) SACR 632 (NWM), X, a 39-year-old married female who had a part-time job at a school as an educator, developed a sexual relationship with a 15-year-old grade 10 school pupil. She raised the defence that she was under the impression that the boy was already 16 years old. The court rejected her defence because the evidence revealed that she had done nothing to verify his age (at para [20]). She was accordingly convicted of a contravention of section 15.

In *The Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development* ZACC/2013 (3 October 2013), the Constitutional Court considered the constitutionality of the criminalisation of consensual sexual conduct of children **12 years or older but under the age of 16 years**. The relevant provisions of the Sexual Offences Act are sections 15 and 16. As already pointed out, section 15(1) makes it an offence for a person (X) to commit an act of sexual penetration with a child (a person between the ages of 12 and 16 years).

The court explained that the crime may be committed in the following circumstances:

- Firstly, if an adult (a person 18 years or older) or a minor (person of 16 years but under the age of 18) engages in consensual sexual penetration with an **adolescent (a person 12 years or older but under the age of 16 years)**.
- **Secondly, the crime may be committed when adolescents (children 12 years or older but under the age of 16 years) engage in consensual sexual penetration with each other.**

Section 16 of the Act contains the same provisions as section 15 except that it criminalises "sexual violation", which is broadly defined as "direct or indirect contact" and includes some forms of masturbation by another person, petting and even kissing. The provisions are similar in other respects to those of section 15(2). **The provisions of section 16 are discussed hereunder in 4.7.3.**

A "close-in-age" defence is available to a child who has been charged with sexual assault, which means that the accused child may rely on the defence that both of the accused were children and that the age difference between them was **no more than two years** (s 56 of the Act discussed hereunder). As pointed out by the court (at para 24), if a 12-year-old person and a 15-year-old person engage in kissing, they are both committing an offence in terms of section 16. If the 15-year-old is prosecuted, the 12-year-old must also be prosecuted, and neither may rely on the close-in-age defence.

The North Gauteng High Court had ruled that these provisions unjustifiably infringe children's constitutional rights to dignity, privacy and bodily and psychological integrity as well as their rights in terms of section 28(2) of the Constitution. The Constitutional Court was asked to confirm the ruling of the High Court. It was contended by the applicants that the provisions were so broad that, instead of protecting children, they in fact harmed children because they would be exposed to the criminal justice system as a result of the prohibited conduct. Such exposure, it was argued in expert evidence before the court, would harm the child's development of a *proper understanding of, and healthy attitudes to, sexual behaviour* (at para 28). Because of these adverse consequences, their rights to human dignity, privacy, physical and psychological integrity as well as the "best interests of the child" principle were infringed.

The Constitutional Court considered the impact of the provisions on each of these rights. First, it was pointed out that children enjoy each of the fundamental rights in the Constitution that are granted to "everyone" (at para 38). The expert evidence before the court indicated that data have

revealed that the majority of South African children 12 years or older but under the age of 16 years begin to explore their sexuality and that this is part of the child's development. Adolescents charged under the impugned provisions might be shamed and embarrassed by criminal prosecutions, which might have a negative impact on their natural development. Another adverse consequence was that the child might be discouraged from seeking help for issues relating to sex from his or her parents or other people. Thus, instead of achieving positive outcomes, the provisions were more likely to heighten the risk of adolescents having negative experiences (at para 47). Dealing first with the right to dignity, the court agreed that the criminalisation of consensual sexual conduct is a "form of stigmatisation which is degrading and invasive" (at para 55). The infringement of the section 10 right to dignity was therefore apparent since, as the court noted, "[a]n individual's human dignity comprises not only how he or she values himself or herself, but also includes how others value him or her" (at para 56). A negative evaluation by others would invariably be a consequence of a criminal trial and conviction of such an adolescent (at para 56). As regards the right to privacy, the court indicated that the provisions invaded "the most intimate spheres of personal relationships" (at para 60). Moreover, evidence was led to the effect that exposure of children to the criminal justice system for engaging in consensual sexual behaviour would have a negative impact on them generally, and would likewise be contrary to the best interests of the child in terms of section 28(2) of the Constitution.

Turning to the limitation analysis, the court rejected the respondents' contention that implementation of the provisions would require prosecutorial discretion at the highest level and that there are other diversionary measures available to avoid a criminal trial and conviction. The court pointed out that adolescents would inevitably be exposed to being arrested and questioned by the police (at para 83). There was no evidence before the court that the purpose of the provisions, namely to protect adolescents from risks associated with sexual acts and consequently to deter them from engaging in such conduct, could reasonably be expected to be achieved. But there was evidence before the court that it would have the opposite effect by "cultivating a society in which adolescents are precluded from having open and frank discussions about sexual conduct with their parents and caregivers" (at para 89). The court found that there was no rational link between the provisions and their stated purpose (at para 94). It also considered the possibility that less restrictive means could be used to educate children about the risks of matters like child pregnancy. The provisions were declared **inconsistent with the Constitution and invalid to the extent that they impose criminal liability on children under the age of 16 years**.

The amendments required in terms of the *Teddy Bear Clinic* case are now reflected in the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015*, which came into effect on 7 July 2015. In the preamble of the Act, it is stated that the **primary objective of sections 15 and 16 of the Act is to protect children who are 12 years or older but under the age of 16 from ADULT sexual predators**. Therefore, the amendment does not mean that the age of consent to sexual acts is now lowered to 12 years. In accordance with the decision in the *Teddy Bear Clinic* case, **section 1** of Act 5 of 2015 now provides that a "child" means a **person under the age of 18 years**.

**Section 16** of the Act provides the same as section 15 above, except that it relates to **sexual violation instead of sexual penetration**.

#### 4.7.2.2 The act

The provision which was declared unconstitutional in the *Teddy Bear* case provides that a child must be **12 years or older but under the age of 16 years** at the time of the commission of the act. **Section 15(1)** of Act 5 of 2015, which deals with **consensual sexual penetration of a child**, now provides that:

a person (X) who commits an act of sexual penetration with a child (Y) **who is 12 years of age or older but under the age of 16 is, despite the consent of Y, guilty of the offence** of having committed an act of consensual sexual penetration with a child, **unless X**, at the time of the commission of such act, was

- (a) **12 years of age or older but under the age of 16 years; or**
- (b) **either 16 or 17 years and the age difference between X and Y was not more than two years.**

Therefore, if X, a 15-year-old boy, sexually penetrates Y, a 12-year-old girl, with her consent, he does not commit an offence in terms of section 15. Also, if a 17-year-old boy sexually penetrates a 15-year-old girl with her consent, he does not commit an offence in terms of section 15.

It is also provided in article 15(2) of the amendment that the institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the Director of Public Prosecutions **if X was either 16 or 17 years of age at the time of the alleged commission of the offence and the age difference between X and Y was MORE than two years.** This means that it may be open to the relevant Director of Public Prosecutions to institute a prosecution in the instance where, for example, X a 17-year-old boy had sexually penetrated a 14-year-old girl with her consent. However, this power may be delegated.

The conduct punishable under the section presently under discussion is "**sexual penetration**" as defined in the Act (s 1). For examples of sexual penetration, see again the discussion of the act required for rape in 4.2.2.2 above.

There is, however, a **defence** which X may rely on when charged with this crime (s 56(2)).

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

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

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

#### *4.7.2.3 Unlawfulness*

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

#### *4.7.2.4 Negligence a sufficient form of culpability*

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

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





## ACTIVITY

Y is a 14-year-old female and a grade 9 student at a high school in Johannesburg. She and her high school friends decide to go to a house party hosted by a 19-year-old male (X) in his first year at university. X is a close friend of some of Y's friends. These friends introduce Y to X, who immediately develops an interest in her. At his request, Y's friends arrange for X and Y to be together for a moment. Y's friends have always put pressure on Y to get a boyfriend and to stop being "old-fashioned" about commitment and sex. After a while, X takes Y to his bedroom and the two have consensual sex. After some months, Y is told by her doctor that she is pregnant, and this news comes to the attention of her parents. Not wanting to lose respect in the eyes of their neighbours (because the family is known to be devoutly religious), they put pressure on Y to lay a charge against X. X is charged with a contravention of section 15 of the Sexual Offences Act 2007. X raises the defence that Y deceived him into believing that she was 16 years old at the time when the offence was committed. Consider the merits of his defence.



## FEEDBACK

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

### 4.7.3 Consensual sexual violation of children (*Criminal Law 387–388*)



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

The special defence created in section 56, and which has already been quoted and discussed, also applies to this crime. The same remarks apply to the elements of unlawfulness and intention, as well as to the consent of the National Director of Public Prosecutions which must be obtained if X is below the age of 16 years. As in the other crime, X may be either male or female, and the same applies to Y.

#### 4.7.4 Sexual exploitation of children under the age of 18 years (**Criminal Law 388–389**)

##### 4.7.4.1 Definition

Section 17 creates a number of crimes relating to the **sexual exploitation** of children. What follows is only a summary of the section's provisions.

**THE WORD “CHILD” AS USED IN THIS SECTION MEANS A PERSON UNDER THE AGE OF 18 YEARS OLD.**

##### *(a) Sexual exploitation of a child*

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



The words “services for reward” mean that the child is being exploited as a sex worker, where payment is received for sexual services rendered. Although children who are sexually abused are also exploited, section 17 employs “sexual exploitation” specifically for these types of situations.

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

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

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

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

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

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

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

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

*(f) Promoting child sex tours*

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

#### 4.7.5 Sexual grooming of children under the age of 18 years

**(Criminal Law 389)**

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

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

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

In the case of *S v RC*, Case No AR 377/2014 (KwaZulu-Natal, Pietermaritzburg Division), X, a 34-year-old school teacher, was convicted of sexual grooming. X described various forms of oral sex to Y, a 13-year-old girl, with the intention to encourage or persuade her to perform, or to diminish or reduce resistance on her part to the performance of, a sexual act with him (X). The court described sexual grooming as the "manipulation of a child's sexual psyche by an adult for his or her own amusement or sexual diversion" (para 55). This constitutes harmful conduct which may have far-reaching consequences for the child, even if the adult has no intention of ultimately performing any overt sexual act with the child.

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

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



**NB** You are not expected to memorise all the ways in which the offence can be committed as set out above. However, you must be able to identify an act of sexual grooming of a child in a given set of facts.

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

**(Criminal Law 389–390)**

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

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

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

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



**NB** You are not expected to memorise the above definition of the crime. However, you must be able to identify a prohibited act in terms of this offence.

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

##### **(Criminal Law 390)**

Section 21 creates an offence similar to the offence in section 8 ("Sexual offences against person 18 years or older") discussed in 4.4.1 above. The offence, however, applies to children under the age of 18 years old.

In *S v MD and NM* (Eastern Cape Local Division, Bhisho) Case No: CC55/2016, X and Y were charged that they unlawfully and intentionally caused the child complainant (Z) to witness or be in their presence whilst engaging in sexual acts in contravention of section 21 (2) (a) of the said Act. According to the court, Z (the girl) testified that "the accused had sex inside the shack, in her presence. She believed that when her parents had sex, they were aware of her presence in that she had been watching TV" ([para 9]). This count was not proven beyond reasonable doubt, as there was no evidence that the accused actually intended that the child watch them having sexual intercourse. Mbenenge J remarked at para 69: "I hasten to say, it is not the mere presence of a child when the perpetrators are engaged in a sexual act that is offensive in terms of the section under consideration. Otherwise, the multitudes of persons who live in abject poverty, occupying single roomed shacks, together with their children, would always run the risk of contravening the section."

The fact that the child complainant had conceded under cross-examination that her parents, while engaging in sexual intercourse, might have thought she was asleep, whereas she was awake and watching TV, was indicative of the absence of such intention. But the court then also noted that there was evidence of the accused having been drunk on many occasions while having sexual intercourse in the presence of the complainant. The court was not convinced that this evidence established *dolus eventualis*, or could provide a basis for a conviction in terms of section 1 of the *Criminal Law Amendment Act 1 of 1988* (at [paras [71]– [72]). Since there was no proof beyond reasonable doubt that the accused had unlawfully and intentionally "caused" the child to witness an act of sexual intercourse, they were both acquitted of a contravention of section 21(2)(a) of the *Sexual Offences Act*.

#### 4.7.8 Exposing or display of genital organs, anus or female breasts to children ("flashing")

The offence is the same as the offence in respect of adults (see the discussion of s 9 in 4.4.1), except for one important difference. In respect of adults, the act must be performed **without** the consent of the victim. In respect of children, the offence is committed **even if the child consented**. In other words, the offence is committed **with or without the consent of the child**.

## 4.8 SEXUAL OFFENCES AGAINST MENTALLY DISABLED PERSONS

### 4.8.1 General

#### **(Criminal Law 390–392)**

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

### 4.8.2 Definition

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

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

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

**The offences created in respect of mentally disabled persons are similar to the offences created in respect of children (see the discussion of sections 17 to 20 in 4.7.4–4.7.6 above). Therefore, they are not discussed here again.**

## 4.9 FAILURE TO REPORT SEXUAL OFFENCES AGAINST CHILDREN AND MENTALLY DISABLED PERSONS

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

## 4.10 TRAFFICKING IN PERSONS FOR SEXUAL PURPOSES

The *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* provided temporary provisions as regards the trafficking of persons for sexual purposes in section 71. Human trafficking is now prosecuted under the *Prevention and Combating of Trafficking in Persons Act 7 of 2013*. The offence of trafficking in persons is defined in section 4 as:

- (1) Any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic by means of-
  - (a) a threat of harm;
  - (b) the threat or use of force or other forms of coercion;
  - (c) the abuse of vulnerability;
  - (d) fraud;
  - (e) deception;
  - (f) abduction;
  - (g) kidnapping;
  - (h) the abuse of power;
  - (i) the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or

- (j) the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage, aimed at either the person or an immediate family member of that person or any person in close relationship to that person, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.
- (2) Any person who-
- (a) adopts a child, facilitated or secured through legal or illegal means; or
  - (b) concludes a forced marriage with another person, within or across the borders of the Republic, for the purpose of the exploitation of that child or any person in any form or manner, is guilty of an offence.

The new human trafficking definition includes not only trafficking for sexual purposes, but also trafficking for labour exploitation, illegal adoption and forced marriages, amongst other crimes.



**NB** You are not expected to memorise the above definition of the crime. However, you must be able to identify a prohibited act in terms of this offence.

#### 4.11 ATTEMPT, CONSPIRACY AND INCITEMENT

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



##### ACTIVITY

X and Z, two adult males, have designed a website on the internet which advertises seaside holidays for less privileged adolescents such as orphans. Their purpose with the website is not in fact as stated on the website. What they really want to achieve is to meet young adults (persons under the age of 18) in order to use them for sexual purposes. When enquiries are made by minors about these camps, they arrange a personal meeting with them. At these personal meetings, they inform them that they (the minors) can earn a lot of money in order to pay for the holiday by performing a few tasks. These tasks include undressing and being photographed by X and Z. They also show them pornographic material and tell the children to imitate some of the acts. If the children consent to these acts, they make films with the intention of selling them. They take these activities even further by using the children for prostitution. X's mother, B, knows what X and Z are doing but turns a blind eye and does not report their activities to the police. In fact, she provides a room in her house for these activities.

- (i) Discuss the offences X and Z may be charged with for these activities.
- (ii) Discuss whether B may be charged with any offence or offences.



##### FEEDBACK

- (i) X and Z may be charged with a contravention of section (18) above in that they unlawfully and intentionally engaged in **sexual grooming** of the children. Section 18 criminalises a long list of acts which all amount to requesting, influencing, inviting, persuading, encouraging or enticing a child (Y), that is, a **person under the age of 18 years**, to indulge in a sexual act or to diminishing his or her resistance to the performance of such acts. It is irrelevant whether the child consented to the act. X and Z may furthermore be charged with a contravention of section 19 of the Act in that they unlawfully and intentionally **exposed child pornography** to persons below the age of

18. Because they photographed these children, they may also be charged with a contravention of section 20, **namely using children for child pornography**. It is irrelevant that the children consented or received some benefit from their involvement in child pornography.

- (ii) The mother, B, may be charged as an accomplice to the crimes mentioned above. She intentionally furthered the commission of the offences by making her house available for these unlawful activities. She may also be charged with a contravention of section 55 in that she aided or abetted the perpetrators of the offence. She also contravened section 54(1) in that she failed to report that offences were being committed against children in terms of this Act.

## SUMMARY

### General

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

### Rape

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

### Compelled rape

- (10) Definition of compelled rape (s 4)
- (11) X may be convicted as a perpetrator of this crime even if he/she did not perform any act of sexual penetration with his or her own body with the complainant. Furthermore, his/her liability is not dependent on the existence of a perpetrator (it is not accessory in character).
- (12) Sentence that may be imposed for compelled rape.

### Sexual assault

- (13) Definition of sexual assault (s 5(1))
- (14) Definition of sexual violation (s 1)
- (15) The act required for the offence of sexual assault includes the inspiring of a belief in the complainant that he/she will be sexually assaulted (s 5(2)).

### Compelled sexual assault

- (16) Definition of compelled sexual assault (s 6)

### Compelled self-sexual assault

- (17) Definition of compelled self-sexual assault (s 7)

### **Sexual offences in respect of persons 18 years or older**

#### **Compelling another to witness sexual crimes or sexual acts**

- (18) Definition (s 8). Included in these offences is the compelling or causing of a person 18 years or older without his/her consent, to witness sexual offences, sexual acts or self-masturbation.

#### **"Flashing"**

- (19) Definition (s 9). The crime is committed without the consent of the victim.

#### **Displaying child pornography**

- (20) Definition (s 10). The crime is committed irrespective of whether Y consents to the displaying or not.

#### **Engaging sexual services for reward**

- (21) Definition (s 11). Both parties consent to the act. Meaning of "engaging" – no actual sexual act required.

#### **Incest**

- (22) Definition (s 12).

#### **Bestiality**

- (23) Definition (s 13).  
(24) Such crime is held to be constitutional (Case of *M*).

### **Sexual offences against children**

Consensual sexual penetration of children 12 years or older but under the age of 16 years

- (25) Definition (s 15). In the *Teddy Bear* case, the offence was declared unconstitutional to the extent that it provides for the prosecution of children 12 years or older but under the age of 16 years.  
(26) These crimes are committed regardless of the consent of the child concerned.  
(27) Section 56(2)(a) provides that an accused person charged with either one of these offences may contend that the child deceived him/her into believing that he/she was 16 years old, or older, at the time when the offence was committed. To be a valid defence, the accused's belief must have been reasonable, namely one shared by a reasonable person in his or her position.

#### **Consensual sexual violation of children**

- (28) Section 16. The crime is committed irrespective of whether the child consented. Same defences as above are applicable. In the *Teddy Bear* case, the provision was declared unconstitutional to the extent that it provides for the prosecution of children 12 years or older but under the age of 16 years.

### **Sexual exploitation of children under the age of 18 years**

- (29) Offence that is widely defined, and includes acts of involvement in sexual exploitation; furthering of sexual exploitation; benefiting from sexual exploitation; living from the earnings of sexual exploitation; and promoting child sex tours (s 17).

### **Sexual grooming of children under the age of 18 years**

- (30) An offence comprising several sub-crimes (s 18): acts of promoting or facilitating the grooming of a child; and acts amounting to active grooming of children. Further acts which amount to the offence are, inter alia, aimed at preventing the grooming of a child over the internet.

### **Display of child pornography to children under 18 years, the use of children for child pornography, or benefiting from child pornography (s 19 and s 20)**



### **Compelling children under 18 to witness sexual acts (s 21)**

#### **"Flashing" (s 22) to children under the age of 18 years**

- (31) The offences (sections 17 to 22) are committed irrespective of whether the child consented to the act.

#### **Sexual offences against mentally disabled persons**

- (32) Definition of a mentally disabled person (s 1)

#### **Failure to report sexual offences against children and mentally disabled persons (s 54(1) and (2))**

#### **Trafficking in persons (s 71)**

- (33) Definition of human trafficking in *Prevention and Combating of Trafficking in Persons Act 7 of 2013* (s 4)



#### **FURTHER READING**

For more information on sexual crimes, read:

- (1) Burchell Principles of *Criminal Law* (2016) 610–639.
- (2) Kemp, Walker, Palmer, Baqwa, Gevers, Leslie & Steynberg *Criminal Law in South Africa* (2018) 351–405.

#### **TEST YOURSELF**

- (1) Discuss the changes that have been brought about by the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*, relating to the common-law crime of rape.
- (2) Discuss the statutory crime of rape.
- (3) Discuss the statutory crime of compelled rape.
- (4) Discuss in detail the meaning of the requirement of "consent" in terms of the Act.
- (5) Discuss the minimum sentences that may be imposed for the crime of rape and compelled rape.
- (6) Can a person who did not perform an act of sexual penetration with the complainant with his/her own body be convicted as a perpetrator on a charge of compelled rape?
- (7) Name four prohibited types of conduct which constitute "acts of sexual penetration".
- (8) Define the crime of sexual assault.
- (9) Define the crime of compelled sexual assault.
- (10) Give examples of conduct which amounts to "sexual violation".
- (11) Explain the differences between the concepts "sexual penetration" and "sexual violation".
- (12) Define the crime of compelled sexual assault and compelled self-sexual assault.
- (13) Discuss the elements of the crimes of "compelled sexual assault" and "compelled self-sexual assault".
- (14) Define the crime of "engaging sexual services for reward".
- (15) Define the crime known as "flashing" in respect of adults.
- (16) Define the crime of incest.
- (17) Name the three prohibited degrees of relationship through which the crime of incest can be committed.
- (18) Consider whether the crime of bestiality can be regarded as constitutional.
- (19) Discuss the crime of consensual sexual penetration of children and explain why the Constitutional Court ruled in the *Teddy Bear* case that the crime is unconstitutional.
- (20) Discuss the crime of consensual sexual violation of children and explain why the Constitutional Court ruled in the *Teddy Bear* case that the crime is unconstitutional.
- (21) Discuss the two defences that an accused may rely on if charged with any of the offences mentioned in (19) and (20).
- (22) Name five ways in which the crime of sexual exploitation of children can be committed.

PART B: CRIMES AGAINST THE COMMUNITY

- (23) Briefly discuss the crime of sexual grooming of children.
- (24) Briefly discuss the crime known as "flashing" in respect of children.
- (25) Discuss the sexual offences that may be committed against mentally disabled people.
- (26) Discuss whether a person who fails to report knowledge of the commission of a sexual offence against a child or a mentally disabled person may be held criminally liable.
- (27) Discuss the offence of "trafficking in persons".

# PART C

## Crimes against the person

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# Learning unit 5

## Crimes against life and potential life



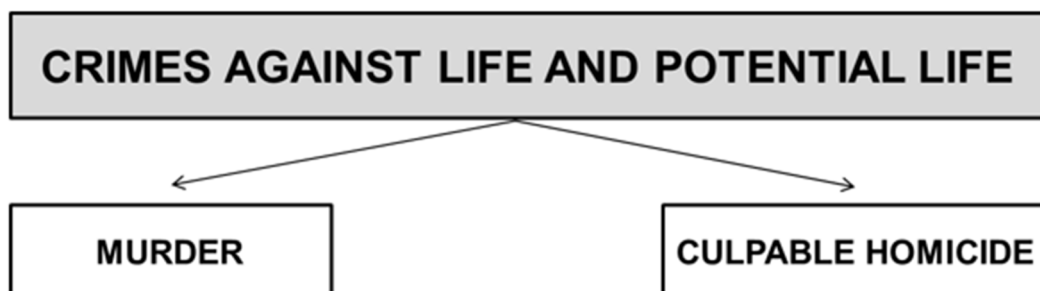
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### LEARNING OUTCOMES

When you have finished this learning unit, you should be able to:

- demonstrate your understanding of the requirements for certain crimes against life and potential life by
  - considering the possible liability of an accused for the crimes of murder and culpable homicide
  - considering the possible punishment to be imposed for murder



## 5.1 BACKGROUND

In this section, we will discuss crimes against life and potential life. The two crimes which will be discussed in this learning unit are murder and culpable homicide.

## 5.2 MURDER

**(Criminal Law 437–441)**

### 5.2.1 Definition

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

### 5.2.2 Elements of the crime

The elements of this crime are

- (1) the **causing** of the death
- (2) of **another person**
- (3) **unlawfully**
- (4) **intentionally**

Elements (1), (3) and (4) are not discussed in detail in *Criminal Law*, since the concepts "causation", "unlawfulness" and "intention" have been dealt with in detail in the discussion of the general principles of criminal law, both in your study guide and in *Criminal Law*. The only new element which has not yet been discussed, and to which you should pay particular attention, is the requirement that "another person" must be killed.

### 5.2.3 "Another person"

The object of this crime must be **another living human being**. Killing oneself (suicide) is not a crime; however, if X assisted Y to commit suicide, X may be convicted of murder if the evidence shows that he unlawfully caused Y's death. Killing an animal also does not constitute murder. As regards the "living human being" requirement, it is generally accepted that at the time of the fatal conduct, the person must have been alive. This includes an infant who has been born alive. In this regard, section 239(1) of the Criminal Procedure Act prescribes that: "such child shall be deemed to have been born alive if the child is proved to have breathed, whether or not the child had an independent circulation, and it shall not be necessary to prove that such child was, at the time of its death, entirely separated from the body of its mother".



Read the following judgment in the *Reader*: **Mshumpa** 2008 (1) SA 126 (E).

This interesting case deals mainly with the requirement that the victim of the crime of murder must be a **living human being**. However, it is also a good illustration of the application of the principles of participation in the crimes of attempted murder, robbery and assault. Other crimes that featured in this judgment are incitement to commit attempted murder and the crime of defeating or obstructing the course of justice.

If X has the intention to kill Y, but Y is already deceased, X can only be charged with attempted murder as he did not in fact cause the death of another living human being.



## ACTIVITY

X, who is very jealous of his wife Y, suspects that she is having an affair with Z. He becomes even more suspicious that Y and Z are having sexual relations when Y informs him that she is six months pregnant. X believes that he is not the father of the child and decides to kill Y and get rid of the baby at the same time. One night, while Y is asleep, he presses a cushion over Y's face and after struggling for some time, she eventually dies from a lack of oxygen. X tells everybody the next day that he woke up to find his wife lying dead next to him. The police investigate the matter and the state pathologist is called in to examine the body and establish the cause of death. The cause of death is identified as lack of oxygen as a result of smothering. The baby is also found to have died as a result of the killing of the mother. X is charged with the murder of Y as well as the murder of the unborn child. The state argues that X should be convicted of murder in respect of the unborn child as well for the following reasons: Although the common-law definition of murder is the unlawful, intentional killing of another *person*, which has always been understood as a human being born alive, the common law should be developed to bring it into line with constitutional values, especially the right to life and the right to dignity of every person, including an unborn child. You are the legal representative of the accused. State your arguments as to why X cannot be convicted of murder in respect of the unborn child as well.



## FEEDBACK

Convincing authority on this matter is to be found in the judgment of Froneman J in *Mshumpa supra* (paras 56–65). The arguments advanced by the court in that case can also be used in this case. Firstly, judicial development of the substantive criminal law by extending the definitions of crimes should be approached carefully in view of the legality principle guaranteed in section 35 (l) of the Constitution. Preferably, the creation of new crimes should be performed by the legislature and not the courts. Secondly, the Constitution does not expressly confer any fundamental rights on an unborn child. Further, South African courts have not ruled in any decision that a child that was not born alive holds any rights in its unborn state. Thirdly, in other countries, the crime of murder has not been extended to include the killing of an unborn child. Rather, the route has been preferred that the legislature create new crimes (so-called feticide laws) to punish such conduct separately. Finally, there are practical difficulties about declaring such conduct to be included in the crime of murder. Some of these difficulties are the following: Should the crime be restricted to killing by third parties or could the mother herself also be a perpetrator of the crime? At what stage of development should the foetus be? Ideally, these are issues which should be considered carefully by the legislature in view of current abortion legislation (*The Choice on Termination of Pregnancy Act 92 of 1996*).



### Do mercy killing and assisted suicide constitute murder?

If a person who is terminally ill, suffering greatly and does not have long to live anymore, asks his doctor to help him to die (instead of waiting for the final end), does the doctor commit the crime of murder? As you know by now, consent by the injured party to be killed is not recognised as a defence in South African law. If the doctor gives the patient a lethal injection himself (mercy killing or euthanasia), it is quite obvious that the doctor will be the cause of the patient's death, especially if intention is established. However, what if the doctor only helps the patient by giving him the lethal drug which the patient will inject himself? This is called assisted suicide. According to *Ex parte Die Minister van Justisie: In re S v Grotjohn* 1970 (2) SA 355 (A), a person who helps another to commit suicide may, depending on the particular circumstances, be found guilty of murder or culpable homicide. Does this prohibition not infringe on the constitutional rights of the patient, for example, his right to die with dignity? One must also take into consideration that medical circumstances have changed drastically in the last 50 years, and also the provisions of s 39(2) of the Constitution which require that, in developing the common law, the court must give effect to the nature, purport and objects of the Bill of Rights. What is your view on assisted suicide? If you need further information on this topic, please read the case of *Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others* 2017 (3) SA 152 (SCA).

## 5.3 CULPABLE HOMICIDE

(**Criminal Law 442–443**)

### 5.3.1 Definition

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

### 5.3.2 Elements of the crime

The elements of this crime are

- (1) the **causing** of the death
- (2) of **another person**
- (3) **unlawfully** and
- (4) **negligently**

### 5.3.3 Negligence



You will notice that the only difference between murder and culpable homicide lies in the form of culpability required for each. In the case of murder, intention is required, while in the case of culpable homicide, X must have acted negligently in causing the death of the deceased.

As you may remember from your CRW2601 studies, the test for negligence is objective. The court must ask itself whether:

- (a) the reasonable person in the same circumstances would have foreseen the possibility that Y's death may result from X's conduct
- (b) the reasonable person would have taken steps to guard against such a possibility
- (c) X's conduct deviated from what the reasonable person would have done in the circumstances

If X is charged with Y's murder, but because of factors such as intoxication or provocation lacked intention, the crime is not automatically reduced from murder to culpable homicide. The court must be satisfied that X was negligent in causing Y's death. In cases where X caused Y's death because X had exceeded the bounds of justification, for example in private defence, X will be convicted of culpable homicide, and not murder. This is because X lacks the intention to kill as there is no awareness of unlawfulness. X, in his provoked or anxious state of defending himself, did not realise that he was acting unlawfully. In *S v Botha* 2019 (1) SACR 127 (SCA), the appellant was dragged by the hair by the deceased, while he was hitting her. The appellant grabbed hold of a steak knife and directed stabbing movements backwards to the deceased, whom she could not see. The court held that she must have foreseen the possibility that she might injure or kill the deceased, but that there was no proof that she had reconciled herself with the occurrence of death or disregarded consequences of it occurring. The conviction for murder was changed to one of culpable homicide.

There is no such crime as attempted culpable homicide, since intent is necessary for an attempt, and X cannot intend to be negligent.



#### ACTIVITY

X is a keen hunter and owns a Musgrave 270 hunting rifle. One day, he decides to clean his rifle, which he keeps in his study. X is under the impression that there are no bullets in the magazine of the rifle because he had removed them after a previous hunting expedition. After cleaning the rifle, he pulls the trigger just to test whether the mechanism is operating smoothly. A shot goes off which kills X's wife who, at that moment, was working on the computer in his office. X is charged with murder. X's defence is that he had made a factual mistake and therefore lacked intention to commit murder. He was under the impression that there were no bullets in the magazine. As state prosecutor, you argue that if X is acquitted of murder, he should nevertheless be convicted of culpable homicide since he was negligent. Explain the onus on the state in proving the offence of culpable homicide.



#### FEEDBACK

It is clear that X had performed a voluntary act that caused Y's death. His act was also unlawful because he cannot rely on any ground of justification, such as private defence or necessity. However, on a charge of murder, X may succeed with the defence of mistake, which excludes any intention to kill. If X succeeds with this defence and is acquitted of murder, it may nevertheless be argued that X was negligent and should be convicted of culpable homicide. The state must prove that a **reasonable person in the same circumstances as X would have foreseen the possibility that his conduct might bring about the death of another person; that the reasonable person would have taken steps to guard against such a possibility and that X's conduct differed from that of a reasonable person.** The state prosecutor can argue that a reasonable person would have foreseen that hunting rifles are highly dangerous instruments and that when the trigger of the rifle was pulled, there was always the chance that there could be a bullet inside that might possibly kill somebody else. Therefore, the reasonable person would not pull the trigger of a rifle in the presence of another person. A reasonable person would, at the very least, have cleaned the gun and pulled the trigger in a place where no other person could possibly be injured. X's conduct differed from that of a reasonable person and he should therefore be convicted of culpable homicide.



## SUMMARY

- (1) Murder is the unlawful and intentional causing of the death of another person, while culpable homicide is the unlawful and negligent causing of the death of another person.
- (2) For murder and culpable homicide, it is required that "another live person" be killed.



## FURTHER READING

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For more information on murder and culpable homicide, read:

- (1) Burchell *Principles of Criminal Law* (2016) 577–586.
- (2) Kemp, Walker, Palmer, Baqwa, Gevers, Leslie & Steynberg *Criminal Law in South Africa* (2018) 315–321.

## TEST YOURSELF

- (1) Define murder and culpable homicide and distinguish between the two crimes.
- (2) Write short notes on the requirement that the death of "another person" must be caused in order to constitute murder.
- (3) Discuss the judgment in *S v Mshumpa* 2008 (1) SACR 126 (E).
- (4) Name the requirements for a conviction of culpable homicide.

# Learning unit 6

## Crimes against bodily integrity



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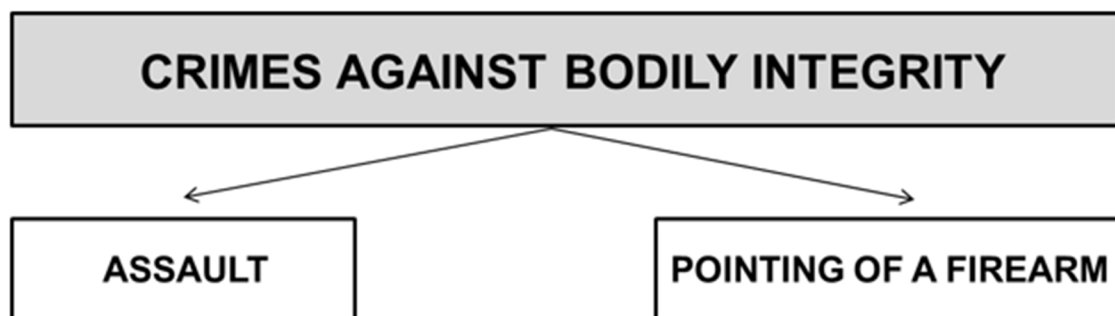
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### LEARNING OUTCOMES

When you have finished this learning unit, you should be able to:

- demonstrate your understanding of the requirements for certain crimes against bodily integrity by considering the possible criminal liability of an accused for
  - the crime of assault (in the form of the direct or indirect application of force, or in the form of the inspiring of fear that force is immediately to be applied)
  - the crime of attempted assault
  - the crime of assault with intent to do grievous bodily harm, or to commit another crime
  - the pointing of a firearm



## 6.1 ASSAULT

(*Criminal Law 447–454; Reader 12–15*)

### 6.1.1 Definition

A person commits assault if she unlawfully and intentionally

- (1) applies force, directly or indirectly, to the person of another, or
- (2) inspires a belief in another person that force is immediately to be applied to her

### 6.1.2 Elements of the crime

The elements of this crime are the following:

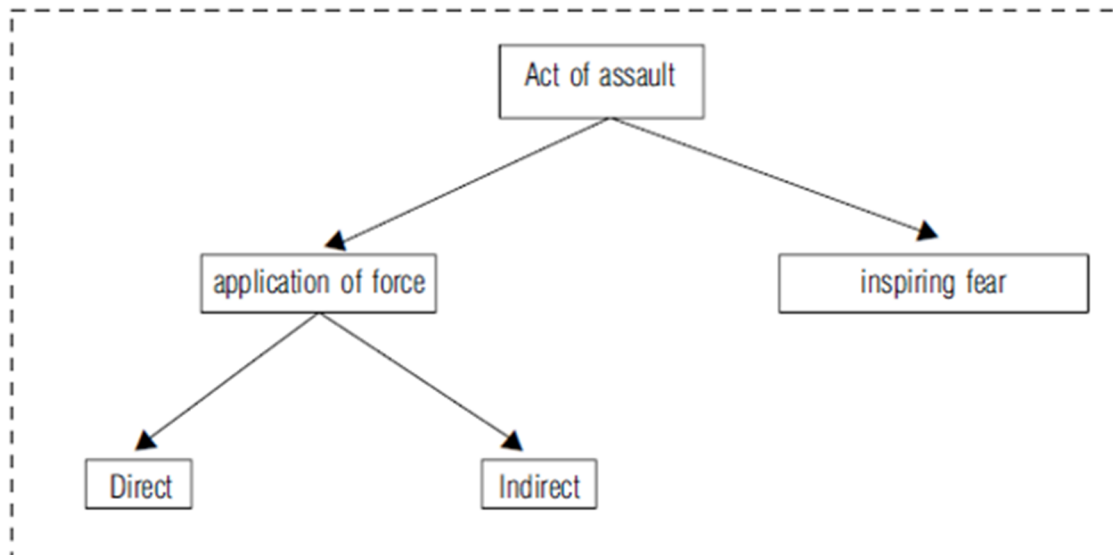
- (1) the **application of force** (or the **inspiring of a belief that force is to be applied**)
- (2) **unlawfulness**
- (3) **intention**

### 6.1.3 Historical overview

In our common law, assault in the sense of an attack or threat of attack to the person of another was not known as an independent crime. There was a comprehensive crime, known as *iniuria*, which included all kinds of violations of the rights of personality. Under the influence of English law, assault in our law developed into an independent crime. An *iniuria* committed against another's dignity (*dignitas*) is punished in our law as *crimen iniuria*; an *iniuria* against another's good name (*fama*) is punished by us as criminal defamation. **Assault is nothing other than *iniuria* against the physical integrity (*corpus*) of another.**

### 6.1.4 Ways in which the crime can be committed

The act of assault may take different forms. First, it may consist in the application of force to the person (body) of another. Secondly, it may consist in inspiring fear in Y, and, more particularly, a belief in Y that force is immediately to be applied to her. The first possibility may, in turn, be subdivided into direct and indirect application of force. The different ways in which the crime can be committed may thus be illustrated as follows in a diagram:



We shall now discuss each way of committing the crime separately.

### 6.1.5 Application of force – direct

The first way in which the crime can be committed is through the application of force. Here, one must distinguish between direct and indirect application of force. We first consider the direct application of force.

The direct application of force is the most common way in which the crime can be committed. This is the form of the crime which corresponds most closely to the ordinary lay person's idea of assault. For example:

- X punches Y with her fist, or
- kicks her, or
- slaps her in the face

The fact that Y does not feel much or any physical pain, is irrelevant. Thus, X may commit the crime even if she only spits in Y's face or trips her so that she stumbles.

### 6.1.6 Application of force – indirect

The application of force may also be indirect. In this form of the crime, X commits some act which results in Y's physical integrity being infringed, as in the following examples:

- X sets a vicious dog on Y, or
- X snatches away a chair from under Y just as she is about to sit on it, resulting in Y's falling to the ground, or
- X derails a train on which Y is travelling, or
- X frightens a horse on which Y is riding so that Y falls from the horse

Note the following two examples from our case law of convictions of assault where the application of force was indirect:

- (1) In *Marx* 1962 (1) SA 848 (N), X gave three glasses of wine to drink to each of two children, aged five and seven years. The children drank the wine and became sick as a result. The younger child, for example, could not walk at all and was in a semiconscious condition. X was convicted of assault. The fact that the harm or discomfort was internal rather than external was held to be irrelevant.
- (2) In *A* 1993 (1) SA 600 (A), X, a policeman, forced Y, whom he had just arrested and taken to the police station, to drink his own urine. X was convicted of assault. The Court rejected the proposition that, since urine was not poisonous or dangerous, the forced drinking of it could not constitute assault, holding that the forced drinking of **any** substance constitutes assault.



Read the following judgment in the *Reader*: **S v A** 1993 (1) SACR 600 (A).

### 6.1.7 Inspiring fear of immediate force

Inspiring fear **or a belief** in Y that force is immediately to be applied to her also constitutes an act of assault. Here, there is no physical contact with, or impact on, Y's body.

This is a rather unusual way of committing the crime – one which, in certain ways, departs from the layperson's conception of what constitutes assault. You should therefore take good note of the rules below setting out the preconditions for holding somebody liable for assault in this form.

For a person to be convicted of assault in this form, the following rules apply:

- (1) The threat must be one of violence to the **person** of Y. Thus, a threat by X to damage Y's property is not sufficient.
- (2) The threat must be one of **immediate** violence. Thus, a threat by X to cause Y some physical harm in the future (e.g. the next day) would not qualify as assault in this form.
- (3) The threat must be one of **unlawful violence**. If X is entitled by law to threaten Y with violence should Y not behave in a certain manner (such as to leave X's house or premises), she does not commit assault if she threatens Y. Thus, X may always threaten Y to use force to defend herself or her property.
- (4) Y (the complainant) must **subjectively believe** that X intends to carry out her threat, and that she is able to do so. The essence of this type of assault is the intentional inculcation of fear upon Y. If Y does not in fact fear the threat, no assault is committed.



#### ACTIVITY

X threatens to shoot Y, but the object X is holding in her hand is not a real pistol, but only a toy pistol. Y knows that the object X is brandishing is only a toy pistol. Consequently, no fear is induced in Y. Has X committed an assault upon Y?



#### FEEDBACK

X has not committed assault, because Y did not fear any immediate bodily harm. Even if X happens to believe that the object she is holding in her hand is a real, loaded pistol, whereas it is in fact only a toy pistol, but Y knows that the object is only a toy pistol, X has not committed assault, because Y did not fear any immediate bodily harm.

- (1) In previous descriptions of this type of assault, it was required that X's conduct should contain some "act or a gesture", and that the crime could accordingly not be committed by words alone. However, the consensus among modern writers is that X commits this form of assault **even though**

**she does not perform any act or gesture, but merely threatens Y verbally.** Thus, if Y turns a corner to be confronted by a motionless X who, with a gun in her hand, commands "Hands up!", X commits assault.

### 6.1.8 Unlawfulness

The use of force or the inspiring of fear must be unlawful. This means that there must be no ground of justification for X's act. The following are examples of instances in which X's act would be justified (i.e. not unlawful):

- (1) *Private defence.* Y threatens to kill or assault X. In order to defend herself, X uses force against Y.
- (2) *Official capacity.* X is a police official who uses force to arrest Y, who has committed a crime in her presence.



*Assault.* Arresting a suspect in an official capacity is a ground of justification for assault.

(3) *Consent.*

- (a) X is a surgeon who cuts open Y's body in the course of the performance of an operation upon Y to which Y has consented.
- (b) Y is a sportswoman (netball or hockey player) who is injured by X during a sporting contest in respect of which Y has voluntarily consented to take part.

As the defence of parental authority to moderately chastise a child has been found unconstitutional in *S v YG* 2018 (1) SACR 64 (GJ), a parent giving a child a hiding may be charged with assault.

### 6.1.9 Intention

X must have intention to apply force to the body of another or to inspire in her fear of the application of force. This implies the following:

- (1) The intention may take the form of direct intention, indirect intention or *dolus eventualis*.

An example of an assault in which X has intention in the form of *dolus eventualis* is the following: X throws stones at birds. There are children around playing. She foresees the possibility that, if she throws a stone at a bird, the stone may miss the bird and strike one of the children. Although she hopes this will not happen, she nevertheless decides to go ahead, unperturbed by the possibility of her injuring a child. She throws a stone, which misses the bird she aimed at and strikes a child.

- (2) In cases of assault which take place by means of the inspiring of fear (as opposed to the application of force), X **must know that her conduct will inspire fear in** Y. This means that X must believe that her threats will inspire fear in Y.
- (3) According to the ordinary principles relating to intention, X's intention must **incorporate knowledge of unlawfulness**. This means that X must know that her conduct is not covered by a ground of justification. Thus, if X believes that she is entitled to act in private defence because she fears an imminent unlawful attack by Y upon herself, whereas she is in fact not entitled to private defence because Y does not intend to attack her, she lacks the necessary intention to assault.
- (4) According to *Chretien* 1981 (1) SA 1097 (A), **intoxication** may lead to X lacking the intention to assault, in which case X must be found not guilty.
- (5) It seems doubtful whether our courts would be prepared to recognise **provocation** as a ground for excluding the intention required for ordinary assault. (They do recognise that provocation may exclude the "special intention" required for the qualified assaults, such as assault with intent to do grievous bodily harm.)

### 6.1.10 Attempt

Is it possible to commit attempted assault? Consider the following example: X strikes at Y's head with her fist, but, because Y moves her head, the blow just misses Y. Previously, it was assumed that attempted assault was impossible, for the following reason: Every time X attempts to assault Y, but her blow misses Y (as in the above example), X has nevertheless inspired a belief in Y that force is immediately to be applied to her, and therefore X is guilty of completed assault even in these cases which, at first glance, would appear to constitute attempted assault only.

It is now recognised that the above argument is fallacious, and that there may indeed be cases in which only attempted assault is committed. Although it may be granted that, where X has indeed inspired fear in Y, she commits completed assault, it must be remembered that, in exceptional cases, it is possible that X's blow at Y, which misses her, may not arouse any fear in Y. In such cases, only attempted assault is committed. Y may, for example, be unaware of X's words or conduct in instances where she is blind or deaf or unconscious or under the influence of liquor, or because she does not understand X's threatening words. Even where she is aware of, and understands, the threat, she may be completely unperturbed, for instance when she knows that it is only a toy revolver that X is pointing at her.



### Is it assault or not?

It is sometimes very difficult to determine whether assault has indeed been committed. Will you be able to say whether assault has been committed in the following situations?

- (1) X removes the metal bar bolting two railway track ends together. The train derailes, but no one is hurt.
- (2) X gives Y a strong purgative, informing Y it is a chocolate sweet.
- (3) X points a toy gun at Y. Y does not know it is a toy gun.
- (4) X swears at Y, pointing her finger at Y, promising to remove Y from his (X's) property if Y does not leave immediately.
- (5) X picks up a stone and threatens to throw it at Y if Y does not stop advancing towards her.

In all the examples mentioned above, it seems that assault has been committed. In (1), the court decided in *R v Jolly and others* 1923 AD 176, that the conduct constituted assault through an indirect application of force. In *S v Marx* 1962 (1) SA 848 (N), the court held that the mere discomfort caused by the fraudulently induced ingestion of a laxative must be seen as assault, as in (2). The pointing of a firearm or something likely to be believed to be a firearm at another person, is assault (3). If the swearing and pointing of a finger in (4) inspired fear of an assault, then this will be assault. X's threat must be conditional, and X must be able to carry the threat into effect. If X used the threat to protect himself or his property, then X's conduct would be lawful, and it will not be assault. This seems to be the case in (5), where the threat made by X was for the purpose of acting in private defence. This example does not constitute assault.

## 6.1.11 Assault with intent to do grievous bodily harm (Criminal Law 453–454)

### 6.1.11.1 Definition

A person commits assault with the intent to cause grievous bodily harm if she unlawfully

- (1) applies force, directly or indirectly, to the person of another, or
- (2) inspires a belief in another person that force is immediately to be applied to her with the specific intent to do grievous bodily harm.

### 6.1.11.2 Elements of the crime

The elements of this crime are the following:

- (1) the **application of force** (or **the inspiring of a belief that force is to be applied**)
- (2) **unlawfulness**
- (3) **intention to do grievous bodily harm**

### 6.1.11.3 Intent to do harm

This crime differs from assault in that there must be a specific intent to do grievous bodily harm. Whether grievous bodily harm is in fact inflicted on Y is immaterial in determining liability (*Dube* 1991 2 SACR 419 (ZS) 424), but it will play a role in sentencing. It is simply the intention to do such harm that is in question. *Dolus eventualis* is sufficient.



Factors which may indicate that X had the intent to do grievous bodily harm are, for example:

- the nature of the weapon or instrument used
- the way in which the weapon or instrument was used
- the degree of violence
- the part of the body aimed at
- the persistence of the attack
- the nature of the injuries inflicted

The crime may be committed even though the physical injuries are slight. In *Joseph* 1964 4 SA 54 (RA), X drove a truck and deliberately swerved towards Y, but did not actually hit him. X was nevertheless convicted of assault with intent to do grievous bodily harm. The “grievous bodily harm” need not necessarily be of a permanent or dangerous nature (*Mdau* 2001 1 SACR 625 (T)). Twisting Y’s arm or punching Y’s face are not indicative of an intent to do grievous bodily harm, but kicking Y’s head while Y is laying on the ground, administering electrical shocks to Y’s body, or throwing acid in Y’s face do constitute examples of the crime.



#### ACTIVITY

X and Y are arguing over a girl. X becomes angry and draws a knife from his pocket. X tells Y to forget the girl and to go home. Y refuses. X tries to stab Y with the knife. Y manages to avert the attack and X misses Y more than ten times. Y flees and runs to the police station to lay a charge of assault with the intent to cause grievous bodily harm. X is charged with this offence. X’s defence is that, although he had tried to stab Y, Y was not injured at all. Therefore, he could not be found guilty of the crime. Can X succeed with this defence?



#### FEEDBACK

X’s defence will not succeed. For a conviction of assault with the intent to cause grievous bodily harm, it is not required that Y did in actual fact suffer serious bodily harm. It is only required that X had the intention to inflict serious bodily harm.



*Assault with intent to do grievous bodily harm.* This crime can be committed even though no grievous bodily harm is in fact inflicted upon Y, and even though no actual physical injuries are inflicted upon him. In *Joseph* 1964 (4) SA 54 (RA), for example, X drove a truck and deliberately swerved towards Y, intending to hit him, but just failed to hit him. He was nevertheless convicted of assault with intent to do grievous bodily harm.

### 6.1.12 Assault with intent to commit another crime

#### (Criminal Law 454)

Assault with intent to commit some other crime is a further qualified form of assault. Examples here are assault with intent to commit rape, robbery or murder. Each additional crime to the assault constitutes a separate offence. All the requirements for an ordinary assault mentioned above are also applicable to these crimes. In addition, there must be an intention to commit the further crime. It is submitted that these forms of assault amount to nothing more than attempts to commit the further crime (e.g. attempted rape or attempted murder).



#### ACTIVITY

X wants to murder Y by poisoning her. X gives Y cyanide pills, and tells her they are pills for her headache. Y puts the pills in her mouth, but before swallowing the poison, she spits the pills out as they taste extremely bad. Did X commit assault with the intent to murder?



#### FEEDBACK

As events have not yet reached the stage where Y has swallowed the poison, this will be an attempt to murder, not assault with the intent to murder.

## 6.2 POINTING OF A FIREARM

### (Criminal Law 458–460)

#### 6.2.1 Definition

Section 120(6) of the *Firearms Control Act* 60 of 2000 provides that it is an offence to point:

- (a) any firearm, an antique firearm or an airgun, whether or not it is loaded or capable of being discharged, at any other person, without good reason to do so; or
- (b) anything which is likely to lead a person to believe that it is a firearm, an antique firearm or an airgun at any other person, without good reason to do so.

Although the subsection creates two different offences, these offences are so closely related that it is convenient to discuss them as a single offence.

#### 6.2.2 Elements of the offence

The elements of the offence are the following:

- (1) the **pointing** of
- (2) a **firearm** or other article
- (3) at **any person**
- (4) **unlawfully** and
- (5) **intentionally**

The offence created in this subsection may overlap with the crime of assault in the form of inspiring fear of immediate personal violence.

### 6.2.3 The act: "To point ... at"

The proscribed act consists simply in pointing the firearm or article described in the subsection at somebody else. In order to secure a conviction, the state need not prove any of the following:

- (1) that X fired a shot
- (2) that the firearm or article was loaded
- (3) that the firearm or article was of such a nature that it could be discharged; in other words, that it was capable of firing a shot

The expression "point at" is capable of being interpreted in more than one way:

- First, it may be interpreted **narrowly** as meaning the pointing of the firearm at Y in such a way that, if discharged, the bullet would **hit** Y (this interpretation was adopted in *Van Zyl* 1993 (1) SACR 338 (C) 340g).
- Secondly, it may be interpreted **broadly** as meaning the directing of the firearm towards Y in such a way that, if it were discharged, the bullet would **either strike Y or pass in her immediate vicinity** (this wider interpretation was adopted in *Hans* 1998 (2) SACR 406 (E) 411–412).

Although support for both interpretations can be found in the case law, it is submitted that the latter, broader interpretation is the correct one. The reasons for following the broader interpretation are the following:

- (1) One can assume that the **intention of the legislature** was to combat the evils surrounding the handling of firearms on as broad a front as possible.
- (2) The narrow construction of the expression would make it **unduly difficult for the state to prove** the commission of the offence, since it would be extraordinarily difficult to prove beyond reasonable doubt that, if the bullet had been fired, it would actually have hit Y, and not merely have missed her by millimetres.
- (3) The **harm sought to be combated by the legislature**, namely the arousal of fear in the mind of Y of being struck by the bullet, would exist irrespective of proof that the bullet would have actually struck her or just missed her.

### 6.2.4 A firearm, et cetera

What must be pointed is a firearm, an antique firearm or an airgun or anything which is likely to lead a person to believe that it is a firearm, an antique firearm or an airgun.

The Act gives long, technical definitions of the words "firearm", "antique firearm" and "airgun".

### 6.2.5 "Any other person"

The firearm or article as described in the Act must be pointed at a **person**. Thus, to point it at, for example, an **animal**, cannot lead to a conviction.

### 6.2.6 Unlawfulness

The requirement of unlawfulness is not specifically mentioned in the definition of the offence, but the words "without good reason to do so" in the definition are wide enough to incorporate grounds of justification. It is clear that X will not be guilty of the crime if, for example, she points a firearm at another while acting in private defence, or if X is a police officer lawfully effecting an arrest.

### 6.2.7 Intention

Intention is not expressly required in the definition of the offence in subsection (6). It is, however, highly unlikely that the legislature intended to create a strict liability offence. It is also unlikely that it could have intended mere negligence to be a sufficient form of culpability, since the words "point at" prima facie denote intentional behaviour. The corresponding offence in the previous

legislation, which was replaced by the present Act, required that the firearm be "wilfully" pointed. It is therefore submitted that the form of culpability required for a conviction under the subsection is intention.

This means that X must know that:

- (1) **what she is handling is an object described in the Act**, namely a firearm, antique firearm, airgun or anything which is likely to lead a person to believe that it is such an article
- (2) she is pointing the weapon **at another person** – thus, if she thinks that she is pointing it at an animal or an inanimate object, she lacks intention
- (3) there is **no "good reason"** for her conduct and that it is unlawful, that is, not covered by a ground of justification

In *Hodgkinson* 2010 (2) SACR 511 (GNP), X had pressed a water pistol against the body of one of his employees. He was charged and convicted of contravening section 120(6) of the Firearms Control Act 60 of 2000 by unlawfully pointing a firearm or something likely to be believed to be a firearm "without good reason to do so". On appeal, the court held that the culpability to be proved was intention and that it was not a strict liability offence. The words "without good reasons to do so" made it clear that a conscious decision to point an object resembling a firearm under circumstances that would constitute a threat was envisaged by the legislature (at 514j-515a). Also, the verb "to point" describes a conscious, deliberate action (at 515a). There was evidence before the trial court that the water pistol was lying openly in the office and that X and his employees, including the appellant, would often make practical jokes and spray water on one another with the water pistol. The court of appeal set aside the conviction on the ground that X had lacked intention to commit the offence.

## SUMMARY

### Assault

- (1) Definition of assault – see definition above.
- (2) The act of assault may consist in either the application of force to the body of another person or in the inspiring of fear or a belief in Y that force is immediately to be applied to her. The application of force may be direct or indirect.
- (3) Grounds of justification which may possibly be raised on a charge of assault are private defence, official capacity, parental authority and consent.
- (4) Intention is the required form of culpability for the crime of assault. Negligence is not a sufficient form of culpability for this crime.
- (5) It is possible to commit attempted assault.

### Assault with the intention to do grievous bodily harm

- (6) All the requirements for an ordinary assault apply to this crime, but, in addition, there must be intent to do grievous bodily harm.
- (7) Whether grievous bodily harm is in fact inflicted on the victim is immaterial in determining liability. It is only the intention to do such harm that is in question.
- (8) Important factors which may indicate that a person had such an intention are, for example, the nature of the weapon or instrument, the way in which it was used, the degree of violence used, and the part of the body aimed at.

### Assault with intent to commit another crime

- (9) All the requirements for ordinary assault are also applicable to these offences. In addition, there must be an intention to commit the further crime, for example rape, robbery or murder.

### Pointing of a firearm

- (10) Definitions of the offence – see definition above.  
(11) The expression "point at" should be interpreted as directing the firearm towards Y in such a way that, if it were discharged, the bullet would either strike Y or pass in her immediate vicinity.  
(12) The gist of the definition of a firearm is any device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of a burning propellant.  
(13) Intention is the required form of culpability for the offence.



### FURTHER READING

For more information on crimes against bodily integrity, read:

- (1) Burchell *Principles of Criminal Law* (2016) 591–609.  
(2) Kemp, Walker, Palmer, Baqwa, Gevers, Leslie & Steynberg *Criminal Law in South Africa* (2018) 326–331.

### TEST YOURSELF

- (1) Define assault.  
(2) Set out briefly the different ways in which assault can be committed.  
(3) Give two illustrations from our case law of assault committed by the indirect application of force.  
(4) Discuss the principles relating to assault in the form of inspiring fear in another that force is immediately to be applied to her.  
(5) Give examples of grounds of justification that exclude the unlawfulness of an assault.  
(6) Discuss the requirement of intention in assault.  
(7) Is the following statement correct? Give reasons for your answer. "It is impossible for somebody to be convicted of attempted assault, because, if one strikes at another and misses the other, the conduct will always amount to the inspiring of a belief in the other that force is immediately to be applied to her."  
(8) If X is charged with assault with intent to do grievous bodily harm, is it incumbent upon the prosecution to prove that grievous bodily harm has in fact been inflicted upon the victim?  
(9) Discuss the meaning of "grievous bodily harm" in the crime of assault with intent to do grievous bodily harm.  
(10) Discuss the crime of assault with intent to commit another crime.  
(11) Define the offence of pointing a firearm.  
(12) As far as proof of the requirement of an act (i.e. "point at ...") in the offence of pointing a firearm is concerned, the state need not prove certain circumstances. Name these circumstances.  
(13) The requirement of an act in the offence of pointing a firearm consists simply in pointing the firearm at somebody else. However, the expression "pointing at" is capable of being interpreted in more than one way. Describe the different interpretations of this expression, indicate which interpretation should be followed, and give reasons why such an interpretation should be followed.  
(14) What is the gist of the definition of "firearm" as this expression is used in the offence of pointing a firearm?  
(15) Give two examples of instances in which the pointing of a firearm is not unlawful.  
(16) What is it that X must know in order to have the intention required for the offence of pointing a firearm? Explain.

# Learning unit 7

## Crimes against dignity, reputation and freedom of movement



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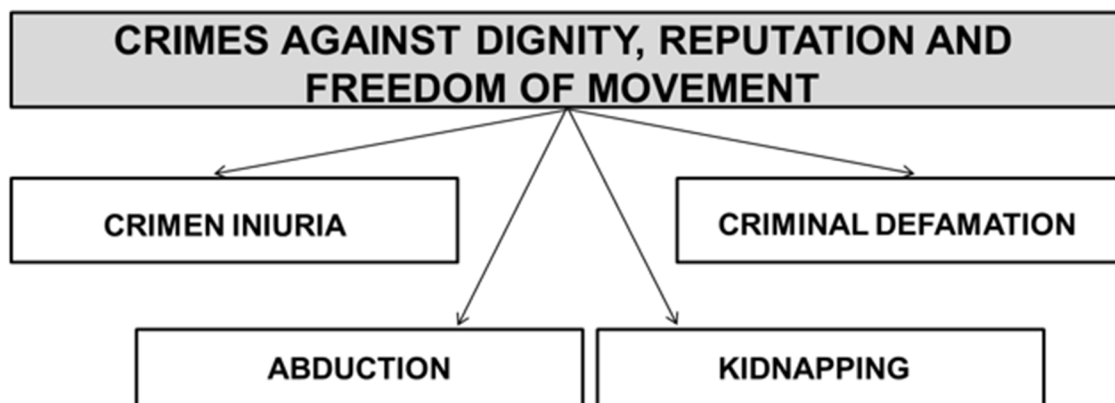
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### LEARNING OUTCOMES

When you have finished this learning unit, you should be able to:

- demonstrate your understanding of the requirements for certain crimes against dignity and reputation by considering the possible liability of an accused for the crimes of *crimen iniuria* and criminal defamation
- demonstrate your understanding of the principles relating to certain crimes against family life and freedom of movement by considering the possible liability of an accused for the crimes of common-law abduction and kidnapping



## 7.1 BACKGROUND

In this section, we discuss certain crimes against dignity and reputation, abduction and kidnapping. These two crimes are related to the protection of family life and freedom of movement.

## 7.2 *CRIMEN INIURIA* (*Criminal Law 461–467*)

### 7.2.1 Definition

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

### 7.2.2 Elements of the crime

The elements of this crime are the following:

- (1) the **infringement**
- (2) of another's **dignity or privacy**
- (3) which is **serious**
- (4) **unlawfulness**
- (5) **intentional**

### 7.2.3 Introduction

A person values not only his physical integrity (i.e. freedom from physical attacks by others), but also his **personality rights**, which include his right to dignity and privacy. It is well known that insults to a person's dignity are regarded by him in just as serious a light as insults to his physical integrity. The criminal law punishes not only violations of a person's physical integrity (under the heading of "assault"), but also violations of certain rights to personality. The last-mentioned violations are punished under the headings of "*crimen iniuria*" and "criminal defamation".

### 7.2.4 Distinction between *crimen iniuria* and criminal defamation

The two crimes, *crimen iniuria* and criminal defamation, should not be confused with each other.

- In the case of ***crimen iniuria***, violations of a person's *dignity and privacy* are made punishable.
- In the case of **criminal defamation**, violations of a person's *good name or reputation* are made punishable.



In order to distinguish between *crimen iniuria* and criminal defamation, it is therefore important to keep in mind the distinction between dignity and privacy on the one hand and reputation (or "good name") on the other, and also the number of parties involved in the two crimes.

A person's **reputation** refers to what others think of him. A violation of reputation always involves three parties, namely:

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

In the case of *crimen iniuria* on the other hand, there are only **two parties** involved, namely:

- the **wrongdoer** (X), who says or does something which violates the dignity or privacy of
- the **complainant** (Y),

as where X insults or degrades Y over the telephone (remarks which nobody other than Y can hear), or where he watches Y undressing.





Students regularly confuse the interests protected by the crime of *crimen iniuria* with the interests protected by the crime of criminal defamation. They regularly make the mistake of writing in the examination that *crimen iniuria* is committed if (*inter alia*) a person's reputation is violated. This is incorrect. Concentrate on avoiding this common mistake!

## 7.2.5 The interests protected by the crime

We now proceed to discuss the elements of the crime. (In order to explain them logically, we shall discuss the second element identified above before discussing the first one.) First, we consider the interest protected by the crime, namely a person's *dignitas* (dignity) and privacy.

### 7.2.5.1 Dignity

The crime first protects a person's dignity, or as this term is often described in legal literature, his *dignitas*.

What does *dignitas* mean? Melius de Villiers (*The Roman and Roman-Dutch Law of Injuries* [1899] 24) gave a classical description of the concept which our courts have followed. It reads as follows:

That valued and serene condition in his social or individual life which is violated when a person is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt.

(This description was quoted with approval in, *inter alia*, *Jana* 1981 (1) SA 671 (T).) Other expressions used by the courts to describe *dignitas* include "mental tranquillity" (*Holliday* 1927 CPD 395, 400) and "his proper pride in himself" (*Tanteli* 1975 (2) SA 772 (T) 775). The gist of the concept of dignity is usually expressed as "**mental tranquillity**", "**self-respect**" or "**feeling of chastity**".

### 7.2.5.2 Privacy

*Crimen iniuria* protects not only a person's dignity, but also his privacy. The courts regard privacy as something which is included in the concept of dignity, but, as a number of commentators have observed, properly viewed, privacy cannot be accommodated under the concept of dignity. One of the reasons for this view is the following:

The right to privacy can be infringed **without Y being aware of the infringement** (as where X watches Y undressing) (*Holliday supra*). On the other hand, an infringement of Y's dignity or right to self-respect is only conceivable if Y is aware of X's insulting words or conduct.

This is the reason why both terms, "dignity" and "privacy", have been designated as the protected interests in the definition of the crime above.



**NB The Bill of Rights in the South African Constitution recognises a person's right to dignity and his right to privacy in different sections. Section 10 recognises a person's right to dignity and section 14 his right to privacy.**

## 7.2.6 Infringement of legal interest may lead to both civil claim and criminal prosecution

If X's dignity or privacy is unlawfully and intentionally violated by Y's conduct, X may also institute a **civil claim** against Y, in which he claims an amount of money for damages or compensation from Y for the unlawful infringement of his interests. The same applies if it is X's good name or reputation which has been violated by Y. In this latter case, it is a claim for defamation which X institutes against Y. These civil claims are something entirely different from criminal prosecution

for *crimen iniuria* or defamation. It is nothing unusual to find that a person whose dignity or good name has been infringed

- not only institutes a civil claim against the alleged infringer, but also
- lays a charge of *crimen iniuria* or criminal defamation against the alleged wrongdoer with the police, resulting in a criminal prosecution for one of these crimes.

## 7.2.7 Infringement of interests protected

### 7.2.7.1 General

- (1) The crime can be committed either by **word or by deed**.
- (2) Although many, or perhaps most, cases of *crimen iniuria* involve some taint of **sexual impropriety**, the crime is **not confined to insults of such a nature**.
- (3) Although many instances of *crimen iniuria* involve conduct by a male towards a female, **X may be either male or female, and the same applies to Y**.

### 7.2.7.2 Subjective and objective aspects of infringement

The infringement of the interests protected contains **both a subjective and an objective element**.

The **subjective element** is the following:

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

- be aware of X's offending behaviour and
- feel degraded or humiliated by it.

There is, however, the following **exception to this rule**: where Y is a **young child** or a **mentally defective** person, he would not be able to understand the nature of X's conduct and, consequently, would not be able to feel degraded by it. This, however, does not afford X a defence. For this reason, the crime can be committed even in respect of a young child or a mentally defective person.

As far as **proof** of the fact that Y felt degraded is concerned, it is usually assumed that conduct which offends the sensibilities of a reasonable person would also have offended Y's sensibilities. If, however, it comes to light that, for some or other reason, Y did not take any offence at (i.e. he did not in any way feel aggrieved or humiliated by) X's behaviour, a court will not convict X of the crime.

In cases of **infringement of privacy** (as opposed to dignity), however, a different rule applies: here it **need not be established that Y was aware** of X's offensive conduct. Thus, if X watches Y undressing, X is taken to have infringed Y's privacy irrespective of whether Y is aware of being watched or not.



*Crimen iniuria*. Y needs not be aware of X's offensive behaviour in order to infringe Y's privacy.

The **objective element** is the following:

Since feelings such as "mental tranquillity" and "self-esteem" (which describe *dignitas*) are highly subjective and emotional concepts, their existence and intensity may vary from person to person. A certain person may be hypersensitive and easily take affront, whereas another may be more robust or broadminded and not feel degraded if the same conduct is directed at him.

For this reason, the law must of necessity apply the following objective standard: X's conduct must be of such a nature that **it would offend at least the feelings of a reasonable person**. If Y happens to be so timid or hypersensitive that he takes affront at conduct that would not affront a reasonable person, the law does not assume that the crime has been committed.

### 7.2.7.3 Examples of infringement of dignity

The following are examples of conduct constituting an infringement of Y's dignity:

- (1) **Indecent exposure**, such as where X exposes his private parts to Y (without Y's consent) (A 1991 (2) SACR 257 (N)). It does not matter whether this takes place in public or in private. (This type of conduct may arguably also be categorised as an instance of invasion of privacy.)
- (2) Communicating to Y (in practice, usually a woman) a **message containing** an explicit or implicit **invitation to**, or a **suggestion of, sexual immorality** (*Olakawu* 1958 (2) SA 357 (C)), such as where X, unsolicited, sends indecent photographs to Y.
- (3) Address another in **language which humiliates or disparages** him, such as calling him a "pikkenien" – *Mostert* 2006 (1) SACR 561 (N).
- (4) Acts which constitute **assault** may also constitute *crimen iniuria*, such as where X spits in Y's face (*Ndlangisa* 1969 (4) SA 324 (E)).
- (5) The uttering of words constituting **vulgar abuse** or gross impertinence may constitute the crime, provided that the circumstances are sufficiently serious. Examples of such cases in which X was convicted of *crimen iniuria* are the following:
  - In *Walton* 1958 (3) SA 693 (R), Y, a mother, asked X to stop making a noise with his motor-cycle so that her child could sleep, whereupon X shouted at Y, "Come here lady and I will give you another."

- In *Momberg* 1970 (2) SA 68 (C), X swore at a traffic officer who issued him with a ticket for a traffic offence, shouting at him, "Jou lae donnerse bliksem!" ("You low-down damn scoundrel!").
- (6) In *S v Van Leperen* 2017 (1) SACR 226 (WCC), the common-law offence of *crimen iniuria* was considered in the context of **offensive behaviour of a sexual nature**. X, an attorney, was charged in the court *a quo* of sexual assault, a contravention of section 5(1) of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007. His conduct consisted in having slapped the buttocks and having made sexual remarks to the complainant, Y, a female manager of three legal aid offices.

X was acquitted by the court *a quo* of both sexual assault and common assault on the ground of having lacked intention, but found guilty nevertheless of *crimen iniuria*. He appealed against his conviction on the ground that his conduct did not constitute the elements of *crimen iniuria*. The court of appeal rejected his argument and upheld the conviction. In the court's view, the court *a quo* found correctly that X had harmed the dignity of Y by telling her that he wanted to "smack her bum"; that "she wore sexy shoes" and that "she needs a man" (at para [28]).

The court of appeal noted that *crimen iniuria* amounts to the unlawful, intentional and serious violation of the dignity or privacy of another, and that the crime protects all the rights of personality other than reputation and bodily integrity (at para [29]). The violation of dignity is determined by applying both an objective and subjective test, referring to *S v Jana* 1981 (1) SA 671 (T) at 675A-B, where the court explained that "the concepts of self-respect, mental tranquillity and privacy are judged both objectively and subjectively. Objectively in that the law accepts that each person is entitled to them. Subjectively in that it depends upon the particular person and the circumstances whether it can be said that his *dignitas* has been impaired."

It is submitted that the description of the objective test in the *Jana* case as "that the law accepts that each person is entitled to [self-respect, mental tranquillity and privacy]" is not entirely correct. The objective test requires of a court to make a value judgment of the conduct, by enquiring whether a reasonable person would also have been offended by the conduct. Again, the subjective test requires an investigation relating to the knowledge of the complainant (whether she was aware of the offending conduct) and whether she felt degraded or humiliated by it.

The court engaged in the subjective enquiry and found that the complainant experienced the words uttered by the appellant as shocking because she was a professional person who viewed herself to be on an equal footing with the appellant. Furthermore, she was perplexed why the appellant humiliated her and tried to diminish her standing (at para [33]). The court then objectively assessed the conduct and concluded (at para [34]) that the "offending words collectively, used in the context where both the appellant and the complainant are attorneys present in a courtroom where other colleagues and members of the public were present, had the effect of humiliating and belittling the complainant". The fact that dignity is expressed in section 1 as a foundational value of our democratic state and guaranteed in section 10 of the Constitution of the Republic of South Africa, 1996, was emphasised (at para [31]), and attorneys and legal practitioners admonished to "develop a consciousness about constitutional rights and obligations which they ought to apply in the course of practising their profession" (at para [43]). The court indicated that sexually offensive misconduct rarely stems from flirtation; instead, its aim is to treat a person "condescendingly and patronisingly" (at para [44]).

#### 7.2.7.4 Examples of infringement of privacy

The following are examples of the infringement of privacy:

- (1) A person's privacy may be infringed by a "**Peeping Tom**", that is, someone who peeps through a window or other aperture at somebody else (usually a woman) undressing or taking a bath, for example. Cases involving "Peeping Toms" are the most common instances of

criminal invasion of privacy which come before the courts (e.g. *Holliday supra*). The fact that Y, at the time she was being watched by X, had not yet undressed, offers X no defence, because the mere unwanted intrusion by X into Y's private sphere is enough to constitute the infringement of the interests protected by the crime.

- (2) A person's privacy may be infringed by "**bugging**", that is, by someone planting a listening device in Y's house, room or office and then listening to his private conversations (A 1971 (2) SA 293 (T)). The fact that the contents of the conversation that was overheard happened not to have revealed anything shameful or scandalous does not afford X a defence, because the mere unlawful intrusion by X into Y's private sphere is enough to constitute the infringement of the interests protected by the crime.
- (3) A person's privacy may conceivably be infringed in a variety of other ways, for example by the **opening and reading of a confidential postal communication** (including an e-mail) addressed to him, or by prying into his private life in an unwarranted manner by means of apparatus such as cameras, telescopes and other "bugging devices".



Try to remember some of these examples of infringements of dignity and privacy provided above, as many are used in assignments and exam question papers.

### 7.2.8 Violation of dignity or privacy must be serious

In order to constitute *crimen iniuria*, violations of dignity or privacy **must be serious**, or, as the same requirement is sometimes expressed, may **not be of a trifling nature** (*Seweya* 2004 (1) SACR 387 (T)).

Although this requirement is vague, it is nevertheless necessary. In everyday life, it is common that people argue with one another and that, in the course of argument, one person may say something to the other which technically amounts to an infringement of the other's dignity (as where X swears at Y). Again, ill-mannered drivers may snarl at other road users or make uncouth gestures at them. The law cannot possibly regard all these relatively small and unfortunate episodes that occur in everyday life as crimes. If every swear word or scornful remark could result in a criminal prosecution, the courts would be inundated with unnecessary trials. In short, as was said in *Walton supra* 695, "in the ordinary hurly-burly of everyday life a man must be expected to endure minor or trivial insults to his dignity".

Whether the words, or behaviour, are serious enough to qualify depends on the circumstances of each case. Factors such as the following may play a role in deciding whether the behaviour was serious (note, the list is not exhaustive):

- (1) The **ages of the parties**. Certain conduct towards young persons is sometimes viewed in a more serious light than it would be if it were directed at mature people.
- (2) The **gender of the parties**. In *Van Meer* 1923 OPD 77 at 80, the Court stated that "[t]he law would naturally be always more studious to protect girls and women against insults from men than it would be in the case of insults offered by one man to another". There is, however, no rule stipulating that the crime can only be committed by a man towards a woman. It can also be committed by a man towards a man, a woman towards a woman or a woman towards a man.
- (3) The **nature of the act**. Certain types of conduct are by their nature notoriously serious, for instance indecent exposure or the activities of "Peeping Toms".
- (4) The **relationship between the parties**. The violation of X's dignity is more serious if she is insulted by a stranger than when she is insulted by her husband or boyfriend in the course of, for example, a domestic argument.
- (5) The **persistence of the conduct**. The persistent repetition of conduct may push it over the borderline between non-punishable conduct and *crimen iniuria*. Thus, to stare at a woman is scarcely injurious, but to follow her and rudely stare persistently at her may be (*Van Meer supra*).

- (6) The **publicity** with which the conduct is accompanied. The degree of impairment of dignity may be greater where X's words are heard not only by Y, to whom they are addressed, but by others as well, or when they are otherwise made known to a larger audience.
- (7) **Sexual impropriety.** If X makes unwanted overtures towards Y which contain an element of sexual impropriety, the conduct will be viewed in a more serious light than when the overtures do not contain such an element. It should, however, be remembered that the crime can be committed even if there is no suggestion of sexual impropriety in X's advances towards Y.
- (8) **Y's public standing.** Although the dignity of all people is protected by the crime, attacks upon the dignity of a person occupying a public office and related to such a person's performance of his duties may be viewed in a more serious light compared with the same behaviour directed at a person in his private capacity. Thus, to swear at a police or traffic officer for merely performing his duties may be more serious than swearing at a private person in his private capacity (*Momberg supra*). The reason for this is that offensive words directed at a person occupying a public office may be viewed as an expression of contempt not only towards the individual person at whom the words are directed, but also towards the very institutions which such persons represent. These institutions are often necessary to maintain law and order and to secure public peace and security.

### 7.2.9 Unlawfulness

Conduct which would otherwise amount to a violation of dignity or privacy may be justified by grounds of justification such as

- **necessity**, for example where, although X appeared naked in Y's presence, it appeared that a fire broke out in X's house while he was having a bath and that for this reason, he had to flee for his life while naked
- **consent**, as where Y gives X permission to look at her while undressing
- **official capacity**, as where X is a policeman who, in the course of the performance of his duties as a detective, enters Y's house without Y's permission and searches the house in an effort to find evidence of the commission of a crime he is investigating

### 7.2.10 Intention

The crime can only be committed intentionally. Negligence is an insufficient ground upon which to base a conviction. X must know that his words or conduct violate Y's dignity or privacy, and he must know that there is no ground of justification for his conduct.

## 7.3 CRIMINAL DEFAMATION

**(Criminal Law 467–469)**

### 7.3.1 Definition

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

### 7.3.2 Elements of the crime

The elements of this crime are the following:

- (1) the **publication**
- (2) of a **defamatory allegation** concerning another
- (3) **unlawfulness**
- (4) **intentional**

### 7.3.3 Publication

As far as the requirement of publication is concerned, you must take note of the following: The term "publication" as used here does not necessarily mean that the allegations should be made public in printed form. It only means that the allegations must come to the attention of people other than Y. The publication can therefore take place orally or in writing. If they come to the attention of Y only, they can at most constitute *crimen iniuria* if they are of such a nature that Y's dignity is injured.

### 7.3.4 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. X must intend to harm Y's reputation by the unlawful publication of defamatory matter concerning him. He must be aware of the fact that what he says or writes will tend to injure Y's reputation. The defamatory allegation must be serious. In *Hoho* 2009 (1) SACR 276 (SCA), X was convicted of 22 charges of criminal defamation stemming from his having published various leaflets defaming certain political office bearers and officials in the Eastern Cape. On appeal to the Supreme Court of Appeal, the following matters were considered: whether the crime had been abrogated by disuse; whether a degree of seriousness of the conduct was an element of the offence and whether the offence was constitutional. The court held that the crime still existed and that there was no proof that it had been repealed through disuse by silent consent of the whole community or by a paucity of prosecutions (281c-h). The court also held that the practice of confining criminal proceedings for defamation to serious cases was not a legal rule. If a prosecution were instituted for a non-serious defamation, the lack of seriousness would be reflected in the sentence. It could be concluded, therefore, that the crime of defamation consisted only in the unlawful and intentional publication of matter concerning another which tended to injure his reputation (286a-c).

The court held that the crime was constitutional, arguing as follows (290 a-e):

Although freedom of expression was fundamental to a democratic society, it was not of paramount value and had to be considered in the context of other values, such as that of human dignity. The law of defamation, both civil and criminal, was designed to protect the reputation of people. Although the criminal remedy was much more drastic than the civil remedy, the requirements for succeeding in criminal proceedings were much more onerous than in civil proceedings. The state had to prove all the elements of the crime beyond reasonable doubt. To expose a person to a criminal conviction if it is proved beyond reasonable doubt that he acted unlawfully, and also knew that he acted unlawfully, was a reasonable limitation on the right to freedom of expression. There is also no reason why the state should prosecute in the case of a complaint in respect of an injury to a person's physical integrity (as in assault), but not in the case of a complaint in respect of an injury to reputation.

In *Motsepe* 2015 (2) SACR 125 (GP), X had written an article for a major newspaper dealing with two different sentences that were imposed by a white magistrate, the one on a black man and the other on a white woman. The article suggested that the magistrate was biased in favour of the white accused. X was convicted of criminal defamation in the trial court on the basis of having been reckless. X appealed against his conviction and the only issue on appeal was whether X had intention to defame the magistrate. The court held that from the evidence it appeared that X had honestly relied on the truth of the statement and deemed it in the public interest to publish the facts. Because he was under the impression that his published words were covered by one of the recognised defences for a claim for defamation, he had lacked intention and was accordingly acquitted since there is no crime such as negligent defamation.

## 7.4 ABDUCTION

### (*Criminal Law 395–399*)

In our law, abduction is regulated only by common law.

#### 7.4.1 Definition

A person commits abduction if he or she unlawfully and intentionally removes an unmarried minor from the control of his or her parents or guardian, without their consent, intending that he or she, or somebody else, may marry or have sexual intercourse with the minor.

#### 7.4.2 Origin and character of the crime

The crime of abduction dates from a period in history when women – especially minors – played a very subordinate role in society. Their parents or guardians exercised considerable authority over them. They had little freedom of movement and were often regarded as economic assets of their parents. The purpose of the crime was to prevent outsiders from removing the minor from the authority of the parents and from depriving the parents of their rights – economic and otherwise – over the minor. In particular, the crime protected the parents' right to consent to their daughter's marriage. The scope of the crime was later extended to protect parents' rights in respect of their sons as well.

Nowadays, minors are, of course, more independent of parental authority. Nevertheless, the crime still exists and protects the rights of parents to consent to the marriage of their minor children, as well as to exercise control over where they stay. Although the importance of the crime has diminished, it still serves a purpose, especially in so far as it punishes unscrupulous persons who entice minors to leave their parental homes in order to make them available for the purposes of engaging in indiscriminate sex (often with the minor's consent and for remuneration).

#### 7.4.3 Legal interest protected by the crime

The interests protected are those of the parents or guardian of the minor since the minor's consent to the removal is not a defence. The interests protected are twofold: the factual exercise of control over the minor and the parents' or guardian's right to consent to the minor's marriage.

#### 7.4.4 Elements of the crime

The elements of the crime are the following:

- (1) the **removal**
- (2) of an **unmarried minor**
- (3) **from the control of his or her parents or guardian**
- (4) with the **intention to marry or have sexual intercourse with the minor**
- (5) **without the consent of the parents or guardian**
- (6) **unlawfulness**
- (7) **intention**

#### 7.4.5 Removal

The perpetrator (X) must remove the minor (Y) from one place to another. X may be either a male or a female. In the vast majority of reported cases, X is a male and Y (the minor) a female. This is the reason why, in the discussion which follows, the masculine form will be used to refer to the wrongdoer (X) and the feminine form to refer to Y. The removal need not be forcible – in fact, in almost all cases of abduction Y consents to the removal. It is not required that X should himself



effect the removal or be present at the time of removal. It is sufficient if X and Y arrange to meet at a place away from the house of the parents (*Jorgenson* 1935 EDL 219).

#### 7.4.6 Person removed must be an unmarried minor

The person who is removed (Y) must be unmarried and a minor, and may be either male or female. (In practice, Y is usually a female.)



**NB** Note that a person is a minor if he is below the age of 18 years (s 17 of the *Children's Act 38 of 2005*).

#### 7.4.7 There must be a removal from the control of the parents or guardian

Y must be removed from the control of his or her parents or guardian. Abduction is committed against the parents or guardian and not against the minor, because, as will be pointed out later, Y's consent to the removal does not afford X a defence.

It is possible that the parents have completely relinquished control over the minor, for example where Y has left the parental home to go and live and work elsewhere, and the parents no longer even know where Y finds herself and no longer even care what she does. If this is the case, X does not commit abduction if he takes Y from where she happens to be staying to another place.

#### 7.4.8 Intention to marry or have sexual intercourse with the minor

The crime is only committed if X removes Y with a certain aim in mind. This aim must be that somebody (usually X himself) either marries Y or has sexual intercourse with her. For the crime to be complete, it is not required that the marriage or sexual intercourse should actually have taken place. All that is required is an intention on the part of X to achieve one of these aims.

The mere temporary removal of a girl from her home in order to have sexual intercourse with her is not yet abduction. X must intend to remove Y from her home either permanently or for a substantial period. If a man wishes to have sexual intercourse with a girl, but it is impractical for him to do so at her parents' home where she lives, and the couple then drive to another place for the purpose of sexual intercourse, whereafter he immediately brings her back to her home, he has not committed abduction. Such conduct may amount to seduction, but mere seduction is not the same as abduction. (Seduction does not even constitute a crime.) In order to distinguish between seduction and abduction, the law requires that X should have had the intention of removing Y for a substantial period (*Killian* 1977 2 SA 31 (C) 35).

The intention to marry Y or have sexual intercourse with her must exist at the time of the removal. If the removal is for an innocent purpose, and X only decides thereafter to have sexual intercourse, the crime is not committed.

It is important to note that the crime is also committed if it is X's intention that **someone other** than himself/herself should marry Y or have sexual intercourse with him/her. This draws attention to an important aspect of the crime, namely the situation where unscrupulous persons entice minors to leave their homes in order to engage in indiscriminate sex with strangers (often for remuneration payable to the minor).

#### 7.4.9 Without the consent of the parents or guardian

The removal must take place without the consent of the parents or guardian. Whether or not Y has consented to the removal, is immaterial. In practice, Y would usually consent to her removal, or even sometimes request X to take her away. This is not a defence, unless **both the parents** or the **guardian** consented. If Y does not consent, then, apart from abduction, X can also be guilty of

the more serious crime of kidnapping – a crime which (in cases in which the victim is no longer a child) is only committed if the victim does not consent to his or her removal.

What must be lacking is the consent of the parents or guardian to both the removal and the purpose of the removal.

### 7.4.10 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.

### 7.4.11 Intention

The form of culpability in this crime is intention. In terms of the general principles relating to intention, X's intention must relate to all the elements of the crime. X must therefore know that Y is an unmarried minor (*Churchill* 1959 (2) SA 575 (A)) and that Y's parents have not consented to the removal.



**Abduction.** The person removed must be an unmarried minor, and the abduction can occur with or without the consent of the minor. The intention must be that the abductor, or someone else, marries or has sexual intercourse with the minor.

**Is ukuthwala abduction?**

*Ukuthwala* is a cultural practice amongst the Nguni people of South Africa, where, after an agreement is made between the families of the prospective bridegroom and bride, the bride is abducted by the man's family for a customary marriage. This custom was especially used for shy youngsters who could not find marriage partners by themselves. The bride was usually informed about the act, and consented, but her consent was not always required. The crime of abduction protects the parents' or guardians' right to control over the minor and who the child can marry. However, if a 14-year-old girl is abducted by a much older man for the purpose of marrying her and having sexual intercourse with her, with the parents' consent, does this still constitute abduction? It seems not. Can parents agree to their underaged children being married, even if the child does not consent to the marriage? What about children's rights in the Constitution that protect their best interests? Please read *S v Jezile* [2015] ZAWCHC 31, 23 March 2015, for more information. It seems that even though abduction cannot be used to punish such acts, the crime of human trafficking may be used.

**ACTIVITY**

X, a 40-year-old female, entices Y, a 17-year-old unmarried girl, to leave her parents' home and work as a prostitute for X and her husband. Y leaves her home voluntarily, but without her parents' consent. What crime has X committed?

**FEEDBACK**

X has committed abduction. She complied with all the elements of the offence: she removed Y (an unmarried minor) unlawfully without her parents' consent with the intention that a third party should have sexual intercourse with her. X has also committed the crime of sexual exploitation of children, and human trafficking.

## 7.5 KIDNAPPING

**(Criminal Law 471–474)**

### 7.5.1 Definition

Kidnapping consists in unlawfully and intentionally depriving a person of his or her freedom of movement and/or, if such person is under the age of 18 years, the custodians of their control over the child.

### 7.5.2 Elements of the crime

The elements of this crime are

- (1) the **deprivation**
- (2) of **freedom of movement** (or **parental control**)
- (3) which takes place **unlawfully**, and
- (4) **intentionally**

### 7.5.3 Character of the crime

The legal interest protected by the crime of kidnapping is a person's **freedom of movement** or a **parent's or a custodian's control over a child**.

**Take note of the following important features of the crime:**

- A parent cannot commit the crime in respect of her own child.
- Forcible removal is not a requirement.
- The length of time for which the person is deprived of his freedom of movement is immaterial.
- Motive (such as demanding a ransom) is immaterial for purposes of liability, although it may be a factor that is taken into consideration for sentencing. If X demands a ransom, she may also be guilty of extortion.
- Unlawfulness may be excluded if X acted in her official capacity (e.g. a police officer effecting a lawful arrest) or where a person aged 18 or above consented to be removed.
- Intention always requires that X had knowledge of unlawfulness. This means that X must know that Y did not consent to the removal or, if Y is a minor, that her parents or custodian did not consent.

GLOSSARY

*dignitas*

dignity

SUMMARY

**Crimen iniuria**

- (1) Definition of *crimen iniuria*– see definition above.
- (2) The crime of *crimen iniuria* protects both a person's dignity and privacy.
- (3) The gist of the concept of dignity (or *dignitas*) is usually expressed as "mental tranquillity", "self-respect" or "feeling of chastity".
- (4) Although many, or perhaps most, cases of *crimen iniuria* involve some measure of sexual impropriety, the crime is not confined to insults of such a nature.
- (5) In instances of infringement of dignity (as opposed to infringement of privacy), Y must be aware of X's offending behaviour and feel degraded or humiliated by it.
- (6) Examples of conduct which infringes Y's dignity are indecent exposure, communicating to Y (in practice, usually a woman) a message containing an invitation to, or a suggestion of, sexual immorality, and vulgar abuse.
- (7) Examples of conduct which infringes Y's privacy are the activities of "Peeping Toms", planting a listening device in Y's house, room or office, and opening and reading a confidential postal communication addressed to Y without his consent.
- (8) In order to qualify as *crimen iniuria*, the infringement of dignity or privacy must be serious.
- (9) The required form of culpability for this crime is intention.

**Criminal defamation**

- (10) Definition of crime – see definition above.
- (11) The crime protects the reputation of a person.
- (12) A person's good name or reputation can be harmed only if the conduct or words complained of come to the notice of someone other than Y; in other words, if publication takes place. If the conduct comes to the notice of Y only, it can at most amount to *crimen iniuria*.
- (13) Grounds of justification are the same as the defences available to the defendant in a civil defamation action, namely truth and public benefit, fair comment and privilege.
- (14) X must intend to harm Y's reputation by the unlawful publication of defamatory matter concerning him. X must also know that his words are not covered by any ground of justification. In other words, X must have the necessary knowledge of unlawfulness.

**Abduction**

- (15) Seven different elements can be identified in the crime of abduction. They were all mentioned above and, thereafter, each of them was explained.

## Kidnapping

- (16) Definition of crime – see definition above.
- (17) The interest protected is, in principle, the freedom of movement of a person. If the person is a child, the interest which is infringed is the control of a parent or guardian over the child.
- (18) X's motive in depriving Y of his or her freedom of movement need not necessarily be to demand a ransom for his or her release. However, if a ransom is demanded, X may also be punished for extortion.
- (19) Childstealing is merely a form of kidnapping.
- (20) Forcible removal is not a requirement for the crime. The removal may also be effected by cunning or craft.
- (21) It is also not required that a person be removed from one place to another. The crime can also be committed even though there is no physical removal, for instance where Y is concealed or imprisoned where he happens to be.
- (22) There is no such requirement for kidnapping that the perpetrator must intend to deprive Y permanently of his freedom of movement.



### FURTHER READING

For more information on crimes against dignity, reputation and freedom of movement, read:

- (1) Burchell *Principles of Criminal Law* (2016) 640–661; 666–672.
- (2) Kemp, Walker, Palmer, Baqwa, Gevers, Leslie & Steynberg *Criminal Law in South Africa* (2018) 332–342; 413–422.

## TEST YOURSELF

- (1) Define *crimen iniuria*.
- (2) Distinguish between *crimen iniuria* and criminal defamation.
- (3) Discuss the meaning of the term dignitas in the crime of *crimen iniuria*.
- (4) Discuss the following statement: "The infringement of the legal interests protected by *crimen iniuria* contains both a subjective and objective element."
- (5) Give examples of
  - (a) the infringement of dignity
  - (b) the infringement of privacy
- (6) Name and discuss the factors which may play a role in deciding whether the infringement of dignity or privacy was serious.
- (7) Define the crime of criminal defamation.
- (8) Distinguish between the interests protected by the crimes of criminal defamation and *crimen iniuria*.
- (9) Name the grounds of justification which may be relied upon on a charge of criminal defamation.
- (10) Discuss the intention required for the crime of criminal defamation.
- (11) Discuss the decision of the Supreme Court of Appeal in *Hoho* 2009 (1) SACR 276 (SCA).
- (12) Define abduction.
- (13) Write short notes on the following requirements for a conviction of abduction:
  - (a) that the minor was "removed" from the control of the parents or guardian
  - (b) with what intention the removal must take place
- (14) Define the crime of kidnapping.
- (15) Is childstealing a separate crime in our law or merely a form of kidnapping?
- (16) Distinguish between kidnapping and abduction.
- (17) Does X commit kidnapping if he removes Y, a 15-year-old boy, with his (Y's) consent from his parents' home, but without the boy's parents' consent?

PART C: CRIMES AGAINST THE PERSON

- (18) Y is a clerk who works in an office. X, who has a grievance against Y, locks the door of Y's office while Y is inside. In doing this, he makes it impossible for Y to leave his office, because the office is on the fifth floor of a building and Y therefore cannot escape through a window. X refuses to open Y's office unless Y complies with certain demands. Y refuses to agree to, or yield to, X's demands. X only lets Y free 24 hours after Y has been locked up in his office. Did X commit kidnapping? Give reasons for your answer.
- (19) In which circumstances would the crimes of kidnapping and abduction overlap?

# PART D

## Crimes against property

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# Learning unit 8

## Theft



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## LEARNING OUTCOMES

When you have finished this learning unit, you should be able to:

- demonstrate your understanding of the requirements for the crime of theft by
  - considering the possible liability of an accused for the crime of theft (in any of its forms, i.e. theft in the form of removal of property, embezzlement or arrogation of possession)
  - recognising someone who assists X, who has stolen property and is still in possession of the property, to hide or sell it, as being not only an accessory after the fact to theft, but also a co-perpetrator

## 8.1 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.

## 8.2 GENERAL CHARACTERISTICS OF THE CRIME

**(Criminal Law 475–572; Reader 16–27)**

Because of the absence of legislation defining the crime, one has to rely on the provisions of Roman-Dutch law in order to define its contents. In Roman-Dutch law, the crime comprised an exceptionally large number of acts.

It covered the appropriation not merely of another's property in the possession of such other person, but also of another's property which was already in the perpetrator's own possession. The following is an example of the last-mentioned form of theft:

Fearing that her house may be burgled while she is away on holiday, my neighbour requests me to keep a bottle of precious wine belonging to her in my house and to look after it while she is away. I agree to do so, receive the bottle of wine and put it away in my house. However, before my neighbour returns from holiday, I drink all the wine myself.

This type of conduct, which consists in appropriating someone else's property already in the perpetrator's possession or control, is known as **embezzlement**.

In our law, unlike other legal systems, embezzlement is not a separate crime, but merely a form of theft. In the above definition of theft, instances of embezzlement are covered by the words in subparagraph (2), which read "belongs to another but is in the perpetrator's own possession". Since acts of embezzlement amount to theft, one cannot define theft in our law merely in terms of the **removal** of another's property. When, in the above example, I drank my neighbour's wine, I did not first **remove** the wine from her possession – I already possessed it myself!

Another unusual characteristic of the crime in our law is that it can be committed even if X takes back her own property which is temporarily in another's lawful possession, for instance where X has pledged her watch to Y and then, before paying her debt to Y, withdraws it from Y's possession without Y's consent. In the above definition of the crime, this type of conduct is covered by the words in subparagraph (3). This form of theft may be described as the unlawful **arrogation of the possession of a thing**. Since such conduct also amounts to theft, it is incorrect to describe theft in our law exclusively in terms of the appropriation of **somebody else's** property.

### 8.3 LATIN TERMINOLOGY

Since the most important concepts relating to theft are derived from Roman law, some of the original Latin terminology is still used today to describe certain concepts relating to the crime. We would like to explain certain of these terms briefly.

The Latin word for theft is *furtum*.

The act of theft was described by the Romans as *contrectatio*. Generally speaking, *contrectatio* meant a physical handling of the property, which almost always involved touching the property. Today, it is clear that one may commit theft without necessarily touching the stolen property, for example where I drive somebody else's sheep from her land onto my own land. Since, in our present law, the act by which theft is committed is much broader than that conveyed by the meaning of the word *contrectatio*, this word should preferably be avoided when describing the act of stealing. The courts sometimes still use the word *contrectatio*, but then the term is nothing more than an "erudite-sounding" synonym for "the act of stealing". We prefer to describe the act as an **appropriation of the property**: not only is the word "appropriation" understandable to the layperson, but it is also flexible enough to encompass the wide variety of acts amounting to theft.

The object of the crime, that is, the property or thing stolen, is described in Latin as *res*.

*Animus furandi* means the "intention to steal". In our opinion, one can express the crux of the intention required for theft better by describing it as an "**intention to appropriate**". The meaning of the terms "appropriation" and "intention to appropriate" will be analysed in the course of the discussion of the crime which follows.

The expression *invito domino* means "without the owner's consent", and therefore refers to the unlawfulness requirement.

### 8.4 DIFFERENT FORMS OF THEFT

It is clear from the discussion above that theft can be committed in a variety of ways. Depending upon the way in which it is committed, it is possible to speak of, and distinguish between, the following different forms of theft in our law:

- (1) **The removal of property.** Here, X removes property belonging to somebody else from that person's possession and appropriates it. This is the most common form of theft.
- (2) **Embezzlement.** Here, X appropriates another's property which she already has in her possession.
- (3) **Arrogation of possession.** Here, X removes her own property which is in the lawful possession of another (such as a pledgee) and appropriates it.

It is also possible to distinguish further forms of theft, such as certain instances of the theft of money in the form of credit, which are governed by certain rules applicable only to such cases.

We shall arrange the discussion of the crime as follows: First, we shall discuss theft in the form of the removal of property. It is during the discussion of this form of theft that we shall analyse the four basic requirements of the crime which (in principle) must always be complied with – no matter what form of theft one is dealing with. Thereafter, we shall consider the other forms of theft, emphasising those particular rules applicable only to such forms of theft.

## 8.5 FOUR BASIC REQUIREMENTS

Four basic requirements must be complied with before a person can be convicted of theft in any of its forms. These four requirements are the following:

- (1) an **act of appropriation**
- (2) in respect of a **certain type of property** (or thing)
- (3) which takes place **unlawfully** and
- (4) **intentionally** (more particularly, with the intention to appropriate)

## 8.6 THEFT IN THE FORM OF THE REMOVAL OF PROPERTY

In this form of theft, X removes Y's property from Y's or somebody else's possession and appropriates it. It is the most common form of theft. The four basic requirements for liability for this form of theft are the following:

### 8.6.1 Act of appropriation

A person commits an act of appropriation if she commits an act whereby

- (1) she deprives the lawful owner or possessor of her property, and
- (2) she herself exercises the rights of an owner in respect of the property.

She thus behaves as if she is the owner or person entitled to the property, whereas she is not, and, in so doing, exercises control over the property.



The word "appropriation" is very important in the crime of theft. Please try to memorise and use the word in your answers on theft, and make sure you know what it means.

#### 8.6.1.1 Act of appropriation consists of two components

An act of appropriation consists of the following two components:

- a **negative** component, namely the exclusion of Y from the property
- a **positive** component, namely X's actual exercise of the rights of an owner in respect of the property in the place of Y

If only the second component has been complied with, but not the first, there is no completed act of appropriation. This explains why X does not commit theft in the following two types of situation:

- (1) **The "pointing out" situation.** X points out certain property (e.g. a cow) to Z and tells Z that the property belongs to her (X). The property in fact belongs not to X, but to Y. X then "sells" the property to Z, but, before Z can remove it, Y, the true owner, intervenes and X's fraudulent conduct is revealed. (The facts in *Makonie* 1942 OPD 164 and *Strydom* 1952 (2) SA 397 (T) are examples of a situation of this kind.) In a set of facts such as this, one could argue that there has been compliance with the positive component (because X professed to exercise the rights of an owner). However, it is clear that the negative component has not been complied with, because the real owner, Y, has not yet been excluded from the control over her property. There has therefore been no completed act of appropriation, and X cannot be convicted of theft. (She may, however, be convicted of attempted theft.)
- (2) **The situation where X is apprehended before she can complete the taking of the property.** In this type of situation, X exercises the rights of an owner over the property, but is caught before she can succeed in getting the property under her control. For example, X sets out to steal a motorcar. She gets into Y's car and starts tampering with the electrical wiring below the steering column of the car, but, before she can succeed in starting the car, she is caught by a police officer. In this type of situation, the positive component of appropriation

is present (X acted as if she were the owner), but the negative component is absent (because Y, the real owner, was not excluded from her property). For this reason, there has not been a completed appropriation of the property. X can, at most, be convicted of attempted theft.

#### 8.6.1.2 *Border between attempted and completed theft*

If X carries away Y's thing, but is apprehended shortly thereafter, before she has succeeded in removing the property to the exact locality she has in mind, the question arises whether she should be convicted of completed theft or attempted theft only.

**The test employed to distinguish between attempted and completed theft is the same as that employed to distinguish between an uncompleted and a completed act of appropriation: the crucial question is whether, at the stage when X was apprehended, Y had lost control of her property and X had gained control of the property in Y's place.**

The answer to this question depends upon the particular circumstances of each case, such as the character of the property taken, the way in which a person would normally exercise control over property of such a nature, and the distance between the place from which the property was removed and the place where X was apprehended with it. Since the thief and the owner have opposing claims to the property, they cannot simultaneously exercise control over it. The precise moment at which the owner loses her control and the thief gains it is a question of fact.

In *Tarusika* 1959 (1) R and N 51, for example, it was held that X had already gained control of the property and had consequently committed completed theft when he had removed a blanket from a washing line, had placed it under his arm and had been caught in possession of it 20 metres from the line.

#### 8.6.1.3 *Stealing from a self-service shop*

If X, intending to steal, conceals in her clothing an article offered for sale in a self-service shop and is apprehended with the article before leaving the shop, the courts have decided in some cases that she can be convicted of completed theft (*Dlamini* 1984 (3) SA 196 (N)).

One would be inclined to think that the owner of the shop exercises control over all the articles as long as they are still in the shop and that X could consequently be guilty of completed theft only if she is caught after having moved past the checkout point or perhaps after having left the shop itself. The fact that the courts accept that X can be convicted of completed theft in such circumstances may, in our view, be explained as follows: Because the public is invited to help themselves in the shop, and because even security personnel who have to try to trace the thieves in the shop find it well-nigh impossible to keep all clients continually under surveillance while they are in the shop, it cannot be said that, practically speaking, the owner of the self-service shop exercises effective control over all the articles in the shop while the shop is open.



Read the following judgment in the *Reader*: **Nkosi** 2012 (1) SACR 87 (GNP).

In **Nkosi** 2012 (1) SACR 87 (GNP), the court observed that "one should be cautious not to lavishly apply the shoplifting principle to all other cases where a determination has to be made between completed and attempted theft" (at 90*h*). In the court's view, theft out of self-service shops constitutes "a special form of theft" because there is always the risk that a person who contemplates theft and hides an article under his clothes may get away with his act (referring to *Tau* 1996 (2) SACR 97 (T) at 102*h-i*).

However, whether completed or only attempted theft was committed in the context of a self-service shop depends on the facts of each particular case. *Mekula* 2012 (2) SACR 521 (ECG) is a

good illustration of the application of the principles. X took a bottle of whiskey from the shelf of a liquor store and concealed it under his clothes. On being spotted by the security guard, he attempted to put the bottle back but the bottle broke. He was convicted of theft but on review his conviction was set aside on the ground that the owner had not yet been excluded from his property. The court found that the owner still exercised effective control over the bottle through the security guard. The security guard had noticed the intended offence and X had recognised that it would not be possible for him to leave the premises with the liquor. The conviction for completed theft was therefore incorrect and was replaced by a conviction for attempted theft.

These cases illustrate that in each instance, it must be determined whether the shop owner still had effective control over the property.

### 8.6.2 The property

In principle, theft can be committed only in respect of a certain type of property (or thing). However, as we shall see, there are specific exceptions to this rule. To qualify as property capable of being stolen, the property must comply with the following requirements:

- (1) The property must be **movable**. An example of immovable property is a farm. Therefore, one cannot steal a part of a farm by moving its beacons or fences. If part of an immovable property is separated from the whole, it qualifies as something that can be stolen; examples in this respect are mealie cobs separated from mealie plants (*Skenke* 1916 EDL 225) and trees cut down to be used as firewood (*Williams* HCG 247).
- (2) The property must be **corporeal**. This means that it must be an independent part of corporeal nature. In principle, one must be able to see or touch it. One cannot therefore steal a mere idea (*Cheeseborough* 1948 (3) SA 756 (T)) or even a tune (although, in the last-mentioned case, X might be liable for damages in terms of the legal provisions relating to copyright). The rule that only corporeal property is capable of being stolen should, however, be viewed circumspectly. This requirement has already been considerably watered down in our law. Note the following two exceptions to the rule:

*First*, from Roman times, the law has recognised that an owner may steal her own property from somebody else who is in lawful possession of the property (such as a pledgee). (This form of theft is known as "the arrogation of possession".) Yet, in reality, it is not the property that is stolen. While it is true that, here, the act is directed at a corporeal thing, what is infringed is the possessor's **right of retention**, which is a right and therefore something incorporeal.

A *second* clear exception to the rule is the following: In the case of certain types of conduct recognised by the courts as theft, namely the theft of money through the "manipulation" of cheques, banking accounts, funds, false entries, etcetera, the object stolen is not a corporeal thing in the form of individual coins or money notes, but something incorporeal, namely "credit" or an "abstract sum of money". (See the discussion below of certain aspects of the theft of money.)

In *Mintoor* 1996 (1) SACR 514 (C), the court held that electricity cannot be stolen since it is not a particular material but rather a movement of molecules; a form of energy.



Read the following judgment in the *Reader*: **Ndebele** 2012 (1) SACR 245 (GSJ)

In **Ndebele** 2012 (1) SACR 245 (GSJ), the court regarded this approach as being out of step with modern developments in the law of theft. Lamont J argued that the courts have moved away from the "physical handling of the property" requirement to a broader and more abstract requirement of "appropriation." This development occurred in order to make provision for the more complicated financial transactions that take place in modern times,

such as theft through manipulation of credit (245c-d). In such instances, the taking does not consist in the physical removal of a thing but rather the "appropriation of a characteristic which attaches to a thing and by depriving the owner of that characteristic" ((254i-j)). The court explained that energy created by electricity does not exist as an abstract concept; it exists in reality in the form of energised electrons. The characteristic which attaches to the electron is the energy by which it moves, and it is that characteristic that is consumed when the electricity passes through a load in the customer's residence through the customer's circuit (at 256b). This characteristic of electricity and the extent to which it has been used is measurable. It is produced and sold to its customers by Eskom and is also susceptible to theft.

- (3) The property must be **available in** (or capable of forming part of) **commerce**. (In Latin phraseology, the property must be *in commercio*.) Property is available in commerce if it is capable of being sold, exchanged or pledged, or generally of being privately owned. The following types of property are **not** capable of forming part of commercial dealings and are therefore not susceptible to theft:
  - (a) *Res communes*, that is, property belonging to everybody, such as the air, the water in the ocean or water in a public stream. In *Mostert* 2010 (1) SACR 223 (SCA), the accused, two sugar cane farmers, were charged, *inter alia*, with various offences under the National Water Act 1998, as well as with the common-law offence of theft. Allegedly, they had pumped more water from a river than legally permitted as riparian owners. The Supreme Court of Appeal held that water flowing in a river or stream (a water resource as envisaged in the legislation) was incapable of being stolen, so that the accused could be convicted of the statutory offences, but not of the common-law offence of theft.
  - (b) *Res derelictae*, that is, property abandoned by its owners with the intention of ridding themselves of it. Property which a person has merely lost, such as money which has fallen out of a person's pocket, is not *res derelictae*, because such a person did not have the intention to get rid of it. It can normally be accepted that articles thrown out by householders in garbage containers or dumped onto rubbish heaps are *res derelictae*.
  - (c) *Res nullius*, that is, property belonging to nobody, although it can be the subject of private ownership, such as wild animals or birds (*Mafohla* 1958 (2) SA 373 (R) (wild kudu); *Mnomiya* 1970 (1) SA 66 (N) (honey of wild bees)). However, if such animals or birds have been reduced to private possession by capture, for example birds in a cage or animals in a zoo, they can be stolen (*Sefula* 1924 TPD 609).
- (4) In principle, the property must **belong to somebody else**. One cannot, therefore, steal one's own property. The exception to this rule is the case of the unlawful arrogation of the possession of a thing (*furtum possessionis*), which will be explained below.

### 8.6.3 Unlawfulness

By far the most important ground of justification excluding the unlawfulness of the act is consent by the owner to the removal or handling of the property. The requirement that the owner should not have consented to the taking is often expressed in legal literature by the statement that X should have acted *invito domino*; this Latin expression means "without the owner's consent".

Presumed consent (also called "spontaneous agency") may also constitute a ground of justification, as in the following example:

While my neighbour Y is away on holiday, her house is threatened by flood waters; I remove her furniture to my own house in order to protect it. I am then not guilty of theft.

### 8.6.4 Intention

The form of culpability required for theft is intention. The crime can never be committed negligently. According to the general principles relating to intention, the intention (and, more particularly, X's knowledge) must refer to all the requirements or elements of the crime. We have

already discussed the three basic requirements for the crime, other than the requirement of intention itself, namely an act of appropriation, the property requirement and the requirement of unlawfulness. In the discussion which follows, we shall consider the intention in respect of each of these three basic requirements separately. Chronologically, one ought first to discuss the intention in respect of the act, but, because this aspect of the requirement of intention is characterised by some unusual features and therefore requires a lengthier explanation, we shall postpone the discussion of this till after a discussion of the intention in respect of the property and unlawfulness requirements.

#### 8.6.4.1 *The intention in respect of the property*

This aspect of the requirement of intention means that X must know that what she is taking, or that at which her conduct is directed, is a movable corporeal property which is available in commerce and which belongs to somebody else or (in cases of theft in the form of the arrogation of possession) which belongs to herself, but in respect of which somebody else has a right of possession which prevails against her (X's) right of possession.

If X believes that her action is directed at a *res nullius* or *res derelictae*, whereas the particular piece of property is in fact not a *res nullius* or *res derelictae*, she lacks the intention to steal and cannot be convicted of theft.

In *Rantsane* 1973 (4) SA 380 (O), for example, X removed a dirty mattress cover from a garbage container in a military camp. He was under the impression that the owner (i.e. the Defence Force authorities at the camp) had thrown it away – in other words, that it was *res derelictae*. It appeared, however, that the quartermaster at the camp had not discarded it, but that one of the conscripts had possibly dumped it in the garbage container because he regarded it as too dirty to sleep on. X was found not guilty of theft, because he had acted mistakenly and therefore lacked the intention to steal.

If X believes that the property she is taking belongs not to another, but to herself, she likewise lacks the intention to steal.

#### 8.6.4.2 *The intention in respect of the unlawfulness*

X must be aware of the fact that she is acting unlawfully, that is, that Y had not agreed to the removal or handling of the property.

In *Slabbert* 1941 OPD 109, Y invited X for a drink at Christmas. On arriving at his host's home, he found no-one there and helped himself to drinks. He was found not guilty on a charge of stealing some of Y's drinks, because he lacked awareness of unlawfulness: he thought that Y would not object if he helped himself to drinks.

#### 8.6.4.3 *The intention in respect of the act (i.e. intention to appropriate)*

As pointed out above, the act of stealing consists in an appropriation of the property. It follows that the intention in respect of the act consists in the intention to appropriate the property.

##### *(a) Meaning of intention to appropriate*

In the discussion of the act, it was also pointed out that the concept "appropriation" comprises two components, a positive and a negative one. The positive component consists in X exercising the rights of an owner over the property, while the negative one consists in X excluding the owner from her property. Since the intention to appropriate is a mirror image of the act of appropriation, it must reflect both the above components of the concept "appropriation".

As a result, X must have:

- (1) **an intention to exercise the rights of an owner in respect of the property, as well as**
- (2) **an intention to exclude the owner from exercising her rights over her property; in other words, to deprive her of her property**

*(b) Intention permanently to deprive*

The intention to deprive the owner (Y) of her property (i.e. intention (b) immediately above) must, however, be qualified in a very important respect: X's intention must be to deprive Y **permanently** of her property. If X wishes to deprive Y only temporarily of her property, she still respects and recognises Y's right to her property throughout. This is contrary to the essence of appropriation. Let us assume that I take my friend's car without her consent, not intending to deprive her of it permanently, but intending merely to take a joyride in it and then to return it to her. If this is my intention when I take and use the car, I do not commit theft, because I lack the intention to appropriate the property.

In the past, it was not always very clear whether an intention permanently to deprive Y of her property was required for a conviction of theft. This particular intention was not required in Roman and Roman-Dutch law (i.e. in our common law). Instead of this requirement, the common law required an intention to act *lucri faciendi gratia*, – that is, with an intention to derive some benefit from the handling of the property. (The concept "benefit" was very widely interpreted in our common law.)

Because the common law did not require an intention permanently to deprive Y of her property, X could be convicted of theft even if she intended to use the property without Y's consent only **temporarily** before returning it to Y. This form of theft in common law was known as *furtum usus*, – that is, theft of the **use** (of the property). In legal literature, this type of conduct is also sometimes referred to as "unlawful borrowing" or the "arrogation of the use of a thing". Before 1955, there was uncertainty in our law whether *furtum usus* (the temporary use of property without the owner's consent) still amounted to theft.

In 1955, the Appellate Division in **Sibiya** 1955 (4) SA 274 (A) removed the uncertainty by clearly holding that *furtum usus* is no longer a form of theft in our law and that, for X to be convicted of theft, an intention permanently to deprive Y of her property is therefore required.



Read the following judgment in the *Reader*: **Sibiya** 1955 (4) SA 274 (A).

In this case, X removed Y's car without his consent and took a joyride in it, intending to return it to Y. However, the car overturned and landed in a donga. When the police arrived at the scene, X (who was apparently unscathed) was still standing near the car. The Appellate Division held that he had not committed theft.

*(c) Intention to appropriate includes intention permanently to deprive*

Although *Sibiya* and other later judgments emphasised the intention permanently to deprive Y of her property, we are of the opinion that it is better to describe the intention in respect of the act as an intention to appropriate the property. The intention to appropriate is not in conflict with the intention permanently to deprive. As explained above, the intention to appropriate is wide enough to encompass the intention permanently to deprive. If one places all the emphasis on the intention permanently to deprive Y of her property, and neglects the intention to appropriate (and, more particularly, the intention directed at the positive component of the concept of appropriation), there is a danger that X may be convicted of theft where the facts reveal that she actually committed only malicious injury to property (a crime that will be discussed hereunder).



Thus if, for example, X chases Y's cattle over a precipice to their death, without performing any further acts in respect of the cattle, or if X merely sets Y's furniture alight, X certainly has the intention permanently to deprive Y of her property, but it is questionable whether she also has the intention to appropriate the property.

It is clear from the judgment in *Sibiya* that the mere temporary use of another's property does not constitute theft. This, however, does not mean that such conduct is not punishable. After the judgment in *Sibiya*, the legislature passed legislation aimed at preventing X from escaping criminal liability in such a situation. In section 1 of Act 50 of 1956, the legislature created an offence penalising the unlawful removal of another's property for temporary use in certain circumstances. This in fact amounts to a statutory form of unlawful borrowing. However, we shall not discuss this statutory offence in this course.

#### *(d) Exceptions to the rule that temporary use is not theft*

Note the following important qualification to the rule that the mere temporary use of another's property is not theft:

- (1) If X removes Y's car intending to use it only temporarily, but, before she returns the car, it breaks down or possibly collides with some object, and X simply abandons it without notifying Y of the situation, she may indeed be guilty of theft. By abandoning the car without caring whether Y will ever find it again, X adopts an intention which is the opposite of an intention of returning the car to Y: she foresees the possibility that Y may lose her car and behaves recklessly towards this possibility. Her state of mind amounts to intention in the form of *dolus eventualis* to deprive Y permanently of her car. The facts in *Laforte* 1922 CPD 487 are similar; in this case, X was convicted of theft.
- (2) If X takes Y's property without Y's consent, not in order to take and use it unreservedly for her own benefit, but only to retain it as a pledge or security for a debt which Y owes her, she lacks the intention to appropriate and is therefore not guilty of theft. The intention to appropriate is absent, because X does not wish to deprive Y of the full benefit of her ownership: she is prepared to return the property to Y as soon as Y has repaid the debt. In *Van Coller* 1970 (1) SA 417 (A), for example, X, a "flying doctor" in Botswana, took possession of four microscopes belonging to the Botswana government without its consent. He intended returning the microscopes, provided that certain criminal charges against him were withdrawn by the Botswana authorities, as they had undertaken to do. The court held that this intent could not be reconciled with an intent to deprive the owner of the full benefit of his ownership. The court therefore held that X had not committed theft.

#### *(e) Intention to acquire benefit not required*

Unlike common law, in our law an intention to acquire some form of gain or advantage from the acquisition or handling of the property is no longer a requirement for theft.

The judgment in *Kinsella* 1961 (3) SA 520 (C) illustrates this principle. In this case, X was a major in the Defence Force. He removed property belonging to the Defence Force without its permission and sold it, not with the intention of converting the proceeds of the sale for his own personal benefit, but in order to use the proceeds to acquire certain facilities for the residents of the military camp of which he was in charge. His defence that he never intended to acquire any personal advantage from the transaction was rejected. The Court stated that he would have been guilty of theft even if he had intended to donate the proceeds of the sale to a charitable organisation.

It follows from the above that, in order to be convicted of theft, it is not required that X should intend to "keep the property for herself". If X were to remove Y's property without consent and minutes later give it to Z as a present, she would still be guilty of theft.



### Does finding “lost treasure” constitute theft?

If a container ship loses a container during rough seas and it washes ashore, do the people who take the contents of a container commit the crime of theft? Similarly, if a boat is grounded, spilling its contents on the beach where it is salvaged by persons, can they be charged with theft? Closer to home, can people who loot the contents of a crashed cargo truck be found guilty of theft? The taking of the property satisfies all the definitional elements of theft: it is the unlawful, intentional appropriation of movable, corporeal property which belongs to another, with the intention to permanently deprive the owner of the property. Do you feel that the people who took the property felt they had a right to the property? Do you think they considered the contents of the crashed truck as *res derelictae* (abandoned property)? What would your views on such behaviour be?

## 8.7 EMBEZZLEMENT (*Criminal Law 490–492*)

As pointed out above, theft can be committed in a variety of ways. Thus far we have considered the form of theft most often incurred in practice, namely the removal by X of somebody else's property and the appropriation of the property. We next consider certain other ways in which the crime can be committed.

X commits theft in the form of embezzlement (sometimes also called “theft by conversion”) if she appropriates another's (Y's) property which is already in her (X's) possession. The only difference between this form of theft and theft in the form of the removal of property is to be found in the way in which the act of appropriation takes place: unlike theft in the form of the removal of property, in the case of embezzlement X need not first remove the property from Y's possession before appropriating it; she only commits an act of appropriation in respect of property already in her possession. The other requirements for the crime apart from the act – that is, the property, the unlawfulness and the intent requirements – are the same as those in the case of theft in the form of the removal of property. In the following discussion of embezzlement, we shall, accordingly, not again discuss these last three requirements. We shall consider certain aspects of the requirement of the act only.

In embezzlement, the way in which X comes into possession of the property is immaterial. For example, it is immaterial whether the animal that X appropriates accidentally walked onto X's land or whether its owner had entrusted it to her.

The following are examples of acts amounting to X's appropriation of Y's property, which is already in X's possession:

- X **consumes** the property (e.g. she eats Y's food or burns Y's firewood)
- she **sells** it (*Markins Motors (Pty) Ltd 1958 (4) SA 686 (N)*)
- she **donates** it
- she **exchanges** it for something else (*Van Heerden 1984 (1) SA 666 (A)*)
- she uses it to **pay her debts**

The conduct of somebody who **finds** or **picks up** an article which somebody else has lost and who then keeps it for herself, or, for example, uses, consumes or sells it, may in certain circumstances amount to theft. Thus, if the finder knows who the owner of the article is or how to trace her, but fails to inform the owner and, for example, consumes it herself, her conduct would amount to an appropriation of the article (*Luther 1962 (3) SA 506 (A)*). (A person who picks up a single coin or other article of small value and appropriates it would normally not be charged with or convicted of theft, because of the operation of the maxim *de minimis non curat lex*.)

The mere failure or procrastination by X to return the property to Y, or her mere false denial of possession, cannot without more ado be construed as an appropriation of the property (*Kumbe* 1962 (3) SA 197 (N)). One would have to investigate all the circumstances of the case before assuming that X's mere failure amounts to an appropriation. However, it is not inconceivable that X's mere passivity or *omissio* may amount to an appropriation; this may, for example, happen if X simply refuses to return Y's mantelpiece clock which she had to look after, but which is now in her lounge where she can regularly consult it to ascertain the time, but X's mere decision not to return the property does not constitute its appropriation; mere thoughts or a mere resolve are not punishable.

In *Director of Public Prosecutions, Western Cape v Parker* 2015 (2) SACR 109 (SCA), the court held that a VAT (value-added tax) vendor who misappropriates an amount of VAT which is payable to the South African Revenue Service (SARS), cannot be charged of common-law theft. This is because the Value-Added Tax Act 89 of 1991 is a scheme with its own directives, processes and penalties and does not confer on the vendor the status of a trustee or tax-collecting agent of SARS. Instead, it creates a debtor-creditor relationship which means that SARS can sue the vendor for payment of the VAT and/or have such vendor charged with offences created in terms of the said Act.

## 8.8 ARROGATION OF POSSESSION (*FURTUM POSSESSIONIS*)

Although, today, *furtum usus* is no longer regarded as a crime in our law, *furtum possessionis* is. In this case, the owner steals her own thing by removing it from the possession of a person who has a right to possess it, which legally prevails over the owner's own right of possession. The pledgee and somebody who has a right of retention are examples of persons who enjoy such a preferential right of possession.

Consider the following example: X wishes to borrow money from Y. Y is only prepared to lend X the money if X gives her (Y) her (X's) watch as security for the repayment of the debt. X gives Y her watch and Y lends X the money. In terms of the agreement, X will get her watch back only after she has repaid Y the amount of money owing. However, before she has paid Y the money, X takes the watch into her own possession without Y's consent. This constitutes theft in the form of the arrogation of possession.

This form of theft is peculiar, in that what X steals is in fact her own property.

In *Roberts* 1936 (1) PH H2 (C), X took his car to a garage for repairs. The garage had a lien (a "right to retain") over the car until such time as the account for the repairs had been paid. X removed his car from the garage without permission. He was convicted of theft.

In *Janoo* 1959 (3) SA 107 (A), X, the owner of a carton of soft goods which he had ordered by post, removed the carton from the station without the permission of the railway authorities. He was entitled to receive the goods only against signature of a receipt and certificate of indemnification. His intention in removing the goods was later to claim the loss from the railway. He was found guilty of theft.



### ACTIVITY

- (1) X's neighbour, Y, owes X R800, but fails for more than two years to pay back the money. One day, X goes to Y's house, takes Y's television set and puts it in her (X's) storeroom. She tells Y that he will get his television back only after he has paid her (X) the R800 which he owes her. X does not use the television set, but merely keeps it in order to induce Y to pay his debt.
- (2) X intentionally removes a large quantity of food and clothing from a millionaire's house without his consent. She does not use any of the booty herself, but distributes it among the poor.

- (3) A stray horse walks onto land belonging to X, a farmer. X does not know who the owner of the horse is and allows it to graze on her property. Three months later, she ascertains that it belongs to Y. A month thereafter, X, who is in financial difficulty, sells the horse and uses the money to pay her debts.



## FEEDBACK

- (1) X did not commit theft, because she did not intend to deprive Y of all the benefits of his ownership. X intended throughout to give the television set back to Y as soon as Y had paid her the debt. She intended to deprive Y only temporarily of his property. This cannot be equated to an intention to appropriate it, for the last-mentioned intention presupposes an intention permanently and fully to exclude Y from his property. The leading case in this regard is *Van Coller*.
- (2) X committed theft despite the fact that she did not use or consume the goods herself. She intended to appropriate the articles unlawfully. She disposed thereof as if she were the owner and, in so doing, excluded the owner from exercising his rights to the articles. The fact that X did not acquire any benefit for herself is no defence in our law. See the decision in *Kinsella*, discussed above.
- (3) X committed theft in the form of embezzlement. The fact that she sold the horse which had come into her possession is clear evidence of an appropriation.

## 8.9 CERTAIN ASPECTS OF THE THEFT OF MONEY

### (*Criminal Law 493–500*)

No-one will deny that money can be stolen, and where cash (banknotes, coins) is unlawfully removed from the owner by a person who appropriates it for herself, it is generally straightforward. In the modern business community, however, cash is seldom used. Money generally changes hands by means of cheques, negotiable instruments, credit or debit entries in books, or registration in the electronic "memory" of a computer.

Suppose that X, an attorney, undertakes to administer the financial affairs of Y, an aged widow who is growing senile. As trustee of Y's money, X has an obligation to receive all cheques made out to Y or represent funds to which she is entitled, and then to deposit them into her banking account or invest them for her at a favourable rate of interest. X receives the cheques, but, contrary to her (X's) duties, she deposits them into her own (i.e. X's) banking account in order to enable her (X) to pay her own private debts.

In such a set of facts, X does not handle any tangible coins or notes, that is, corporeal things. What she is dealing with and converting to her own use is something incorporeal, namely mere "credit" or an "abstract sum of money". If she were to be convicted of theft, it would mean that she would in fact be convicted of theft of incorporeal property. However, according to our courts, this consideration affords her no defence on a charge of theft: the conduct described above constitutes theft (*Verwey 1968 (4) SA 682 (A)*). The courts emphasise that what is important is not so much the particular mechanisms employed by X to acquire money, but rather the economic effect of her actions, namely the reduction of the credit in Y's banking account (*Scoullides 1956 (2) SA 388 (A)*).

The position would be the same if, in the above example, X had undertaken to write out cheques on behalf of Y in order to pay her creditors, but, contrary to her undertaking, X wrote out cheques enabling her to withdraw money from Y's banking account and to channel this money into her own banking account in order to pay her (i.e. X's) own private debts. X would then be guilty of

theft of the money. The fact that, as a trustee, she has the right to write out cheques on Y's behalf does not afford X a defence, because, according to the courts, Y has a so-called "special interest or property" in the money or funds in her account; by writing out cheques contrary to her duties, X infringes Y's "special interest or property" (*Manuel* 1953 (4) SA 523 (A)).

### 8.10 THEFT IS A CONTINUING CRIME

Theft is a *delictum continuum* or a continuing crime. This means that the commission of the crime continues for as long as the stolen property remains in the possession of the thief.

The result of this rule is that, generally, our law draws no distinction between perpetrators and accessories after the fact in respect of theft. If X has stolen property and thereafter Y assists X, who is still in possession of the property, to hide or sell it, Y is guilty not merely of being an accessory after the fact to the theft, but also of theft as a co-perpetrator, because, at the time she assisted X, the theft was not yet completed, but still in the process of taking place.

In *Von Elling* 1945 AD 234, X was convicted of theft (as a co-perpetrator) because, at the request of Z, who had stolen a motorcar, he drove the car from one garage to another with the intention of concealing it from the owner.

### GLOSSARY

|                              |                                                                         |
|------------------------------|-------------------------------------------------------------------------|
| <i>animus furandi</i>        | the intention to steal                                                  |
| <i>contrectatio</i>          | the act of stealing (handling or touching of the property)              |
| <i>delictum continuum</i>    | a continuing crime                                                      |
| <i>furtum</i>                | theft                                                                   |
| <i>furtum possessionis</i>   | theft of the possession of the property (arrogation of possession)      |
| <i>furtum usus</i>           | theft of the use of the property (no longer a form of theft in our law) |
| <i>invito domino</i>         | without the consent of the owner                                        |
| <i>lucri faciendi gratia</i> | the intention of gaining some gain or advantage                         |
| <i>res</i>                   | the thing or property                                                   |
| <i>res communes</i>          | things belonging to everybody                                           |
| <i>res derelictae</i>        | abandoned things                                                        |
| <i>res in commercio</i>      | things that are capable of forming part of commerce                     |
| <i>res nullius</i>           | things belonging to nobody                                              |

### SUMMARY

- (1) Definition of theft: see the definition above.
- (2) The act of stealing consists in the appropriation of the property.
- (3) The act of appropriation consists in any act whereby X
  - (a) deprives the lawful owner or possessor of her property, and
  - (b) exercises the rights of an owner herself in respect of the property
- (4) A person can commit theft of another's property either in circumstances in which the property is in the owner's possession or in circumstances in which it is in the perpetrator's own

possession. The former form of theft is known as the **removal of property** and the latter as **embezzlement**.

- (5) It is possible for the perpetrator (X) to commit theft even in respect of property belonging to herself. This happens if she removes her own property from the possession of a person (such as a pledgee) who has a right to possess it, which legally prevails over the owner's own right of possession. This form of theft is known as the **arrogation of possession**.
- (6) For property to be capable of being stolen, it must
  - (a) be **movable**
  - (b) be **corporeal**
  - (c) be **capable of forming part of commerce** (which means that it should not fall into one of the following categories:
    - (i) *res communes*– things belonging to **everybody**
    - (ii) *res derelictae*– **abandoned** property
    - (iii) *res nullius*– things belonging to **nobody**)
  - (d) **belong to somebody else** (except in cases of the arrogation of possession)
- (7) In order to be unlawful, the act of stealing must take place, *inter alia*, **without the permission** of the person who has a right to possess it.
- (8) In order to have the intention required for theft, X's intention (which includes her knowledge) must
  - (a) relate to the **act**
  - (b) relate to the **nature of property**
  - (c) relate to the **unlawfulness**, and,
  - (d) furthermore, she must have the intention **permanently** (and not merely temporarily) to deprive the person entitled to the possession of the property, of such property.

The intention relating to the **act** means that X must intend to appropriate the property. The intention relating to the nature of the property (ie, the **property requirement**) means that she must know that the thing she is appropriating is a movable, corporeal thing belonging (in principle) to another. The intention in respect of the **unlawfulness** requirement comprises, *inter alia*, a knowledge on the part of X that the person who is entitled to the possession of the property has not consented to the taking of the property.
- (9) The intention permanently to deprive the person entitled to the possession of such property means that X does not commit theft if she takes the property with the intention merely of using it temporarily and then of returning it to the person entitled to its possession.
- (10) In theft in the form of embezzlement, X appropriates another's property which already happens to be in her (X's) possession. Here it is not necessary for X first to remove the property from another's possession, since she is already in possession of it.
- (11) In theft in the form of the arrogation of possession, the owner steals by removing her own property from the possession of the person who has a right to possess it and whose right legally prevails over the owner's own right of possession.



#### FURTHER READING

For more information on crimes of theft, read:

- (1) Burchell Principles of *Criminal Law* (2016) 689–703.
- (2) Kemp, Walker, Palmer, Baqwa, Gevers, Leslie & Steynberg *Criminal Law in South Africa* (2018) 424–440.

TEST YOURSELF

1. Define theft.
2. Distinguish between the following forms of theft:
  - (a) the removal of property
  - (b) embezzlement
  - (c) the arrogation of possession
3. Define and discuss the meaning of "the act of appropriation".
4. Discuss fully the question of which types of property are capable of being stolen.
5. Discuss the intention to appropriate.
6. Discuss the form of theft known as embezzlement.
7. Discuss the form of theft known as the arrogation of possession.
8. X visits a self-service shop. She takes a piece of soap from a shelf and hides it in her clothing, intending to steal it. When she reaches the till, a security guard, who has watched her the whole time, arrests her. With reference to the requirement of an act in theft, discuss the question whether X should be convicted of theft or merely of attempted theft.
9. Is it required, in order to satisfy the intention requirement in theft that X should have intended to derive some benefit from the acquisition of the property? Discuss.
10. X takes Y's motorcar without Y's consent and drives a few kilometres in it just for pleasure. Thereafter, she brings it back to Y. Already, when she switched on the car, she intended to use it only temporarily and then to restore it to Y. Has X committed theft? Discuss with reference to case law.
11. What is the meaning of the following?
  - (a) *contrectatio*
  - (b) *animus furandi*
  - (c) *furtum usus*

# Learning unit 9

## Robbery and receiving stolen property



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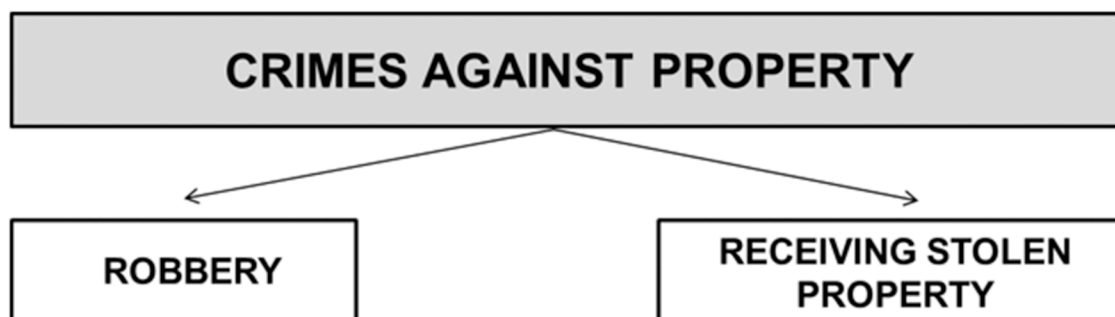
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### LEARNING OUTCOMES

When you have finished this learning unit, you should be able to:

- demonstrate your understanding of the requirements for certain crimes against property by
  - considering the possible liability of an accused for the crime of robbery
  - identifying the crime of which the "bag-snatcher" can be convicted
  - considering the possible punishment to be imposed for robbery
  - considering the possible liability of an accused for the crime known as receiving stolen property, knowing it to have been stolen
- demonstrate your understanding of the punishment prescribed for robbery.



## 9.1 ROBBERY

*(Criminal Law 508–512; Reader 28–30)*

### 9.1.1 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.



Please note that it is customary to describe robbery briefly as "theft by violence". Though incomplete, such a description does reflect the essence of the crime. Please also remember that for the crime of theft "force" is required, while for the crime of robbery "violence" is essential.

### 9.1.2 Elements of the crime

The elements of the crime are the following:

- (1) the **theft of the property**
- (2) **the use of either actual violence or threats of violence**
- (3) a **causal connection** between the violence (or threats thereof) and the acquisition of the property
- (4) **unlawfulness**
- (5) **intention**

### 9.1.3 General character of the crime

All the requirements for theft apply to robbery too. We are not going to repeat all of them. It is sufficient to point out the following: Just as in theft, the possessor or person who is entitled to the property must not, of course, have consented to the taking, and X must have known that consent

was lacking. Also, only movable, corporeal property that is available in commerce can form the object of robbery. In *S v Sishuba* 2018 (1) SACR 402 (WCC), the court held that the forced transfer of money by electronic means amounts to the crime of robbery. After threatening Y with violence, X took R14 000 from Y's bank account by electronic means. Henney J concluded (at para 94) that, similar to theft, the crime of robbery could also be committed by the theft of an incorporeal thing through violence or force.

#### 9.1.4 Application of force

As appears from the definition of the crime, robbery can be committed in two ways, namely either by the application of actual violence or by threats of violence. (The crime of assault, likewise, can be committed in these two ways.)

As far as the actual application of violence is concerned, the violence must be aimed at Y's person, that is his bodily integrity (*Pachai* 1962 (4) SA 246 (T) 249). The violence may be slight, and Y need not necessarily be injured. Robbery is likewise committed if X injures Y and thereupon takes the property from him while he (Y) is physically incapacitated, provided that X already at the time of the assault intended to take it (*Mokoena* 1975 (4) SA 295 (O); *L* 1982 (2) SA 768 (ZH)).



#### Force, theft and robbery

X, a thief, uses force on Y, a homeowner, who confronts him when he escapes out Y's back door. Is this robbery? If so, would it still be robbery if Y had not confronted X in the house but chased him down the street and was then attacked by X? In order to answer these questions, you need to consider when force was applied by X to the person of Y. Was the theft still continuing when the force was used? When did the appropriation end? It is logical that an appropriation lasts as long as the thief is still in the act of stealing, or "on the job"? Try to answer these questions by considering the above statements. In *S v Davids* 2019 (1) SACR 257 (WCC), the accused pushed the complainant off her feet while escaping the scene of a housebreaking. The court held that the act constituted robbery, but without aggravating circumstances. Consider the following as well: pickpocketing is considered theft and not robbery, because the pickpocket does not use force in order to steal. But what about the situation when X snatches a lit cigarette from Y's hand where there is no direct contact between the hands of X and Y? Will this constitute robbery or not? This situation is regarded as similar to pickpocketing, and is simply theft.

#### 9.1.5 Threats of violence

Robbery is committed even if there is no actual violence against Y: a threat of physical violence against Y if he does not hand over the property, is sufficient (***Ex parte Minister of Justice: In re R v Gesa, R v De Jongh*** 1959 (1) SA 234 (A)). In such a case, Y simply submits, through fear, to the taking of the property. Thus Y need not necessarily be physically incapacitated. The threats of violence may be express or implied.



Read the following judgment in the Reader: ***Ex parte Minister of Justice: In re R v Gesa, R v De Jongh*** 1959 (1) SA 234 (A).

### 9.1.6 Causal link between violence (or threats thereof) and the acquisition of the property

There must be a causal link between the violence or threats of violence on the one hand and the acquisition of the property on the other. If X acquires the property not as a result of the violence (or threats), but as a result of some other consideration or event, he does not commit robbery.

The judgment in *Pachai* 1962 (4) SA 146 (T) illustrates this rule. In this case, X made telephone calls to Y in the course of which he threatened Y. Y reported the telephone calls to the police, who then set a trap for X in Y's shop. X entered the shop, demanded money and cigarettes from Y, and aimed a pistol at Y. Y then handed over the money and cigarettes to X. At that stage, the police were hiding in the shop and, immediately after the handing over of the property, arrested X. The court held that Y did not hand over the property to X **as a result of** X's threats, but in the course of a prearranged plan together with the police which was aimed at securing X's arrest. Consequently, X was not found guilty of robbery. He was, however, found guilty of attempted robbery.

If X steals something from Y, and then uses violence to retain the property (i.e. to prevent Y from regaining his property), or to avoid being caught by the police (or someone else), he does not commit robbery, although he may be convicted of the two separate offences of theft and assault (*Ngoyo* 1959 (2) SA 461 (T)). The converse is also true: if X only wanted to assault Y, and, after having knocked him unconscious for the first time, discovers his (Y's) watch lying in the road and then only hits on the idea of taking it, and in fact does so, he does not commit robbery, but the two separate offences of assault and theft (*Malinga* 1962 (3) SA 589 (T)).

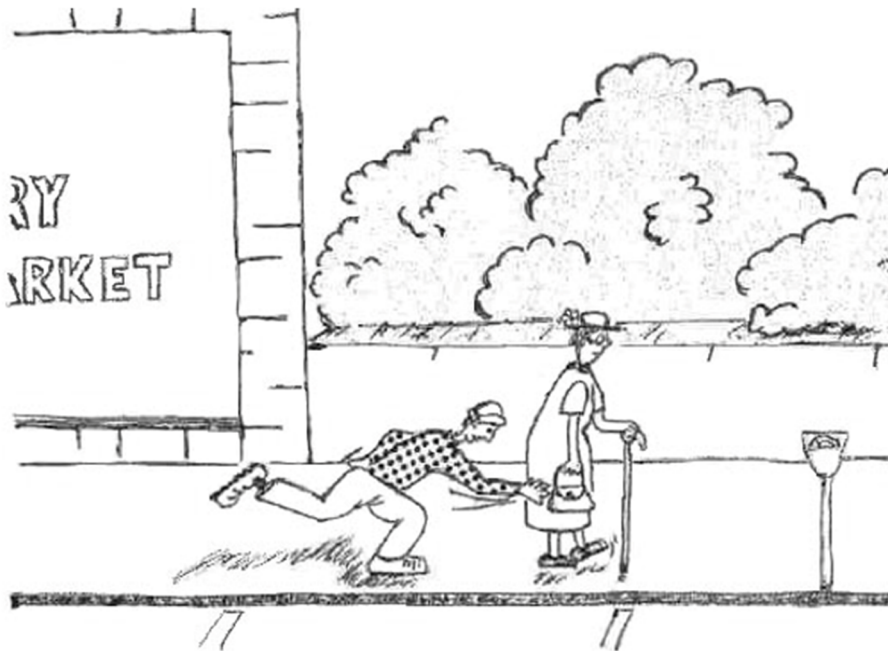
Usually, the violence or threats of violence precede the acquisition of the property. However, in *Yolelo* 1981 (1) SA 1002 (A), the Appellate Division held that there is no absolute rule that requires the violence to precede the acquisition. **If there is such a close connection between the theft and the violence that these can be seen as connecting components of one and the same course of action, robbery may, according to this decision, be committed, even though the violence does not precede the taking of the property.** In this case, X was in the process of stealing certain articles from Y's house, when Y caught him red-handed in the house. X assaulted Y and incapacitated her by gagging her with a napkin, tying her arms and locking her up in the bathroom. X then continued to search the house for money and arms. If one considers all the facts of this case, it is, however, difficult to assume that the assault on Y took place only after X had already completed the theft.



*Robbery.* Usually the violence or threats of violence precede the acquisition of the property.

#### 9.1.7 The "bag-and cellphone-snatching cases"

Does X commit robbery if, with a quick, unexpected manoeuvre, he snatches Y's handbag, which she is clutching under her arm, and runs away with it without Y offering, or being able to offer, any resistance? (See illustration below.)



In *Sithole* 1981 (1) SA 1186 (N), the Natal Court held that the handbag snatcher commits robbery, and not merely theft. In this case, Y was carrying her handbag clutched under her armpit. X was behind her and suddenly grabbed it and ran off with it. In this case, the court expressed the view that, for handbag-snatching to amount to robbery, **it is sufficient if X intentionally uses force in**

**order to overcome the hold which Y has on the bag for the purpose of carrying it or if X intentionally uses force to prevent or forestall such resistance as Y would ordinarily offer to the taking of the bag, if she were aware of X's intentions.** The judge emphasised that it is not necessary for Y to offer resistance or to try to retain possession of the bag. In *Mofokeng* 1982 (4) SA 147 (T) and *Witbooi* 1984 (1) SA 242 (C), the judgment in *Sithole* was followed by other divisions of the Supreme Court.

In *Salmons* 2006 (1) SACR 333 (C), the question before the court was whether the grabbing of a cellphone out of the complainant's hand, constituted robbery or merely theft. Upon an extensive review of the case law and academic opinion, the court concluded that **any force applied to the person of a victim**, however slight, was sufficient to constitute robbery. The court argued that the physical grabbing of a handbag or a cellphone out of a complainant's hand is a physical intervention necessary for dispossession. To "grab" is, in the court's words, "to seize suddenly and roughly" (at 340e). It does not matter whether such an act is labelled "force" or "violence". Because it is a physical act against the person of another, it complies with the definition of robbery and does not merely amount to theft. The decision in *Salmons* was cited with approval in *Mambo* 2006 (2) SACR 563 (SCA).

If Y does offer resistance, by, for example, clinging on to her handbag or cellphone while X pulls it away from her or drags her, it is self-evident that there is actual violence and, consequently, that X's conduct amounts to robbery (*Hlatwayo* 1980 (3) SA 425 (O)).

### 9.1.8 Property need not be on the victim's person or in his presence

In *Ex parte Minister van Justisie: In re S v Seekoei* 1984 (4) SA 690 (A), X violently attacked Y and forced her to hand him the keys to her shop which was two kilometres away. He then tied her to a pole, using barbed wire, and drove her car to the shop, where he stole money and other property. The trial judge refused to convict X of robbery, for he was of the opinion that it was a requirement for robbery that the property should be on the victim's person or in his presence at the time of the theft. The Appellate Division held that the trial judge had erred in this regard, that, for robbery, no such requirement in fact existed, and that X should have been convicted of robbery.



#### ACTIVITY

Discuss whether X may be convicted of robbery in the following instances:

- (a) X threatens Y that he will hurt her physically if she does not hand over her handbag to X. Y, fearing that X will carry out his threat, gives her bag to X.
- (b) In a quick, unexpected movement from behind, X snatches Y's handbag which she is holding under her arm. X runs away with the handbag. Y sustains no injuries as a result of the incident.



#### FEEDBACK

- (a) X may be convicted of robbery. A mere threat of physical violence against Y if she does not hand over the property may lead to a conviction of the completed crime.
- (b) X may be convicted of robbery. He intentionally used force in order to forestall the resistance which Y would normally have offered had she known beforehand what X had in mind. See the decision in *Sithole* and *Salmons supra*.

## 9.2 RECEIVING STOLEN PROPERTY (*Criminal Law 512–514*)

The crime of receiving stolen property, knowing it to be stolen, coincides with theft. A person who commits this crime is simultaneously an accessory after the fact to theft. They are also considered perpetrators of theft, particularly because of the rule that theft is a continuing crime.

### 9.2.1 Definition

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

### 9.2.2 Elements of the crime

The elements of this crime are the following:

- (1) **receiving**
- (2) **stolen goods**
- (3) unlawfully and
- (4) **intentionally** (which includes knowledge of the fact that the goods are stolen)

### 9.2.3 Stolen property

The crime of receiving stolen property can be committed only in respect of property capable of being stolen, that is, movable corporeal property *in commercio*. This crime punishes **receiving stolen property**, so if X receives the *proceeds of the sale of stolen property*, he does not commit the crime (*Augustine 1986 3 SA 294 (C)*).

### 9.2.4 Receiving the property

Although the crime consists of receiving stolen property, the act of receiving presupposes an act of taking into possession. If X is merely negotiating with the thief, and even physically inspects the stolen goods, X cannot be found guilty of receiving stolen property. X can be found guilty of the crime if he intends to keep the stolen property as his own (*possessio civilis*); and also if X keeps the property temporarily for another person (*possessio naturalis*).

### 9.2.5 Unlawfulness

The receiving of stolen property must be unlawful. If X receives the property with the consent of the owner, or with the intention to return it to the owner, or handing it over to the police, he does not commit the crime.

### 9.2.6 Culpability

X must firstly know that he is receiving goods into his possession, and secondly that the goods are stolen. *Dolus eventualis* suffices, that is, it is sufficient that X was aware of the possibility that the property might be stolen, and despite this decided to receive it. The requirement of intention is satisfied if X has a strong suspicion that the goods are stolen, but refrains from making inquiries in order to avoid confirmation of his suspicions. X must know at the moment of receiving the property, that it is stolen. If X only later discovers that the goods are stolen, and then decides to appropriate the property, X commits the crime of theft.

## SUMMARY

### Robbery

- (1) Definition of robbery: see definition above.
- (2) Robbery can be defined very succinctly as theft by violence. The violence may be either actual or in the form of a threat of violence.
- (3) There must be a causal connection between the violence and the obtaining of the property. This means, *inter alia*, the following: X merely wishes to assault Y, and in fact does so. After the assault, Y lies unconscious on the ground. At that stage, X discovers for the first time that Y is wearing a valuable watch. X takes the watch for himself. X is then not guilty of robbery, but of assault and theft.
- (4) If X snatches Y's handbag, which she is clasping under her arm, away from her and runs away with it, he does not, according to the courts, commit only theft, but in fact robbery, because he intentionally forestalls any possibility of Y offering any resistance.
- (5) It is not required for robbery that the property should necessarily be on the person of the victim or in his presence when the violence takes place.

### Receiving stolen property

- (6) The correct, complete name of this crime is "receiving stolen property, knowing it to have been stolen".
- (7) Definition of this crime: see definition above.
- (8) A person who commits this crime renders himself, at the same time, guilty of being an accessory after the fact to theft. Since persons who are accessories after the fact to theft are usually regarded as thieves (i.e. perpetrators of theft), the crime of receiving overlaps the crime of theft.
- (9) The crime can be committed only in respect of property that is capable of being stolen.
- (10) X need not necessarily touch the property when he receives it. Neither is it necessary for him to receive the property with the intention of keeping it for himself; he also commits the crime if he receives it with the intention of keeping it temporarily for somebody else.
- (11) X must know that the property is stolen, or he must foresee the possibility that it may be stolen and reconcile himself to such possibility.



### FURTHER READING

For more information on crimes of robbery and receiving stolen property, read:

- (1) Burchell *Principles of Criminal Law* (2016) 721–735.
- (2) Kemp, Walker, Palmer, Baqwa, Gevers, Leslie & Steynberg *Criminal Law in South Africa* (2018) 443–448.

## TEST YOURSELF

1. Define (a) robbery and (b) receiving stolen property, knowing it to have been stolen.
2. Can a person commit robbery if he obtains property not by means of actual violence, but only by means of threats of violence? Discuss with reference to case law.
3. With reference to case law, discuss the requirement for robbery that there should be a causal connection between the violence and the obtaining of the property.
4. Does X commit theft or robbery if, in a quick, unexpected movement, he snatches a handbag from Y, who is clutching it under her arm, and runs away with it?
5. Can somebody who has received property, knowing it to have been stolen, be convicted also of theft or of being an accessory to theft?
6. Discuss the requirement for the crime of receiving stolen property that X must have received the property.
7. Discuss the culpability requirement in the crime of receiving stolen property.

# Learning unit 10

## Fraud and related crimes



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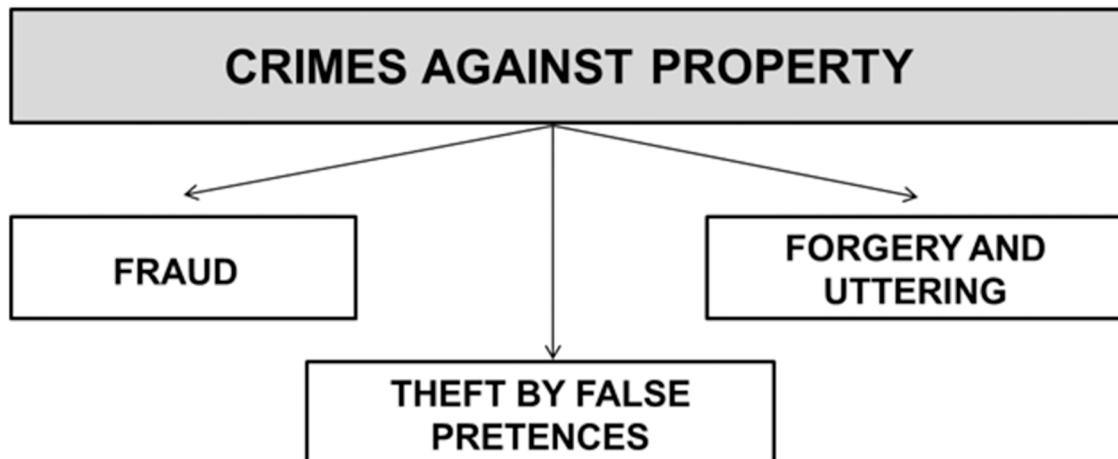
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### LEARNING OUTCOMES

When you have finished this learning unit, you should be able to:

- demonstrate your understanding of the requirements for certain crimes against property by
  - considering the possible liability of an accused for the crimes of fraud, attempted fraud, forgery and uttering, and theft by false pretences



## 10.1 FRAUD

(*Criminal Law 523–532; Reader 38–41*)

### 10.1.1 Definition

Fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice, or which is potentially prejudicial.

### 10.1.2 Elements of the crime

The elements of the crime are

- (1) **misrepresentation**
- (2) which causes or may **cause prejudice**, and which is
- (3) **unlawful** and
- (4) **intentional**

### 10.1.3 The misrepresentation

The first requirement for fraud is that there must be a misrepresentation. This is the conduct requirement of the crime. By misrepresentation is meant **a deception by means of a falsehood**. X must, in other words, represent to Y that a fact, or set of facts, exists which in truth does not exist.

- (1) **Form that the misrepresentation may take:** Although the misrepresentation will generally take the form of writing or speech, conduct other than writing or speech may sometimes be sufficient, such as a nod of the head signifying consent (*Larkins* 1934 AD 91).
- (2) The misrepresentation may furthermore be **either express or implied**. Note the following rule relating to implicit misrepresentation: In the general course of events, somebody who buys goods, not by paying cash, but on credit, implicitly represents that, at the time of purchase, she is willing to pay for them or intends to pay for them in the future, and that she

believes she will be able to do so. If, at the time of purchase, she in fact has no such intention or belief, she misrepresents the state of her mind (*Persotam* 1938 AD 92).

In *Mdantile* 2011 (2) SACR 142 (FB), X had bribed a security official to gain entrance to the station platform and thence onto the train. He was charged with and convicted of fraud. The court held that the mere fact that there was not sufficient evidence of an oral statement whereby a misrepresentation was made expressly did not stand in the way of a conviction for the crime. Through his conduct, X had represented to the world that he had a valid ticket, knowing that such a representation was false. The court also found that his conduct was intended to induce Transnet to convey him at its expense and to its detriment. Therefore, a misrepresentation as well as real prejudice had been established.

- (3) The misrepresentation may be made by **either a commissio (positive act) or an omissio (omission)**. In most cases, the misrepresentation is made by means of a *commissio*. A mere omission by X to disclose a fact may, in the eyes of the law, amount to the making of a misrepresentation, if there is a legal duty on X to disclose the fact. (Compare the discussion above of the liability for an omission.) The legal duty may arise –

- (a) specifically by **statute**. Thus, in terms of section 137(a) of the *Insolvency Act* 24 of 1936, an insolvent person is obliged to disclose the fact that she is insolvent to any person from whom she receives credit for more than a certain amount during the sequestration of her estate.
- (b) from considerations **other than the terms of a statute**, such as where a court is of the opinion that X should have acted positively to remove a misconception which would, in the natural course of events, have existed in Y's mind. The following are examples of such cases:

In *Larkins supra*, X informed Y on 24 August that his salary for the month would be deposited in his banking account on 30 August. On the strength of this, Y lent him money. However, X failed to mention that, prior to 24 August, he had ceded his entire salary for the month to some other person. He was convicted of fraud on the strength of his omission.

In *Yengeni* 2006 (1) SACR 405 (T), X, a member of parliament, failed, in breach of a parliamentary code of conduct, to disclose to parliament a benefit negotiated for himself. The court held that, although the breach of the parliamentary code of conduct in itself did not amount to fraud, X could nevertheless be convicted of fraud because he was under a legal obligation to speak and had, by his deliberate failure to disclose the benefit, intended to mislead parliament.

In *Tshopo* 2013 (1) SACR 127 (FB), X, Y and Z had secured a tender from the Provincial Department of Education to distribute books and other educational material to schools. X was employed by the traffic department and married to the MEC for Health (later Education). X completed the tender form on behalf of Y, who was his sister. They were charged with fraud and convicted on the basis of an omission, namely, a failure to comply with a duty to make a "declaration of interest" in the tender application, revealing any affinity relationship between themselves and government officials.

The court also rejected the argument that the Department of Education did not suffer any prejudice or potential prejudice as it had paid moneys for services actually rendered. The prejudice required for the crime of fraud need not necessarily be of a proprietary nature. The court emphasised the importance that the state keep strict control over state tenders that are being "unscrupulously used for self-enrichment by public servants" (at para 130a). The failure to reveal in a tender application the employment relationship with the state and with the MEC was prejudicial to other tenderers and the community at large, which constituted the element of prejudice.

- (4) It has sometimes been stated (e.g. in *Larkins supra* 92) that a **mere false promise as to the future cannot be equated to a misrepresentation**. From this it follows that the misrepresentation must refer to an existing state of affairs or to some past event, but not to some

future event (*Feinberg* 1956 (1) SA 734 (O) 736). However, this contention is misleading, as a person who promises to do something at some future stage implies, when making the promise, that she intends fulfilling it. If this is not in fact her intention, she is guilty of a falsehood regarding an existing state of affairs, in that she implies that she has a certain belief or intention which she in fact does not have (*Persotam supra*).

An important consequence of the above is the rule which has developed that a person writing out a cheque and handing it to another is generally deemed to have implied that, at that stage, she believes there are sufficient funds in her banking account to cover payment of the cheque when it is presented to the bank (*Deetlefs* 1953 (1) SA 418 (A)).

- (5) A misrepresentation may also be made in respect of a **computer**. For example, if X uses Y's PIN number without Y's consent to transfer credit from Y's account to her own account, she (X) may be convicted of fraud, because she falsely presents that it is Y who is transferring the money or that Y has consented to the transfer.

## 10.1.4 The prejudice

### 10.1.4.1 General

We now come to the second element of the crime, namely the requirement that the misrepresentation must **cause actual prejudice or be potentially prejudicial**. Mere lying is not punishable as fraud. The crime is only committed if the lie brings about some sort of harm to another. For the purposes of this crime, the harm is referred to as "prejudice".

In many instances of fraud, the person to whom the false representation is made is in fact prejudiced. For example, X falsely represents to Y that the painting she is selling to Y is an original painting by a famous artist and therefore worth a great amount of money, whereas it is in fact merely a copy of the original and worth very little (if any) money. Actual prejudice is, however, not required; mere potential prejudice is sufficient to warrant a conviction. Nor is it required that the prejudice be of a patrimonial nature. We shall now examine these last two propositions (which incorporate important principles) in more detail.

### 10.1.4.2 Prejudice may be either actual or potential

Even if the prosecution has not proved that the misrepresentation resulted in actual prejudice, X may still be convicted if it is proved that her misrepresentation was potentially prejudicial.



The difference between actual and potential prejudice is **very important**. Let's make this difference clearer with an example: Assume X has insured with an insurance company all the articles belonging to her against theft. She subsequently claims an amount of money from the insurance company on the ground that certain articles belonging to her have been stolen. Her allegation that the articles have been stolen is, however, false. If the insurance company had paid her the money she claimed, the company would have suffered actual prejudice. Assume, however, that, after she has put in her claim, the company discovers that the articles concerned were in fact not stolen and that X's claim was therefore false. It accordingly refuses to pay X the amount of her claim. Can X nevertheless be convicted of fraud? The answer is "Yes", because, although the company has not suffered any actual prejudice, X's misrepresentation resulted in **potential** prejudice. Please remember that potential prejudice is very important in insurance claims cases.

What is the meaning of "**potential prejudice**"?

- (1) "Potential prejudice" means that the misrepresentation, looked at objectively, involved some **risk** of prejudice, or that it was **likely** to prejudice. In *Mngqibisa* 2008 (1) SACR 92 (SCA), X

falsely represented to Y, who acted on behalf of an insurance company, that, at the time of a collision, he had been the driver of his motor vehicle, whereas in fact his wife (Z) had been the driver. At the time of the collision, Z was still a learner driver. In terms of the insurance policy, an additional excess was payable in the event of a claim where the driver was only in possession of a learner driver's licence. After having made the misrepresentation to Y, X told A, the claims assessor, the truth, namely that his wife (Z) was actually the driver of the vehicle at the time of the collision. The claim was never paid out. X was charged with fraud, in that he had caused potential prejudice to the insurance company. It was argued by the state that the insurance company was potentially prejudiced because it might have been induced to pay out under the policy on the basis that the statement was true. The Supreme Court of Appeal confirmed that only potential prejudice is required for the crime of fraud, and that this approach has consistently been followed through the years (93f). The fact that X had subsequently told the truth to A (the claims assessor) was not regarded as a factor exonerating him. He was convicted of fraud on the basis that potential prejudice is occasioned **at the time of making the false representation** (95e).

- (2) "Likely to prejudice" does not mean that there should be a probability of prejudice, but only that there should be a **possibility** of prejudice (*Heyne* 1956 (3) SA 604 (A)). This means that what is required is that prejudice **can** be, not **will** be, caused.
- (3) On the other hand, the possibility of prejudice should **not be too remote or fanciful** (*Kruger* 1961 (4) SA 816 (A) 832).
- (4) The prejudice need **not necessarily be suffered by the representee** (the party to whom the misrepresentation is directed); prejudice to a third party, or even to the state or the community in general, is sufficient (*Myeza* 1985 (4) SA 30 (T) 32C).
- (5) **It is not relevant that Y, the victim, was not misled by the misrepresentation**; it is the representation's potential which is the crucial issue. Thus, in *Dyonta* 1935 AD 52, X attempted to sell glass as diamonds to Y. Both X and Y knew that the articles were glass and not diamonds. X was nevertheless convicted, since the "representation that the stones were diamonds was capable in the ordinary course of events of deceiving a person with no knowledge of diamonds and, that being so, the misrepresentation was calculated to prejudice ...". It follows that it makes no difference whether or not Y reacts to the misrepresentation, or whether X's fraudulent scheme is successful or not (*Isaacs* 1968 (2) SA 187 (D) 191).

In *Ndwambi* 2016 (2) SACR 195 (SCA), X was caught in a police trap operation, selling a fake rhinoceros horn for R350 000. He was convicted of fraud and appealed on the ground that the elements of fraud relating to the element of prejudice and the intent to defraud, and more particularly the intent to deceive component thereof, had not been established on the evidence. With regard to the **requirement of prejudice**, it was argued on the behalf of X that since the state's evidence was to the effect that the police had no intention to pay for the rhino horn, there was no question of prejudice. The court dismissed this argument, pointing out (at paras [18]–[21]) that the important perspective was not that of the deceived, but rather the deceiver (citing in support of this long-standing rule the cases of *Dyontya* 1935 AD 52; *S v Mngqibisa* 2008 (1) SACR 92 (SCA); and *S v Brown* 2015 (1) SACR 211 (SCA)). In any event, objectively speaking, some risk of harm which did not have to be financial, proprietary or even to the person to whom the representation had been addressed might have been caused, given the contribution of such transactions to the illegal trade in rhinoceros horn in South Africa (paras [18]–[22]).

- (6) Since potential prejudice is sufficient, it is unnecessary to require a causal connection between the misrepresentation and the prejudice. Even where there is no causal connection, there may still be fraud, provided that one can say that the misrepresentation holds the potential for prejudice. After all, a successful misrepresentation is not required for fraud.

#### 10.1.4.3 Prejudice may be either proprietary or non-proprietary in nature

The 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. In other instances of prejudice, the prejudice is non-proprietary in nature.

Although, in most cases, the prejudice or potential prejudice is of a proprietary nature, this need not necessarily be the case. A few examples of fraud involving non-proprietary prejudice are the following:

- (1) writing an examination for another – at the very least, this constitutes potential prejudice to the education authorities (*Thabetha* 1948 (3) SA 218 (T))
- (2) submitting a forged driver's licence to a prosecutor during a trial for a traffic offence (*Jass* 1965 (3) SA 248 (E))
- (3) making false entries in a register reflecting the sale of liquor – this prejudices the state in its control of the sale of liquor (*Heyne supra*)
- (4) laying a false charge with, or making a false statement to, the police (*Van Biljon* 1965 (3) SA 314 (T))
- (5) Failing to disclose to parliament, in breach of a parliamentary code of conduct, a benefit negotiated for oneself (*Yengeni supra* 423). The prejudice, or potential prejudice, suffered is that parliament and its individual members cannot function properly without correct information and accurate knowledge of a particular matter before it which has to be considered.
- (6) Failure to disclose in a tender application for school textbooks a family connection to a person employed by the state in the Department of Education. In *Tshopo* 2013 1 SACR 127 (FB), the court held that such omission amounts to a misrepresentation which is prejudicial to other tenderers and the community at large and renders the state incapable of administering public funds fairly.

### 10.1.5 Unlawfulness

Compulsion or obedience to orders may conceivably operate as grounds of justification. The fact that Y is aware of the falsehood is no defence, as we saw above. As any fraudulent misrepresentation is obviously unlawful, unlawfulness does not play an important role in this crime.

### 10.1.6 Intent

According to the general principles relating to intent (and set out above in the discussion of intent), X's intent must relate to all the requirements of the crime other than the intent requirement. This means that, apart from the intention relating to unlawfulness (i.e. awareness of unlawfulness), X's intent must cover the following:

The intent relating to the requirement of **misrepresentation** means that X must know, or at least foresee the possibility, that the representation she is making to Y is untrue.

The intent relating to the requirement of **prejudice** means that X must know, or at least foresee the possibility, that Y or some other party may suffer actual or potential prejudice as a result of her misrepresentation (*Bougarde* 1954 (2) SA 5 (C)).

There is a distinction between an **intention to deceive** and an **intention to defraud**. The former means an intention to make somebody believe that something which is in fact false is true. **The latter means the intention to induce somebody to embark – as a result of the misrepresentation – on a course of action prejudicial to herself** (*Isaacs supra* 191). The former is the intention relating to the misrepresentation, and the latter is the intention relating to both the misrepresentation and the prejudice. It is this latter intention which must be established in order to convict somebody of fraud. **This means that the mere telling of lies, which the teller thereof does not believe will cause the person to whom they are told to act upon them to his prejudice, is not fraud** (*Harvey* 1956 (1) SA 461 (T) 464).

In *Ndwambi* (see the discussion of the case under 10.1.4) it was argued, *inter alia*, that X, by trying to sell a fake rhino horn to a police trap, did not have the intention required for fraud. The court rejected this argument, stating that X's conduct "was calculated to prejudice" and therefore sufficient to establish the intention required for fraud (at par [22]).



Read the following decision in the *Reader*: ***S v Gardener*** 2011 (1) SACR 570 (SCA).

In ***Gardener*** 2011 (1) SACR 570 (SCA), X and Y, two chief executive officers of company A, failed to disclose their interests in company B to the board of company A. Company A had bought shares in company B and as a result of this transaction X and Y secured substantial profits. They were charged with fraud and duly convicted. On appeal, the questions before the court were whether they had the intention of defrauding company A and whether their failure to disclose resulted in actual or potential prejudice to the company. The court summarised the following requirements for this type of fraud (at para 30 as first formulated in *Burstein* 1978 (4) SA 602 (T)):

1. a duty to disclose the particular fact
2. a wilful breach of this duty
3. an intention to defraud which involves
  - (i) knowledge of the particular fact
  - (ii) awareness and appreciation of the existence of the duty to disclose
  - (iii) deliberate refraining from disclosure in order to deceive and induce the representee to act to its prejudice or potential prejudice
4. actual or potential prejudice of the representee

The court found that the conduct of X and Y was potentially prejudicial to company A since, *inter alia*, it precluded company A from considering the advantages and disadvantages of the sale and induced company A to raise the finance and pay X and Y for their interest in company B. Moreover, their conduct was **deliberate since it was done to avoid proper consideration of the transaction by the board in the self-interest of X and Y** (para 57). In considering the **intention to cause prejudice, the court deemed it unnecessary to be more specific as to the nature of that prejudice**. The court stated (at para 58) that when company directors directly withhold information that is material to the affairs of their company from the board of directors there is, in the absence of an explanation for such conduct which may reasonably be true, a case of fraudulent non-disclosure. That is because the company can only make decisions through a board that is properly informed. In such circumstances, both the prejudice and the intention to prejudice have been proved. X and Y had deliberately withheld knowledge of their interest in company B from the board of company A. Their intention can therefore only have been that they feared the steps which the board, if properly informed, would take and intended to preclude such action. The board was therefore deprived of the opportunity to exercise its judgment in the interests of the company and this was a fact that both X and Y were aware of. The court upheld the conviction for fraud for these reasons.

### 10.1.7 Attempt

As potential prejudice is sufficient to constitute fraud, the view has long been held that there can be no such crime as attempted fraud, since, even if the misrepresentation is not believed, or even if Y does not act on the strength of the representation, potential prejudice is present and consequently fraud is committed (*Nay* 1934 TPD 52; *Smith* 1952 (2) PH H105 (O)). In *Heyne* 1956 (3) SA 604 (A), the Appellate Division, however, held that attempted fraud is indeed possible. This will arise in the case where the misrepresentation has been made, but has not yet come to Y's attention, for example where a letter containing a misrepresentation is lost in the post or intercepted.



## ACTIVITY

Consider whether X may be convicted of fraud in the following circumstances:

- (i) X tells his wife, Y, that he is going on a business trip. In the meantime, he is going with his friends to a rugby test match.
- (ii) (i) X goes to a very smart restaurant. She orders a bottle of champagne and an expensive meal. She tells the restaurant owner that she is waiting for her boyfriend. The truth is that she has neither an appointment with a boyfriend nor an intention to pay for the meal. After having finished her meal, she tells the restaurant owner that her boyfriend, who did not arrive, was supposed to pay for the meal and that she has no money. Accordingly, she fails to pay for her meal.
- (iii) X is caught by a traffic officer for speeding. Y asks X for her particulars. She gives him a false name, ID number and address.



## FEEDBACK

- (i) It is clear that X made a misrepresentation to Y. However, the mere telling of a lie does not amount to fraud. There must be prejudice, or at least potential prejudice, involved. One may argue that, even if there is potential prejudice in this case, it is remote and fanciful, and therefore not sufficient to sustain a conviction of fraud.
- (ii) X may be convicted of fraud. By ordering a meal, X represented by her conduct that she was able and willing to pay for it. Since she had no honest belief in her ability and willingness to pay, she committed fraud.
- (iii) This is a straightforward example of fraud. Keep in mind that the prejudice need not necessarily be suffered by the representee. Prejudice to the state or the community in general is sufficient.

## 10.2 FORGERY AND UTTERING

**(Criminal Law 532–535)**

## 10.2.1 Definition

Forgery consists in unlawfully and intentionally making a false document to the actual or potential prejudice of another, while uttering consists in unlawfully and intentionally passing off a false document to the actual or potential prejudice of another.

## 10.2.2 Elements of the crime

The elements of the crime are the following:

1. **making a false document** (forgery) and/or
2. **passing off a false document**
3. **actual or potential prejudice** of another
4. **unlawfulness**
5. **intention**

## 10.2.3 General character of the crime

Forgery is a type of fraud. The misrepresentation in forgery is the falsification of a document (making a false document). Apart from this, all requirements are also that of fraud: there must be intent to defraud, and actual or potential prejudice. The only difference between fraud and

forgery is that fraud is completed only when the misrepresentation has come to the notice of the representee, whereas forgery is completed the moment the document is falsified. If the document is then brought to the attention of others, another crime is committed, namely uttering the document. Although these are two distinct crimes, it has become customary to charge an accused with “forgery and uttering”, as it is usually the forger of the document who also offers it to others.

#### 10.2.4 Falsification of a document

The term “document” is interpreted broadly for the purposes of the crime, and includes, amongst others:

- testimonials
- cheques
- receipts
- promissory notes
- bonds
- documents setting out educational qualifications

For a document to be falsified, it is not a requirement that it contains untrue statements. If a lie is reduced to writing, it does not become a forgery. A document is false when it purports to be something other than it is. This occurs when a document is a counterfeit imitation of another document, or the document falsely claims to have been drawn up by somebody other than its author, or that it contains material information (such as figures or dates) which it did not originally contain. A clumsily done forgery still constitutes a falsified document, as the possibility of potential prejudice is present. A document may be falsified in many ways, for example, by altering, deleting, substituting or adding particulars on the document. A document falsely claiming to be a copy of a non-existent document is a forged document, as is one signed in the name of a fictitious person (*Mashiya* 1955 2 SA 417 (E)).

#### 10.2.5 Passing off a false document

If the person who utters the falsified document is not the person who forged it, she will be charged with uttering only. The phrase “passing off” means that the falsified document is communicated to another person by, for example, offering or delivering the document to the person, or attempt to make use of it in some or other way. The person who utters the document must represent it as genuine. If the document does not reach the person to whom it is addressed (e.g. where a letter is lost in the post), there is only attempted uttering. The passing off of the document need not be done by the utterer herself, but can take place through the instrumentality of another person. It is immaterial whether the person to whom the document is uttered is in fact misled thereby.

### 10.3 THEFT BY FALSE PRETENCES

**(Criminal Law 535–537)**

#### 10.3.1 Definition

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



### 10.3.2 Elements of the crime

The elements of the crime are the following:

- (1) a **misrepresentation** by X to Y
- (2) **actual prejudice** (i.e. harm or loss) suffered by Y, in that she parts with her property by allowing X to take possession of it
- (3) a **causal** connection between the misrepresentation and the prejudice
- (4) an **appropriation** of the property by X
- (5) **unlawfulness**
- (6) **intention**

### 10.3.3 General character of crime

This crime can be regarded both as a form of theft and as a form of fraud. What happens when X commits this crime is the following: First, she commits fraud by making a misrepresentation to Y; secondly, Y, as a result of this misrepresentation, "voluntarily" hands over movable, corporeal property to X; and, thirdly, X appropriates this property. In short, it is fraud followed by a theft. For example, X goes to Y's house and falsely represents to Y, who is a housewife, that she (X) repairs and services television sets, and that her (Y's) husband has requested her (X) to fetch their television set for servicing. On the strength of this misrepresentation, Y allows X to remove the set from their home. X disappears with it and appropriates it to herself. X thus makes use of a misrepresentation to obtain Y's consent to her removal of the property, thereby excluding any resistance by Y to the removal.

Cases such as these are treated as theft, because it is assumed that, although Y seemingly consented to part with the property and allowed X to take it, Y's "consent" is not regarded by the law as valid consent: consent induced by fraud or misrepresentation is not regarded as valid consent (compare the discussion above of consent as a ground of justification).

The crime of theft by false pretences is, strictly speaking, unnecessary, because in every case in which X is convicted of this crime, she could equally well be convicted of fraud. It therefore completely overlaps with fraud. Thus, if the crime were to disappear, it would always still be possible to charge X with, and convict her of, fraud.



Please note that although every case of theft by false pretences also involves fraud, the opposite is not the case: every case of fraud does not involve theft by false pretences, since X can commit fraud without obtaining or appropriating movable, corporeal property (e.g. where X writes an examination in Y's place, misrepresenting to the examination authorities that she is Y). Please remember this difference.

## SUMMARY

### Fraud

- (1) Definition of fraud – see definition above.
- (2) The misrepresentation in fraud is the presentation of a fact which does not exist, and
  - (a) may be made in speech, writing or in conduct
  - (b) may be made expressly or tacitly
  - (c) may consist in either a *commissio* or an *omissio*
  - (d) is not made through a mere false promise as to the future
- (3) The misrepresentation in fraud must cause actual prejudice or be potentially prejudicial to another.
- (4) The prejudice required for fraud may be
  - (a) either actual or potential, and
  - (b) either proprietary or non-proprietary in nature

- (5) Because of the wide interpretation of prejudice, there need not be an actual causal connection between the misrepresentation and the prejudice required.
- (6) In fraud, X's intent must relate to both the misrepresentation and the requirement of prejudice.
- (7) In the case of *Heyne* 1956 (3) SA 604 (A), the Appellate Division decided that attempted fraud can be committed if the misrepresentation has not yet come to the complainant's attention.

### Forgery and uttering

- (8) Forgery is a form of fraud in which the misrepresentation takes place by means of forgery.
- (9) The crime of uttering takes place when the forgery is brought to the attention of someone else.
- (10) In the crimes of forgery and uttering, our courts give a wide interpretation to the concept "document".
- (11) In forgery, the document is regarded as false if it purports to be something other than it is.

### Theft by false pretences

- (12) Theft by false pretences always involves fraud, which is then followed by theft of the property concerned.
- (13) In cases of theft by false pretences, Y seemingly consents to part with her property in favour of X, but this consent is not regarded by the law as valid consent.



### FURTHER READING

For more information on crimes of fraud and related crimes, read:

- (1) Burchell *Principles of Criminal Law* (2016) 742–756.
- (2) Kemp, Walker, Palmer, Baqwa, Gevers, Leslie & Steynberg *Criminal Law in South Africa* (2018) 460–66.

### TEST YOURSELF

- (1) Define fraud, forgery and uttering, and theft by false pretences.
- (2) Discuss the nature of the misrepresentation in fraud.
- (3) Discuss the element of prejudice in fraud.
- (4) Discuss the requirement of intention in fraud.
- (5) Discuss the judgment of the Supreme Court of Appeal in *Gardener* 2011 (1) SACR 570 (SCA).
- (6) Is attempted fraud possible? Discuss in the light of *Heyne* 1956 (3) SA 604 (A).
- (7) X forges a document unlawfully and shows it to Y with the intention of defrauding her. Of which crime or crimes can X be convicted? Discuss.
- (8) Will it make a difference to your answer in the previous question if X did not forge the document herself, but nevertheless passed off the forged document to Y with the intention of defrauding her?
- (9) Is there a **forgery** of a document in the following instances?
  - (a) X only writes a falsehood on a piece of paper.
  - (b) X only changes the date which already appears on the document.
  - (c) X draws up a document which falsely purports to be a copy of a non-existing document.
- (10) Compare **theft by false pretences** with ordinary theft.
- (11) Explain why theft by false pretences can be regarded as a form of **fraud**.

# Learning unit 11

## Crimes relating to damage to property



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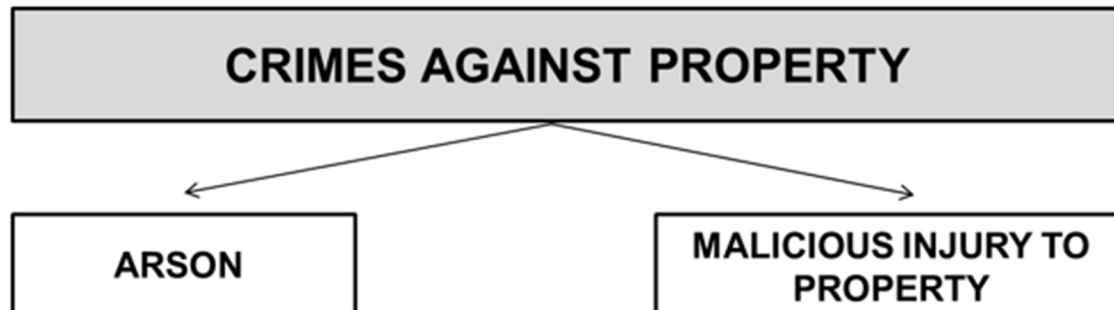
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### LEARNING OUTCOMES

When you have finished this learning unit, you should be able to:

- demonstrate your understanding of the requirements for certain crimes relating to damage to property by considering the possible criminal liability of an accused for the crimes of malicious injury to property and arson



## 11.1 BACKGROUND

Criminal law protects interests in property by punishing those who damage property. The general crime used for this purpose is malicious injury to property. Malicious injury to property overlaps with the crime of arson, which is merely a particular form of malicious injury to property (*Motau* 1963 (2) SA 521 (T) 523).

## 11.2 MALICIOUS INJURY TO PROPERTY

**(Criminal Law 539–541)**

### 11.2.1 Definition

Malicious injury to property consists in unlawfully and intentionally

- (1) damaging property belonging to another person or
- (2) damaging one's own insured property with the intention of claiming the value of the property from the insurer.

### 11.2.2 Elements of the crime

The elements of the crime are the following:

- (1) **damaging**
- (2) **property**
- (3) **unlawfully** and
- (4) **intentionally**

### 11.2.3 The property

The property must be corporeal and **may be either movable or immovable**.

In principle, one cannot commit the crime in respect of one's own property, because it stands to reason that the owner of property is free to do with his property what he likes. For example, if I no longer like my old rickety table, I commit no crime if I chop it to pieces and use it as firewood. It is for this reason that it is required in the first part of the above definition of the crime that the property should belong to another. However, the courts have held that X also commits the crime if he sets fire to his own insured property in order to claim its value from the insurer of the property (*Van Zyl* 1987 (1) SA 497 (O)).

### 11.2.4 Damage

Damage, as understood in the definition of the crime, is difficult to define in abstract terms. It includes the total or partial destruction of the property, for instance where an animal is killed or wounded, or the loss of the property or substance (e.g. the draining of petrol from a container), and the causing of any injury (whether permanent or temporary) to property. There can be damage even where the original structure of the property is not changed, for example where a statue is painted (*Bowden* 1957 (3) SA 148 (T)). It will usually be assumed that there is damage if the property has been tampered with in such a way that it will cost the owner money or at least some measure of effort or labour to restore it to its original form (*Bowden supra* 150).

### 11.2.5 Unlawfulness

Otherwise, unlawful injury to property may be justified by:

- (1) statutory provisions giving X the right to destroy, wound or catch trespassing animals (*Oosthuizen* 1974 (1) SA 435 (C))
- (2) necessity, for instance where X defends himself against an aggressive animal (*Jaffet* 1962 (2) PH H220 (R))
- (3) official capacity, for example where a policeman breaks open a door to gain access to a house in which a criminal is hiding
- (4) consent by the owner of the property

### 11.2.6 Intention

The crime can only be committed intentionally. In practice, the crime is described as "malicious" injury to property. However, the use of the word "malicious" may be misleading, because it creates the impression that X must act with an evil or malicious motive. X's motive is in fact not a relevant consideration (*Mnyanda* 1973 (4) SA 603 (N) 605).



#### **Are graffiti malicious injury to property?**

If someone writes, draws, scratches or sprays writing or drawings on a wall or other surface in a public place, without the permission of the owner of the wall or surface, does this act constitute malicious injury to property? At first glance, this seems to be the case as the graffiti damage the wall or surface. In considering how much damage is caused, the question is asked whether the graffiti are easily removable. Can graffiti be washed away with soap and water, or have they partially or totally damaged the wall or structure? But are graffiti not art? Some artists' graffiti might improve the value of the property rather than damage it. Should we distinguish between art graffiti and vandalism graffiti? Graffiti are specifically criminalised in section 44 of the *General Law Further Amendment Act* 93 of 1964, and unfortunately there is no defence if the act has artistic value. In the case of *Bowden* 1957 (3) SA 148 (T), the court held that graffiti constitute damage, even where the original structure of the property is not changed, for instance, painting a statue. There is damage if the property has been altered in such a way that it would cost the owner money or some effort or labour to restore it to its original form. What is your opinion on this topic? Are graffiti damage or art?

## 11.3 ARSON

### **(Criminal Law 542)**

Arson is a particular form of the crime of malicious injury to property.

### 11.3.1 Definition

A person commits arson if he unlawfully and intentionally sets fire to:

- (a) immovable property belonging to another; or
- (b) his own immovable insured property, in order to claim the value of the property from the insurer.

### 11.3.2 Elements of the crime

The elements of the crime are the following:

- (1) **setting fire to**
- (b) **immovable property**
- (c) **unlawfully** and
- (d) **intentionally**

### 11.3.3 The property

The property must be corporeal and **must be immovable**. X commits arson if he sets fire to another person's immovable property, or to his own insured property in order to claim its value from the insurer. If X sets fire to his own insured property for an insurance claim, the crime of fraud is also applicable.

### 11.3.4 Setting fire to

As soon as X sets fire to the property, the crime is completed. If X is caught at a stage before the property has been set alight, he is guilty of attempted arson only, provided his conduct has proceeded beyond mere acts of preparation.



#### ACTIVITY

X sets fire to his house and his car, intending to claim the value of the property from his insurer. X is in fact paid by the insurer for the "damage" that he has suffered. Of which crimes can X be convicted?



#### FEEDBACK

X may be convicted of arson in respect of the immovable property (his house) and of malicious injury to property in respect of the movable property (his car). He may also be charged with fraud. He unlawfully and intentionally made a misrepresentation to the insurer, which prejudiced the company since the company compensated him financially.

### SUMMARY

#### Malicious injury to property

- (1) Definition of malicious injury to property – see definition above.
- (2) The property must be corporeal and may be either movable or immovable.
- (3) It will usually be assumed that there is damage if the property has been tampered with in such a way that it will cost the owner money or at least some measure of effort or labour to restore it to its original form.
- (4) Intention is a requirement for the offence. The perpetrator's conduct need not be accompanied by an evil or malicious motive.

### Arson

- (5) Definition of arson – see definition above.
- (6) Arson can only be committed in respect of immovable property. If a movable thing is set on fire, it amounts to malicious injury to property.
- (7) Intention, and more particularly, intention to damage the property by setting fire to it, thereby causing patrimonial harm to somebody, is required.



#### FURTHER READING

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For more information on crimes related to damage to property, read:

- (1) Burchell *Principles of Criminal Law* (2016) 757–766.
- (2) Kemp, Walker, Palmer, Baqwa, Gevers, Leslie & Steynberg *Criminal Law in South Africa* (2018) 455–458.

### TEST YOURSELF

- (1) Define malicious injury to property.
- (2) Complete the following statement: In malicious injury to property, the property must be corporeal and may be either ..... or .....
- (3) Explain whether someone may commit malicious injury to property in respect of his own property.
- (4) Explain the meaning of the concept "damage" in this crime.
- (5) Name and illustrate the grounds of justification which may be raised on a charge of malicious injury to property.
- (6) Define arson.
- (7) Complete the following statement: The crime of arson can be committed only in respect of ..... property.
- (8) Which crime is committed if movable property is set on fire?
- (9) Can a person commit arson in respect of his or her own property? Refer to authority.

# Learning unit 12

## Housebreaking with the intent to commit a crime



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### LEARNING OUTCOMES

When you have finished this learning unit, you should be able to:

- demonstrate your understanding of the requirements for certain crimes against property by considering the possible liability of an accused for the crime of housebreaking with intent to commit a crime

(On this crime in general, see *Criminal Law* 543–550.)

## CRIMES AGAINST PROPERTY



## HOUSEBREAKING WITH INTENT TO COMMIT ANOTHER CRIME



## 12.1 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.

## 12.2 ELEMENTS OF THE CRIME

The elements of the crime are the following:

- (1) **breaking and entering**
- (2) **a building or structure**
- (3) **unlawfully** and
- (4) **intentionally**

## 12.3 BREAKING AND ENTERING

The requirement of an act in this crime consists of two components, namely

- (1) **breaking into** the structure
- (2) **entering it**

### 12.3.1 Breaking

When one uses the word "breaking", one is inclined to think of an act which causes damage to the building or structure. Although in most cases in which this crime is committed there may be some degree of damage to the building caused by X, **it is not a requirement for liability for this crime that actual damage be inflicted to the building or structure.**

All that is required for an act to amount to a **breaking** is the **removal or displacement of an obstacle which bars entry to the building** and which **forms part of the building** itself.

The word "breaking" is therefore a so-called "term of art", that is, an artificial concept (*Ngobeza* 1992 (1) SACR 610 (T)).

If one applies the above criterion to concrete facts, one finds that acts such as the following do **not amount to a "breaking in"** (since there is no displacement of an obstacle forming part of the building):

- walking through an **open door** into a building
- climbing through an **open window** into a building
- stretching one's arm through an **open hole** in a wall of a building (*Rudman* 1989 (3) SA 368 (E))

The most obvious **act which does qualify as a breaking in** is, of course, physically **breaking a door, window, wall or roof** of a building (in order to gain entry into the building). However, even acts which are on the face of it more innocuous than those described, **qualify as a breaking**. Examples of such acts are the following:

- merely pushing open a **closed (even though not locked) door** or window
- merely pushing open a **partially closed door** or window (*Moroe* 1981 (4) SA 897 (O))



The reason why these last-mentioned acts qualify is because X displaces an obstacle which **bars entry into** the building and which **forms part of the building** itself. Doors, windows, walls or roofs all form part of the building or structure. It makes sense that removing these from the building will constitute a break-in. But remember that one can also remove a flower pot or a curtain from a window. These things do not form part of the building.

If, in her effort to gain entry into the house through an open window, X merely shifts a flower pot which is placed on the windowsill to one side, her act does not qualify as a breaking in, because the flower pot does not form part of the building or structure itself. However, if she pushes a blind in front of an open window to one side in order to gain entry, her act does qualify as a breaking in, because the blind is attached to the window and therefore forms part of the building (*Lekute* 1991 (2) SACR 221 (C)). It has been held that a curtain at a window is not an "obstruction", and that X therefore does not "break into" a house if she merely pushes a curtain at an open window to one side in order to gain entry (*Hlongwane* 1992 (2) SACR 484 (N) 486).

In conclusion, it must be stressed that the breaking in must be **into** the building. To break **out** of a building after having entered it without a breaking in cannot lead to a conviction of housebreaking (*Tusi* 1957 (4) SA 553 (N) 556). Thus, if X walks through an open door into the building, and while inside the wind blows the door shut and X has to open the door (or even break it down) in order to get out of the building, there is no "breaking into" for the purposes of this crime.

### 12.3.2 Entering

Mere "breaking" without "entering" is not sufficient to constitute the crime (*Maruma* 1955 (3) SA 561 (O)), although it may amount to an attempt to commit the crime. Like the concepts "building" and "breaking", "entering" also has a technical meaning. The entry is complete the moment X has **inserted any part of her body, or any instrument she is using for that purpose, into the opening**, with the intention of thereby exercising control over some of the contents of the building or structure (*Melville* 1959 (3) SA 544 (E)). In *Mavela* 2008 (2) SACR 608 (Ck), X had broken a window and was about to enter with his body, when he was seen by someone and desisted. Because it was not clear that he had already inserted a part of his body or his hand into the premises, he was convicted only of attempted housebreaking with intent to steal.

## 12.4 BUILDING OR STRUCTURE

The house, structure or premises in respect of which the crime is committed can be **any structure which is or might ordinarily be used for human habitation or for the storage or housing of property**. It is difficult, from the cases, to deduce a general principle that can be applied in order to decide whether a particular premise or structure qualifies as a premise or structure in respect of which the crime can be committed. We submit that the following principle, which is advocated in both De Wet and Swanepoel *Strafreg* 4 ed (1985) 351 and Snyman *Criminal Law* 6ed (2014) 544–546, should be followed in this respect:

If the structure or premises is used for the storage of goods, it must be immovable, but if it is used for human habitation, it does not matter whether it is movable or immovable. This explains why structures such as the following (which are all immovable) always qualify as structures in respect of which the crime can be committed:

- a house
- a storeroom
- a factory
- business premises

This also explains why structures such as the following (which are either movable or not used for human habitation) do not qualify as structures in respect of which the crime can be committed:

- a motorcar
- a railway truck used for conveying goods
- a fowl run made of tubes and wire netting
- an enclosed backyard
- a tent which is used only for the storage of goods (*Abrahams* 1998 (2) SACR 655 (C))

A caravan is a "house on wheels", and therefore a movable thing that can be used for either human habitation or the storage of goods, or both. It is accordingly a structure which does not readily fit into the classification set out in the principle advanced and applied above. The position in our law, as far as the question whether a caravan can be broken into, may be summarised as follows: Generally speaking, the courts accept that a caravan does qualify as a structure, even if the breaking in takes place at a time when nobody is living in it (*Madyo* 1990 (1) SACR 292 (EC); *Temmers* 1994 (1) SACR 357 (C)), but that it does not qualify if, although it can be moved, it is used merely for the purpose of storing goods (*Jecha* 1984 (1) SA 215 (Z)).

In *Temmers supra*, the court rejected the criterion which we advanced above, but we submit that the alternative, very vague criterion applied by the court in this case, should not be followed. (You may, if you wish, read the criticism of the criterion advanced in *Temmers*, yourself, in *Criminal Law* 545–547.) In *Mavungu* 2009 (1) SACR 425 (T), X had broken into a brand-new caravan which was the property of a caravan business. He did not steal anything, but intended only to sleep there. The court held that a caravan was a "house" for the purpose of housebreaking and also a "building" for the purposes of trespassing. X was convicted of housebreaking with the intent to commit the statutory crime of trespassing (s 1-(1)(b) of the *Trespass Act* 6 of 1959).

## 12.5 UNLAWFULNESS

The breaking into and entering of the building or structure must be unlawful. Thus, the crime is not committed if one breaks into and enters one's own house, or a room which one shares with someone else, or if one has permission to enter (e.g. as a domestic worker) (*Mashinga* 1976 (2) PH H210 (A)).

## 12.6 INTENTION

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

- (1) **X must have the intention of unlawfully breaking into and entering the house or structure.** Such intention will be absent if, for example, she believes that she is breaking into her own house, or that she is committing the act of housebreaking with the consent of the owner of the house.
- (2) **Furthermore, X must have the intention of committing some other crime inside.** Mere housebreaking without such an intention does not amount to the crime. However, housebreaking without such an intention may, of course, depending on the circumstances, be punishable as malicious injury to property. The further crime which X intends to commit must be a different one from the housebreaking itself. In practice, housebreaking is mostly committed with the intention to steal, but, in principle, charges of housebreaking with intent to commit any crime are competent. The legislature has even sanctioned charges of housebreaking with the intention of committing a crime unknown to the prosecutor (see s 95(12) read with ss 262 and 263 of the *Criminal Procedure Act* 51 of 1977).



### How does housebreaking with the intent to commit theft differ from the crime of theft?

Why is an intention to commit theft treated as a separate offence if the theft occurs in a specific building or structure? Why is this crime not treated simply as a form of theft? There are not, for example, special offences for shoplifting or pick-pocketing – these criminal acts are regarded as forms of theft. Why single out housebreaking with the intent to commit theft as a particular kind of theft? Perhaps the answer lies in the fact that housebreaking constitutes an invasion of a person's private life, his sense of security and peace. After all, a person's home is his castle. An uninvited person who trespasses in such a situation, with an additional intent to commit theft, destroys people's feeling of safety and security. But what about housebreaking with the intent to commit theft that occurs in office buildings and garden sheds? Here, the reason for the existence of this crime may be the possibility of violence occurring. A person who finds a trespasser in his home or building may resort to violence. Can you think of any other reason why this particular crime is treated as a separate offence?

### SUMMARY

- (1) Definition of the crime – see definition above.
- (2) The act consists in the (a) housebreaking and (b) entering of a building or structure.
- (3) The "breaking" consists in the removal or displacement of any obstacle which bars entry to the structure and which forms part of the structure itself.
- (4) The entering is complete the moment X has inserted any part of her body, or any instrument she is using for that purpose, into the opening, with the intention of thereby exercising control over some of the contents of the building or structure.
- (5) The building or structure may be any movable or immovable structure which is or might ordinarily be used for human habitation, or any immovable structure which is or might be used for storage or housing of property.
- (6) The intention required for housebreaking comprises the following two distinct components, which must both be present:
  - (a) X must have the intention of unlawfully breaking into and entering the building or structure.
  - (b) X must have the intention of committing some other crime inside of the building or structure.



### FURTHER READING

For more information on housebreaking with the intent to commit a crime, read:

- (1) Burchell *Principles of Criminal Law* (2016) 765–771.
- (2) Kemp, Walker, Palmer, Baqwa, Gevers, Leslie & Steynberg *Criminal Law in South Africa* (2018) 451–453.

### TEST YOURSELF

- (1) Define the crime of housebreaking with the intention to commit a crime.
- (2) Insert the missing words: The "breaking" consists in the ..... or ..... of any obstacle which bars entry to the structure and which forms part of the structure itself.
- (3) Which of the following acts amounts to an act of "breaking"?
  - (a) X pushes open a partially closed window or door.
  - (b) X stretches her hand through an open window in order to steal a radio standing on the windowsill.

## LEARNING UNIT 12: Housebreaking with the intent to commit a crime

- (c) X walks through an open door or climbs through an open window.
  - (d) X opens an unlocked door.
- (4) At what stage is the entering complete?
- (5) Name and explain the two components of the intention required for the crime of housebreaking.