Criminal Law

CR Snyman

Sixth edition



LexisNexis®

CRIMINAL LAW

SIXTH EDITION

CRIMINAL LAW

SIXTH EDITION

by

CR SNYMAN
BA LLD (UOFS)
Research Fellow and former Professor of Criminal and Procedural Law,
University of South Africa
Advocate of the High Court of South Africa

LexisNexis®

Members of the LexisNexis Group worldwide

South Africa	LexisNexis (Pty) Ltd
DURBAN	215 Peter Mokaba Road (North Ridge Road), Morningside, Durban, 4001
JOHANNESBURG	Building No. 9, Harrowdene Office Park, 124 Western Service Road, Woodmead, 2191
CAPE TOWN	Office Floor 2, North Lobby, Boulevard Place, Heron Close, Century City, 7441
	www.lexisnexis.co.za
Australia	LexisNexis, CHATSWOOD, New South Wales
Austria	LexisNexis Verlag ARD Orac, VIENNA
Benelux	LexisNexis Benelux, AMSTERDAM
Canada	LexisNexis Canada, MARKHAM, Ontario
China	LexisNexis, BEIJING
France	LexisNexis, PARIS
Germany	LexisNexis Germany, MÜNSTER
Hong Kong	LexisNexis, HONG KONG
India	LexisNexis, NEW DELHI
Italy	Giuffrè Editore, MILAN
Japan	LexisNexis, TOKYO
Korea	LexisNexis, SEOUL
Malaysia	LexisNexis, KUALA LUMPUR
New Zealand	LexisNexis, WELLINGTON
Poland	LexisNexis Poland, WARSAW
Singapore	LexisNexis, SINGAPORE
United Kingdom	LexisNexis, LONDON
USA	LexisNexis, DAYTON, Ohio

© CR Snyman 2014

ISBN Softcover 978 0 409 05308 1

First edition 1984
Reprinted 1987, 1990
Second edition 1991
Reprinted 1992, 1993
Third edition 1995
Reprinted 1996, 1997, 1998, 2000, 2001
Fourth edition 2002
Reprinted 2003, 2005, 2006, 2007
Fifth edition 2008

Copyright subsists in this work. No part of this work may be reproduced in any form or by any means without the publisher's written permission. Any unauthorised reproduction of this work will constitute a copyright infringement and render the doer liable under both civil and criminal law.

Whilst every effort has been made to ensure that the information published in this work is accurate, the editors, authors, writers, contributors, publishers and printers take no responsibility for any loss or damage suffered by any person as a result of the reliance upon the information contained therein.

Editor: Lisa Sandford
Technical Editor: Liz Bisschoff



Printed in South Africa by Interpak Books Pietermaritzburg

PREFACE

To prepare a new edition of a book such as this one, of which five previous editions have already appeared, would seem to the uninitiated to be a task which ought not to be particularly difficult. One tends to assume that the author merely needs to insert the latest new case law and legislation dealing with criminal law into the existing text. In reality the preparation of a new edition is not that simple. If the author were merely to "add" references or discussions of new case law or new legislation, the book would, like a snowball, simply become bigger and bigger with each new edition, until it becomes unwieldy.

In the preparation of this edition of the work I tried as far as possible to keep the total length of the work roughly the same as that of previous editions. In principle this meant that every insertion of new material had to be counter-balanced by the deletion of some existing material. It is here that the problem arises. An author is loath to eliminate existing statements or discussions to which he has devoted much time and research in the past. Sometimes an author feels that the challenge in preparing a new edition is not so much to decide what to add, but rather what to leave out. For every new judgment referred to in a footnote, an existing one should, at least theoretically, be deleted. However, it is by no means easy to decide which references to delete and which to retain. Sometimes I have deleted a single sentence in the text, sometimes a whole footnote, and sometimes a paragraph.

In the discussion of the crisis in the criminal justice system (I D 4) I abide by my view that the abolition of the death sentence for murder in *Makwanyana* 1995 2 SACR 1 (CC) was wrong, pointing out that never before in the peacetime history of this country has the value of human life been lower than since the introduction of the "right to life", the concept of "the sanctity of human life" and, accompanying it, the abolition of the death sentence. I adhere to my view that although the Constitutional Court in that case intended to protect and extend the right to life and the sanctity of human life, what it in fact achieved was exactly the opposite.

Some of the most important changes to the text of this edition, compared to that of the previous edition, are the following:

In the discussion of the principle of legality (I F 7) I discuss the important new decision of the Supreme Court of Appeal in *Director of Public Prosecutions,*

Western Cape v Prins 2012 2 SACR 183 (SCA), which deals with the question of whether a court can accept that an Act has created a crime if it creates a criminal norm only, but remains silent on the criminal sanction – in other words, where the legislature creates a provision in an Act stating that certain conduct constitutes a crime but fails to set out the punishment for the crime.

Sections 7 and 11 of the new Child Justice Act 75 of 2008 set out new age limits for determining the criminal capacity of young children. These new provisions have necessitated a rewriting of large parts of the discussion of the effect of immature age on liability (V B (iv)) and has also necessitated changes in the definitions of the crimes of common-law abduction (XII B 1) and kidnapping (XVII A 1).

New judgments on the topic of private defence (IV B) which have been incorporated into the discussion in this edition, include *Steyn* 2010 1 SACR 411 (SCA) and *Snyders v Louw* 2009 2 SACR 463 (C). The judgment of the Supreme Court of Appeal in *Maimela and another v Makhado Municipality and another* 2011 2 SACR 329 (SCA) has been incorporated in the discussion of the defence of necessity (IV C).

The whole discussion of the effect of provocation on liability (V F) has been rewritten. This defence has undergone many changes through the years. The last reported judgment dealing specifically with the effect of provocation dates back to more than forty years ago (*Mokonto* 1971 2 SA 319 (A)), which leaves the commentator with little or no authority on which to rely when describing this topic.

The much-discussed new judgment of the Supreme Court of Appeal in *Humphreys* 2013 2 SACR 1 (SCA), dealing with the conative element of *dolus eventualis*, has been discussed and criticised in the discussion of this topic (V C 8).

The judgment of the Supreme Court of Appeal in *Hoho* 2009 1 SACR 276 (SCA) has necessitated a rewriting of the largest part of the discussion of the crime of criminal defamation (XVI B).

Further important new judgments which are discussed in this edition are *Ndebele* 2012 1 SACR 245 (GSJ) which deals with theft of electricity (XVIII A 8) and *Mshumpa* 2008 1 SACR 126 (E), which deals with a number of topics, including the principle of legality, the definition of murder, incitement and conspiracy.

In the previous editions of this work it was argued that the act required for theft should simply be described as an appropriation of the property (instead of a *contrectatio fraudulosa* or a "taking and carrying away") and the intention required an intention to appropriate. It seems as if the courts now consistently follow this view, especially if one reads the latest reported judgments on this crime, such as *Nkosi* 2012 1 SACR 87 (GNP) and *Mekula* 2012 2 SACR 521 (ECG). The discussion of theft (XVIII A) has accordingly been abbreviated as far as the discussion of the requirements of an act and of the intention in the first number of pages of the discussion of this crime is concerned.

I have referred to reported judgments up to and including the December 2013 issue of the *South African Criminal Law Reports*, as well as to other legal literature available to me at the end of 2013.

CR SNYMAN
Pretoria
March 2014

CONTENTS

PAGE

PREFACE v

PART ONE: GENERAL PRINCIPLES

I INTRODUCTION
- A Introductory topics 3
- B The sources of criminal law 5
- C Theories of punishment 10
- D The crisis in the criminal justice system 20
- E Criminal liability: A summary 29
- F The principle of legality 35

II CONDUCT
- A Conduct (act or omission) 51
- B Omissions 58
- C Possession 62

III THE DEFINITIONAL ELEMENTS
- A Compliance with the definitional elements 71
- B Causation 79

IV UNLAWFULNESS (JUSTIFICATION)
- A The concept of unlawfulness 95
- B Private defence 102
- C Necessity 114
- D Consent 122
- E Presumed consent 127
- F Official capacity 128
- G Use of force and homicide during arrest 129
- H Obedience to orders 134

PAGE

I Disciplinary chastisement ... 137
J Excursus: Trifling nature of act as a defence ... 139
K Excursus: Entrapment is not a ground of justification ... 140

V CULPABILITY
A Requirement of culpability in general ... 145
B Criminal capacity ... 155
(i) The concept of criminal capacity ... 155
(ii) Non-pathological criminal incapacity ... 158
(iii) Mental illness ... 164
(iv) Immature age ... 173
C Intention ... 176
D Negligence ... 204
E Effect of intoxication ... 216
F Effect of provocation ... 230
G Necessity as a ground excluding culpability ... 235
H Strict and vicarious liability ... 236
(i) Strict liability ... 236
(ii) Vicarious liability ... 242

VI CRIMINAL LIABILITY OF CORPORATE BODIES ... 245

VII PARTICIPATION AND ACCESSORIES AFTER THE FACT
A General ... 249
B Perpetrators ... 252
C Accomplices ... 265
D Accessories after the fact ... 271

VIII ATTEMPT, CONSPIRACY AND INCITEMENT
A General ... 275
B Attempt ... 276
C Conspiracy ... 286
D Incitement ... 289

PART TWO: SPECIFIC CRIMES

CRIMES AGAINST THE STATE AND THE ADMINISTRATION OF JUSTICE

IX CRIMES AGAINST THE STATE
A High treason ... 299
B Sedition ... 308
C Public violence ... 311

PAGE

X CRIMES AGAINST THE ADMINISTRATION OF JUSTICE
A Contempt of court ... 315
B Defeating or obstructing the course of justice ... 327
C Perjury ... 332
D Subornation of perjury ... 335
E Making conflicting statements under different oaths (contravention of section 319(3) of Act 56 of 1955) ... 336
F Making false statements in an affidavit (contravention of section 9 of Act 16 of 1963) ... 338
G Escaping from custody ... 338

CRIMES AGAINST THE COMMUNITY

XI SEXUAL CRIMES
A General ... 341
B Rape ... 343
C Compelled rape ... 358
D Sexual assault ... 360
E Compelled sexual assault ... 368
F Compelled self-sexual assault ... 369
G Compelling another to watch sexual acts ... 371
H Exposing genital organs, anus or breasts ("flashing") ... 372
I Displaying child pornography ... 373
J Engaging sexual services for reward (prostitution) ... 373
K Incest ... 378
L Bestiality ... 381
M Sexual act with a corpse ... 383
N Sexual offences against children ... 383
O Sexual offences against mentally disabled persons ... 390

XII CRIMES AGAINST THE FAMILY
A Bigamy ... 393
B Common-law abduction ... 395

XIII CRIMES AGAINST PUBLIC WELFARE
A Corruption ... 401
B Extortion ... 417
C Drug offences ... 420
D Unlawful possession of firearms or ammunition ... 426
E Concealment of births ... 432
F Public indecency ... 433
G Violating a grave ... 435
H Violating a corpse ... 436

PAGE

CRIMES AGAINST A PERSON

XIV CRIMES AGAINST LIFE
A Murder ... 437
B Culpable homicide ... 442
C Administering poison or another noxious substance ... 443
D Exposing an infant ... 444

XV CRIMES AGAINST BODILY INTEGRITY
A Assault ... 447
B Intimidation ... 455
C Pointing a firearm ... 458

XVI CRIMES AGAINST DIGNITY AND REPUTATION
A *Crimen iniuria* ... 461
B Criminal defamation ... 467

XVII CRIMES AGAINST FREEDOM OF MOVEMENT
A Kidnapping ... 471

CRIMES AGAINST PROPERTY

XVIII CRIMES RELATING TO APPROPRIATION OF PROPERTY
A Theft ... 475
B Removal of property for use ... 502
C Robbery ... 508
D Receiving stolen property ... 512
E Inability to give account of possession of goods suspected of being stolen (contravention of section 36 of Act 62 of 1955) ... 515
F Receiving stolen property without reasonable cause (contravention of section 37 of Act 62 of 1955) ... 519

XIX FRAUD AND RELATED CRIMES
A Fraud ... 523
B Forgery and uttering ... 532
C Theft by false pretences ... 535

XX CRIMES RELATING TO DAMAGE TO PROPERTY
A Malicious injury to property ... 539
B Arson ... 542
C Housebreaking with intent to commit a crime ... 543
D Possession of housebreaking implements ... 550
E Trespass ... 551

SCHEDULES ... 555
BIBLIOGRAPHY ... 559
MOST IMPORTANT LEGISLATION DISCUSSED ... 567
TABLE OF CASES ... 569
INDEX ... 603

PART ONE

GENERAL PRINCIPLES

CHAPTER

I

INTRODUCTION

A INTRODUCTORY TOPICS

1 Criminal law and the legal system This book deals with South African criminal law. Law is traditionally subdivided into two main categories, namely public law and private law. In principle, public law deals with the relationship between the state as an authoritative power and the subjects of the state, with the relationship between the different branches of state authority (such as the different ministries of the state), and with the relationship between different states. Private law, on the other hand, may be said to regulate relationships between individuals as subjects of the legal order. The state as an authoritative power is always a party in public law. Just as private law may be subdivided into, for example, the law of obligations, the law of succession and the law of things, public law may be subdivided into, for example, constitutional law, administrative law and criminal law.

However, law may also be subdivided in another way, namely by distinguishing between substantive law and formal law. Substantive (or material) law comprises substantive legal rules setting out the rights and duties of subjects or of the state, while formal law comprises rules setting out the procedure or methods by which the rules of substantive law are enforced. In terms of this subdivision, both public and private law form part of substantive law, whilst formal or procedural law may be further subdivided into the law relating to criminal procedure, that relating to civil procedure and the law of evidence. Criminal law forms part of substantive law. Criminal procedure is, from the point of view of criminal law, an important auxiliary branch of the law. It lays down the procedure by which alleged criminals are brought before court and tried for their alleged crimes. Some other important branches of law and related spheres of study which may influence or which may be influenced by criminal law are the law of delict, the law of evidence, criminology and penology. The latter two are, in any event in South Africa, not regarded as pure legal sciences.

2 Crimes and delicts Whilst there are many similarities between crimes and delicts, there are nevertheless also fundamental differences between the two. It is precisely when a crime is compared with a delict that a crime's fundamental characteristics come to the fore. Both crimes and delicts may be described as unlawful, blameworthy acts or omissions. Broadly speaking, a delict is an

unlawful, blameworthy act or omission resulting in damage to another and in a right on the part of the injured party to compensation. The injured party may, if he so wishes, institute an action for damages against the offender. A crime, on the other hand, is unlawful, blameworthy conduct punishable by the state.

One and the same act may constitute both a crime and a delict. If X assaults Y, Y can claim damages from X on the grounds of delict. He can also lodge a complaint with the police against X on the grounds of assault, which may lead to X's conviction and punishment for the crime of assault. This, however, does not mean that all delicts also constitute crimes. Two examples of conduct constituting a delict but not a crime are the negligent causing of damage and seduction. Again, most crimes, for example high treason, perjury, bigamy and the unlawful possession of drugs, are not delicts.

In principle, the following distinction may be made: a crime is almost invariably injurious to the public interest, by which is meant, the interests of the state or the community, whereas a delict is ordinarily injurious only to private or individual interests.[1] Whereas criminal law forms part of public law, the law of delict forms part of private law, and in particular of that part of private law which is known as the law of obligations. It is not for the person who has suffered harm or injury as a result of the commission of a crime to decide whether the offender should be criminally charged or not. The police may decide to proceed with a criminal charge even if the complainant begs them not to do so. In the case of a delict, on the other hand, it is up to the person who has suffered damage to decide whether to sue the wrongdoer for damages or not.

Perhaps the most important difference between a crime and a delict lies in the nature of the sanctions which follow on their commission. Where a delict has been committed the guilty party is ordered to pay compensation to the complainant, the purpose of which is to put the complainant in the same position he would have been in had the delict not been committed. Where someone is convicted of a crime, on the other hand, a punishment is imposed on him, with a view to retribution, the prevention of crime, deterrence or the rehabilitation of the offender. Generally speaking, a convicted person will suffer some form of pain or misfortune such as imprisonment or a fine. Furthermore, it is as a rule the state which prosecutes in a criminal case. Although provision is made in the Criminal Procedure Act[2] for private prosecutions, these are extremely rare in South Africa; the right to prosecute privately is really nothing more than a "safety valve" left open to the aggrieved individual where the state refuses to prosecute.

If a person is charged in a court with having committed a crime, the trial is governed by the rules of criminal procedure. But if someone claims damages on the ground of delict, the trial is governed by the rules of civil procedure.

To summarise, the distinguishing features of a crime can be described as follows: it is conduct which is legally forbidden, which may, in principle, be prosecuted only by the state, and which always results in the imposition of punishment.

---

1 The last part of this statement is subject to the following exception: it is possible for the state to be a plaintiff or a defendant in a delictual claim in private law matters where it figures not as the bearer of authority but on an equal footing with the individual.

2 Act 51 of 1977. See ss 7–17.

The most important points of difference between a crime and a delict can be summarised as follows:

Crimes	Delicts
1 Directed against public interests	Directed against private interests
2 Form part of public law	Form part of private law
3 State prosecutes	Private party institutes action
4 Result in the imposition of punishment by the state	Result in the guilty party being ordered to pay damages to the injured party
5 State prosecutes perpetrator irrespective of the desires of private individual	Injured party can choose whether he wishes to claim damages or not
6 Trial governed by rules of criminal procedure	Trial governed by rules of civil procedure

3 No difference between "crimes" and "offences" In South Africa criminally punishable conduct is sometimes referred to as a "crime" and sometimes as an "offence". However, there is no technical difference between a "crime" and an "offence". In the discussion which follows, the term "crime" will be used throughout in the interests of consistency.

B THE SOURCES OF CRIMINAL LAW

1 Three main sources of our criminal law The three most important sources of our criminal law are first, legislation, secondly, the common law, and thirdly, case law. However, the second and third sources overlap, since the contents of the common law has to a very large extent been set out in our reported (ie, published) case law.

In addition to these sources one can identify certain further sources of influence which have left their mark on our criminal law, and which will be described briefly hereafter. These influences are English law, German criminal-law theory, and the Bill of Rights in the Constitution.

2 Legislation In considering the sources of our criminal law, legislation must occupy the first place, since an Act creating a crime or containing a provision relating to the determination of criminal liability must obviously be applied and receive priority over the provisions of common law. Unlike our criminal procedure, our substantive criminal law has not yet been codified, and it does not seem that it will be within the foreseeable future.[3] Until now the South African legislature has been silent on the general principles of criminal law, with the

3 South Africa is one of the very few countries in the world in which the substantive criminal law has not yet been set out in a single, comprehensive and coherent Act or Code. In 1995 Snyman drew up a *Draft Criminal Code for South Africa*. For a discussion of the implications of the absence of an official criminal code in South Africa, the advantages of codification, as well as comparisons to other countries or jurisdictions, see the Introduction to this publication.

important exception of the rules governing the defence of mental illness, which were set out in sections 77 to 79 of the Criminal Procedure Act 51 of 1977. The best-known specific crimes, such as murder, assault and theft, are nowhere statutorily defined, and their requirements must therefore be sought in our common law. Nevertheless, the South African legislature has created a vast number of statutory crimes. In a book of this scope it is impossible to pay attention to all of them. Only some of the more important ones will be discussed.

There is one Act which towers above all other Acts in importance. This is the Constitution of the Republic of South Africa 108 of 1996. Chapter 2 of the Constitution contains a Bill of Rights. All rules of law, irrespective of whether they are contained in legislation or in common law, must be compatible with this Bill of Rights. If a rule is incompatible with the Bill of Rights, it may be declared null and void. This applies, of course, also to the rules governing substantive criminal law.

3 Case law The role of the courts in describing and developing our criminal law is vital. According to the principle of judicial precedent which is followed in South Africa, as it is in England (but not in continental Europe), a lower court is in principle bound to follow the construction placed upon a point of law by a higher court, and a division of the High Court is in principle also bound by an earlier interpretation of a point of law by the same division. Today a practitioner who wants to find out the common law (ie, those legal rules not contained in Acts of parliament or enactments of other subordinate legislatures) on a particular point seldom needs to read the old authorities such a Matthaeus or Voet. Almost all the most important rules and principles of common law have, over the years, been adopted and expounded in our case law.

4 Common law The term "common law" refers to those rules of law not contained in an Act of parliament or of legislation enacted by some other subordinate legislature, such as a provincial legislature, but which are nevertheless just as binding as any legislation. The common law of South Africa is Roman-Dutch law. Roman-Dutch law is that system of law which originated about 2 500 years ago in Rome, spread during and after the Middle Ages to Western Europe and was received from the late thirteenth, up to the end of the sixteenth century, in the Netherlands. Justinian was the emperor of the Eastern Roman empire from 527 to 565 AD. He ordered the scattered texts of Roman law to be assembled in one compilation. This came to be known as the *Corpus Iuris Civilis*. It consisted of four parts, namely (*a*) the *Institutiones*, (*b*) the *Digesta* or *Pandectae*, (*c*) the *Codex* and (*d*) the *Novellae*. Criminal law was discussed chiefly in D 48 and 49 and C 9.

In later centuries Roman law as expounded in the Justinian compilation was studied by jurists in Italy, who were known as the Glossators and Commentators. In the course of time the influence of this compilation spread across the whole of Western Europe. Between roughly the thirteenth and the end of the sixteenth centuries Roman law was received also in the Netherlands. The legal system known as Roman-Dutch law resulted from the reception of Roman law in the Netherlands and the fusion of Roman law and local customary law.

To ascertain the content of this legal system, recourse must be had to the works of the great Dutch jurists who wrote treatises on this legal system. The most noteworthy writers who wrote specifically on criminal law are the following:

Damhouder (1507–1581), who is known especially for his work *Praxis Rerum Criminalium*; Matthaeus (1601–1654), who is known especially for his work *De Criminibus*; Moorman (1696–1743), who wrote *Verhandelinge over de Misdaaden en der selver straffen*, and Van der Keessel (1735–1816), who wrote *Praelectiones ad Ius Criminale*. Other well-known authors who wrote comprehensive treatises on the law in general, including criminal law, include Van Leeuwen, Huber, Voet, Van der Linden and Hugo de Groot (Grotius). The works of the Roman-Dutch writers were written in Latin or Dutch, but in the course of time almost all the works have been translated into English.

The officials of the Dutch East India Company who administered the settlement at the Cape after 1652 applied Roman-Dutch law. When for the first time in 1795 and again finally in 1806 the Cape became an English colony, English law did not replace Roman-Dutch law as the common law. Roman-Dutch law spread to all the territories, colonies, republics and states which in 1910 came together to form the Union of South Africa. Today it still forms the common law of the Republic of South Africa. As already pointed out, the most important rules and principles of our common law have found their way into our case law, with the result that it is seldom necessary to go beyond the case law and consult the old original treatises of the Roman-Dutch authors in order to find out the contents or our law.

It is clear that the influence of the Roman-Dutch writers on criminal law in South Africa is on the decline. The reasons for this are, first, that in the course of the last century or two our courts have garnered what wisdom there is to be found in the old sources and, secondly, that the technological age in which we are living is characterised by needs and problems which in many respects differ markedly from those of two or three centuries ago. The value of historical research in law is not disputed; it may even be necessary as the starting point of a writer's investigation. It is nevertheless submitted that it would be wrong to equate all legal investigation with investigation into the history of law, for this would mean looking in one direction only, namely backwards. Furthermore, it must be kept in mind that the historical method of research in criminal law is impeded by the following factors: the old authorities were usually more concerned with the punishment to be imposed for a crime than with the prerequisites for liability; they often contradicted one another; they did not discuss the general principles of criminal law on a systematic basis; and because their knowledge of, among other things, psychology and human motivation in general was limited, their views concerning important topics such as the criminal capacity of mentally ill persons or of youths are no longer of much value to us.

5 The influence of English law Apart from the three main sources of our criminal law identified and discussed above, it is necessary briefly to consider certain other factors which have influenced or still influence our criminal law. Here one is not dealing with sources of our criminal law in the strict sense of the word, but rather with factors which have influenced and are still influencing our criminal law to such an extent that they cannot be ignored.

Although English law did not replace Roman-Dutch law when the Cape became an English colony, it nevertheless in the course of the nineteenth century exerted a strong influence on our law in general and criminal law in particular. Conduct which was generally speaking punishable under Roman-Dutch law

was often punished under new headings. Examples of these "new crimes" are the qualified assaults (assaults committed with the intention of committing another crime or of inflicting grievous bodily harm); housebreaking with the intention of committing a crime; receiving stolen property knowing it to be stolen; culpable homicide and fraud (which was a combination of the old crime of *stellionatus* and the *crimina falsi*).

The infiltration of English law into the then existing Roman-Dutch criminal law was in many respects inevitable and even to be welcomed. The common law was deficient in certain respects. The expositions of the law by the various Roman-Dutch writers were sometimes contradictory. Descriptions of the crimes were often vague, and the writers more concerned with the punishments attendant upon crimes than with their essential elements. To compound these problems, very few legal practitioners were able to read and understand Latin properly.

Act 24 of 1886 of the Cape, also known as the "Native Territories' Penal Code", embodied a criminal code for the area now known as the Transkei and adjacent areas. The code is an almost exact transcription of a criminal code drawn up by Sir James Stephen and introduced by him in a bill in the British parliament but which was never adopted. In later years this code exerted a considerable influence on South African criminal law as expounded by the courts, for example, in defining the limits of the defence of provocation (section 141) and in defining theft (section 179).

The influence of English law is especially noticeable in the appellation and subdivision of the specific crimes, as well as in the particular requirements for these crimes. In the field of the general principles of criminal law the influence of English law is less noticeable. Concepts such as "unlawfulness", "grounds of justification", "criminal capacity" and *dolus eventualis*, which have found their way into our criminal law, are unknown in English law.

6 German criminal-law theory The study of criminal law consists of more than the mere recording of a large number of isolated rules, examples, sections of statutes, definitions of crimes and court decisions. It comprises a systematic arrangement of this material, in other words a search for and formulation of certain general principles to be applied in solving individual sets of facts. The researcher may be aware of a large number of facts, examples, cases and rules, but without the aid of general principles he will not know how to relate them to one another. He will not be able to extricate himself from the seeming mass of casuistry with which he is confronted. The term "criminal-law theory" denotes a method of arranging the numerous subordinate rules, examples or cases according to a system of general principles. Criminal-law theory is characterised by the systematic description of the requirements for criminal liability, that is, the general requirements applicable to all crimes. Concepts which come to mind in this respect are, for example, "act", "unlawfulness", "intention" and "culpability" or "blameworthiness".

Strictly speaking there is no legal system that can dispense with a set of general rules. Accordingly, in every legal system criminal law may be described as "scientific" or "systematic". Nevertheless, it is clear that as far as this aspect of the law is concerned, the approach to the study of criminal law of continental Europe differs considerably from that of England. On the Continent, and more particularly in Germany, the "scientific" approach is much more in evidence

than in England. In fact, the approach to the study of criminal law known as "criminal-law theory" is almost invariably associated with the particular approach or method followed in Germany ("Strafrechtswissenschaft"). This approach utilises a highly sophisticated system of concepts in describing the general prerequisites for criminal liability. The emphasis here is on the formulation of concepts which are universally valid, not confined to a particular place or time and not dependent upon contingencies such as the accidents of history or the peculiarities of individual nations or nationalities.[4] This model's method or reasoning is systematic and analytic. The tendency is to reason deductively, that is, from the general to the particular.

This systematic continental model is also recommended for South Africa. Our legal system has its origins in the Continent, but even leaving that consideration aside it is the Continental model which is the most conducive to legal certainty and to a consistent application of legal rules. Instead of having to apply, in an *ad hoc* fashion, a collection of incidental and often unconnected individual examples from the past by way of analogy to a new set of facts, the investigator or judge has at his disposal a coherent system of principles to apply to novel – and sometimes even unusual – facts.

7 The Bill of Rights The coming into operation of the Constitution of the Republic of South Africa 108 of 1996 has had a far-reaching influence on the whole of South African law. Chapter 2 of the Constitution contains a Bill of Rights. The provisions of the Bill of Rights apply to the executive, the judiciary and all organs of state.[5] Parliament is no longer sovereign, and all rules of law, irrespective of whether they are contained in statutes or common law, must be compatible with the rights contained in the Bill of Rights.

The Bill of Rights prohibits discrimination on the grounds of, among other things, race, gender, religion or language. It also creates a large number of rights, such as, a right to dignity, life, freedom and security of the person, privacy, religion, freedom of expression, political choice, property, education, language, and a fair trial. It also creates a number of so-called "second generation rights", such as a right to a clean environment, access to adequate housing, health care services, food, water and education, but it is noticeable that no provision is made for a right to an environment as free as possible of crime, or of a right to adequate protection against crime.

Section 36 contains an important provision: the rights in the Bill of Rights may be limited in terms of law of general application, but only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and taking into account certain factors set out in the section. The rights are therefore not absolute, but may be restricted.

A new human rights culture has therefore been created which has a great influence on many facets of the law, including substantive criminal law. In the

---

4 For this reason it is not surprising to discover the many books on German criminal law translated into foreign languages and to discern the influence of criminal-law theory in countries as far apart as Japan in the Far East, the Spanish- and Portuguese-speaking countries in South and Central America and, of course, continental Europe.

5 S 8(1) of the Constitution 108 of 1996.

course of the discussion in this book attention will sometimes be drawn, where applicable, to real or possible constitutional implications on the rules of criminal law.

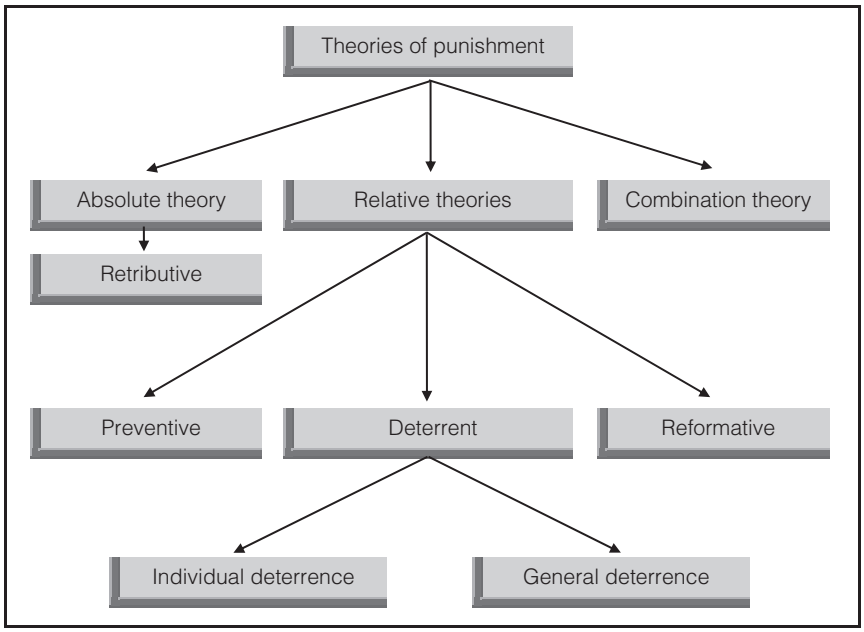
C THEORIES OF PUNISHMENT

1 Introduction This book contains an exposition of those rules of law which stipulate when a person is guilty of a crime. However, determining criminal liability is not an end in itself. After X has been convicted of a crime he must be sentenced. A sentence usually profoundly infringes upon X's basic human rights, such as his right to freedom of movement, privacy and dignity. In a society which values human rights, this infringement calls out to be justified.

The different answers given through the ages to the question of what right society has to punish convicted offenders, together with supporting arguments, are referred to as theories of punishment. The theories of punishment are of vital importance. They seek to answer not only the question as to the justification of punishment (and, by extension, the justification of the whole existence of criminal law), but also what punishment ought to be imposed in each individual case. These theories even have a direct impact on the construction of the general principles of liability and of the defences afforded an accused.

2 Classification of theories There are various theories of punishment, some very old, and some quite modern. The first classification distinguishes between three theories: the absolute theory, the relative theories and the combination or unitary theory. In the discussion which follows, the relative theories are further classified into the preventive, deterrent and reformative theories. The deterrent theory is subdivided into individual deterrence and general deterrence.

The following diagram sets out the classification of the theories.



3 Difference between absolute and relative theories A distinction is made between the absolute theory and the relative theories of punishment. There is only one absolute theory, namely the retributive theory, while there are a number of relative theories. According to the absolute theory, punishment is an end in itself; it is X's just desert. The relative theories are also known as the utilitarian, teleological or purpose theories. According to the relative theories, punishment is only a means to a secondary end or purpose (hence the name "relative theories"). This secondary purpose is different for each of the relative theories: for the preventive theory it is the prevention of crime; for the deterrent theory it is deterring the individual or society from committing a crime; and for the reformative theory it is the reformation of the criminal.

The absolute theory is of a retrospective nature: one looks only at the past, that is, at the crime that has been committed. If, on the other hand, one follows the relative theories, one looks at the future: the emphasis is on the object (eg prevention or reformation) that one wishes to achieve by means of the punishment.

4 The retributive theory

(*a*) *Description of concept* According to the retributive theory, punishment is justified because it is X's just desert. Retribution restores the legal balance that has been disturbed by the commission of the crime. Punishment is the payment of the account which, because of the commission of the crime, X owes to society.

This simple truth can be explained as follows in more detail: The legal order offers every member of society a certain advantage, while at the same time burdening him with an obligation. The advantage is that the law protects him in that it prohibits other people from infringing upon his basic rights or interests, such as his life, physical integrity and property. However, this advantage can exist only as long as each member of society fulfils his obligation, which consists in refraining from infringing upon other members' rights. In other words, there is reciprocity between the advantage and the obligation or duty. The advantage has a price, namely the duty to refrain from injuring another's interests. If everybody exercises the required self-restraint and refrains from injuring another's interests, the two scales of justice are evenly balanced; the advantages and disadvantages are evenly distributed.

However, if a person voluntarily refrains from exercising the required self-control and commits an act harming or injuring another's interests, in circumstances in which he could have acted lawfully, the scales of justice are no longer in balance. X (the wrongdoer) renounces a duty which others voluntarily take upon themselves, and in so doing he acquires an unjustifiable advantage over those who respect their duties to society. He enjoys the advantages of the system without fulfilling his obligations. In so doing he becomes a "free rider". According to the philosophy underlying retribution (or "just desert"), X now has a debt which he owes to society. By being given a punishment and by serving such punishment he pays the debt he owes to society. In this way the "score is made even again".[6] The two scales of justice become balanced again.

---

6 Snyman 2001 *THRHR* 218 224–227; *Mafu* 1992 2 SACR 494 (A) 497*c-d*, where the court quoted the meaning of "retribution" in the C*oncise Oxford Dictionary* (1990): [*continued*]

Retribution is therefore the restoring of the legal balance which has been disturbed by the commission of the crime.

The retributive theory therefore does not seek to justify punishment with reference to some future benefit which may be achieved through punishment (such as deterrence or prevention). Strictly speaking it is, therefore, not correct to describe retribution as a "purpose of punishment". It is rather the essential characteristic of punishment.

(*b*) *The rebirth of retribution* There was a time, not long ago, when retribution was not held in high esteem in Western society. There was a belief, strengthened by the growth of new disciplines such as sociology and psychology, that crime could successfully be combatted by the utilitarian mechanisms of deterrence and rehabilitation. This belief proved to be illusory, with the result that since about the seventies of the last century courts and writers, especially in the USA, have returned to retribution as justification of punishment.[7]

A new analysis of the writings of philosophers of the Enlightenment, such as Immanuel Kant, revealed the links between retribution and the essential features of justice, such as equality, freedom of will, moral responsibility, and linked to all this, the dignity of man.[8] The essence of retribution has come to be seen as the restoring of the legal balance which has been disturbed by the commission of the crime. To avoid equating retribution with vengeance, there is a tendency to replace the term "retribution" with "just desert". The expression "restorative justice" is also sometimes used.

(*c*) *Retribution does not mean vengeance* The word "retribution" may have more than one meaning. Without exploring all the different meanings and nuances the term may have,[9] attention is here drawn to one of the meanings sometimes assigned to it, namely that of "vengeance". By "vengeance" is meant the idea of an eye for an eye and a tooth for a tooth. This is the "primitive" or "Old Testament" meaning of the word[10] – the so-called *lex talionis*. According to this meaning of the term the very same harm or injury inflicted by the wrongdoer should be inflicted upon himself.

It is completely wrong to assign this meaning to the term "retribution". It might have had this meaning in primitive societies, but modern writers on criminal

---

"requital for evil done"; *Dressler* 17; Sendor 1994 *Journal of Contemporary Legal Issues* 323 337–343, 350–357.

7 Snyman 2001 *THRHR* 218 221–222 *Moore* 84 ff; *Morris* ch 2; *Dressler* 16–19; *Murphy* 82–115, 223–245; Moore in *Schoeman* (Ed) 179–217; Hampton 1992 *University of California LR* 1659 ff; Dressler 1990 *Michigan LR* 1448 ff; Fletcher 1994 *Journal of Contemporary Legal Issues* 101 ff; Arenella 1992 *University of California LR* 1511 ff; Bainbridge 1985 *American Bar Association Journal* (May) 61 ff; Falls 1987 *Law and Philosophy* 25 ff; Sendor 1994 *Journal of Contemporary Legal Issues* 324 ff; Byrd 1989 *Law and Philosophy* 152; Taylor 1981 *Law and Contemporary Problems* 46 ff; Cotton 2001 *American Criminal Law Review* 1313. (The very title of this article says it all. It reads "Back with a Vengeance: the Resilience of Retribution as an Articulated Purpose of Criminal Punishment".)

8 See especially the articles mentioned in previous footnote by *Falls* 32–41; *Hampton* 1667–1671, and *Murphy* 82–92.

9 Such as, expiation or atonement, denunciation of the crime and the criminal, and the mollification of society. See Snyman 2001 *THRHR* 218 222–225.

10 Genesis 9: 6; Exodus 21: 23–25.

law reject this meaning, and favour the more enlightened meaning described above, namely the restoring of the legal balance which has been disturbed by the commission of the crime.

(*d*) *Degree of punishment must be in proportion to the degree of harm* According to the retributive theory the extent of the punishment must be proportionate to the extent of the harm done or of the violation of the law. The less the harm, the less the punishment ought to be, because the debt which the offender owes the legal order is then smaller. This is illustrated by the fact that the punishment imposed for an attempt to commit a crime is, as a rule, less severe than for the commission of the completed crime. Again, the driver of a motor vehicle who negligently causes a person's death will receive a heavier sentence than one who merely drives negligently but, fortunately for him, does not seriously injure anyone or damage any property. By insisting upon the proportionality between harm and punishment, retribution reveals its basic link with the principle of equality, which is inherent in the principle of justice. The right to equality is in fact enshrined in the South African Bill of Rights.[11]

The idea of a proportional relationship between harm and punishment, inherent in the retributive theory, is of great importance in the imposition of punishment. If the retributive theory were to be rejected and only the relative theories followed, it would mean that punishment that is out of all proportion to the seriousness of the crime committed, could be imposed. If the emphasis were solely on prevention, the best thing to do would be to imprison for life each thief who took even the smallest article. Such harsh punishment would probably also be the best form of deterrence. The reformative theory, applied in isolation, would also have the result that a person who had committed a relatively minor crime could be subjected to reformative treatment for a lengthy period in an effort to cure him of his errant ways.

In short, punishment presupposes the idea of retribution. The retributive theory is accordingly the only theory that relates punishment directly to the completed crime and to the idea of justice.

(*e*) *Expression of society's condemnation of the crime* According to the retributive theory punishment expresses society's condemnation, its emphatic denunciation, of the crime. For this reason the retributive theory is sometimes called "the expressive theory of punishment".

By committing a crime the criminal by implication sends out a message to the victim that he holds him in contempt, that he is his superior and that he dominates him. Punishment in the form of retribution serves to cancel this message of dominance, "brings down" the offender to the same level as the victim, and expresses solidarity, not only with the victim, but with the maintenance of justice in general.

(*f*) *Retribution respects freedom of will and explains necessity of culpability requirement* A very important difference between the retributive theory and the relative (utilitarian) theories is the following: the retributive theory operates within an indeterministic construction of society; it therefore presupposes that

---

11 S 9(1) of the Constitution. For a good example of the application of this principle, see *Mngoma* 2009 1 SACR 435 (EC).

man has a free will and that he may accordingly either be praised or blamed for his actions. The relative or utilitarian theories, on the other hand, operate within a deterministic construction, which, at least in its original, unadulterated form, presupposes that man does not have a freedom of choice but is the victim of outside forces such as heredity, the environment or upbringing. He is the product of circumstances and is being manipulated or at least capable of being manipulated by outside circumstances. The reformative theory, for example, presupposes that the transgressor is a "sick" person who, like other sick people, could be changed by therapy into once again becoming a "normal" law-abiding citizen.

The importance of this distinction is the following: Free people can be held responsible for their choices, provided the choices were made voluntarily. They have in a certain sense merely brought the punishment upon themselves. They can fairly be blamed for what they did and their *punishment is their just desert*. They have earned their punishment. According to the utilitarian model, on the other hand, the transgressor cannot be blamed for acting in the way he did, because what he did was not the result of his own free choice, but of outside forces. He may arouse our pity or compassion, but blame is out of place. After all, one may blame another for his actions only if he could have avoided it, and according to the relative theories X could not have avoided the wrongful acts. Since the general requirement for criminal liability known as culpability (*mens rea* or fault) is based on X's blameworthiness, it is the retributive theory, and not the utilitarian theories, which offers the best explanation of the culpability requirement.

If one considers the deterrent theory (a relative theory) one finds that people can be deterred from crime even by punishing somebody who transgressed the norms of criminal law while lacking culpability. One can in fact deter people from crime even by punishing not X himself, but his family or friends (something which is not unknown in authoritarian regimes).

(*g*) *Retribution respects human dignity* By applying the retributive theory, the legal order respects X's human dignity, because X is treated not as a depersonalised cog in a machine, but as a free, responsible human being. His punishment is founded upon his own free choice.[12] As Kant emphasised, man's dignity requires him to be treated not as a means to an end, but as an end in itself. His worth is not based upon his utility to others, as the utilitarians would have him be, but upon an inherent, inalienable dignity. On the basis of retribution only, can X, after serving his sentence, look his fellow citizens in the eye in the knowledge that he has "paid his account" and is therefore their equal again. The utilitarian theories treat a person as an object to be manipulated or conditioned, as one would treat an animal.

To abandon retribution and to justify punishment on utilitarian grounds only is to treat the offender as somebody who is not the equal of other members of

---

12 *Morris* 42: "[I]n the therapy world nothing is earned and what we receive comes to us through compassion, or through a desire to control us. Resentment is out of place. We can take credit for nothing but must always regard ourselves . . . as fortunate recipients of benefits or unfortunate carriers of disease who must be controlled. We know that within our own world human beings who have been so regarded and who come to accept this view of themselves come to look upon themselves as worthless." See also Snyman 2001 *THRHR* 218 230–231.

society. Whereas the latter are all subject to the law and are therefore obliged to pay the debts they may owe society according to their deserts, the offender is treated as an exception, as somebody "different". Society, in effect, tells him: "You are not like the rest of us. We do not treat you according to your deserts or (which is the same) your merit; we do not measure your worth by the same yardstick by which we measure that of everybody else." This in turn is tantamount to giving the offender a sense of guilt for the rest of his life, for whereas everybody else in society would be proud to pay their debt and thereafter to look their fellow citizen in the eye as an equal, the offender is treated as an exception to the rules applicable to everybody else; he is denied the opportunity of functioning as an equal of others in a paradigm in which everybody is treated according to his merits or desert.

5 The preventive theory We now turn our attention to the relative theories of punishment. We shall first discuss the preventive theory, according to which the purpose of punishment is the prevention of crime. This theory can overlap with both the deterrent and the reformative theories, since both deterrence and reformation may be seen merely as methods of preventing the commission of crimes. On the other hand, certain forms of punishment are in line with the preventive theory without necessarily also serving the aims of deterrence and reformation. Examples are capital punishment, life imprisonment and the forfeiture of, for example, a driver's licence. If a legal system were to go so far as to castrate certain sexual offenders, this too would be an application of the preventive theory.

Some sources recognise a theory of punishment known as "incapacitation".[13] Closer scrutiny of this theory reveals that it is merely a variation of the preventive theory. According to the theory of incapacitation X is punished in order to prevent him being capable of committing crime again. This theory is closely linked to the view that the purpose of punishment is the protection of society.

The success of the preventive theory depends largely upon the ability of a court to establish beforehand which accused are so dangerous that they should permanently, or at least for a long period, be removed from society. However, it is often difficult for a court to determine beforehand with certainty whether an accused falls into this category. This is one of the points of criticism against the efficacy of this theory. A convicted person's record could, however, be used as guideline: should it show previous convictions, indicating that he makes a habit of committing crimes, the court may take this into account and sentence him to a long term of imprisonment in order to prevent him from committing crimes again.

6 The theory of individual deterrence A distinction must be drawn between individual and general deterrence. Individual deterrence means that the offender as an individual is deterred from the commission of further crimes, and general deterrence means that the whole community is deterred from committing crimes. The idea at the root of individual deterrence is to teach the individual person convicted of a crime a lesson which will deter him from committing crimes in the future. In South Africa the premise of this theory is undermined by the shockingly high percentage of recidivism (offenders who

13 Eg *La Fave* 27; *Allen* 1.3.1.3; *Burchell and Milton* 73–74.

continue to commit crime after being released from prison) – this lies in the region of 90%[14] and suggests that this theory is not very effective, in any event not in South Africa.

7 The theory of general deterrence According to this theory the emphasis is not, as in the previous theory, on the individual offender, who, by having instilled fear in him, will supposedly be deterred from again committing crime. The emphasis here is on the effect of punishment on society in general: the purpose of punishment is to deter society as a whole from committing crime. The belief is that the imposition of punishment sends out a message to society that crime will be punished and that, as a result of this message, members of society will fear that if they transgress the law they will be punished, and that this fear will result in their refraining from engaging in criminal conduct.

There is a common misconception that the effectiveness of general deterrence depends only upon the severity of the punishment, and that this theory is accordingly effective only if a relatively severe punishment is prescribed and imposed. Although the degree of punishment is not irrelevant in judging the effectiveness of this theory, the success of the theory in fact does not depend on the severity of the sentence, but on how probable it is that an offender will be caught, convicted and serve out his sentence. The theory is accordingly successful only if there is a reasonable certainty that an offender will be traced by the police, that the prosecution of the crime in court will be effective and result in a conviction, and that the offender will serve his sentence and not be freed on parole too early, or escape from prison.

If the police fail to trace offenders (as a result of, for example, understaffing, bad training or corruption), the state prosecutor fails to prove an accused's guilt in court (as a result of, for example, shortages of personnel, bad training, or lack of professional experience), or the prison authorities cannot ensure that a convicted offender serves his sentence and does not escape before the expiry of his sentence period, the deterrent theory cannot operate effectively. Prospective offenders will then think it is worth taking a chance by committing the crime, since the chances of their being brought to justice are relatively slim.

This is precisely the danger facing criminal justice in South Africa. It is well known that a variety of factors, such as an understaffed police force, some police officers and prosecutors lacking the required skills, possible corruption and bad administration (factors which may all be traced back to a lack of funds) considerably weaken the probability of a real offender being brought to justice and punished. In fact, in the light of statistics showing how few offenders are ultimately apprehended, prosecuted and sentenced, it is difficult not to conclude that in South Africa it pays to commit crime.[15] For this reason the theory of general deterrence can only be of limited value in a country such as South Africa.

---

14 In June 1996 it was estimated that 94% of all prisoners who leave prisons continue to commit crime. See *SAIRR Survey* 1996/1997 63. According to *SAIRR Survey* 1999/2000 91 between 88% and 90% of all convicted criminals committed crime again after being released. See also Prinsloo 1997 *SACJ* 46 and the statistics mentioned in this article.

15 In 1996 it was estimated that of every 1 000 crimes committed in South Africa, only 450 were reported, 230 solved, 100 criminals prosecuted, 77 accused convicted, 33 accused sentenced to imprisonment and 8 accused sentenced to imprisonment for periods longer

[*continued*]

Quite apart from the misgivings regarding the effectiveness of this theory, attention must be drawn to certain further points of criticism against this theory.

Firstly, it must be remembered that this theory, in typical utilitarian fashion, is based upon the premise that man prefers the painless to the painful, and that he is a rational being who will always weigh up the advantages and disadvantages of a prospective action before he decides to act. However, this is by no means always so, especially where a person commits a murder or assaults someone in the heat of the moment.

A *second* point of criticism of the theory is that its basic premise, namely that the average person is deterred from committing a crime by the punishment imposed upon others, can presumably never be proved. To be able to prove it one would have to know how many people would commit the crime if there were no criminal sanction. This cannot be ascertained empirically. The deterrent effect of punishment on the community as a whole rests on faith rather than on real empirical evidence.

A *third* point of criticism of the theory is that the requirement of culpability, which is a cornerstone of criminal liability, cannot readily be explained by merely relying on this theory: it is possible to deter people from committing crime even by punishing those who transgress the rules of criminal law without any culpability. If, for example, the law were to punish an insane person for having committed an unlawful act, such punishment could still operate as a deterrent to others.

The *fourth* and perhaps most important criticism of this theory is the following: If one applies this theory, it becomes permissible to impose a punishment on an offender which is not proportional to the harm he inflicted when he committed the crime, but which is higher than a proportional sentence. This is, after all, what happens if a court imposes a sentence which it wishes to operate as a deterrent to others. In this way one individual is sacrificed for the sake of the community, and that individual is degraded to being a mere instrument used to achieve a further goal. Such a technique is open to criticism as being immoral, because, in accordance with the deterministic origin of this theory, the accused is not (as in the case of retribution) regarded as a free, responsible agent who gets only what he deserves, but is used as a means to an end, namely the presumed improvement of society.[16]

8 The reformative theory This theory is of fairly recent origin. Its premise is that the purpose of punishment is to reform the offender as a person, so that he may become a normal law-abiding member of the community once again. Here the emphasis is not on the crime itself, the harm caused or the deterrent

---

than 2 years (*Nedcor Project on Crime, Violence and Investment* June 1996; *SAIRR Survey* 1996/1997 63. Kotze 2003 *SACJ* 38 39 alleges that "the perpetrator of some serious violent crimes have a less than 2% chance of being caught and punished". According to *SAIRR Survey* 2003/2004 395 the SA Law Commission has found that only in 1% of murder cases, 5% of rape cases and 3% of cases of robbery with aggravating circumstances have there been convictions. Of all serious crime there have been convictions in only 6% of cases. About 75% of all serious crimes have never even ended up in the courts.

16 Cf the apt remarks in this regard in *Dodo* 2001 1 SACR 594 (CC) par 38.

effect which punishment may have, but on the person and personality of the offender. According to this theory an offender commits a crime because of some personality defect, or because of psychological factors stemming from his background, such as an unhappy or broken parental home, a disadvantaged environment or bad influences from friends. The recent growth of the sociological and psychological sciences has largely contributed to the creation of this theory.

The following are some points of criticism against this theory: *Firstly*, the theory does not provide for the punishment to be proportionate to the harm inflicted or to the degree of violation of the law. The application of the theory might entail the imposition of long periods of imprisonment (to afford enough time for rehabilitation), even for crimes of a minor nature. *Secondly*, it is difficult to ascertain beforehand how long it will take to reform an offender. *Thirdly*, the theory is effective only if the offenders are relatively young; when it comes to older offenders it is very difficult, if not impossible, to break old habits and change set ideas. *Fourthly*, experience has taught that rehabilitation of the offender is more often than not an ideal rather than a reality. The high percentage of recidivism is proof of this. Certain people simply cannot be rehabilitated. However, the ideal of reformation may be indirectly advanced if a court imposes a sentence which is suspended on condition that X subject himself to a certain rehabilitation programme. The reformation then takes place outside prison.

A *fifth* basic point of criticism is that, strictly speaking, it is not necessary to wait for a person to commit a crime before one starts to reform him. A completely consistent application of this theory would mean that once a person clearly manifests a morbid propensity towards certain criminal conduct (as, for example, the kleptomaniac or the psychopath who cannot control his sexual desires), one ought not to wait for him to commit a crime, but should have him committed to a rehabilitation institution immediately so that an attempt can be made to cure him of his problem. There would then be no relationship between what happens to such a "sick person" and the commission of a crime. The person requiring treatment would then no longer be a criminal, and the "treatment" he received would then be viewed in the same light as the hospitalisation of ill people. Even if one were to describe the treatment as "punishment", it would not entail any blameworthiness on the part of the person "treated". In fact, strictly speaking it is not even correct to describe the rehabilitative treatment which the offender receives as "punishment", because in this theory the emphasis is not on any unpleasantness which the offender should receive, but rather on measures aimed at making him a better person.

In the light of the above criticism of the theory it is not surprising that the theory has lately lost its attractiveness in countries such as the USA and England. However, South African courts still believe in rehabilitation as a purpose of punishment in appropriate cases. Owing to the overpopulation of the prisons as well as the lack of sufficient funds to implement the expensive treatment programmes, it is doubtful whether this theory of punishment can be applied with success in South Africa. In the light of the alarming increase in crime in recent times in South Africa as well as the justified insistence of the community (all population groups) that punishment reflect the abhorrence of crime, this theory of punishment should not be granted too much weight.

9 The combination theory The courts do not reject any one of the theories set out above outright but, on the other hand, they do not accept any single theory as being the only correct one to the exclusion of all the others. Like other courts in the Western world, our courts apply a combination of all the above-mentioned theories, and for this reason one may speak of a combination theory.

The idea of retribution (not in the sense of vengeance, but in the sense of the restoring of a disturbed legal balance) ought, in principle, to form the backbone of our approach to punishment. There is no such thing as punishment devoid of any element of retribution. The retributive theory is indispensable, for it is the only one which decrees that there ought to be a proportionate relationship between the punishment meted out and the moral blameworthiness of the offender, as well as between the degree of punishment, on the one hand, and the extent of the harm done or the degree in which the law was violated, on the other hand.

The nature of the combination theory applied in a particular case is determined by the weight afforded to each of the particular theories contained in the combination. Our courts emphasise that there are three main considerations to be taken into account when sentence is imposed, namely the crime, the criminal and the interests of society.[17] By "crime" is meant especially the consideration that the degree of harm or the seriousness of the violation must be taken into account (retributive theory); by "criminal" is meant especially that the personal circumstances of the offender, for example, the personal reasons which drove him to crime as well as his prospects of one day becoming a law-abiding member of society again must be taken into account (reformative theory); by "the interests of society" is meant either that society must be protected from a dangerous criminal (preventive theory) or that the community must be deterred from crime (theory of general deterrence) or that the righteous indignation of society at the contravention of the law must find some expression (retributive theory).

In a judgment which ought to be welcomed, the Supreme Court of Appeal in 2011 held in *Matyityi*[18] that a court when imposing sentence should also take into account the interests of the *victim*. After this decision it is perhaps more correct to say that there are, according to the courts, *four* key considerations that must be taken into account when imposing sentence, namely, the crime, the criminal, the interests of the community and the interests of the victim.

There ought to be a healthy balance between these three considerations. A court should not emphasise any one of them at the expense of the others. Nevertheless, a close scrutiny of the case law reveals that the courts tend to regard general deterrence as the most important purpose of punishment, and that retribution no longer plays an important role. This approach to punishment can be criticised, as will be shown below.[19]

---

17 *Zinn* 1969 2 SA 537 (A) 540; *Khumalo* 1984 3 SA 327 (A) 330; *B* 1985 2 SA 120 (A) 124; *Malgas* 2001 1 SACR 469 (SCA) 478*d*; *De Kock* 1997 2 SACR 171 (T) 183; *Cassiem* 2001 1 SACR 489 (SCA) 494. See also generally the discussion in *Terblanche* 167–171.

18 2011 1 SACR 40 (SCA) par 16-17.

19 *Infra* par 10.

It is impossible to combine these three considerations in a particular way with specific weight allotted to each beforehand, and then to use this as a rigid formula in all cases. Each case is unique and each accused differs from all others. Our courts quite rightly emphasise the importance of the individualisation of sentences.[20] However, this does not mean that the principle of ensuring, in so far as this is possible, the uniformity of sentences where the relevant circumstances in cases resemble each other, should therefore be thrown overboard.[21] A discussion of all the considerations (such as age, ability to pay a fine, previous convictions) which ought to be taken into account when punishing different types of crime and different types of offenders falls outside the scope of this book.

10 Evaluation of existing rules relating to punishment The weight attributed in a specific country and at a specific time to each of the theories of punishment depends upon the particular circumstances in that country at that time. Unlike in most other countries, crime levels have soared to alarming proportions in South Africa in recent times.

It is submitted that, in the light of the particular circumstances in South Africa, retribution (just desert) ought to have a higher priority than was until recently the case. Considerations pertaining to the individual interests and circumstances of the accused ought to receive less weight than in previous times. It is time that the combatting of crime and the protection of society receive the highest priority. More emphasis ought to be placed on retribution in order to express society's justified condemnation of crime.

The legislature has already taken a significant step towards the implementation of sentences to protect society when it enacted section 51 of the Criminal Law Amendment Act 105 of 1997. This section provides for certain minimum periods of imprisonment, including even mandatory life imprisonment in certain cases, unless there are substantial and compelling circumstances which justify the imposition of a lesser sentence. The introduction of mandatory minimum sentences by the legislature should be welcomed. Although it fetters judicial discretion relating to the measure of punishment, it is a necessary step in the light of the crisis in which the administration of criminal justice finds itself in this country.

Although considerations relating to the rehabilitation of the individual offender should not be discarded completely, the reformative theory must necessarily have a lower priority in this country. Reformation of offenders is costly. South Africa does not have the financial means to realise the reformative ideals.

D THE CRISIS IN THE CRIMINAL JUSTICE SYSTEM

1 A dysfunctional criminal justice system The South African criminal justice system, with the best will in the world, cannot be described as other than dysfunctional. Since about 1990 crime has rocketed to levels never before

---

20 *Zinn supra*; *B supra* 125F–G; *Matoma* 1981 3 SA 838 (A) 843A.

21 *Reddy* 1975 3 SA 757 (A) 760; *Goldman* 1990 1 SACR 1 (A) 3*d–e*; *Blank* 1995 1 SACR 62 (A) 70.

experienced in this country. It is an embarrassing fact that neither the introduction of the new Constitution with its Bill of Rights nor the abolition of the death sentence has succeeded in checking the staggering escalation of crime and securing adequate personal safety for the citizens of this country.

2 Crime statistics The following statistics illustrate the alarming crime rate in the country:

(*a*) *Crime in general*

- In 2011 it was estimated that 44 murders, 181 sexual crimes, 278 aggravated robberies and 678 burglaries were committed every day in South Africa.[22]
- In 2009 the World Economic Forum conducted a survey of 133 countries in order to ascertain their economic competitiveness. In the section of the report dealing with the safety of the citizens within the state – in other words the incidence of crime – South Africa ended up right at the bottom of the list.[23]
- Even when comparing South Africa with other African states, South Africa fares particularly badly when it comes to the personal safety of individuals: in 2011 the Mo-Ibrahim index, which measures the state of government in the 53 states on the African continent annually, placed South Africa 44 out of 53 on the ranking list which deals with the personal safety of the country's inhabitants.[24]
- A study over two years by the South African Law Commission in about 2003 revealed that the percentage of convictions in South African was low. The commission found that only 11% of murder cases, 5% of rape cases, and 3% of cases of robbery with aggravating circumstances resulted in a conviction. Of all serious crime only 6% resulted in a conviction. About 75% of cases of serious crime never reached the courts.[25]
- According to a survey conducted in 2012 only 13% of females and 23% of males of all races regarded it as safe to walk alone in the dark in the area where they live.[26]
- According to a survey conducted in 2011 during a certain twelve-month period 26,3 million Africans (77% of the total number questioned) personally experienced the commission of crimes.[27]
- Between 1994 and 2013 the drug-related crime rate increased by 234%.[28]
- Because of the high crime rate, 25% of South Africans between 18 and 35 years of age of *all population groups* would like to leave the country and settle elsewhere.[29]

---

22 *SAIRR SA Survey 2010/2011 707*
23 Press Report 9/9/2009.
24 Press Report 12/10/2011.
25 *SAIRR SA Survey 2003/3004* 395.
26 *SAIRR SA Survey 2013* 803.
27 *SAIRR SA Survey 2013* 800.
28 *SAIRR SA Survey 2013* 758.
29 Press Report 3/9/2012, reporting on a survey conducted by "Pondering Panda".

- In 2006 51% of the respondents in a survey said that they had had something stolen from their houses or were the victims of physical attack during the previous 12 months.[30]
- It is estimated that the recidivism rate in South Africa is 94%. This means that 94% of all prisoners who are released from prison because their periods of imprisonment have expired commit crime again.[31]

(*b*) *Murder*

- From 1950 until about 1990 the average number of murders committed in South Africa was approximately 7 000 per year. In 1978 it was, in fact, 5 644. During the first eight years of the new democratic dispensation the average number of murders was about three times as high, namely 24 000 per year.[32]
- In 1990, the first year in which the moratorium on the death sentence was introduced, the number of murders rose from 11 740 in 1989 to 18 569 in 1990.[33]
- During the first decade after the abolition of capital punishment (1990) about a quarter of a million people were murdered.[34] During the period between 2000 and 2013 this figure has, conservatively calculated, increased with another quarter of a million people, which means that since the abolition of the death sentence and 2013 at least half a million people have been murdered in this country.[35]
- The world average number of murders per 100 000 of the population is about 6. The number of murders per 100 000 of the population in China and Australia is 1, in Egypt and the United Kingdom 1.2; in most other European countries about 2, and in France, Canada and India 4.[36] The South African figure of 31 per 100 000 means that it is more than five times higher than the world average.
- The chance of murderers in South Africa escaping the clutches of the law is high. According to a report of the police in 2011 only 27% of murders reported to the police are solved by them. Of the cases solved only 30% end

---

30 *Nedcor ISS SA Crime Quarterly* Dec 2006 1.

31 *SAIRR SA Survey 1996/1997* 63.

32 Statistics obtained from the Institute for Security Studies. See also *SAISS Crime Quarterly* Mar 2004 10, which sets out the murder statistics since 1938; *SAIRR Survey* 1982 211; *SAIRR Survey* 1983 218. *Van der Westhuizen* 20 states that in 1976 5 729 murders were committed, representing 23.9 out of 100 000 of the population, in 1977 the figure was 7 332 (29.9 per 100 000) and in 1978 5644 (20.8 per 100 000). In 1994/1995 25 965 murders were committed (*SAIRR SA Survey* 2003/2004 386), and in 1995/1996 26 877 (*SAIRR Fast Facts* Nov 2004 2).

33 *Nedcor ISS Crime Index* 1997 A5.

34 It is easy to make this computation. There were about 18 000 murders in 1990, thereafter increasing to about 24 000 (some years even more than that number) a year. (See the statistics, with authorities, quoted *supra* par 2,5.) In fact, the number of a quarter of a million murders may have been reached even before the year 2000.

35 *Cf SAIRR SA Survey 2010/2011* 721, where the number of murders per annum from 1994 to 2010 is specified. 14 years multiplied by 18 000 (murders per annum) equals 252 000.

36 *Nedcor ISS SA Crime Quarterly* Mar 2007 2; *SAIRR Fast Facts* May 2013 9.

up in court.[37] This means that only about 8% of reported cases ultimately end up in court, and of these only a certain number result in a conviction.

- More people are murdered in South Africa annually than those killed in road accidents (16 259 compared to 13 803).[38] This fact should be read together with the fact that the average number of people who die in car accidents in South African (27 per 100 000) is three times higher than the world average.[39] South Africa is the only country in the world where the number of people murdered annually is more than those killed in motor accidents annually.[40]
- The chance of police officials being murdered in South Africa is twice as high as that of an ordinary citizen, and the chance of a farmer being murdered four times as high than that of an ordinary citizen.[41]

There is, however, light at the end of the tunnel. Since about 2000 the number of murders per year gradually decreased. Whereas the number of murders in 1994/1995 was 25 965 (67 per 100 000 of the population), by 2012/2013 it decreased to 16 259 or 31 per 100 000.[42] Since about 2010 the number of murders seems to have stabilised at around 16 500 per year. This decrease is no doubt welcome news. However, it should not be forgotten that, as pointed out above, the South Africa murder rate is still more than five times higher than the world average. The 16 259 murders per year in South Africa translates into 31 murders per 100 000 of the population and an average of about 45 murders per day, or about one murder every 30 minutes.[43] Furthermore, the incidence of two crimes closely associated with the commission of murders, namely household burglary and robbery with aggravating circumstances, has increased significantly between 1994 and 2013 – 13% and 25% respectively.[44]

(*c*) *Robbery*

- During a twelve-month period in 1994 to 1995 there were 32 659 cases of common robbery. During the corresponding twelve-month period in 2012 to 2013 the number has increased by 64% to 53 540. As far as robbery with aggravating circumstances is concerned, during the twelve-month period in 1994 to 1995 there were 84 785 cases of the commission of this crime. During the corresponding twelve-month period in 2012 to 2013 the number has increased by 25% to 105 888.[45]
- According to a survey conducted by the United Nations among 65 countries in 2000, the robbery rate per 100 000 of the population in South Africa was 460, whereas in the USA it was 141, in Russia 91 and in France 40.[46]

---

37 Press Report 17/10/2011.
38 *SAIRR SA Survey 2012* 733.
39 Press report 24/10/2012.
40 Press report 7/2/2010, quoting Kerwin Lebone of the SAIRR.
41 Press report, 24/10/2013, relying on a statement by Dr J Burger, senior researches or the Institute for Security Studies.
42 *SAIRR S A Survey 2013* 752.
43 *SAIRR S A Survey 2013* 752.
44 *SA Survey 2013* 752 – 756.
45 *SAIRR SA Survey 2013* 752.
46 *SAIRR SA Survey* 2004/2005 467.

- A survey in 2012 revealed that the conviction rate for house robberies in South Africa is only 7.67%. (In the USA it is 53%).[47]

(*d*) *Rape*

- During a twelve-month period in 1994/1995 44 751 rapes were reported, and in 2006/2007 52 617. This represents an increase of 18%.[48]
- In 2005/2006 it was estimated that an average of 150 women were raped every day.[49]
- According to a survey conducted by the United Nations among 65 countries in 2000, the rape rate per 100 000 of the population in South Africa was 123, whereas in the United Kingdom it was 14, in Thailand 6, in Hungary 5 and in India 1.[50]
- It is virtually impossible to ascertain the number of rapes per year after 2007, since the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 changed the definition of rape as well as a number of other sexual crimes. The number of "sexual offences" committed during a twelve-month period in 2012-2013 is given as 66 387.[51]
- A survey by the Medical Research Council conducted in 2012 in Gauteng revealed that, although 48 003 cases of rape (presumably rape in the new, wide definition of the word) were reported during a twelve-month period in 2011 to 2012, only one out of every 25 rapes actually committed were reported to the police. On this basis the number of rapes during this period must have been 48 003 × 25 = 1 200 075, which translates into 3 287 rapes per day.[52]

(*e*) *Housebreaking*

- In 1994/1995 there were 231 355 cases of housebreaking. In 2012/2013 residential burglary alone has increased to 262 113 – an increase of 13%.[53] In 2012/2013 there were, in addition 73 640 cases of non-residential burglary, that is housebreaking in respect of business premises. The total number of housebreaking cases in 2012/2013 is therefore 335 753,[54] which translates into an average of 92 housebreakings per day. It has been estimated that about 39% of residential burglaries are not even reported to the police, *inter alia*, because the victims do not believe that the police will do something about it.[55]

3 Commentary on crime statistics While every right-minded citizen cannot but welcome the introduction of the Bill of Rights into the South African

---

47 Finding by Prof Zinn of UNISA in his research for his PHD.
48 *SAIRR Fast Facts* Aug 2007 2.
49 *Nedcor ISS SA Crime Quarterly* Mar 2007 2.
50 *SAIRR SA Survey* 2004/2005 467.
51 *SAIRR SA Survey 2013* 752.
52 Press report 14/2/2013, relying on a research finding by the "Tswharanang Legal Centre" and the Medical Research Council.
53 *SAIRR SA Survey 2013* 752.
54 *SAIRR SA Survey 2013* 752.
55 Press report, 4/5/2013, based on an article by Lizette Lancaster of the Institute for Security Studies.

Constitution, the implementation thereof in the field of criminal justice in South Africa has not been successful. Rather, it has led to an alarming increase in the crime rate and a marked decrease in personal safety, while the administrative services (police and court system) necessary for the implementation of the Bill of Rights, have proved wanting.

A tree is known by its fruit. No matter what beautiful sounding phrases or expressions are used (such as "right to life, dignity", or "the sanctity of human life") in the formulation of basic legal principles, the ultimate test for determining the success of a system – in this case the criminal justice system of South Africa – is its practical results. If one considers the fruit of our present criminal justice system – the alarmingly high crime rate, the ineffective policing and prosecution of criminals, the congested prison system and, flowing from that, the ever-present fear of crime pervading society – there is not much in our criminal justice system to be proud of. There is too much one-sided emphasis on the rights of accused and convicted persons and too little emphasis on the legitimate rights to safety of law-abiding citizens.

Without real fruit (such as personal safety) becoming visible to ordinary, law-abiding citizens, much of the human-rights concepts resounding in the field of criminal justice (such as "human dignity", "the sanctity of human life") run the risk of becoming mere ritualistic cant. Apartheid was characterised by the use of such cant – empty phrases incompatible with the realities of everyday life. We are running the risk of repeating the same type of error. We should not allow ideology to be placed once again above reality, ideas above people.

There must be very few other countries in the world, and certainly no other civilised countries, where fear haunts everyday life to the same extent as in South Africa. A feeling of personal safety has decreased markedly since 1994. If the purpose of the introduction of a Bill of Rights was to create a society where there is, as far as possible, freedom of fear of one's personal safety, then the Bill of Rights has certainly not succeeded in its aim. It is difficult to counter the argument that the authorities in South Africa are "soft on crime" and are either losing the fight against it or at least not winning it. It is difficult to avoid the perception that in South Africa crime is out of control.

Properties, especially private homes, are barricaded to look almost like small prisons in order to protect the inhabitants from burglaries or robbers. Huge amounts are spent on sophisticated alarm systems and on paying private security firms to protect citizens – that is, to do what the police are supposed to do. The inability of the police to protect the citizens properly is illustrated by the fact that there are about 250% more guards employed by private security firms than police officials.[56] Citizens among all population groups create societies to protect them from criminals. This entails, among other things, that thousands of ordinary law-abiding citizens, men as well as women, periodically have to expose themselves to danger while for example, by day or especially by night they patrol their neighbourhoods to protect their families and neighbours. South Africa has undoubtedly become one of the most unsafe countries in the world to live in.

---

56 *SAIRR SA Survey* 2004/2005 511; *SAIRR Fast Facts* April 2013 4.

How does one explain to a hypothetical objective observer that under the unjust system of apartheid crime rates were significantly lower than under the new, just human rights dispensation? Or must one assume that the price that the country is presently paying in the form of crime and, together with it, the fear and uncertainty with which every person has to wrestle daily, is but the normal price for living in a free country with a human rights Constitution which respects the supremacy of the rule of law? Why is this same situation absent in other free societies?

There are a number of reasons for the crisis in the South African criminal justice system, but one of them is the unduly high emphasis placed on the relative theories of punishment (deterrence, rehabilitation) when sentencing criminals. This downplays the pivotal role of just desert, and with it, the notion of responsibility, always seeking to place the blame for crime on somebody or something other than the criminals themselves.

4 Death sentence wrongly abolished? Linked to the whole debate about theories of punishment and the rules of sentencing, is the question of the feasibility of the death sentence for murder in South Africa. In *Makwanyane*[57] the Constitutional Court held that the death sentence for murder is unconstitutional, because it is cruel, inhuman and degrading, and incompatible with the right to life and the right to dignity as guaranteed in the Constitution.

Makwanyane is one of the most remarkable decisions ever delivered in the history of our criminal justice system, and one which probably has had the most catastrophic consequences on society of any judgment relating to criminal justice. Seldom, if ever, will one find a judgment the consequences of which has been so exactly the opposite of what the court intended it to have. What the court intended to achieve, was to protect and extend the right to life and the value of human life (the much-vaunted "sanctity of human life"). What it achieved, was exactly the opposite.

Never before in the peacetime history of this country has the value of human life been lower than since the introduction of the "right to life", the concept of "the sanctity of human life" and, accompanying it, the abolition of the death sentence. This statement is not merely a subjective, personal or even ideological opinion. It is a cold statistical fact. The statistics mentioned above bear out the truth of the statement. It is common-place to hear people from all walks of life express the opinion that the value of human life in South Africa has been reduced to that of the price of a cell-phone. It is not argued here that there is anything wrong with the Bill of Rights and the right to life contained in it. What is argued here is that the court in *Makwanyane* interpreted the Bill of Rights incorrectly. The judgment is a failed attempt at social engineering. It does not matter what intellectual gymnastics the proponents of the abolition of the death sentence perform to justify their view; at the end of the day it is the cold reality as reflected on the scoreboard below that tells one whether the judgment was right or wrong. A criminal justice system which professes that the right to life is the highest good, but which in practice ends up with one of the highest *pro rata* murder rates (and crime rated in general) in the whole word, is a sick system, operating with distorted principles.

---

57 1995 3 SA 391 (CC); 1995 2 SACR 1 (CC).

5 Arguments in favour of the death sentence South Africa can be proud of its new Constitution and the Bill of Rights enshrined therein, and for having turned its back on apartheid with all its evils. From this it does not necessarily follow that abolishing the death sentence was correct. It is submitted that the death sentence for murder ought to be reinstated. If the prevalence of crime in general, and murder in particular, were more or less the same in South Africa as in other civilised countries, there could, it is submitted, be no objection to the abolition of the death sentence. However, in South Africa the incidence of crime in general, and murder in particular, is so high that the reinstatement of the death sentence is justified.

As justification for the abolition of the death sentence, great reliance was placed on arguments that were advanced in legal systems of other countries abroad. However, as pointed out above, in these countries the incidence of crime in general and murder in particular is incomparably lower than in South Africa. This raises the question: how certain can one be that the opinions on capital punishment held in these countries, and upon which the abolitionists in South Africa rely so heavily as support for their argument, also apply to the situation in South Africa, with its population coming from cultural and socio-economic backgrounds so different from those in the other civilised Western countries?

There can be little doubt the death sentence does serve as a deterrent. Statistics given above indicate clearly that during the almost forty years preceding 1990, when the death sentence was a competent sentence, the *pro rata* murder rate was about three times lower than after 1990.[58]

Yet, even if (contrary to what the present author, many judges and other highly respected lawyers and the public in general,[59] believe) one were to accept that the death sentence is not a deterrent, it still does not mean that the abolition of the death sentence in this country is therefore justified. Deterrence is not the only justification for punishment. Retribution cannot and must not be overlooked. In fact, as was pointed out above,[60] in a country such as South Africa retribution ought to play a much more important role than considerations relating to deterrence or rehabilitation. The idea of retribution or "just desert" implies that punishment ought to be a reflection of the community's condemnation of crime. The abolition of the death sentence at present in South Africa is not compatible with this fundamental principle of sentencing.

The protection of society plays an important role in sentencing. One of the most important tasks of a state is to protect its citizens. If one considers the crime wave sweeping across South Africa and, together therewith, the suffering of victims of crime and the uncertainty and fear to which the whole community is exposed, can one really allege that in South Africa the state has succeeded in discharging this most basic of its duties? Section 7(2) of the Constitution states that the state must respect, *protect*, promote and fulfil the rights in the Bill of Rights. If the shockingly high murder rate mentioned above is kept in mind, it is more than doubtful whether the state respects, *protects* and promotes the

---

58 *Supra* I D 2(*b*).
59 *Infra* text opposite fn 42.
60 *Supra* C 10.

right to life (to mention only one of the fundamental rights) of innocent, law-abiding citizens. Precisely the opposite is busy happening.

To allege that in this country we have succeeded in creating a culture of respect for the sanctity of human life would be an affront to the ordinary person's common sense. It cannot be argued that there is respect for the sanctity of human life, unless the "sanctity of life" of convicted murderers carries more weight than that of the hapless victims of crime as well as all the potential victims – and this includes the whole community. By what logic should the "sanctity of life" in a country be measured by the number of murderers executed and not by the number of innocent people murdered? The expression "sanctity of life" seems to have been elevated in certain quarters to a pseudo-religious creed, although in the minds of these people such sanctity relates only to criminals, not to innocent victims of crime; nor does it relate to unborn foetuses.

The so-called "sanctity of human life", which is relied so heavily upon by abolitionists is a concept not free of sham and hypocrisy, for the law allows lawful abortion upon extremely flimsy grounds. In 2013 about 90 000 lawful abortions were performed in South Africa.[61] In the decade between 1996 and 2006 more than half a million abortions were performed.[62] The "sanctity of human life" is a concept which is applied by certain people only when it suits them, and discarded when it suits another lobby or pressure group.

What is more, the very existence of a punishment such as the much-vaunted "imprisonment for life", which has replaced the death sentence and which, according to the abolitionists, is just as effective a deterrent as the death sentence, must be taken with a pinch of salt, since somebody who has received such a punishment may be, and generally is, released on parole.[63] And even on the assumption that "life imprisonment" means imprisonment for the rest of the prisoner's life, it is an illusion to assume that such a form of punishment serves as an adequate deterrent for other would-be murderers.

The overwhelming majority of the population is in favour of the death sentence.[64] Clearly their view is correct.

Even if the reinstatement of the death sentence did not lead to a significant decrease in the murder rate and crime in general, it would at least give the

---

61 *SAIRR Fast Facts* Nov 2013 22

62 Press report 24 Feb 2007.

63 S 73(6)(*b*)(iv) of the Correctional Services Act 111 of 1998 provides that a person who has been sentenced to life imprisonment may not be placed on parole until he has served at least 25 years of the sentence, but on reaching the age of 65 years a prisoner may be placed on parole if he has served at least 15 years of such sentence. This means that if X was sentenced to life imprisonment when he was 50 years of age, he may be released after only 15 years in prison.

64 A survey conducted in 1996 showed that almost three-quarters of the population were in favour of the reintroduction of the death sentence. See *SAIRR Survey* 1996/1997 57. According to a survey the results of which were published by Kotzee in 2003 *SACJ* 38 55, 66% of the respondents stated that they were in favour of the death penalty. (Among the respondents who were also members of the ANC, the figure was 60%.) According to a survey conducted by the HRCS in 2004, 72% of blacks, 92% of whites, 76% of coloureds and 86% of Asians were in favour of the death sentence. (Press report of 8 Oct 2004.) See also *Nedcor ISS SA Crime Quarterly* 27.

community the feeling that justice is being done; that murderers pay for their misdeeds; that there is a recognition of the community's condemnation of the crime; and that the murderer's right to life does not carry more weight than the right to life of the murdered victim or that of other members or society. The reinstatement of the death sentence would, ironically, send out a message that the law places a high value on life. Expressions such as "the right to life" and "the sanctity of human life" would then have a concrete meaning for the people of this country.

E CRIMINAL LIABILITY: A SUMMARY

1 General This summary of criminal liability is intended to help the person who, in reading this book, is encountering criminal law for the first time. Its purpose is to give such a person a perspective of the material to be discussed, to help him understand the subdivisions and distinctions which will follow, and to help him appreciate clearly the relationship between the different topics and the different prerequisites for liability.

Although criminal law (like law in general) is not an exact science like mathematics which is governed by exact, immutable laws, jurists nevertheless endeavour to structure the rules of this branch of the law. In so doing they develop and work with what might be called a certain "grammar of criminal liability". Such a structure or "grammar" enhances legal certainty and enables the investigator to come to grips more readily with novel or unforeseeable sets of facts.

The discussion which follows may be viewed as a very concise summary of the first half of this book, and is intended to aid the student who is commencing the study of criminal law.

The book is divided into two parts. Part one deals with the general principles of criminal law, in other words with those principles applicable to all crimes, irrespective of the definition of each. Part two is devoted to a discussion of the most important specific crimes known to our law, with the emphasis on those rules or requirements peculiar to each.

In the discussion which follows and throughout the book the perpetrator of the act – that is, the accused or wrongdoer – will be referred to as X, and the complainant or victim will be referred to as Y. When a third party is involved, he or she will be referred to as Z.

2 Requirements for liability

(*a*) *Legality* The very first question to be asked in determining somebody's criminal liability is whether the type of conduct forming the basis of the charge is recognised in our law as a crime. A court may not convict a person and punish him merely because it is of the opinion that his conduct is immoral or dangerous to society or because, in general terms, it "deserves" to be punished. A court must be certain that X's alleged conduct (eg "the removing of a minor from her parental home without the consent of her parents in order to marry her" – conduct which amounts to the crime of abduction) is recognised *by the law* as a crime. This very obvious principle is known as the "principle of *legality*".

(*b*) *Act or conduct* Once it is clear that the law regards the conduct as a crime, the next step is to enquire whether there was *conduct* on the part of X.

By "conduct" is meant an *act* or an *omission*. Since the punishment of omissions is more the exception than the rule, this requirement of liability is mostly referred to as the "requirement of an act".

The requirement of an act or conduct incorporates the principle that mere thoughts or even decisions are not punishable. Before there can be any question of criminal liability, X must have started converting his thoughts into action. Furthermore, for the purposes of criminal law conduct can lead to liability only if it is *voluntary*. Conduct is voluntary if X is capable of subjecting his bodily or muscular movements to his will or intellect. For this reason the bodily movements of, for example, a somnambulist are not considered by the law to amount to an "act".

An omission – that is, a failure by X to perform active conduct – can lead to liability only if the law imposed a duty on X to act positively and X failed to do so.

(*c*) *Conduct must comply with definitional elements of crime* The following general requirement for criminal liability is that X's conduct must *comply with the definitional elements of the crime* in question. What does "the definitional elements" mean? It is the concise description of the type of conduct proscribed by the law and the circumstances in which it must take place in order to constitute a crime. By looking at the definitional elements, one is able to see how one type of crime differs from another. For example, the definitional elements of robbery are "the violent removal and appropriation of movable corporeal property belonging to another".

The definitional elements contain not merely a description of the type of conduct proscribed (eg "injure", "make a declaration" or "sexual intercourse") but may also contain a description of the way in which the act must be performed (eg "violently"), the person performing the act (eg "a licence holder"), the person or object in respect of which the act must be performed (eg "a minor"), the place where the act must take place (eg "on a public road"), a particular time during which the act must take place, and so forth.

Every particular crime has requirements which other crimes do not have. A study of the particular requirements of each separate crime is undertaken in the second half of this book. The requirement for liability with which we are dealing here is simply that X's conduct must *comply with* these definitional elements.

(*d*) *Unlawfulness* A lay person would probably be inclined to think that once the requirements discussed above have been complied with, nothing more is required for holding X liable and that he may be convicted. However, somebody who is versed in the principles of criminal law will know that there are still two very important further general requirements of liability, namely unlawfulness and culpability, which must be complied with before X can be held liable. The reason why a lay person will in all probability not think of these two requirements is because they are, as it were, "unwritten" or "invisible": they are requirements of liability which are not always expressly spelt out in (especially the statutory) definition of the crime. Their existence accordingly creates the possibility that X may rely on defences which are not expressly spelt out in the definitional elements of the crime in question.

We next consider the next general requirement for liability, namely *unlawfulness*. The mere fact that X had committed an act and that such act complies

with the definitional elements of the crime does not necessarily mean that it is also unlawful in the sense in which this word is used in criminal law. If a policeman X gets hold of a criminal on the run by diving him to the ground, X's act accord with the definitional elements of the crime of assault, but his act is not unlawful and he will therefore not be guilty of assault. To take another example: X, while driving his motor car, exceeds the speed limit. This act complies with the definition of the proscription of the offence "to drive a motor car on a public road at a speed in excess of (say) 120 kilometres per hour". If, however, he does this in order to get his gravely ill child to hospital in time for emergency treatment, his conduct will not be unlawful.[65]

"Unlawful" means, of course, "contrary to law", but by "law" in this context is meant not merely the rule contained in the definitional elements of the crime, but the totality of the rules of law, and this includes rules which in certain circumstances allow a person to commit an act which is contrary to the "letter" of a legal prohibition or norm. In practice there are a number of well-known situations where the law tolerates an act which infringes the "letter" of the law as set out in the definitional elements. These situations are known as grounds of justification. Well-known grounds of justification are private defence (which includes self-defence), necessity, consent and official capacity. In the examples above the act of the policeman is justified by the ground of justification known official capacity, and that of the father who exceeds the speed limit by necessity.

If X's conduct corresponds with the definitional elements, the conduct may be described as "provisionally unlawful". Before one can finally describe it as unlawful, it must be clear that there is no justification for the conduct. Grounds of justification are situations in which the conduct at first glance seems to fall within the letter of the prohibition, but where closer scrutiny reveals that the law in fact tolerates such conduct. The reason why the law tolerates it (ie, regards it as not being unlawful) is because the particular conduct protects a value or interest which in the eyes of the law is more important than the value or interest which the conduct infringes. If the meaning of the word unlawful within the present context causes any problem, the problem can be overcome by always replacing the word "unlawful" with "unjustified" or "without justification".

(*e*) *Culpability* Even if the conduct corresponds not only to the definitional elements but is also unlawful, it still does not necessarily mean that X is criminally liable. There is still one last important requirement which must also be complied with, namely that X's conduct must have been *culpable*. In the legal literature, especially the older literature, as well as in the terminology used by the courts, this element is described by the Latin expression *mens rea*. The culpability requirement means that there must be grounds upon which X may, in the eyes of the law, personally be blamed for his unlawful conduct. Here the focus shifts from the act to the actor, that is, X himself, his personal abilities, knowledge, or lack thereof. The culpability requirement comprises two components or "sub-requirements". Both these sub-requirements must be complied with before one can draw the conclusion that X's act was culpable.

The first of these sub-requirements is that of *criminal capacity* (often abbreviated merely to "capacity"). This means that at the time of the commission of

---

65 *Pretorius* 1975 2 SA 85 (SWA).

the act X must have had certain mental abilities. A person cannot legally be blamed for his conduct unless he is endowed with these mental abilities. The mental abilities X must have are first, the ability to appreciate the wrongfulness of his act (ie, to distinguish between "right" and "wrong"), and secondly, the ability to act in accordance with such an appreciation. Examples of categories of people who lack criminal capacity are mentally ill ("insane") persons and young children.

The second sub-requirement (or "leg" of the culpability requirement) is that X's act must be either *intentional* or *negligent*. Intention is a requirement for most crimes, but there are also crimes requiring only negligence. If intention is required, it means that X must will the fulfilment (realisation) of the definitional elements, knowing that his conduct is unlawful; or that he must foresee the possibility of his conduct fulfilling the definitional elements and being unlawful but nevertheless proceed with it. He must therefore know or foresee that the type of conduct in which he is engaging is criminally punishable, that it takes place in circumstances in which it fulfils the definitional elements of the crime concerned, and that it is unlawful (ie, unjustifiable). If he does not know or foresee it, his ignorance or mistake excludes intention.

The following are two examples of mistakes excluding intention: (*a*) X takes property belonging to Y in the belief that Y had given him permission to take it, whereas Y had in fact not given such permission. Y then lacks the intention and culpability required for theft. (*b*) X wants to shoot a baboon. In the dusk he sees a figure crouching which he believes to be a baboon, and shoots. The figure struck by the bullet turns out to be, not a baboon, but a human being. X then lacks the intention and culpability required for murder.

Some crimes require negligence instead of intention. An example of such a crime is culpable homicide. This crime is committed if a person unlawfully and negligently causes another's death. By negligence is understood, in brief, that X's conduct does not comply with the standard of care required by the law in the particular circumstances, or (as the same criterion is usually expressed in another way) that X fails to act in the way in which a reasonable person would act in the circumstances.

3 Different ways of grouping requirements Immediately above, under the heading "Requirements for liability", five requirements for liability have been described. If one regards capacity as a requirement separate from culpability, as some writers do, this means that six different general requirements for liability can be identified, namely:

1 legality;

2 conduct;

3 compliance with definitional elements;

4 unlawfulness;

5 capacity; and

6 culpability.

This list contains all possible general requirements for liability. Is it not possible to reduce the requirements to a smaller number in order to simplify the

construction of criminal liability? The answer to this question is clearly affirmative. There are different ways in which to simplify the description of liability by slightly rearranging the grouping of the requirements or "elements" for liability. In the discussion which follows these different ways are briefly considered.

One cannot describe all six of these requirements as "elements of a crime". The first requirement, that of legality, is never regarded as an element of a crime in the sense that the accused, by his conduct and subjective attributes, must comply with this requirement. It is only necessary for the accused to comply with requirements 2 to 6 above. This consideration is underlined by the fact that in more than ninety-nine percent of criminal cases X is charged with a crime that is so well known (eg assault, theft, culpable homicide) that the court will not waste its time investigating whether in our law there is such a crime as the one with which X is being charged. Only in fairly exceptional cases is it necessary for the court to study, for example, a statute in order to ascertain whether what X is charged with really constitutes a crime. This is another reason why the principle of legality is not regarded as an "element" of a crime.

As far as the remaining requirements (2 to 6 above) are concerned, there are different ways of grouping them, depending on the degree of abstraction that is used.

Firstly, at a very high level of abstraction, it is possible to group the requirements into only two categories, namely wrongdoing and culpability. Wrongdoing is an umbrella concept comprising requirements 2 to 4 listed above. If one follows this dichotomy, culpability invariably includes capacity. This grouping of the elements of liability into only two categories is well known in continental jurisprudence. It is also well known in Anglo-American legal systems, where requirements 2 to 4 are described as "*actus reus*" and 5 and 6 as "*mens rea*". (These two Latin phrases will be avoided in this book, which seeks to explain criminal-law concepts in language understandable to everybody. These phrases are also avoided by modern English writers on criminal law. The South African courts, however, regrettably still regularly use this obscure terminology.) Classifying these requirements into only two groups is not advisable, because it is an oversimplification of what is actually a more complex issue.

Secondly, many writers in South Africa divide the general requirements for liability into three categories, namely the act, unlawfulness and culpability.[66] In this classification capacity is deemed to form part of culpability. Compliance with the definitional elements is completely ignored as a separate requirement; the indispensable definitional elements of a crime are artificially forced into either the act or unlawfulness. This grouping of the requirements must be rejected, as must any categorisation of the general requirements which ignores compliance with the definitional elements as a separate requirement. No crime, not even the simplest one, consists of only an act, unlawfulness and culpability.

Thirdly, there are writers who combine requirements 2 and 3 above. The resultant combined requirement is then called the "realisation of the definitional elements". The requirement of an act is viewed as forming part of this "realisation" or

66 This is, in broad outline, the classification followed in *De Wet and Swanepoel* chs 3–5.

"fulfilment".[67] These writers also view liability as consisting of three elements, namely the above-mentioned element (which incorporates that of an act), unlawfulness and culpability. This grouping of the requirements does have its merits, but it is submitted that it is better and more logical to separate the requirement of an act from that of realisation of the definitional elements. The concept "realisation of the definitional elements" is too abstract; it is better to base the construction of liability on the better known and more concrete concept of an act.

Fourthly, there is an arrangement or grouping of requirements which to my mind is the best one, namely that whereby the general requirements for liability are divided into four categories, namely the act (or conduct), compliance with the definitional elements, unlawfulness and culpability. In this subdivision, capacity forms part of culpability. It is also possible to regard capacity as a requirement separate from culpability, in which case there would be five instead of four categories. It is submitted that it is better to regard capacity as part of culpability, the reason for this being the normative (as opposed to the psychological) nature of the concept of culpability.[68] This four-part arrangement of the requirements for liability will be followed in this book, the four parts or "elements" being conduct, compliance with the definitional elements, unlawfulness and culpability.

The following description of criminal liability combines all four of the above requirements: *A person commits a crime if he engages in conduct which accords with the definitional elements of the crime in question, which is unlawful and culpable*. More concisely expressed, *a crime consists in unlawful, culpable conduct which accords with the definitional elements.* If one wants to describe criminal liability in less technical language, one can state that *crime is unjustifiable, culpable conduct which accords with the definition of a crime*.

4 Sequence of requirements It is of the utmost importance to bear in mind that the investigation into the presence of the four requirements or elements of liability, set out above, follow a certain sequence. It is the sequence in which the requirements were set out above. If the investigation into whether there was (voluntary) conduct on the part of X reveals that there was in fact no such conduct, it means that X is not guilty of the crime in question and the matter is concluded. It is then unnecessary to investigate whether further requirements such as unlawfulness and culpability have been complied with.

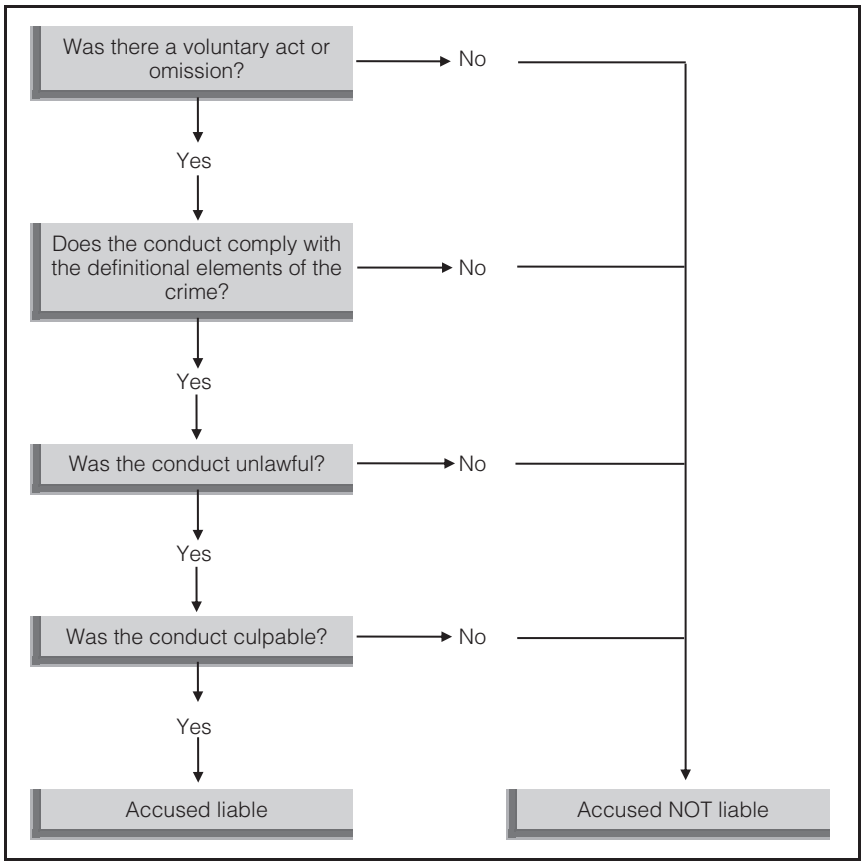
An investigation into whether the conduct complied with the definitional elements is necessary only once it is clear that the conduct requirement has been complied with. Again, only if it is clear that the conduct complied with the definitional elements is it necessary to investigate the question of unlawfulness, and only if the latter requirement has been complied with is it necessary to investigate whether X's act was also culpable. An inquiry into a later requirement therefore presupposes the existence of the previous requirements.

---

67 See eg *Badenhorst* 358–385 and the discussion in *Eser and Fletcher* 62–63.

68 See the discussion *infra* V A 9–10 of the psychological and the normative theories of culpability.

The rule relating to the sequence in which the investigation into criminal liability takes place can be depicted graphically as follows:



5 Murder and culpable homicide In conclusion, a hint to the reader who has done no previous reading on criminal law: in the discussion of the general principles which follows, the principles will often be illustrated by references to the crimes of murder and culpable homicide. In order to follow the discussion from the beginning, it is necessary to know what the definitions of these two crimes are. Murder is the unlawful, intentional causing of the death of another person. Culpable homicide is the unlawful, negligent causing of the death of another person. It will be noticed that the only point of difference between these two crimes is the form of culpability required for each: intention for murder, and negligence for culpable homicide.

F THE PRINCIPLE OF LEGALITY

1 Introduction The modern state has expanded its powers to such an extent that today, more than ever, it has become necessary to protect the freedom of the individual. The principle of legality plays an important role in this regard. In its broadest sense, the principle of legality can be described as a mechanism to ensure that the state, its organs and its officials do not consider themselves to

be above the law in the exercise of their functions but remain subject to it. In the field of criminal law the principle fulfils the important task of preventing the arbitrary punishment of people by state officials, and of ensuring that the determination of criminal liability and the passing of sentence correspond with clear and existing rules of law. The principle of legality in criminal law is also known as the *nullum crimen sine lege* principle. (The Latin words, literally translated, mean "no crime without a law".)

2 Definition A definition of the principle of legality, embodying its most important facets, can be formulated as follows:

> 1 An accused may not be found guilty of a crime unless the type of conduct with which he is charged:
>
> (*a*) has been *recognised* by the law *as a crime*;
>
> (*b*) *in clear terms;*
>
> (*c*) *before the conduct took place;*
>
> (*d*) *without the court having to stretch the meaning of the words* and concepts in the definition to bring the particular conduct of the accused within the compass of the definition, and
>
> 2 After conviction an accused may not be sentenced unless the punishment also *complies with the four principles* set out immediately above under 1(*a*) to (*d*).[69]

3 Rules embodied in principle The principle of legality in criminal law embodies the following five rules or principles:

(*a*) a court may find an accused guilty of a crime only if the type of conduct performed by him is *recognised* by the law *as a crime* – in other words, a court itself may not create a crime (the *ius acceptum* principle, which appears in item 1(*a*) of the definition given above);

(*b*) a court may find an accused guilty of a crime only if the kind of act performed by him was already recognised as a crime at the time of its commission (the *ius praevium* principle, which appears in item 1(*c*) of the definition given above);

(*c*) crimes should not be formulated vaguely (the *ius certum* principle, which appears in item 1(*b*) of the definition given above);

(*d*) a court should interpret the definition of a crime narrowly rather than broadly (the *ius strictum* principle, which appears in item 1(*d*) of the definition given above);

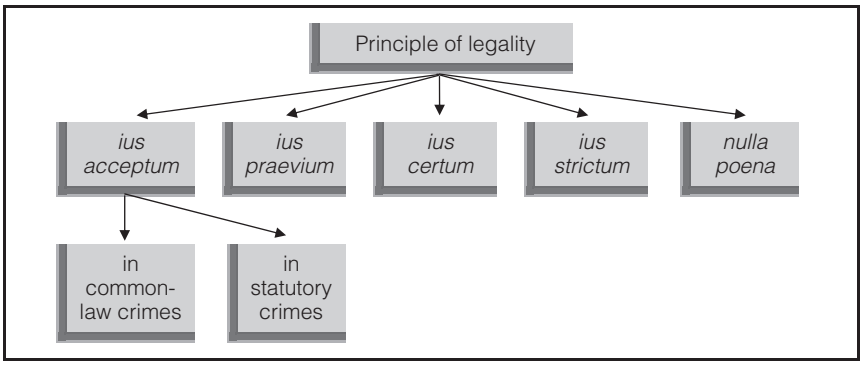
(*e*) after X has been found guilty, the abovementioned four principles must also be applied *mutatis mutandis* when it comes to imposing a sentence; this means that the applicable sentence (regarding both its form and extent) must already have been determined in reasonably clear terms by the law at the time of the commission of the crime, that a court must interpret the words defining

---

69 As to the different sub-rules embodied in the principle, see *Western Areas Ltd* 2004 1 SACR 429 (W) 437.

the punishment narrowly rather than widely, and that a court is not free to impose any sentence other than the one legally authorised (the *nulla poena sine lege* principle, which can be further abbreviated to the *nulla poena* principle).

In the discussion which follows each of these five principles will be analysed in greater depth. For convenience they will sometimes be referred to by their concise Latin descriptions or "tags" mentioned above. The rules embodied in the principle of legality as well as their subdivisions may be set out as follows in a diagram:



After a discussion of the rationale of the principle as well as of the recognition of the principle in our Constitution, the sequence of the rest of the discussion of this principle will correspond to the sequence in which the rules have been arranged in the above diagram.

4 Rationale The rationale or basis of the principle of legality is the policy consideration that the rules of the criminal law ought to be as clear and precise as possible so that people may find out, with reasonable ease and in advance, how to behave in order to avoid committing crimes. In American literature this idea is often referred to as "the principle of fair warning".[70] For example, if it is possible for the legislature to create a crime with retrospective effect and consequently for a court to find X guilty of a crime even though the type of act he committed was not punishable at the time of its commission, an injustice is done since X is punished for behaviour that he could not have identified as punishable before its commission. It is similarly difficult or even impossible for a person to know in advance precisely what kind of conduct is punishable if the definitions of crimes are vague or their content problematic, or if a court has the power to decide for itself whether a certain type of conduct that had previously gone unpunished should in fact be punished.

The principle of legality has its origin in the Age of Enlightenment, and more specifically in the ideas of a group of thinkers in the seventeenth and especially the eighteenth century who rebelled against the obscurities of the Middle Ages and the excessive power of royalty, the aristocracy and the Church.

5 Recognition of the principle of legality in the South African constitution The principle of legality is incorporated in section 35(3)(*l*) and (*n*) of the

---

70 *La Fave and Scott* 104; *Dressler* 41–42.

Constitution of the Republic of South Africa 108 of 1996. Section 35 forms part of chapter 2 of the Constitution, which contains the Bill of Rights. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.[71] This means that every provision in a statute or common law which is in conflict with the Bill of Rights may be declared null and void by a court.

Section 35(3) provides that every accused person has a right to a fair trial, and paragraph (*l*) of this subsection provides that this right to a fair trial includes *the right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted*. A further paragraph in this subsection, namely paragraph (*n*), contains a further provision bearing upon the principle of legality. According to paragraph (*n*) the right to a fair trial includes *the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing*.

Section 35(3)(*l*) clearly incorporates the *ius praevium* principle. By implication it also contains the *ius acceptum* principle: if a court may not find a person guilty of an act or omission that was not an offence at the time it was committed or omitted (*ius praevium*), it follows by necessary implication that a court does not have the power to create a crime (*ius acceptum*). In other words, if a court had the power to create crimes, it would mean that a court had the power to convict a person of a crime even though X's act did not constitute a crime at the time it was performed.

Section 35(3)(*n*) relates to the *nulla poena sine lege* principle, that is, the role of the principle of legality in the field of the imposition of punishment.

Section 35(3)(*l*) and (*n*) contains no provision relating directly to the *ius certum* and *ius strictum* principles, but the Constitutional Court may interpret the provisions of the section in such a way that it relates to these aspects of the principle of legality as well.[72]

The substantive criminal law of South Africa is not codified. The most important crimes, as well as almost all the general principles of liability, are derived from common law and are therefore not contained in legislation. South Africa is one of only a small number of countries or jurisdictions in which criminal law is uncodified. This is regrettable.[73] The absence of a codification hampers the smooth operation of the principle of legality in this country, although it does not render it impossible. In the place of a criminal code, a large collection of authoritative decisions lays down the requirements for every common-law crime as well as the general principles of criminal law. However,

---

71 S 8(1) of the Constitution of the Republic of South Africa 108 of 1996.

72 See the discussion *infra* pars 9 and 10.

73 For a draft criminal code of South Africa, containing not only definitions of common-law crimes but also of the most important general principles of liability, see Snyman *A Draft Criminal Code for South Africa. With a Commentary*. The introductory chapter of this work contains a plea for the codification of our criminal law as well as a discussion of the style which such a codification ought to adopt. See also Snyman *Huldigingsbundel Strauss* 255.

it is not easy for a lay person to ascertain what the definitions of crimes and the general rules of criminal liability are.

6 The *ius acceptum* rule in common-law crimes What follows is a discussion of the various rules embodied in the principle of legality as identified above and which are referred to by their concise Latin descriptions: *ius acceptum*, *ius praevium*, *ius certum*, *ius strictum* and *nulla poena*.

First to be discussed is the *ius acceptum* principle. Thus principle implies that a court may not find a person guilty of a crime unless the type of conduct he performed is recognised by the law as a crime. In other words, a court itself may not create new crimes. Therefore, when answering the question "what constitutes criminal behaviour?" the court is bound by the "law as we have received it to date", that is, the *ius acceptum*. In South Africa *ius acceptum* must be understood to denote not only the common law but also existing statutory law. The *ius acceptum* principle is anchored in our law by virtue of the provisions of section 35(3)(*l*) of the Constitution, which provides that every accused has a right to a fair trial, which includes the right not to be convicted for an act or omission that was not an offence at the time it was committed or omitted.

It is convenient to discuss the application of this principle under two headings: first, the application of the rule to common-law crimes and secondly, its application to statutory crimes.

Certain types of conduct might be wrong from a moral or religious point of view, but might nevertheless not be prohibited by law. Even if they are prohibited by law, this does not necessarily mean that they are crimes: perhaps they may give rise to civil-law liability only or to the authorities' taking certain steps in terms of administrative law. Not *all* transgressions of the law constitute crimes. For example, a simple breach of contract is not a crime. Only when specific conduct is declared *a crime* by law (statutory or common law), is there a possibility of criminal liability. Consequently, a court is not empowered to punish conduct simply because it "deserves" to be punished according to the judge's conception of morality, religion or even politics. The only way in which a new crime can be created is by means of legislation.[74]

Although a court may not create a crime or extend the scope of an existing crime, it may create a new defence or extend the scope of an existing defence.

7 The *ius acceptum* rule in crimes created by parliament If parliament wishes to create a crime, an Act purporting to create such a crime will best comply with the principle of legality if it expressly declares (*a*) that the particular type of conduct is a crime, and (*b*) what the parameters are of the punishment a court must impose if it finds a person guilty of the commission of such a crime.

However, sometimes it is not very clear from the wording of the Act whether a section or provision of the Act has indeed created a crime or not. In such a case, the function of the principle of legality is the following: a court should only assume that a new crime has been created if it appears unambiguously from the

---

74 *Malgas* 2001 1 SACR 469 (SCA) 472*g–h*. See also *Solomon* 1973 4 SA 644 (C), in which the court refused to recognise the existence of a common-law crime named "conflagration".

wording of the Act that a crime has in fact been created. If the Act does not expressly state that a particular type of conduct is a crime, the court should be slow to hold that a crime has in fact been created. This consideration or rule corresponds to the presumption in the interpretation of statutes that a provision in an Act which is ambiguous must be interpreted in favour of the accused.[75]

In this regard it is feasible to distinguish between legal norms, criminal norms and criminal sanctions that may be created in an Act.

- A *legal norm* in an Act is merely a rule of law, the infringement of which is not a crime.
- A *criminal norm* is a provision in an Act stating clearly that certain conduct constitutes a crime.
- A *criminal sanction* is a provision in an Act prescribing the parameters of the punishment a court must impose once a person has been found guilty of the particular crime.

The difference may be illustrated by the following example. A statutory prohibition may be stated in one of the following three ways:

(*a*) You may not travel on a train without a ticket.

(*b*) You may not travel on a train without a ticket and anybody contravening this provision shall be guilty of a criminal offence.

(*c*) You may not travel on a train without a ticket and anybody contravening this provision shall be guilty of an offence and punishable upon conviction with imprisonment for a maximum period of three months or a maximum fine of R1 000, or both such imprisonment and fine. Provision (*a*) contains a simple prohibition that constitutes a legal norm, but not a norm in which a crime is created. Although non-fulfilment of the regulation may well lead to administrative action (such as putting the passenger off at the next stop) it does not contain a criminal norm. A court will not, without strong and convincing indications to the contrary, hold that such a regulation has created a crime.[76]

Provision (*b*) does contain a criminal norm, because of the words "shall be guilty of an offence". However, it does not contain a criminal sanction because there is no mention of the punishment that should be imposed.

Provision (*c*) contains both a criminal norm and criminal sanction. The criminal sanction is contained in the words "and punishable upon conviction with imprisonment for a maximum period of three months or a maximum fine of R1 000, or both such imprisonment and fine".

---

75 *Milton and Cowling* Introduction 1–16–19; *Majola* 1975 2 SA 727 (A) 735; *Klopper* 1975 4 SA 773 (A) 780. In *Van Rooyen* 2002 1 SACR 661 (T) the court refused to hold that a mere provision in an Act placing a duty on a police officer to render certain assistance, created a crime.

76 *Bethlehem Municipality* 1941 OPD 230; *La Grange* 1991 1 SACR 276 (C); *Theledi* 1992 1 SACR 336 (T) 337*a–b*; *Smit* 2007 2 SACR 335 (T). Contrast, however, *Forlee* 1917 TPD 52. An example of a provision in a statute creating a legal, but not a criminal norm can be found in s 165(3) of the Constitution of the Republic of South Africa 108 of 1996, which provides: "No person or organ of state may interfere with the functioning of the courts." The section does not provide that contravention of the prohibition constitutes a crime.

What is the position if the legislature creates a criminal *norm* only, but remains silent on the criminal *sanction*, as in provision (*b*) above? Such a situation arose squarely in *Director of Public Prosecutions, Western Cape v Prins*.[77] The very important Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (sometimes loosely referred to as the "Sexual Offences Act"), which reformulated all the sexual offences in our law, clearly stated that persons who committed the acts described in the Act, such as rape and sexual assault, were guilty of a crime, but the Act failed to set out any punishment to be imposed upon conviction for such crimes. The question which the Supreme Court of Appeal had to decide was whether the provisions in the Act referred to above nevertheless created crimes. The court answered the question affirmatively. The decision is largely based upon principles relating to the interpretation of statutes, and more particularly the provisions of section 276(1) of the Criminal Procedure Act 51 of 1977, which provides that a person convicted of a crime may receive any of a number of sentences listed, such as imprisonment, a fine and correctional supervision. The court held that section 276(1) was a general provision empowering courts to impose sentences in respect of all crimes, both common-law and statutory, where there is no other provision in law prescribing the sentence or maximum sentence that could be imposed for a specific crime. The extent of the punishment is in the discretion of the court, subject only to provisions limiting a court's powers of punishment, as is the case in Magistrate's Courts. This judgment affords strong support for the proposition that if parliament creates a crime but fails to specify the punishment, the principle of legality has indeed been complied with, provided it is clear from the legislative provision that the prohibition is described as an offence and that parliament intended to create an offence.

In the unlikely event of a statutory provision containing a criminal *sanction*, but not a criminal *norm*, in all probability the court will decide that the legislature undoubtedly intended to create a crime, and will assume that a crime was indeed created.[78]

Although there are some cases in which the courts have not adhered strictly to abovementioned principles,[79] there are also some other, more recent, cases in which the courts, after studying the Act as a whole, correctly refused to accept that the legislature intended to create a crime by merely inserting a legal norm without a criminal norm.[80] The latter line of cases is to be preferred.

8 Prohibition on the creation of crimes with retrospective effect (*ius praevium*) The principle of legality entails that no-one may be found guilty of a crime unless *at the moment it took place*, his conduct was already recognised by law as a crime. It follows that the creation of a crime with retrospective effect (ie, the *ex post facto* creation of crimes) is in conflict with the principle

77 2012 2 SACR 183 (SCA), discussed by Terblanche and Jordaan 2012 *SACJ* 379.

78 *Fredericks* 1923 TPD 350 353; *Rabie, Strauss and Maré* 82; *Burchell and Milton* 99.

79 *Forlee* 1917 TPD 52 (criticised by *De Wet and Swanepoel* 46–47; *Rabie, Strauss and Maré* 87 as well as in *Francis* 1994 1 SACR 350 (C) 354–356); *Langley* 1931 CPD 31 33; *Baraitser* 1931 CPD 418 and *Grové* 1956 1 SA 507 (SWA) 508–509.

80 *La Grange* 1991 1 SACR 276 (C); *Theledi* 1992 1 SACR 336 (T); *Francis* 1994 1 SACR 350 (C); *Van Rooyen* 2002 1 SACR 661 (T).

of legality. This application of the principle of legality is known as the *ius praevium* rule.

The *ius praevium* principle is incorporated in section 35(3)(*l*) of the Constitution, which provides that every accused has a right to a fair trial, which includes the right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted. This means that any provision by any legislative body which creates a crime with retrospective effect is null and void.

9 Crimes must be formulated clearly (*ius certum*) Even if the *ius acceptum* and the *ius praevium* principles discussed above are complied with, the principle of legality can still be undermined by the creation of criminal norms which are formulated vaguely or unclearly.[81] If the formulation of a crime is unclear or vague, it is difficult for the subject to understand exactly what is expected of him. At issue here is the *ius certum* principle. An extreme example of an excessively widely formulated criminal prohibition would read as follows: "Anyone who commits an act which is harmful to the community commits a crime."[82]

One of the reasons why an excessively widely formulated criminal provision violates the principle of legality is that such a provision can serve as a smokescreen behind which the state authority can "hide" a particular type of act which it wishes to proscribe but which, for tactical reasons, it does not wish to name expressly.

Although the Constitution does not expressly provide that vague or unclear penal provisions may be struck down, it is quite possible and even probable that section 35(3)(*l*) (which provides that every accused has a right to a fair trial, which includes the right not to be convicted for an act or omission that was not an offence at the time it was committed or omitted) will be interpreted in such a way that vaguely defined crimes created in any legislation may be declared null and void. This "void-for-vagueness" rule may be based on either X's right to a fair trial in general or on the principle that if a criminal norm in legislation is vague and uncertain, it cannot be stated that the act or omission in question in fact constituted an offence prior to the court's interpretation of the legislation.

It is also possible to base the operation of the *ius certum* provision in our law on the provisions of section 35(3)(*a*) of the Constitution, which provides that the right to a fair trial includes the right to be informed of the charge with

---

81 *Jordan* 2002 2 SACR 499 (CC) 518*c–d.*

82 An example of a vaguely formulated statutory provision creating a crime can be found in s 1(1)(*b*) of the Intimidation Act 138 of 1991, which provides *inter alia* that "any person who . . . conducts himself in such a manner . . . that it might reasonably be expected that the natural and probable consequences thereof would be that a person perceiving the act fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person . . ." (etc) commits the crime of intimidation. The "cosmic scope" of this provision was criticised in *Holbrook* [1998] 3 All SA 597 (E) 601 (where the court stated that "[t]his section is so widely couched that it may well be construed that a person who throws a cat into a swimming pool may well be guilty of an offence . . .") and *Motshari* 2001 1 SACR 550 (NC) 554–556.

sufficient detail to answer it. In *Lavhengwa*[83] it was held that the right created in section 35(3)(*a*) implied that the charge itself had to be clear and unambiguous. This, according to the court, would only be the case if the nature of the crime with which X is charged is sufficiently clear and unambiguous to comply with the constitutional right to be sufficiently informed of the charge. It was further held that, in order to comply with the requirement of sufficient clarity, one should bear in mind, first, that absolute clarity is not required; reasonable clarity is sufficient;[84] and secondly, that a court which has to decide whether a provision is clear or vague should approach the legislation on the basis that it is dealing with reasonable and not foolish or capricious people.[85]

It is not only statutory criminal provisions that may, on the ground of vagueness, be declared null and void in terms of the Constitution, but also provisions of common law that are vague and uncertain.[86]

However, it is impossible to comply with the *ius certum* principle in every respect. It is impossible in any legal system – even one which best upholds the principle of legality – to formulate legal rules in general, and criminal provisions in particular, so precisely and concretely that there will never be any difference of opinion regarding their interpretation and application.[87] Legal rules are not meant to apply merely to an individual person or to an event which occurs only once; it is in the nature of legal rules that they be formulated in general terms. Apart from this, language is not in all respects a perfect means of communication, and even concepts such as "certainty" and "clarity" are relative and a matter of degree. It is precisely for this reason that the principle of legality can never be complied with literally and fully in any legal system.

10 Provisions creating crimes must be interpreted strictly (*ius strictum*) The fourth application of the principle of legality is to be found in the *ius strictum* rule. Even if the above-mentioned three aspects of the requirement of legality, that is, *ius acceptum*, *ius praevium* and *ius certum*, are complied with, the general principle can nevertheless be undermined if a court is free to interpret the words or concepts contained in the definition of the crime widely, or to extend their application by analogous interpretation. The Constitution contains no express provision relating to the *ius strictum* principle. However, it is submitted that the provisions of section 35(3) – and thereunder paragraphs (*a*) and (*l*) – are wide enough to incorporate this principle.

There is a well-known rule in the interpretation of statutes that crime-creating provisions in both Acts of parliament and subordinate legislation must be

---

83 1996 2 SACR 453 (W) 483–485. See also the discussion of the role of vagueness in the interpretation of penal provisions in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 102 (W) 117–119.

84 Cf *Pretoria Timber Co (Pty) Ltd* 1950 3 SA 163 (A) 176H; *Eneldoe's Taxi Service (Pty) Ltd* 1966 1 SA 329 (A) 339G.

85 Cf *O'Malley* 1976 1 SA 469 (N) 474G; *Mahlangu* 1986 1 SA 135 (T) 141G–H.

86 In *Friedman (1)* 1996 1 SACR 181 (W) it was argued on behalf of X that the rule in regard to the crime of fraud that the prejudice need be neither actual nor of a patrimonial nature, was unconstitutional on the ground of vagueness. The court rejected the argument. It is noteworthy that nowhere in the judgment did the court call into question the principle that rules of common law may be declared null and void on the ground of vagueness.

87 *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) par 108.

interpreted strictly.[88] Sometimes this method of interpretation is referred to as interpretation *in favorem libertatis*. The underlying idea here is not that the Act should be interpreted to weigh against the state and in favour of X, but only that *where doubt exists* concerning the interpretation of a criminal provision, X should be given the benefit of the doubt.[89]

The rule that provisions which create crimes or describe criminal conduct should be interpreted strictly rather than broadly, also applies to common-law crimes. A court is not free to extend the definition or field of application of a common-law crime by means of a wide interpretation of the requirements for the crime.[90] Therefore, if there is uncertainty about the scope of one of the elements of a common-law crime, the court should interpret the definition of such element strictly. A court may be unsure whether, according to our old common-law sources, a specific kind of conduct can be brought under a particular recognised common-law crime. (Often, there is a difference of opinion among our common-law writers on certain points of law.) A consistent application of the principle of legality implies that in such cases, a court must accept that the conduct does not fall under the definition of such a crime. It is preferable to leave it to the legislature (if it so wishes) to declare that such conduct amounts to the commission of a particular crime (or to the commission of a new statutory crime).[91]

On the other hand it would be wrong to infer from the above that if at any time a person is charged with a common-law crime and the facts of the case do not clearly correspond with those of any examples of the crime quoted by the common-law authorities, X should, therefore, be acquitted. The principle of legality does not mean that a court should so slavishly adhere to the letter of the old sources of the law that common-law crimes are deprived of playing a meaningful role in our modern society – a society which in many respects differs fundamentally from the society of centuries ago in which our common-law writers lived. There are certain cases in which South African courts were prepared to regard certain types of conduct as amounting to the commission of common-law crimes, in spite of the fact that the common-law writers did not cite the commission of these acts as examples of the crimes in question. Thus, for example, the South African courts broadened the field of application of theft by in certain situations relating to the theft of money deviating from the

---

88 *Sachs* 1953 1 SA 392 (A) 399–400; *Stassen* 1965 4 SA 131 (T) 134; *Claassen* 1997 1 SACR 675 (C) 680*f–g*.

89 *Milton and Cowling* Introduction 1–42 ff.

90 See, however, the discussion *infra* par 12 of the judgment of the Constitutional Court in *Masiya v Director of Public Prosecutions* 2007 2 SACR 435 (CC).

91 *Augustine* 1986 3 SA 294 (C) 302I–J; *Mintoor* 1996 1 SACR 514 (C) 517A–B (but contrast *Ndebele* 2012 1 SACR 245 (GSJ). The decisions in *Sibiya* 1955 4 SA 247 (A) (relating to theft) and *Von Molendorff* 1987 1 SA 135 (T) (relating to extortion) constitute two examples of the correct application of this principle. In *Sibiya*'s case the Appellate Division held that because of doubt that existed over the question of whether the mere temporary use of another's property (*furtum usus*) constituted theft according to our common-law authorities, such conduct should not be regarded as amounting to theft. Schreiner JA declared at 256: "There should if possible be a high degree of rigidity in the definition of crimes; the more precise the definition the better." Contrast, however, *Ndebele supra*.

well-known rule of common law that only corporeal, movable property can be stolen; they held that a person can commit theft even though the object of the appropriation is merely an "abstract sum of money" or "credit" (which in many cases amounts, technically speaking, to nothing more than a claim against a bank).[92]

11 Extending the scope of existing crimes by analogy not permitted The *ius strictum* principle implies further that a court is not authorised to extend a crime's field of application *by means of analogy* to the detriment of X. Otherwise a court would be free to extend the definition or field of application of an existing crime by means of a wide interpretation of the requirements for the crime. This rule applies just as much to statutory crimes as to common-law crimes.[93] Analogy refers to a partial resemblance between two concepts; since the resemblance is partially only, it follows that in other respects the two concepts differ from one another. Although it is not permissible to extend the description of punishable conduct by means of analogy, in criminal law there is no objection to the extension of defences by analogy.[94] The borderline between legitimate interpretation of a legal provision and an illegitimate extension thereof (whether by analogy or otherwise) is fluid and not always easy to ascertain; nevertheless one is here dealing with a valid and necessary borderline.[95]

However, as far as this aspect of the principle of legality is concerned, there is unfortunately a fly in the ointment: that is the judgment of the Constitutional Court in *Masiya v Director of Public Prosecutions.*[96]

12 The judgment in *Masiya* In *Masiya v Director of Public Prosecutions*[97] the Constitutional Court extended the scope of the common-law crime of rape to include not merely sexual penetration of a woman by a man's penis through her vagina, but also such penetration through her anus. This judgment was delivered before the legislature enacted a new broader definition of rape. Before this judgment was delivered, intercourse with a woman through her

---

92 *Infra* XVIII A 15; *Kotze* 1965 1 SA 118 (A); *Verwey* 1968 4 SA 682 (A) 687. Another example of a case in which a court was prepared to extend the field of application of a common-law crime is *Burger* 1975 2 SA 601 (C). In this case the court held that the crime of defeating or obstructing the administration of justice could be committed by making a false declaration to the police, despite the fact that no examples of the offence being committed in this way are given in the common-law authorities.

93 *Oberholzer* 1941 OPD 48 60. A good example of a case in which the court refused to extend the area of application of a criminal norm by means of analogy is *Smith* 1973 3 SA 945 (O). In this case X was charged with having been in possession of indecent *photographic* material, in contravention of certain provisions of Act 37 of 1967. However, it appeared that the pictures in his possession were *photostat* reproductions. The court refused to extend the provisions of the Act and X was acquitted.

94 *Jescheck and Weigend* 134–135; *Schönke-Schröder* n 31 *ad* s 1; Labuschagne 1988 *SACJ* 52 67. Thus, the Appellate Division in *Chretien* 1981 1 SA 1097 (A) held that the defence of a lack of criminal capacity should not be limited to cases of mental illness and youth, but should also be extended to apply to certain cases of intoxication. There can therefore be no objection against the extension by way of analogy of the scope of a ground of justification, since this is to X's advantage – *Mnanzana* 1966 3 SA 38 (T).

95 *Augustine* 1986 3 SA 294 (C) 302I–393B; *Von Molendorff* 1987 1 SA 135 (T) 169H–I.

96 2007 2 SACR 435 (CC).

97 *Supra*.

anus was punishable as indecent assault. The judgment of the Constitutional Court amounts to the court extending the scope of the (common-law) crime of rape to include a type of situation not previously included in its definition, thereby broadening its field of operation.

This judgment is undoubtedly wrong. It is a disturbing judgment, as it clearly undermines the whole application of principle of legality, which is the cornerstone of a civilised criminal justice system. The Constitutional Court arrogated to itself the right to redefine crimes, even if it amounts to broadening the field of operation of the existing definition.

The court based its judgment on the provisions of section 39(2) of the Constitution, according to which the court has to harmonise the common law with the spirit, purport and objects of the Bill of Rights. By extending the definition to cover also penetration through the anus, the court stated that it would "express the abhorrence with which our society regards these pervasive but outrageous acts".[98] The whole argument of the court that it is irrational and illogical to regard intercourse *per anum* as constituting a crime different from intercourse *per vaginam*, and that the drawing of such a difference discriminates arbitrarily against women[99] is incorrect. The difference between these two types of intercourse has a rational and logical basis namely, the anatomically difference between men and women[100] as well as the fact that the main or at least one of the main reasons for criminalising rape is to protect the woman from becoming pregnant without her will – a consideration which is completely lacking in the case of intercourse *per anum.*

This, however, is not the only point of criticism against the judgment as far as the principle of legality is concerned. The following point of criticism of the judgment is that it sets a disturbing example: the principle applied by the court is that (*i*) if the court is of opinion that conduct which presently does not fall within the definition of a crime should fall thereunder because it is *analogous* to the conduct presently falling within the definition, (ii) that both types of conduct relate to the same right(s) protected in the Bill of Rights, and (*iii*) that it is feasible that the conduct hitherto falling outside the definition should be punished with the same punishment as that prescribed for conduct falling under the existing definition, then the court is free to enlarge the definition of the crime in order to accommodate conduct not previously punished under that heading.

Say, for example, that (before the legislature enacted new legislation dealing with sexual crimes) X places his penis in a woman's mouth without her consent. This may likewise be described as just as heinous, abhorrent, reprehensible and a violation of the woman's dignity, freedom, privacy and bodily

---

98 Par 44.

99 See especially the argument of the magistrate as well as the judge in the court which first heard the issue, reported in *Masiya* 2006 2 SACR 357 (T) 363–364, 378–379.

100 Males and females are created differently in that below the waist males have only one orifice which can be sexually penetrated, namely the anus, whereas females have two, namely the anus as well as the vagina. To regard this difference as amounting to discrimination or inequality is incorrect. It would amount to "putting God in the dock" because He (or She or evolution or whoever or whatever one believes to have created the world and mankind), by creating two different types of people, failed to obey the (present "politically correct") ideology that there ought to be no differences between people.

integrity. Must we now accept that this latter type of conduct also amounted to the crime of (common-law) rape? Presumably the answer to this question is "yes". Once the Constitutional Court recognises the validity of what it calls the "incremental development of the common law" (to use the euphemistic expression used by the court as a description of its "right" to extend the ambit of existing crimes by way of analogy), there is no knowing where this analogous extension of crimes will end.[101] Are we now returning to the year 1888, when the court in *Marais*[102] held that judges are *custodes morum* – the guardians of the morals?

This judgment sets a dangerous precedent, because it undermines the principle of legality. It flies in the face of a cornerstone of the rule of law, namely, the threefold partition of the state's powers into legislative, executive and judicial. Instead of leaving it to the legislature to extend the definitions of

---

101 One can think of many examples of crimes other than rape in respect of which the scope may be enlarged by arguments based on analogy. The following three examples make this clear: The common-law crime of *housebreaking with intent to steal* cannot be committed in respect of a motor car. If X breaks into a motor car with the intent to steal something inside, he can at most be convicted of malicious injury to property in respect of the car (as well as theft, if he appropriates something inside the car). Yet one can argue that the social danger of breaking into a car is just as great as the social danger of breaking into some other structure used for the storing of goods, no matter how small or flimsy it is – which according to our law is something that does qualify as a structure in respect of which housebreaking can be committed. Both crimes, or types of situations, are related to the right to property enshrined in s 25 of the Constitution. The two types of conduct are analogous. What is more, the punishment imposed for housebreaking with intent to commit a crime is usually more severe than that imposed after a conviction of malicious injury to property. Must we now, on the strength of the judgment in *Masiya*, assume that the courts may hold that the definition of housebreaking should be broadened in order to include also the breaking into a motor car (or perhaps even a whole list of other structures or containers in respect of which the crime can presently not be committed)?

A second example is the common-law crime of *arson*. This crime can only be committed in respect of immovable property (*Motau* 1963 2 SA 521 (T) 522). If one sets a motor car or a railway truck alight, the perpetrator can therefore not be convicted of arson but only of malicious injury to property. But once again one can argue that the social danger of setting a car alight is just as great as the social danger of setting some immovable structure, however small, alight; that both crimes relate to the same right enshrined in s 25 of the Constitution, namely the right to property; that the two types of conduct are analogous, and that the punishment for arson is usually more severe than that for malicious injury to property. Does this now mean that a court may one day hold that the definition of arson must be extended to include the setting alight also of movable property?

A third example is the common-law crime of *theft*. Generally speaking, theft cannot be committed in respect of incorporeal property, such as an idea, a tune, or a plot of a story. Yet the unlawful appropriation of the latter "things" may, just as theft of corporeal property, be turned to economic advantage. The use of analogy allows one to regard the unlawful appropriation of at least certain incorporeal things as theft. One may argue that such appropriation is socially and economically just as objectionable as traditional theft. Does this now mean that a court may by way of "incremental development of the common law" enlarge the field of operation of common-law theft to include also the appropriation of such incorporeal property?

102 (1888) 6 SC 367.

crimes, the court simply arrogates to itself the power to do so. On the European continent, where the principle of legality is held in high esteem (and where it also originated), courts do not have the right to extend the definition of existing crimes to include situations which are not covered by the existing definition.[103]

One of the reasons for this rule applied on the European continent is that if there were no rule prohibiting the extension of crimes by way of analogy, judges would be unduly swayed by emotional considerations, the public media and pressure groups instead of approaching the matter in objective and abstract terms. It is, by the way, noticeable that the judgment in *Masiya* teems with emotionally-charged language and expressions.[104] It is difficult to think of any other judgment of our courts that are based on such emotionally charged adjectives as the judgment in this case. In reality one should not be surprised at the emotionally charged nature of this judgment, because if a court turns its back on the perfectly rational principle on which the former common-law crime of rape is based (namely the prohibition on vaginal penetration of a woman by a man's penis without consent, *in order to prevent the woman from becoming pregnant without her consent*), all that remains for the court to rely on for its alternative opinion, is recourse to emotion.

Much more acceptable than the judgment in *Masiya* is the judgment of Froneman J in *Mshumpa*.[105] In this case the prosecution invited the court to extend the definition of murder so as to include the unlawful, intentional killing of a foetus. The court refused to extend the ambit of the crime as requested by the prosecution. This case was decided after the judgment in *Masiya* had been delivered. The court in *Mshumpa* referred to the judgment in *Masiya* but refused to follow it, declaring that it is the duty of parliament, and not the courts, to extend the definitions of crimes, and that section 39(2) of the Constitution cannot be used to circumvent the operation of the principle of legality.

---

103 *Cf* the judgment of the European Court of Human Rights in *Kokkinakis v Greece* (1994) 16 EHRR 397 par 52, where the court quite correctly held that "the criminal law must not be extensively construed to an accused's detriment, for example by analogy". (See the discussion of Hoctor 2007 *Annual Survey* 289.) See further the discussion in *Jecheck and Weigend* 134; *Jakobs* 82, who warns against interpreting a criminal provision in more general terms than is allowed ("Generalisierungsverbot"); *Roxin* 102; *Hazewinkel-Suringa-Remmelink* 487, who states that the reason for this prohibition (on analagous interpretation) is that judges may be unduly swayed by emotional considerations, the public media and pressure groups instead of approaching the matter in general, abstract terms, as parliament usually does.

104 Cf eg par 9, 28, 30, 36, 44, 79. For criticism of the judgment of the Transvaal court in the *Masiya* case, see Hoctor 2007 *SACJ* 78, especially 86. For detailed criticism of the Constitutional Court's judgment in *Masiya*, see Snyman 2007 *SALJ* 677, Hoctor 2007 *SACJ* 78; Ramosa 2009 *SACJ* 353. However, Phelps 2008 *SALJ* 638, Freedman 2008 *SACJ* 244-252 and Kemp in Du Plessis and Lubbe (ed), *A Man of Principle. The life and legacy of JC de Wet* (2013) 387-388, defend the judgment. Freedman's statement on 252 that "the power to extend a common-law crime or to create a new common-law crime has been conferred by s 39(2) on the courts because they are the 'protectors and expounders of the common law'" goes too far. A statement such as this would have been music in the ears of the Nazi judges in Germany.

105 2008 1 SACR 126 (EC).

13 The principle of legality in punishment In the discussion so far, attention has been paid to the application of the principle of legality to the creation, validity, formulation and interpretation of crimes or definitions of crimes. When dealing with the imposition of punishment, the *ius acceptum*, *ius praevium*, *ius certum* and *ius strictum* principles apply equally. The application of the principle of legality to punishment (as opposed to the existence of the crime itself) is often expressed by the maxim *nulla poena sine lege* – no penalty without a statutory provision or legal rule.

The application of the *ius acceptum* principle to punishment is as follows: in the same way as a court cannot find anyone guilty of a crime unless his conduct is recognised by statutory or common law as a crime, it cannot impose a punishment unless the punishment, in respect of both its nature and extent, is recognised or prescribed by statutory or common law.[106] In the case of statutory crimes, the maximum penalty which can be imposed for each crime is usually specifically set out. If the legislature creates a crime, it should, in order to best comply with the principle of legality, also set out the punishment for the crime. This limits the possibility of an unusual, cruel or arbitrary punishment being imposed. If the legislature creates an offence but omits to specify the punishment, then the punishment is in the discretion of the court.[107]

The application of the *ius praevium* principle to punishment is as follows: if the punishment to be imposed for a certain crime is increased, it must not be applied to the detriment of an accused who committed the crime before the punishment was increased. Section 35(3)(*n*) of the Constitution provides that the right to a fair trial includes the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.[108] The rule against the retrospective operation of sentences does not apply to cases in which the legislature *reduces* the punishment. The reason for this exception is that provisions in an Act which benefit the citizen do operate retrospectively.[109] The application of the *ius certum* principle to punishment is that the legislature should not express itself vaguely or unclearly when creating and describing punishment.

The application of the *ius strictum* principle to punishment is that where a provision in an Act which creates and prescribes a punishment is ambiguous, the court must interpret the provision strictly. Furthermore, a court may not extend by analogy the provision which prescribes the punishment to cases which the legislature could not have had in mind.

---

106 *Malgas* 2001 1 SACR 469 (SCA) 472*g–h*; *Dodo* 2001 1 SACR 594 (CC) 604*e–f*.
107 *Milton and Cowling* Introduction 1–20.
108 *Senyolo* 2010 2 SACR 571 (GHJ).
109 *Sillas* 1959 4 SA 305 (A) 308; *Milton and Cowling* Introduction 1–28.

CHAPTER

II

CONDUCT

A CONDUCT (ACT OR OMISSION)

1 "Conduct", "act", "omission" The first general requirement for criminal liability is that there must be *conduct* on the part of X. By "conduct" is understood an *act* or an *omission*. "Act" is sometimes referred to as "positive conduct", "commission" or *commissio* and an "omission" as "negative conduct", "failure to act" or *omissio*.

From a technically correct point of view the term "act" does not include an "omission". "Act" is rather the exact opposite of an "omission". There is no general concept which embraces them both. The two differ from each other as day and night, because to do something and not to do something are exact opposites. The word "conduct" may refer to both of them, but the use of the word "conduct" is merely a formal, linguistic device of referring to both of them simultaneously. On a material level the differences remain.[1] This is confirmed by the fact that the legislature, when referring to this first element of criminal liability, regularly speaks of "act or omission" or uses an expression such as "somebody who commits an act or fails to commit an act".[2]

To be technically correct one would, therefore, always have to speak of "an act or an omission" when referring to this first basic element of liability. Since this expression is somewhat strained, and since the punishment of omissions is more the exception than the rule, writers tend to use the word "act" in a wide

---

1 In German criminal-law theory, which strives toward a description of the principles of criminal liability which is as systematic as possible, there has for decades been a heated debate on whether it is possible to combine an act and omission in one general concept, and if so, what this overarching concept is. Eventually most jurists agreed that such a general concept does not exist. As a result the discussion of the general principles of liability in German textbooks is divided into two strictly separate parts, one dealing with liability for acts and the other with liability for omissions. The advantage of such a procedure is that the general principles are set out very logically and systematically, but the disadvantage of this method is the degree of repetition of the discussion of the same concepts. To avoid this repetition, in this book the general principles will be described as they apply to both active and passive conduct. For this reason the word "conduct" will often be used when referring to both an act and an omission.

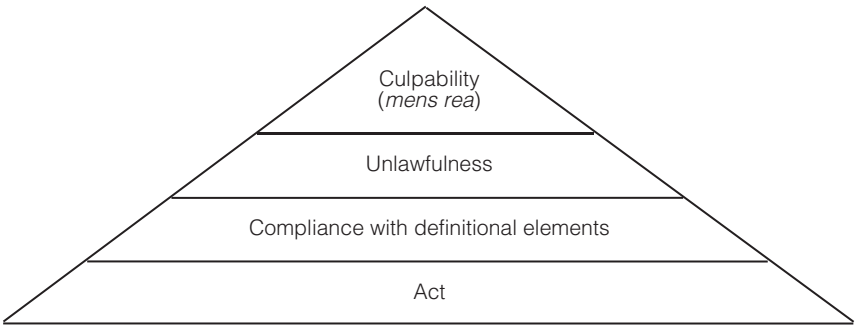
2 Cf the wording of s 78(1) of the Criminal Procedure Act 51 of 1977.

sense as referring to both an act and an omission – in other words, as a synonym for "conduct". Normally this use of the word "act" in a non-technical, non-literal sense does not lead to confusion. From the context of the statement the reader would normally be able to make out whether the writer uses the word "act" loosely as a term referring to both an act of omission, or whether it is used in the strict, technical sense of "active conduct".

2 "Act" means "the type of act described in the definitional elements" Criminal law does not prohibit a mere act *in abstracto*. Put differently, there is no rule of law declaring "You may not act". At every conscious moment of a person's existence she performs some act or other, such as walking, opening a door, or simply sitting and staring out of the window. It stands to reason that "act" as the word is used in criminal law does not refer to the "events" just mentioned; it refers only to the type of act mentioned in the definition of the crime with which X is charged, and more specifically, the type of act set out in the definitional elements of the relevant crime. The law does not concern itself with any other possible "act" committed by X (ie, an act other than the one mentioned in the definitional elements). Thus if X is charged with rape, the act required is sexual penetration; if she is charged with arson, the act required is setting fire to a certain type of structure.

3 The act functions as both the basis of and as a limitation of liability[3] The concept of an act performs two important functions in the construction of criminal liability: first, it forms the *basis* of liability and, secondly, it serves to *limit the scope* of liability.

We first consider the first-mentioned function of an act. Because the act is the basic element in the construction of a system of criminal liability, all the other elements or requirements for liability are attributes or qualifications of the act. It is pointless to investigate whether there has been compliance with the requirement of unlawfulness if it is not yet clear whether there was an act which is compatible with the definitional elements, since only such an act can be unlawful. Again, the discussion of culpability below will reveal that the presence of culpability can be determined only once it is clear that there has been an act that complies with the definitional elements and that is also unlawful. The act can therefore be seen as the base of a pyramid which may be sketched as follows:



3 On this aspect of the requirement of an act, see *Jescheck and Weigend* 219–220; *Roxin* ch 8 pars 4, 12, 58–73.

The second function of the requirement of an act is to determine the outer limits of criminal liability and in this way to limit its scope. The act must be described in such a way that it excludes from the field of investigation conduct or events which are irrelevant for the purposes of criminal law. Such conduct or events are:

(*a*) thoughts that have not yet been transformed into an act or conduct;

(*b*) non-human conduct, such as that of an animal; and

(*c*) involuntary muscular movements, such as those of a somnambulist.

Each of these will be discussed below.

4 Thoughts not punishable Merely thinking of doing something, or even a decision to do it, is not punishable.[4] Before there can be any question of criminal liability, X must have started converting her thoughts into actions. This does not mean that only the completed crime, with all the harm already done, is punishable. As will be seen,[5] an attempt to commit a crime is also punishable, but even then some act is required which goes beyond a mere idea or a decision to do something. Even uttering words may be sufficient to constitute a crime, as is evident from the fact that incitement and conspiracy are punishable.[6]

5 Act must be a human act The act must be a human act; in other words, the subject of the act must be a human being. In ancient societies and during the Middle Ages, animals and even inanimate objects, such as beams which fell on people's heads, were sometimes "tried" and "punished",[7] but this could not happen today in the South African or any other modern legal system. A human being, however, can be punished if she commits a crime through the instrumentality of an animal, for example if she incites her dog to bite someone.[8] In this type of situation the law regards the animal merely as a means employed by X to achieve her criminal purpose, and the basis of X's liability is the same as the basis on which she will be liable if she uses an instrument such as a stick or a firearm. The rule that the act must be committed by a human being is subject to the exception that a juristic person or corporate body such as a company can sometimes also be punished. Because of the extent of this subject, the criminal liability of a corporate body will be discussed separately later.[9]

6 Act not necessarily a muscular contraction It is incorrect to interpret the concept of an "act" as necessarily implying a bodily movement or muscular contraction. To do this is to adopt what is sometimes called the "naturalistic" theory of an act, according to which the concept of an act is derived purely from the natural sciences. This is an obsolete view, dating from the nineteenth century and strongly influenced by the positivistic legal tradition then in vogue.

---

4 D 48 19 18: *cogitationis poenam nemo patitur*; D 50 16 225; Huber *HR* 6 1 4 ("want van de gedachten is men alleen aan God reekenschap schuldig"); Matthaeus Prol 1 5; Moorman Inl 1 13; Van der Linden 2 1 3 2; *Milne and Erleigh (7)* 1951 1 SA 791 (A) 822; *Van der Westhuizen* 1951 2 SA 338 (C) 341.

5 *Infra* VIII B.

6 *Infra* VIII C and D.

7 See Exodus 21: 28.

8 *Thody* 1971 2 SA 213 (N) and cf *Fernandez* 1966 2 SA 259 (A).

9 *Infra* VI.

The obvious flaw in this theory is that it is unable to explain why omissions are also punishable. An omission is, after all, a form of conduct in which there is, by definition, no muscular contraction or physical movement. "Act" must therefore be understood, not in terms of the natural sciences, but as a technical term, peculiar to the law, which includes in its meaning both a commission and an omission. One can, of course, sidestep the whole question as to how an "act" can include also an omission, by simply avoiding the term "act" and using in its stead either the expression "act or omission" or "conduct".

As will become clear later in the discussion in this book, X's conduct may qualify as an act for the purposes of criminal liability even though it is not her own physical movements that directly perform the forbidden act, but if she uses another person as an instrument through which she performs such an act.

7 "Act" not limited to intentional conduct It is wrong to limit the concept of an act to conduct that is willed – that is, intentional conduct. Even an unintentional act may amount to an "act" for the purposes of criminal law, as where the act takes place negligently.

If X is charged with a crime requiring intention (as opposed to negligence), X's will or intention is obviously of great importance when determining whether X is guilty of having committed the crime, but as a rule this intention does not form part of the requirement of an act; it becomes an issue only in investigating the later elements or requirements for liability, and more specifically the culpability element.

8 Act must be voluntary Only voluntary conduct is punishable.[10] Conduct is voluntary if X is capable of subjecting her bodily movements to her will or intellect. She must be capable of making a decision about her conduct (act or omission) and to execute this decision. This implies that she must be capable of preventing the prohibited act or result if she applies her mind to the matter. It is not required that X make a rational or well-considered decision; even an infant or mentally ill person can act, even though such a person cannot make a rational decision. If the conduct cannot be controlled by the will, it is involuntary, as, for example, when a sleep-walker tramples on somebody, or an epileptic moves her hand while having an epileptic fit and hits someone's face. If X's conduct is involuntary, it means that X is not the "author" or creator of the act or omission; it means that it is not X who has acted, but rather that the event or occurrence is something *which happened to X*.

9 Absolute force The voluntariness of an act is excluded, first, by absolute force (*vis absoluta*).[11] In this form of force X's ability to subject her bodily movements to her will or intellect is excluded. The following is an example of absolute force: X is slicing an orange with her pocket-knife. Z, who is much bigger and stronger than X, grabs X's hand which holds the knife and presses it, with the blade pointing downward, into Y's chest. Y dies as a result of the knife-wound. X with her inferior physique would have been unable to prevent the incident, even if she had tried. X performed no act. It was Z who performed the act.

---

10 *Goliath* 1972 3 SA 1 (A) 29; *Cunningham* 1996 1 SACR 631 (A) 635–636; *Kok* 1998 1 SACR 532 (N) 545*d–e*; *Henry* 1999 1 SACR 13 (SCA) 19*i*.

11 *Hercules* 1954 3 SA 826 (A) 831G; *Goliath* 1972 3 SA 1 (A) 11, 29.

This situation must be distinguished from relative force (*vis compulsiva*). In this type of force X does have the ability of subjecting her bodily movements to her will or intellect, but is confronted with the prospect of suffering some harm or wrong if she chooses not to commit it.[12] The following is an example of relative force: Z orders X to shoot and kill Y, and threatens to kill X herself if she (X) refuses to comply with the order. The circumstances are such that X cannot escape the predicament in which she finds herself. If X then shoots Y, there is indeed an act, but X may escape liability on the ground that her conduct is justified or excused by necessity.[13] In this form of coercion X is influenced to act in a certain manner, but it still remains possible for her to act in a manner in which she can avoid the injurious conduct.

10 Automatism A more important respect in which the law assumes that there is no act because what is done, is done involuntarily, is where a person behaves in a mechanical fashion. Examples of mechanical behaviour are reflex movements such as heart palpitations or a sneezing fit, somnambulism,[14] muscular movements such as an arm movement while a person is asleep or unconscious[15] or having a nightmare, an epileptic fit,[16] and the so-called "black-out".[17] Mere amnesia after the act, that is, the inability to remember what happened at the critical moment is not to be equated to automatism, because the question is not what X can remember of the events, but whether she acted voluntarily at the critical moment.[18]

These types of behaviour are often somewhat loosely referred to as cases of "automatism", since the muscular movements are more reminiscent of the mechanical behaviour of an automaton than of the responsible conduct of a human being whose bodily movements are subject to the control of her will.[19] It really does not matter much in what terms the conduct is described; the question is simply whether it was voluntary, in other words, whether the person concerned was capable of subjecting her bodily movements or her behaviour to the control of her will.

11 Distinction between automatism due to involuntary conduct and unconscious behaviour attributable to mental illness A distinction must be drawn between automatism due to involuntary conduct and unconscious behaviour attributable to mental illness. In the former type of situation X, who is

---

12 As in *Goliath supra* and *Peterson* 1980 1 SA 938 (A).

13 *Infra* IV C.

14 Van der Linden 2 1 6 4; Moorman Inl 2 24; *Johnson supra* 204.

15 *Dhlamini* 1955 1 SA 120 (T); *Naidoo* 1971 3 SA 605 (N) 607E.

16 *Schoonwinkel* 1953 3 SA 136 (C), but contrast *Victor* 1943 TPD 77.

17 *Van Rensburg* 1987 3 SA 35 (T) (automatism due to X's suffering from hypoglycaemia); *Viljoen* 1992 1 SACR 601 (T). See also *Stellmacher* 1983 2 SA 181 (SWA) 185A–B. Although X was quite rightly acquitted in this case, the court erred in regarding his hypoglycaemia and/or epileptic state as a factor excluding criminal capacity. See 187A, 188B. On the defence of automatism in general, see *Johnson* 1969 1 SA 201 (A) 204–205; *Trickett* 1973 3 SA 526 (T); s 2.01(2).

18 *Piccione* 1967 2 SA 334 (N); *Majola* 2001 1 SACR 337 (N) 339–340; *Humphreys* 2013 2 SACR 1 (SCA) par 10-11. On the effect of amnesia on criminal liability generally, see Hoctor 2000 *SACJ* 273.

19 *Humphreys* 2013 2 SACR 1 (SCA) par 8.

mentally sane, only momentarily behaves involuntarily because of, for example, an epileptic fit, as explained above. In the latter type of situation X's unconscious conduct is attributable to a mental pathology, that is, mental illness (insanity).

In the past the courts have referred to the former type of situation as "sane automatism" and to the latter as "insane automatism". This terminology can lead to confusion, since the defence known as "insane automatism" is in fact nothing other than the defence of mental illness (insanity).[20] This confusing terminology originated at a time when the concept "criminal capacity" was still unknown in our law. In the interests of clarity it is better to avoid using the expressions "sane automatism" and "insane automatism", and to reserve the term "automatism" to involuntary conduct not attributable to a mental disease. It is noteworthy that the Supreme Court of Appeal has recently on more than one occasion[21] avoided the terms "sane automatism" and "insane automatism", preferring to use the expression "automatism not attributable to mental pathology" instead of "sane automatism". (By "mental pathology" is meant "mental illness".) In *Henry*[22] the court also used the expression "psychogenic automatism" to refer to "sane automatism" (ie, automatism excluding voluntary conduct). What in the past was referred to as "insane automatism" can better be described as "pathological loss of consciousness". The crucial difference to be drawn is between loss of consciousness due to mental illness and loss of consciousness due to involuntary conduct.

12 Practical importance of above distinction The difference between automatism due to involuntary conduct and unconscious behaviour attributable to mental illness is of great practical importance, for two reasons:

1 *The placing of the onus of proof* depends upon the defence which X raises. In cases of automatism due to involuntary conduct the onus is on the state to prove that the act was voluntary,[23] although the state is assisted by the natural inference that, in the absence of exceptional circumstances, sane persons who engage in conduct which would ordinarily give rise to criminal liability do so consciously and voluntarily.[24] In cases of unconscious behaviour attributable to mental illness the defence is one of mental illness and the onus is on X to prove that she suffered from mental illness.[25]

2 *The order which the court must make* if it upholds X's defence, depends upon the defence which X successfully raises. A successful defence of automatism due to involuntary conduct results in X's leaving the court a free person. If X relies on unconscious behaviour attributable to mental

---

20 In *Kok* 2001 2 SACR 106 (SCA) the Supreme Court of Appeal emphasised at 110*d–e* that s 78(6) of the Criminal Procedure Act 51 of 1977 contains no reference to "sane automatism", and that the latter term is not a psychiatric term, but merely a useful tag to describe automatism arising from some cause other than mental illness.

21 *Cunningham* 1996 1 SACR 631 (A) 635–636; *Henry* 1999 1 SACR 13 (SCA) 19–20.

22 *Supra* 20*e–f*.

23 *Kok* 1998 1 SACR 532 (N) 545; *Henry* 1999 1 SACR 13 (SCA) 19*i–j*; *Humphreys* 2013 2 SACR 1 (SCA) par 9

24 *Kok supra* 545*d–f*; *Cunningham supra* 635*j*–636*b*; *Henry supra* 20*a–c*; *Humphreys supra* par 9.

25 *Infra* V B (iii) 9.

illness and her defence succeeds, she must be dealt with in accordance with the rules relating to the defence of mental illness: section 78(6) of the Criminal Procedure Act provides that in such a case a court must find X not guilty but that the court then has a discretion to order that X be detained in a psychiatric hospital, in which case X does not leave the court as a free person.[26]

13 Proving automatism due to involuntary conduct The attitude of the court towards a defence of automatism is usually one of great circumspection.[27] An accused who has no other defence is likely to resort to this one in a last attempt to try and escape the consequences of her acts. Evidence of a mere loss of temper is insufficient to warrant an inference of automatic behaviour. Even where "sane automatism" is pleaded and the onus is on the state, X must base her defence on medical or other expert evidence which is sufficient to create a doubt as to whether the action was voluntary.[28]

It may sometimes be difficult to decide whether X's unconscious or "automatic" behaviour stems from mental illness or not. Expert evidence of a psychiatric nature will be of much assistance to the court in pointing to factors which may be consistent, or inconsistent, as the case may be, with involuntary conduct which is non-pathological (ie, unrelated to a mental illness). Such evidence may, for example, relate to such matters as the nature of the emotional stimulus which allegedly served as a trigger mechanism for the condition.[29]

The mere subconscious repression of an unacceptable memory (sometimes described as "psychogenic amnesia") does not mean that X in fact acted involuntarily.[30] It is well known in psychology that if a person experiences a very traumatic event, recalling the event in the mind may be so unpleasant that the person's subconscious "blocks", as it were, subsequent recollection of the event. This then results in such person being subsequently unable to recollect what happened. This inability to remember is not the same as the inability to subject a person's bodily movements to her will or intellect. It is the latter inability which is the crux of the test to determine whether the defence of automatism not attributable to mental illness should succeed or not. What a court must determine when X relies on the defence of such automatism is therefore not X's ability to remember what happened when the alleged crime was committed, but whether at the crucial moment she had the ability to subject her bodily movements to her will or intellect.

14 Antecedent liability The following qualification of the rule that muscular or bodily movements performed in a condition of automatism do not result in criminal liability should be noted: if X, knowing that she suffers epileptic fits or that, because of some illness or infirmity she may suffer a "black-out", nevertheless proceeds to drive a motor car, hoping that she will not suffer a fit or "black-out" while she is behind the steering wheel, but does, she cannot rely on the

---

26 *Infra* V B (iii) 10.
27 *Potgieter* 1994 1 SACR 61 (A) 72–74; *Henry* 1999 1 SACR 13 (SCA) 20*c*; *Humpheys supra* par 10.
28 *Cunningham supra* 635; *Henry supra* 20; *Humphreys supra* par 10
29 *Henry supra* 20–21.
30 *Henry supra 20g–i.*

defence of automatism. In these circumstances she can be held criminally liable for certain crimes which require culpability in the form of negligence, such as negligent driving or culpable homicide. Her voluntary act is performed when she starts to drive the car while still conscious.[31] In this way she sets in motion a causal chain of events which culminates in the harmful and unlawful result. At the moment she commenced driving the car she was in a position to choose not to do so. This situation is sometimes referred to as "antecedent liability".

B OMISSIONS

1 Introduction It is not only a positive act which may lead to criminal liability; an omission to act may also do so. In the first instance one has to do with active conduct or a *commissio*, and in the second with failure to act or *omissio*. The relationship between the concepts "act", "omission" and "conduct" has already been discussed above.[32]

2 Prohibitive and imperative norms The distinction between *commissiones* and *omissiones* relates to the division of the norms of criminal law into two groups, namely prohibitive and imperative norms. Prohibitive norms ("Don't do that!") prohibit persons from performing certain acts. Imperative norms ("Do that!"), on the other hand, command persons to engage in certain active conduct; they therefore prohibit persons from omitting to act positively.

The vast majority of criminal-law norms are prohibitive norms. Only in exceptional cases does the law command a person to engage in active conduct. The reason for this is, *firstly*, that as far as possible, the law does not concern itself with people who simply do nothing; *secondly*, that the law does not impose a general obligation upon people at all times to race to the rescue of others and to protect them from harm;[33] and *thirdly*, that imperative norms constitute a greater infringement upon a person's freedom than prohibitive norms, since imperative norms place a duty upon her in certain circumstances to engage in active conduct whereas prohibitive norms merely exclude certain possible forms of conduct from the otherwise unlimited scope of conduct in which she is allowed to engage.

Imperative norms can only be infringed through an omission. Prohibitive norms, on the other hand, can be infringed through either active conduct (*commissio*) or an omission (*omissio*). For example, the prohibitive norm which reads "you may not kill" may be infringed through either an act or an omission. An example of the infringement of this norm by means of an omission is where a mother causes her baby to die by simply omitting to feed it.

3 Legal duty to act positively An omission is punishable only if there is a legal duty upon somebody to perform a certain type of active conduct. A moral duty is not necessarily the same as a legal duty. Therefore, for the purposes of

---

31 *Shevill* 1964 4 SA 51 (RA) (driver of motor car fell asleep); *Trickett* 1973 3 SA 526 (T) 532; *Grobler* 1974 2 SA 663 (T) (crane operator fell asleep); *Van Rensburg* 1987 3 SA 35 (T) 39C–D.

32 *Supra* II A 1.

33 Burchell *Huldigingsbundel vir C R Snyman* 10-13.

the law "an omission" does not mean "to do nothing", but rather "to omit to engage in active conduct in circumstances in which there is a legal duty to act positively". Only then can X's conduct (ie, her omission) be said to accord with the definitional elements of the relevant crime.

If the legal duty is not created expressly (eg in legislation) the rule is that there is a legal duty on X to act positively if the legal convictions of the community demand that there be such a duty.[34] To ascertain what the legal convictions of the community are, the values enshrined in the Bill of Rights in the Constitution must be taken into consideration.[35]

4 Legal duty: particular situations It is customary, in discussions about the question of when an omission leads to criminal liability, to enumerate a number of situations in which there is a legal duty on X to act positively. Such a list will also be supplied below. In the first three instances mentioned below the legal duty has been created expressly. In these situations it is not necessary to consider the legal convictions of society in order to ascertain whether or not there is a legal duty. However, the legal convictions of society play an important role in the instances mentioned thereafter.

There is not a closed list of situations in which a legal duty exists. Most situations described in the list below should rather be viewed as instances encountered relatively often in practice and which have crystallised into easily recognisable applications of the general rule, mentioned above, that there is a legal duty to act positively if the legal convictions of the community require that there be such a duty. The situations enumerated in this list cannot be separated into watertight compartments; they may overlap.

(1) A *statute* may place a duty on somebody to act positively,[36] for example, to complete an annual income-tax form, or not to leave the scene of a car accident but to render assistance to the injured and report the accident to the police.[37]

(2) A legal duty may arise by virtue of the provisions of the *common law*. According to the provisions of the common law dealing with the crime of high treason, a duty is imposed on every person who owes allegiance to the state and who discovers that an act of high treason is being committed or planned, to disclose this fact to the police as soon as possible. The mere (intentional) omission to do this is equivalent to an act of high treason.[38]

(3) A legal duty may arise by virtue of *an order of court*, as in the following example: husband X and his wife Y are granted a divorce, and the court which grants the divorce orders X to pay maintenance to Y in order to support her and the children born of the marriage. If X omits to pay the maintenance, he may be convicted of the crime of contempt of court.

---

34 *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 797A–B; *Mahlangu* 1995 2 SACR 425 (T) 435, especially 435*j*–436*a*; *Williams* 1998 2 SACR 191 (SCA) 194*a*–*b*. (Contrast, however, *Minister of Law and Order v Kadir* 1995 1 SA 303 (A).)

35 *Carmichele v Minister of Safety and Security* 2002 1 SACR 79 (CC).

36 Burchell *Huldigingsbundel vir C R Snyman* 15 ff.

37 S 61 of the National Road Traffic Act 93 of 1996.

38 *Banda* 1990 3 SA 466 (B) 512A–B; *infra* IX A 6(*b*).

(4) A duty may arise from *agreement*. In *Pitwood,*[39] an English case, the facts were that X and a railway concern had agreed that, for remuneration, X would close a gate every time a train went over a crossing. On one occasion he omitted to do so and in this way caused an accident for which he was held liable.

(5) A duty may arise where a person *accepts responsibility for the control of a dangerous* or a potentially dangerous *object*, and then fails to control it properly. In *Fernandez*,[40] for example, X kept a baboon and failed to repair its cage properly, with the result that the animal escaped and bit a child, who later died. X was convicted of culpable homicide.[41]

(6) A duty may arise where a person stands in a *protective relationship* towards somebody else. For example, a parent or guardian has a duty to feed a child.[42] A protective relationship may also exist where somebody accepts responsibility for the safety of other people, such as where X is the leader of a mountain-climbing expedition, or someone looking after a baby, or a life-saver at a swimming pool or beach.

(7) A duty may arise from a *previous positive act,* as where X lights a fire in an area where there is dry grass, and then walks away without putting out the fire to prevent it from spreading. This type of case is sometimes referred to as an *omissio per commissionem*, since the omission follows upon a commission or positive act which has created a duty to act positively.[43]

(8) A duty may sometimes arise by virtue of the fact that a person is the incumbent of a certain *office*, such as a medical practitioner or a police official. In *Minister van Polisie v Ewels*[44] it was held that a policeman on duty who witnesses an assault has a duty to come to the assistance of the person being assaulted.

5 Omissions must be voluntary; the defence of impossibility Like active conduct, X's omission must be voluntary in order to result in criminal liability. Only then can the omission lead to criminal liability. An omission is voluntary

---

39 (1902) 19 TLR 37.

40 1966 2 SA 259 (A).

41 See also *Russell* 1967 3 SA 739 (N) (operating a crane under a live electric wire); *Claasen* 1979 4 SA 460 (ZS) 465 (X allowed a teenage girl, who did not have even a learner's licence, to drive his large motor car while he was talking to another passenger in it. As a result of his omission properly to exercise control over the girl's driving, he collided with a cyclist, killing him. X was convicted of culpable homicide).

42 *Chenjere* 1960 1 SA 473 (FC); *B* 1994 2 SACR 237 (E) 248.

43 *Russell supra* 743H; *Claasen supra* 465; *Van Aardt* 2009 1 SACR 648 (SCA) par 41-42.

44 1975 3 SA 590 (A). See also *Govender* 2004 2 SACR 389 (SCA) 389*c-d*; *F v Minister of Safety and Security* 2009 2 SACR 639 (C) par 47,48. See also the applications of the *Ewels* case in *Gaba* 1981 3 SA 745 (O) and *A* 1991 2 SACR 257 (N) 272–273. In *Mahlangu* 1995 2 SACR 425 (T) 434–436 at least one of the judges (MJ Strydom J) who heard the appeal, was (*obiter* – see 434*g*) of the opinion that there was a legal duty on X, an employee at a filling station, to inform his employer Y, who was also the owner of the filling station, that he (X) knew that the filling station would be robbed, and that X's omission thus to inform Y constituted a ground for convicting X of being an accomplice to the robbery which in fact ensued. MJ Strydom J based the existence of the legal duty upon the fact that X was an employee of Y (whose filling station was robbed) and that there was accordingly a relation of trust between X and Y.

if it is *possible* for X to perform the positive act. After all, the law cannot expect somebody who is lame to come to the aid of a drowning person, or somebody who is bound in chains to extinguish a fire.

If X is summoned to appear as a witness at the same time on the same day in both Pretoria and Cape Town, it is impossible for her to be present at both places simultaneously. When charged with contempt of court because of her failure to appear at one of these places, she may plead impossibility as a defence. In short, the objective impossibility of discharging a legal duty is always a defence when the form of conduct with which X is charged is an omission. The notion that the law cannot expect somebody to do the impossible is usually expressed by the maxim *lex non cogit ad impossibilia*, which means "the law does not apply to that which is impossible".

The requirements for the defence of impossibility are as follows:[45]

(*a*) The defence is available only if the legal provision which is infringed *places a positive duty on X*, that is, if the rule which is transgressed amounts to the law demanding from its subjects: "Do this!" or "You must!" Put differently, the defence is applicable only if the prosecution alleges that X *failed to do* something – in other words, if X is charged with an *omission*. The defence cannot be raised if the legal rule which X has allegedly infringed amounts to the law demanding of its subjects: "Don't do this!" or "You may not!" Put differently, the defence cannot be raised if X is charged with a *commission* (active conduct).[46] The reason for this is that the law, from a policy point of view, wants to confine the defence within the closest possible limits. Where there is a simple prohibition ("Don't do this!" – in other words if X is charged with a *commissio*) X must merely refrain from committing the prohibited act, which she is not compelled to do. She should therefore not be allowed to plead that it was impossible for her *not* to commit the act.

This defence may, for example, be pleaded successfully where a legal provision places a positive duty on someone to attend a meeting,[47] or to report for military duty, or to affix a revenue stamp to a receipt.[48] It cannot, however, be pleaded successfully where a provision prohibits a person from driving a car without a driver's licence,[49] or from catching fish of a certain size,[50] or from entering a certain area.[51] The law compels nobody to drive a car, to catch fish or to enter a certain area. In this category of cases X might, however, if circumstances warrant it, rely on necessity as a defence, as where she drives a car without a driver's licence in order to obtain urgently needed medical aid for a seriously injured person. Here her unlawful act is justified because she infringes a relatively minor interest in order to protect a relatively major interest, not because it is impossible for her *not* to drive a car.

---

45 On the defence of impossibility in general, see Van Oosten 1986 *THRHR* 375; Ellis 1986 *De Jure* 393.

46 *Canestra* 1951 2 SA 317 (A) 324; *Leeuw* 1975 1 SA 439 (O) 440.

47 *Jetha* 1929 NPD 91.

48 *Mostert* 1915 CPD 266; *De Jager* 1917 CPD 558.

49 *Leeuw supra*. Cf also *Adcock* 1948 2 SA 818 (C) 822.

50 *Canestra* 1951 2 SA 317 (A) 324.

51 *Contra Mafu* 1966 2 SA 240 (E). In this case X's defence should rather have been regarded as one of necessity.

The result of this requirement is that the defence of impossibility can be pleaded only if the conduct which forms the basis of the charge consists in an omission. This means that this defence is rarely invoked in our law. Comparatively few positive duties are imposed by common law.

(*b*) It must be *objectively and physically impossible* for X to comply with the relevant legal provision.[52] It must be impossible for any person placed in X's position to comply with the law. It must also be absolutely (and not merely relatively) impossible to comply with the law: if X is imprisoned for a certain period, she cannot invoke impossibility as a defence if she is charged with failure to pay her tax, if it is possible for her to arrange that somebody else will pay it on her behalf.[53] The mere fact that compliance with the law is exceptionally inconvenient for X or requires a particular effort on her part does not mean that it is impossible for her to comply with the law.[54]

(*c*) There is authority for the proposition that X cannot rely on impossibility if she herself is responsible for the circumstances in which she finds herself.[55] It is submitted that it is preferable to separate the act which brings about the situation of impossibility from the failure to comply with the law. To project the reprehensibility of the former onto the latter is reminiscent of an application of the discarded doctrine of *versari in re illicita* (the "taint doctrine").[56] If the first act amounts to a crime, X may be convicted of and punished for it separately. If, however, X foresees that, by committing a certain act, she will find herself in a situation in which it will be impossible for her to comply with a legal duty, the picture changes: she ought then not to be allowed to rely on impossibility.

C POSSESSION[57]

1 Introduction Several important statutory provisions criminalise the possession of certain articles, such as unlicensed firearms,[58] drugs[59] or child pornography.[60] There are certain general rules governing the meaning of the concept of "possession". These rules are set out in the discussion which follows. The phenomenon of crimes prohibiting the possession of certain articles is found only in crimes created by statute, not in common-law crimes.[61]

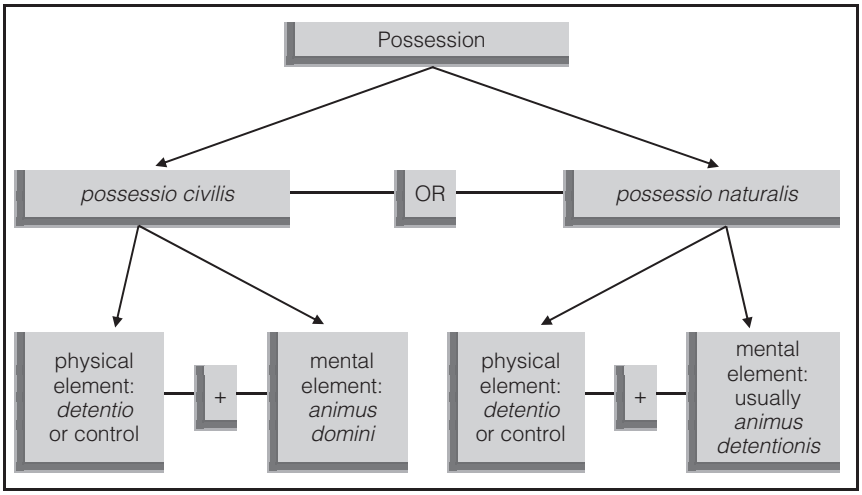
---

52 *Leeuw supra* 440; *Moeng* 1977 3 SA 986 (O) 991.
53 *Hoko* 1941 SR 211 212.
54 *Attorney-General v Grieve* 1934 TPD 187; *Leeuw supra* 440.
55 *Close Settlement Corporation* 1922 AD 294 300.
56 On this doctrine, see *infra* V A 8.
57 See generally Snyman 2007 *THRHR* 540; 2008 *THRHR* 13; Hugo 1974 *THRHR* 148; 295; *LAWSA* 6 pars 391–399; Whiting 1971 *SALJ* 296; Middleton 1974 *THRHR* 183.
58 S 3 of the Firearms Control Act 60 of 2000; *infra* XIII D.
59 S 4 of the Drugs and Drugs Trafficking Act 140 of 1992; *infra* XII C.
60 S 27 of the Films and Publications Act 65 of 1996, held to be constitutional in *De Reuck v DPP* 2003 2 SACR 445 (CC).
61 The question may arise whether the common-law crime of receiving stolen goods knowing the goods to be stolen is not perhaps an example of a common-law crime in which the possession of certain articles is prohibited. It is submitted that the answer to this question is negative. The act prohibited in this crime is not the possession of stolen goods, but the receiving of such goods. There is, however, a close link between the receiving and the possession of the goods. See *infra* XVIII D 6.

In crimes criminalising the possession of an article, "possession" refers to the particular act or conduct required for a conviction. From a dogmatic point of view it is difficult to categorise possession as either a positive act (*commissio*) or an omission (*omissio*). Possession may sometimes be proven by a positive act on the part of X, as where she physically handles the article by locking it up in a drawer. It may also be proven by an omission on the part of X, as where she is informed that another person has placed a packet containing drugs in the drawer of a desk over which she has control, and she simply acquiesces in the situation and does nothing further to terminate her control over the packet. Possession could indeed be described as a "state of affairs".

2 The two elements of possession – *corpus* and *animus* Possession consists of two elements, namely a physical and a mental. The physical element is objective in nature. It is referred to as *corpus* or *detentio*, and entails the physical control over the article. The second element is subjective in nature. It is referred to as *animus*, and describes the intention with which X exercises control over the article. Before X can be said to possess an article, both *corpus* and *animus* must be present, and they must be present simultaneously. The contents of the *animus* is not the same in each crime of possession; it may vary from crime to crime, depending on how wide or narrow the legislature, when creating the crime, intends the concept of possession to be in that particular crime.

3 The two forms of possession – *possessio civilis* and *possessio naturalis* The law differentiates between two forms of possession, namely *possessio civilis* and *possessio naturalis*. The difference between these two forms of possession is not found in the physical element, that is, the way in which X exercises control over the article, but in the *animus* element, that is, the particular intention with which X exercises control over the article.



Possessio civilis is also known as "juridical possession" or "legal possession". In this form of possession X's *animus* takes the form of *animus domini*, that is, the intention to exercise control over the article *as an owner* or in the belief that she is the owner. *Possessio civilis* is the *narrow* form of possession. If a statute creating a crime of possession is interpreted as requiring *possessio civilis*, fewer

people qualify as possessors compared to where the statute is interpreted as creating *possessio naturalis*.

Possessio naturalis is known as "natural possession". In this form of possession X exercises control over the article without intending to possess it as owner. X knows that somebody else (Y) is the owner, but nevertheless exercises control over the article on behalf of Y. This form of possession is the *wider* form of possession. If a statute creating a crime of possession is interpreted as requiring *possessio naturalis*, a wider circle of people qualify as possessors compared to the situation where the statute is interpreted as creating *possessio civilis*.

In most statutory provisions criminalising the possession of a certain type of article, the courts interpret the criminalising provision in such a way that the legislature is deemed to have intended mere *possessio naturalis* to be punishable. The courts are generally unwilling to hold that the legislature intended the prohibited possession to take the form of *possessio civilis*, because such an interpretation would place a difficult onus of proof upon the prosecution: the prosecution would then have to prove that X intended to exercise control over the article *animo domini* (in the belief that she was the owner). Since X's specific intention is known to herself only, it is difficult for the prosecution to prove X's specific intention to control the article not on behalf of another, but in the belief that she herself was the owner.[62]

4 The physical element (*corpus*) The physical element of possession refers to X's exercising of control over the article. Whether somebody has the control over an article is a question of fact, depending on the circumstances of each case. Whether X exercises control over an article depends on considerations such as the nature and size of the article, its purpose and function, and generally the way in which one usually handles the particular type of article. If, for example, X is the only person who has a key to a room or safe, she is usually regarded as exercising control over the contents of the room or safe.[63]

In order to exercise control, X need not necessarily touch or handle the article herself. She may exercise control through the instrumentality of somebody else, such as a servant or employee.

X may further exercise control over an article despite the fact that the article is not in her immediate presence. If, for example, X is the owner of a delivery vehicle driven by Y, her employee, and X can communicate with Y by cell phone and in such a way give Y instructions regarding what to do with containers in the vehicle, X exercises control over the containers and the vehicle even though the vehicle is a thousand kilometres away from her.[64]

Two people who have opposing claims to an article cannot exercise control over it simultaneously.[65] The one's possession excludes that of the other. However, it is possible for two or more people who do not have opposing claims to

---

62 *R* 1971 3 SA 798 (T) 802C–D; *Solomon v Visser* 1972 2 SA 327 (C) 339.

63 *Shaw v Hendry* 1927 CPD 357.

64 *Singiswa* 1981 4 SA 403 (C). In this case X was a prisoner on Robben Island, and was convicted of possession of dagga, despite the fact that the dagga was far away from X in Guguletu, a suburb of Cape Town.

65 *Singiswa supra* 405F–G; *Nddlovu* 1982 2 SA 202 (T) 204F–G.

the article, to exercise control over the article simultaneously and therefore to possess it jointly.[66] Control over an article by two or more people is possible if X exercises the control through an agent or servant Y, provided, of course, that Y also has knowledge of the contents of the article.

5 The *animus* element

(*a*) *General*

In the definitions of the different crimes in which the possession of a certain type of article is criminalised, "possession" does not always bear the same meaning. The different meanings of "possession" in different crimes of possession do not flow from any differences in the meaning of the *corpus* element (control over the article), but in different meanings attached to the *animus* or mental element of the possession.

Different Latin expressions are used to describe the contents of the *animus* element. The use of these expressions by courts and writers is not always consistent, and this sometimes leads to unnecessary confusion concerning the meaning of possession in the particular crime. The different Latin expressions used to describe the *animus* requirement will now be considered.

(*b*) *Animus tenendi and animus detentionis*

Animus tenendi means the intention to keep the article. *Animus detentionis* means the intention to exercise control (*detentio*) over it. These two expressions essentially mean the same and may be used as synonyms. It is not possible to intend to hold the article without intending to exercise control over it. This *animus* is always required to establish possession. It is the minimum requirement for proof of the *animus*. Without the existence of this *animus* there can be no possession.

This requirement in reality encompasses two subrequirements: *Firstly*, X must have knowledge of the existence of the article in her control. This implies knowledge by X of the essential identity or character of the article. *Secondly*, X must be aware of the fact that she is exercising control over it.[67] Put more concisely, X must know, first, *what* it is that she has in her control, and secondly, *that* she is exercising control over it.[68] The courts sometimes refer to this requirement by stating that there must be "witting possession".[69] If an article is placed in the hands of somebody who is sleeping, the latter cannot be said to "possess" the article. If Y places a prohibited article in the drawer of X's desk while X is out of her office and accordingly unaware of the presence of the article in her desk drawer, X can similarly not be said to exercise control over the article and thus to possess it.

In most of the crimes in which the legislature criminalises the possession of a certain type of article, the legislature intends the *animus* required for a conviction

---

66 *Masilo* 1963 4 SA 918 (T) (X, the driver of a motor-car, picked up passenger Y, while knowing that Y was in possession of dagga. The court held that both X and Y possessed the dagga); *Hoosain* 1990 2 SA 1 (A) 11A–B; *Mayekiso* 1990 2 SACR 38 (NC) 43*a*.

67 *Moyage* 1958 3 SA 400 (A) 409C–D; *Blauw* 1972 3 SA 83 (C) 84D; *Mofokeng* 1973 1 SA 89 (O) 91E–F; *Skhosana* 1973 1 SA 322 (O) 325A; *Jacobs* 1989 1 SA 652 (A) 656C, 659D–H; Whiting 1971 *SALJ* 296 297.

68 *Mosoinyane* 1998 1 SACR 583 (T) 592*c*.

69 *Brick* 1973 2 SA 571 (A) 580B–C; *Cleminshaw* 1981 3 SA 685 (C) 690D–E.

to consist of *animus tenendi* or *animus detentionis*, as explained above. The possession is then known as *possessio naturalis*, as opposed to *possessio civilis*.

(*c*) *Animus domini*

Animus domini means knowledge or belief by X that she is the owner (*dominus*) of the article. The legislature may create a crime of possession and intend the possession not to have the wide meaning of *possessio naturalis* (where the *animus* consists of *animus tenendi*), but to have the more restricted meaning of *possessio civilis*. In such a case the *animus* required for a conviction is not merely an *animus tenendi*, but also an *animus domini*. X must then exercise control over the article as an owner, or in the belief that she is the owner. It is then not sufficient for a conviction that X exercises control over the article on behalf of somebody else. Merely to exercise control as an agent, servant, messenger or bailee, is then not sufficient. A well-known example in the common law of a *possessor* who possesses with *animus domini* is the *bona fide possessor*. She is somebody who is not the real owner, but who *bona fide* believes that she is the owner.

(*d*) *Animus tenendi with or without the intention to derive a benefit from the article*

The *animus* required for possession is sometimes expressed as *animus ex re commodum acquirendi* – that is, the intention to derive some benefit from the possession of the article. Examples of such possessors are lessees, pledgees, persons who have an article on loan and people who have the right of retention of the article.

A further possibility is that X may exercise control over the article without any motive to derive a benefit, as where she takes care of the article at the owner's request simply as a favour, that is, from purely altruistic motives. X's *animus* may then be described as *animus non sibi sed alteri possidendi* – that is, the intention to possess the article not for one's own benefit, but for somebody else's benefit.

People who possess an article with one of the two intentions described in the above two paragraphs, do not possess *animo domini*, because they know that somebody else is the owner. They have only the *animus tenendi*.[70] It is submitted that the *animi* described in the above two paragraphs should play no role in criminal law. The meaning of these *animi* should be restricted to private law. The difference between *animus tenendi* with intent to derive a benefit and such *animus* without an intent to derive a benefit relates to X's motive only, and X's motive is, as far as the determination of criminal liability is concerned, irrelevant.[71]

(*e*) *Animus rem sibi habendi*

Another expression sometimes used in legal literature is *animus rem sibi habendi*.[72] This expression means "the intention to keep the article for yourself". It is a confusing expression because it may refer to either the intention of

---

70 *Ndwalane* 1995 2 SACR 697 (A) 702*c–d*.
71 *Infra* V C 12.
72 *R* 1971 3 SA 798 (T) 801D–F; *Brick* 1973 2 SA 571 (A) 582H.

the *possessor civilis* or that of the *possessor naturalis*. The *possessor civilis* always has this intention, but the thief, who knows that somebody else is the owner and therefore cannot have the *animus domini*, also has the *animus rem sibi habendi*. In order to avoid confusion, this expression should not be used in criminal law.

(*f*) *Animus possidendi*

The Latin expression most often used to describe the *animus* element of possession is *animus possidendi*. Literally it means only the "intention to possess". This expression, or at least its literal meaning, says nothing about the important question of what the contents of X's intention must be in order to lead to a conviction of possession.

An analysis of the use of this expression by both courts and writers reveals that courts and writers do not always attach the same meaning to this often-used expression.

- *Firstly*, it is sometimes used merely as a synonym for the *animus* requirement in general.[73] It is then nothing else than a neutral term referring to "the mental element of possession".
- *Secondly*, it is sometimes used to refer to awareness by X that she is in possession of the article – in other words, to "witting possession".[74]
- *Thirdly*, it is sometimes used to refer to the *animus tenendi* (or, what is the same, the *animus detentionis*) – that is, the intention to exercise control, irrespective of whether X is aware or unaware of the fact that somebody else is the owner, and irrespective of whether X's motive is to benefit herself or another.[75]
- *Fourthly*, it is sometimes used as a synonym for *animus domini*.[76]
- *Fifthly*, it is sometimes used as a synonym for the intention to derive a benefit from the possession of the article.[77]

The general impression one gets from an analysis of the use of this expression by the courts is that it is merely employed as a synonym for the *animus* element in general. It is submitted that, in order to avoid confusion, it is advisable to avoid the use of this expression as far as possible. If one merely speaks of the "*animus* requirement" or the "mental element of possession", one can avoid confusion. The most important reason for the confusion concerning the contents of the mental element of possession is the courts' and writers' predilection for the use of Latin expressions to refer to this element. (Presumably this creates the impression of erudition.) Much, if not most, of the confusion can be avoided by describing the contents of this element not in Latin, but in plain English (or another language used in legal literature in South Africa, such as Afrikaans).

---

73 *Nabo* 1968 4 SA 699 (EC) 400F; *Mbulawa* 1969 1 SA 532 (EC) 535D; *Cleminshaw* 1981 3 SA 685 (C) 690D–E; *Quinta* 1984 3 SA 334 (C) 338A; *Mello* 1998 1 SACR 267 (T) 272*c*.

74 *Gumbi* 1927 TPD 660 662; *Gentle* 1983 3 SA 45 (N) 46H; *Cleminshaw supra* 690.

75 *Kasamula* 1945 TPD 252 356–357; *Nabo* 1968 4 SA 699 (EC) 700H; *R* 1971 3 SA 798 (T) 803F–G; *Quinta* 1984 3 SA 334 (C) 338A.

76 *Pule* 1960 2 SA 668 (T) 669C; *R supra* 801A, 801C–E; *Ndwalane* 1995 2 SACR 697 (A) 702*c*.

77 *Kasamula* 1945 TPD 252 257; *Binns* 1961 2 SA 104 (T) 107G.

(*g*) *Joint possession*

Just as more than one person may have the physical control of an article, more than one person may also simultaneously have the mental element required for possession. More than one person may, for example, simultaneously (illegally) possess a firearm (which is a crime which does not require *animus domini* but only *animus detentionis*).[78] If they have the common purpose to commit a robbery but only one of them has the detention of the firearm, the mere fact that they have a common purpose to commit a robbery does not necessarily mean that all of them possess that firearm. Such a deduction can only be made if the court finds that the robber who had the detention intended to possess it not only for himself but also on behalf of the other(s), and that the other(s) had the intention that the robber having the detention should exercise the physical detention on their behalf. Such a finding cannot automatically be made from the mere fact that the participants acted with a common purpose to rob, because such common purpose may equally exist in a situation in which the robber having the detention of the firearm intends to possess it only for himself.[79]

(*h*) *Animus element does not form part of culpability (mens rea)*

In crimes criminalising the possession of certain types of articles, the *animus* element of possession does not form part of the culpability requirement (*mens rea*) of the crime, but of the wrongdoing (*actus reus*).[80] Even if the crime is one that requires culpability in the form of intention, the *animus* element of possession forms part of the description of the act required for a conviction, and not of culpability. The fact that the *animus* invariably has a subjective character does not mean that it therefore forms part of the culpability requirement, because it is wrong to regard – as do the adherents of the psychological concept of culpability – all subjective requirements for liability as necessarily incorporated into the culpability requirement.[81]

In *Jacobs*,[82] a case which dealt specifically with the unlawful possession of a certain article, the Appeal Court expressly held that the *animus* element of

---

78 *Infra* XIII D 2 (*c*).

79 *Nkosi* 1998 1 SACR 284 (W); *Motsema* 2012 2 SACR 96 (SGJ). In *Kwanda* 2013 1 SACR 137 (SCA) X was the driver of a vehicle. Y sat next to him with an AK47 rifle. On a charge of unlawfully possessing a firearm, the court held that, even assuming that X knew that Y possessed the AK47, he (X) was not guilty of (jointly) possessing the firearm, because it was not proven that he intended to possess it jointly. It is difficult to agree with the court's finding: it is difficult to believe that X, who drove the car in the knowledge that Y possessed the firearm, did not in any way commit an act whereby he at the very least jointly exercised control of the firearm. For just criticism of this judgment, see Jordaan 2013 *SACJ* 93.

80 For an explanation of the meaning of wrongdoing and culpability, see *supra* I E 2–3; *infra* IV A, especially IV A 11; V A, especially V A 2.

81 See the discussion *infra* V A 9–10.

82 1989 1 SA 882 (A) 656–661. It is noticeable that the Appeal Court in this case did not follow the previous cases of *Smith* 1965 4 SA 166 (C), *Job* 1976 1 SA 207 (NC) 208; *Quinta* 1984 3 SA 334 (C) 337I, 338D and *Adams* 1986 4 SA 882 (A) 891H–I, in which the courts held (incorrectly, it is submitted) that the knowledge by X that the packet under her control contained a prohibited article, forms part, not of the *animus* element of possession, but of culpability. In *Cameron* 2005 2 SACR 279 (SCA) 183*d* the court likewise regarded *mens rea* as an element separate from the mental element of possession.

possession does not form part of culpability, but of the act. Van Heerden JA held that one cannot say that X possesses dagga unless she knows that the article over which she is exercising control is in fact dagga. If X thinks that the packet over which she is exercising control contains only tobacco, she cannot be said to possess dagga, but only tobacco. This subjective knowledge of X therefore relates to the act of possession, and not to culpability. Culpability is still required, and consists in X's awareness that she possesses the dagga unlawfully. The latter awareness is absent if X thinks that the possession of that type of article is not prohibited by law,[83] or if she thinks that her conduct is covered by some ground of justification, such as coercion (necessity) or public authority.

6 The unwilling receiver of a prohibited article Assume that one day X walks to her post box, opens it, finds an envelope addressed to herself in it, opens the envelope, and discovers that it contains photos of child pornography, the possession of which is a crime.[84] X did not order the photos from anyone. Some unknown person with a perverted sense of humour simply sent them to her. Sometime thereafter the police visit her house and find the envelope containing the photos on her dining-room table. Is she guilty of the unlawful possession of the photos?

There are two reported decisions in which the facts were more or less similar to those set out above. In *R*[85] the police visited X's house about one hour after he had received the packet in the post. By that time he had not yet gotten rid of the photos, neither had he contacted the police. The court held that he was not guilty of the unlawful possession of the photos, because the relevant legislation required X to have the intent to exercise control over the article "for his own purpose or benefit". A perusal of the judgment as a whole reveals that what the court actually intended to say is that the legislature required X to hold the articles *animo domini*, and that X in this case did not have such an intention.[86] In *Brick*[87] a period of 24 hours expired between the time X received the packet and the time the police discovered it in X's house. The Appeal Court held that X was guilty of the possession of the article. The court refused to follow the argument in *R*'s case,[88] holding it to be sufficient for a conviction that there was "witting physical detention, custody or control".[89]

---

83 *De Blom* 1977 3 SA 513 (A); *infra* V C 23–24.

84 S 27 of the Films and Publications Act 65 of 1996, held to be constitutional in *De Reuck v DPP* 2003 2 SACR 445 (CC).

85 1971 3 SA 798 (T).

86 The court's reasoning concerning the applicable law is open to criticism. The court's conclusion about the law applicable to the relevant crime is incompatible with the court's own previous (correct) finding that "it is immaterial for the purposes of statutory possession [by which the court must have intended to mean *possessio naturalis*] whether the holder intends to control the prohibited article for his own benefit or on behalf of another" (803A). It is also incompatible with the court's own previous statement that in statutory crimes prohibiting the possession of an article, only an *animus tenendi* is required (803B). Quite apart from these points of criticism, the court's finding that X had to intend to exercise control "for his own purpose or benefit" is ambiguous, as this expression may cover both *animus domini* and *animus tenendi*.

87 1973 2 SA 571 (A), followed in *Hanekom* 1979 2 SA 1130 (A) 1135H and *Adams* 1986 4 SA 882 (A) 891.

88 *Supra*.

89 580C–D.

It is submitted that cases such as these should not, as the courts in these cases did, be decided with reference to any type of *animus* which X must have, but with reference to the general requirement applicable to all acts and omissions, namely that only an act or an omission which is voluntary can lead to a conviction. In factual situations such as these, the requirement of voluntariness means that the conduct of possessing the article begins only when the time during which X might reasonably be allowed to get rid of the article, or to inform the police about it, has elapsed. Only thereafter can her act of possessing be described as voluntary. One must distinguish between the *coming into being* of the situation in which X found herself, and its *continuation*. In the former instance one cannot construe a voluntary act, but in the latter one can.[90] It is submitted that an application of this principle to the facts in the two cases discussed above leads to conclusions which are similar to those in fact reached by the two courts.

90 Middleton 1974 *THRHR* 183 185–186; Whiting 1971 *SALJ* 296 300.

CHAPTER

III

THE DEFINITIONAL ELEMENTS

A COMPLIANCE WITH THE DEFINITIONAL ELEMENTS[1]

1 Meaning of definitional elements Once it is clear that there was an act or omission (conduct) on the part of X, the next step in the determination of criminal liability is to investigate whether the conduct complied with the definitional elements of the crime with which X is charged. In order to understand this principle, it is necessary, first, to explain the meaning of the expression "definitional elements".

By "definitional elements" is understood the concise description of the requirements set by the law for liability for *the specific type of crime with which X is charged, as opposed to other crimes*. By "requirements" in this context is meant not the general requirements applying to all crimes (eg voluntary conduct, unlawfulness and culpability), but the particular requirements applying to a certain type of crime only.

The definitional elements contain the model or formula with the aid of which both an ordinary person and a court may know what particular requirements apply to a certain type of crime. By implication it also indicates in which respects the particular crime with which one is dealing differs from other crimes. One may also explain the meaning of "definitional elements" as follows: All legal provisions creating crimes may be reduced to the following simple formula: "whoever does 'A', commits a crime". In this formula 'A' represents the definitional elements of the particular crime.

---

1 See generally Snyman 1994 *SALJ* 65; Rabie 1986 *SACC* 225; *Jescheck and Weigend* 244 ff; *Schönke-Schröder* n 43 ff *ad* s 13; *Maurach-Zipf* chs 19–22; *Roxin* 278 ff; *Fletcher* 553–566; Sendor 1990 *Wake Forest LR* 707, especially 720–725. The concept or element of liability being discussed here is known in German as "Tatbestand". It is submitted that "Tatbestand" is best translated as "the definitional elements". *Fletcher* 553–554 declares that "we lack a term (in English) corresponding to the German *Tatbestand* or Spanish *Tipo* that expresses the inculpatory facet of criminal conduct . . ." Elsewhere Fletcher has proposed the term "paradigm" as a translation of "Tatbestand" – see Eser in *Eser and Fletcher* 1 37 fn 32. This is an excellent brief description of the contents of this requirement, but the term is unknown in South African criminal-law terminology. *Allen* 311 speaks of "definitional element of the offence" – the same term used in this book.

The ideal is that crimes should be defined in such a way, and that their definitional elements should accordingly be such that the definition and its elements are compatible with what is often called the "principle of fair labelling". This principle entails that the definitional elements should be a fair reflection of what kind of wrongdoing the law seeks to prohibit under a specific heading or crime. The definitional elements should be such that even lay people would readily be able to know what type of conduct a specific crime seeks to punish. Unfortunately, this is not the case in all crimes.[2]

2 Fulfilment of definitional elements Strictly speaking, the element of liability under discussion here should not merely be called "the definitional elements", but "the fulfilment (or realisation) of the definitional elements". For liability there must be not only an act on the part of X, but this act must also constitute a fulfilment of the definitional elements. X's act must be in accordance with, or correspond to, the definitional elements.

3 The act and the fulfilment of definitional elements To require a fulfilment of the definitional elements goes further than merely requiring conduct. This is why it is incorrect to regard the fulfilment of the definitional elements as forming part of the conduct requirement. On the other hand, the concept "definitional elements" is wide enough to include X's act or conduct – for example sexual penetration, possession, the making of a declaration or the causing of a situation.

4 Contents of definitional elements Although the definitional elements always describe the kind of act which is prohibited, it is not limited to a description of the type of act required. After all, the law does not prohibit mere possession without more, but possession of *particular, circumscribed articles* (such as drugs or unlicenced firearms); neither does the law forbid mere sexual penetration without more but, for example, sexual penetration between people who, *on account of consanguinity, may not marry each other* (incest); nor does the law forbid the mere making of a declaration without more, but the making of a declaration *which is false and made under oath in the course of a judicial process* (perjury).

Thus the definitional elements refer not merely to the kind of act (possession, sexual intercourse) but also a description of the *circumstances* in which the act must take place, such as for instance, the particular *way* in which the act must be committed (eg "violently", in robbery), the *characteristics of the person* committing the act (eg "somebody who owes allegiance" in high treason), the *nature of the object* in respect of which the act must be committed (eg "drugs" or "movable corporeal property" in theft), and sometimes a particular *place* where the act has to be committed (eg driving "on a public road") or a particular *time* when or during which the act has to be committed (eg "during the hunting season").

Let us consider as an example the crime of reckless driving. If one considers the section of the statute which creates the crime (section 63(1) of the National

---

2 *Cf* the criticism of the definition of the crime of murder in South African law *infra* V F 3 and XIV A 3 – more specifically the fact that the intentional, unlawful causing of another's death in not graded or subdivided into two categories, as is the case in perhaps all other jurisdictions in the Western world.

Road Traffic Act 93 of 1996), it is clear that a person commits this crime if he (1) *drives* (as this word is defined in the statute) (2) a *vehicle* (as this word is defined in the statute) (3) *on a public road* (as this phrase is defined in the statute) (4) in a *reckless way*. The four requirements printed in italics constitute the definitional elements of this crime. Requirement (1) – the driving – expresses the requirement of the act, which forms part of the definitional elements. However, requirements (2) and (3) do not form part of the requirement of an act.

Some crimes, such as murder and culpable homicide, require the existence of a causal link between the act and a certain situation (the result). The causation requirement forms part of the definitional elements, and not (as is often assumed) of the requirement of an act. The causal link is a specification of the circumstances in which the act is punishable. The causation requirement is an indication of how one crime may differ from another: whereas all crimes require an act, not all require causation. Whether there was an act is one enquiry; whether the act caused a certain situation (result) is an entirely different one.

If one were to discuss substantive criminal law in a strictly chronological way, one would have to discuss the definitional elements of each specific crime at this stage, that is, after the discussion of the concept of an act and before discussing the concepts of unlawfulness. However, authors of books on criminal law never follow such a procedure, for there are so many specific crimes, and the individual definitional elements of these crimes are so numerous, that it is customary to "suspend", as it were, the discussion of all these definitional elements until after an analysis of the other remaining general requirements of liability, such as unlawfulness and culpability. Once all these general requirements have been discussed, the definitional elements of the different specific crimes will be set out in the second part of this book. This is the customary sequence of discussion followed in books on criminal law. It is therefore in the second part of this book that, for example, concepts such as "dignity of the court" (in the crime of contempt of court), "prejudice" (in fraud), "marriage ceremony" (in bigamy), "damage" (in malicious injury to property"), and "movable, corporeal property" (in theft) – to mention just a few definitional elements – will be set out and analysed.

5 Definitional elements and unlawfulness Fulfilment of the definitional elements should not be confused with the quite distinct requirement of unlawfulness. South African writers on criminal law tend to define unlawfulness merely as an infringement of a criminal-law provision or as compliance with the definition of the crime.[3] This is clearly incorrect. In statements such as these, two distinct elements of liability – the fulfilment of the definitional elements and unlawfulness – are confused. The fact that the act complies with the definition of the crime means no more than that the act accords with the

3 See *De Wet and Swanepoel* 69; "Wederregtelik is 'n doen of late indien dit strydig is met 'n verbods- of gebodsbepaling, wat die sanksie ook al mag wees"; *Visser, Vorster and Maré* 179, who define unlawfulness as "an infringement of a criminal law provision"; *Burchell and Milton* 226, who state that "conduct will be unlawful when it does comply with the definition of a crime".

definitional elements of the relevant crime. It does not yet mean that the act is unlawful. Before an act can be described as unlawful, it must not only conform to the definitional elements but it must also comply with the quite distinct criterion for determining unlawfulness.[4]

Although one must distinguish between an act complying with the definitional elements and an act that is unlawful, the former is nevertheless a strong pointer towards the latter: it in fact means that the act is provisionally unlawful. Before it can conclusively be branded as unlawful, it must be clear that there are no grounds of justification for the act.

The definitional elements contain at least the minimum requirements for liability necessary to constitute a comprehensible and meaningful criminal norm.[5] The definitional elements furthermore correspond to those requirements of a crime which the prosecution in a criminal trial has to prove in order to incriminate the accused or prove a so-called "*prima facie* case" against him.[6] When it creates a crime, it is impossible for the legislature to refer to every conceivable defence (grounds of justification and grounds excluding culpability) that X may raise and to stipulate to what extent he may successfully rely on it. The legislature leaves it to the courts to decide to what extent an act which complies with the definitional elements may nevertheless be justified or excused. Yet, as for the requirements contained in the definitional elements, a court has no choice but to apply them.

6 The concept "wrongdoing" If it is clear that the act not only complies with the definitional elements but that it is also unlawful, it means that there has been wrongdoing.[7] "Wrongdoing" is thus the general concept which encompasses both the definitional elements (and thus the act) and unlawfulness. It thus summarises all the requirements for liability with the exception of culpability. The expressions "unlawful act" and "wrongdoing" are generally used as synonyms. The expression "*actus reus*", which is often used by the courts, means the same as "wrongdoing".

7 Subjective component of definitional elements; relationship between definitional elements and culpability The definitional elements do not consist

---

4 *I* 1976 1 SA 781 (RA) 788; *Clarke v Hurst* 1992 4 SA 630 (D) 652–653; *Fourie* 2001 2 SACR 674 (C) 678*b–c*. For an exposition of the criterion for determining unlawfulness, see *infra* IV A 8–9. If "unlawful" simply meant "contrary to the requirements set out in the definition of the crime", one may well ask why writers of books on criminal law (eg *Hunt-Milton* and *Burchell and Milton*) who venture to define every specific crime, invariably use the word "unlawful" in their definitions of crimes *in addition to* setting out the definitional elements of the crime in their definitions. Elementary logic dictates that the term one sets out to define should not already be included in the definition, otherwise the definition merely begs the question: "an act is unlawful if it is unlawful".

5 *Fletcher* 567: "The minimal demand of the definition of an offence is that it reflects a morally coherent norm in a given society at a given time. It is only when the definition corresponds to a norm of this social force that satisfying the definition inculpates the actor."

6 *Fletcher* 553–554.

7 This concept is derived from Continental literature. *Fletcher* 515 ff applies it and similarly describes it as "wrongdoing". In German it is known as "Unrecht". On this concept, see *Jescheck and Weigend* 245; *Schönke-Schröder* n 51 *ad* s 13; *Jakobs* 159.

exclusively of objective requirements. They also contain subjective requirements, that is, requirements relating X's intention.

In crimes requiring intention, the intention plays a role, not only in the determination of culpability, but also in the wrongdoing – a term which, as explained above, includes the definitional elements. In crimes requiring negligence, both the courts and writers nowadays accept that the negligence plays a dual role in that it forms part of both the definitional elements (or "unlawful conduct") and culpability.[8] As far as crimes requiring intention are concerned, however, our courts as well as most writers still assume that the intention forms part of culpability only. This is incorrect. Intention forms part of both the definitional elements and culpability.[9]

Since intention plays a role in both the fulfilment of the definitional elements and culpability, it would not be wrong to incorporate a full discussion of the concept of intention into the discussion of the present element of liability, namely the fulfilment of the definitional elements. A number of Continental authors discuss intention under the definitional elements, while others discuss it under culpability. It would, however, serve the purposes of this book better to discuss it under culpability, since such an arrangement of the material accords more closely with the law as presently applied by the courts in this country.

8 Intention as part of the definitional elements The influence of the psychological theory of culpability is so strong that people accustomed to placing intention exclusively under culpability may find it strange to hear that intention already plays a role in determining whether there has been compliance with the definitional elements as well. It is precisely for this reason that it is necessary to explain in some detail why intention is already relevant at this stage of the enquiry into liability.

It is important to remind oneself once again that the definitional elements contain at least the minimum requirements necessary to constitute a meaningful criminal norm. If, after inquiring into whether there has been a fulfilment of the definitional elements, one enquires into unlawfulness, the question one has to ask oneself is whether the conduct complying with the definitional elements accords with the criterion for unlawfulness, namely the *boni mores* or the legal

---

8 *Ngubane* 1985 3 SA 677 (A) 686E–F, 687E; *Ex parte Minister van Justisie: in re S v SAUK* 1992 4 SA 804 (A) 808; *Burchell and Milton* ch 35; Bertelsmann 1975 *SALJ* 59 60–62; Botha 1977 *SALJ* 29; Whiting 1991 *SALJ* 431 433–435.

9 The reason why the South African courts and many (although fortunately not all) writers still adhere to the idea that all the subjective requirements for culpability belong to only one element of liability, namely culpability, is the strong influence of the psychological theory of culpability. This theory of culpability, which has its roots in outdated nineteenth-century concepts such as positivism and the naturalistic theory of an act, and which has long since been rejected on the Continent, implies that the presence of elements of liability other than culpability can be determined only with the aid of objective criteria. The psychological theory of culpability will be explained and also subjected to criticism below in the discussion of the culpability requirement. See *infra* V A 9–10. For support for the view expressed in the text, see Sendor 1990 *Wake Forest LR* 707 717–719, who emphasises "the dual nature of *mens rea* elements as relevant to both wrongfulness and responsibility [ie, culpability]".

convictions of society.[10] Yet before this question can be answered, the "conduct complying with the definitional elements" must be recognisable as a fulfilment of a criminal norm; it must be recognisable as conduct which the criminal law seeks to prohibit or disallow, as opposed to conduct which is merely "neutral", that is, might just as well *prima facie* amount to perfectly lawful behaviour. For the conduct to be so recognizable, X's intention must necessarily also form part of the definitional elements. The aim of the discussion which follows is to prove and illustrate this point.

(*a*) *Crimes of double intention* In crimes requiring a double intention, that is crimes where, apart from the intention to commit the act, an intention to achieve some further aim by means of the act is required,[11] one can determine whether the act was unlawful[12] only once it is clear that, through his act, X intended to achieve the further aim. Without the existence of such an intent the act is not recognisable as the commission of something which the law seeks to prohibit – in other words, as the fulfilment of definitional elements. It follows that at least part of X's intention must be found to exist before the question relating to unlawfulness (and *a fortiori*, before the question relating to culpability) can be inquired into.[13]

(*b*) *Crimes requiring a certain characteristic intention* Further evidence of the existence of subjective requirements in the definitional elements may be found in the construction of certain other crimes which require a *certain characteristic intention,* such as theft and high treason.

An analysis of the crime of *theft* shows that it is impossible to determine whether there was theftuous conduct (or a fulfilment of the definitional elements of this crime) without first enquiring whether X acted with the characteristic

---

10 *Infra* IV A 8.

11 Examples of such crimes are abduction (where, in addition to intending to remove the minor, X must intend to marry or have sexual intercourse with such minor – see *infra* XII B; corruption (where, in addition to intending to give a gratification, X must, through such giving, intend to induce the receiver to act in a certain way contrary to his duties – see *infra* XIII A; and housebreaking with intent to commit a crime (*infra* XX C).

12 One can only determine whether an act was unlawful once it is clear that the act complies with the definitional elements. This is the logical sequence in which liability is determined.

13 Let us assume that X is charged with corruption and that he raises the defence of coercion (necessity). Necessity is a ground of justification which, if successfully raised, excludes the unlawfulness of the act. Before the question relating to unlawfulness can be answered, one must first be certain that X committed an act which complied with the definitional elements of the crime concerned. Yet how is it possible to know whether the act complied with the definitional elements of this crime (corruption) if one does not know whether the gratification was given to the receiver *with the intention* of inducing him to act in a certain way? The mere objective giving of, for instance, money to an official or an agent is not prohibited: it will only be recognisable as proscribed conduct if one knows that the money was given with the intention of inducing the official or agent to act improperly in some way, such as to award to the giver a tender which in law he is not entitled to. It follows that one must first determine the intention with which the benefit was given before determining the unlawfulness of the conduct. Accordingly, the intention with which the benefit was given forms part of the definitional elements of the offence as well, and not only of the culpability requirement. The same principle applies to other offences requiring a double intent.

intention required for this crime, namely an intention to appropriate the property.[14] If one excludes this intent from the definitional elements, the latter becomes meaningless in the sense that they describe conduct which might as well be perfectly innocent.[15] It follows that the intention to appropriate must be determined before inquiring into unlawfulness and culpability.

The same holds good for *high treason.* A closer look at this crime shows that the conduct required need not take the form of any specifically defined external act. Any act – even one which, viewed from the outside, seems completely innocent – can amount to high treason, provided X committed it with the peculiar intent required for this crime, namely the hostile intent.[16] It is only X's subjective state of mind (intention, knowledge) that brings his conduct within the definitional elements of this crime.

(*c*) *Crimes of attempt* That X's intention should form part of the definitional elements becomes equally clear if one considers *attempt to commit a crime,* especially the form of attempt known as *attempt to commit the impossible.* For example, X, intending to kill his enemy Y, fires a shot at a realistically stuffed scarecrow in the mistaken belief that he is killing Y. X is guilty of attempted murder.[17] What constitutes the wrongdoing (unlawful fulfilment of the definitional elements) for which X is punished? If one ignores X's intent, only the external act, namely shooting at a scarecrow, remains. This, however, does not amount to conduct proscribed by the law. Intention must therefore form part of the definitional elements.[18]

---

14 The conduct proscribed in this crime cannot be described merely with the aid of objective concepts (ie, concepts relating to external conduct only) such as "take", "hold", "carry away" or "handle". These concepts can apply equally to non-theftuous acts, such as those committed by somebody who merely uses the property temporarily or merely looks after it on behalf of the owner.

15 Assume that in a certain case the evidence reveals that the following externally perceivable events have taken place: X has removed his neighbour Y's furniture without Y's consent and taken it to his own house. Can one merely, on the strength of such "objective conduct", now conclude that there was conduct conforming to the definitional elements of the crime of theft? Certainly not. In order to answer this question one must know what X's intention was when he carried away the furniture. If, eg he intended to protect Y's possessions, which were being threatened by flood waters, by carrying them away and storing them temporarily in his own house which is situated on a higher level, there was obviously no conduct conforming to the definitional elements.

16 Assume that X's act consisted in nothing more than affording Y, at his request, a sleeping-place for one night. Can one, on the strength of this simple set of acts alone, conclude that X has committed an act which conforms to the definitional elements of high treason? Obviously not. Assume, however, that the evidence further brings to light the following: Y's plan was to look for the head of state the next day and, having found him, murder him; X was aware of what Y intended to do, but nevertheless proceeded to give Y accommodation in the knowledge that by so doing he made it easier for Y to achieve his ultimate goal. If this further evidence is taken into account, one can without any difficulty conclude that X's conduct does indeed conform to the definitional elements of the offence. Yet, viewed from the outside, there is nothing to indicate that X's conduct is a fulfilment of the definitional elements of the crime.

17 *Davies* 1956 3 SA 52 (A); *infra* VIII B 8.

18 A consideration of certain other forms of attempt leads to the same conclusion. Eg X fires a shot which just misses Y. Does this amount to conduct conforming to the definitional elements of the crime of attempted murder? This question can be answered only by

[*continued*]

(*d*) *Possession* In the discussion above of crimes consisting of the unlawful possession of an article,[19] it was pointed out that the act of possession always contains a certain subjective requirement, namely the *animus* or intent to possess. In fact in *Jacobs*[20] the Appeal Court explicitly held that the *animus* element of possession does not form part of culpability, but of the act. Van Heerden JA held that one cannot say that X possesses dagga unless he knows that the article over which he is exercising control, is in fact dagga. This subjective knowledge of X therefore relates to the act of possession, and not to culpability.

(*e*) *Remaining crimes* As far as the remaining crimes (ie, crimes not mentioned and discussed above) are concerned, the principle remains that X's intention should form part of the definitional elements as well, and not be confined exclusively to culpability. Intention, like negligence, also forms part of the definitional elements because it constitutes part of the minimum requirements which must be mentioned in the definitional elements of the crime in order to make such definitional elements understandable and to indicate how it differs from other crimes.

Thus, to summarise: The investigation into whether the definitional elements have been complied with logically precedes the investigation into unlawfulness (and after that, culpability). It was shown that an investigation into the fulfilment of the definitional elements necessarily includes an investigation into X's subjective state of mind. It therefore follows that the investigation into X's subjective state of mind takes place *before* the investigation into unlawfulness (and *a fortiori* culpability). It is, however, not disputed that intention also plays a role in determining the existence of culpability. Intention plays a *double role* in the determination of criminal liability, namely as an element of both the definitional elements and of culpability. This is an important principle to bear in mind when the concept of culpability is discussed below.

9 Arrangement of crimes according to their definitional elements Crimes may be divided into different groups or categories according to their definitional elements.

Firstly, one may differentiate between crimes which *impair* legally protected interests (eg malicious injury to property, assault and murder) and crimes which merely *endanger* such interests (eg negligent driving, unlawful possession of a firearm, unlawful dealing in, or possession of, drugs and high treason).

Secondly, one may differentiate between crimes committed by means of a *single* act (eg assault and fraud) and crimes committed by means of *more than one* act (eg robbery, which requires both violence and an appropriation of property).

---

considering X's intention. If, eg he pulled the trigger under the impression that the firearm was unloaded, his conduct obviously does not conform to the definitional elements of this crime. If, in the attempted crime the intention forms part of the definitional elements, the same consideration must apply *a fortiori* to the completed crime. It would be illogical to assume that intention forms part of the definitional elements in attempt but not in the completed crime.

19 *Supra* II C.

20 1989 1 SA 882 (A) 656–661.

Thirdly, it is possible to differentiate between crimes requiring a *single intent* (such as murder, rape and assault) and crimes requiring a *double intent* (such as abduction, where, in addition to intending to remove the minor, X must also intend to marry or have sexual intercourse with him or her; corruption; housebreaking with intent to commit a crime; and assault with intent to do grievous bodily harm).

Fourthly, one may differentiate between crimes which can be committed only *by means of one's own body* (sometimes referred to as "autographic crimes") (such as the old common-law crimes of rape and incest) and crimes which can also be committed *through the instrumentality of another* (such as murder or assault).

Fifthly, one may differentiate between crimes in respect of which a certain act or omission is proscribed, irrespective of its result (*formally defined crimes*) and crimes in respect of which any conduct that *causes a certain result* is proscribed (*materially defined crimes*, also called *result crimes*).

These differentiations may have various consequences, which will be pointed out in the course of the discussion in this book. The fifth differentiation pointed out above, namely that between formally and materially defined crimes, is particularly important and is discussed immediately below. As will be seen, this differentiation deals with a concept which is of particular importance in criminal law, namely causation. It must be emphasised that causation is not a general element of liability besides conduct, fulfilment of the definitional elements, unlawfulness and culpability. It is merely a way in which the definitional elements of certain crimes are fulfilled. It therefore forms part of the definitional elements.

B CAUSATION

1 Summary of rules for determining causation Before analysing this topic, it is useful first to summarise the most important rules pertaining to causation presently applied in our law:

(1) In order to find that X's act had caused a certain condition (such as Y's death), X's act must first be a *factual* cause and secondly a *legal* cause of Y's death.

(2) In order to determine whether X's act is a factual cause of Y's death, the *conditio sine qua non* formula is applied: X's act is a factual cause of the death if X's act cannot be thought away without Y's death disappearing at the same time.

(3) Many factors or events may qualify as factual causes of a prohibited condition. In order to eliminate factual causes which are irrelevant, the criterion of legal causation is applied.

(4) X's act is the legal cause of Y's death if a court is of the opinion that policy considerations require that X's act be regarded as the cause of Y's death. By "policy considerations" is meant considerations which ensure that it is reasonable and fair to regard X's act as the cause of Y's death.

(5) In order to find that it would be reasonable and fair to regard X's act as the cause of Y's death, a court may invoke the aid of one or more specific theories of legal causation. Among these theories are the "proximate cause" criterion, the theory of adequate causation and the *novus actus interveniens* criterion.

2 Formally and materially defined crimes Crimes may be divided into two groups, namely formally and materially defined crimes.

In formally defined crimes, a certain type of conduct is prohibited irrespective of the result of such conduct. Examples of crimes falling in this category are the possession of drugs, driving a motor car negligently, and perjury.

In materially defined crimes, on the other hand, it is not specific conduct which is prohibited, but any conduct which *causes* a specific condition. Examples of this type of crime are murder, culpable homicide, arson and abortion. Let us consider the example of murder. Here, the act consists in causing a certain condition, namely the death of another person. In principle it does not matter whether X caused Y's death by stabbing him with a knife, shooting him with a revolver, poisoning him or, in the dark, showing him a path to a destination which X knows, will lead him over a high precipice. The question is simply whether X's conduct *caused* Y's death, irrespective of the type of conduct employed by X.

Sometimes formally defined crimes are, for the sake of brevity, dubbed "conduct crimes" and materially defined crimes "result crimes".

3 The problem to be solved In materially defined crimes, the question must always be answered whether X's act caused the prohibited situation or state of affairs or, to put it differently, whether there was a causal link (nexus) between X's conduct and the prohibited situation (eg Y's death).

In the vast majority of cases of materially defined crimes which come before the courts, determining whether X's act was the cause of the prohibited situation does not present any problems. If X shoots Y in the head with a revolver or stabs him in the heart with a knife, and Y dies almost immediately, and if nothing unusual (such as a flash of lightning) which might be shown to have occasioned the death has occurred, nobody will doubt that X has caused Y's death.

However, the course of events may sometimes take a strange turn. This will be clear from the examples and decisions which will be given or referred to below. For example, following X's assault on Y, Y may die after the ambulance transporting him to the hospital crashes into a tree, or after he is struck by lightning on the spot where he is lying after the assault, or after he receives the wrong medical treatment, or because he is a manic-depressive person and the assault induces him to commit suicide. In such circumstances can one still allege that X has caused Y's death? Should the cause of death not rather be seen as the motor accident, the flash of lightning, the incompetent medical practitioner or Y's own conduct?

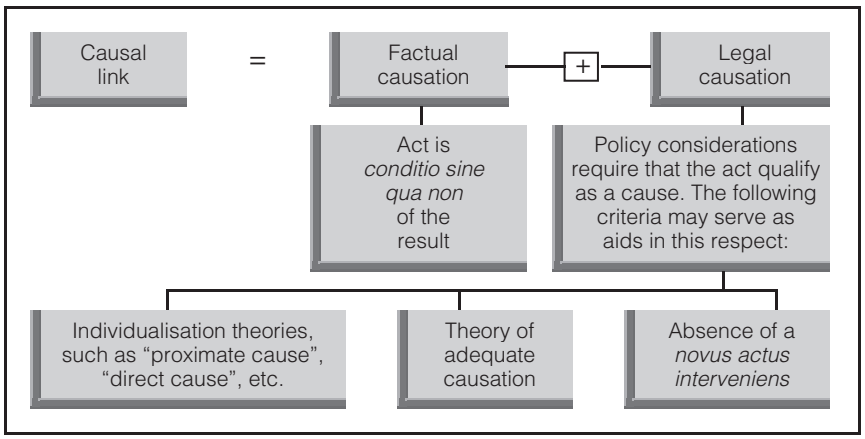
In order to keep the discussion which follows within bounds, the question of causation will be discussed only in the context of the crimes of murder and culpable homicide, since problems in connection with causation in criminal law generally arise in the context of these crimes.

4 Precipitating death In the determination of causation in cases of murder or culpable homicide it must be remembered that "to cause the death" actually means to cause the death at the time when, and the place where, Y died. All people die at some time; therefore to ask whether the act caused the death is in fact to ask whether the act precipitated the death. The fact that Y suffered from an incurable disease from which he would shortly have died in any event, or

that Y would in any event have been executed a mere hour later, does not afford X a defence.

5 Factual and legal causation Despite conflicting opinions about the law relating to causation in legal literature, the courts have, especially since 1983 (when the Appellate Division delivered judgment in *Daniëls*)[21] laid down certain broad principles relating to the determining of a causal link. The courts have confirmed that in order to determine whether certain conduct has caused a certain prohibited condition (eg Y's death), two requirements must be met: *first* one must determine whether the conduct was a *factual* cause of the condition (in other words whether there was a factual causation) and *secondly* one must determine whether the conduct was also the *legal* cause of the condition (in other words whether there was legal causation). Only if the conduct is both the factual and the legal cause of the condition can a court accept that there has been a causal link between the conduct and the condition.[22]

6 Arrangement of discussion The discussion of causation which follows will follow the above-mentioned two-part classification of the field of investigation. The following is a diagram of the broad arrangement of the field of investigation:



7 Factual causation – *conditio sine qua non* In order to determine whether an act is a factual cause of the prohibited situation all the relevant facts and circumstances must be investigated, and one has to decide with the aid of one's knowledge and experience whether the prohibited situation flows from X's conduct. Sometimes it may be necessary to rely on expert evidence.[23]

If one decides that the conduct is indeed a factual cause of the situation, there is a useful way of checking whether one's conclusion is correct: one can use the *conditio sine qua non* formula. According to this formula or theory one must

---

21 1983 3 SA 275 (A).

22 *Daniëls supra* 331C–D; *Mokgethi* 1990 1 SA 32 (A) 39; *Tembani* 2007 1 SACR 355 (SCA) par 10.

23 Eg to prove that certain medication administered by X to Y, who was a diabetic or who suffered from his heart, could have caused his death.

ask oneself what would have happened if X's conduct had not taken place: would the result nevertheless have ensued? If the answer to this question is "No", one can be sure that the conduct is a factual cause of the situation or result. If the answer to this question is "Yes", one knows that the conduct was *not* a factual cause of the situation. *Conditio sine qua non* literally means "a condition (or antecedent) without which . . . not"; in other words, an antecedent (act or conduct) without which the prohibited situation would *not* have materialised.

Conduct is therefore a conditio sine qua non for a situation if the conduct cannot be "thought away" without the situation disappearing at the same time. A convenient English equivalent of this formula is but-for causation (or more precisely, but-for not causation). For conduct or an event to be a but-for cause, one must be able to say that *but for* the conduct or event, the prohibited situation would *not* have happened.

The application of the *conditio sine qua non* formula may be illustrated as follows: Assume X assaults Y and injures him to such an extent that he must undergo an operation. Y dies during the operation. In this case X's act is a factual cause of Y's death, because if he had not assaulted Y, it would not have been necessary to operate on Y and Y would not have died. Contrast, however, the following situation: X administers poison to Y. It is a poison that takes a reasonably long period to have an effect. Before the poison can kill Y, Y suffers a heart attack due to natural causes (in other words, a cause not linked to the poisoning) and dies. In this case X's act is not a factual cause of Y's death because Y would have died at that particular time even had X not administered the poison.

The *conditio sine qua non* theory has been criticised by various writers[24] who point out, quite correctly, that one cannot describe *conditio sine qua non* as a *test* to determine the presence of causation. One first decides on the strength of all the facts whether the conduct is the cause of Y's death, and only after concluding that it is, does one declare that the conduct was a *conditio sine qua non* of death. One cannot determine whether the conduct is a *conditio sine qua non* of the result before deciding that there is a causal connection.

If one states that "but for X's act Y would not have died", it means that one has already, on the strength of other considerations, decided that the act is a factual cause of Y's death: it means that one is merely stating one's conclusion. The "other considerations" mentioned here refer to knowledge and experience which lead one to conclude that one situation flows from another. For example, one knows from experience that if one strikes a match and throws it onto petrol, the petrol catches alight. Thus *conditio sine qua non* is not a neutral, mechanical technique that one can use to determine beforehand (ie, before one already knows that there is a causal connection between the act and the particular situation) whether a certain act caused a certain situation. This consideration has led most Continental writers to reject this theory as a *test* to determine the existence of a causal connection; according to them it may at most be used as a method of checking whether a causal connection which one has already accepted,

---

24 *Van Rensburg* 3–65; Van Rensburg *Huldigingsbundel Pont* 395–396; 1977 *TSAR* 101; Visser 1989 *THRHR* 558; *Visser, Vorster and Maré* 112–117, 120–122; Potgieter 1990 *THRHR* 267.

in fact exists (in other words whether one's decision that there is a causal connection is correct).[25]

All this does not mean that the *conditio sine qua non* formula is worthless and that it should be rejected as a checking mechanism. This formula or theory has, in any event, already attained such a firm footing in our case law[26] that it is difficult to believe that the courts would easily reject it. It can be accepted that this concept will retain the hold it has already secured in our legal literature and case law. However, in the light of the above criticism of this concept, one should guard against describing *conditio sine qua non* as a *test* for determining (factual) causation. It would, however, not be wrong to describe it as a "formula", a "concept" or a "theory". In the discussion of causation below this terminology will sometimes be used.

8 Factual causation covers a wide field A specific situation or result does not have one factual cause, but a whole number of factual causes. Every condition imaginable which cannot be "thought away" without the prohibited situation also disappearing qualifies as a factual cause or *conditio sine qua non* of the particular situation (result). If X stabs Y with a knife and kills him, it is not only the stabbing which is a *conditio sine qua non* of the death, but also, for example, the manufacture and sale of the knife.

However, one must bear in mind that the determination of causation is not limited to ascertaining whether there was factual causation. In fact, once one has decided that there is factual causation, one has merely reached the half-way mark in one's investigation into the existence of a causal link: as will be seen hereafter, the second half of the investigation comprises an investigation into legal causation. This latter investigation essentially comprises the application of some criterion whereby the wide ambit of factual causation and the operation of the *conditio sine qua non* formula may be *limited*.

9 Legal causation – general The mere fact that X's act is a factual cause of the forbidden situation is still not sufficient ground upon which a court may find that there is a causal link between the act and the situation (result). Before a court can find that there is such a causal link, it must be clear that the act is not merely a factual, but also a legal cause of the situation.[27] This means that the act must qualify as a cause of the forbidden result not only according to the criteria of natural science or one's ordinary experience, but also according to the criteria applied by the law. The legal criteria are narrower than those applied to determine factual causation; they are based upon normative value

---

25 See the criticism of this theory by *Jescheck and Weigend* 281–282; *Schönke-Schröder* n 74 *ad* s 13; *Jakobs* 186 ("Eine verwirrende, das Kausalproblem verfälschende und letzlich restlos überflüssige Rolle spielt . . . die . . . *conditio sine qua non*"); *Schmidhäuser* 226 (who describes the theory as "Selbsttäuschung"); *Hazewinkel-Suringa-Remmelink* 175–176.

26 *Daniëls* 1983 3 SA 275 (A) 331B–C: "Daar kan weinig twyfel bestaan, dat in ons regspraak die bepaling van 'feitlike' oorsaaklike verband op die grondslag van die *conditio sine qua non* geskied"; see also 332F–G and 324G–H. See also *Minister of Police v Skosana* 1977 1 SA 31 (A) 33, 34–35, 43–44; *Van As* 1967 4 SA 594 (A) 601; *Haarmeyer* 1971 3 SA 43 (A) 47H; *Tembani* 2007 1 SACR 355 (SCA) par 10.

27 *Daniëls* 1983 3 SA 275 (A) 325A, 331C–D; *Mokgethi* 1990 1 SA 32 (A) 39–40, especially 39D and 40C; *Madikane* 1990 1 SACR 377 (N) 384G; *Tembani supra* par 10.

judgments or policy considerations, on questions such as whether it is reasonable or just to regard the act as a cause of the forbidden situation. Only an act which is a factual cause of the situation can qualify as a legal cause thereof.

10 The criterion for legal causation The question that arises next is what criterion to apply to determine whether an act which is a factual cause of the prohibited situation also qualifies as a legal cause of the situation. This question leads one to a number of different theories or criteria formulated in the legal literature. These theories are usually referred to as the "theories of legal causation".

In *Mokgethi*[28] the Appellate Division held that it is wrong to identify only one of these theories as the correct one to be applied in all cases and in so doing to exclude from consideration all the other theories of legal causation. According to the court one should apply a flexible criterion: the overriding consideration in the determination of legal causation is the demands of what is fair and just; in endeavouring to ascertain what is a fair and just conclusion, however, a court may take into consideration the different theories of legal causation referred to above and use them as guides in reaching a conclusion.

In the discussion which follows, the most important theories of legal causation will be briefly explained.

11 The individualisation theories This generic concept includes a number of theories or tests which all have the following in common: among the great number of conditions or acts which constitute factual causes of the prohibited situation only *a single one* – usually the most operative condition – must be singled out as the legal cause. Thus, it is argued, for example, that one must look for the "proximate" cause or condition, or the "substantial cause", or the cause which in terms of its value or importance is the most decisive (*causa causans*), or the "direct cause" or the "efficient cause". These (and similar) expressions (such as "immediate" or "effective cause") amount to substantially the same thing, namely that one must search for *only one* individual condition as the legal cause of the prohibited situation.

The objections to these theories are that the criteria they adopt are arbitrary and depend upon coincidence. Two or more conditions may be operative in equal measures in bringing about a result. This is especially so when a number of people participate in the commission of a crime, as where X incited or persuaded Z to commit a murder, which Z did while W stood guard in order to warn Z should the police arrive. Did X, Z or W cause the death? In a situation such as this, where three different people have acted, one cannot regard the act of one as the *only* cause of death to the exclusion of the acts of the other two. The principle that a situation may have more than one cause is recognised in criminal law. It is wrong to assume that only the very last grain in the scale causes it to tip and not the combined mass of the other grains too.

As a result of these objections, the individualisation theories have, for the most part, been rejected on the European continent. Although some of these theories have been followed in certain South African judgments[29] there are also

---

28 1990 1 SA 32 (A) 40–41.

29 *Burger* 1959 2 SA 110 (T) 113C ("*causa causans"*); *Grobler* 1972 4 SA 559 (O) 561C ("die direkte en enigste oorsaak"); *Grobler* 1974 2 SA 663 (T) 667H ("die onmiddellike

[*continued*]

cases in which the courts have refused to adopt these criteria.[30] The clearest example is *Daniëls*,[31] in which two judges of appeal expressly refused to accept that only an act which is a proximate cause of the death could qualify as its cause.[32] It is submitted that this view is correct. "Proximate cause" and other individualisation theories are too vague and arbitrary to serve as a satisfactory criterion.

12 The theory of adequate causation Because of the vagueness of the individualisation theories, many jurists have rejected attempts to identify only one individual action as the cause of a condition. Instead, they base a causal relationship on generalisations which an ordinary person may make regarding the relationship between a certain type of event and a certain type of result, and on the contrast between the normal and the abnormal course of events. This generalisation theory (a term used to distinguish it from the individualisation theories) is known as the theory of adequate causation.

According to this theory *an act is a legal cause of a situation if, according to human experience, in the normal course of events, the act has the tendency to bring about that type of situation*. It must be typical of such an act to bring about the result in question. If the turn of events is atypical in the sense that the act has brought about an unlikely, unpredictable or uncontrollable result, there is no "adequate relationship" between the act and the result and the act cannot be said to have caused the result. To put it more simply, the act is the cause of the situation if it can be said: "That comes of doing so-and-so". The test always involves a consideration of the probable results of an act, and for this reason the theory is reminiscent of the test sometimes applied in Anglo-American law, according to which one must determine whether the result corresponds to the "natural and probable consequences" or the "reasonable consequences" of the act.[33]

To strike a match is to perform an act which tends to cause a fire, or which in normal circumstances has that potential. If, therefore, X strikes a match and uses the burning match to set a wooden cabin alight, one can aver without difficulty that his act was the cause of the burning down of the cabin. However, the question arises whether his act can be described as the cause of the burning

---

oorsaak"); *Jantjies* 1991 1 SACR 74 (C) 78B ("die regstreekse oorsaak"); *Tembani* 1999 1 SACR 192 (W) 203*a* ("an operating and substantial cause").

30 Eg *Youngleson (1)* 1948 1 SA 819 (W) 821; *Grotjohn* 1970 2 SA 355 (A) 363–364.

31 1983 3 SA 275 (A).

32 See 341C (*per* Van Winsen AJA), as well as 331A–B and 332–333, especially 333G (*per* Jansen JA). Contrast, however, the approaches of Nicholas AJA 304D–E and Trengove JA 324–325. *Daniëls*'s case is discussed in more detail *infra* par 21.

33 See the application of this theory in *Loubser* 1953 2 PH H190 (W) in which Rumpff J declared that in the eyes of the law an act is a cause of a situation if, according to human experience, the situation will flow from the act. The test applied in this decision was expressly accepted and followed in *Grobler* 1972 4 SA 559 (O) 560–561. Although in *Daniëls supra* 332A Jansen JA doubted whether it would be correct to describe the *novus actus* generally in terms of the theory of adequate causation, it is significant that he later declares on the same page (332H): "Volgens menslike ervaring het die skote deur die eerste appellant die algemene neiging gehad om in die normale loop van sake die dood deur 'n skietwond teweeg te bring." This is an application of the theory of adequate causation. See also *Counter* 2000 2 SACR 241 (T) 250*b–c* (". . . is, in the ordinary human experience, totally unexpected"); *Ramosunya* 2000 2 SACR 257 (T) 260–265.

down of the cabin in the following circumstance: All he does is to call a dog. The dog jumps up and in so doing frightens a cat. The frightened cat jumps through a window of the cabin, knocking over a lighted candle which in turn sets the whole cabin alight. If one applies the theory of adequate causation, one must conclude that in this situation X's act was not the legal cause of the burning down of the cabin, because all that X did was to call a dog, and merely calling a dog is not an act which, according to human experience, in the normal course of events has the tendency to cause a wooden cabin to burn down.

In order to determine whether there is an "adequate relationship" between the act and the result, all the factual circumstances ascertainable by a sensible person should be taken into consideration. If X gives Y, who has a thin skull, a light slap on the head and Y dies, the fact that Y had a thin skull should be taken into consideration in the application of the test. The question is therefore not "has a slight blow to another's head the tendency to cause death?" but "has a slight blow to the head of somebody who has a thin skull the tendency to cause death?" Since the answer to the latter question is "yes", there is in terms of the theory of adequate causation a causal relationship in this type of situation.

However, this does not mean that X's particular knowledge is left out of consideration in determining what a probable result would be in the circumstances. The criterion is the knowledge of an ordinary sensible person who in addition has the extra knowledge which X may happen to have. Thus if X has some additional knowledge regarding the nature or effect of the act compared to what an objective observer would have, that additional knowledge must be taken into consideration. Furthermore, in deciding what a probable result might be, the totality of human knowledge must be taken into consideration, including knowledge which only a specialist in a particular field might have. Even knowledge which comes to light only after the occurrence of the events in question may be taken into consideration.[34]

When applying the *sine qua non* theory one applies an objective and diagnostic test, that is, one looks back at events; when applying the theory of adequate causation one uses an objective prognostic test, that is, one looks forward as from the moment of the act and asks whether that type of result was to be expected. An advantage of the test is that it limits the field of possible liability by taking into account man's ability to direct or steer the chain of causation and in this way eliminates the role of mere chance.

13 ***Novus actus interveniens*** This expression means "a new intervening event". It is an important criterion which the courts in particular apply to determine causation, although here, as will be shown later, one is, strictly speaking, not dealing with yet another theory of causation. If a *novus actus interveniens* (sometimes abbreviated to *novus actus* or *nova causa*) has taken place, it means that between X's initial act and the ultimate death of Y, an event which has broken the chain of causation has taken place, preventing one from regarding X's act as the cause of Y's death. *Novus actus interveniens* is actually a negative "test" of causation: a causal relationship is assumed to exist if an act is a *conditio sine qua non* of a result and a *novus actus* is lacking.

---

34 *Van Rensburg* 195–197; Van der Walt 1966 *THRHR* 244 251; *Hart and Honoré* 482–483; *Schönke-Schröder* n 87 *ad* s 13; Joubert 1965 *Codicillus* 6 10.

An example of the application of this concept is the following: X inflicts a light, non-lethal wound on Y's head. Y is taken to a doctor for treatment. The moment before he enters the building in which the doctor's rooms are, Y is struck and killed by lightning. If X had not assaulted Y, Y would not have gone to the doctor and would therefore not have been struck by lightning; X's act is therefore a *sine qua non* of Y's death. Nevertheless X's act is not regarded as the legal cause of death because the flash of lightning was a *novus actus*. The position would be the same if, after the assault, and whilst Y was being taken to hospital in an ambulance, which was being driven recklessly, an accident occurred in which Y was killed; or if a fire broke out in the hospital to which Y had been admitted for treatment and Y died in the fire.

If X performs an act which is a *conditio sine qua non* of Y's death and X, Y or a third party (Z) subsequently performs another act which hastens Y's death, it does not necessarily mean that the latter act is regarded as a *novus actus*. If, for example, X assaults Y, who runs away in order to avoid being assaulted further and then in the process of fleeing sustains a lethal injury as a result of which he dies, the causal relationship between X's assault and Y's death is not broken. The position is the same if the medical treatment which Y receives in hospital is administered in good faith and with normal care, but subsequently proves to have been the wrong treatment,[35] or if X gives Y, who is suffering from depression, a gun with which he may shoot himself if he so wishes, and Y does in fact kill himself.[36]

The important question which now arises is how one can know whether a subsequent event qualifies as a *novus actus* so that the earlier one may no longer be regarded as a cause of the prohibited situation. In *Grotjohn*[37] Steyn CJ said that a later event can be deemed to have broken the causal link only if it is a completely independent act, having nothing to do with and bearing no relationship to X's act. A reasonable inference to be drawn from the examples in our case law is that an event can be a *novus actus interveniens* only if it is *an unsuspected, abnormal or unusual event*, in other words one which, according to general human experience, deviates from the ordinary course of events and cannot be regarded as a probable result of X's act. Viewed thus, there is practically no difference between the test to determine a *novus actus* and the test of adequate causation.

An event can qualify as a *novus actus* only if it is itself a *conditio sine qua non* of the resultant situation and if X had not foreseen or intended that it should result in the prohibited situation (such as Y's death).[38]

14 The foreseeability theory According to this theory an act is a legal cause of a situation if the situation is reasonably foreseeable for a person with a

---

35 *Infra* par 21.

36 *Infra* par 20.

37 1970 2 SA 355 (A) 364A. For other decisions dealing with *novus actus*, see *Hibbert* 1979 4 SA 717 (D) 721–722; *Daniëls* 1983 3 SA 275 (A); *Williams* 1986 4 SA 1188 (A); *Madikane* 1990 1 SACR 377 (N) 384G; *Tembani* 1999 1 SACR 192 (W); *Lungile* 1999 2 SACR 597 (SCA) 605–606; *Counter* 2003 1 SACR 143 (SCA) 153; *Agliotti* 2011 2 SACR 437 (GSJ), discussed critically by Jordaan 2011 *SACJ* 356. For a detailed discussion of the judgments in *Tembani* and *Counter*, see Carstens 2006 *SACJ* 192.

38 *Infra* par 25.

normal intelligence.[39] The objection to this test is that it confuses the requirement of causation with the requirement of culpability (and more particularly negligence).

15 Criterion applied by courts: policy considerations Having set out the most important theories or tests for determining legal causation, the question arises which one is the correct one to apply. It is relatively easy to set out the courts' answer to this question: the Appellate Division has, especially in *Mokgethi*,[40] stated very clearly that it is incorrect to single out one of these theories as the only correct one and then to apply that theory in all cases. The court held that courts should adopt a flexible attitude, which implies that a court should not regard only one specific theory as the correct one. One criterion may produce the fairest result in one set of facts, while another set of facts may best be served by applying another criterion. According to the Appellate Division, the overriding consideration in deciding upon legal causation is that a court should be guided by *policy considerations*. This means that a court should strive towards a conclusion which would not exceed the limits of what is reasonable, fair and just. The particular theories of legal causation discussed above, such as "proximate cause", adequate causation and the absence of a *novus actus*, are aids that may be applied in order to reach a just conclusion.

16 Theory of adequate causation preferable The courts' flexible, open approach to legal causation, with its references to "what is fair and just", may, on a purely theoretical level, appear to be very equitable, but the question does arise whether this open approach is not – precisely because of its flexible nature – too vague. The price a legal system pays for criteria which are too vague is lack of legal certainty. The danger of adopting such a wide criterion is that when a court is confronted with a concrete set of facts in respect of which there has not yet been an earlier precedent, it would simply rely on its intuition in deciding whether a particular act or event is legally a cause of a situation.

It is submitted that the best criterion to apply is the adequate-causation test. Objections to the different individualisation theories have already been discussed. In the discussion of the *novus actus interveniens* it was pointed out that this criterion relies to a large extent upon similar considerations to those underlying the theory of adequate causation. It is merely a negative expression of the adequate-causation test: a situation is not regarded as causally related to a preceding act if it arose in an unusual or unexpected way.

Although the courts do not want to bind themselves to accept the adequate-causation test, it is nevertheless very noticeable that two important Appellate Division cases dealing with causation in criminal law, namely *Daniëls*[41] and *Mokgethi*,[42] are completely compatible with an application of this test. In his reasons in *Daniëls* for finding that there had been causation, Jansen JA used language which may serve as a textbook example of the application of the

---

39 Support for this approach may be found in *Van den Berg* 1948 2 SA 836 (T) 838; *Stavast* 1964 3 SA 617 (T) 621; *John* 1969 2 SA 560 (RA) 565–571.

40 1990 1 SA 32 (A) 39–41.

41 1983 3 SA 275 (A).

42 1990 1 SA 32 (A).

terminology of this theory ("According to *human experience* the shots . . . had the *general tendency in the normal course of events* to bring about a gun-wound"[43] (translated and italics supplied)).

17 Multiple causes of same condition In order to find that a causal link was present, it is unnecessary for a court to go so far as to find that X's act was the *sole* cause of the situation; it is sufficient to find that the act was *a* cause (possibly one of many) of the situation.

18 Causation and the doctrine of common purpose If X and Z (and perhaps others together with them) acted with a common purpose to kill Y and their common endeavour leads to Y's death, they are liable for murder in terms of the doctrine of common purpose (which will be discussed later).[44] According to this doctrine, each of them is guilty of murder despite the fact that there is no causal link between the individual conduct of each of them and Y's death. (There is, of course, a causal link between their mutual conduct and Y's death.)

19 Causation by an omission In the discussion of causation thus far the question throughout has been whether a positive act was the cause of a certain situation. It is settled that an omission to act, resulting in a certain situation, may be punishable, as when a mother fails to feed her baby which then dies, or where a railway crossing attendant fails to lower the boom when the train is approaching and a motorist is then crushed by the train.

A person's omission to act positively, resulting in a certain prohibited state of affairs, is punishable only if that person has a legal duty to act positively. The situations and cases in which there is such a legal duty according to our law, were mentioned in the discussion above[45] of omissions.

In applying the *conditio sine qua non* test to an omission, one must establish whether the prohibited result would still have ensued if in place of X's omission there had been a positive act on his part, in accordance with his legal duty. Instead of *thinking away* the act, one must *imagine a positive act* in the place of the omission.[46] The result is that strictly speaking, the enquiry into causation in cases of omission does not entail determining a *conditio sine qua non* (condition *without* which . . .), but a *conditio cum qua non* (condition *with* which . . .).

20 Subsequent conduct by the victim We now proceed to a discussion of the courts' treatment of certain concrete situations. It is convenient to divide these situations into a number of categories, and to discuss them under the following separate headings: Y's subsequent conduct; that of a third party (Z); that of X himself; extraordinary circumstances such as natural events; and cases where Y had some abnormal physiological condition. Firstly, attention is paid to cases where there was some subsequent conduct on the part of the victim (Y).

---

43 *Daniëls supra* 332H. See also *Counter* 2003 1 SACR 143 (SCA) 153*f–g*: ". . . which led directly to his wife's death by stages entirely predictable and in accordance with human experience."

44 *Infra* VII B 7–16.

45 *Supra* II B 3, 4.

46 *Van As* 1967 4 SA 594 (A) 601;*Van Heerden* 2010 1 SACR 529 (EC).

If X encourages Y to commit suicide, or provides him with the means of doing so, and Y indeed commits suicide, the fact that the last act which led to Y's death was his (Y's) own conscious and voluntary act does not mean that the causal chain which X has set in motion has been broken; Y's voluntary act therefore does not constitute a *novus actus*.[47] This conclusion is perfectly compatible with the theory of adequate causation: as was pointed out above,[48] the particular circumstances of which X was aware must, according to this theory, also be considered when determining whether the act had the tendency to bring about that kind of result.

Our courts have not yet held, as far as could be ascertained, that a person's refusal or omission to submit to medical treatment after being assaulted breaks the causal chain. Where the wound is not of a serious nature (in other words, where it will not lead to death regardless of whether medical treatment is given) and Y unreasonably refuses medical treatment or advice, no causal link ought to be found. It is submitted that a person's refusal on religious grounds to undergo or allow a blood transfusion which would undoubtedly save his life must be regarded as conduct breaking the causal chain.

In *Mokgethi*[49] X shot a bank teller (Y) in the back during a robbery, as a result of which Y became a paraplegic and was confined to a wheelchair. Y's condition improved to such an extent that he was later able to resume his work at the bank. His doctor instructed him to shift his position in the wheelchair regularly in order to prevent pressure sores from developing on his buttocks. He failed to shift his position often enough, with the result that serious pressure sores and accompanying septicaemia developed, causing his death. He died more or less six months after he had been shot. The court held that X's act was not the legal cause of Y's death. After an analysis of cases in which the victim's failure precipitated the death, Van Heerden JA laid down the following general criterion which could, according to him, be used in a number of situations of this nature: X's act which is a *conditio sine qua non* of Y's death is normally too remote from the result to lead to criminal liability (ie, to qualify as a legal cause of Y's death) if (i) the immediate cause of Y's death was a failure on his part to obtain medical or similar advice, to undergo treatment or to follow instructions; (ii) the wounding itself was not lethal or, at least, no longer lethal at that particular time; and (iii) the failure was relatively unreasonable, that is, unreasonable also taking into account, for example, the victim's characteristics and convictions.[50]

21 Subsequent conduct of a third party If X assaults Y, who is then given the wrong medical treatment, which leads directly to his death, the question arises whether the medical treatment has interrupted the chain of causation. The answer to this question usually depends on how serious the initial wound has been and the degree of negligence or malfeasance on the part of the doctor or

47 *Ex parte die Minister van Justisie: in re S v Grotjohn* 1970 2 SA 355 (A); *Agliotti* 2011 2 SACR 437 (GSJ) par 21.
48 *Supra* par 12.
49 1990 1 SA 32 (A).
50 See 46J–47B.

medical staff. It is submitted that the following propositions are a fair reflection of our law on this topic:

(1) If the injuries were of such a serious nature that Y would have died in any event, despite correct medical treatment, then the fact that the treatment was injudicious or negligent does not amount to a *novus actus*.

(2) If the injuries were not of such a serious nature and medical treatment was given *bona fide* and with normal care, then the fact that it subsequently appears that the treatment was wrong, cannot operate in X's favour: the causal nexus is established.[51] Doctors may sometimes differ among themselves, and in an emergency a doctor must sometimes make a hasty decision which may afterwards prove to be incorrect. Human experience tells us that medical science is not infallible.[52]

(3) If the injuries were not of such a serious nature as in (1) above and the wrong medical treatment was given intentionally or in a grossly negligent manner, the chain of causation is interrupted.[53] To use the terminology of the theory of adequate causation, one may say that one assumes or expects that medical treatment will not be performed intentionally incorrectly (ie, *mala fide*) or in a grossly negligent manner.

(4) What is the position if the injuries were of a serious nature and Y's life could have been saved by correct medical treatment, but the medical treatment was improper or negligent? The answer to this question depends on whether, at this time and in this country, one can expect medical treatment always to be proper and proficient. It would seem that the answer to the latter question is negative, and that even in these cases the courts would not automatically hold that the causal chain has been broken by the improper medical treatment. For example, in *Tembani*[54] the Supreme Court of Appeal had to decide whether improper treatment of Y by hospital staff who were overworked and understaffed (a scenario not uncommon in South Africa), broke the causal chain. The court held that it did not. The court stated that the deliberate infliction of an intrinsically dangerous wound, from which Y is likely to die without medical intervention, must generally lead to liability for an ensuing death. This rule applies even if the medical treatment later given is substandard or negligent.[55] It is submitted that the decision in *Tembani* is correct. Although the approach adopted in this case is hardly a compliment to the medical services in this country, it is a realistic view which merely confirms what is already generally known. Quite

---

51 *Dawood* 1972 3 SA 825 (N) 828; *Counter* 2000 2 SACR 241 (T) 250; *Ramosunya* 2000 2 SACR 257 (T) 265*d–f*.

52 Carstens 2006 *SACJ* 192 203: "Not every medical slip, wrong diagnosis or mistake imports negligence . . . Despite good intentions, things sometimes go amiss in surgical operations or medical treatment."

53 *Du Plessis supra* 645B; *Counter* 2000 2 SACR 241 (T) 250*a–b*; *Jordan* (1956) 49 Cr App Rep 152. Note the following case in which there was no suggestion of incorrect medical treatment: For a case in which there was no suggestion of any incorrect medical treatment, see *Williams* 1986 4 SA 1188 (A).

54 2007 1 SACR 355 (SCA). For a penetrative discussion of this case and of the effects of medical negligence on causation, see Carstens 2006 *SACJ* 192.

55 Par 25.

apart from this, it seems unjust to allow X, who has intentionally inflicted a lethal or at least very serious injury to Y, to argue afterwards that the subsequent improper medical care should redound to his benefit and absolve him from full responsibility for his deed. The court in *Tembani* added *obiter* that even if the medical treatment was grossly negligent, it would still not break the causal chain.[56] It is submitted that this latter view goes too far. Although medical services in South Africa are very strained and not always up to standard, it seems incorrect to assume that in the normal course of events one can expect medical services in this country that are grossly negligent.

In *Daniëls*[57] X twice shot Y in the back with a firearm, whereupon Y fell to the ground. Although still alive, he would have died unless he received medical treatment within about thirty minutes – something which was highly unlikely, since the events took place on a lonely road in the countryside. X threw the firearm onto the ground near Y. Shortly after Y fell to the ground, Z appeared on the scene and shot Y through the ear. Of the five judges of appeal who heard the appeal, two (Botha JA and Nicholas AJA) held that X and Z had acted with a common purpose and that their joint conduct was therefore the cause of death.[58] According to the interpretation of the evidence by the other three judges of appeal, however, X and Z had acted independently of each other.[59] Not one of the judges doubted that Z's act was a cause of the death. However, the question that the last-mentioned three judges had to decide was whether (assuming that X and Z had acted independently of each other) X's act also amounted to a cause of the death. Two of the three judges, namely Jansen JA and Van Winsen AJA, held that there was indeed a causal link between X's act and Y's death. According to these two judges policy considerations did not demand that Z's act qualify as a *novus actus*. Although Z's act was the proximate cause of the death, causation in criminal law is not (according to these two judges) based exclusively on the criterion of proximate cause.[60] However, Trengove JA, who was the third judge to find that X and Z had acted independently of each other, was of the opinion that Z's act was indeed a *novus actus* which broke the chain of causation between X's act and Y's death.[61]

It is submitted that the judgment of Jansen JA (with which Van Winsen AJA agreed) is to be preferred to that of Trengove JA. The two shots fired into Y's back by X would in any event have caused Y's death,[62] even had Z not also fired a shot at Y, and, as Jansen JA quite correctly pointed out,[63] human experience showed that X's shots had the tendency, in the ordinary course of events, to result in death.

---

56 Par 29.
57 1983 3 SA 275 (A).
58 304E (Nicholas AJA); 322F–G, 323C–D (Botha JA).
59 324B (Trengove JA); 306F–H, 314A–D (Van Winsen AJA); 330F–G (Jansen JA).
60 314A–D (Van Winsen AJA); 332–333 (Jansen JA).
61 325E–H.
62 Cf the remarks at 314A–B, 332H. If the wounds inflicted by X were not so serious that they would in any event have led to Y's death, Z's conduct might well have amounted to a *novus actus* – see 314D (*per* Van Winsen JA).
63 332H.

The conduct of a police official who intervenes in an armed robbery and, in an attempt to prevent the robbery or to apprehend the robbers, fires a shot which kills an innocent bystander, does not break the causal chain between the acts of the robbers and the death of the bystander.[64]

22 X's own subsequent conduct X, wanting to kill Y, assaults him, then, thinking he is dead while he is in fact still alive, burns the supposed corpse. If Y really dies as a result of the burning, X's subsequent conduct is not regarded as a *novus actus*.[65] However, the two events must be so closely related to each other as regards duration and method of performance that it may be said that for all practical purposes they constitute one single transaction.[66] The second act or event is not a *novus actus* since it is not unusual, abnormal or unexpected for a murderer to hide his victim's corpse or to try and erase the evidence of his evil deed. Both acts are performed by the same person with the same end in view.

23 Acts of nature, *vis major*, etc Although such cases have not yet figured in our reported case law, there can be little doubt that if X assaults Y, and the injured Y is then killed by a flash of lightning, a tsunami wave or a wild animal, eventualities which X has not foreseen, the subsequent event is a *novus actus*. The examples given are eventualities which general human experience does not lead one to expect after an assault.

24 Abnormal physiological condition of victim It was pointed out above in the discussion of the theory of adequate causation[67] that, according to this theory or test, any unusual physiological condition of Y, such as a thin skull or a weak heart, must indeed be taken into consideration, and that where a person with such physical qualities is assaulted there is a causal nexus between the assault and the death, even though Y would not have died if he had not had these exceptional qualities. Our courts have also accepted the principle that, with regard to causation, Y's particular physiological condition cannot operate as a defence in X's favour.[68] This principle is sometimes expressed by the maxim "you take your victim as you find him".

25 *Novus actus* foreseen by perpetrator All the above rules relating to a *novus actus* are subject to the qualification that if X planned the unusual turn of events or foresaw it, it cannot amount to a *novus actus*.[69] This accords with the rule of the adequate causation test mentioned above[70] that, in determining

---

64 *Lungile* 1999 2 SACR 597 (SCA) 605–606. Cf also *Nhlapo* 1981 2 SA 744 (A).

65 *Masilela* 1968 2 SA 558 (A); *Thabo Meli* [1954] 1 All ER 373 (PC).

66 If the two events cannot be regarded as one single transaction, X may escape liability, since his assault (X's first act in respect of Y) did not constitute a completed act of murder, although it was accompanied by culpability, while the second act was, in turn, committed without culpability (because X was then under the impression that Y was already dead and that he was therefore dealing with a corpse), although it constituted the completed act required for murder. In such a case X escapes liability because the act and the culpability were not present contemporaneously. This requirement of contemporaneity is discussed *infra* V A 7.

67 *Supra* par 12.

68 *Du Plessis* 1960 2 SA 642 (T); *Ntuli* 1962 4 SA 238 (W).

69 *Grotjohn* 1970 2 SA 355 (A) 364; *Hibbert* 1979 4 SA 717 (D) 722.

70 *Supra* par 12.

whether an act tends to lead to a certain result, one should take into account not only the circumstances ascertainable by the sensible person, but also the additional circumstances known to X.

CHAPTER

IV

UNLAWFULNESS (JUSTIFICATION)

A THE CONCEPT OF UNLAWFULNESS

1 "Visible" and "invisible" requirements of liability A lay person would probably be inclined to think that once the two requirements discussed in the previous two chapters (namely conduct and compliance with the definitional elements) have been complied with, nothing more is required in order to hold X liable and convict him. However, somebody who is versed in the principles of criminal law will know that there are still two very important further general requirements of liability, namely unlawfulness and culpability, which must be complied with before X can be held liable.

The reason why a lay person might not think of these two requirements is because they are, as it were, "unwritten" or "invisible": the contents of the requirements of unlawfulness and culpability do not normally form part of the "letter" or "visible part" of the legal rule or definition of the crime. More particularly, the word "unlawful" does not normally even appear in the definition of a crime in a statute. Nor can one necessarily expect to find, in a statutory definition of a crime, words such as "intentionally" or "negligently" that serve as synonyms of the culpability requirement. Nevertheless, a court will not convict X of a crime unless it is satisfied that the conduct complying with the definitional elements was also unlawful and culpable – in other words, unless these "unwritten" or "invisible" requirements have also been complied with.

2 Compliance with definitional elements and unlawfulness The mere fact that there is an act which complies with the definitional elements does not mean that the person who performs the act is liable for the particular crime. Satisfying the definitional elements is not the only general requirement for liability. The next step in the determination of liability is to enquire whether the act which complies with the definitional elements is also unlawful.

An act which complies with the definitional elements is not necessarily unlawful. This will immediately become clear if one considers the following examples:

(*a*) The definitional elements of murder read "the intentional killing of another human being". Nevertheless a person is not guilty if she kills somebody in self-defence; her act is then justified and therefore not unlawful.

(*b*) X inserts a knife into Y's body. Although her act may satisfy the definitional elements of assault, the act is justified and therefore not unlawful if X is a medical doctor who is performing an operation on Y with Y's permission, in order to cure her of an ailment.

(*c*) X exceeds the speed limit while driving her motor car. Her conduct satisfies the definitional elements of the crime of exceeding the speed limit. However, if she does so in order to get her gravely ill child to hospital for emergency treatment, her conduct is justified and therefore not unlawful.[1]

There are many other examples of conduct which satisfies the definitional elements, but are nevertheless not unlawful. It is a common phenomenon that an act which ostensibly falls within the letter of the law (in other words, which corresponds to the definitional elements) proves upon closer scrutiny not to be contrary to the law, as the examples above illustrate. In these cases the law tolerates the violation of the legal norm, because the law does not consist merely of commands and prohibitions contained in the definitional elements, but also of rules or criteria which in certain circumstances permit an act which is contrary to such a command or prohibition. An act is unlawful if it is in conflict with the rules or criteria of the legal order as a whole, and not merely with the particular definitional elements.

3 Why the term "unlawfulness" may cause confusion The word "unlawful" is one of the most unfortunate and confusing terms used in the description of criminal liability. It would be a good thing if one could dispense with this term and replace it with a term such as "unjustified" or "lack of justification", but unfortunately the term "unlawful" is already too firmly embedded in our legal language to be simply ignored and replaced by another.

The reason why the term "unlawful" may cause confusion is that the term can easily be confused (as indeed it often is) with the quite distinct requirement that the conduct must comply with the definitional elements. The word "unlawful" creates the impression – especially in the eyes of a lay person – that it merely means that the conduct must be contrary to the "(visible) letter" of the legal rule in question – that is, the definitional elements. This, however, is not what the word means. Whether the conduct is unlawful in fact constitutes an enquiry distinct from the enquiry into whether there is compliance with the definitional elements.

On the other hand these two enquiries are closely linked. The link is the following: The fact that an act complies with the definitional elements is a pointer or sign that it may also be unlawful. If the act complies with the definitional elements it can, in fact, be described as "provisionally unlawful" or "*prima facie* unlawful". However, it can be conclusively branded as unlawful only if it is clear that it cannot be justified in terms of the criteria for unlawfulness which will be discussed below.

4 Overcoming the confusion: "unlawful" means "unjustified" The confusion may be overcome if one keeps in mind that the enquiry into "unlawfulness" is in fact an enquiry aimed at establishing whether there is an *absence* of

---

1 *Pretorius* 1975 2 SA 85 (SWA).

something – namely justification for the conduct complying with the definitional elements. The enquiry into whether conduct is unlawful therefore always bears a *negative* character. Another way of overcoming possible confusion would be by using the terms "unjustified" or "without justification" as synonyms for "unlawful", because conduct complying with the definitional elements is unlawful if it cannot be justified.

5 Unlawfulness and wrongdoing "Wrongdoing" is the umbrella concept which comprises both the requirement of compliance with the definitional elements and unlawfulness; put differently, it is the unlawful fulfilment of the definitional elements of the crime.

6 Act is either lawful or unlawful The concept of unlawfulness embraces a negative or disapproving judgment by the legal order of the act. The law either approves or disapproves of the act. An act is therefore either lawful or unlawful. There is no third possibility: unlawfulness cannot be graded.[2] Furthermore, only human conduct can be unlawful. Acts or events such as a hurricane, a flood or an attack by an animal cannot be unlawful. "Unlawful" is an adjective, the noun of which is always a voluntary human act or omission.

7 Grounds of justification The next important question which arises is: When is conduct which corresponds to the definitional elements nevertheless not unlawful?

There are a number of cases or situations, well known in daily practice, where an act which corresponds to the definitional elements is nevertheless not regarded as unlawful. Unlawfulness is excluded because of the presence of grounds of justification. Some well-known grounds of justification are private defence (which includes self-defence), necessity, consent and official capacity. Later in this chapter the grounds of justification will be discussed one by one.

At this point it is tempting to define unlawfulness simply as "the absence of a ground of justification". However, such a purely negative definition of unlawfulness is not acceptable, for two reasons in particular. *Firstly*, all writers on criminal law agree that there is not a limited number (*numerus clausus*) of grounds of justification. If there is not, how is one to determine the lawfulness or unlawfulness of conduct which does not fall within the ambit of one of the familiar grounds of justification? *Secondly*, it should be remembered that each ground of justification has its limits. Where an act exceeds these limits it is unlawful. What is the criterion for determining the limits of the grounds of justification?

8 "Unlawful" means "contrary to the community's perception of justice or the legal convictions of the community" Writers on criminal law have proposed different criteria to determine the material contents of unlawfulness.[3]

---

2 *Maurach-Zipf* ch 24 par 16; *Van der Westhuizen* 425.

3 On the material contents of unlawfulness, see *I* 1976 1 SA 781 (RA) 788–789; *Clarke v Hurst* 1992 4 SA 630 (D) 652–653; *Fourie* 2001 2 SACR 674 (C); *Van der Westhuizen* 371 ff, especially 452–496; Van der Westhuizen 1984 *De Jure* 369 373–378; Bertelsmann 1982 *THRHR* 412 414 ff; Robinson (1982) 82 *Columbia Law Review* 82, especially 203, 213–219; *Jescheck and Weigend* 233 ff; *Schönke-Schröder* n 45–50 *ad* s 13; *Maurach-Zipf* ch 24 par 20 ff; *Roxin* 596 ff; *Hazewinkel-Suringa-Remmelink* 343 ff; Eser in *Eser and Fletcher* 1 47–50; the articles by Hassemer, Roxin and Lenckner in *Eser and Fletcher* 1 175 ff, 230 ff and 493 ff.

Among the criteria suggested are that unlawfulness consists of the following: a violation of certain legally protected interests or values; conduct which does not accord with the *boni mores* (literally "good morals"); conduct which violates the community's perception of justice or equity; conduct which is at variance with public or legal policy; conduct which is contrary to the legal notions or the legal convictions of society; conduct which is contrary to the requirement of objective reasonableness; conduct which causes more harm than benefit; or conduct which is not "socially adequate".

Most of the above viewpoints are reconcilable. Whether one speaks of the one or the other is a matter of a choice of words rather than the description of conflicting viewpoints. It is submitted that the most acceptable viewpoint is the one according to which unlawfulness consists in *conduct which is contrary to the community's perception of justice or with the legal convictions of society*.[4] It is, of course, a vague criterion, yet the same objection can be lodged against all the other criteria mentioned above. It is simply impossible to formulate such a general concept or criterion in more concrete terms.

The contents of the Bill of Rights in chapter 2 of the Constitution must obviously play an important role in deciding whether conduct is in conflict with public policy or the community's perception of justice and therefore unlawful. The values reflected in the Constitution, such as "human dignity, the achievement of equality and the advancement of human rights and freedoms"[5] are of crucial importance in deciding this issue.[6]

Society's or an individual's legal and moral convictions often coincide, but not always. What must be considered when deciding whether conduct is unlawful are not moral convictions, but legal convictions.

One must always first establish whether an act which accords with the definitional elements is not perhaps justified because the legal convictions of society deem the act, committed in those particular circumstances, in fact to be lawful. The act is then not unlawful. The grounds of justification must be seen as practical aids in the determination of unlawfulness. They merely represent the situations which are most often encountered in practice and which have therefore come to be known as easily recognisable grounds for the exclusion of unlawfulness. They do not cover the whole field of the subject of this discussion, namely the demarcation of lawful and unlawful conduct.

The following is an imaginary example of a situation where X's act, which at first sight seems to "break the law", is in fact not unlawful, despite the fact that it does not fall under one of the recognised grounds of justification (which will be discussed below): X is the owner of an attractive guest house next to a tarred road. The success of her business depends upon the travelling public being able to reach her property via the tarred road. Over the years the provincial authorities responsible for keeping the road in good repair neglect their duties, with the result that the road becomes near to impassable. X's complains and asks the

---

4 *I* 1976 1 SA 781 (RA) 788; *Robson* 1991 3 SA 322 (W) 333E; *Clarke v Hurst supra* 653B, 659B–C; *Fourie supra* 681*a–b; Engelbrecht* 2005 2 SACR 41 (W) 54*b*, 106*a*.

5 See s 1 of the Constitution, Act 108 of 1996.

6 *Engelbrecht* 2005 2 SACR 41 (W) par 332.

authorities to repair the road, but the request falls on deaf ears. At last she and people in her employ break the existing pieces of tar, remove them and retar the impassable piece or road. As a result of her actions she is charged with the crime of malicious injury to property, in that she has destroyed parts of the road belonging to the provincial authority. She can then successfully rely on a plea that her conduct was lawful. It accorded with the community's perception of justice or the legal convictions of the community. It caused more benefit to society than any conceivable harm, and was therefore "socially adequate".

9 "Unlawful" does not mean "contrary to definitional elements of the crime" It was emphasized above that the mere fact that the act accords with the definitional elements does not necessarily mean that it is also unlawful. It is therefore incorrect to define unlawfulness merely as an infringement of a criminal-law provision or as compliance with the definition of the crime. Such a statement confuses the unlawfulness with the definitional elements.

The definitional elements contain no references to grounds of justification. If the legislature creates a crime, it usually merely stipulates that any person who commits a certain type of act in certain circumstances (such as possessing a certain type of drug without permission, driving a vehicle recklessly on a public road, or pointing a firearm at somebody else) commits a crime. Normally the legislature does not add words such as "unless the accused acted in self-defence, necessity, an official capacity or in obedience to orders". Nevertheless it is generally recognized that no court will convict X of such statutory offences if she in fact acted in private defence (which includes self-defence) in a situation of emergency (necessity) or in an official capacity – to mention just some of the recognised grounds of justification. Why would a court not convict X in these circumstances? After all, her conduct falls *within* the description of the conduct proscribed in the statute. The reason is that the court is not bound to consider exclusively the requirements contained in the "letter of the law", but also applies rules or principles that go beyond the definitional elements or "letter of the law". These rules relate to unlawfulness, for the concept of unlawfulness is based upon values which go beyond the rules or requirements expressed in the definitional elements.

Conduct which is, according to general notions of society, completely acceptable, does not require any justification. That which is justified must necessarily be conduct which is recognisable as a violation of a norm. One can identify the violation of a norm by having regard to the definitional elements of the applicable crime.

10 Subjective considerations also relevant in establishing unlawfulness It is sometimes alleged in South African legal literature that the test to determine unlawfulness is objective and that X's intention therefore does not come into the picture when determining unlawfulness (or wrongdoing).[7] This view is incorrect. It was pointed out above[8] that X's will (colourless intention) forms part of the definitional elements; the latter comprises both objective and subjective

7 *Goliath* 1972 3 SA 1 (A) 11B–C; *Ex parte Minister van Justisie: in re S v SAUK* 1992 4 SA 804 (A) 808F–G.

8 *Supra* III A 7–8.

factors. The concept of unlawfulness is an evaluation of the act which corresponds to the definitional elements. Since the latter contains both objective and subjective elements, it follows that the former must also be coloured by subjective factors. In order to determine whether an act is unlawful, it is necessary not merely to establish that, viewed from the outside (ie, objectively), the act is in conflict with the legal order, but also to consider X's will or intention.

The presence of subjective factors in wrongdoing (unlawful act) is evidenced not merely by their presence in the definitional elements, but also by the subjective factors which must be taken into consideration in order to determine whether there is a ground of justification. *A person who relies on a ground of justification must be aware of the circumstances which render her conduct lawful*. She must consciously act lawfully. If the circumstances justifying her conduct are objectively present but she is not subjectively conscious of their existence, and her conduct is aimed at acting outside the justificatory circumstances, her conduct is unlawful. In short, X's act is justified not merely by objective, but also by subjective factors.[9]

11 Difference between unlawfulness and culpability From the foregoing it is clear that to describe unlawfulness as "objective" and culpability as "subjective" is misleading and confusing. If one must employ the sometimes ambiguous

---

9 *Fletcher* 557: "The consensus of Western legal systems is that actors may avail themselves of justifications only if they act with a justificatory intent"; 564: "the act of 'exercising' or 'acting under' a privilege [a ground of justification] presupposes knowledge of the justifying circumstances". See also *Wessels* ch 8 par 275–280; *Maurach-Zipf* ch 25 par 24 ff; *Roxin* ch 14 par 94–97; *Jescheck* 294 ff; Mousourakis 1998 *Stell LR* 165 173. The following examples illustrate this principle:

(*a*) Y, a medical doctor, on the pretext that this amounts to necessary medical treatment, decides to murder X by injecting air into her veins. Just as Y is about to insert the point of the needle into X's body, X, who is unaware of Y's intention, decides to assault Y. Only afterwards does X discover that if she had not assaulted Y at that particular moment, Y would have killed her. In such a case X's conduct is unlawful; on a charge of assault she cannot rely on private defence as a justification for her conduct. She had no intention of defending herself against an unlawful assault. There is no such thing as unconscious, fortuitous or accidental private defence. X must therefore intend to act in private defence. See *infra* IV B 4 (d) and the authorities referred to there.

(*b*) A person who relies on necessity as a ground of justification must be conscious of the fact that an emergency exists, and that she is therefore acting in necessity. If X throws a brick through the window of Y's house in order to break into it, and it later transpires that by so doing she has saved Y and her family, who were sleeping in a room filled with poisonous gas, from certain death, X cannot rely on necessity as a defence. See *infra* IV C 6 (*f*) and the authorities referred to there.

(*c*) The reason why the person who acts on the grounds of presumed consent (spontaneous agent or *negotiorum gestor*) does not act unlawfully is to be found in her intention. Eg X moves her neighbour Y's furniture to her own house, without Y's consent. This would normally be theft, but if X moves the furniture in order to save it from flood waters which are threatening Y's house while she is away on holiday, her conduct is lawful. See *infra* IV E 3.

(*d*) In *I* 1976 1 SA 781 (RA) the court held that to peep through a window at somebody else undressing, is not unlawful if it is done with the sole and *bona fide* intention of obtaining evidence of adultery, in order to use such evidence in a later suit of divorce.

terms "objective" and "subjective" in describing the difference between unlawfulness and culpability, the difference, in my opinion, is best described as follows: Unlawfulness is "objective" in the sense that the act is judged in accordance with a *generally applied* criterion, namely the legal provisions which are directed at all people on an equal basis, that is, without differentiating between, for example, children, adults, mentally disordered people, mentally healthy people, blind people and mute people. On the other hand, what is judged according to this objective (generally applicable) criterion, namely the human act corresponding to the definitional elements, contains both external (objective) and internal (subjective) factors.

Furthermore, as far as the general criterion for unlawfulness is concerned, it must be remembered that just as an ambulance's screaming siren is addressed to everybody, even though some people may be deaf, or mentally disordered, or be children, so the provisions of the law apply to all persons regardless of their individual characteristics. This is the reason why it is equally unlawful for a rich and a poor person to commit theft, and why it is just as unlawful for a psychopath who finds it very difficult to restrain his sexual desires as it is for a normal person to commit a sexual crime. All acts, no matter by whom committed, which are contrary to the material content of the law are therefore unlawful. This means that *even children and mentally disordered persons act unlawfully if their conduct is contrary to the law*.[10] It is only when one comes to the question of culpability that attention is paid to the perpetrator as a person; to her individual aptitudes, talents, weaknesses and insight.[11] In short, unlawfulness may be described as a judgment or an evaluation of the act, and culpability as a judgment or evaluation of the perpetrator.

12 Erroneous belief in the existence of ground of justification: conduct remains unlawful The subjective factors which have to be taken into consideration when deciding whether an act is lawful were emphasised above. However, just as it is wrong to see unlawfulness as consisting of merely objective ("external") factors, it is similarly wrong to place all the emphasis on subjective factors and to forget about the objective ones. No ground of justification can exist in the absence of objective factors, and for this reason X's conduct remains unlawful if she subjectively thinks that there is a ground of justification whereas in fact there is none. A so-called "putative ground of justification" is therefore in fact no ground of justification. A putative ground of justification is one that does not legally exist but which X wrongly believes to exist. It "exists" in X's imagination only. X mistakenly believes that her conduct is covered by a ground of justification.

The following example illustrates this principle: Y wants to play a practical joke on X and aims a toy pistol at her. X thinks that Y is threatening her with a

---

10 Williams *Textbook* 502; *Jescheck and Weigend* 236–238; *Van der Westhuizen* 422.

11 *Fletcher* 458, 761–762: "Claims of justification lend themselves to universalisation. That the doing is objectively right (or at least not wrongful) means that anyone is licensed to do it . . . Excuses, in contrast, are always personal to the actor". See also Le Roux 1996 *Obiter* 247 256; *Jesheck and Weigend* 244; *Schönke-Schröder* n 48 *ad* s 13; Eser in *Eser and Fletcher* 1 26 ff, especially 61; Robinson 1982 *Columbia Law Review* 199 203, 213; Fletcher 1985 *Harvard Law Review* 949; Fletcher 1974 *Southern California Law Review* 1269 1305.

real pistol and in turn fires at Y, killing her. X's act is unlawful because there is no unlawful attack upon her. She can, however, rely on mistake (absence of intention) as a defence.

13 Proving unlawfulness: onus of proof In terms of the rules relating to the law of evidence the state (prosecution) bears the onus of proving beyond reasonable doubt that X's conduct not only corresponded to the definitional elements, but also that it was unlawful. This means that if in the course of a trial the question arises whether X's conduct is covered by a ground of justification the onus is on the state to prove that her conduct cannot be justified.

B PRIVATE DEFENCE

1 Definition A person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her or somebody else's life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to the attack.[12]

2 General The first ground of justification, private defence, has ancient roots. It can rightly be alleged that this ground of justification has no history, because it exists from the beginning of time. In the course of history it has therefore not gained its place, but merely maintained it. Natural justice dictates that every person has a right to defend herself against an unlawful attack.[13] In daily parlance this ground of justification is often referred to as "self-defence", but this description is too narrow, since it is not only persons who defend themselves but also those who defend others who can rely upon this ground of justification.

There are two *rationes* or theories for the existence of private defence. The first is the *protection theory*, which emphasises each person's right to defend oneself or another against an unlawful attack. The second is the *upholding-of-justice theory*.[14] The idea underlying this theory is that people acting in private defence perform acts whereby they assist in upholding the legal order. Private defence is meant to prevent justice from yielding to injustice, because private defence comes into play only in situations in which there is an unlawful attack. In the primitive societies of the past, where there was no organised police force to uphold the law, the right to private defence played a very important role. On the emergence of an organised state authority the field of operation of private defence became more restricted, so that today it can only be applied in certain defined circumstances. It stands to reason that it is impossible for the state authorities to protect the individual at all times against unlawful attack, and for that reason every individual today still has the right to "take the law into her own

12 *Engelbrecht* 2005 2 SACR 41 (W) par 228; *Steyn* 2010 1 SACR 411 (SCA) par 16.

13 *D* 9 2 4; *D* 9.2.45.4; *D* 16.1 27. This right is also explicitly recognised in s 2(2) of the European Convention of Human Rights as well as s 51 of the Charter of the United Nations.

14 On the two *rationes* underlying private defence, see Snyman 2004 *SACJ* 178.

hands", so to speak, in private defence, and temporarily to act on behalf of the state authority in order to uphold the law.[15]

For the purposes of classification of the requirements of the defence it is convenient to divide the requirements of private defence into two groups. The first comprises the requirements with which the attack, against which a person acts in private defence, must comply; the second, the requirements with which the defence must comply.

3 Requirements of the attack

(*a*) *The attack must be unlawful*[16] A person cannot act in private defence against lawful conduct. For this reason a person acts unlawfully if she attacks a police officer who is authorised to arrest a person or is authorised by a warrant to search a house. If the police officer is not authorised by law to perform a particular act, or if she exceeds the limits of her authority, she may be resisted.[17]

Private defence against private defence is not possible, but private defence against an act in which the limits of private defence are exceeded is possible, because the latter act is then unlawful. For example, X assaults Y lightly by trampling on her (Y's) foot. Y reacts by attacking X with an axe. Since Y's act is out of proportion to Y's initial attack on her, her (Y's) act is unlawful. X may then act in private defence against this attack. X may therefore rely on private defence even if she (X) was the original aggressor.

X cannot rely on private defence is she kills Y in the course of a pre-arranged duel. An example of such a case is *Jansen*.[18] X and Y decided to settle their differences by a knife duel. During the fight Y first stabbed X, and then X stabbed Y in the heart, killing him. The court held, quite correctly, that X could not rely on private defence, and convicted him of murder. X's averting of the blow was merely part of the execution of an unlawful attack which he had planned beforehand.

An unlawful attack presupposes a voluntary human act. Involuntary muscular movements by Y therefore do not qualify as an unlawful attack. If X directs her attack against human conduct which is involuntary, as where Y walks in her sleep, she does not act in private defence, but may rely on the ground of justification known as necessity.

As the law does not address itself to animals, and animals are therefore not subject to the law, they cannot act unlawfully. Therefore a person does not act in private defence if she defends herself against an attack by an animal, but here she can rely on the ground of justification known as necessity.[19] If, on the other

---

15 *Engelbrecht* 2005 2 SACR 41 (W) par 350, discussed by Grant 2007 *SACJ* 1

16 *Goliath* 1972 3 SA 1 (A) 10; *Kibi* 1978 4 SA 173 (E) 180; *Snyders v Louw* 2009 2 SACR 463 (C) 469-470.

17 *Moloy* 1953 3 SA 659 (T) 661; *Folkus* 1954 3 SA 442 (SWA) 445.

18 1983 3 SA 534 (NC).

19 *Infra* IV C. In *Nkhumeleni* 1986 3 SA 105 (V) it was held that if X assaults Y, and Y's dog spontaneously comes to his master's assistance and attacks X, the dog's conduct, like that of its master, is lawful and X cannot then claim that his stabbing of the dog (in order to defend himself) was justified by necessity. It would perhaps have been more correct to say that the dog's conduct was merely an extension of his master's lawful conduct, or an instrument in his hands.

hand, a person uses an animal as an instrument of attack, the person defending herself does act in private defence, because here there is an unlawful attack by a human being.

There are three conditions with which the requirement presently under discussion need *not* comply. They are the following:

Firstly, the assault need not be committed culpably. It is therefore also possible to act in private defence against somebody who lacks criminal capacity,[20] such as a mentally disordered person,[21] a child, or somebody who acts in error. For example, Y arrests X, while under the impression that she is entitled to do so. Y is in fact not entitled to do so. Y's act, although not committed culpably, is unlawful and X can act in private defence against it.

Secondly, the attack need not be directed at the defender. X may equally act in private defence to protect a third person Z (somebody other than the attacker), even if there is no family or protective relationship between X and Z.[22] However, there is no private defence if Z does not wish to be helped and this wish of hers is recognisable to X.[23]

Thirdly, the attack need not necessarily consist in a positive act (*commissio*), although in fact it nearly always does. Although unlikely to occur often, an omission (*omissio*) ought also to qualify as an "attack", provided the other requirements of private defence are present. An example in this respect is that of the convict who assaults prison warders and escapes when her term of imprisonment has expired but she has not been released.

In *Engelbrecht*,[24] a case in which X alleged that she had killed Y in private defence, the trial judge held that Y's attack need not necessarily be physical in nature, but that it may also take the form of psychological and emotional abuse, as when a wife is emotionally harassed by her husband over a prolonged period of time. However, the two assessors in this case did not agree with the judge that X, who had killed her husband after being abused by him for a long time, acted in private defence. It is submitted that the trial judge in this case bent the rules of private defence too far, that her interpretation of the law was incorrect and that the assessors' view of the matter was correct. To view, in the words of the trial judge, "emotional abuse, degradation of life, diminution of dignity and threats to commit any such acts" by Y as an unlawful attack, giving X the right to kill Y, will result in the rules relating to private defence becoming too vague, and lead to misuse of private defence as a ground of justification. It is submitted that the legal convictions of society do not allow a wife who is abused by her husband (as happened in this case) to smother her husband with a plastic

---

20 *Goliath* 1972 3 SA 1 (A) 30A.
21 *K* 1956 3 SA 353 (A).
22 *Patel* 1959 3 SA 121 (A) 123; *Mokoena* 1976 4 SA 162 (O) 163.
23 *Schönke-Schröder* n 25 *ad* s 32; *Maurach-Zipf* ch 26 pars 50–54. Care should be taken not to deprive private defence of its character by granting every individual the right to play policeman. Thus one cannot by acting in private defence protect society as a whole. The self-appointed protector of morals who arrogates to herself the right to confiscate "immoral" magazines in order to "protect" others who may read them cannot rely on private defence.
24 2005 2 SACR 41 (W) par 344.

bag while he was sleeping – especially not if the evidence shows (as the assessors indeed found) that there were other less lethal ways in which X could have escaped Y's abuse.

(*b*) *The attack must be directed at an interest which legally deserves to be protected* Most often a person acts in private defence in protection of her life or bodily integrity, but in principle there is no reason why X cannot act in private defence in protection of other legal interests as well. The courts have accordingly recognised private defence in protection of property,[25] dignity,[26] freedom of movement (prevention of unlawful arrest),[27] the private use of one's own property (prevention of trespassing onto property),[28] and sexual integrity (prevention of rape),[29] as well as private defence in order to prevent arson[30] or *crimen iniuria*,[31] but not private defence against an attempt to gain access to and control of a child who was in the custody of a divorced parent.[32]

(*c*) *The attack must be imminent but not yet completed*[33] X may not attack Y merely because she expects Y to attack her at some time in the future. She may attack Y only if there is an attack or immediate threat of attack by Y against her; in this case it is, of course, not necessary for her to wait for Y's first blow – she may defend herself by attacking Y, with the precise object of averting that first blow.[34]

Private defence is not a means of exercising vengeance, neither is it a form of punishment. For this reason X acts unlawfully if she attacks Y when Y's attack upon her is already something of the past.[35]

---

25 *Ex parte die Minister van Justisie: in re S v Van Wyk* 1967 1 SA 488 (A) (in later footnotes reference to this important case will simply be to "*Van Wyk*"); *Texeira* 1980 3 SA 755 (A) 765A; *Mogohlwane* 1982 2 SA 587 (T).

26 *Van Vuuren* 1961 3 SA 305 (E).

27 *Kleyn* 1927 CPD 288; *Karvie* 1945 TPD 159.

28 *Thomas* 1928 EDL 401; *Botes* 1966 3 SA 606 (O).

29 *Mokoena* 1976 4 SA 162 (O), and cf *Van Wyk supra* 497A–B.

30 Cf *Van Wyk supra* 496E, 498A, 504A.

31 Cf *Ndalangisa* 1969 4 SA 324 (E).

32 *Kamffer* 1965 3 SA 96 (T) 100. It is submitted that the trial judge in *Engelbrecht* 2005 2 SACR 41 (W) par 345 went too far when she declared that even "quality of life, her home, her emotional and psychological wellbeing, her freedom as well as those interests of her child(ren)" are protected by the right to private defence. In protection of, among others, these interests, X had killed her husband. For more particulars of this case, see the text *supra* par 3(*a*).

33 *Van Wyk* 1967 1 SA 488 (A) 504E–F; *Mokgiba* 1999 1 SACR 534 (O) 550; *Govender v Minister of Safety and Security* 2009 2 SACR 87 (D&C).

34 *Ngubane v Chief Executive Director of Emergence Services, Ethekwini Metropolitan Services* 2013 1 SACR 48 (KZD) par 29.

35 *Mogohlwane* 1982 2 SA 587 (T). It is submitted that the court in *Engelbrecht* 2005 2 SACR 41 (W) par 349 went too far when it declared that "where abuse [by Y, the husband, on his wife, X] is frequent and regular such that it can be termed a 'pattern' or a 'cycle' of abuse then it would seem that the requirement of 'imminence' should extend to encompass abuse which is 'inevitable'". In this case X killed her husband Y by smothering him with a plastic bag while he was sleeping, after she had suffered abuse from him for some time. It is submitted that Y's abuse of X cannot be construed as an immediate threat upon X, giving X the right to kill him, especially in view of the fact that (as the two assessors indeed found) the evidence showed that there were other less harmful ways in which X could have escaped the abuse.

When automatic defence mechanisms are set up (such as a shotgun which is rigged in such a way that it will go off in a shop during the night if a thief enters it), there is not yet a threatened attack at the time when they are set up, but the law recognises that to set up and trigger such mechanisms may constitute valid private defence in certain narrowly defined circumstances.[36] Their setting up must be viewed as a precautionary measure or as a preparation for an act of defence. The latter only takes place when the thief sets foot in the trap.

4 Requirements of the defence

(*a*) *It must be directed against the attacker* If Y attacks X, X cannot then direct her act in private defence against Z. However, an attack on Z by X may in certain circumstances be justified by necessity, as will be explained below.[37]

(*b*) *The defensive act must be necessary* in order to protect the interest threatened. The execution of the defensive act must be the only way in which the attacked party can avert the threat to her rights or interests. If, on the termination of a lease, the obstinate lessee refuses to leave the house, the lessor is not entitled to seize her by the throat and eject her from the premises. She can protect her right and interests by availing herself of the ordinary legal remedies, which are to obtain an ejection order from a court and possibly also to claim damages. The basic idea underlying private defence is that a person is allowed to "take the law into her own hands", as it were, only if the ordinary legal remedies do not afford her effective protection.[38] She is not allowed to arrogate to herself the functions of a judge and a sheriff. On the other hand, a threatened person need not acquiesce merely because she will be able to claim damages afterwards. The present rule merely means that the threatened person may not summarily take the law into her own hands if the usual legal remedies afford her adequate protection.

Excursus: Is there a duty to flee? A question that arises in this connection is whether the person who is being attacked must flee if she can do so in order to ward off the attack. Thus far the courts have not yet unequivocally decided whether or not such a duty to flee exists. There are a number of instances in which it can with reasonable certainty be accepted that there is no duty on the attacked party (X) to flee. These instances are the following:

Firstly, it would seem that if X can ward off the attack by merely *injuring* Y instead of killing her, she may do so. It is only in cases where X *kills* Y that there is uncertainty in our law whether or not there is a duty on X to flee.[39]

Secondly, our courts recognise the principle that if it is dangerous for X to flee in the sense that she would then expose herself to, for example, a stab or a shot in the back, she need not flee, but may act pro-actively and put her attacker out of action.[40] *The law does not expect a person to gamble with her life by*

---

36 *Van Wyk supra* 498.
37 *Infra* IV C.
38 *Engelbrecht* 2005 2 SACR 41 (W) par 351.
39 *La Fave* 547–548: "It seems everywhere agreed that one who can safely retreat need not do so before using non-deadly force."
40 *Zikalala* 1953 2 SA 568 (A) 573; *Texeira* 1980 3 SA 755 (A) 765 (C); *Ntsomi v Minister of Law and Order* 1990 1 SA 512 (C) 527; *Mothoana* 1992 2 SACR 383 (O) 385; *Snyders v Louw* 2009 2 SACR 463 (C) par 25; *Steyn* 2010 2 SACR 411 (SCA) par 24.

turning her back on her attacker and merely hoping that she will not be hit by a bullet or be stabbed in the back with a knife by the attacker.[41] It is the attacker, who unlawfully and intentionally launches the attack, who carries the risk of injury or death, and not the attacked party.

Thirdly, the law does not expect X to flee from her own house if she is attacked there.[42] Her house or place of residence is her last refuge – her "castle" – where she may protect herself against any unlawful attack.

Fourthly, it is not expected of a law enforcement officer, such as a police officer, to flee if she is being attacked while lawfully performing her duties.[43]

Fifthly, there is much to be said for the view that if X is attacked by a person lacking criminal capacity (such as a mentally ill person, a child or an extremely intoxicated person), and she can escape danger by fleeing, she should do so, because in such cases it is not disgraceful to flee, and the maintenance of law is not thereby endangered.[44]

However, the question arises whether X should flee from her attacker in cases not falling under one of the above-mentioned categories, such as when X is attacked by Y when both she and Y find themselves in a narrow alley and both of them carry weapons.

Although the courts have not yet unequivocally held that in such circumstances there is indeed a duty on X to flee, there are indications in our case law that create the impression that the courts in fact expect her to flee.[45]

---

41 This view was endorsed by the Supreme Court of Appeal in *Steyn* 2010 1 SACR 411 (SCA) par 21. See also Hoctor 2010 *SACJ* 125 127 in his discussion of this judgment, and *Ngubane v Chief Executive Director of Emergency Services, Ethekwini Metropolitan Services* 2013 1 SACR 48 (KZD) par 27.

42 *Engelbrecht* 2005 2 SACR 41 (W) par 354; S 3.04(2)(*b*)(iii) of the American *Model Penal Code*.

43 *Ntsomi v Minister of Law and Order supra* 528 530.

44 Snyman 2004 *SACJ* 178 186; *Jescheck and Weigend* 341.

45 *Zikalala* 1953 2 SA 568 (A) 571–572; *K* 1956 3 SA 353 (A) 358H; *Patel* 1959 3 SA 121 (A) 123F; *Mnguni* 1966 3 SA 776 (T) 779A; *Dougherty* 2003 2 SACR 36 (W) 50. The latter decision is completely incorrect. It was a classic case of private defence, and the court should have upheld X's plea of private defence. Had X not shot Y, Y and his co-perpetrator would, in all probability, have overpowered and killed X. To expect of X, as the court apparently did, to turn his back on his attackers and run away, amounts to the court expecting of X to gamble with his life. X was one man alone against two attackers. X was no longer young (he was 63), while Y and his co-perpetrator were about 31 and 25 years of age. They had already shortly before attacked some of the other people at X's party, and they did not approach X with any peaceable motive. When they came close to X, he acted entirely reasonably by first firing a warning shot. It was only when Y was approximately 3,5 metres from X that X shot him. It would seem that the court was grasping at straws in an attempt to find reasons why X should not have shot Y, such as the far-fetched argument that X was not a trained shot, and did not yet have any training in the use of firearms (44*b*). Since when may only people trained in the use of firearms defend themselves in private defence? And what did Y's clothing, that is, the fact that Y was not wearing a shirt (50*b*) have to do with the question whether X was entitled to shoot Y in private defence? For an analysis and scathing criticism of this decision, see Snyman 2004 *THRHR* 325. An aspect of Snyman's criticism of this decision was quoted with approval in *Engelbrecht* 2005 2 SACR 41 (W) par 329, and described as "convincing". The decision in *Engelbrecht* can in fact be construed as one in which it was held that there was *no* duty on X to flee. See in particular pars 354–355.

It is submitted that there is *no duty on the attacked party to flee.*[46] To recognise a duty to flee is to deny the very essence of the present defence. Private defence deals with the defence of the legal order, that is, the upholding of justice. Fleeing is no defence; it is a capitulation to injustice. Why must justice yield to injustice? In private defence the attacked party (X) acts as upholder of the law, since the state authority (police) is not present to protect her. Just as there is no duty on a police officer to run away from a criminal, there is no duty on X to flee from a person (Y) who unlawfully attacks her in circumstances where the police are not present to protect her. A legal system such as ours, that expects of its subjects to respect and promote the rule of law, cannot simultaneously expect of them to flee from an unlawful attack, since that would amount to expecting of them to turn their backs on the rule of law in order to let the rule of injustice carry the day. German criminal law theory, in which the concept of private defence has been analysed in depth, does not recognise any duty on X to flee.[47] Modern authors on Anglo-American law likewise criticise the recognition of any duty to flee.[48]

(*c*) *There must be a reasonable relationship between the attack and the defensive act* It stands to reason that there ought to be a certain balance between the attack and the defence. After all, you may not shoot and kill another person who strikes you with only a fly-swatter. It is not feasible to formulate the nature of the relationship which must exist between the attack and the defence in precise, abstract terms. Whether this requirement for private defence has been complied with is in practice more a question of fact than of law.[49]

A clearer picture of this requirement emerges if one considers the elements between which there need *not* be a proportional relationship:

Firstly, there need not be a proportional relationship between *the nature of the interest threatened and the nature of the interest impaired.*[50] The attacked party may impair an interest of the assailant which differs in nature from that which she is defending. The following examples illustrate this point: If Y threatens to deprive X of a possession belonging to X, X is entitled to assault Y in private defence in order to protect her possession; this means that X may, in order to protect her own property, impair an interest of Y which is not of a proprietary nature, namely Y's physical integrity. In *Ex parte die Minister van*

---

46 For a more detailed discussion of the subject, see Snyman 2004 *SACJ* 178 184–187. The judgment in *Snyders v Louw* 2009 2 SACR463 (C) is largely compatible with the approach that there is no duty to flee. See especially par 24–26. In this case Y tried to break into X's car which was parked in front of his house. X confronted Y with a firearm but Y continued his aggressive behaviour towards X. The court correctly rejected the argument that X should have fled into his house (par 25).

47 *Jescheck and Weigend* 343–344; *Schönke-Schreuder* n 40 *ad* s 32; *Roxin* ch 15 par 2, 49; *Jakobs* 395.

48 *Allen* 194 remarks: "If there were a duty to retreat a person would never be able to use pre-emptive force." The American author Dressler 227 declares: "The retreat rule would have a counter-utilitarian effect; it would embolden aggressors, and innocent people, if required to retreat, might be killed while fleeing."

49 *Trainor* 2003 1 SACR 35 (SCA) 41*h–I*; *Snyders v Louw supra* 472-475.

50 *Ex parte die Minister van Justisie : in re S v Van Wyk* 1967 1 SA 488 (A) 496–497.

Justisie: in re S v Van Wyk[51] the Appeal Court held that X may in extreme circumstances even kill Y in order to protect her property. It is submitted that this judgment is compatible with the Bill of Rights in the Constitution and therefore valid even today, provided, of course, that the other requirements for private defence are also complied with, such as that, the property must be of very great value to X and that X must first have tried other, less harmful ways to ward off the attack, to no avail.[52] Furthermore, X may kill Y in private

---

51 1967 1 SA 488 (A). In this case X, a shopkeeper, whose shop had been broken into repeatedly, took extensive precautionary measures to safeguard his store, without success. At last, in desperation, he rigged up a shotgun in such a way that a person breaking in would trigger it off if he entered by a certain window or went behind the counter to take goods. One night an intruder broke in, set off the contrivance and received a fatal wound. On a charge of murder X the shopkeeper invoked private defence and the court upheld his defence. Some of the court's most important findings were the following: Where both X's possessions and her life or limb are threatened by Y, Y may be killed, as where Y is a thief whom X catches in her house during the night, and where it is clear that Y will offer resistance rather than leave the house empty-handed (496E–H). However, one may also kill a thief who is running away with stolen goods, provided this is the only way in which the goods can be retained (496–498). The court disposed of the objection that there was a disproportionality between life and property by pointing out that it is not always practicable to weigh the nature of the interest threatened against the nature of the interest which is actually impaired (496–497, 503–504). There must not be a less harmful method available to X of retaining her property (497–498). Eg, if she knows that she can recover the goods at a later stage, she may not shoot (498A). In addition, she may shoot only if she has first issued a warning (498B–C, 505A, 510C–D) where this is reasonably practicable. The protected possessions must also not be of trifling value (498A, 503H). The principles enunciated in *Van Wyk* were later applied in *Mogohlwane* 1982 2 SA 587 (T).

52 It is submitted that the decision is compatible with the Constitution, provided it is clear from the facts that X's act was really the *ultima ratio* – the very last alternative – to protect her property. X has, of course, impaired Y's right to life, but this impairment is reasonable and justifiable. It is always reasonable and justifiable for someone whose rights are threatened by unlawful conduct, to ward off such a threat, if need be by killing her assailant. The same considerations apply here as those set out in the text in support of the rule that the law can never expect the attacked party to flee. Maré in *Bill of Rights Compendium* 2A–13 is also of the opinion that the decision in *Van Wyk* is not in conflict with the Constitution, but Ally and Viljoen 2003 *SACJ* 121 and apparently also *Burchell and Milton* 254 ("life must be prized above property, and *Van Wyk*'s days are now numbered") argue that the decision is incompatible with the Constitution. It is submitted that this latter view is wrong. Consider the following example: in the course of a mass demonstration, demonstrators decide to loot shops which happen to be near them. X is the owner of a jewellery shop. The contents of the shop constitute her whole life's possessions. Demonstrators smash the windows of her shop with iron bars, force the burglar proofing open, burst into the shop and start stealing the goods. X warns them that she will shoot them if they continue, and also fires warning shots into the air, all to no avail. If X is not allowed to kill a plunderer, it means that the law expects her to stand with folded arms and look on as they rob her of all her life's possessions. It also means that the plunderers have a "right to steal" which is stronger than X's right to protect her life's property. Why must justice yield to injustice? And if X in this situation may not kill the thief, must one then accept that a woman who is about to be raped may also not kill her would-be rapist? (Quite apart from this, experience – the alarming murder rate – in this country has taught that the so-called "sacrosanct right to life" is more a chimera, an abstract theoretical concept, than a concrete instrument of protection for innocent citizens.) In German criminal law theory it is generally accepted that, despite the protection of rights and values flowing directly or indirectly from the provisions of the German *Grundgesetz*

[*continued*]

defence, not only if her life is endangered by Y's attack on her, but also in order to ward off *serious* bodily injury, provided, of course, X cannot ward off the threat to her physical integrity in any other way than by killing Y.[53] If Y threatens to rape a woman X, X may defend her chastity even by killing Y.[54] The nature of the interest protected and the interest impaired may therefore be dissimilar. However, this rule must be tempered by the qualification that in cases of extreme disproportion between interests, reliance on private defence may be unsuccessful.[55]

Secondly, it is not required that there be a proportional relation between the *weapons or means used by the attacker and the weapons or means used by the attacked party*. If the person attacked may not defend herself with a different type of weapon from the one used by the attacker, it follows that the attacker has the choice of weapon, and such rule would obviously be unacceptable.[56] X may ward off an attack on her by Y by shooting and killing Y even though Y has no weapon, because one person is capable of killing another merely by using her hands. This is especially the case if Y is young and strong whereas X is physically relatively weak.

Thirdly, it is not required that there be a precise proportional relation between the *value or extent of the injury inflicted or threatened to be inflicted by the attacker and the value or extent of the injury inflicted by the defending party*.[57] The proportionality need not be precise; it is sufficient if it is approximate. What an approximate proportionality is depends upon the facts of each case. One does not, as a referee in a boxing match would do, count the exact amount of blows executed by the attacked party and then compare it to the amount of blows executed by the assailant. In short, precise retribution does not serve as a basis for deciding whether a person can rely on private defence.[58]

It is submitted that the furthest one is entitled to generalise, is to require that there should be a reasonable relationship between the attack and the defensive act, in the light of the particular circumstances in which the events take place. In order to decide whether there was such a reasonable relationship between attack and defence, the relative strength of the parties, their sex and age, the means they have at their disposal, the nature of the threat, the value of the interest threatened, and the persistence of the attack are all factors (among others) which must be taken into consideration.[59] One must consider the possible

---

as well as from s II of the European Convention of Human Rights, X does have the right in extreme circumstances to kill another in protection of her property – *Jesheck and Weigend* 343; *Baumann* 323; *Roxin* 678–679; *Wessels* 97; *Schönke-Schröder* n 46–50 *ad* s 32; *Kühl* ch 7 par 118; *Maurach-Zipf* ch 26 par 31.

53 *Jackson* 1963 2 SA 626 (A); *K* 1956 3 SA 353 (A) 359; *T* 1986 2 SA 112 (O) 128D–E.

54 *Van Wyk supra* 497A–B; *Mokoena* 1976 4 SA 162 (O) 163.

55 *Van Wyk supra* 498B.

56 *Ntsomi v Minister of Law and Order* 1990 1 SA 512 (C) 529C–D.

57 *Van Wyk supra* 496–497

58 *Van Wyk supra* 497B.

59 *T* 1986 2 SA 112 (O) 129; *Trainor* 2003 1 SACR 35 (SCA) 41–42; *Steyn* 2010 1 SACR 411 (SCA) par 19, discussed by Walker 2012 *SACJ* 84. It is submitted that the court in *Engelbrecht* 2005 2 SACR 41 (W) par 357 went too far when it stated that a court should also take into consideration factors such as "gender socialisation and experiences" (whatever this may mean) between the parties, ". . . including power relations on an economic,

[*continued*]

means or methods which the defending party had at her disposal at the crucial moment. If she could have averted the attack by resorting to conduct which was less harmful than that actually employed by her, and if she inflicted injury or harm to the attacker which was unnecessary to overcome the threat, her conduct does not comply with this requirement for private defence.[60] If, for example, the attacked party could have overcome the threat by using her fists or by kicking the assailant, she may not use a knife, let alone a firearm. However, it is wrong to expect the attacked party, by choosing a less dangerous method, to expose herself to any risks.[61]

Assume that X, sleeping in her home, is woken in the middle of the night by a burglar Y, who approaches her room or that of a family member. May X summarily shoot Y in order to kill her, or must she first ask Y to identify herself and state the purpose of her visit, in order to decide what, objectively, the appropriate defensive measures would be in the circumstances? Must she first try to arrest Y and then call the police? It is submitted that in such a situation X is entitled summarily to resort to the extreme measure of shooting at Y. Even if subsequent investigation reveals that Y was an unarmed or a physically weak person who could easily have been overpowered by X, and who wanted to steal, say, only a cell phone, it is extremely unlikely that any court would hold that X acted unlawfully in shooting at Y. A celebrated phrase emanating from English law reads "a person's home is her castle". Experience tells us that even a moment's hesitation by X in such circumstances might be fatal to X. To deny X the right to shoot in such circumstances is to require her to gamble with her life or that of the other people in the house, and the law cannot expect this of her.[62]

(*d*) *The attacked person must be aware of the fact that she is acting in private defence*[63] There is no such thing as unconscious or accidental private defence. This requirement is of more than academic importance, for two reasons.

---

sexual, social, familial, employment and socio-religious level . . . the impact upon the body, mind, heart, spirit of the victim . . ." Many of the factors mentioned by the court are too vague. Considerations such as the "mind, heart, spirit of the victim" unjustifiably drags subjective factors into an enquiry which is entirely objective. It would result in emotional people acquiring a right to kill where more unemotional people do not have it.

60 *Van Wyk* 1967 1 SA 488 (A) 501A; *Van Antwerpen* 1976 3 SA 399 (T); *Engelbrecht supra* par 357.

61 Cf the discussion *supra* IV B 4(*b*) of the question whether there is a duty on X to flee.

62 Even if a court holds that X cannot rely on private defence because objectively there was a less harmful way in which she could have overcome the danger, the court would in most cases refuse to convict X of murder if she shot and killed Y, on the following ground: although X acted unlawfully, she lacked intention because she honestly believed that her life or that of her family members were in danger. This means that there was no awareness of unlawfulness on her part and therefore no intention. For an explanation of how awareness of unlawfulness forms part of intention, see *infra* V C 23.

63 *Schönke-Schröder* n 63 *ad* s 32; *Jescheck and Weigend* 342–343; *Maurach-Zipf* ch 26 par 27; *Roxin* ch 15 par 129 ff; *Kühl* ch 6 par 10 ff; *Fletcher* 559–560; *Peters* 214, who declares: "opzet ligt ook besloten in de term *weer* van noodweer: men weert zich niet per ongeluk". The moment one tries to formulate the defence of private defence in abstract terms, one finds that it is necessary to use a phrase denoting subjective intention such as "in order to". The requirement set out in the text has also been recognised by South African writers. See Van Oosten 1977 *THRHR* 90 93; Labuschagne 1979 *SACC* 271 273; 1985 *De Jure* 155 158; *Badenhorst* 174; Morkel and Alberts 1984 *TRW* 104 105.

Firstly, it prevents private defence from being abused in situations which can be described as "provoked private defence". Example: X is looking for a pretext or an excuse to assault Y, whom she dislikes. She now intentionally provokes Y, in order to make her lose her temper and assault her (X). When this happens, X retaliates and attacks Y and then relies upon private defence. This is not true private defence. X's attack is unlawful, because X, who is really the attacker, means not merely to defend herself, but to be the aggressor.[64]

Secondly, private defence should be excluded in cases where it is pure coincidence that the act of defence is in fact directed at an unlawful attack. Example: X decides to kill Y, whom she dislikes, and shoots and kills her while she is sitting in a bus full of passengers. Only afterwards is it discovered that Y was an urban terrorist who was on the point of blowing up the bus and all its passengers with a hand-grenade. If X had not killed her in time, she (X) would have been killed herself in the explosion. X ought not to be allowed to rely on private defence. X never intended to act in private defence because she was completely unaware of Y's aggressive intentions.

5 Test for private defence If X thinks that she is in danger, but she is not, or that someone is attacking her unlawfully, but in fact the attack is lawful, the defensive measures she takes cannot constitute private defence. This does not mean that X is then necessarily guilty of murder or assault, as the case may be, because an unlawful act is not the only prerequisite for criminal liability. Culpability is also required and, as will be seen later,[65] X's mistake may well exclude culpability, so that she will not be liable for the crime. This situation is known as putative (or supposed) private defence and is, of course, not true private defence.

It is usually stated that the test of private defence is objective.[66] This proposition is acceptable, provided that the role of this "objective test" is merely to distinguish between actual private defence and putative private defence, as explained immediately above. However, if by "objective" is meant that X need not be aware of the fact that she is acting in private defence (requirement (*d*) above of the requirements of the defence) such a so-called "objective test" is unacceptable.

The courts sometimes state that, in order to determine whether X acted in private defence, one should ask whether the reasonable person in the circumstances in which X found herself would have acted in the same way (or, to put it differently, whether X *reasonably* believed that she was in danger).[67] Such an approach leads to the test of private defence (unlawfulness) being confused with the test of negligence (where one similarly has to enquire how the reasonable person would have acted). Upon closer scrutiny, however, it would appear that

---

64 *Smith and Hogan* 280; *Schönke-Schröder* n 54 *ad* s 32; *Maurach-Zipf* ch 26 par 41 ff; *Jescheck and Weigend* 346–347; *Kühl* ch 7 par 207 ff; *Jakobs* 403 ff.

65 *Infra* V C 14.

66 *Ntuli* 1975 1 SA 429 (A) 436; *Motleleni* 1976 1 SA 403 (A) 406C; *De Oliveira* 1993 2 SACR 59 (A) 63*i*; *Engelbrecht* 2005 2 SACR 41 (W) par 327; *Snyders v Louw* 2009 2 SACR 463 (C) 474.

67 *Patel* 1959 3 SA 121 (A) 123; *Motleleni* 1976 1 SA 403 (A) 406C–D; *Van Antwerpen* 1976 3 SA 399 (T) 401D; *De Oliveira supra* 63*i*.

the courts apply the reasonable person test here merely in order to determine whether X's conduct was reasonable in the sense that it accorded with what is usually acceptable in society.[68] In this way the criterion of the reasonable person is employed merely as an aid to determine whether X's conduct was lawful or unlawful. There can be no criticism of such an approach.

At the same time, the courts often emphasise that in determining whether X's conduct was reasonable (in other words lawful), the judicial officer should not judge the events like an armchair critic, but should to the best of her ability endeavour to place herself in the shoes of the attacked person at the critical moment, and keep in mind that such a person probably had only a few seconds in which to make a decision which was of vital importance to her. The court should then ask itself whether a reasonable person would also have acted in that way in those circumstances. A person who suffers a sudden attack cannot always be expected to weigh up all the advantages and disadvantages of her defensive act, and to act calmly.[69]

6 Exceeding the limits of private defence If the attacked party exceeds the limits of private defence by causing more harm or injury to the attacker than is justified by the attack, she acts unlawfully. She then becomes an attacker herself. In deciding whether X is then guilty of a crime, and if so, which crime, one must distinguish between cases in which she had killed Y and cases in which she had only injured Y.

(*a*) *Cases in which X kills Y* In order to determine whether X, who had exceeded the limits of private defence, is guilty of murder, culpable homicide or perhaps not guilty of any crime, one must simply apply the ordinary test to determine culpability (intention or negligence). The only difference between murder and culpable homicide is the form of culpability required for each: intention in the case of murder and negligence in the case of culpable homicide.

The position in our law is as follows:

(1) If X (the party who was originally attacked) is aware of the fact that her conduct is unlawful (because it exceeds the bounds of private defence) and that it will result in Y's death, or if she subjectively foresees this possibility and reconciles herself to it, she acts with *dolus* (intention accompanied by awareness of unlawfulness) and is guilty of murder.[70]

(2) If intention to kill as explained in the previous sentence is absent, X can nevertheless still be guilty of culpable homicide if she *ought* reasonably *to have foreseen* that she might exceed the bounds of private defence and that she might kill the aggressor. She was then negligent in respect of the death.[71]

---

68 *Steyn* 2010 1 SACR 411 (SCA) par 18.

69 *Patel supra* 123; *Ntuli* 1975 1 SA 429 (A) 437 (point 7): "In applying these formulations to flesh and blood facts, the Courts adopt a robust attitude, not seeking to measure with nice intellectual calipers the precise bounds of legitimate self-defence"; *Nyokong* 1975 3 SA 792 (O) 794; *Sataardien* 1998 1 SACR 637 (C) 644; *Snyders v Louw supra* 475; *Steyn supra* par 24.

70 *Ntuli* 1975 1 SA 429 (A) (point 6 (ii)); *De Oliveira* 1993 2 SACR 59 (A) 63*h–i*.

71 *Ntuli supra* 436 (point 4), 437 (point 6 (i)); *Ngomane* 1979 3 SA 859 (A) 863–864; *Naidoo* 1997 1 SACR 62 (T) 68; *Dougherty* 2003 2 SACR 36 (W) 47*a–b.*

(3) If, subjectively, she did not foresee the possibility of death and it can also not be said that she ought reasonably to have foreseen it, both intention and negligence in respect of death are absent and she is not guilty of either murder or culpable homicide.

It must be emphasised that the mere fact that X knew or foresaw that her act might result in Y's death, does not mean that she intended to kill (as this requirement is understood in the law) and that she is therefore guilty of murder. As will be seen later in the discussion of intention,[72] awareness of unlawfulness is an indispensable requirement of *dolus* (intention in the technical, legal sense of the word). In ordinary cases where the bounds of private defence are exceeded there can usually be no doubt that intention in the sense of a direction of the will (ie, "colourless intention," or intention without an appreciation of the unlawful quality of the act) is present. After all, X wishes to put the original aggressor out of action by killing her. What she usually does not realise is that her conduct exceeds the bounds of private defence and that she is acting unlawfully; she then has only a "colourless" intention to kill.

(*b*) *Cases in which X only injures Y* If in the course of exceeding the limits of private defence X does not kill Y but merely injures her, there are only two possibilities, namely that X is guilty of assault, or that she is not guilty of any crime. The crime of assault can only be committed intentionally. There is no such crime as negligent assault. If X subjectively knew or foresaw the possibility that she might exceed the limits of private defence and in so doing would or could injure Y, she had the necessary intention to assault and is guilty of assault. If she did not foresee this possibility, the intention to assault is absent and she is not guilty.[73] Mere negligence in respect of the injury does not render her guilty of any crime.

C NECESSITY

1 Definition A person acts in necessity, and her act is therefore lawful, if she acts in protection of her or somebody else's life, bodily integrity, property or other legally recognised interest which is endangered by a threat of harm which has commenced or is imminent and which cannot be averted in another way, provided the person is not legally compelled to endure the danger and the interest protected by the protective act is not out of proportion to the interest infringed by the act. It is immaterial whether the threat of harm takes the form of compulsion by a human being or emanates from a non-human agency such as force of circumstance.

2 Necessity and private defence The two grounds of justification known as necessity and private defence are closely related to each other. In both cases X protects interests which are of value to her, such as life, bodily integrity and

72 *Infra* V C 23.
73 *Ntuli supra* 436–437 (point 5); *Mokoena* 1976 4 SA 162 (O) 163.

property, against threatening danger. The differences between these two grounds of justification are the following:

(1) Private defence always stems from and is always directed at an unlawful (human) attack; necessity, on the other hand, can stem from either an unlawful human act or from chance circumstances, such as acts of nature.

(2) Whereas in cases of private defence the act of defence is always directed at an unlawful human attack, in cases of necessity it is directed at either the interests of another innocent party or a mere legal provision.[74]

If somebody defends herself against an attack by an animal she acts in necessity, not in private defence, since an animal does not act unlawfully.

Private defence is much more readily justified on ethical grounds, since there is always an unlawful attack and the attacker simply gets what she deserves. On the other hand, to justify necessity is more difficult. Here X finds herself in a situation in which she must choose between two evils: she must either suffer personal harm, or break the law; and which she should choose is often a debatable point. It is precisely for this reason that there must be strict compliance with the requirements of necessity before the defence can be successful. The attitude of our courts to a plea of necessity is often one of scepticism, and they also emphasise that its field of application should be kept as narrow as possible.[75]

If X acts in a situation of necessity, she acts lawfully, and Y can therefore not act in private defence against X's act.[76]

3 Compulsion and inevitable evil A situation of necessity may arise either from compulsion or from inevitable evil. An example of the former is where Y orders X to commit an act which is punishable, such as setting Z's motor car on fire, and threatens to kill X if she refuses to execute the command. In such a case the emergency is the result of an unlawful human act and the act committed out of necessity (assuming that X yields to the threat) is directed at an innocent third person, namely Z.

In the case of inevitable evil the situation of emergency is the result of non-human intervention, such as acts of nature (eg floods or lightning flashes) or other chance circumstances (eg famine or shipwreck). Examples of such cases of necessity are the following:

(1) A fire breaks out in Y's house while X is in it. X can save herself only by breaking a window and escaping through it. If X is later charged with malicious injury to property in respect of the broken window, she can rely on necessity as a ground of justification for her conduct.

---

74 *Goliath* 1972 3 SA 1 (A) 22E. Examples of cases where the act of defence was directed at a legal provision are *Rabodila* 1974 3 SA 324 (O) (at a provision in a law prohibiting illegal entry into the Republic); *Pretorius* 1975 2 SA 85 (SWA) (at the rule prohibiting people from exceeding the speed limit); *Alfeus* 1979 3 SA 145 (A) (at a prohibition in the former Terrorism Act 83 of 1967).

75 *Samuel* 1960 4 SA 702 (R) 703; *Damascus* 1965 4 SA 598 (R) 602; *Kibi* 1978 4 SA 173 (E) 178.

76 *Goliath supra* 29 32; *Adams* 1981 1 SA 187 (A) 220A–B.

(2) X's baby Y gets hold of a bottle of pills and swallows all the pills. In order to save Y's life X rushes her to hospital by car and exceeds the speed limit. If X is later charged with exceeding the speed limit, she may rely on necessity as a ground of justification for her conduct.

In the first example X's act is directed at the interests of an innocent person (Y) while in the second example her act is an infringement of a rule of criminal law only (the prohibition on speeding).

For necessity to be successfully raised as a defence it is immaterial whether it stems from compulsion or from inevitable evil. Nor does it matter whether the defensive or rescuing act is directed at the interests of another person or at a legal provision.[77] The question is merely whether the person pleading necessity was faced with a situation of emergency.

4 Absolute and relative compulsion In the case of absolute compulsion (*vis absoluta*) X does not commit a voluntary act: for example Y, who is much stronger than X, grabs X's hand who is holding a knife, and stabs Z. X is physically unable to prevent Y's action. The reason for X's non-liability is then not necessity, but the absence of voluntary conduct.[78] In the case of relative compulsion (*vis compulsiva*) there is indeed a voluntary act on the part of X: Y threatens to kill X if X does not kill Z. In this case X is free to choose to be killed herself. It is only cases of relative compulsion which may amount to situations of necessity.

5 Necessity is either a ground of justification or a ground excluding culpability Necessity may be either a ground of justification (which excludes the unlawfulness of the act) or a ground excluding culpability.[79] In order to understand the difference between these two possible effects of necessity it is important to understand and bear in mind the general criteria for determining unlawfulness and culpability respectively – criteria which are set out elsewhere in this book.[80]

Necessity is a ground of justification if X finds herself in an emergency situation, has to weigh two conflicting interests against each other and then infringes the interest which is of less importance according to the legal convictions of the community, in order to protect the interest which is of greater importance. For example, X parks her motor car in front of a doctor's surgery on a yellow line so that her husband, who is with her in the car, and who has just suffered a heart attack, may reach the doctor as soon as possible. In this case the husband's

---

77 *Goliath supra* 10–11, 22.

78 *Goliath supra* 11, 29, and see *supra* II A 8,10.

79 *Bailey* 1982 3 SA 772 (A) 796A; the judgment of Wessels JA in *Goliath* 1972 3 SA 1 (A) 27–37, especially 36G–H, 38A; *Burchell and* Milton 276–278; *Van der Westhuizen* 368–370, 696; Van der Westhuizen 1981 *De Jure* 182 184; 1984 *De Jure* 369 380–381; Bertelsmann 1981 *THRHR* 413 ff, especially 416–421; 1982 *THRHR* 412 417–418; Le Roux 2002 *SACJ* 99 (an important and clear exposition of the law); Mousourakis 1998 *Stell LR* 165 175–176; *Fletcher* 774 ff, 802 ff, 818 ff. See also s 35 of the German penal code, *Jescheck and Weigend* 479 ff; *Schönke-Schröder ad* s 35; *Kühl* ch 12 B 1; *Jakobs* ch 20 1. On Dutch law, see *Van Bemmelen* 205 ff; *Hazewinkel-Suringa-Remmelink* 295 ff.

80 On the criterion for unlawfulness, see *supra* IV A 8–11 and on that for culpability, *infra* V A.

interest in his health outweighs the community's interest that nobody should park on a yellow line; when charged with contravening the parking regulations X may successfully relies on necessity as a ground of justification.

If, however, X infringes the greater interest in order to protect the minor one, she acts unlawfully. In certain circumstances necessity can then operate as a ground excluding culpability, on the following basis: Although X acts unlawfully, the law does not expect a person to be a martyr or a hero. X can therefore not be blamed for committing an unlawful act – even if she acts intentionally and with awareness of unlawfulness.[81]

The best example of how a situation of necessity can serve to negative culpability is where X kills somebody in order to ward off a threat to her own life. For example, Z orders X to kill Y and threatens to kill X if she fails to obey the command; X, fearing for her life, kills Y.[82] X's conduct is unlawful because a person is not entitled to consider her life as being more important than that of her fellow human being. An important reason why one person's life cannot be regarded as more important than that of another is the provisions of section 9(1) of the Constitution, which provides that everyone is equal before the law and has the right to equal protection and benefit of the law. The law nevertheless assumes that, as Rumpff JA pointed out in *Goliath*,[83] only somebody "who is endowed with a quality of heroism" would intentionally sacrifice her life for that of another. X can therefore not be blamed for committing the unlawful act, and for this reason she acts without culpability.

Two important aspects of the distinction between necessity excluding unlawfulness and necessity excluding culpability should be borne in mind. Firstly, the distinction presupposes an acceptance and application of the normative theory of culpability – a concept which will be set out below.[84] Secondly, a person who acts in a situation of necessity which excludes unlawfulness acts lawfully and private defence against such an act is therefore not possible. Thus if Y resists or opposes X's lawful conduct, she (Y) acts unlawfully. Y is obliged to tolerate or submit to X's conduct. Furthermore, other people act lawfully if they come to X's assistance, but not if they come to Y's assistance.[85] Where necessity excludes culpability, on the other hand, the position is different: If X is coerced to kill Y, she acts unlawfully and therefore Y may act in private defence against X's attack. This is in fact one of the important reasons why killing

---

81 This proposition becomes clearer if the principles underlying the normative theory of culpability (*infra* V A 9) are borne in mind.

82 For a more detailed discussion of these types of cases, see *infra* par 8.

83 *Supra* 25C–D. See also *Bailey* 1982 3 SA 772 (A) 798E–F, in which mention was made of "die gewone deursnee-mens as maatstaf van wat van die beskuldigde verwag kan word – dus 'n normatiewe benadering". The court added: "As dit van die beskuldigde nie verwag kan word om anders te handel as die oorledene te dood nie, dan is hy nie verwytbaar nie en moet hy onskuldig bevind word. As dit wel verwag kon word dat hy anders moes gehandel het, is hy wel verwytbaar." In *Mandela* 2001 1 SACR 156 (C) 167*c–e* the court similarly assumed that on a charge of murder necessity in the form of coercion may exclude X's culpability.

84 *Infra* V A 9,10.

85 On the duty to submit to lawful conduct and considerations surrounding this duty, see the previous (5th) ed of this book 101–102.

another under coercion (ie, necessity) cannot be justified: if the coercion was treated as a ground of justification, it would mean that the innocent victim would be lawfully obliged to submit to the attack upon herself, and that if she were to defend herself, her act would be unlawful! This is obviously an indefensible conclusion.[86]

The discussion of necessity which follows is limited to necessity as a ground of justification. Necessity as a ground excluding culpability will be briefly discussed below in the chapter dealing with culpability.

6 Requirements for a successful plea of necessity The requirements for a successful plea of necessity closely resemble the requirements for a successful plea of private defence. They are the following:

(*a*) Some legal interest of X, such as her life, bodily integrity[87] or property must be threatened. In principle one should also be able to protect other interests such as dignity, freedom of movement and chastity in a situation of necessity.[88]

(*b*) One can also act in a situation of necessity to protect another's interest,[89] such as where X protects Y against attack by an animal.

(*c*) The emergency must already have begun or be imminent, but it must not have terminated, nor be expected only in the future.[90]

(*d*) Whether somebody can raise the defence of necessity if she herself is responsible for the emergency is a controversial question.[91] It is submitted that X ought not to be precluded from successfully raising it merely because she caused the emergency herself. If she were, it would mean that if, because of X's carelessness, her baby swallowed an overdose of pills, X would not be allowed to exceed the speed limit while rushing the baby to hospital, but would have to resign herself to the child's dying. The two acts, namely the creation of danger and rescue from it, should be kept apart. To project the reprehensibility of the

---

86 This consideration is emphasised by Wessels JA in *Goliath* 1972 3 SA 1 (A) 29H; Bertelsmann 1984 *THRHR* 413 416, 420–421; Van der Westhuizen 366–367, 695; Le Roux 1996 *Obiter* 247 256; 1999 *THRHR* 285 289–292; *LAWSA* 6 44; *Fletcher* 760–764, 766–767, 830; *Dressler* 309–310.

87 As regards a threat to life or bodily integrity, see *Mahomed* 1938 AD 30; *Goliath* 1972 3 SA 1 (A); *Rabodila* 1974 3 SA 324 (O); *Alfeus* 1979 3 SA 145 (A).

88 The mere danger of losing one's job does not give one the right to act out of necessity; if one cannot exercise one's profession without contravening the law, one should find another profession – *Canestra* 1951 2 SA 317 (A) 324.

89 Cf *Pretorius* 1975 2 SA 85 (SWA), where the act committed out of necessity was aimed at protecting X's child.

90 *Pretorius supra* 90B; *Kibi* 1978 4 SA 173 (E) 181; *Lungile* 1999 2 SACR 597 (SCA) 601*b–c*.

91 Authority for the proposition that X cannot rely on the defence of necessity if she herself caused the situation of emergency can be found in *Kibi* 1978 4 SA 173 (E) 181, and indirectly also in *Bradbury* 1967 1 SA 387 (A) 393E–F, 404. On the other hand, direct authority for the contrary view, namely that X is not precluded from relying on necessity as a defence even though she herself caused the emergency, can be found in *Pretorius supra* 90D and indirectly also in *Mahomed* 1938 AD 30. Writers who support the latter view include *De Wet and Swanepoel* 91; *Van der Merwe and Olivier* 89–90; Labuschagne 1974 *Acta Juridica* 73 94–96; *Van der Westhuizen* 608, 612 and *Jecheck and Weigend* 363.

former onto the latter is strongly reminiscent of the discarded taint doctrine (doctrine of *versari in re illicita*).[92] If the first act amounts to a crime X can be punished for it, as where she sets fire to a house and then has to break out of the house to save her own life.

As a general rule a person who voluntarily and deliberately becomes a member of a criminal gang with knowledge of its disciplinary code of vengeance cannot rely on necessity (compulsion) as a defence if she participates in the criminal activities but later alleges that she was coerced to do so.[93]

(*e*) If somebody is legally compelled to endure the danger, she cannot rely on necessity. Persons such as police officers, soldiers and members of a fire brigade cannot avert the dangers inherent in the exercise of their profession by infringing the rights of innocent parties.[94] Another aspect of this rule is that a person cannot rely on necessity as a defence if what appears to her as a threat is in fact lawful (human) conduct. If X is arrested lawfully, she may therefore not damage the police van in which she has been locked up in order to escape from it.[95]

(*f*) X must be conscious of the fact that an emergency exists, and that she is therefore acting out of necessity. There is no such thing as a chance or accidental act of necessity. If X throws a brick through the window of Y's house in order to break in, and it later appears that by so doing she has saved Y and her family, who were sleeping in a room filled with poisonous gas, from certain death, X cannot rely on necessity as a defence.[96] If the emergency is the result of threats or coercion, X must be *aware* of the threats and *believe* that they will be executed. If, for example, X knows that Z, who is uttering the threats, is only joking or only holding a toy pistol, but she nevertheless kills Y, she cannot rely on the defence of necessity.[97]

(*g*) X's act must be necessary in order to avert the threat or danger. Where, for example, Z orders X to kill Y and threatens to kill X if she does not, and it appears that X can overcome her dilemma by fleeing, she must flee if possible and necessary seek police protection.[98]

(*h*) The harm occasioned by the defensive act must not be out of proportion to the interest threatened, and X must therefore not cause more harm than is necessary to escape the danger. This "proportionality requirement" is often expressed in the statement that the protected interest should be of greater value than the interest which is infringed. It is this requirement which is the most important

---

92 *De Wet and Swanepoel* 91. On this doctrine see *infra* V A 8.

93 *Bradbury* 1967 1 SA 387 (A) 404H; *Lungile* 1999 2 SACR 597 (SCA) 601*e–g*; *Mandela* 2001 1 SACR 156 (C) 165*c–d*.

94 *Kibi* 1978 4 SA 173 (E).

95 *Kibi supra*.

96 This aspect of the defence of necessity has not yet enjoyed the attention of our courts. However, as explained *supra* IV A 10, X must be aware of the existence of justificatory circumstances if she relies on a ground of justification. The same consideration applies here as in the corresponding requirement for private defence (*supra* IV B 4(d)). See *Jescheck and Weigend* 365; *Schönke-Schröder* n 48 *ad* s 34; *Maurach-Zipf* ch 27 par 44 ff; *Kühl* ch 8 par 183 ff; *Roxin* ch 16 par 105 ff.

97 *Mucherechdzo* 1982 1 SA 215 (ZS) 217B–C.

98 *Damascus* 1965 4 SA 598 (R), 603–604; *Bradbury* 1967 1 SA 387 (A) 390C, 393F–G, 392C–D, 404; *Rabodila supra* 325; *Alfeus supra*.

one in practice, and it can also be the most difficult to apply.[99] The protected and the impaired interests are often of a different nature, as where somebody damages another's property in protection of her own physical integrity.

It is impossible to draw up strict abstract rules in advance for determining whether the defensive act is proportionate to the imminent danger. Each case must be judged in light of its own particular circumstances. One of the most important – and also the most difficult – questions arising in respect of the requirement under discussion is whether one is entitled to kill another in a situation of necessity. Because of its complexity this question will be discussed separately below.[100]

7 Putative necessity If X subjectively thinks that she is in an emergency situation whereas there is, in fact no threat to her interests, she cannot succeed with a plea of necessity. If in such a case she commits an act which does not comply with the requirements of the defence of necessity, her act is unlawful. However, her mistaken belief in the existence of justificatory circumstances may exclude culpability: If she is charged with a crime requiring intention, her mistake could mean that she lacked awareness of unlawfulness and therefore *dolus* (intention).[101] If she is charged with a crime requiring negligence, her mistake could serve to exclude culpability provided the mistake was reasonable.[102] A putative (imagined) situation of necessity can therefore not be equated with a real one.

The courts often state that in order to determine whether a plea of necessity should succeed, one should apply the test of the reasonable person: would she, if she were to find herself in the same circumstances, do the same as X did?[103] This, however, is the test for negligence. In cases of necessity it must be determined whether X *really* found herself in a situation of emergency. However, it seems that our courts, in speaking of the reasonable person in this connection, mean only that X's conduct must have been reasonable. They seem to regard the reasonable person as a personification of the legal notions of society, and this test merely as a practical aid in determining the unlawfulness of the act.

8 Killing another person out of necessity

(*a*) *Killing another in necessity may constitute a complete defence* Possibly the most controversial question relating to necessity as a ground of justification is whether a person who is threatened may kill another in order to escape from the situation of emergency. Naturally, the question arises only if the threatened person finds herself in mortal danger. This mortal danger may stem from compulsion, as where Y threatens to kill X if X does not kill Z, or from an event not

---

99 On this requirement, see generally *Malan* 1998 2 SACR 143 (C).

100 *Infra* par 8.

101 *Van Zyl* [1996] 1 All SA 336 (W). In this case motorist X was involved in a slight motor accident. He failed to stop after the accident. He thought that he was the victim of a planned hijacking of his motor car. On the facts the court could not find that there was indeed an attempt to hijack his car, but the court held that he honestly believed that his car would be hijacked. He was found not guilty of the statutory crime of leaving the scene of an accident because of lack of culpability (intent). For an analysis of the judgment, see Snyman 1996 *SACJ* 220.

102 See the discussion of intention and negligence *infra* IV C 14, 23; V D 16.

103 *Goliath supra* 11; *Rabodila supra* 325; *Peterson* 1980 1 SA 938 (A) 949F–G.

occasioned by human intervention, as where two shipwrecked persons vie for control of a timber beam which can support only one of them, and the one eventually pushes the other away in order to stay alive.[104]

In *Goliath*[105] the Appellate Division held that necessity could be a complete defence even in a situation in which X killed another. In this case X was ordered by Z to hold Y tightly so that Z might stab and kill Y. X was unwilling throughout, but Z threatened to kill him if he refused to help him. The court inferred from the circumstances of the case that it was not possible for X to run away from Z – Z would then have stabbed and killed him. The only way in which X could save his own life was by yielding to Z's threat and assisting him in the murder. In the court *a quo* X was acquitted on the ground of compulsion, and on appeal by the state on a question of law reserved, the Appellate Division held that compulsion could, depending upon the circumstances of a case, constitute a complete defence to a charge of murder. It was added that a court should not come to such a conclusion lightly, and that the facts would have to be closely scrutinised and judged with the greatest caution.

One of the decisive considerations in the main judgment of the court, delivered by Rumpff JA, was that one should never demand of X more than is reasonable; that, considering everyone's inclination to self-preservation, an ordinary person regards her life as more important than that of another; that only she "who is endowed with a quality of heroism" will purposely sacrifice her life for another, and that to demand of X that she should sacrifice herself therefore amounts to demanding more of her than is demanded of the average person.[106] It is submitted that the judgment in *Goliath* is correct.

(*b*) *Act committed in necessity operates here as ground excluding culpability and not as ground of justification* The important question which arises from a dogmatic point of view, is whether the compulsion in the circumstances of this case amounted to a ground of justification or whether it was a ground which excluded X's culpability. In delivering the main judgment, Rumpff JA expressly declined to answer this question.[107] However, Wessels JA in his minority judgment expressly decided that the compulsion excluded not the unlawfulness of the act, but X's culpability.[108] It is submitted that this view is correct. Wessels JA quite correctly pointed out[109] that if the compulsion were a ground of justification, it would mean that X's conduct was lawful and that Y would not have been entitled to act in private defence against X's aggression, since acting in private defence is not possible against lawful conduct. This is obviously an untenable conclusion. Y would have been compelled by law to submit to X's mortal attack on himself. Two parties who are locked in mortal combat against

---

104 For an extensive discussion of the subject, see *Burchell and Milton* 267–279; *Van der Westhuizen* 617–696; Paley 1971 *Acta Juridica* 205 230 ff; Zeffert 1975 *SALJ* 321; Pauw 1977 *De Jure* 72, Burchell 1977 *SALJ* 282; Burchell 1988 *SACJ* 18; Maré 1993 *SACJ* 165.

105 1972 3 SA 1 (A).

106 At 25.

107 At 25H–26A.

108 At 36G–H, 38A.

109 At 29H.

each other cannot both be acting lawfully. In *Mandela*[110] the court likewise assumed that on a charge of murder necessity in the form of coercion may exclude X's culpability.

A second and related reason why X's conduct cannot be regarded as justified is the consideration that X did not protect an interest which was of greater value than the one she infringed, because the law ought not to assume that one person's life is more valuable than that of another. To assume that one person's life is more valuable than that of another is incompatible with section 9(1) of the Constitution, which provides that everyone is equal before the law and has the right to equal protection and benefit of the law. The provisions of sections 10 and 11, which provide for a right to human dignity and life respectively, further strengthen the view that one person's life may not be regarded as more valuable than that of another.

A set of facts such as the one presently under discussion should legally be construed as follows: X's conduct towards Y was unlawful (which implies that Y was indeed entitled to act in private defence against X's attack upon her). Her (X's) conduct was also intentional: she acted with awareness of unlawfulness. However, X escapes liability because she did not act with culpability.[111] The reason why she did not act with culpability is because the law could not reasonably have *expected* of her to act otherwise. Therefore her conduct was not blameworthy.[112] Blameworthiness and culpability were absent in terms of the application of the normative theory of culpability.[113] This way of construing this set of facts is followed not only on the European continent, but lately also increasingly by authors in the Anglo-American legal tradition.[114]

9 Necessity as a ground for the mitigation of punishment If the defence of necessity is rejected, for example because X could have fled, or because the infringed interest was more important than the one protected, the extent of the threat to X may be taken into account as a mitigating factor when punishment is imposed.[115]

D CONSENT

1 General Consent by the person who would otherwise be regarded as the victim of X's conduct may, in certain cases, render X's otherwise unlawful conduct lawful. To generalise about consent as a ground of justification in criminal

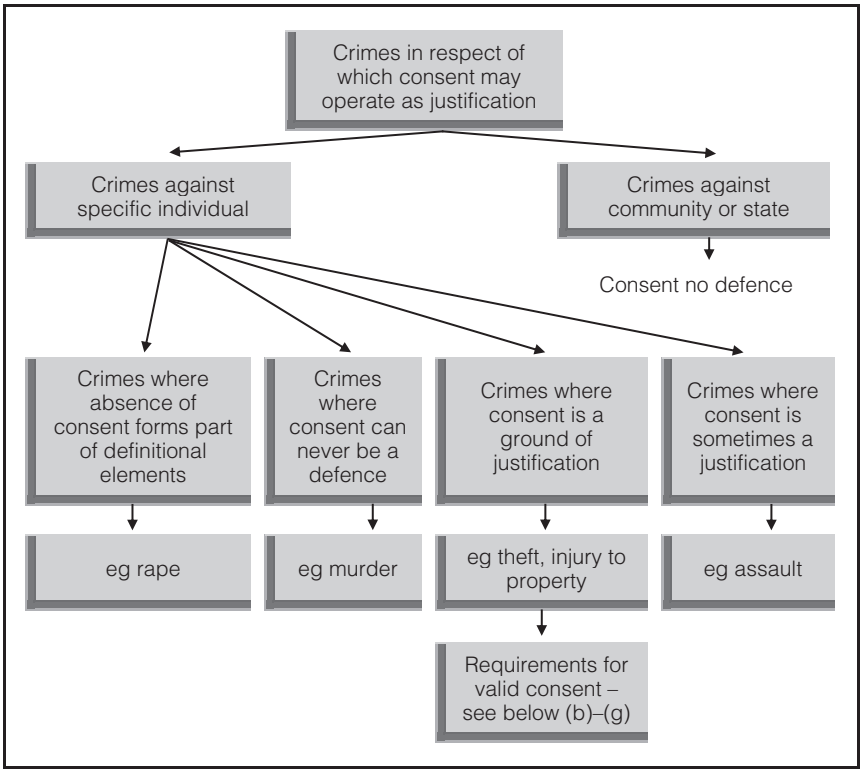
---

110 2001 1 SACR 156 (C) 167*c–e*.
111 Le Roux 2002 *SAS* 99.
112 See the discussion *infra* V G.
113 See in respect of the normative concept of culpability *infra* V A 9.
114 *Fletcher* 802 ff 818 ff; *Dressler* 299 ff, in particular 305; *Robinson* 2 354–355 369; Williams 1982 *Criminal Law Review* 732; Roberts (from the University of Nottingham) 1998 *SACJ* 285 310; Sendor 1990 *Wake Forest LR* 707 716, 733, 747; Mousourakis (an Australian author) 1998 *Stell LR* 165 175–176; s 244 of the draft code compiled by the American authors Robinson, Greene and Goldstein and published in 1996 *Journal of Criminal Law and Criminology* 304 ff. Also see the judgment of the Canadian court in *Perka v R* [1985] 42 CR 3d 113, where the court recognized necessity as ground to exclude culpability. As to South African authors, see Paizes 1996 *SALJ* 237, in particular 259; *Burchell and Milton* 276–278.
115 *Werner* 1947 2 SA 828 (A) 837–838; *Mneke* 1961 2 SA 240 (N); *Goliath supra* 23, 30; *X* 1974 1 SA 344 (RA) 348B–D.

law is possible only to a limited degree, since consent can operate as a ground of justification in respect of certain crimes only, and then only under certain circumstances. If, in crimes in which consent may exclude the unlawfulness of the act (such as theft), no consent has been given, the conduct is unlawful. If X thinks that consent has been given, whereas in fact no consent has been given, X may escape liability on the ground that she lacked culpability.[116]

2 Requirements for successfully relying on consent as a defence The requirements for successfully relying on consent as a defence will now be discussed. The first requirement (marked (*a*)) requires the longest discussion, and will, in the interests of clarity, be subdivided into a number of subdivisions (marked (*i*) to (*iii*)). These subdivisions should not be confused with the later separate requirements marked (*b*) to (*g*)).

(*a*) *The crime and the type of act in question must be of such a nature that the law recognises consent to the commission of such an act as a ground of justification* Consent does not operate as a ground of justification in all crimes, and in those crimes in which it does, it does so in certain circumstances only. It is therefore necessary first of all to identity the crimes in respect of which consent can operate as a ground of justification. The following is a diagram of the broad arrangement of the field of investigation:



116 *K* 1958 3 SA 420 (A) 421, 425; *Z* 1960 1 SA 739 (A); *D* 1963 3 SA 263 (E) 267.

(*i*) *Crimes in respect of which consent may operate as a ground of justification* A distinction must be drawn between those types of crimes which are committed against a specific, identifiable, individual person, and those that are not committed against an individual but against the community or the state, such as high treason, perjury, bigamy, possession of drugs or contravention of the speed limit. There is no room for the defence of consent in the latter type of crimes. It can only operate as a defence in the former.

Turning now to those crimes that are always committed against a specific individual, it is useful, in considering the effect of consent on liability, to classify these crimes into four categories.

Firstly, there are those crimes in respect of which consent does operate as a defence, but whose dogmatic structure is such that the consent does not operate as a ground of justification because the absence of consent forms part of the definitional elements of the crime. The best-known example in this respect is rape. A person (X) only commits rape if the penetration takes place without the victim's (Y's) consent. Absence of consent must of necessity form part of the definitional elements of the crime, because it forms part of the minimum requirements necessary for the existence of a meaningful criminal prohibition.

Secondly, there are crimes in respect of which consent by the injured party is never recognised as a defence. The best-known example is murder.[117] Mercy killing (euthanasia) at the request of the suffering party is unlawful.[118]

Thirdly, there are crimes in respect of which consent does operate as a ground of justification. Well-known examples of such crimes are theft and malicious injury to property.

Fourthly, there is a group of crimes in respect of which consent is sometimes regarded as a ground of justification and sometimes not. An example of a crime falling into this category is assault.

As far as this fourth group of crimes is concerned, it should be borne in mind that, unlike the law of delict, which in principle protects individual rights or interests, criminal law protects the public interest too; the state or community has an interest in the prosecution and punishment of all crimes, even those committed against an individual. The result is that, as far as criminal law is concerned, an individual's consent to impairment of her interests is not always recognised by the law. Thus intercourse with a girl below a certain age constitutes a crime even where she consents, and even physical harm inflicted on somebody at her own request is sometimes regarded by the law as unlawful and therefore as amounting to assault. It is difficult to pinpoint the dividing line between harm to which one may and harm to which one may not consent. The criterion to be applied in this respect is the general criterion of unlawfulness, namely the community's perceptions of justice or public policy.[119]

---

117 *Robinson* 1968 1 SA 666 (A) 678; *Hibbert* 1979 4 SA 717 (D); *Agliotti* 2011 2 SACR 437 (GSJ) par 21. Although suicide is no longer a crime (*Grotjohn* 1970 2 SA 355 (A) 363), somebody who assists another in committing suicide, or who brings it about, may render herself guilty of murder – *Grotjohn supra*; *Agliotti supra.*

118 *Hartmann* 1975 3 SA 532 (C); *Nkwanyana* 2003 1 SACR 67 (W) 72*d–f.*

119 Cf *supra* IV A 8 and see *Sikunyana* 1961 3 SA 549 (E) 551; *Collett* 1978 3 SA 206 (RA) 209, 211–213.

(*ii*) *When consent may be a ground of justification in assault* On a charge of assault, consent may sometimes be a ground of justification and sometimes not. The best-known examples of assault cases where consent may indeed operate as a defence are those where injuries are inflicted on others in the course of sporting events, and where a person's bodily integrity is impaired in the course of medical treatment, such as an operation. Other examples of "impairments of bodily integrity" such as a kiss, a handshake or even a haircut occur so often in everyday life that non-liability is taken for granted.

A participant in sport may validly consent only to those injuries which are normally to be expected in that particular sport. Voluntary participation in a particular type of sport may also imply that the participant consents to injuries sustained as a result of acts which contravene the rules of the game, such as a late tackle in rugby, but only if such incidents are normally to be expected in that particular game. Serious injuries which are forbidden by the rules of the game and which are not normally to be expected cannot, however, be justified by consent.

The reason why a medical doctor cannot be charged with assaulting a patient upon whom she performs an operation is the patient's consent to the operation[120] (assuming that it has been given). If it was impossible for the patient to consent because of unconsciousness or mental illness, for example, the doctor's conduct may nevertheless be justified by necessity or presumed consent.[121] In all these cases the doctor must have the intention of performing a medical operation on the patient.[122] If, however, the patient refuses to consent, the doctor's conduct is, with certain exceptions,[123] not justified.

(*iii*) *Sexual assault* Sexual assault (presently a statutory crime)[124] may be committed with or without the use of force or the infliction of injuries.[125] Consent may operate as a justification for the act if no injuries are inflicted.[126] Where injuries are inflicted, it has been held that consent may not be pleaded as a defence.[127] It would, however, seem to be more realistic to enquire in such cases too whether the act is *contra bonos mores* or not. If the injury is slight, it is conceivable that the law may recognise consent to the act as a defence.[128]

(*b*) *The consent must be given voluntarily, without coercion*[129] Whether consent has been given voluntarily, is mostly a factual question. Consent obtained as a result of violence, fear or intimidation is not voluntary consent. If, for example, X brandishes a revolver while demanding money from Y and Y hands over the money because she feels threatened, there is no valid consent to the

---

120 *Sikunyana* 1961 3 SA 549 (E) 551; *D* 1998 1 SACR 33 (T).
121 On necessity, see *supra* IV C and on presumed consent *infra* IV E.
122 Strauss 1964 *SALJ* 179 183, 187.
123 As where a parent consents to a necessary operation on an unwilling child. See generally the discussion in *Strauss* 5–6.
124 Infra XI D.
125 *Infra* XI D.
126 *Matsemela* 1988 2 SA 254 (T); *D* 1998 1 SACR 33 (T) 39*d–e*.
127 *D* 1963 3 SA 263 (E) 265.
128 *Matsemela* 1988 2 SA 254 (T).
129 *C* 1952 4 SA 117 (O) 121; *M* 1953 4 SA 393 (A). For a more detailed discussion of this requirement, see the discussion of the corresponding requirement in rape *infra* XI B 6.

giving of the money.[130] Mere submission is not consent.[131] If a woman decides that it is futile to resist the strong, armed attacker who is trying to rape her, and simply acquiesces in what he does to her, her conduct cannot be construed as consent to intercourse.[132]

(*c*) *The person giving the consent must be mentally capable of giving consent* She must have the mental capacity to know not only the nature of the act to which she consents, but also to appreciate its consequences. For this reason if a woman is mentally ill, under a certain age, drunk, asleep or unconscious, she cannot give valid consent to sexual penetration.[133] As far as children are concerned, a girl under the age of twelve is at law incapable of giving valid consent to sexual intercourse. Even if she "consents", sexual penetration of her amounts to rape.[134]

In respect of other crimes there is no such arbitrary age limit. In these cases whether the child is endowed with the required mental abilities is always a question of fact. Factors such as the child's intelligence, experience of life, general standard of education and social background must be taken into account. Sexual penetration of a person above the age of twelve years but below the age of sixteen, with consent, is not rape, but constitutes a statutory crime sometimes referred to as "statutory rape", that is, contravening section 15(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.[135]

(*d*) *The consenting person must be aware of the true and material facts regarding the act to which she consents* What the material facts are depends on the definitional elements of the particular crime. In the case of rape the woman must be aware of the fact that it is sexual penetration to which she is consenting. If she thinks that an operation is to be performed on her, there is no valid consent.[136] This is a case of a mistake in respect of the act, known as *error in negotio*. If, on the other hand, the woman knows that she is consenting to sexual penetration, but is merely mistaken as regards its consequences (as where she thinks that the penetration will cure her of a vaginal infection), there is valid consent.[137]

In cases of rape, there can furthermore be no valid consent if the woman mistakes the identity of the man (*error personae*). If, in the darkness of the hotel room, she thinks that it is her husband who is having intercourse with her, whereas in fact it is a stranger, there is no valid consent.[138]

(*e*) *The consent may be given either expressly or tacitly* It is customary to require the patient to give written consent to some types of operation, but naturally the rugby player need not before a game give each of his opponents express permission to tackle him. There is no qualitative difference between express and tacit consent.

---

130 *Ex parte Minister of Justice: in re R v Gesa*; *R v De Jongh* 1959 1 SA 234 (A).
131 *McCoy* 1953 2 SA 4 (R) 12; *D* 1969 2 SA 591 (RA).
132 *Volschenck* 1968 2 PH H283 (D).
133 *C* 1952 4 SA 117 (O) 121; *K* 1958 3 SA 420 (A) 421.
134 *K* 1951 4 SA 49 (O) 52; *Z* 1960 1 SA 739 (A) 742.
135 32 of 2007. See *infra* XI N.
136 *Flattery* [1877] 2 QBD 410; *Williams* [1923] 1 KB 340.
137 *Williams* 1931 1 PH H38 (E); *K* 1966 1 SA 366 (RA).
138 *C* 1952 4 SA 117 (O) 120–121.

(*f*) *The consent must be given before the otherwise unlawful act is committed* Approval given afterwards does not render the act lawful. Consent, once given, remains revocable, provided the act has not yet been committed.[139] A person cannot bind herself never to revoke consent to, for example, assault. Such an agreement would be invalid as being *contra bonos mores*. Neither can an employee, for example, agree with her employer that she will waive the protection which the law affords her against unlawful assault, and allow her employer to decide when she may be punished.[140] Such "consent" is in conflict with public policy, for it undermines the whole operation of the legal order on the basis of the equality of all people in the eyes of the law.

(*g*) *In principle consent must be given by the complainant herself*, but in exceptional circumstances someone else may give consent on her behalf, as where a parent consents to an operation to be performed on her child.

E PRESUMED CONSENT[141]

1 Definition If X commits an act which infringes the interests of another (Y), and X's act thereby accords with the definitional elements of a crime, her conduct is justified if she acts in defence of, or in the furthering of, Y's interests, in circumstances in which Y's consent to the act is not obtainable but there are, nevertheless, at the time of X's conduct reasonable grounds for assuming that Y would indeed have consented to X's conduct had she been in a position to make a decision about it.[142]

The type of conduct falling under this ground of justification is usually discussed by authors of textbooks on criminal law under the heading of "spontaneous agency", "unauthorised administration" or "*negotiorum gestio*". Whereas in the ground of justification known as consent there is an actual manifestation of the will on the part of Y, in this ground of justification the law ascribes to Y a presumed consent.

---

139 *Handcock* 1925 OPD 147; *M* 1953 4 SA 393 (A) 397–398.

140 *Collett* 1978 3 SA 206 (RA) 211, 212.

141 Labuschagne 1994 *TSAR* 811; Snyman 1996 *THRHR* 106. There is, as far as could be ascertained, no South African decision in a criminal matter in which this defence was squarely an issue. The reason for this is not that the defence is not recognised in our law, but simply that in sets of facts in which this defence comes to the fore, it is mostly so obvious that X's conduct is justified, that the prosecution authorities do not even bother to charge X with the commission of a crime.

142 Snyman 1996 *THRHR* 106 107. S 20(3) of the Transkeian *Penal Code* of 1983 (Act 9 of 1983 of the Transkei) contains a provision which to a large extent covers the ground of justification presently under discussion. The subs reads as follows: "No act or omission shall be an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for the person to signify consent, or if that person is incapable of giving consent and has no guardian or other person in lawful charge of her from whom it is possible to obtain consent in time for the thing to be done with benefit."

2 Examples The following are some examples of situations in which this ground of justification finds application:

(*a*) Y loses consciousness in a motor accident. X1, an ambulance driver and paramedic summoned to the scene of the accident, transports Y to a hospital where X2 performs an operation on her in order to save her life. Although X1's conduct conforms to the definitional elements of kidnapping (deprivation of a person's freedom of movement), her conduct is justified by the present ground of justification and she can accordingly not be found guilty of this crime. As far as X2 is concerned, although her conduct conforms to the definitional elements of assault, she is not guilty of this crime because her conduct is justified by the present ground of justification.

(*b*) While X's neighbour, Y, is away on holiday, X notices that Y's house has been broken into. It is impossible for X to contact Y. In order to protect Y's possessions, X affixes some form of burglar proofing to the windows of Y's house and removes some of Y's belongings to her (X's) house for safe-keeping until Y returns. If X is subsequently charged with trespassing onto Y's property, injury to property (because of her affixing of burglar proofing to the windows of Y's house) and theft of Y's property (because of her removal of some of Y's belongings to her (X's) house), she can invoke this ground of justification as a defence.

3 Requirements for successfully relying on this ground of justification The requirements for successfully relying on this ground of justification are the following:[143]

(*a*) It must not be possible for X to obtain Y's consent in advance. If it is possible, X must obtain Y's consent, in which case X may rely on consent as justification.

(*b*) There must be reasonable grounds for assuming that, had Y been aware of the material facts, she would not have objected to X's conduct. The test to ascertain the existence of reasonable grounds is objective.

(*c*) The reasonable grounds for assuming that Y would not have objected to X's conduct must exist at the time that X performs her act.

(*d*) At the time of performing her act X must know that there are reasonable grounds for assuming that Y would not object to her (X's) acts.

(*e*) X must intend to protect or further Y's interests.

(*f*) X's intrusion into Y's interests must not go beyond conduct to which Y would presumably have given consent.

(*g*) It is not required that X's act should indeed have succeeded in protecting or furthering Y's interests.

F OFFICIAL CAPACITY

1 Definition An act which would otherwise be unlawful is justified if X is entitled to perform it by virtue of the office she holds, provided it is performed in the execution of her duties.

---

143 See Snyman 1996 *THRHR* 106 for a more detailed discussion of these requirements.

2 General Applying the abovementioned definition, the clerk whose duty it is to supervise the exhibits in court cases and who locks up a bundle of drugs in a chest, is not guilty of the unlawful possession of drugs which are exhibits in a court case; the official whose duty it is to confiscate liquor or a dangerous weapon in terms of a court order does not commit malicious injury to property, and the police official who searches an arrested or suspected criminal does not commit assault or *crimen iniuria*.

Even where a government official acts in her official capacity in terms of an Act which is not binding on the state, her otherwise unlawful act may still be justified by her official capacity.[144] An Act which is not binding on the state may nevertheless still be binding on its officials, unless the Act either expressly or by implication authorises the official to contravene its provisions in certain circumstances.[145] Thus, for example, it has been held that a post office official who exceeds the speed limit in her official vehicle whilst doing her rounds collecting post from post-boxes does not act unlawfully if she would not otherwise be able to complete her work in time.[146]

An instance of official capacity serving as ground of justification is where a police official assaults or even kills somebody in the course of arresting or attempting to arrest such a person. Because of the importance of this subject it is discussed immediately below under a separate heading.

G USE OF FORCE AND HOMICIDE DURING ARREST

1 General If a police officer or any other person authorised to make an arrest (hereafter X) arrests a criminal or an alleged criminal (hereafter Y), or attempts to arrest such person, and Y resists the arrest or flees or tries to flee, the law allows X, within certain limits, to use such force against Y as is reasonably necessary to overcome Y's resistance. X will then not be guilty of assaulting Y. The arrest must of course be lawful. The question of who is authorised to make an arrest, under which circumstances and in which way, will not be discussed here. These matters are set out in detail in sections 38 to 48 of the Criminal Procedure Act 51 of 1977. The justification for the use of force, or even homicide, by someone who is arresting another, is governed by statute, namely section 49 of the Criminal Procedure Act. The previous wording of section 49 was declared unconstitutional by the Constitutional Court in *Ex parte Minister of Safety and Security: in re S v Walters*.[147] In 2003 a new wording for section 49 came into effect[148] and in 2012 the wording was amended again.[149]

---

144 *Church* 1935 OPD 70; *Thomas* 1954 1 SA 185 (SWA); *Huyser* 1968 3 SA 490 (NC).
145 *De Bruin* 1975 3 SA 56 (T). Cf also *Reed* 1972 2 SA 34 (R).
146 *De Beer* 1929 TPD 104.
147 2002 2 SACR 105 (CC).
148 S 29 was amended by s 7 of the Judicial Matters Second Amendment Act 122 of 1998.
149 By s 1 of Act 9 of 2012.

2 Wording of section 49 The wording of the section is as follows:

> **49. Use of force in effecting arrest**
>
> (1) For the purposes of this section–
>
> (*a*) **'arrestor'** means any person authorised under this Act to arrest or to assist in arresting a suspect;
>
> (*b*) **'suspect'** means any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence; and
>
> (*c*) **'deadly force'** means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.
>
> (2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing. but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if–
>
> (*a*) the suspect poses a threat of serious violence to the arrestor or any other person; or
>
> (*b*) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.

The 2012 amendment of the section amounted to a substantial change in the law relating to this subject. The former wording inserted by the 1998 amendment favoured criminals or suspected criminals and placed all sorts of unnecessary barriers in the way of the police when effecting an arrest which involved injuring or killing a suspect.[150]

3 Three basic requirements set out in section 49 For the defence described in section 49 to succeed, the following three basic requirements must be complied with:

(*a*) the requirement of *necessity*;

(*b*) the requirement of *proportionality*; and

(*c*) the requirement that

  (i) Y must pose *a threat of serious violence* or

  (ii) X must have a suspicion that Y had committed a crime involving *serious bodily harm in the past*.

Each of these three requirements will now be discussed.

---

150 For criticism of the previous wording, the discussion of this subject in the 5th ed of this work may be consulted.

4 X's conduct must be necessary As with certain other grounds of justification, such as private defence, necessity and lawful chastisement, two of the most important requirements for a successful reliance on the defence created in section 49 are the requirements that X's conduct should be *necessary* and the requirement that the conduct should be *proportional*. The requirement that the conduct should be *necessary* means that X's conduct should be the *only* way in which X can effect Y's arrest. This is is apparent from the words "the suspect cannot be arrested without the use of force" and "use such force as is reasonably necessary" in subsection (2).

If there is any other way in which Y's arrest can be effected without using force, X cannot rely on the protection of section 49. X may not shoot at or assault Y during the arrest, if it is possible for X to arrest Y without the force referred to. If, for example, X knows where Y lives and it is possible for X to arrest Y there without the use of force, she should arrest Y at Y's house. Furthermore, before firing at Y, X should first warn Y verbally that, should Y not stop fleeing, X will fire a shot at her. ("Stop or I'll shoot!") If such verbal warning does not have the desired effect, X ought, depending on the circumstances, first to fire a warning shot in the air or the ground. If this also does not have the desired effect, X ought first to fire at Y's legs, as opposed to her body.[151]

5 Requirement of proportionality The requirement of proportionality is expressly incorporated into section 49. It means that the nature and degree of force applied by X should be proportional, not only to the seriousness of the crime which Y is suspected of having committed, but also to the degree of danger that Y's conduct during the arrest poses for the safety of X and other members of society.[152] Whether such proportionality indeed exists in a given instance, is mostly a question of fact. This requirement largely resembles the corresponding requirement in the defence known as private defence, which has already been discussed in some detail.[153]

6 Third basic requirement: the proviso in section 49(2) In addition to the requirements of necessity and proportionality discussed immediately above, the proviso in subsection (2) incorporates a third general requirement which must be complied with before X can successfully rely on the defence set out in the section. The proviso starts with the words "but, in addition to . . ." towards the end of subsection (2).

This third general requirement is that "deadly force" (as this expression is defined in subsection (1)(*c*)) may be used only in certain defined circumstances set out is subsection 2(*a*) and (*b*). The gist of these subparagraphs is that the deadly force may only be used if

(i) Y's behaviour amounts to a serious threat of violence to X or another or

---

151 *Ex parte Minister of Safety and Security: in re S v Walters* 2002 2 SACR 105 (CC) 119*e–f*; *Matlou v Makhubedu* 1978 1 SA 946 (A) 958A–B; *Macu v Du Toit* 1983 4 SA 629 (A) 637 ff.

152 *Govender v Minister of Safety and Security* 2001 2 SACR 197 (SCA).

153 *Supra* IV B 4 (*c*).

(ii) X has a reasonable suspicion that Y had in the past committed a crime involving serious bodily harm and there are no other means of arresting Y.

The meaning of the words "deadly force" is set out in subsection (1)(*c*). The legislature's choice of words in this regard is unfortunate. "Deadly force" surely means "force resulting in death". Force aimed at causing only serious bodily harm can by definition not be "deadly force". Nevertheless the definition in subsection (1)(*c*) makes it clear that the words "deadly force" as used here by the legislature refers to force that is either deadly or that leads to serious bodily harm. It is submitted that the word "serious" as used here by the legislature bears the same meaning as "grievous" – an important term in the crime known as "assault with intent to do grievous bodily harm".[154]

The provisions of subsection 2(*a*) and (*b*) do not apply cumulatively but alternatively.

7 The wording of subsection 2(*a*) The provisions of subsection 2(*a*) is largely self-explanatory. They bear resemblance to the corresponding requirements in the defence known as private defence, which was discussed above.[155] The test to determine whether section 2(*a*) has been complied with is objective: it is not enough for X to subjectively have believed that Y's behaviour posed a threat.

It is noticeable that the wording does not require the threat to be "immediate". X may act in private defence only if there is an immediate threat of harm or violence to her or somebody else.[156] In the previous wording of the section (inserted by the 1998 amendment which came into operation in 2003)[157] it was specifically required that the threat had to be immediate. However, it is submitted that the context of subsection 2(*a*) dictates that the threat must be immediate. The legislature could not have intended to give X the right to use "deadly force" when arresting Y in circumstances in which X only feared that Y may inflict "serious violence to the arrestor or any other person" days later.

8 The wording of subsection 2(*b*) Whereas subsection 2(a) refers to something that may happen in the *future* (a threat of serious violence), subsection 2(*b*) refers to something that has happened in the *past* ("suspected . . . of having committed a crime").

Subsection 2(*b*) only refers to situations in which Y is believed to have committed a crime involving the infliction of serious bodily harm. It does not refer to situations in which Y is suspected of having committed crimes not involving bodily harm, such as theft, fraud, corruption or *crimen iniuria*.

Subsection 2(*b*) only speaks of "serious bodily harm", and not of any form of homicide such as murder or culpable homicide, but it is submitted that, considering the definition of "deadly force" in subsection 1(c), as well as the general aim of the provision, the words "serious bodily harm" in subsection 2(*b*) includes

154 *Infra* XV A 8.
155 *Supra* IV B 3.
156 *Supra* IV B 3(*c*).
157 See the reference *supra* par 1.

killing. It would be anomalous if X is allowed to arrest and even kill Y on a reasonable suspicion of having committed a serious form of assault, but not if she has a reasonable suspicion that Y had committed the more serious crime of murder. (It is to be regretted that the legislature had not, in the interests of clarity, inserted the words "or killing" after the words "serious bodily harm" in subsection 2(*b*).) If X, a security guard, witnesses Y shooting and killing Z and driving off in Z's car in the course of a car hijacking, X may shoot Y, provided the circumstances are such that there are no reasonable means of effecting the arrest. If, for example, X knows Y's identity and her place of residence, she may not shoot Y, because she can then arrest Y later at her place of residence.

The wording of subsection 2(*b*) is wide enough to refer to situations in which X reasonably believes that Y has committed a crime or a number of crimes involving serious bodily harm *in the past*, as where she believes Y to be a so-called "serial murderer" or "serial rapist". In such situations X's behaviour does not necessarily pose a threat of harm to X or somebody else at the time X sees Y. If X reasonably believes that Y is the "serial killer" the police are searching for and that there is no other way of arresting Y other than confronting her there and then, she may arrest Y and if Y resists, she may use deadly force as described in the section to effect the arrest.

9 Section 49 only creates ground of justification Section 49 creates a statutory ground of justification, not a ground excluding culpability. If X relies on the defence created in section 49 and the court rejects this defence, it means only that X's conduct was unlawful (unjustified). It does not mean that X is now automatically guilty of murder. In order to ascertain whether X should be found guilty of murder or of culpable homicide, or even not guilty, one merely applies the same principles as where X relies on a ground of justification such as private defence, but this defence is unsuccessful because X has exceeded the limits of private defence. These principles were laid down by the Appeal Court in *Ntuli*,[158] where it was held that one merely applies the normal principles relating to intention and negligence in order to ascertain whether X is guilty of murder or culpable homicide.

10 X may rely on defence of ignorance of law If X has killed an alleged criminal in the course of effecting an arrest and her reliance on the protection of section 49 fails, X can still escape a conviction of murder by successfully relying on an alternative defence, namely that she honestly believed that the law allowed her to act as she did; that she therefore laboured under an honest mistake of law, that she therefore lacked awareness of unlawfulness and therefore lacked the intention required for a conviction of murder. The defence of mistake of law as created in *De Blom*[159] can therefore, if upheld, prevent X from being found guilty of murder. Should X, however, raise the defence of mistake of law, she will almost certainly be found guilty of culpable homicide on the grounds that a reasonable person in the same circumstances would not have made the same mistake as X had made, and that X had therefore caused Y's death negligently.

---

158 1975 1 SA 429 (A).
159 1977 3 SA 513 (A). On the defence of ignorance of law, see *infra* V C 24.

11 Onus of proof The courts interpreted the previous wording of section 49 in such a way that the onus of proof was on X, the arrestor relying on the protection offered by this section, to prove that her conduct met the requirements described in the section.[160] One of the pillars of criminal justice in the new constitutional dispensation is the accused's right to be deemed not guilty until the state has proven the opposite.[161] This consideration makes it highly improbable that the courts will still acknowledge the principle that the onus of proof rests on X. However, it is submitted that there can to be no objection to placing on X a procedural onus to create a reasonable doubt as to whether her conduct complied with the provisions of the section. This is not an onus of proof, but only an evidential onus of creating a reasonable doubt. X should place before the court the factual basis of her defence, from which the court can infer that she is relying on the defence created in the section as well as the particular aspect or instance of the section on which she is relying.

H OBEDIENCE TO ORDERS

1 General The question arising here is whether an otherwise unlawful act may be justified by the fact that the person when committing the act was merely obeying the order of somebody else to whom she was subordinate. This question arises mostly with reference to the conduct of subordinates in the defence force and the police, but is not limited to soldiers and policemen. It may also apply to, for example, municipal police officers.[162]

One must first distinguish between an act committed in obedience to a lawful order, and one committed in obedience to an unlawful order. In the former case, the act is justified on the ground that the subordinate is acting in an official capacity, or because she is merely a part or an extension of the body or authority which acts in an official capacity. Here we are concerned with the latter case only.

2 Different possible approaches There are different approaches to the question whether obedience to an order from a superior may justify an act.

Firstly, one may argue that the subordinate has a duty of blind obedience to her superior's order. According to this view, an act performed in obedience to an order will always constitute a ground of justification. This view is unacceptable as far as serious crimes are concerned. Our law, like most civilised legal systems, will not be prepared to excuse a soldier who commits rape if an officer orders him to do so or who, like the war criminal Eichmann, commits mass murders, merely because she acts in obedience to the orders of a superior.

Secondly, one may adopt an opposite point of view, and hold that the fact that the subordinate obeyed an order is not a ground of justification. The objection to this point of view is that it implies that a subordinate must, before complying with any order issued to her, first decide for herself whether it is lawful or unlawful. This would hardly be conducive to sound discipline in the various armed forces.

---

160 *Britz* 1949 3 SA 293 (A) 303–304; *Swanepoel* 1985 1 SA 576 (A) 587–588.
161 S 35(3)(*h*) of the Constitution.
162 *Mostert* 2006 1 SACR 560 (N) 564*a*.

3 Manifest unlawful order may not be obeyed There is still a *third* possible approach to the question whether an act is justified because, in performing the act, the actor obeyed an order from a superior. According to this third approach one should adopt a middle course between the first and second approaches described above. By doing this, one attempts to satisfy the demands of morality, while at the same time acknowledging the need for discipline in the various branches of the armed forces. It is this middle-course approach which is the most acceptable one.

A middle course was indeed adopted in the important decision of *Smith*.[163] In this case the court rejected both the first and the second approaches set out above, which it described as the "two extreme propositions of law", and opted for a middle course by adopting and applying the following rule: a soldier is compelled to obey an order only *if the order is manifestly lawful*. If it is manifestly unlawful, she may not obey it; and if she does, she acts unlawfully. This test has been applied in later South African decisions.[164]

The middle-course approach was obviously favoured by the compilers of the Constitution, because section 199(6) of the Constitution provides that no member of any security service may obey a manifestly illegal order.

According to the general proportionality requirement applicable to grounds of justification, the defence of obedience to orders will succeed only if the subordinate does not bring about more harm than necessary in order to execute her order.[165]

4 General requirements for defence to succeed The general requirements for the defence to succeed are the following:

(*a*) the order must emanate from a person lawfully placed in authority over X;

(*b*) X must have been under a duty to obey the order;

(*c*) the order must not be manifestly unlawful; and

(*d*) X must have done no more harm that is necessary to carry out the order.[166]

The latter requirement is analogous to the corresponding requirements in other grounds of justification such as private defence[167] and necessity.[168]

5 Deciding whether order is manifestly unlawful In deciding whether an order is manifestly unlawful, one must consider the content of the order and the circumstances in which it was given, and then ask oneself whether a reasonable soldier in the position of X would have regarded the order as lawful or unlawful. Thus it was, for example, held in the USA that an order to a soldier standing guard to shoot anybody who used offensive language was manifestly unlawful, and that a soldier charged with murder might not invoke obedience to such an

---

163 (1900) 17 SC 561.
164 *Banda* 1990 3 SA 466 (B); *Mohale* 1999 2 SACR 1 (W); *Mostert supra* 565–566.
165 *Mayers* 1958 3 SA 793 (R) 796–797.
166 *Mostert* 2006 1 SACR 560 (N) 564*d–e*; 567–568. For an analysis of the decision in *Mostert*, see Bhamjee and Hoctor 2006 *Obiter* 663.
167 *Supra* IV B 4(*c*).
168 *Supra* IV C 6(*h*).

order as a defence.[169] It was also held in the USA that an order to assist an officer in committing rape fell within the same category.[170] An aid in the application of this test is to enquire whether that which the subordinate is ordered to do falls within the scope of her normal duties.

6 Mistake relating to the nature of the order If the subordinate knows that the order is unlawful, she cannot raise obedience as a ground of justification.[171] It is conceivable that in many cases where a subordinate has obeyed a superior's unlawful order she may raise the defence of mistake, if she believed that the order was lawful. Here she was not aware of the unlawfulness and therefore had no intention to commit the crime.[172]

7 Subordinate acting in necessity It is also conceivable that the subordinate may rely on necessity as a ground of justification if her superior threatens her with harm which is not less than the harm she is ordered to inflict upon another. In such a case the lawfulness of the subordinate's conduct will, of course, be judged according to the rules relating to necessity set out above.[173]

8 Judging response by victim of subordinate's act The question arises how a situation such as the following should be treated by the law: Z, a superior officer, issues an order which is unlawful, although not manifestly so, to her subordinate, X, to perform a certain act against Y, for example to arrest or assault Y. X executes the order. Because the order is not manifestly unlawful, X's act is lawful. However, Y resists X's act. As was pointed out above in the discussion of private defence,[174] a person can act in private defence only against an unlawful attack on her. If the attack on her is lawful, and she resists such an attack, she acts unlawfully. After all, two people who fight each other cannot both act lawfully. Neither can the law assume that if two persons are locked in combat they both act unlawfully but that the winner will not be punished; such an approach will amount to "an institutional recognition of anarchy and the survival of the fittest"[175] – in other words, the "law of the jungle". Does it now follow that Y in the present set of facts is guilty of assault (or even murder, if she kills X) because she resisted X's attack on her?

It is submitted that the question as to Y's liability should be answered as follows: Because X's act was lawful, Y's act must be deemed to be unlawful. However, Y should escape liability on the ground that, although her act was unlawful, she nevertheless lacked culpability. The absence of culpability is explained by applying the normative theory of culpability:[176] the law cannot reasonably expect of a person in Y's position to act otherwise.

---

169 *United States v Bevans* 24 Fed Cases 1183 No 14, 589 (CC Mass 1816).
170 *State v Roy* 233 NC 558 64 SE 2nd 840 (1951).
171 *Shepard* 1967 4 SA 170 (W) 177–178; *Sixishe* 1992 1 SACR 620 (CkA) 626*b–c*.
172 *Andreas* 1989 2 PH H35 (SWA); and cf *Mule* 1990 1 SACR 517 (SWA) 528–529.
173 *Supra* IV C.
174 *Supra* IV B 3(*a*).
175 Le Roux 1996 *Obiter* 247 256. Le Roux argues that the subordinate's defence should not be viewed as a ground of justification, but as a ground for the exclusion of her culpability. This argument relies on an application of the normative theory of culpability.
176 *Infra* V A 9.

I DISCIPLINARY CHASTISEMENT[177]

1 General Parents may, in the course of maintaining authority over their children and in the interests of the child's education, punish their children with moderate and reasonable corporal punishment.[178]

2 Teachers no longer have the right to impose corporal punishment Before the coming into operation of the Constitution not only parents, but also teachers and people *in loco parentis*, such as people in charge of school hostels, had the right to punish the children in their charge with moderate and reasonable corporal punishment in order to maintain authority and discipline.[179] However, the right of teachers to chastise children in their care physically has been abolished by section 10 of the South African Schools Act 84 of 1996. The section provides that no person may administer corporal punishment at a school to a learner, and that any person who contravenes this provision is guilty of an offence and liable on conviction to a sentence which could be imposed for assault. Apart from these legislative provisions, it can be accepted with certainty that any such "right" would be unconstitutional. [180]

In *Christian Education South Africa v Minister of Education*[181] the facts were the following: A private Christian organisation administered a private school and believed that in terms of their Christian principles the physical chastisement of children at school was lawful. Parents who enrolled their children at the school had to consent to their children being subjected to physical chastisement if they contravened rules. The organisation applied for an order exempting their school from the provisions of section 10 of the South African Schools Act, which would mean that they would have the right physically to chastise pupils in the school. The organisation argued that the right to religious freedom, provided for in section 31 of the Constitution, allowed them to be exempted from the provisions of section 10, which prohibited physical chastisement in schools. However, the Constitutional Court held that the order requested by the private organisation could not be granted and that the private school was therefore not exempted from the provisions of section 10. The court held that even if one assumed that section 10 infringed upon parents' right to religious freedom, such infringement was justified, because even private schools exercised their functions for the benefit of the public interest.

---

177 See generally Pete 1994 *SACJ* 295; Bekink 2006 *SACJ* 173. Discussions of this subject dating from the period before the coming into operation of the Constitution are mostly outdated and may be left out of consideration, since the provisions of the Bill of Rights in ch 2 of the Constitution have had an important impact on this ground of justification, as will be apparent from the discussion in the text.

178 Voet 5 1 2, 47 10 2; Grotius *De Jure Belli ac Pacis* 2 5 4; Huber *HR* 1 9 12; Van Leeuwen *RHR* 1 13 1; Van der Linden 1 4 1; *Scheepers* 1915 AD 337 338; *Theron* 1936 OPD 166 176; *Booysen* 1977 2 PH H148 (C); *Lekgathe* 1982 3 SA 104 (B) 109A.

179 See generally the authorities referred to in previous footnote.

180 Such "right" would be incompatible with the rights enshrined in ss 10, 12 and 28(1)(*d*).

181 2000 4 SA 757 (CC).

3 Parent's right of chastisement In terms of the common law parents have a right to chastise their own children, provided the chastisement is moderate and reasonable, in order to maintain authority and discipline.

It is submitted that this right of parents is constitutional. This right is closely connected with parents' rights and duties in respect of the education and upbringing of their children. Thus far the courts have not yet held this right to be unconstitutional. Any prohibition of a parents' right to chastise their children even moderately would, in any event, be almost impossible to enforce. Proponents of the abolition of this right tend to confuse moderate chastisement of children with child abuse, which is something completely different. Child abuse relates to a continuous and *mala fide* maltreatment of children or the infliction of cruelty on them over a prolonged period of time. Disciplinary chastisement relates to the occasional slap on the thigh or the buttocks of a child who continually and intentionally misbehaves, with the *bona fide* motive of the parent to improve the child's manners and inculcate acceptable social behaviour.

In South Africa people – and more specifically people who are parents – who are in favour of such abolition, are far in the minority. The large majority of black people in the country are in favour of retaining the right of parents to chastise their children moderately. Experience elsewhere confirms that abolishing parents' right to chastise their children even moderately leads to a form of social ostracism of families with children, because of the unruliness of the children. This is already apparent in the phenomenon of certain hotels abroad which refuse to accommodate families with children.

Parents are legally entitled to chastise their children only if the chastisement does not exceed the bounds of moderation.[182] What is "moderate" depends on the circumstances of each case, such as the character of the offence, the age, gender, build and health of the child, and the degree of force applied.[183] The chastisement must furthermore be reasonable. The child must have acted wrongfully, or threatened to act wrongfully. The child must have deserved the chastisement.[184] A parent who gives her child a hiding, not because the child did anything wrong, but merely "to ensure beforehand that the child will always be obedient", acts unreasonably and unlawfully. It follows that it is important to consider the parent's motive (which is a subjective factor). The parent must chastise the child in order to educate the child or to censure or correct the child for an actual misdeed. If she punishes the child merely to give vent to her rage or out of sadism, her conduct is not justified.

4 Spouse and employer have no right of chastisement A husband does not have the right to impose physical chastisement on his wife, nor does an employer have such a right in respect of an employee.[185]

---

182 *Tshabalala v Jacobs* 1942 TPD 310; *Hiltonian Society v Crofton* 1952 3 SA 130 (A) 134; *Booysen* 1977 2 PH H148 (C).
183 *Lekgathe* 1982 3 SA 104 (B) 109B–C.
184 *Muller* 1948 4 SA 848 (O) 865; *Lekgathe supra* 109D.
185 *Collett* 1978 3 SA 206 (RA) 209.

J EXCURSUS: TRIFLING NATURE OF ACT AS A DEFENCE

1 Description of defence If X commits an act which is unlawful but the degree in which she contravenes the law is minimal, that is, of a trifling nature, a court will not convict her of the crime in question. The principle that comes into play here, is that embodied in the maxim *de minimis non curat lex*, which means "the law does not concern itself with trifles". Applying this principle, a court would, for example, not convict X of the theft of a pin; neither would it convict her of malicious damage to property if the evidence reveals that, while trimming a hedge separating her property from that of her neighbour, she merely cut a few twigs off the hedge on her neighbour's side.[186]

The most important decision concerning the *de minimis* rule is *Kgogong*:[187] In this case the Appeal Court refused to uphold a conviction of theft where the evidence was that X had merely taken and removed a small piece of paper without any value and merely regarded as waste paper. Whether the trifling nature of the act or of the infringement of the law should be regarded as a complete defence or merely a ground for mitigation of punishment depends upon the circumstances of each individual case.[188]

The question arises exactly where in the dogmatic structure of criminal liability this defence should be classified. It is tempting to classify it as a ground of justification, but it is submitted that this view is incorrect.[189] If this defence is upheld, it means that X has committed an act which complies with the definitional elements of the crime and which is also unlawful and culpable, but that X is nevertheless afforded a defence because, from the point of view of practical legal policy, the courts' time should not be wasted with mere trivialities, and the law therefore discourages charges based on such trivialities.[190] In South

---

186 This is what happened in *Dane* 1957 2 SA 472 (N).

187 1980 3 SA 600 (A).

188 Cases in which this defence succeeded, include *Bester* 1971 4 SA 28 (T) (the court – incorrectly, it is submitted – refused to convict X of assault after he had boxed an 11 year old boy on the ears); *Van der Merwe* 1974 4 SA 310 (E); *Van Zyl* 1975 2 SA 489 (N); *Nene* 1982 2 SA 143 (N) (transporting goods for a consideration); and *Kgogong supra*; *Visagie* 2009 2 SACR 70 (W). Cases in which the defence was rejected, include *Van Wyk* 1974 1 SA 36 (A) (riding a motor-cycle without the owner's consent); *Danster* 1976 3 SA 668 (SWA) (dealing in dagga); *Magidson* 1984 3 SA 825 (T) 832–833 (banknotes reproduced on plastic keyring tags); *Nedzamba* 1993 1 SACR 673 (V) (two blank cheque forms stolen with purpose of using them to commit fraud); *Tshabalala* 2002 1 SACR 605 (W) 606*h–i*, in which it was held that theft of "only" R59,66 was not trivial.

189 For a similar view, see Strauss 1970 *SALJ* 483; Labuschagne 1973 *Acta Juridica* 291 303–304; Hoctor 2004 *SACJ* 394 395.

190 The reason this defence does not, if upheld, justify X's conduct is that there is no higher or more important value which is protected by the commission of the act. To steal a pin is just as unlawful as to steal a motor car. Unlawfulness cannot, like culpability, be "graded" into degrees. An act is either lawful or unlawful. If X gives Y only a slight slap on her back without her consent, she acts unlawfully, despite the more or less trivial nature of the "assault", and Y is therefore entitled to act in private defence against X. If the defence presently under discussion is treated as a ground of justification, X's slap would have to be regarded as lawful. This would mean that Y would not have the right to defend herself against X in private defence. Such a view of the law would be untenable.

Africa in particular, the criminal courts are already inundated with charges of serious crimes, with which they can hardly cope.

(Strictly speaking, therefore, this defence ought not to be discussed either under unlawfulness or culpability. The only reason it is discussed in this chapter is for the practical consideration that it would be unrealistic to devote a whole separate chapter of this book to this simple defence which deals merely with trivialities.)

K EXCURSUS: ENTRAPMENT IS NOT A GROUND OF JUSTIFICATION

1 Entrapment not a ground of justification The fact that the police set up a trap in order to obtain evidence of X's commission of the crime and that X committed the crime in the course of such entrapment does not mean that X's conduct is justified.[191] On the other hand, it does not necessarily follow that she is guilty of the crime committed in the course of the entrapment. She may in certain circumstances escape liability because the court may hold that evidence regarding the entrapment is not permissible.[192] In other words, entrapment may sometimes operate as a defence via the rules of the law of evidence. Thus far, however, our courts have not been prepared to recognise it as a defence in terms of the substantive criminal law (and more in particular as a ground of justification).

2 Wide meaning of the term "entrapment" Entrapment may have more than one meaning. There is, on the one hand, the situation such as the following: X is a person who is prone to committing a certain type of crime (such as illicitly buying uncut diamonds). She is looking for an opportunity to commit this crime. The trap (Y, in the discussion which follows) in no way influences or incites X to commit the crime, but at most *affords her an opportunity* to commit the crime. X then in fact commits the crime. On the other hand there is a situation such as the following: X is in no way prone to committing the offence. Y incites or persuades an initially unwilling X to commit the crime, and X then in fact commits the crime as a result of Y's inducement. As will be explained below, it is now reasonably settled that in the first-mentioned type of situation the entrapment does not afford X a defence, whereas it does in the second one.

These two types of situations just mentioned may be described as two extremes. There are, of course, a number of other possibilities falling somewhere between these two extremes. The question which arises is how the situations falling between these extremes should be treated.

---

191 *Aldridge* 1991 1 SACR 611 (C); *Pule* 1996 2 SACR 604 (O) 607*f–g*; *Desai* 1997 1 SACR 38 (W) 41*c–d*, *f–g*; *Hassen* 1997 1 SACR 247 (T) 248*a*, 251*c*; *Hayes* 1998 1 SACR 625 (O); *Dube* 2000 1 SACR 53 (N) 73*e*; *Hammond* 2008 1 SACR 476 (SCA) par 22.

192 See *Nortje* 1996 2 SACR 308 (C), in which X's defence of entrapment succeeded on this ground, as well as s 252A of the Criminal Procedure Act 51 of 1977. This section is discussed *infra* par 4. For a detailed discussion of the provisions of s 252A, see *Kotze* 2010 1 SACR 100 (SCA).

3 Entrapment necessary in certain cases There are certain crimes in respect of which there are no direct victims, and accordingly no complainants laying charges. These crimes are usually committed in secret, so that there are no (or very few) witnesses. Furthermore, these crimes are often committed by organised syndicates with cunning and sophisticated perpetrators. Examples that come to mind of crimes of this nature are those relating to the illicit trading in uncut diamonds, unwrought gold or other precious stones, drug offences and corruption. Not only in South Africa, but across the world, it is acknowledged that the police are best able to trace the commission of these crimes by making use of traps.

4 Provisions of section 252A of the Criminal Procedure Act In 1994 the South African Law Commission investigated the application of the trapping system in South Africa. In its report[193] the Commission recommended that the use of the trapping system be retained, but that its application be subjected to greater judicial control. This should, according to the Commission's recommendations, be achieved not through the recognition of entrapment as a defence in substantive criminal law, but by the acceptance of an evidentiary exclusionary rule granting courts the power to exclude evidence of entrapment. The government accepted the Commission's recommendations, and this resulted in the insertion of section 252A into the Criminal Procedure Act 51 of 1977. The section is very widely worded. It gives a court a wide discretion to decide whether evidence of entrapment should be allowed.

The section is very long and will not be set out fully here. Briefly stated, it provides that the police may make use of a trap in order to uncover the commission of a crime, and that evidence relating to what happened in the course of the entrapment shall be admissible, provided that the conduct of the police (Y) does not go beyond providing an opportunity for X to commit a crime. In order to determine whether Y's conduct went beyond providing X an opportunity to commit a crime, the court may take a great number of factors, enumerated in subsection (2), into consideration, such as the nature of the crime; the type of inducement used by Y and the degree of its persistence; whether Y's conduct amounted to an exploitation of X's emotions or economic circumstances; and whether Y had a suspicion that X had previously committed a similar crime.

Even if the court finds that Y's conduct went beyond merely affording X an opportunity to commit a crime, it may nevertheless allow evidence concerning the entrapment if it finds that the evidence was not obtained in an improper and unfair manner and that the admission of such evidence would not render the trial unfair or otherwise be detrimental to the administration of justice. In deciding whether there was compliance with the standard just mentioned, the court has to weigh up the public interest against X's personal interest, and may take a number of considerations enumerated in subsection (3) into account, such as the nature and seriousness of the crime; whether it would otherwise be difficult to uncover the commission of the relevant type of crime; and whether there has been any infringement of any fundamental right contained in the Constitution.

---

193 SA Law Commission *The Application of the Trapping System* Working Paper 51 Project 84 (1994).

The provisions of section 252A are so wide that it was, strictly speaking, unnecessary to enact the section, since the courts would in any event have taken the considerations mentioned therein into consideration. It is nevertheless submitted that one of the most important practical implications of the section is the following:

- *If Y merely affords X an opportunity to commit a crime, without there being any incitement or persuasion, the chances of X having a defence are slender.*
- *If, however, there is an unwillingness on the part of X which Y has to overcome by inciting, instigating or persuading X to commit the crime, the chances of X having a defence are great.*[194]

Subsection 5(*a*) of section 252A contains an important provision: according to this subsection, a police official who sets a trap in order to uncover the commission of a crime is not criminally liable in respect of her conduct relating to the trap, provided she acted in good faith.[195]

5 Possible future developments The recommendations of the South African Law Commission that the defence of entrapment be treated not as part of the rules of substantive criminal law but rather via the rules of the law of evidence, as well as the provisions in section 252A, do not necessarily constitute the last word regarding the effect of entrapment on criminal liability. The topic must also be considered in the light of the Bill of Rights in the Constitution, and more specifically rights such as the right to privacy,[196] the right to "administrative action that is lawful, reasonable and procedurally fair"[197] and the right to a fair trial.[198] The Constitutional Court has not yet considered this matter.[199]

The possibility cannot be excluded that some day entrapment might still in certain circumstances be recognised as a defence in substantive criminal law, as

---

194 This explains the acquittal in *Nortje supra* (see especially 320) and *Hayes* 1998 1 SACR 625 (O) (see especially 632*f–h*). Cf also *Desai* 1997 1 SACR 38 (W) 42*h–i*; *Odugo* 2001 1 SACR 560 (W). See also 640*e–f*; *Matsabu* 2009 1 SACR 513 (SCA) par 16; *Van der Berg* 2009 1 SACR 661 (HHA) par 31; *Lachman* 2010 2 SACR 52 (SCA); *Zurich* 2010 1 SACR 171 (SCA)

195 In *Ohlenschlager supra* 749*b–e* and *Pule* 1996 2 SACR 604 (O) 608–609 it was held that the police official who set the trap cannot escape criminal liability for her actions during the trap. It is submitted that these two decisions on this point are incorrect, since the courts failed properly to consider the possibility of Y's conduct being justified by Y's having acted in an official capacity.

196 S 14.

197 S 33.

198 S 35(3). Cf *Nortje supra* 320*f*: "The police procedures in this case were fundamentally unfair and the accused did not have a fair trial. As has been pointed out, it would be farcical to insist on the highest standards of fairness in the courts while at the same time tolerating a low standard of fairness in police procedures which take place before an accused person reaches the court."

199 In *Hassen* 1997 1 SACR 247 (T) 250*g–h* the Transvaal court held that "it was correctly argued . . . that the setting of a trap can under certain circumstances constitute a violation of a person's right to a fair trial . . . and that such a violation should under certain circumstances result in an acquittal". See also *Nortje* 1996 2 SACR 308 (C) 320*f* and the *obiter dicta* in *De Bruyn* 1992 2 SACR 574 (Nm) 582 and *Mendez v Kitching* 1995 2 SACR 634 (E) 647*a–c*.

is the case in the United States.[200] In any event, it seems artificial to refuse to regard entrapment as a defence in terms of substantive criminal law, and yet give a court the power to exclude evidence relating to the entrapment. The same result can be reached by treating entrapment in appropriate cases as either a ground of justification or as a defence excluding culpability. In treating entrapment in this way the same criteria presently used to decide whether evidence of entrapment is permissible can be applied. It is possible to treat entrapment as a defence excluding culpability by applying the normative theory of culpability. This means that a court would argue as follows: although X acted unlawfully and intentionally, her conduct is nevertheless excused because the law cannot reasonably expect her to have acted differently.[201]

---

200 In the USA the courts are prepared to recognise entrapment as a defence in certain circumstances. There are, generally speaking, two broad approaches towards the defence, *viz* the subjective and the objective. According to the subjective approach, X has a defence because, as the court stated in the authoritative judgment in *Sorrels v United States* (1932) 287 US 435 441, X "[had] no previous disposition to commit it but . . . the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation . . ." According to the objective approach, the conduct of the police is judged objectively, and the test is whether the conduct of the police would have persuaded a fictional innocent person, ie, one not predisposed to commit the crime, to the commission of the crime. (See *Sorrels v United States supra* 454–459; *Sherman v United States* (1958) 356 US 369.) In England entrapment is no defence – *McEvilly and Lee* [1979] 60 Crim LR 150 155; *Mealy and Sheridan* [1974] Crim App R 59; *Sang* [1979] 2 All ER 1222 (HL).

201 Le Roux 1997 *SACJ* 3. The basis of X's defence would then be the same as in the defence of exculpatory necessity (*supra* IV C 5; *infra* V G). As to the normative theory of culpability, see *infra* V A 9.

CHAPTER

V

CULPABILITY

A REQUIREMENT OF CULPABILITY IN GENERAL

1 Introduction The mere fact that a person has committed an act which corresponds to the definitional elements of the crime and which is unlawful is not sufficient to render him criminally liable. It is further required that X's conduct be culpable. (The courts normally refer to culpability as *mens rea*. This Latin expression literally means "guilty mind".) By "culpability" is meant that *there must, in the eyes of the law, be grounds for blaming X personally for his unlawful conduct*.

The whole question of culpability may be reduced to one simple question, namely "could one in all fairness have expected X to avoid the wrongdoing?" If the answer to this question is "no", there is no culpability. Thus, it is the requirement of culpability which prevents a mentally ill person or a young child from being criminally liable for his wrongdoing; because of his lack of insight or self-control one cannot in fairness expect him to act in accordance with the rules of the law.

Intention is included in the concept of culpability. Accordingly, if, because of a mistake, X lacks intention, he also lacks culpability. This will become clear if we consider the following two examples:

(*a*) On leaving a gathering, X takes a coat, which he genuinely believes to be his own from the row of pegs in the entrance hall of the building. The coat in fact belongs to Y, although it is identical to that of X. But for the requirement of culpability, X would be guilty of theft.

(*b*) X throws a bottle through a window, intending it to land on a rubbish dump next to the house, to which access is forbidden. Y, an escaping prisoner fleeing the police, of whose existence X is completely unaware, happens to run past the window at that precise moment, and is struck on the head by the bottle. But for the requirement of culpability, X would be guilty of assault.

It is therefore clear that it is the requirement of culpability which ensures that nobody is punished for harm which he commits accidentally, or of which he was not or could not have been aware.

2 Culpability and unlawfulness The question of culpability arises only once it has been established that there was an unlawful act. It would be nonsensical

to attach blame to lawful conduct. The unlawfulness of the act is determined by criteria which are applicable to everybody in society, whether rich or poor, clever or stupid, young or old. This is the reason why it is just as unlawful for somebody who is poor to steal as for somebody who is rich and why it is just as unlawful for psychopaths, who find it very difficult to control their sexual desires, to commit sexual crimes as it is for normal people. Criteria employed to determine unlawfulness do not relate to X's personal characteristics.

However, when the question of culpability arises, the picture changes: the focus now shifts to the perpetrator (X) as a person and as an individual, and the question here is whether that particular person (X), in the light of his personal aptitudes, gifts, shortcomings and knowledge, and of what the legal order may fairly expect of him, can be blamed for his wrongdoing. If this is the case, it means that the wrongdoing can be attributed to X personally; he is "charged with the account" arising from the wrongdoing. It is possible to construe some *blameworthy mindset* on his part.

3 Terminology Before the requirement of culpability is discussed in detail, it is first necessary to remove some possible misconceptions relating to its terminology.

In this book the requirement presently under discussion is described as culpability. The term describing this requirement which the courts almost invariably use, is *mens rea*. The Latin *mens rea* is a technical term. The very fact that this term, rather than an English equivalent, is still used today, proves that it is not regarded as readily translatable into or explicable in simple English. It may be translated literally as "a guilty mind" but, as will be seen in the discussion of this requirement, a person may be said to have *mens rea* and be guilty of a crime even though he is unaware that he is committing a crime. This is the case if X is convicted of a crime requiring *mens rea* in the form of (inadvertent or unconscious) negligence. It is therefore clear that *mens rea* is an unfortunate and ambiguous expression. It is not surprising that writers on criminal law often criticise its use.[1] Most modern writers on criminal law eschew the expression *mens rea* in favour of some other term which is more readily understandable.[2]

The criticism levelled at the use of the term *mens rea* may be avoided if this requirement is described as "culpability". This word is derived from the Latin word *culpa*, which means "blame" – a concept which goes to the root of the present requirement. Another expression that may be used to describe the present requirement is "blameworthiness" – a word which means the same as "culpability".

---

1 "There is no term fraught with greater ambiguity than that venerable Latin phrase that haunts Anglo-American criminal law: *mens rea*" – *Fletcher* 398.

2 *Burchell and Milton* ch 29–37 use the term "fault". The drafters of the draft English criminal code and the Australian model criminal code also use the term "fault". This is a much better term than *mens rea*, but has the disadvantage of not readily conveying the crux of what this element of liability means. "Fault" is – especially for the lay person – not necessarily synonymous with the idea of blameworthiness or culpability, which are, it is submitted, more accurate and acceptable descriptions. One may also make a "fault" unintentionally or without negligence. "Culpability" is the term referred to in both the American *Model Penal Code* (eg s 2.02) and the new draft Canadian *Penal Code* (eg s 2(4) ff).

Just as the well-known grounds excluding unlawfulness are known as grounds of justification, so it is customary to refer to grounds excluding culpability (such as mistake) as excuses.

4 Culpability presupposes freedom of will[3] Culpability presupposes that man is free to overcome the limitations of his nature and to choose whether to engage in conduct for which he will be held liable. If one adopts a strictly *deterministic* point of view, accepting that all man's actions are predetermined by, for example, his genetic and biological make-up, or by the social or climatic milieu in which he grew up, there can be no place for the requirement of culpability: one must then accept that man's conduct is the result of blind causal processes. If this view were adopted, there would be no point in praising someone for meritorious conduct; there would similarly be no point in reproaching him for misconduct. The whole basis of criminal law would collapse: one would then have to accept that a person's commission of a crime was something over which he had no more control than he had over his contracting a disease. Just as one would not reproach him for catching a disease, one would not blame him for committing a crime. It would be as senseless to punish somebody for a crime as it would be to punish him for being ill.

Whether man's will is indeed free is a philosophical question. Whatever answers philosophers might have given or may still give to this question, the view of most modern writers on criminal law is that, for the purposes of determining criminal liability, one simply has to accept that man's will is free, despite the fact that this assumption is not susceptible of empirical proof. Without such an assumption there is no room for culpability and criminal liability.

Freedom of will must, for the purposes of criminal liability, be construed as man's ability to rise above the forces of blind causal determinism; that is, his ability to control the influence which his impulses and passions and his environment have on him. In this way he is capable of meaningful self-realisation, that is, of directing and steering the course of his life in accordance with norms and values – something which an animal is incapable of doing since it is trapped by the forces of instinct and habit. For the purposes of criminal law in general, and of determining culpability in particular, one should merely be able to say that, in the particular circumstances and in the light of our knowledge and experience of human conduct, X *could* have behaved differently; that, had he used his mental powers to the full, he *could* have complied with the provisions of the law. The normal sane person who is no longer a child may therefore be held responsible for his deeds and be blamed for his misdeeds. This is also the reason why young children and mentally ill people are not punished when they perform unlawful acts. This will be explained more fully in the discussion below of criminal capacity.

5 Legal and moral culpability Culpability as a prerequisite for liability refers to *legal* culpability as opposed to *moral* culpability. For the purposes of legal terminology, the term "culpability" is always used in the context of legal norms. Legal and moral norms often coincide, but do not necessarily always do

3 *Rumpff Report* 2 4; Hoctor 2004 *SALJ* 304 309–311; *Fletcher* 801–802; *Jescheck and Weigend* 407 ff; *Schönke-Schröder* n 108–110 *ad* s 13; *Politoff and Koopmans* 24–27.

so. Legal norms are binding even though they may not be regarded as being buttressed by a moral norm. This is the reason why a person may be legally culpable even when he does not feel that he has done anything blameworthy. People who regard their private religious, political or moral convictions as more important than the provisions of the law and who knowingly transgress these provisions, cannot escape liability on the ground of their personal convictions.

Furthermore, the blame inherent in culpability does not relate to X's character, personality or general attitude towards life; it is coupled to a specific act.[4] If X has not committed a specific act recognised by the law as a crime, he cannot be legally blamed and punished, no matter how wicked or depraved his general way of life may be.[5]

6 Two forms of culpability: intention and negligence There are two forms of culpability in our law, namely intention and negligence. They are sometimes referred to by their Latin names, namely *dolus* and *culpa* respectively.

7 The principle of contemporaneity[6] The culpability and the unlawful act must be contemporaneous. No crime is committed if the unlawful act is committed at a certain time without culpability, and the culpability is present at a later stage without an unlawful act taking place simultaneously. Nor is any crime committed if on the first occasion there is culpability without an unlawful act and on the second occasion an unlawful act unaccompanied by culpability. This is the reason why X does not commit murder if he kills Y accidentally and later expresses joy at having killed him. For the same reason X will not be guilty of murder if, whilst he is driving to Y's house in order to kill him there, he negligently runs over somebody, and it later transpires that the deceased is Y.

In *Masilela*[7] X assaulted Y and strangled Y, intending to kill him; then, believing him to be dead, he threw his body onto a bed and ransacked the house. He then set fire to the bed and the house and disappeared with the booty. Y was in fact still alive after the assault and only died in the fire. When charged with having murdered Y, it was argued on behalf of X that there were two separate acts; that during the first act there was an intention to kill without an act of killing and during the second act an act of killing without intention (because to dispose of what was believed to be a corpse cannot be equated with an intention to kill a human being). This argument was rejected by the Appeal Court on the ground

4 On the difference between "Tatstrafrecht" (criminal liability based upon the commission of an act) and "Täterstrafrecht" (criminal liability based upon the characteristics of the specific perpetrator), as well as the rejection of so-called "Lebensführungsschuld" (culpability based upon a person's "way of living"), see *Jescheck and Weigend* 423–424; *Schönke-Schröder* n 106 *ad* s 13; Wessels ch 10 par 400–404; *Hazewinkel-Suringa-Remmelink* 195.

5 The reason for this is the retributive character of criminal law. The object of the retribution is not the way in which X's personality has developed or his "life-style" ("what he is"), but a specific unlawful *act*.

6 On this principle, see *Masilela* 1968 2 SA 558 (A) 571 574; *Mtombeni* 1993 1 SACR 591 (ZS). It is submitted that the judgment in *Goosen* 1989 4 SA 1013 (A) does not detract from this principle. *Goosen*'s case is discussed *infra* V C 19.

7 1968 2 SA 558 (A).

that the two acts were so closely related to each other as regards *inter alia* time and place, that X's actions in reality amounted to a single course of action.[8]

8 No replacement for culpability – rejection of "taint doctrine"[9] The taint doctrine may be defined as follows: If a person engages in an unlawful or immoral activity, he is criminally liable for all the consequences flowing from this activity, irrespective of whether he acted intentionally or negligently in respect of the consequences. The unlawful or immoral nature of the activity colours or "taints" the consequences, so that the person may be held criminally liable for the consequences without requiring culpability (intention or negligence) in respect of the consequences. In this way a person may be liable for a crime without any culpability on his part. In South Africa the taint doctrine is also known as the doctrine of *versari in re illicita*, or simply "the *versari* doctrine".

In the canon law of the Middle Ages, according to this doctrine, X's liability did not depend on whether the harmful consequence was foreseen or even, for that matter, foreseeable. If, for example, X lawfully shoots at a wild bird and the bullet accidentally hits Y, of whose presence he is unaware, X lacks culpability. If, however, X shoots at a fowl belonging to another person without such person's permission, or hunts on another's land without his permission, and the bullet hits Y (of whose existence X is unaware), X is guilty of murder, for he has engaged in an unlawful act and is liable for all the consequences flowing from it.[10] The blameworthiness of the unlawful conduct is projected onto the causing of Y's death.

The operation of the taint doctrine can be illustrated by the following fictitious example: X drives his motor-car at night at high speed. The road makes a sharp turn to the right. Because of inattention and the high speed at which he is travelling, X does not succeed in turning his motor-car to the right in time. His car accordingly leaves the road and bursts into a cornfield next to the road, where Y, a tramp, lies asleep. It was impossible for X to see Y lying in the field. The car passes over Y, as a result of which Y dies. Can X be convicted of culpable homicide? If one applied the taint doctrine, the answer would be "yes", for the following reasons: X drove negligently, and could clearly be charged with the statutory crime of negligent driving. X had caused Y's death while engaged in the commission of an unlawful act (negligent driving), and the fact that Y's death was not foreseeable for either X or a reasonable person is no defence, since it is not necessary to require negligence in respect of Y's death. X's negligent driving *taints* all the acts and consequences flowing from his conduct, and serves as a *replacement* of the requirement of culpability (ie, negligence in

---

8 See 571, 574. *Masilela*'s case was followed in *Nyongano* 1975 1 PH H42 (R). In this case X strangled Y and, believing him to be dead, fastened his hands behind him, tied a heavy stone to him, and hurled him into a crocodile-infested river. The court held that X had committed murder, even though the strangulation might not have caused his death. See also *Mtombeni* 1993 1 SACR 591 (ZS).

9 See in general *Swanepoel passim*; *Burchell and Milton* 370–371; *Husak* 69–72, who specifically discusses this topic under the heading "Taint"; *Ashworth* 88–89, who discusses the topic under the headings "The principle of Correspondence" and "Constructive Liability".

10 Cf the examples in *Swanepoel* 58–59.

respect of Y's death).[11] If one does not follow the *versari* doctrine, X cannot be convicted of culpable homicide because Y's death was not reasonably foreseeable and X was therefore not negligent in respect of Y's death. X could then at most be convicted of negligent driving.

In 1965 the Appellate Division rejected the taint doctrine in *Bernardus*.[12] The court held that the taint or *versari* doctrine was in conflict with the requirement of culpability. If X intentionally assaults Y and Y dies as a result of the assault, the intention in respect of the assault could not serve as substitute for the negligence required for a conviction of culpable homicide. X would be guilty of culpable homicide only if a court can infer from the circumstances that X was negligent in respect of Y's death.

In the overwhelming majority of assault cases the possibility of death as a result of the assault is reasonably foreseeable, the reasonable person would guard against this possibility of death ensuing and the person committing the assault would therefore be guilty of culpable homicide if the victim should die. Nevertheless it is conceivable that in exceptional cases X may assault Y without death being reasonably foreseeable. Such a case was *Van As*.[13] In this case X merely slapped Y, an extremely fat person, on the cheek, as a result of which Y fell backwards and hit his head on a cement floor, lost consciousness and died. X's conviction of culpable homicide was set aside by the Appellate Division, since Y's death was not reasonably foreseeable.

9 The normative character of culpability: culpability and blame Culpability is the grounds upon which, in the eyes of the law, X may personally be blamed for his unlawful act.[14] Because culpability expresses blame, it must necessarily have a normative character. This means that, to determine whether X acted with culpability, his unlawful act must be measured against a certain norm or standard. Only if it falls short of this standard can X be blamed for his act.

If one alleges that X acted with or without culpability, one necessarily expresses a v*alue judgment.* To determine culpability, one must enquire whether the law could in all fairness have expected X to act differently – that is, lawfully. Only if the answer to this question is "yes" may X be blamed for his act. Culpability is the opposite of "merit" or "praise", which is similarly an evaluation. Whereas "merit" or "praise" expresses an approving evaluation, "culpability" expresses a disapproving evaluation.

The norm against which X's decision to act is measured, is something *outside* X: X cannot be measured by his (X's) own standards. If one were to measure X by only his own standards ("by himself"), it would be very difficult, if not impossible, ever to blame a bad person for his wrongdoing: he would then always be measured by his own "bad" or "low" standards. The standard by which X's decision to act must be measured in order to determine whether he may be blamed for his wrongdoing, is an objective standard – one by which all people are measured.

---

11 Two notorious examples of the early application of this doctrine by the Appellate Division are *Wallendorf* 1920 AD 383 and *Matsepe* 1931 AD 150.

12 1965 3 SA 287 (A).

13 1976 2 SA 921 (A).

14 *Hazewinkel-Suringa-Remmelink* 166; *Hommes* 537–538.

In the form of culpability known as negligence the normative character of the culpability is indisputable: here X's conduct is measured by the standard of what a reasonable person in X's position would have done at the relevant moment.[15] In the form of culpability known as intention the normative character of culpability is not so apparent. It is, in fact, accepted that the test for intention is subjective. How is it possible to say that the test for intention is simultaneously also normative?

The answer is as follows: In the overwhelming majority – more than 99 percent – of cases in which crimes are committed intentionally, it is relatively easy to find the grounds upon which X may be blamed for his deed. These grounds are the following:

(*a*) X was aware of the circumstances which made his act correspond to the definitional elements and rendered it unlawful;

(*b*) he was capable of acting in accordance with his insights into right and wrong; and

(*c*) he willed the commission of the act constituting the crime.

The first ground mentioned above is known as *awareness of unlawfulness*. As will be explained later in the discussion of intention,[16] awareness of unlawfulness is an integral part of the concept of intention in criminal law; it "colours" the intention in that it brings X's will, which is merely a neutral factor, in closer connection with the idea of blame. The second ground refers to the requirement that X must have criminal capacity at the time of the commission of the act. As will be seen later,[17] such capacity forms one of the indispensable building blocks of the culpability requirement, because without it X can never be blamed for his act. In the absence of unusual circumstances, these three grounds or factors are sufficient to constitute grounds for the negative or disapproving evaluation of the act which is inherent in the idea of culpability.

There may nevertheless be unusual or exceptional circumstances that result in these three grounds not being sufficient to constitute grounds for blaming X for his act. X then lacks culpability, despite the fact that, while he had criminal capacity, he committed an unlawful act with intention, including awareness of unlawfulness. A good practical example of such a situation is where X commits the act in a situation of necessity in the form of inescapable duress, which is so strong that one cannot reasonably expect X to withstand the pressure to commit the act. For example, Z orders X to kill Y and threatens to kill him (X) if he refuses to execute the order. The surrounding circumstances are such that X cannot escape his dilemma. If X yields to the duress and kills Y, he acts unlawfully (because the killing of another even under coercion is a violation of the material legal norm), but he lacks culpability despite the fact that he kills Y intentionally (including awareness of unlawfulness).[18]

---

15 *Infra* V D 4, 8.

16 *Infra* V C 23.

17 *Infra* par 11.

18 *Bailey* 1982 3 SA 772 (A). Jansen JA asked how a court should determine the blameworthiness of an accused who had killed another person under coercion yet had nevertheless acted intentionally and with awareness of unlawfulness (797H). His answer was that it

[*continued*]

Here there is no culpability because a fourth ground or prerequisite for the existence of blame is added to the three already mentioned above. This fourth ground is that the surrounding circumstances in which the act takes place must be normal, or put differently, that the law could have expected of X in the particular circumstances to have acted differently, namely to avoid the wrongdoing. In reality the law cannot expect of somebody in the position of X in the abovementioned example to have acted differently, because the average person is not prepared to offer his own life for that of another.[19] One may refer to this requirement as "fair expectation": it refers to what the law may fairly expect of a person in X's position.[20] It is an objective criterion. This (fourth) ground for blaming X is so seldom encountered in practice that the legal sources find it

---

has to adopt an objective approach, employing the average person as a criterion of what could be expected of X. He explicitly referred to this approach as a normative one. He said that if it could not have been expected of X to have done otherwise than to have killed Y, he could not be blamed and had to be found not guilty; if however, it could have been expected of him to act differently, he could be blamed (798E–F). See also the judgment of Wessels JA in *Goliath* 1972 3 SA 1 (A) 27–37, especially 29G–H, 34G–H, 36C–D, G–H.

19 Possibly without realising it, Rumpff JA expressed this component of the normative theory of culpability very well in *Goliath* 1972 3 SA 1 (A) when he stated at 25B–C that the law cannot demand more of X than is reasonable, and that "reasonable" in this context means "dit wat van die gewone deursnee-mens in die besondere omstandighede verwag kan word" ("that which can be expected of the ordinary average person in the particular circumstances"). This also applies to what he said subsequently (25C–D), namely that an ordinary person regards his life as more important than that of another and that "(a)lleen hy wat met 'n kwaliteit van heroïsme bedeeld is, sal doelbewus sy lewe vir 'n ander opoffer" ("only a person who is endowed with a quality of heroism would consciously sacrifice his life for another"). Rumpff JA declined to decide whether in the particular case before the court the situation of necessity excluded unlawfulness or culpability (25H). It is submitted that his approach amounts to treating necessity as an excuse (ie, a ground excluding culpability). *Van der Westhuizen* 369, 680, Bertelsmann 1981 *THRHR* 413 421, Le Roux 1996 *Obiter* 247 256 and especially Le Roux 2002 *SACJ* 99 all give the same interpretation to Rumpff JA's judgment. In his minority judgment Wessels JA clearly regarded the necessity as an excuse, ie, as a ground excluding culpability (36G–H, 38A). In *Mandela* 2001 1 SACR 156 (C) especially 167*c–e* the court likewise assumed that on a charge of murder X may rely on necessity in the form of coercion as a ground excluding *culpability*. *Fletcher* 492 emphasises that the requirement of culpability embodies a concession to human weakness. See also *Fletcher* 492–493: "There are two major stumbling blocks to a value-free theory of attribution (ie, the psychological theory of culpability). The first is the problem of negligence; and the second, the problem of excuses based on overwhelming pressure or mental illness. In assessing claims of duress, for example, one cannot avoid the question whether the actor should have yielded to the external pressure. This is patently a normative issue." On 497 he states that ". . . the primary normative question in assessing accountability is whether the actor could fairly have been expected to avoid committing the wrongful act". For further authority that necessity in the form of coercion excludes X's culpability, and not the unlawfulness of the act, see *Ashworth* 225–230; *Burchell and Hunt* 103; *Burchell and Milton* 278.

20 On this criterion, see Snyman 1991 *THRHR* 4; *Politoff and Koopmans* 47, 145. As to the rule that one should measure X's decision to commit an unlawful act to a standard *outside* himself, namely what the law could fairly have expected of a person in X's position, see *Bailey* 1982 3 SA 772 (A) 797G, 798F; Van *Zyl* 1982 THRHR 437 438–439 and 1983 *THRHR* 101 103; *Jescheck and Weigend* 428; *Schönke-Schöder* notes 116–119 before s 16.

unnecessary to mention it expressly as one of the prerequisites for the existence of culpability *in the form of intention*. This explains why it is usually accepted that the test for intention is subjective.

The concept of culpability described above is known as the *normative concept of culpability*.[21] This concept of culpability offers a logical and persuasive explanation from a systematic point of view of the culpability requirement. In South Africa a growing number of legal scholars follow or advocate the normative concept or at least material aspects thereof.[22] Some judgments of our courts may be interpreted as supportive of the normative theory.[23]

10 Rejection of the psychological theory of culpability In criminal law theory there are two ways of constructing culpability, corresponding to two theories of culpability. The first is the normative concept of culpability and the second the psychological concept of culpability. The normative concept has been explained immediately above in paragraph 9. The psychological concept differs from the normative concept in that the grounds for blaming X for his wrongdoing are not investigated when determining culpability. Instead, culpability is regarded as reflecting the psychological relationship between X and the act or ensuing result. Culpability is accordingly regarded as the sum of all the "subjective" requirements for liability. The reference to *mens rea* as "the mental element of crime" in English legal literature is typical of this approach.[24] Culpability is viewed as a particular "state of mind". According to this theory of culpability

---

21 On the normative theory of culpability, see Van der Merwe 1983 *THRHR* 33 34; Kok 1981 *THRHR* 66 71–73; Van Zyl 1982 *THRHR* 437 438–439; Bertelsmann 1974 *Acta Juridica* 34 35–38; 1981 *THRHR* 413 418; *Badenhorst* 394 ff; Snyman 1979 *SACJ* 136 and especially 1991 *THRHR* 4; *Bergenthuin* 587–589; Bergenthuin 1985 *De Jure* 257 273, 275–278; 1986 *De Jure* 263 272–273; Mousourakis 1998 *Stell LR* 165 especially 173; *Fletcher* 396–401, 492 ff; *Jescheck and Weigend* 420–422; 1975 *CILSA* 112 116–119; *Schönke-Schröder* n 114–119 *ad* s 13; *Maurach-Zipf* ch 30 par 15 ff, 19, 31 ff; *Jacobs* 469; *Politoff and Koopmans* 47 ff; *Hazewinkel-Suringa* 193–194; *Peters* 67, 80–81; 196–198; *Hommes* 535 ff; Eser in *Eser and Fletcher* 1 41 ff; Stribopoulos 1999 *Criminal Law Quarterly* 227. For criticism of this theory of culpability, see Du Plessis 1984 *SALJ* 301–323, but see Snyman's answer in 1985 *SALJ* 120 to Du Plessis's criticism. Van Oosten 1995 *THRHR* 361 and 568 likewise criticises this theory, whereupon Snyman 1996 *THRHR* 638 answered in defence of the theory.

22 Writers who support the normative theory and criticise the psychological theory, include NJ van der Merwe 1976 *SALJ* 280 282; Kok 1981 *THRHR* 66–73; 1982 *SACC* 27 ff especially 32–34; DP van der Merwe 1982 *THRHR* 140 146; 1982 *SALJ* 430 435–437; 1983 *SACC* 33 ff; *Badenhorst* especially 394–413, and in general ch VI and X; Van Zyl 1982 *THRHR* 437–439; 1983 *THRHR* 100–104; *Bergenthuin* 536, 589 and 601; 1985 *De Jure* 273 277; Alberts 1984 *De Jure* 115 118; Le Roux 1996 *Obiter* 247 (a particularly well-founded exposition); 1997 *SACJ* 1 especially 16–18; 1999 *Obiter* 405 411; 1999 *THRHR* 285; Paizes 1996 *SALJ* 237 (although the author does not explicitly use the label "normative theory of culpability"); Wolhuter 1996 *SACJ* 151 166; Mousourakis 1998 *Stell LR* 165 especially 173.

23 Decisions in which a measure of support for the normative theory may be found, are *Goliath* 1972 3 SA 1 (A) (see the minority decision of Wessels JA 27–37, especially 29G–H; 34G–H; 36C–D, G–H); *Bailey* 1982 3 SA 772 (A) especially 798E–F; *Barnard* 1985 4 SA 431 (W) 436, 438F–G; *Mandela* 2001 1 SACR 156 (C) 167–169.

24 Williams *Textbook* 71: "*Mens rea* denotes the mental state (subjective element) required for the particular crime in question. *Actus reus* denotes the external situation forbidden by law – the external elements of the offence."

it is unnecessary to go further and to enquire whether one could in all fairness have expected of X to have acted lawfully.

The psychological theory of culpability is the result of the strong influence of the old, outdated positivistic legal philosophy dating from the Victorian era.[25] According to positivism, culpability should not embody a value judgment; it should have nothing to do with the idea of approval or disapproval.

The psychological theory of culpability may be criticised on various grounds.[26]

Firstly, in emphasising X's state of mind to the exclusion of all else, the adherents of this theory forget that it is possible for X to escape liability even though he did have the prescribed state of mind. Intention alone does not necessarily imply culpability. After all, one can also "intentionally do good".[27]

Secondly, this theory cannot explain why crimes which require not intention, but merely negligence, are also punishable. If the negligence is conscious[28] it may still be possible to construe some psychological relationship between the perpetrator and the act, but this type of negligence is extremely rare and seldom capable of being proved; in practice the overwhelming majority of cases of negligence involve unconscious negligence. Unconscious negligence is not a state of mind but the very reverse – the absence of any state of mind. The driver who absent-mindedly fails to stop at a stop street, thereby causing the death of a pedestrian, has given no thought to the consequences of his act.

Thirdly, perhaps the strongest point of criticism against the psychological theory is that it is irreconcilable with the indisputable presence of subjective components in the concept of wrongdoing (definitional elements plus unlawfulness). The psychological theory's premise is that culpability is the receptacle of all the "subjective" requirements for liability; it is the sum total of all the "internal" requirements for liability, whereas wrongdoing (the unlawful act) in turn comprises all the "external" ("objective") requirements.[29] However, it was pointed out above in the discussion of the definitional elements and of unlawfulness that these two requirements or elements (which together comprise the "wrongdoing") also contain subjective or "internal" components.[30] The same "psychological relationship between the perpetrator and his act" which according to the psychological theory forms the "essence of culpability", is in fact also an indispensable component of the definitional elements and of unlawfulness. In respect of quite a number of crimes, one can only determine whether there was wrongdoing by considering X's intention. Examples of such crimes have already been given.[31]

---

25 *Fletcher* 496, 503, 512, 578; *Jescheck and Weigend* 203, 420; Hommes in *Strafrecht in Perspectief* 166; Snyman 1985 *SALJ* 120 126–127.

26 See the criticism of Snyman 1985 *SALJ* 120 123–127; *Badenhorst* 395; *Fletcher* 396–401, 492 ff; *Jescheck and Weigend* 205–206, 420; Jescheck 1975 *CILSA* 112 113–119; *Roxin* ch 7 par 17, 21, ch 19 par 14 ff; *Schönke-Schröder* n 113 *ad* s 13.

27 "To describe an act as intentional is neither to approve or disapprove it" – *Fletcher* 401. See also Paizes 1996 *SALJ* 237 258.

28 On conscious negligence, see *infra* V D 14.

29 *Goliath* 1972 3 SA 1 (A) 11B–C; *Ex parte Minister van Justisie: in re S v SAUK* 1992 4 SA 804 (A) 808F–G.

30 *Supra* III A 7–8 (definitional elements) and IV A 10 (unlawfulness).

31 *Supra* III A 7–8.

11 Culpability and criminal capacity Once the requirement of culpability is complied with, it follows that in the eyes of the law there are grounds for blaming X personally for his unlawful conduct. One of these indispensable grounds is that X must have criminal capacity. Briefly, it means that X must have the mental capacity or ability to distinguish between right and wrong and to conduct himself in accordance with this appreciation. In practice it means *inter alia* that he must be neither a child nor suffering from a mental illness when he commits the crime.

It has sometimes been alleged that criminal capacity is a separate requirement for liability apart from the requirement of culpability.[32] This is incorrect. Capacity is not a separate, independent requirement, but forms part of the requirement of culpability: without a perpetrator who has criminal capacity no court can come to the conclusion that such a perpetrator is to be blamed for what he did. Blameworthiness is, after all, the essence of culpability. Capacity is an indispensable component of culpability in its true sense, that is, not merely intention or negligence, but the totality of the grounds upon which X may fairly be blamed in the eyes of the law for what he did.[33] The reason for the requirement of capacity is not to assist the court to find out whether X had intention, since a person who lacks capacity (such as a six-year-old child) can also act intentionally. There is also the following reason why capacity should not be treated as a requirement distinct from culpability: As will be seen below,[34] the intention must relate to all the other elements of liability, except, of course, the culpability requirement itself. This means that it must relate to the conduct, the definitional elements and the unlawfulness. If capacity is treated as an element of the crime distinct from culpability, it would mean that the intention must relate also to the capacity. This would not make sense.

Before embarking on a discussion of the two "forms of culpability", namely intention and negligence, it is necessary first to discuss criminal capacity.

B CRIMINAL CAPACITY

(i) THE CONCEPT OF CRIMINAL CAPACITY

1 Meaning of "criminal capacity" Before a person can be said to have acted with culpability, he must have had criminal capacity[35] – an expression often abbreviated simply to "capacity". A person is endowed with capacity if he has the mental abilities required by the law to be held responsible and liable for his unlawful conduct. It stands to reason that people such as the mentally ill (the "insane") and very young children cannot be held criminally liable for their unlawful conduct, since they lack the mental abilities which normal adult people have.

---

32 *Mkize* 1959 2 SA 260 (N) 264D–E; *Johnson* 1969 1 SA 201 (A) 204E; *Burchell and Milton* ch 24.

33 *Engelbrecht* 2005 2 SACR 41 (W) par 455; Hoctor 2004 *SALJ* 304 311.

34 *Infra* IV C 13, 14.

35 *Mahlinza* 1967 1 SA 408 (A) 414G–H; *Lesch* 1983 1 SA 814 (O) 823A–B; *Campher* 1987 1 SA 940 (A) 965D–E; *Laubscher* 1988 1 SA 163 (A) 166F–G; *Calitz* 1990 1 SACR 119 (A) 126*d*.

The mental abilities which a person must have in order to have criminal capacity, are:

(1) the ability to appreciate the wrongfulness of his conduct; and

(2) the ability to conduct himself in accordance with such an appreciation of the wrongfulness of his conduct.

If a person lacks one of these abilities, he lacks criminal capacity and cannot be held criminally liable for unlawful conduct in which he engaged while lacking one of these abilities.

2 Capacity and unlawfulness The need to consider X's capacity arises only once it is clear that X has committed an unlawful act. It follows that a person who lacks capacity is nevertheless capable of committing an unlawful act. This principle is of practical importance in the following respect: as pointed out above,[36] a person may rely on private defence only if he defends himself against an unlawful attack. Since even a person who lacks capacity, such as somebody of immature age, may act unlawfully, X may rely on private defence even if he defends himself against an attack by such a young child.[37]

3 Capacity and culpability Before any person can be said to have acted culpably, it must be clear that at the time of the act such a person was endowed with criminal capacity. Such capacity is an indispensable component of the concept of culpability. To say that a person acted culpably means that there are grounds upon which, in the eyes of the law, he may fairly be blamed for his unlawful conduct. One of the reasons he can be blamed is the fact that at the time of the conduct he had criminal capacity. If an investigation reveals that X lacked capacity at the time of his conduct, he escapes conviction because of lack of capacity; it then becomes unnecessary to investigate whether he acted with intention or negligence.[38]

4 Capacity and intention Even though capacity is one of the grounds for the blame inherent in culpability, it does not follow that capacity and culpability are one and the same thing. They are two different concepts. In determining whether X had intention, one must ascertain what knowledge he had. In determining whether he had capacity, the question is not what knowledge he had, but what his mental abilities were, in other words whether he had the *mental abilities* to appreciate the wrongfulness of his act and to act in accordance with such an appreciation.

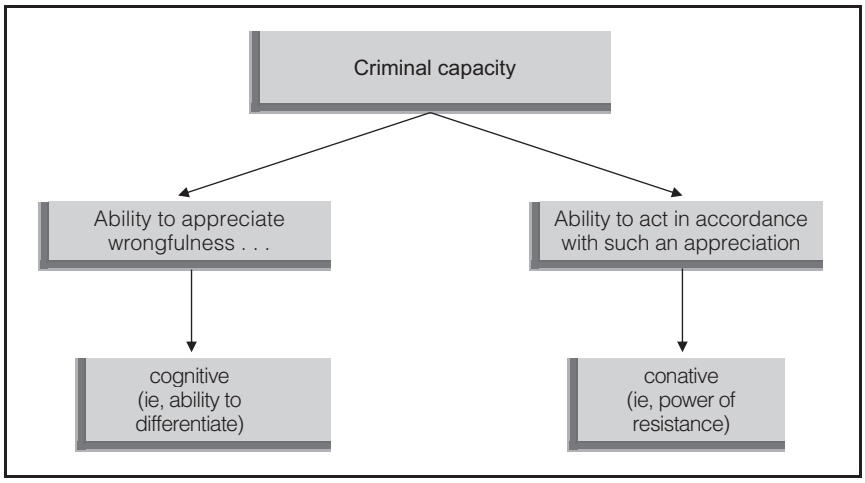
More particularly, it is important not to confuse the question relating to X's awareness of unlawfulness (which forms part of intention or *dolus*) with the question relating to X's capacity. Awareness of unlawfulness deals with X's knowledge or awareness of the unlawfulness of his act. Capacity, on the other hand, deals with X's *ability* to appreciate the unlawfulness of his conduct and to conduct himself in accordance with such an appreciation. It is therefore wrong to allege "that X had capacity because he knew that what he was doing, was wrong".

---

36 *Supra* IV B 3 (*a*).
37 *K* 1956 3 SA 353 (A); *supra* IV B 3 (*a*).
38 *Mahlinza* 1967 1 SA 408 (A) 415A; *Campher* 1987 1 SA 940 (A) 955C–F.

5 X must have capacity at the time of his conduct A person may at a certain time have capacity and at another time lack capacity. A mentally disturbed person may for a reasonably short period be mentally perfectly normal and therefore have capacity (this is the so-called *lucidum intervallum*) and thereafter again lapse into a state of mental abnormality. For the purposes of determining liability a court needs to know only whether X had capacity at the moment he committed the unlawful act.

6 Two psychological requirements for capacity X's capacity is determined with the aid of two psychological factors, namely first, his ability to distinguish between right and wrong, and secondly, his ability to conduct himself in accordance with his insight into right and wrong. These two factors form the basis of a person's capacity and his responsibility for his conduct.[39] These two factors refer to two different categories of mental functions.



The first function, that is, the ability to distinguish between right and wrong, lawful and unlawful, forms part of a person's *cognitive* mental function. The cognitive function is related to a person's reason or intellect, in other words his ability to perceive, to reason and to remember.[40] Here the emphasis is on a person's insight and understanding.

The cognitive function may be described in different words. Sometimes (as in section 78(1) of the Criminal Procedure Act) it is described as the ability to appreciate the wrongfulness of a person's act. Sometimes it is described as the ability to appreciate the unlawfulness of the act, and sometimes as the ability to differentiate between right and wrong. Normally it does not matter what expression one uses; they are simply employed as synonyms.

A person's ability to conduct himself in accordance with his insight into right and wrong is known as his *conative* mental function. The conative function consists in a person's ability to control his behaviour in accordance with his

39 *Rumpff Report* 8 2, 9 30; *Lesch* 1983 1 SA 814 (O) 823G–H; *Engelbrecht* 2005 2 SACR 41 (W) par 457.

40 *Rumpff Report* 9 9, 9 13; *Laubscher supra* 166H–I; *Wiid* 1990 1 SACR 561 (A) 563*h*.

insights – which means that, unlike an animal, he is able to make a decision, set himself a goal, to pursue it, and to resist impulses or desires to act contrary to what his insights into right and wrong reveal to him.[41] Here, the key word or idea is "self-control". According to the *Rumpff Report* the conative function implies "a disposition of the perpetrator through which his insight into the unlawful nature of a particular act can restrain him from, and thus set up a counter-motive to, its execution".[42]

In short, the cognitive and conative functions amount to insight (ability to differentiate) and self-control (power of resistance) respectively.[43]

In order to have capacity X must have both of the two above-mentioned psychological functions or abilities. If either is absent, he lacks capacity.

7 Absence of capacity distinguished from involuntary behaviour The (*a*) inability to act in accordance with an appreciation of the wrongfulness of the act (in other words absence of the conative mental function) must not be confused with (*b*) the inability of a person to subject his bodily movements to his will or intellect. Inability (*b*) deals with the question of whether X has committed an act in the criminal-law sense of the word. If inability (*b*) is absent, it means that X has acted involuntarily and that there was no act or conduct as these terms are understood in criminal law. An example in this respect is where X walks in his sleep. The crucial question here is whether X is capable of controlling his physical (or motor) movements by his will. On the other hand, inability (*a*) has nothing to do with the question of whether X has acted or not, but forms part of the test to determine capacity. Here X does have the power to subject his bodily movements to his will, but what he is not capable of doing, is to properly resist the temptation to commit a crime. In short, in (*a*) the mental power of resistance which a normal person has is absent, whereas in (*b*) the power or ability physically to control one's bodily movements is lacking.[44]

(ii) NON-PATHOLOGICAL CRIMINAL INCAPACITY[45]

1 General The defence of mental illness is limited to situations where X suffered from a pathological disturbance of his mental abilities. "Pathological" means "emanating from a disease". However, what is the situation if X alleges that he did not suffer from a pathological disturbance of his mental abilities, but that he nevertheless was unable to direct his conduct in accordance with his insight into right and wrong, owing to factors such as emotional stress or anger – that is, factors which cannot be described as a "pathological illness" but rather a brief emotional disturbance occasioned by some outside factor?

---

41 *Rumpff Report* 9 9, 9 20–29, 9 33; *Laubscher supra* 166I–J; *Wiid supra* 564*h–i*.

42 *Rumpff Report* 9 33. See also *Lesch supra* 823H–824B and *Campher supra* 956 and 958I.

43 *Rumpff Report* 9 32, 9 84, 9 91; *Laubscher supra* 166H–J, 167C–D; *Wiid supra* 563*i–j*.

44 In *Eadie* 2002 1 SACR 663 (SCA) pars 54 and 60 Navsa JA disagreed with the view expressed in the text. For criticism of the judgment in *Eadie*, see *infra* V B (ii) 4; Snyman 2003 *Acta Juridica* 14–20.

45 For a discussion of this defence, before the Supreme Court of Appeal threw cold water on it in *Eadie* 2002 1 SACR 663 (SCA), see *Burchell and Hunt* ch 22; Van Oosten 1993 *SACJ* 126 ff; Snyman 1989 *TRW* 1 ff. For a discussion of this subject after the decision in *Eadie*, see Snyman 2003 *Acta Juridica* 1; Burchell 2003 *Acta Juridica* 23; *Burchell and Milton* ch 28; Hoctor *Huldigingsbundel Snyman* 110 133 ff.

X and Y are, for example, involved in a raging quarrel, in the course of which X becomes so angry that he shoots and kills Y. X was not suffering from any pathological mental disturbance, but he alleges that at the critical moment he totally lost all self-control for a relatively short period of time. These are situations which occur within the context of crimes such as murder and assault where X admits that he unlawfully shot or assaulted Y, but alleges that, owing to factors such as anger, stress, fear, tension, "emotional storm" or "total personality disintegration", he lacked criminal capacity. A typical allegation of X in this type of situation is that he cannot remember anything of what happened at the critical moment; that "everything suddenly just became black around me, and when I came to my senses again, I found that I had shot Y".

Before approximately 1987 the law did not recognise the type of defence raised by X in the situation set out above, as a complete defence (ie, a defence that leads to total acquittal). The reason for this is simple: the courts quite rightly realised that X's defence in fact amounted to nothing else than the defence of provocation, and as far as this defence is concerned, South African law, like Anglo-American law, refused to regard anger caused by provocation as an absolute defence in the sense that it could lead to total acquittal.

This rule was based on the following very healthy legal principle: the law must treat all people on an equal footing. The law cannot afford to differentiate between people who do not control their tempers and people who do. If an adult, mentally normal person who fails to control his temper and who then commits an unlawful act were to be afforded a complete defence merely because he lost his temper, it would mean that the law treats such people on a different footing from those other members of society who do indeed take the trouble to keep their tempers under control. It would mean that undisciplined people are judged by a standard which differs from that applicable to disciplined people. Such a distinction is unjustified.[46] In short, the law expects adult, mentally healthy people to control their tempers. This principle is linked to the inevitably objective nature of law: all people must be treated alike.

Unfortunately this very necessary, objective aspect of criminal justice suffered a setback when the Appeal Court decided in *Campher*[47] (1987) and *Wiid*[48] (1990) that extreme provocation could totally exclude criminal capacity and lead to a total acquittal. However, the court did not recognise this radical change to be a change in the defence of provocation. Instead it created a new, bombastic, erudite-sounding expression, namely "non-pathological criminal incapacity". By this it meant a form of incapacity that is not the result of a

---

46 In *Kensley* 1995 1 SACR 646 (A) 658*g–I* Van den Heever JA expressed this principle very well: "Criminal law for purposes of conviction . . . constitutes a set of norms applicable to sane adult members of society in general, not different norms depending on the personality of the offender. Then virtue would be punished and indiscipline rewarded: the short-tempered man absolved for the lack of self-control required of his more restrained brother. As a matter of self-preservation society expects its members, even when under the influence of alcohol, to keep their emotions sufficiently in check to avoid harming others and the requirement is a realistic one since experience teaches that people normally do."

47 1987 1 SA 940 (A).

48 1990 1 SACR 561 (A).

pathological (ie, "emanating from a disease") mental disturbance, as in the case of the defence created in section 78(1) of the Criminal Procedure Act. The creation of this defence had far-reaching implications. People who were accused of murder and who admitted having killed their victims unlawfully could be found not guilty on the ground of absence of criminal capacity due to factors such as "emotional stress" or "emotional breakdown".[49]

The following development in the history of this defence took place in 2002, when the Supreme Court of Appeal in *Eadie*[50] delivered a judgment that can be interpreted as the death-knell for the defence of non-pathological criminal incapacity. The court held that if someone raises this defence on the grounds of extreme provocation, the defence should be treated as a reliance on the defence of sane automatism, that is, the defence that X did not act voluntarily. Before discussing *Eadie* in more detail, it is fitting first to consider briefly what the defence of non-pathological criminal incapacity entailed in the period before this judgment (1987–2002).

2 The decision in *Eadie* In *Eadie*[51] the Supreme Court of Appeal delivered a judgment that seemed to pull the plug on this defence. In this case X assaulted and killed Y with a hockey stick, following an incidence of road rage. The court rejected his defence of non-pathological criminal incapacity and confirmed his conviction of murder.

After a detailed analysis of the case law dealing with this defence, Navsa JA, who delivered the unanimous judgment of the court, held that there is no difference between a reliance on non-pathological criminal incapacity emanating from emotional stress and provocation, on the one hand, and the defence of sane automatism, on the other hand.[52] More particularly, the court held that there is no difference between the second (ie, conative) leg of the test for criminal capacity (ie, X's ability to act in accordance with his insights) and the requirement applicable to the act (the "first element" of criminal liability) that X's bodily movements must be voluntary. If X alleges that, as a result of provocation, his psyche had disintegrated to such an extent that he could no longer control himself, it amounts to an allegation that he could no longer control his muscular movements and that he therefore acted involuntarily. Such a plea of involuntary conduct is nothing else than the defence of sane automatism.[53] It is a well-known fact that the defence of sane automatism is not easily upheld.[54]

---

49 For a discussion of the reported case law in which this defence was raised and sometimes upheld, see *Eadie* 2002 1 SACR 663 (SCA) 673–686.

50 2002 1 SACR 663 (SCA).

51 2002 1 SACR 663 (SCA). For a detailed discussion of this decision, see Snyman 2003 *Acta Juridica* 1 14–22, who is very critical of the decision, Burchell 2003 *Acta Juridica* 23, who, *inter alia*, discusses the evidentiary aspects emphasised in the judgment; Louw 2003 *SACR* 200; Hoctor 2009 *Annual Survey of SA Law* 300-306, who is very critical of the decision, describing it as "a recrudescence of objectivity in relation to *mens rea*, which sets the law relating to criiminal liability back decades" (304).

52 Par 57.

53 Par 57–58.

54 For a discussion of the defence of involuntary conduct, ie, sane automatism, see *supra* II A 10–13.

The upholding of X's conviction of murder by the Supreme Court of Appeal cannot be faulted. On the facts the finding of both the trial court and the Supreme Court of Appeal, namely that X's defence should be rejected, was completely correct. Had the court simply found that the defence no longer exists because it is irreconcilable with the basic policy consideration mentioned above (which demands that all people – those who lose their tempers as well as those who take the trouble to control their tempers – should be judged by the same standard),[55] one could have agreed entirely with such a decision. However, instead of "burying", as it were, the defence on the solid ground of its incompatibility with legal policy, the court attempted to "bury" it on the grounds of criminal law theory. It is exactly here that the court, with respect, took the wrong turn.

3 Criticism of the court's view of the general principles of criminal liability

Although, as stated above, one can agree with the ultimate conclusion reached by the court in *Eadie*, the legal reasoning on which the court attempted to base its conclusion is flawed. The judgment is in fact one of the most enigmatic judgments of the Supreme Court of Appeal in the field of the general principles of criminal law during the past half century.

Firstly, the whole tenor of the judgment is not that the defence should be abolished, but that evidence of the absence of capacity at the crucial moment should not be believed, or at least not readily believed. Yet what is the situation if there is indeed credible evidence, not rebutted by the state, that X lacked capacity at the time of the commission of the deed? Must the court then acquit X on the ground of absence of capacity? The court fails to answer this question, leaving it to the reader to grapple in the dark as to what the answer is. In a crucial passage Navsa JA states: "It appears to me to be justified to test the accused's evidence about his state of mind, not only against his prior and subsequent conduct but also against the court's experience of human behaviour and social interaction. Critics may describe this as principle yielding to policy."[56] If by this the judge meant that the veracity or credibility of an accused's (or other witnesses') evidence of lack of capacity should be judged by using the standard of "the court's experience of human behaviour and social interaction", the statement does not make sense. One cannot decide whether something really existed (*in casu*, X's criminal capacity) by having recourse to whether such a thing (X's criminal capacity) *ought to have* existed. Such a way of arguing would amount to confusing that which *is* with that which *ought to be*, or confusing reality with morality.

Secondly, one must disagree with the court's equation of the conative leg of the test for criminal capacity with the requirement of voluntariness in the element of the act. As already pointed out above,[57] one is in fact here dealing with

---

55 *Supra* par 1.

56 Par 64.

57 *Supra* V B (i) 6. For a further explanation of this distinction, see Snyman 2003 *Acta Juridica* 1 16–19. In his discussion of the finding of the court *a quo* in *Eadie*, Hoctor 2001 *SACJ* 195 202 states: "It is clear that lack of conative capacity ('weerstandskrag/wilsbeheervermoë') does not result in involuntary ('onwillekeurige') behaviour." At 205 the same author states: "As regards *S v Eadie (1)*, it is submitted that though the case was

[*continued*]

two completely different things. If the conative leg of the test of criminal incapacity is not complied with, it means that X is indeed able to control his bodily movements by subjecting his muscular contractions to the control of his will or intellect, but that he is unable to resist the temptation to act in a way that differs from what his insights have taught him. The conative leg implies, in the words of the *Rumpff* report,[58] "a disposition of the perpetrator through which his insight into the unlawful nature of a particular act can restrain him from, and thus set up a counter-motive to, its execution".

Young children between the ages of seven and fourteen can control their muscular movements and do, therefore, have the ability to perform voluntary acts, but the courts often find that they nevertheless lack the mental ability to resist temptation to act unlawfully, as when they participate in criminal acts together with older perpetrators, such as their fathers. The courts regularly acknowledge this principle.[59] This completely correct principle applied by the courts cannot be reconciled with the reasoning in *Eadie*, as this principle presupposes voluntary conduct by someone who is unable to act in accordance with his insights.

In addition, the wording of the two important sections from two statutes, namely section 78(1) of the Criminal Procedure Act, which formulates the test for criminal capacity in the defence of mental illness,[60] and section 1(1) of the Criminal Law Amendment Act 1 of 1988, which defines the crime of "statutory intoxication",[61] makes sense only if one assumes that the test for a voluntary act is something different from the test to determine whether there was compliance with the second (ie, conative) leg of the test for criminal capacity. The "act" mentioned in these sections (which are so important for the present purposes) must of necessity refer to a "voluntary act", otherwise these provisions do not make sense.[62]

Thirdly, it makes no sense to treat a plea of non-compliance with one element of liability as synonymous with a plea of non-compliance with another element of liability. It would surely be nonsensical to treat a defence alleging the absence of culpability or intention as synonymous with a defence alleging the absence of unlawfulness. But, according to the judgment in *Eadie*, a defence alleging the absence of criminal capacity due to extreme provocation should be treated as synonymous with a defence alleging the absence of a voluntary act – an argument which contradicts the elementary principles of the construction of criminal liability.[63]

---

correctly decided, the reflection of the apparently increasing tendency to conflate sane automatism and non-pathological incapacity is unwelcome. Not only is such a development retrogressive in that it is clearly unscientific (the concepts incontestably relate to different elements of criminal liability), it is also unwarrantable . . ."

58 *Rumpf* report 9 33.

59 *Dikant* 1948 1 SA 693 (O) 700–701; *Dyk* 1969 1 SA 601 (C) 603E–F; *M* 1978 3 SA 557 (Tk); *Khubeka* 1980 4 SA 221 (O); *Pietersen* 1983 4 SA 904 (E) 910H; *Ngobese* 2002 1 SACR 562 (W) 565.

60 For a quotation and a discussion of the section, see *infra* V B (iii) 2–7.

61 For a quotation and discussion of this section, see *infra* V E 13–15.

62 For a detailed exposition of this argument, see Snyman 1993 *Acta Juridica* 1 16–17.

63 For similar criticism of the judgment, see Hoctor *Huldigingsbundel Snyman* 110.

Fourthly, it seems as though the court tried to sit on two chairs at the same time. There are statements implying that the conative leg of the test for criminal capacity is unnecessary as it amounts to the same as the test to determine the presence of a voluntary act.[64] Other statements again amount to exactly the contrary, namely that the second leg of the test to determine criminal incapacity is indeed to be taken into consideration.[65] One cannot help wondering sometimes whether the court in fact knows what "criminal capacity" really means. For example, in one passage the court alleges that "the phenomenon of sane people temporarily losing cognitive control . . . is rare".[66] There is no such thing as "cognitive control". "Control" by definition refers to the conative leg of the test for criminal capacity, and not to the cognitive leg.[67] Elsewhere the judge agrees with a person who declares that ". . . the only circumstance in which one could 'lose control' is where one's cognitive functions are absent".[68] This statement is patently wrong. It is one's conative functions that fall apart when you lose control, not your cognitive functions.[69]

Fifthly, there is the strange statement by Navsa JA that "the insistence that one should see an involuntary act unconnected to the mental element, in order to maintain a more scientific approach to the law, is . . . an over-refinement".[70] How can the "mental element", that is, the requirement of culpability, form part of the requirement of the act? One has to wonder whether the learned judge understands the basic building blocks of criminal liability – the difference between wrongdoing and culpability,[71] or to use the terminology favoured by the courts, between *actus reus* and *mens rea*.

4 Defence of non-pathological criminal incapacity by implication abolished If, for the sake of argument, one ignores the dogmatic-theoretical questions discussed immediately above, the reader of this judgment is still faced with another dilemma. It is this: does the defence of non-pathological criminal incapacity still exist after this decision? The Supreme Court of Appeal has chosen not to answer this question directly, but to leave it to the readers of the judgment to wrangle with what the answer to this important question is.

It is submitted that the Supreme Court of Appeal in this judgment in fact abolished this defence. The reader may be inclined to think that the defence has been abolished only in situations where criminal incapacity is due to provocation, and that it does not apply to situations in which X alleges that he lacked criminal capacity because of factors not directly related with provocation, such

---

64 Eg par 57: ". . . [W]hen it has been shown that an accused has the ability to appreciate the difference between right and wrong, in order to escape liability, he would have to successfully raise involuntariness as a defence." Also see the statements in par 58.

65 Par 57: "I am, however, not persuaded that the second leg of the test expounded in *Laubscher*'s case should fall away."

66 Par 65.

67 See the discussion *supra* V B (i) 6 and the references – including case law – referred to in the footnotes of this discussion.

68 Par 43.

69 *Supra* V B (i) 6.

70 Par 58 *in fine*.

71 *Supra* I E 2; IV A 5, 11; V A 2.

as stress, shock, concussion, panic or fear. The problem, however, is that these conditions are so closely related to emotional stress caused by provocation, that they could hardly be separated from the latter.

However, between the lines of this obscure judgment, one does notice with reasonable certainty a certain trend in the approach of the court, namely to steer our law away from the extreme subjective approach to culpability, which the same court adopted in previous decisions such as *De Blom,*[72] *Chretien,*[73] *Campher*[74] and *Wiid,*[75] and to recognise the need for some or other objective factor – or "corrective" – in the concept of culpability. Such development of the concept of culpability in our law must be welcomed as it links up with the normative character of the concept of culpability.

(iii) MENTAL ILLNESS

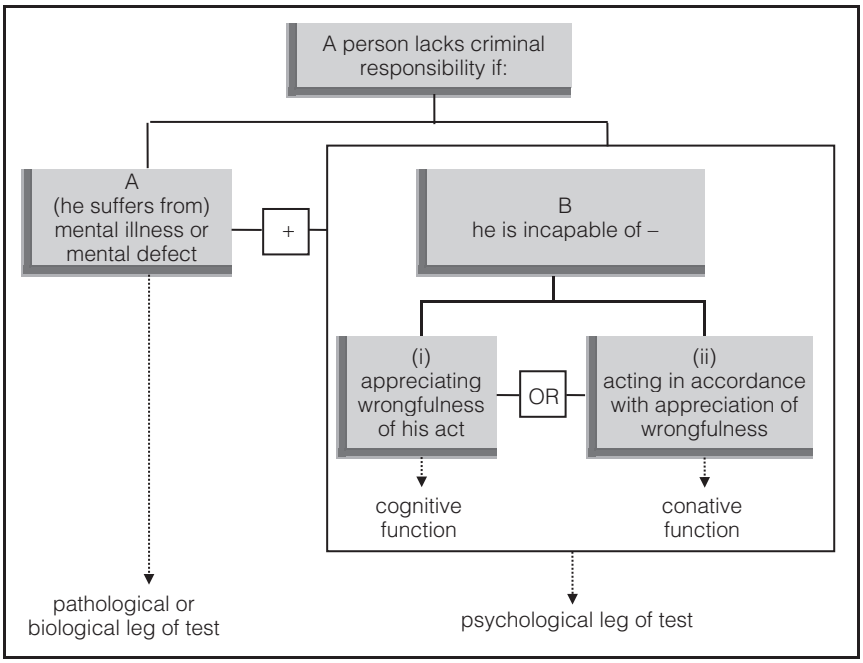
1 Introduction Since 1977 the defence of mental illness (insanity) has been governed by statute, namely the provisions of sections 77 to 79 of the Criminal Procedure Act 51 of 1977. Before 1977 this defence, which was then known as the "defence of insanity", was largely based upon the so-called *M'Naghten* rules, derived from English law.[76]

2 The test to determine criminal capacity If the defence of mental illness is raised, the test to determine X's criminal responsibility set out in section 78(1) of the Criminal Procedure Act must be applied. (The Criminal Procedure Act employs the expression "criminal responsibility" in the place of "criminal capacity".)

> Section 78(1) reads as follows:
> "A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or her incapable–
> (*a*) of appreciating the wrongfulness of his or her act or omission; or
> (*b*) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,
> shall not be criminally responsible for such act."

72 1977 3 SA 513 (A).
73 1981 1 SA 1097 (A).
74 1987 1 SA 940 (A).
75 1990 1 SACR 561 (A).
76 *M'Naghten* (1843) 10 Cland Finn 200.

3 Analysis of section 78(1) The test embodied in the subsection may be illustrated as follows:



The test enunciated in this section has two legs, which are indicated in the diagram above in two squares marked "A" and "B". The first square (A) comprises the *pathological* leg (or biological leg, as it is sometimes called) of the test. The second square (marked B) comprises the *psychological* leg of the test. The test set out in section 78(1) to determine whether X lacks criminal capacity or responsibility embodies a so-called *mixed* test, in the sense that both X's pathological condition (see the first square, A) and psychological factors (see the second square, B) are taken into account.

4 Mental illness or mental defect The first part of the test for criminal responsibility, namely that X must have been suffering from a mental illness or mental defect, will be considered first.

It is clear from the further subsections of section 78, and from section 79, that whether X was suffering from a mental illness or mental defect must be determined with the aid of psychiatric evidence. The terms "mental illness" and "mental defect" do not relate to only certain known forms of mental abnormality, to the exclusion of others. A court would be undertaking an impossible and even dangerous task if it were to seek a general symptom which would enable it to identify a mental abnormality as a "mental illness" or "mental defect" within the meaning of section 78(1).[77]

---

77 *Mahlinza* 1967 1 SA 408 (A) 417; *Kok* 2001 2 SACR 106 (SCA) 110*e–f*. For a discussion of the requirement of "mental illness or metal defect" in s 78(1), see Le Roux and Stevens 2012 *SACJ* 44.

The Criminal Procedure Act does not stipulate what the difference is between a mental illness and a mental defect. In practice the answer to this question will usually appear from the expert evidence of a psychiatrist. A possible explanation of the difference between these two expressions is the following: A "mental defect" is normally characterised by an abnormally low intellect which is usually evident already at an early stage and is of a permanent nature. A "mental illness", on the other hand, usually manifests itself later in life and is not necessarily of a permanent nature.

It is not necessary to prove that a mental illness or defect originated in X's mind: the defence may be successful even if the origin was organic, as in the case of arteriosclerosis.[78] Nor is the duration of the mental illness relevant: it may be of either a permanent or a temporary nature.[79] In the latter case it must of course have been present at the time of the act.[80] Whether the mental illness is curable or incurable is similarly irrelevant.[81] If X was mentally ill before and after the act but he committed it during a *lucidum intervallum* (sane interval), he does not lack criminal responsibility for the act.

The term "mental illness" or "mental defect" refers to a pathological disturbance of the mental faculties, not to a temporary clouding of the mental faculties which cannot be ascribed to a mental disease, but merely to external stimuli such as alcohol or drugs or even provocation.[82] However, continual consumption of alcohol may result in a condition known as *delirium tremens*, which is acknowledged to be a form of mental illness; if X committed the act while he was in that condition, he may successfully rely on the section.[83]

The fact that a person has been, or may be, declared mentally ill in terms of legislation dealing with the civil admission of people in institutions for the mentally ill, does not mean that he is therefore also mentally ill for the purposes of section 78(1) of the Criminal Procedure Act. Such a declaration in terms of the former legislation is something completely different from criminal non-responsibility and "mental illness" or "mental defect" as intended in section 78(1).[84] On the other hand such a declaration is a factor which, together with others, a court may take into consideration when deciding whether a person lacks criminal responsibility.[85]

A court cannot reach a finding of criminal non-responsibility without hearing expert evidence by psychiatrists. If it is alleged in the course of criminal proceedings that X by reason of mental illness or mental defect was not criminally responsible at the time of the commission of the alleged crime, the court must

---

78 *Holliday* 1924 AD 250 257, 260; *Mahlinza supra* 417, 418. In this decision the Appellate Division approved the English decision of *Kemp* [1956] 3 All ER 249, in which the cause of X's mental illness was arteriosclerosis. The English court nevertheless held that X was suffering from a disease of the mind and was not criminally liable. Cf also *Campher* 1987 1 SA 940 (A) 965F–G; *Edward* 1992 2 SACR 429 (ZH) 433*d*–*e*.

79 *Mahlinza* supra 417; *Campher* supra 965F; *Laubscher* 1988 1 SA 163 (A) 167E.

80 *Gouws* 2004 2 SACR 512 (W).

81 *Kemp supra* 253.

82 *Stellmacher* 1983 2 SA 181 (SWA) 187–188.

83 *Ivory* 1916 WLD 17; *Holliday supra* 257.

84 *Mahlinza supra* 416; *Mnyanda* 1976 2 SA 751 (A) 764.

85 *Von Zell (1)* 1953 3 SA 303 (A) 309.

direct that a psychiatric inquiry into the matter be held in the manner prescribed in the act.[86] This is prescribed in section 79 of the Criminal Procedure Act. Since the provisions of this section are of procedural importance only, they will not be set out and discussed here. It suffices to mention that the section contains, for example, provisions relating to the number of psychiatrists who must participate in the investigation, the committal of X to a mental hospital or other place for the purposes of the investigation, the report to be drawn up by the psychiatrists, and the adjudication of the report by the court.

5 Psychological requirements for criminal non-responsibility The fact that a person suffers from a mental illness or defect is not in itself sufficient to warrant a finding that he is not criminally responsible. The mental illness or defect must have a certain effect on his abilities: he must lack the capacity to (*a*) appreciate the wrongfulness of his act or (*b*) act in accordance with an appreciation of the wrongfulness of his act. These two psychological criteria apply in the alternative. Even if X is capable of appreciating the wrongfulness of his act, he will escape liability if it appears that he lacks the capacity to act in accordance with that appreciation.

In the discussion above[87] of the concept of criminal capacity in general, the two psychological requirements for capacity identified in the *Rumpff Report* have been discussed. As pointed out in that discussion, the ability to appreciate the wrongfulness of the act forms part of a person's cognitive mental functions, while the ability to act in accordance with such an appreciation forms part of his conative mental functions.

6 Capacity to appreciate wrongfulness of conduct The first part of the psychological criterion for criminal responsibility is the capacity to appreciate the wrongfulness of the conduct. However, no mention is made in section 78(1) of the situation where X does not understand the nature of his act. This seems to be a deficiency in the section. It is conceivable that a person's cognitive functions may be so impeded that he does not understand the nature of his act, or, in colloquial terms, "he does not know what he is doing". For example, he thinks in his befuddlement "that he is chopping a log of wood whereas he is striking a human being". However, the argument that these types of cases are also covered by the first part of the psychological test can be supported: if X does not even know what he is doing, how can he appreciate its unlawfulness?[88]

7 Capacity to act in accordance with appreciation of wrongfulness X must at the time of the act (because of mental illness or mental defect) be incapable of acting in accordance with an appreciation of the wrongfulness of his act. Such lack of self-control may be the result of a gradual process of disintegration of the personality.[89]

8 Mental illness and automatism The absence of liability because of mental illness must not be confused with the evasion of liability where X acted in a state of automatism. Although some cases of mental illness may closely resemble

---

86 S 78(2) of the Criminal Procedure Act 51 of 1977.
87 *Supra* V B (i) 6.
88 Strauss 1974 *THRHR* 219 234; Van Oosten 1990 *SACJ* 1 6.
89 This is well illustrated by the facts and the finding in *Kavin* 1978 2 SA 731 (W).

cases of automatism, they should nevertheless be clearly distinguished. If X relies on the defence of automatism, the onus of disproving it rests on the state.[90] The basis of the non-liability is that there is no act in the criminal-law sense of the word, because the conduct is not voluntary. If this defence is successful, X is found not guilty and discharged. The court does not make a special verdict (as is done if the defence of mental illness succeeds). If, on the other hand, X's defence is one of mental illness, the onus of proving mental illness rests on the party raising the defence; this is usually X (the accused) himself.[91] The basis of X's non-liability in this case is absence of criminal responsibility (capacity), and if the defence is successful, X is not released, but usually ordered to be detained in a psychiatric hospital or prison.[92]

Automatism has already been discussed above in connection with the requirement of an act.[93] The essence of the defence of automatism is involuntary conduct which is not a manifestation of a mental disease. Examples of such conduct are sleepwalking, muscular movements during dreams, and epileptic fits. It is, however, possible that such behaviour (eg an epileptic fit) may result from a pathological mental disease.[94] Whether this is the case is a question of fact to be determined by the court with the aid of expert evidence. A disturbance of the consciousness may result from a situation not brought about by voluntary conduct, for example shock, concussion as a result of a blow to the head, or the unwitting taking of a sedative. In such cases X may rely on automatism but not on mental illness.[95]

The expression "sane automatism" which is sometimes used in legal literature, relates to cases in which X's conduct is only momentarily involuntary and he accordingly does not "act" in the legal sense of the word. The expression "insane automatism", on the other hand, refers to cases in which the abnormal or seemingly involuntary conduct is the result of mental illness. The use of the expressions "sane" and "insane" automatism may lead to confusion and ought to be avoided, since the defence known as "insane automatism" is in reality nothing else but the defence of mental illness ("insanity").[96] This confusing terminology dates from the old days when the concept of criminal capacity was still unknown in criminal law.

In the interest of clarity the expressions "sane automatism" and "insane automatism" should be avoided. The term "automatism" ought to be restricted to involuntary behaviour not attributable to mental illness. It is very significant that the Supreme Court of Appeal has recently in more than one judgment[97] in

---

90 *Trickett* 1973 3 SA 526 (T), and see *supra* II A 12, 13.
91 S 78(1A) of the Criminal Procedure Act 51 of 1977; *infra* par 9.
92 S 78(6) of the Criminal Procedure Act 51 of 1977; *infra* par 10.
93 *Supra* II A 10–13.
94 On the liability of an epileptic, see *Kumalo* 1956 3 SA 238 (N); *Mokwanazi* 1959 3 SA 782 (W); *Leeuw* 1980 3 SA 815 (A); *Strauss* 136 ff.
95 *Trickett supra* 532; *Stellmacher* 1983 2 SA 181 (SWA).
96 In *Kok* 2001 2 SACR 106 (SCA) 109–110 the Supreme Court of Appeal emphasised that s 78(6) of the Criminal Procedure Act contained no reference to "sane automatism", and that the latter expression was not a term used in psychology, but only a tag employed to refer to automatism which is not attributable to a mental illness.
97 *Cunningham* 1996 1 SACR 631 (A) 635–636; *Henry* 1999 1 SACR 13 (SCA) 19–20.

which the present topic was at issue, avoided the use of the terms "sane automatism" and "insane automatism", preferring rather to speak of "automatism not attributable to mental pathology". In *Henry*[98] the court also used the expression "psychogenic automatism" instead of "sane automatism". What in the past has been described as "insane automatism" can better be described as "pathological loss of consciousness". The important difference which must be drawn is that between loss of consciousness due to a mental illness and such loss due to involuntary behaviour.

9 Burden of proof In 1998 section 78 of the Criminal Procedure Act was amended by the insertion of section 78(1A), which reads as follows: "Every person is presumed not to suffer from a mental illness or mental defect so as not to be criminally responsible in terms of section 78(1), until the contrary is proved on a balance of probabilities." A new section 78(1B) has also been inserted. It reads as follows: "Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accused shall be on the party who raises the issue." The expression "criminal responsibility" used by the legislature is synonymous with "criminal capacity".

The effect of section 78(1A) is that there is a presumption that all people are mentally normal. The effect of section 78(1B) is that if X raises the defence of mental illness, the burden of proving that he suffered from a mental illness at the time of the commission of the act rests on him (X). He discharges it by proving on a balance of probabilities that he was mentally ill at the time of the act. The state may also allege that X was mentally ill at the time of the commission of the act. In such a case the burden of proving the mental illness on a balance of probabilities rests on the state. In practice it is usually, if not invariably, X who raises the defence. It is only in exceptional circumstances that the state will allege that X was mentally ill.

It is conceivable that the constitutionality of the rule that the onus of proof rests on X to prove his mental illness if he is the party raising the defence, may in future be challenged on the basis that it amounts to an unjustifiable infringement of the presumption of innocence. In the Canadian case of *Chaulk*[99] the majority of the court held that the presumption of sanity, as well as the onus placed upon an accused who raises this defence, is a justifiable limitation of X's right to be presumed innocent, and that this rule is therefore not unconstitutional.

It has been argued that it would be better to burden the state with the onus of proving that X was not mentally ill at the time of the conduct in question, but to place a duty on an accused who raises this defence to place evidence before the court which would be sufficient to create at least a reasonable doubt as to whether he was mentally sound.[100] Such a rule would accord with the general rule relating to the onus in criminal matters as well as the presumption of innocence. Such a rule would also accord with the rule relating to the onus of

98 1999 1 SACR 13 (SCA) 20*e–f*.
99 (1991) ICRR (2d) 1 (SCC).
100 *Burchell and Milton* 394–395*;* Milton 1998 *SACJ* 228 231–232.

proof in the defence of automatism. It is submitted that this argument has merit, especially if one bears in mind that a mentally ill person is, of all persons, the least capable of proving his incapacity.

10 Verdict Section 78(6), as amended, provides that if the defence of mental illness is successful, the court must find X not guilty. The court then has a discretion to issue any one of the following directions:

(1) that X be detained in a psychiatric hospital or prison pending the decision of a judge in chambers;

(2) that X be admitted to and detained in an institution named by the court and there be treated as if he were an involuntary mental care health user as provided for in the Mental Health Care Act 17 of 2002;

(3) that X be released subject to such conditions as the court considers appropriate; or

(4) that X be released unconditionally.

Some of these orders may only be made in certain circumstances set out in the section. Because of the complexity of these provisions, and because they are more a matter of procedural law, they will not be discussed here.

An example of a case in which the court may decide to release X unconditionally is where the evidence shows that, although X might have suffered from mental illness when he committed the wrongful act, at the time of his trial he was mentally completely normal again.

11 Release of accused The release of persons who have been detained in a psychiatric institution or prison after a court has found that they were mentally ill at the time of the commission of the act, is governed by the provisions of sections 37 and 47 of the Mental Health Care Act 17 of 2002. These sections set out rather long and complicated administrative procedures to determine whether a patient may be released.

A detailed discussion of these provisions falls outside the scope of this book. It suffices to state that people like the following may, in terms of section 47, apply to a judge in chambers for an order for the discharge of the patient (X): X himself; X's spouse or next of kin; an official curator *ad litem*; or the head of the health establishment to which X is admitted. After consideration of the application the judge may issue one of several different orders, such as that X be released unconditionally, that he be released on certain conditions, that he should continue to be detained as a patient or that he no longer be detained as a patient.

The result is that X may be deprived of his freedom for a long period even though he committed a relatively minor crime. It is for precisely this reason that the defence of mental illness is generally raised only if X is charged with a crime for which a severe sentence may be imposed, such as murder.

12 Diminished responsibility Section 78(7) provides that if the court finds that X at the time of the commission of the act was criminally responsible for the act, but that his capacity to appreciate its wrongfulness or to act in accordance with an appreciation of its wrongfulness was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility (capacity) into account when sentencing him.

This subsection confirms that the borderline between criminal capacity and criminal non-capacity is not an absolute one, but a question of degree. A person may suffer from a mental illness yet nevertheless be able to appreciate the wrongfulness of his conduct and act in accordance with that appreciation. He will then, of course, not succeed in a defence of mental illness in terms of section 78(1). If it appears that, despite his criminal capacity, he finds it more difficult than a normal person to act in accordance with his appreciation of right and wrong, because his ability to resist temptation is less than that of a normal person, he must be convicted of the crime (assuming that the other requirements for liability are also met), but these psychological factors may be taken into account and may then warrant the imposition of a less severe punishment.[101]

13 Psychopaths Although not all psychiatrists and psychologists are in full agreement on every detail in the description of a psychopath, it can be accepted for present purposes that the main characteristics of a psychopath are the following: he is a person who, from an early age, has suffered from emotional immaturity or instability, which manifests itself in an inability to comply with the accepted moral and social norms. He acts impulsively, does not readily learn from experience, is egocentric and has no feelings of compassion towards others, feels little or no guilt, and accordingly finds it more difficult than a normal person to appreciate the wrongfulness of his conduct or to act in accordance with such an appreciation.[102] Psychopathy is a psychiatric concept which has a wide range, and for this very reason is not of much value to the lawyer who is trying to determine criminal liability.

Most authorities nowadays are of the opinion that for legal purposes psychopathy indicates an antisocial personality rather than a mental illness or mental defect which excludes criminal capacity.[103] However, psychopathy may, either alone or cumulatively with other factors, lead to a finding of diminished responsibility, provided the psychopathy is causally related to the crime in question and of a sufficiently serious degree to weaken the psychopath's self-control to the extent that he is morally less blameworthy than a person endowed with normal will-power would have been.[104]

Following certain recommendations by the Booysen Commission of Inquiry, the Criminal Procedure Act was amended in 1993 by the insertion of sections 286A and 286B. These sections provide that if the court is satisfied that X represents a danger to the physical or mental well-being of other persons and that the community should be protected against him, the court must declare him

---

101 *Sibiya* 1984 1 SA 91 (A); *M* 1985 1 SA 1 (A); *Director of Public Prosecutions, Transvaal v Venter* 2009 1 SACR 165 (SCA) par 47, 51.

102 The first sentence of this description of a psychopath is based upon a description accepted by the court in *Kennedy* 1951 4 SA 431 (A) 434. The most comprehensive discussion in our case law of the meaning of psychopathy and its effect on criminal liability is to be found in *Mnyanda* 1976 2 SA 751 (A) and in *Pieterse* 1982 3 SA 678 (A). For other descriptions of psychopathy, see the expert evidence quoted in *J* 1975 3 SA 146 (O) 150; *Lehnberg* 1975 4 SA 553 (A) 559E; *Phillips* 1985 2 SA 727 (N); *Kosztur* 1988 3 SA 926 (A) 930–931; *Lawrence* 1991 2 SACR 57 (A) 66–67. See further *Rumpff Report* ch 8; Davis 1982 *SACC* 143; 1983 *SACC* 259; Van Oosten 1992 *De Jure* 1.

103 Van Oosten 1992 *De Jure* 1 17–18.

104 *Mnyanda supra* 763–767; *Pieterse supra* 687; *Phillips supra*.

a dangerous criminal. The court must then impose imprisonment for an indefinite period and direct that he be brought before the court on the expiration of a period determined by the court. Although these provisions do not refer expressly to psychopaths, it is apparent that psychopaths will frequently be dealt with in terms of these provisions.[105]

14 Incapacity to stand trial The discussion thus far of mental illness has related only to cases in which X's mental condition at the time of the commission of the alleged crime was at issue. Sometimes, however, it is not X's mental condition *at the time of the commission of the alleged crime* which is put at issue, but his mental condition *at the time of his trial*. It stands to reason that a court cannot try a mentally ill person. Such a person is incapable not only of giving evidence properly, but also of either defending himself or of properly instructing his legal representative. This is the position no matter what his mental condition was at the time of the commission of the alleged crime. An allegation that X is mentally ill at the time of his trial must therefore not be confused with an allegation that he was mentally ill at the time of the commission of the alleged crime. The Criminal Procedure Act makes separate provision for each of the above two possibilities.[106]

The procedure to be followed if it is alleged that because of mental illness X lacks the capacity to understand the proceedings, and can therefore not be tried, is set out in section 77, read with section 79. As the provisions of these two sections are primarily of procedural importance, they will not be set out and discussed here. It is sufficient to mention that the investigation basically follows the same pattern as the investigation by experts where it is alleged that X was mentally ill at the time of the commission of the alleged crime. Section 79 contains provisions relating to the number of psychiatrists who must conduct the investigation, the committal of X to a mental hospital or other place for the purposes of observation or investigation, the report to be drawn up by the psychiatrists, and the adjudication of the report by the court. If the court finds that X is capable of understanding the proceedings so as to make a proper defence, the proceedings are continued in the ordinary way.[107] If, however, the court finds that X lacks this capacity, the court has a discretion to issue one of a number of orders which are set out in detail in section 77(6). If, for example, X is charged with a serious crime such as murder, the court must direct that X be detained in a psychiatric hospital or a prison pending the signification of a judge in chambers.[108] After such a direction has been made, X may subsequently, at any time when he is no longer mentally ill, be prosecuted and tried for the alleged crime.[109]

---

105 For a discussion of these sections, see *Bull* 2001 2 SACR 674 (SCA).

106 S 77 deals with the capacity of the accused to understand the proceedings (alleged mental illness at the time of the trial), and s 78 deals with mental illness at the time of the commission of the alleged crime. Concerning the need for legal representation for X, as well as a discussion of procedural matters in enquiries in terms of s 77, see *Matu* 2012 1 SACR 68 (ECB).

107 S 77(5).

108 S 77(6).

109 S 77(7).

(iv) IMMATURE AGE

1 Summary of rules

(*a*) Criminal capacity may be completely absent because of X's immature age. In this respect South African law distinguishes between three age groups, namely 0-9 years; 10-13 years; and 14 years and older.

(*b*) Children who have not yet completed their ninth year, in other words who have not yet reached their tenth birthday, are irrebuttably presumed to lack criminal capacity. They can therefore never be convicted of any crime because of any act or omission on their part before they have reached their tenth birthday.

(*c*) From the date that children have completed their ninth year, in other words from the date upon which they have reached their tenth birthday, until they complete their thirteenth year, in other words until they have reached their fourteenth birthday, they are rebuttably presumed to lack criminal capacity. Children in this age group may be convicted of a crime because of an act or omission on their part, provided the state rebuts the presumption of criminal incapacity applicable to children in this age group beyond reasonable doubt and provided, of course, the state also proves that the children's conduct complied with the other elements of the crime of which they have been charged.[110]

(*d*) In the case of people between the ages of 14 and 21 years of age, the normal principles applicable to all adults apply; it is presumed that at the time of the act or omission such persons had criminal capacity, but this presumption is rebuttable.

The words "irrebuttably presumed to lack criminal capacity" in statement (*b*) means the following: if it is clear to a court that at the time of the commission of the alleged crime X was a child who was not yet ten years old, it will not even allow the prosecution to lead evidence with a view of proving that the child was indeed endowed with criminal capacity at the time of the act. The words "rebuttably presumed to lack criminal capacity" in statement (*c*) means the following: if it is clear to a court that at the time of the commission of the alleged crime X had been a child who was at least ten years of age but not yet 14 years, the court's point of departure is that such a child lacked criminal capacity, but the court will nevertheless allow the state (prosecution) to try to convince it, through evidence or otherwise, that the child had indeed been endowed with criminal capacity at the time of the commission of the alleged crime.

A person who lacks criminal capacity because of youth cannot even be convicted as an accomplice to a crime. He can, of course, be used by another person as an innocent instrument in the commission of a crime by such other person.

---

110 *K* 1956 3 SA 353 (A); *Mdukazi* 1972 4 SA 256 (NC); *M* 1978 3 SA 557 (Tk); 558; *M* 1979 4 SA 564 (B) 566; *Pietersen* 1983 4 SA 904 (E) 907.

2 Age limits laid down in Act 75 of 2008 The rules set out above are based on the provisions of sections 7 and 11 of the Child Justice Act 75 of 2008. All references hereafter to "the Act" are references to this Act. This Act has replaced the former common law provisions relating to the criminal capacity of young persons.[111] In reality the only substantial change in the law brought about by the Act is the replacement of the first age limit, which according to the common law had been seven years, by a new age limit of ten years. Practically speaking, this amendment does not make much difference, because even before the coming into operation of the Act the state in practice almost never prosecuted a child who had been below the age of ten at the time of the commission of the alleged crime.

3 Test laid down in Act to determine criminal capacity of children The test to determine whether a child between the ages of ten and fourteen years had criminal capacity is explicitly set out in section 11(1) of the Act. The subsection provides that, in order to prove the criminal capacity of a child in this age group, the state must prove beyond reasonable doubt that at the time of the commission of the alleged crime the child had the capacity firstly, to appreciate the difference between right and wrong and secondly, to act in accordance with that appreciation. In broad terms this test is in line with the general test to determine criminal capacity set out above.[112] The first part of the test contains the cognitive element and the second the conative element.

4 Test to determine criminal capacity in general The provisions of section 11(1) must be welcomed, because in the previous case law it was not completely clear what the test was to determine the capacity of children below fourteen years of age.

A good indication of the factors which a court must take into account in deciding whether a child between the ages of ten and fourteen has criminal capacity is to look at the factors which a prosecutor must, according to section 10, take into consideration when deciding whether a child in this age group should be prosecuted. These factors include the following: the child's educational level, cognitive ability, domestic and environmental circumstances, real age and maturity at the time of the commission of the alleged crime and the nature and seriousness of the alleged crime. From a procedural point of view a court must also consider the contents of a probation officer's assessment report as set out in the Act.

Section 11(3) provides that a Magistrate or Child Justice Court may order an evaluation of the criminal capacity of the child by a suitably qualified person, which must include an assessment of the cognitive, moral, emotional, psychological and social development of the child.

It stands to reason that the closer a child approaches the age of ten, the stronger is the presumption that he lacked capacity, and the nearer he approaches fourteen years, the weaker is the presumption.[113] The child's personal experience also plays a role.

---

111 See s 7(3) of the Act.
112 *Supra* V B (i) 1.
113 *K* 1956 3 SA 353 (A) 358; *Ngobese* 2002 1 SACR 562 (W) 564*f-g*.

5 Cognitive leg of test Section 11(1) requires the state to prove firstly, that the child between ten and fourteen years had the capacity to appreciate the difference between right and wrong. These words refer to the child's capacity to differentiate between right and wrong in general, and not to the child's capacity to appreciate the wrongfulness of the specific act which he had committed in the specific circumstances of the case – in other words taking into account the specific type of crime he had allegedly committed and the specific defences which might play a role in the circumstances of the case. Before the coming into operation of the Act the courts expressly held that the state had to prove that the child had the capacity to appreciate the wrongfulness of the act in the latter (narrower) sense of the term.[114]

It is submitted that the abovementioned words in section 11(1) should be interpreted in such a way that they refer to the capacity to differentiate between right and wrong, bearing in mind the specific acts committed by X and the specific circumstances of the case, as opposed to the difference between right and wrong in general. Such an interpretation, which places a heavier onus on the state, would accord with *firstly*, the rule relating to the interpretation of statutes that statutory provisions should, as far as possible, be interpreted in the light of the common law, and *secondly*, the provisions of section 28(2) of the Constitution, which forms part of the Bill of Rights and which provides that the child's best interests are of particular importance in every matter concerning the child.

Where common law crimes such as assault and theft are concerned, it is easier for the state to prove that the child was aware of the wrongfulness of his conduct than where statutory crimes are concerned, especially if the latter are of a fairly technical nature.[115]

6 Conative leg of test As far as the second leg of the test for criminal capacity set out in section 11(1) (ie, the conative leg of the test) is concerned, it must be borne in mind that a child can be regarded as having criminal capacity only if he has the necessary self-control and power of resistance to temptation. Young children often act impulsively, or are otherwise influenced by older children or adults to such an extent that their power of resistance are either absent or considerably weaker than those of ordinary adult persons.[116] Even before the present Act came into force the courts had refused to convict children below fourteen who have committed crimes under the influence of older persons, whether family or friends.[117]

---

114 *K supra* 456; *M* 1978 3 SA 557 (Tk) 558; *Ngobese supra* 564*i*. For a valuable and critical analysis of the cognitive leg of the test as formulated in the Act, see Walker 2011 *SACJ* 33.

115 *M* 1979 4 SA 564 (B0566); *Ngobese supra* 564*g*.

116 *Ngobese* 2002 1 SACR 562 (W) 565.

117 *Dikant* 1948 1 SA 693 (O) 700–701; *M* 1978 3 SA 557 (Tk); *Khubeka* 1980 4 SA 221 (O); *Pietersen* 1983 4 SA 904 (E) 910H.

C INTENTION

1 Description of concept

"Intention", as this term is used in criminal law, means that a person commits an act:

(1) while his will is directed towards the commission of the act or the causing of the result;

(2) in the knowledge of

(*a*) the existence of the circumstances mentioned in the definitional elements of the relevant crime and

(*b*) in the knowledge of the unlawfulness of the act.

If X acts with his will directed towards the commission of the act but without the knowledge referred to in (2)(*a*) and (*b*), he is said to act with so-called "colourless intention". "Colourless intention" corresponds more or less with the meaning which intention has in everyday parlance, that is, the lay person's language used outside the courts.

In the law, and in criminal law in particular, the term "intention" is always used in a technical sense, that is, a meaning which differs from the popular meaning of the word in ordinary parlance. X acts with intention in the technical meaning of the word if his will is directed towards the commission of the prohibited act or the causing of the prohibited result while he has the knowledge referred to in (2)(*a*) and (*b*). His intention or will is then "coloured" by the knowledge referred to in (2)(*a*) and (*b*).

Lawyers are fond of referring to "coloured intention" by its Latin name *dolus*. By using the word *dolus*, one ensures that one is not referring to "colourless intention", but to intention in the technical meaning which the word has in legal terminology.

In paragraphs numbered 2 to 13 below, the discussion will mainly centre on the meaning of "intention" in the sense of "colourless intention", that is, the direction of the will towards performing the act or towards bringing about the specific result. In paragraphs 14 to 24 below, the discussion will mainly be devoted to the requirements that X must have knowledge of the existence of the circumstances mentioned in the definitional elements (in other words, the requirement that X must not be mistaken), as well as the requirement of knowledge of unlawfulness.

2 Two elements of intention[118] Intention, in whatever form, consists of two elements, namely a cognitive (or intellectual) and a conative (volitional or voluntative) element.

The *cognitive* element consists in X's *knowledge* of the act, of the circumstances mentioned in the definitional elements and of the unlawfulness.

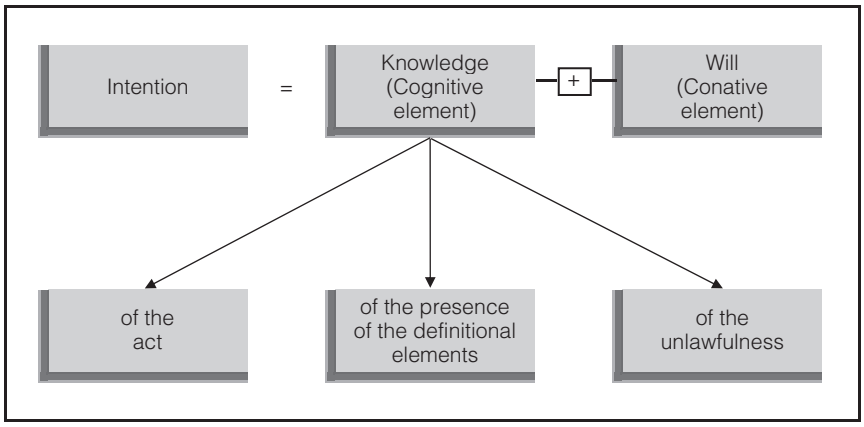
---

118 See *Jescheck and Weigend* 293–294; *Maurach-Zipf* ch 22 pars 1–2; *Schönke-Schröder* n 9–14 *ad* s 15.

The *conative* element consists in directing the *will* towards a certain act or result: X *decides* to accomplish in practice what he has previously pictured to himself in his imagination only. This decision to act transforms what was until then only "day-dreaming" or "imagination" into intention.

> Intention in the technical sense of the term can therefore be defined as the will to commit the act or cause the result set out in the definitional elements of the crime, in the knowledge of the circumstances rendering such act or result unlawful.

Defined even more tersely, one can say that *intention is to know and to will an unlawful act or a result.* The following diagram illustrates these principles:



3 Forms of intention There are three forms of intention, namely direct intention (*dolus directus*), indirect intention (*dolus indirectus*) and what is usually described as *dolus eventualis*. In a crime requiring intention it is sufficient for the state to prove that X entertained any one of these forms of intention. The three forms of intention will now be discussed one by one.

4 *Dolus directus*

> Direct intention (*dolus directus*) comprises a person's directing his will towards achieving the prohibited result or towards performing the prohibited act. This result or act is his goal. He desires the act or result.[119]

This form of intention comes closest to the everyday meaning of "intention". In this form of intention X is *certain* that he is committing the prohibited act or that he is causing the prohibited result. He does not regard the commission of the act or the causing of the result as a mere possibility. An example of this type of intention is where X, having a grudge against Y with whom his wife has fallen in love, awaits Y at Y's home and upon his arrival, shoots Y through the heart in order to kill him.

---

119 *Ferreira* 2004 2 SACR 454 (SCA) 475*c–d*; *Humphreys* 2013 2 SACR 1 (SCA) par 12.

5 *Dolus indirectus*

In indirect intention (*dolus indirectus*) the prohibited act or result is not X's goal, but he realises that if he wants to achieve his goal, the prohibited act or result will of necessity materialise.

For example, X is sitting in his neighbour's (Y's) house. From inside the house he wants to shoot a bird which is outside. He realises that his shot will of necessity shatter Y's window-pane. Although he is not anxious to bring about this result, he nevertheless decides to go ahead, aims at the bird and shoots the window-pane to pieces. If he is subsequently charged with damaging Y's property, he cannot be heard to say that he meant to shoot only the bird, not to damage the window-pane. It is evident from this example that this form of intention may be present even though X does not desire the prohibited result. The volitional element here consists in the fact that X directs his will towards shooting the bird and decides to go ahead with it knowing full well that he will necessarily also shatter the window-pane.

6 Dolus eventualis[120]

The definition of *dolus eventualis* is as follows: A person acts with intention in the form of *dolus eventualis* if the commission of the unlawful act or the causing of the unlawful result is not his main aim, but:

(*a*) he subjectively foresees the possibility that, in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused, and

(*b*) he reconciles himself to this possibility.

Another way of describing component (b) is to say that X was reckless as to whether the act may be committed or the result may ensue. However, it does not matter whether component (b) is described in terms of "reconciliation with the possibility" or in terms of "recklessness".[121]

---

120 For general discussions of this form of intention, see Labuschagne 1988 *SACJ* 415–418; Whiting 1988 *SACJ* 419–425; Loubser and Rabie 1988 *SACJ* 425–446; Paizes 1988 *SALJ* 636 ff; Snyman 1990 *SALJ* 365 ff.

121 For descriptions of *dolus eventualis*, see *P* 1972 3 SA 412 (A) 416: "The test for such *dolus* is whether the appellant subjectively foresaw the possibility of death resulting from his assault on the deceased, but persisted therein, reckless whether such possibility became fact"; *Sikweza* 1974 4 SA 732 (A) 736: "[W]hether the accused foresaw the *possibility* of death resulting from the unlawful act, yet persisted in his conduct reckless whether death ensued or not"; *Mavhungu* 1981 1 SA 56 (A) 66G–H; *Swanepoel* 1983 1 SA 434 (A) 456H; *Ngubane* 1985 3 SA 677 (A) 685–686; *Talane* 1986 3 SA 196 (A) 208A; *Majosi* 1991 2 SACR 532 (A) 537*c–d*; *Van Wyk* 1992 1 SACR 147 (Nm) 157*i–j*; *De Oliveira* 1993 2 SACR 59 (A) 65*i–j*: "that . . . [the appellant] . . . did foresee . . . the possibility of death ensuing . . . but reconciled himself to that event occurring"; *Maritz* 1996 1 SACR 405 (A) 415*a–b*: ". . . nie alleen dat die dader die moontlike gevolge van sy optrede voorsien het nie, maar dat hy die risiko daarvan bewustelik aanvaar het"; *Van Aardt* 2009 1 SACR 648 (SCA) par 40; *Humphreys* 2013 2 SACR 1 (SCA) par 12; *Makgatho* 2013 2 SACR 13 (SCA) par 10.

Dolus eventualis is a form of intention which deviates from "intention" in its ordinary sense. Sometimes writers or courts have referred to this form of intention not by its Latin name, but by expressions such as "constructive intention" or "legal intention". These expressions tend to give rise to confusion. The Latin term *dolus eventualis* is the one generally used to describe this form of intention, and the one which will be used in the discussion which follows.

X acts with this form of intention if he directs his will towards a certain event or result which for the sake of convenience will here be described as A, but foresees that if he achieves A there is a possibility that another event or result, B, might ensue. However, he does not allow himself to be deterred by the foreseen possibility that B may ensue, and proceeds with his original plan to bring about A, indifferent as to whether B will ensue or not. In the course of committing the act, B does in fact ensue. In the eyes of the law he then has intention in respect of B.

The following is an example of a situation in which X acts with this form of intention: X wants to burn down a building. He foresees the possibility that somebody (Y) may be inside it, but nevertheless decides to proceed with his plan, not caring whether Y is in the building or not. He may even wish that Y is not in the building. He decides to go ahead with his plan to set fire to the building, "come what may". He does not allow himself to be deterred by the possibility that Y may be inside the building. He sets fire to the building. Y is indeed inside the building, and dies in the flames. In the eyes of the law X intentionally caused Y's death. It is no defence for X to allege afterwards that this intention was directed only at setting the building alight, and not at killing Y.

Another example is where X, standing on a bridge above a freeway, throws a rock onto the road in which traffic is racing by beneath him. X knows that the rock may or may not strike a vehicle. If the rock does strike a car and the question arises whether he had the intention to strike a car, X cannot rely on the fact that he was not sure whether the rock would strike a car or not.

If X has *dolus eventualis*, it is possible that he may in the eyes of the law have the intention to bring about a result even though he does not wish the result to follow. In fact, *dolus eventualis* may be present even though X hopes that the prohibited result will *not* follow. In this form of intention the voluntative element consists in the fact that X directs his will towards event A, and decides to bring it about even though he realises that a secondary result (event B) may flow from his act.

In practice *dolus eventualis* is very important. It happens daily that X, who has been charged with, for example, murder, in that he had struck Y with a knife, admits to having struck Y with the knife but nevertheless alleges that he never had the intention to kill Y, because he only wanted to "frighten" Y. If, however, the court finds upon the evidence that X had indeed foreseen the possibility that his conduct may result in Y's death and that he acted recklessly in respect of this possibility, there are sufficient grounds for the court to find that X had indeed killed Y intentionally.

7 *Dolus eventualis*: Foreseeing the result There are two requirements for the existence of *dolus eventualis*. The first is that X should *foresee* the possibility of the result, and the second is that he should *reconcile* himself to this

possibility. The first may be described as the cognitive part of the test and the second as the conative (or volitional) part of the test.

The first requirement deals with what X conceives to be the circumstances or results of his act. There can be no *dolus eventualis* if X does not envisage those circumstances or results. *Dolus eventualis* differs from *dolus indirectus* in that X foresees the prohibited result not as one which will *necessarily* flow from his act, but only as a *possibility*.[122]

The term "possibility" as used in this context is elastic: must it be a strong possibility, or is a slight, remote or exceptional possibility also sufficient? The answer is that *dolus eventualis* is absent if X foresees the possibility only as remote or far-fetched. Any normal person foresees that there is a remote or exceptional possibility that an everyday activity, such as driving a motor car, may result in somebody else's death, and if he nevertheless proceeds with such an activity, it does not mean that he therefore has *dolus eventualis* in respect of the result which he foresees only as a remote possibility. On the other hand, *dolus eventualis* is not limited to cases where the result is foreseen as a strong possibility. It is submitted that the correct approach is to assume that there must be a *real or reasonable* possibility that the result may ensue. In *Makgatho*[123] the Supreme Court of Appeal in a unanimous judgment expressly endorsed this view.

However, the fact that the possibility is remote may be of importance from an evidential point of view. It may influence the making of deductions concerning what X subjectively foresaw: the more remote (or improbable) the possibility that the result might ensue, the more difficult it will be to find as a fact that X indeed foresaw that possibility.[124] Furthermore, if the possibility of the result ensuing was remote or far-fetched, *dolus eventualis* will probably be absent in that X did not reconcile himself to the possibility that the result might ensue. It is difficult to see how one can reconcile oneself to a far-fetched possibility of the result ensuing.

---

122 See the cases referred to in the previous footnote. That it is sufficient to foresee the *possibility* (as opposed to the *probability*) of the result ensuing is evident from *Nkombani* 1963 4 SA 877 (A) 891C–D; *Sigwahla* 1967 4 SA 566 (A) 570B–C and *Sikweza supra* 736F.

123 2013 2 SACR 13 (SCA) par 9. For strong support of the proposition that what is required is foresight of a *reasonable* possibility, see *Van Wyk* 1992 1 SACR 147 (Nm) 161*b* (per Ackermann AJA). This view of *dolus eventualis* was quoted with apparent approval by the Supreme Court of Appeal in *Van Aardt* 2009 1 SACR 648 (SCA) par 39. *Contra Qeqe* 2012 2 SACR 141 (ECG), in which the court erroneously rejected an argument that the foresight must be one of a *reasonable* possibility and opted for the view that foresight of even a remote possibility suffices.

It is interesting to note the definition of intention in s 2(1) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 as well as s 1(6) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004, and more particularly when a person is deemed to have knowledge of a certain fact in terms of these acts. Both these Acts provide that X is deemed to have knowledge of a fact *inter alia* if he believes that there is a *reasonable* possibility of the existence of that fact. This is a strong indication that even the legislature requires a reasonable (as opposed to a remote) possibility for *dolus eventualis*.

124 *Dladla* 1980 1 SA 1 (A) 4H; *Shaik* 1983 4 SA 57 (A) 62D–E.

8 *Dolus eventualis*: Reconciling oneself to the ensuing result It does not follow from the fact that X foresaw the result as a reasonable possibility that *dolus eventualis* is therefore present. A person may foresee a result as possible, and nevertheless lack *dolus eventualis*, if he decides or comes to the conclusion that the result will not ensue from his act. Hence the second requirement for this form of intention, namely that X must also have reconciled himself to the possibility that the result may follow.

"Reconcile with the possibility" means that X decides to go ahead with his actions even though he foresees the possibility that the prohibited result may follow. To him it is immaterial whether this result flows from his actions or not: he is not concerned about it. He does not allow himself to be deterred by the prospect of the forbidden result flowing from his act. He is *reckless* in respect of the prohibited result.[125] By "reckless" is meant that X consciously accepts a risk.[126]

There is almost never direct evidence of the existence of the second (conative) part of the test to determine *dolus eventualis*. A court almost always bases its finding on whether the second part of the test has been complied with on deductions or inferences from the facts.

Some writers are of the opinion that the second part of the test to determine *dolus eventualis* (ie, the "volitional element") is redundant, and that all that is required for *dolus eventualis* is subjective foresight of the possibility of the result ensuing, provided the possibility is not remote, but substantial or "concrete".[127] According to this view "recklessness" (the word often employed to refer to the second part of the test) adds nothing to the first part of the test: if X foresaw the possibility of the result but nevertheless proceeded with his act he was in any event reckless. Recklessness, according to this view, can be absent only if X foresaw the possibility but decided *not* to proceed with his act, in which event he will escape liability on the basis that there was no unlawful act.[128]

The courts do not follow this view of *dolus eventualis*, but favour the approach set out above according to which the test for *dolus eventualis* always includes a second (volitional) leg, namely X's reconciling him to the possibility of the result ensuing. Support for the courts' approach may be found in the consideration that intention always includes a reference to X's will; intention cannot consist merely in knowledge or appreciation of the existence of some

---

125 See the cases referred to *supra* under par 6 where *dolus eventualis* is defined, as well as *Dladla* 1980 1 SA 1 (A) 4; *Ngubane* 1985 3 SA 677 (A) 685D–F and *Maritz* 1996 1 SACR 405 (A) 415*a–b,* For a discussion of the voluntative part of the test to determine *dolus eventualis*, see De la Harpe and Van der Walt 2003 *SACJ* 207.

126 In *Nkombani* 1963 4 SA 877 (A) 896D Holmes JA stated: "To reck means to take heed of something, so as to be alarmed or troubled thereby or so as to modify one's conduct or purpose on that account."

127 Smith 1979 *SALJ* 81 92–93; Morkel 1981 *SACC* 162 173; 1982 *THRHR* 321 324; Paizes 1988 *SALJ* 636 638. These writers argue that although the courts almost invariably mention the second part of the test in their formulation, the outcome of the case never turns on an application of this second part of the test.

128 See the criticism by Smith 1979 *SALJ* 81 ff, especially 92–93, Morkel 1981 *SACC* 162 165–170; Bertelsmann 1975 *SALJ* 59 71–77; 1980 *SACC* 28 29–31; Paizes 1988 *SACJ* 636 639.

fact.[129] In *Ngubane*[130] the Appellate Division considered this alternative view of *dolus eventualis* but held unambiguously that "(t)he distinguishing feature of *dolus eventualis* is the volitional component: the agent (the perpetrator) 'consents' to the consequence foreseen as a possibility, he 'reconciles himself' to it, he 'takes it into the bargain'."

In *Humphreys*[131] X was the driver of a minibus transporting school schoolchildren. The route he followed traversed a railway crossing controlled with booms. When he approached the crossing the booms were already down and cars were standing in front of the booms, waiting for the train to cross and the booms to be lifted. Because the booms are positioned on different sides of the railway line, they can be avoided, even when they are down, by overtaking the line of vehicles parked in front of the boom on their right-hand side, approaching the crossing in the lane destined for oncoming traffic and by then turning sharply to the correct lane to pass the boom on the other side. This is exactly what X did, despite the flashing warning lights. On entering the crossing the minibus was hit by the train, with catastrophic consequences. Ten children were fatally injured. Four survived, but suffered serious injury. X himself was injured, but not fatally. He was charged with murder in respect of the ten children who died, and attempted murder in respect of those who were fortunate to survive.

X's appeal to the Supreme Court of Appeal against his original convictions of murder and attempted murder revolved around the issue of *dolus eventualis*. It was beyond dispute that X had subjectively foreseen the possibility of his conduct causing the death of those who died, but the question arose whether the second leg of the test for *dolus eventualis*, namely the conative leg (reconciliation with the foreseen possibility of death) had been complied with. The court (*per* Brand JA) held, by inferential reasoning, that X may have thought that the collision would not occur. According to the court, he did not reconcile himself to the possibility of the collision because such an inference would necessarily entail that he had reconciled himself with his own death. Such an inference could, according to the court, not be drawn beyond reasonable doubt, and therefore the conative leg of the test for *dolus eventualis* was not complied with. X's ten convictions of murder were accordingly set aside and replaced with ten convictions of culpable homicide. The four convictions of attempted murder were also set aside and the original sentence of twenty years' imprisonment was replaced with a sentence of eight years' imprisonment.

---

129 *Ngubane* 1985 3 SA 677 (A) 685D. See also Bertelsmann 1980 *SACC* 28 29.

130 1985 3 SA 677 (A) 685D. In *Beukes* 1988 1 SA 511 (A) 521–522 the Appellate Division similarly accepted that both foresight and "reconciliation" were required for *dolus eventualis*. Referring to the latter part of the test, the court made the following observations: "'n Hof maak dus 'n afleiding aangaande 'n beskuldigde se gemoed uit die feite wat daarop dui dat dit, objektief gesien, redelik moontlik was dat die gevolg sal intree. Indien so 'n moontlikheid nie bestaan nie word eenvoudig aanvaar dat die dader nie die gevolg in sy bewussyn opgeneem het nie. Indien wel, word in die reël uit die blote feit dat hy handelend opgetree het, afgelei dat hy die gevolg op die koop toe geneem het. Dit kom my dus voor dat die tweede element normaalweg slegs bevredig is indien die dader die intrede van die gevolg as 'n redelike moontlikheid voorsien het." See also *Maritz* 1996 1 SACR 405 (A) 415*b*–416*f–g*.

131 2013 2 SACR 1 (SCA).

The court's exposition of the principles relating to *dolus eventualis* cannot be faulted. The only possible criticism of the case revolves around the court's application of the law to the facts. Is it really so far-fetched to allege that X did not reconcile himself to the possibility of a collision and therefore to his own death? X's conduct was similar to the conduct of a person playing "Russian roulette". Such a person clearly reconciles himself with the possibility of his own death. It is difficult to imagine more reckless behaviour than that of X. One can agree with Hoctor's description of the court's application of the law to the facts as resting on "very shaky foundations of logic and psychology"[132] It is submitted that the trial court's finding that X did have *dolus eventualis* in respect of the deaths or possible deaths of the passengers is to be preferred.

More acceptable is the judgment in *Qeqe*.[133] Having stolen a car, X was chased by the police. Trying to evade the police, he drove the car he stole as fast as possible through a township street in the middle of the day, more or less when the schoolchildren were on the streets, at one stage leaving the road and driving on one pavement, then swerving to the opposite pavement. He drove in a "zig-zag" way and cut corners. In the course of his manoeuvers he caused the deaths of three children. He was convicted of the murders of all three children, the court having found that he had the necessary *dolus eventualis* in respect of the deaths of each of them. X foresaw the possibility of his act causing the death of the children and he reconciled himself to this possibility.

9 *Dolus eventualis* and conscious negligence X does not comply with the second part of the test to determine *dolus eventualis* if he foresees the possibility of the result, but decides that it will not flow from his actions. Here he does not accept or reconcile himself to the result. *Dolus eventualis* is excluded even if he unreasonably comes to the conclusion that the result will not follow, because the test in respect of intention is purely subjective, as will be explained below. The question is not whether he *should* have accepted that the result would follow, but whether *in actual fact* he accepted that it would follow.

If he foresaw the result but unreasonably came to the conclusion that it would not materialise, he was negligent. One may say that he *should* have realised that the result would follow from his actions, but in fact did not realise it. He was then negligent, for the test in respect of negligence is not subjective, but objective. This form of negligence is known as conscious negligence (*luxuria*), in order to distinguish it from unconscious negligence, where X is not even aware of the possibility of the result, although he *should* have been aware of it.[134] Conscious negligence is therefore not a form of intention, but a form of negligence.[135] In *Ngubane*[136] the Appellate Division confirmed that the difference

---

132 Hoctor 2013 *SACJ* 75 84. At 85 he describes the court's reasons for dismissing the judgment of the trial court as "rather underwhelming". See also the commentary on the case by Carstens 2013 *SACJ* 67 as well as the criticism of the court's finding that the second leg of the test for *dolus eventualis* has not been complied with by Watney 2013 *TSAR* 770, especially 776, who describes the court's reasoning as "kunsmatig en spekulatief" ("artificial and speculative")

133 2012 2 SACR 41 (ECG).

134 On conscious negligence see *Ngubane* 1985 3 SA 677 (A) 685; *Humphreys* 2013 2 SACR 1 (SCA) par 15.

135 *Humphreys* 2013 2 SACR 1 (SCA) par 15.

136 1985 3 SA 677 (A) 685D–F.

between *dolus eventualis* and conscious negligence is not to be found in the presence or absence of the *foresight* of the result (cognitive element), but in whether or not X reconciled himself to the foreseen possibility (volitional element).

The above principles may be illustrated by the following example: X shoots duck swimming on a lake. On the opposite side of the lake people are having a picnic. He is aware of the presence of these people and realises that if he shoots and the bullet misses the duck, it may hit one of the picnickers. Assume that, although he does not wish to kill a picnicker, his attitude towards this foreseen possibility is: "I don't care", "I can't be bothered", or "I'm going to shoot, no matter what happens". He shoots at the duck, but the bullet misses the duck and strikes and kills a picnicker. He will then have *dolus eventualis* in respect of the picnicker's death and be guilty of murder.

Assume, however, that, having foreseen the possibility that the bullet may hit a picnicker, he reasons as follows with himself: "I am a crack shot. In the past I have often shot duck here. I have never missed one, and therefore a picnicker will not be struck by a bullet." If he then shoots and misses the duck and the bullet strikes a picnicker, with fatal consequences, he lacks *dolus eventualis*; he acts with conscious negligence only, provided it is clear that a reasonable person, in his position, would not reason and act likewise.

In short, in the case of *dolus eventualis*, X *hopes* that the bullet will not hit a picnicker. In the case of conscious negligence he *bona fide believes* that it will not.[137]

10 Subjective test The test in respect of intention is purely subjective. The court must determine what the state of mind of that particular person – the accused (X) – was when he committed the act. When determining whether X had intention, the question is never whether he *should* have foreseen the result, but whether he foresaw it as an actual fact. To say that X "should have foreseen" says nothing about what X actually thought or foresaw; it is simply comparing his state of mind or conduct with another's, namely the fictitious reasonable person. To do this is to apply the test in respect of negligence, which is objective. Intention always deals with "what is", not with "what ought to be". The latter forms part of negligence. "What is" and "what ought to be" are two distinct concepts. They do not overlap. The courts emphasise that the test to determine intention is subjective:[138] the court must try to imagine itself in X's position when he committed the act and determine whether he had the intention then (or foresaw the possibility of the result and reconciled himself to this possibility).

11 Determining intention by inferential reasoning How does the state prove in a court that X had intention at the time of the commission of the act?

Sometimes there may be direct evidence of X's intention: if, in a confession, in the course of being questioned at the stage of plea-explanation or when giving evidence before the court, X admits that he acted intentionally, and if the court believes him, there is of course no problem for the court to find that he in fact acted intentionally. However, in the great majority of cases there is no such

---

137 *Buda* 2004 1 SACR 9 (T) 20*e*; *Van Aardt* 2009 1 SACR 648 (SCA) par 41.

138 *Dube* 2010 1 SACR 65 (KZP) par 6–8; *Humphreys* 2013 2 SACR 1 (SCA) par 13; *Makgatho* 2013 2 SACR 13 (SCA) par 10.

admission by X. X is under no obligation to give evidence, and even if he decides to give evidence, he may decide falsely to deny that he had intention. How can a court then determine whether X acted intentionally? X is, after all, the only person who knows what his state of mind was at the crucial moment when he committed the act.

There is no rule to the effect that a court may find that X acted with intention only if he (X) admitted that he had intention – in other words, if there is direct proof of intention. It is, after all, a well-known fact that many accused who in fact did have intention, subsequently falsely deny in court that they acted intentionally. If this happens, a court may base a finding that X acted intentionally on indirect proof in intention. This means that the court may infer the intention from evidence relating to X's outward conduct at the time of the commission of his act as well as the circumstances surrounding the events.

If a court is called upon to determine by indirect proof, that is, by inferential reasoning, whether X had intention, it must guard against subtly applying an objective instead of a subjective test to determine intention. It is dangerous for a court to argue as follows: "Any normal person who commits the act which X committed, would know that it would result in the death of the victim; therefore X acted intentionally." Although the court (judge or magistrate) is free to apply general knowledge of human behaviour and of the motivation of such behaviour, it must guard against exclusively considering what a "normal", "ordinary" or "reasonable" person would have thought or felt in given circumstances. The court must go further than this: it must consider all the circumstances of the case (such as the possibility of a previous quarrel between the parties) as well as all of X's individual characteristics which the evidence may have brought to light and which may have a bearing on his state of mind, such as his age, degree of intoxication, his possible irascibility, possible lack of education or low degree of intelligence. The court must then to the best of its ability try and place itself in X's position at the time of the commission of the act and then try and ascertain what his (X's) state of mind was at that moment – that is, whether, for example, he appreciated or foresaw the possibility that his act could result in Y's death.[139]

The effect of the application of the subjective test is that the court must guard against "armchair reasoning": as far as possible it must avoid, in the calm atmosphere of the court, imputing to X a state of mind based on facts which came to light only after the act had already been committed,[140] or based upon what the judge or magistrate himself or an ordinary person would have thought had he been in X's shoes at the time of the act.

Courts sometimes use the expression that X "*must* have foreseen" death. Read in its proper context this may mean nothing more than that the inference is drawn by the court from the evidence that X in actual fact foresaw death.[141]

---

139 As to inferential reasoning in determining *dolus eventualis*, see *Humphreys* 2013 2 SACR 1 (SCA) par 14.

140 *Sigwahla* 1967 4 SA 566 (A) 570A; *De Bruyn* 1968 4 SA 498 (A) 507; *Sataardien* 1998 1 SACR 637 (C) 644.

141 *Majosi* 1991 2 SACR 532 (A) 538*e*; *De Oliveira* 1993 2 SACR 59 (A) 65*i–j*: "The only reasonable inference to be drawn from the evidence . . . is that he must have foreseen,

[*continued*]

However, if by "must have foreseen" is meant not "did in fact foresee", but "should (as a reasonable person) have foreseen", the wrong test is being applied in respect of intention, namely an objective instead of a subjective one. The words "should", "ought to" and sometimes even "must" describe the objective test to determine negligence, not the subjective test in respect of intention. It is inadvisable for a court to use expressions such as "must have" or "should have" when indicating that X had intention. The courts have on numerous occasions emphasised that one should not too readily proceed from "ought to have foreseen" to "must have foreseen" and hence to "by necessary inference in fact did foresee" the possible consequences of the conduct.[142]

In deciding by way of inference what X thought or foresaw at the critical moment a court undoubtedly considers objective factors such as the type of weapon which X used, the seriousness of the injury or depth of the wound (if, for example, X inflicted the wound with a knife), the part of Y's body which was wounded as well as the objective probabilities of the case and general human experience.[143] However, these factors are merely aids employed in answering the ultimate question, namely whether X subjectively foresaw the possibility of the prohibited consequence or circumstance and whether he reconciled himself to that possibility. Thus, in the absence of any admission by X, a court is unlikely to find that he foresaw a very improbable possibility or that he reconciled himself to it.[144]

12 Intention and motive Intention must not be confused with the motive for committing the crime. In determining whether X acted with intention, the motive behind the act is immaterial.[145] For this reason X is guilty of theft even though he steals from the rich in order to give to the poor. A good motive may at most have an influence on the degree of punishment. If it is clear that X acted intentionally the fact that his motive was laudable or that one may have sympathy for him cannot serve to exclude the existence of intention, as where he administers a fatal drug to his ailing father in order to release him from a long, painful and incurable illness.[146] Furthermore, if X had the intention to commit an unlawful act or to cause an unlawful result the fact that he did not desire to commit the act or to cause the result in no way affects the existence of his intention.[147]

13 Intention in respect of a circumstance The intention, and more particularly X's knowledge, must relate to the act, the circumstances or consequences set out in the definitional elements of the crime and the unlawfulness. In the discussion of *dolus eventualis* above, because the crime of murder was the model used, it was usually stated that X must foresee the possible *result* of his

---

and by necessary inference did foresee, the possibility . . ."; *Campos* 2002 1 SACR 233 (SCA) 247*e*: "he must have known, and therefore by inference did know ..."

142 *Maritz* 1996 1 SACR 405 (A) 417*b–e*; *Lungile* 1999 2 SACR 597 (SCA) 602*h–i*; *Campos supra* 242*h-i*; *Dube* 2010 1 SACR 65 (KZP) par 6–7.

143 *Beukes* 1988 1 SA 511 (A) 552D–E; *Humphreys* 2013 2 SACR 1 (SCA) par 13.

144 *Dladla* 1980 1 SA 1 (A) 4H.

145 *Nkombani* 1963 4 SA 877 (A) 889C; *Van Biljon* 1965 3 SA 314 (T) 318F–G.

146 *Hartmann* 1975 3 SA 532 (C) 534, 536.

147 *Kgware* 1977 2 SA 454 (O) 455E; *Hibbert* 1979 4 SA 717 (D) 722H.

conduct. It is, however, only certain crimes (the so-called materially defined crimes) which are defined in terms of the causing of a certain result (such as the causing of death in cases of murder and culpable homicide). Formally defined crimes are defined, not in terms of the causing of a certain result, but in terms of the commission of a certain act in certain circumstances.

Intention in respect of a circumstance means that X knows or is aware of that particular circumstance. For example: One of the requirements for a conviction of the crime of possessing a drug in contravention of section 4 of the Drugs and Drug Trafficking Act[148] is that the object or article possessed must be a drug as defined in the Act. Intention in respect of this requirement or circumstance means knowledge by X that what is in his possession is an article described in the Act as a substance which he is not allowed to possess (eg dagga or opium).

This intention may also exist in the form of *dolus eventualis*, namely if X realises the possibility that the article or substance which he has obtained in his possession may be dagga, but does not allow himself to be deterred by this consideration and nevertheless proceeds to possess the substance (in other words, he reconciles himself to this possibility).[149]

14 Mistake excludes intention The knowledge component of intention must relate to the act, all the circumstances or consequences mentioned in the definitional elements of the crime, as well as of the unlawfulness of the act. If X is unaware of any of these factors, he lacks the intention to commit the crime. In legal terminology it is said that there was a "mistake" or "error" on X's part.

The following are two examples of mistake in respect of a circumstance set out in the definitional elements of the crime:

(*a*) X is hunting buck. In the dusk he sees a figure which he thinks is a buck, and shoots at it. It turns out to be a human being whom he has killed. He is then not guilty of murder, since a requirement for murder is that it must be a human being who has been killed: X had the intention of killing, not a human being, but a buck. He was mistaken in respect of one of the definitional elements of the crime of murder, namely the requirement that the victim must be a human being.

(*b*) As X is leaving a meeting he takes a coat, which he believes to be his own, from the coat-rack at the door. He has in fact taken Y's coat, which resembles his own. X is then not guilty of theft, for one of the requirements for theft is that the property taken should belong to a person other than the one taking it. X did not intend to commit theft, but merely to take his own property. He was mistaken in respect of one of the definitional elements of the crime, namely the ownership of the object taken.

As stated above, the intention must also relate to the unlawfulness of the act. If there is no awareness of unlawfulness, there is similarly a mistake which excludes intention. Because of its scope, awareness of unlawfulness merits a separate discussion, which follows later.[150]

---

148 Act 140 of 1992.

149 This principle is borne out by the following decisions: *Churchill* 1959 2 SA 575 (A) 578; *Z* 1960 1 SA 739 (A) 743, 745; *Kazi* 1963 4 SA 742 (W) 750; *Killian* 1977 2 SA 31 (C) 36.

150 *Infra* par 23–24.

15 Mistake need not be reasonable Whether there really was a mistake which excludes intention, is a question of fact. What must be determined is X's true state of mind and his conception of the relevant events and circumstances. The question is not whether the reasonable person in X's position would have made a mistake. The test in respect of intention is subjective, and if one compares X's state of mind and his view of the circumstances with those of the reasonable person in the same circumstances, one is applying an objective test in respect of intention, which is not warranted. To say that mistake excludes intention only if it is reasonable, is the same as saying that it is essential that the reasonable person should have made a mistake under those circumstances.[151]

Because the test is subjective, X's individual characteristics, his level of superstition, degree of intelligence, background and psychological disposition may be taken into account in determining whether he had the required intention, or whether the intention was excluded because of mistake. The reasonableness of the mistake is at most a factor which, from an evidential point of view, tends to indicate that there is indeed a mistake;[152] however, it should not be forgotten that in exceptional circumstances it is possible to make an unreasonable mistake.

It is usually also said that the mistake must be *bona fide*. Since there cannot be such a thing as a *mala fide* mistake, a statement that the mistake must be *bona fide* means only that the mistake must not be feigned, but must be genuine, that is, that it must in actual fact have existed at the crucial moment.[153]

16 Material and immaterial mistakes Not every wrong impression of facts qualifies as a mistake excluding intention and therefore affording X a defence. Sometimes X may be mistaken about a fact or circumstance and yet not be allowed to rely on his mistake as a defence. *Only a mistake relating to the act, the definitional elements and the unlawfulness may exclude intention.* This is the principle underlying the statement sometimes found in legal literature that mistake excludes intention only if the mistake is *material*. A mistake is material only if it relates to the factors described above.

One should therefore always first look at the definitional elements of the particular crime. On a charge of rape, for example, the presence or absence of consent by the woman to sexual penetration is material, because absence of consent constitutes one of the definitional elements of rape. In the crime of incest absence of consent to intercourse is not a definitional element of the crime, and therefore in this crime the presence or absence of consent to intercourse is immaterial: a mistaken belief by X that there was consent to intercourse does not exclude the intention required for this crime.

17 *Error in objecto* The difference explained immediately above between material and immaterial mistakes must be kept in mind especially in situations in which X is mistaken about the object of his act. Such a mistake is known in legal literature as *error in objecto*. *Error in objecto* is not the description of a legal rule; it merely describes a certain type of factual situation. It is therefore

---

151 *Jassane* 1973 4 SA 658 (T); *Sam* 1980 4 SA 289 (T).
152 *Rantsane* 1973 4 SA 380 (O) 382G; *Sam supra* 294E.
153 *Reabow* 2007 2 SACR 292 (E) pars 20 and 21.

wrong to assume that as soon as a certain set of facts amounts to an *error in objecto*, only one conclusion (that X is guilty or not guilty) may legally be drawn. Whether *error in objecto* excludes intention and is therefore a defence depends upon what the definitional elements of the particular crime are. Murder is the unlawful, intentional causing of the death of another person. The object of the murder, according to the definitional elements, is therefore a human being. If X thinks that he is shooting a buck whereas he is in fact shooting a human being, he is mistaken about the object of his act (*error in objecto*), and this mistake excludes the intention to murder.

What is the position if X intended to shoot Z but it subsequently transpires that he mistook his victim's identity and in fact shot Y? Here his mistake did not relate to whether it was a human being he was killing, but to the identity of the human being. Murder is committed any time a person unlawfully and intentionally kills *a* human being, and not merely if a person kills that particular human being who, according to his conception of the facts, corresponds to the person he wanted to be the victim. For this reason X in this case is guilty of murder. His mistake about the object of his act (*error in objecto*) will not exclude his intention, because the mistake did not relate to an element contained in the definition of the crime.

18 Mistake as to motive A mistake relating to a person's motive for committing a crime is not a mistake relating to the act, the definitional elements or the unlawfulness. Therefore this type of mistake does not exclude X's intention. Examples: (*a*) X appropriates Y's umbrella because he thinks his own is lost but he later discovers that it is not. (*b*) X kills Y because he thinks Y has appointed him sole heir to his riches, but is subsequently disappointed to learn that Y bequeathed his property to somebody else (or that Y was a pauper). This type of mistake is not material, for a particular motive or inducement does not form part of the definitional elements of the crimes of theft or murder.

The following example further illustrates these principles: X marries Y because he believes that his wife Z has died. Z is in fact still alive. This mistake will exclude the intention to commit bigamy, because although it was X's belief which induced him to marry again, it simultaneously related to a circumstance forming part of the definitional elements of bigamy, namely X's married state.

19 Mistake relating to chain of causation[154]

(*a*) *Description of mistake relating to chain of causation* Mistake concerning the chain of causation can only occur in the context of materially defined crimes such as murder. X believes that the result will be brought about in a certain manner; the result does ensue, but in a manner which differs from that foreseen by X. For example, X sets about killing Y by pushing him off a bridge into a river, in the expectation that he will drown; in fact, Y is killed because in his fall he hits one of the pillars of the bridge. Another example is where X shoots at Y, but misses; Y, whose heart and nerves are weak, in fact dies of shock.

---

154 See in general Van Oosten 1976 *De Jure* 65; 1982 *TSAR* 81, 220; Oosthuizen 1987 *JJS* 205; Snyman 1991 *SACJ* 50; Du Plessis 1989 *TSAR* 268; Paizes 1993 *SALJ* 493.

The question whether a mistake relating to the causal chain of events excludes intention arises only if X in fact envisages that the result would ensue because of a particular cause, in other words that the chain of causation leading up to the result (such as Y's death) would follow a certain path. If he intends or envisages the result without believing that the result would ensue in a certain way, the question does not arise.

Before 1989 both the courts[155] and writers on criminal law[156] assumed that this form of mistake did not exclude intention. The main reason for holding this view was that the definitional elements of murder did not contain a requirement to the effect that Y's death had to ensue in a certain way only (such as by poisoning, shooting or stabbing); murder is committed simply by causing Y's death, *no matter in which way Y eventually dies*.

(*b*) *The present legal position* In 1989 in *Goosen*[157] the Appellate Division analysed this form of mistake and held that a mistake relating to the causal chain of events does exclude intention, provided the actual causal chain of events differed materially from that envisaged by X. In other words, in materially defined crimes (ie, "result crimes") X's intention must, according to the court, be directed at bringing about the result in substantially the same manner as that in which it was actually caused.

In this case, X, together with two other persons, Z and W, had taken part in the joint robbery of Y. The shot that actually killed Y had been fired by Z, but the court, after examining the evidence, found that at the crucial moment when Z had fired the shot, he (Z) had acted involuntarily because he had been frightened by an approaching vehicle. The question was whether X, who had taken part in the joint venture by driving the gang in a car to Y, could be convicted of murdering Y on the ground of the shot fired by the co-member of the gang, Z. X had known that Z had a firearm, and had foreseen that Z could fire at Y, but had not foreseen that Y would die as a result of a bullet's being fired involuntarily by Z.

In a unanimous judgment delivered by Van Heerden JA the Appellate Division found that there was a substantial difference between the actual and the foreseen manner in which the death was caused, that X had not foreseen that the death could be caused in this way, and that X's misconception or mistake in this regard excluded the intention to murder. The court did not want to amplify the rule it laid down by specifying what criterion should be applied to distinguish between "material" (ie, "substantial") and "immaterial" differences in the manner in which death is caused. (In passing, it should be mentioned that the judgment can be understood properly only on the assumption that the court

---

155 *Butelezi* 1963 2 PH H238 (D); *Nkombani* 1963 4 SA 877 (A); *Masilela* 1968 2 SA 558 (A), especially 573–574; *Daniëls* 1983 3 SA 275 (A) 332–333. See also *Thabo Meli* [1954] 1 All ER 373 (PC). This is a decision of the Privy Council in England, in a case serving before it on appeal from the former Basutoland where, as in South Africa, the common law is Roman-Dutch law.

156 *De Wet and Swanepoel* 141–142; Van der Walt 1962 *THRHR* 70–74; Van Oosten 1976 *De Jure* 65; 1982 *TSAR* 81, 220; Oosthuizen 1987 *JJS* 205.

157 1989 4 SA 1013 (A) 1025–1026, discussed by Snyman 1991 *SACJ* 50; Visser 1990 *THRHR* 601; Burchell 1990 *SALJ* 168; Jordaan 1990 *SACJ* 208.

applied the common purpose doctrine, which will be discussed below.[158] One has to accept that X, Z and W acted with a common purpose to kill Y, because it is only on the assumption of the existence of such common purpose that the act of Z, which caused the death, can be imputed to X.)

(*c*) *Criticism of judgment in Goosen* It is submitted that the judgment in *Goosen* is incorrect. A mistake relating to the causal chain of events ought not to exclude X's intention, since in result crimes such a form of mistake is not material. The reason why it is not material is that the intention required in result crimes does not include knowledge of the precise time and way in which the result is brought about; all that is required is that X foresee that his act will cause the proscribed state of affairs.[159] The definitional elements of murder do not require that death be brought about in a specific way (such as by poisoning, stabbing the victim in the heart or hurling him from a cliff); all that is required is that X's conduct in general should cause Y's death. The court's attempt to distinguish previous cases which held that this type of mistake does not exclude intention, is unconvincing.

The problem with the Appellate Division's approach to the subject in *Goosen* is that the court failed to give any indication of how to determine whether the actual causal chain of events differed *materially* from the causal chain envisaged by X. The only possible criterion which comes to mind, and the only one borne out by the German-law sources on which the court relied, is that one should enquire whether the actual (deviating) events fell outside the bounds of what, according to human experience, can be expected to flow from the type of act that X committed. Put differently, one must be able to describe the deviating events as "abnormal", "unforeseeable" or "improbable". However, the problem with this criterion is that it is exactly the same as the criterion used to determine whether there is "legal causation"; more particularly, it is the same as the criterion to determine whether, according to the theory of adequate causation, there is a causal link between X's conduct and the proscribed result (Y's death).

This brings one to the crux of the criticism against the judgment in *Goosen*: the moment one tries to define the concept of "material deviation" one inevitably applies the same criteria used to determine legal causation; examples of key words or concepts in this connection are "improbable", "unexpected", "remote" and *novus actus interveniens*. If a court were to follow *Goosen*, it would mean that the court would, when answering a question relating to culpability (intention), have to apply a criterion which it has already applied earlier when investigating the question of causation. One does not solve a problem arising in one element of a crime by applying a test which one has already

158 *Infra* VII B 7–16.

159 The following statement by *Ashworth* 200 is completely correct: "When D sets out to commit an offence by one method but actually causes the prohibited consequence in a different way, the offence may be said to have been committed by an unforeseen mode. Since most crimes penalizing a result (with fault) do not specify any particular mode of commission, it is easy to regard the difference of mode as legally irrelevant. D intended to kill V; he chose to shoot him, but the shot missed; it hit a nearby heavy object, which fell on V's head and caused his death. Any moral distinction between the two modes is surely too slender to justify recognition . . . Pragmatism is surely the best approach here, and English law is generally right to ignore the unforeseen mode."

employed in another, earlier element of the crime. In short: the problem incurred in the type of factual situation under discussion is not a problem relating to *culpability* (or intention), but to *causation*. If, in a set of facts such as that in *Goosen* a court does not want to hold X criminally liable for murder, the reason for not holding him liable must be found in the absence of a legal causal link between X's conduct and Y's death, and not in the absence of an intention to kill.

(*d*) *Courts seem not to follow judgment in Goosen* In the light of the abovementioned problems encountered when trying to apply the judgment in *Goosen*, it comes as no surprise to find that the courts – and more particularly the same Appellate Division that heard the *Goosen* case, in subsequent cases in which there were strong probabilities that X was mistaken as to the causal chain of events, decided the matters without applying or even referring to the novel rule applied in *Goosen*.

Thus in *Nair*[160] X assaulted Y and threw Y's body into the sea. It was uncertain whether Y died as a result of X's assault upon him or as a result of drowning. There was a reasonable possibility that X might have meant to let Y die by drowning, but that Y in fact died as a result of X's assault, or the other way around. X was, quite correctly, convicted of murder. It never even occurred to the court to investigate the question of mistake relating to the causal chain of events. It is submitted that the judgment in *Nair* in correct, since a mistake relating to the precise way in which Y would die is irrelevant.

In *Lungile*[161] X and others executed an armed robbery in a shop. A policeman intervened and fired shots, one of which killed Y, an innocent bystander. The probabilities were overwhelming that X never anticipated that Y could be killed by the lawful conduct of a policeman. It was a strange and unexpected way in which Y was killed. Nevertheless the court – correctly, it is submitted – convicted X of murder without even considering the question whether X's possible mistake as to the causal chain of events might exonerate X.

The facts and judgment of the Supreme Court of Appeal in *Molimi*[162] likewise clearly reveal the existence of a mistake relating to the causal chain. Nevertheless the court confirmed a conviction without even considering the judgment in *Goosen*.

It is submitted that the judgments in *Nair, Lungile and Molimi* are to be preferred to that in *Goosen*. Moreover, people who undertake a robbery (as the accused in the *Goosen* case) and who foresee that somebody may be killed in the course of the robbery but nevertheless decide to go ahead with the robbery, are as a rule not bothered by the precise way (precise causal chain) in which Y will be killed.

---

160 1993 1 SACR 451 (A).

161 1999 2 SACR 597 (SCA). For an analogous set of facts in which in which the Appeal Court likewise confirmed X's conviction of murder without even considering whether his mistake relating to the precise causal chain might have excluded his intention, see *Nhlapo* 1981 2 SA 744 (A) 751

162 2006 2 SACR 8 (SCA). The argument in the text may also apply to the reasoning in *Gedezi* 2010 2 SACR 363 (WCC) par 60.

20 The going astray of the blow (*aberratio ictus*)[163]

(*a*) *Description of concept* *Aberratio ictus* means the going astray or missing of the blow. It is not a form of mistake. X has pictured what he is aiming at correctly, but through lack of skill, clumsiness or other factors he misses his aim, and the blow or shot strikes somebody or something else. Examples of *aberratio ictus* are the following:

(*i*) Intending to shoot and kill his enemy Y, X fires a shot at Y. The bullet misses Y, strikes a round iron pole next to Y, ricochets and strikes Z, who is standing a few paces to Y's right, killing him.

(*ii*) X wishes to kill his enemy Y by throwing a javelin at him. He throws a javelin at Y, but just after the javelin has left his hand, Z unexpectedly runs out from behind a bush and in front of Y and the javelin strikes Z, killing him.

(*iii*) Intending to kill his enemy Y, X places a poisoned apple at a spot where he expects Y to pass, expecting Y to pick up the apple and eat it. However, Z, and not Y, passes the spot, picks up the apple, eats it, and dies.

What all these examples have in common is that the blow aimed at Y went awry and struck somebody else, namely Z. *Aberratio ictus* differs from *error in objecto*. In *error in objecto* there are only two parties, whereas in *aberratio ictus* there are three parties. The question that arises is whether in the eyes of the law X had intention also in respect of Z's death.

(*b*) *Two opposite approaches* A perusal of this subject in the legal literature reveals two opposite approaches regarding the question of whether X had intention in respect of Z's death.

(*i*) *Transferred intention approach* According to the one approach the question of whether X in an *aberratio ictus* situation had the intention to kill Z should be answered as follows: X wished to kill *a* person. Murder consists in the unlawful, intentional causing of the death of *a* person. Through his conduct X in fact caused the death of *a* person. The fact that the actual victim of X's conduct happened to be somebody other than the particular person that X wished to kill (Y), ought not to afford X any defence. In the eyes of the law X intended to kill Z, because X's intention to kill Y is transferred to his killing of Z, even though X might perhaps not even have foreseen that Z might be struck by the blow.

The Anglo-American legal systems, which for the most part follow this approach, refer to this approach as the "doctrine of transferred malice (or intent)", because X's intent in respect of Y's killing is transferred to his killing of Z.

(*ii*) *Concrete figure approach* The adherents of the opposite or alternative approach argue as follows: One can accept that X intended to kill Z only if X knew that his blow would strike the specific figure represented by Z, or if he had foreseen that his blow might strike the figure or object actually struck by the blow and had reconciled himself to this possibility. In other words, one merely applies the ordinary principles relating to intention, and more particularly *dolus eventualis*. If X had not foreseen that his blow

163 See generally Burchell in *Fiat Iustitia. Essays in memory of OD Schreiner* 165–171; Snyman 1998 *SACJ* 1.

might strike Z he lacked intention in respect of Z's death and cannot be convicted of murder.

According to this second approach, X's intention to kill Y cannot serve as a substitute for the intention to kill Z. In order to determine whether X had the intention to kill Z the question is not simply whether he had the intention to kill *a* person, but whether he had the intention to kill *that particular concrete figure which was actually struck by the blow*. Only if this last-mentioned question is answered in the affirmative can one assume that X had intention in respect of Z. According to this approach, what is crucial is not an abstract "intention to kill a person" but an intention "to kill the actual, concrete figure struck by the blow".

(*c*) *Weight of authority in case law follow concrete figure approach* To a certain extent, support for the transferred intent approach can be found in South African case law before 1950,[164] but the weight of authority in the case law after this date supports the concrete figure approach. The Supreme Court of Appeal has not yet spoken the last word on the question how cases of *aberratio ictus* should be judged. In *Mtshiza*[165] a single judge of Appeal, Holmes JA, delivered a judgment in which he clearly followed the concrete figure approach to the subject. This was an appeal not against a conviction, but against sentence. The other judges of Appeal who heard the matter delivered a separate judgment in which they upheld the appeal against sentence on grounds completely different from those given by Holmes JA. According to the rules relating to the precedent system in our law, the Supreme Court of Appeal is still free to choose any of the abovementioned two approaches to the matter. However, the views of Holmes JA in this case were followed in a string of judgments in Provincial Courts.[166] The weight of authority in our case law therefore favours the concrete figure approach.

(*d*) *Concrete figure approach the correct one; criticism of transferred intent approach* It is submitted that the concrete figure approach is correct and that the judgment of Holmes JA in *Mtzhiza* should therefore be followed. If the Supreme Court of Appeal has to decide one day which of the two approaches ought to be followed, the court ought to give preference to the concrete figure approach. The reasons for this view are the following:[167]

Firstly, the doctrine of transferred intent originated at a time in the history of English law when attempt to commit a crime was not yet punishable. It was

---

164 *Xulu* 1943 AD 616; *Kuzwayo* 1949 3 SA 761 (A); *Koza* 1949 4 SA 555 (A). It cannot be denied that our common-law writers adopted an approach to this subject that is in substantial agreement with the transferred intent approach. See Voet 48 8 2; Matthaeus 48 5 3, 12, 13; Damhouder 87 7; Moorman 2 1 20.

165 1970 3 SA 747 (A).

166 *Tissen* 1979 4 SA 293 (T); *Raisa* 1979 4 SA 541 (O); *Matle* 1984 3 SA 748 (NC) 751B–C; *Ncube* 1984 1 SA 204 (ZS); *Mkansi* 2004 1 SACR 281 (T). *Mavhungu* 1981 1 SA 56 (A) was not a case of *aberratio ictus*, but rather one of *error in objecto*. The court nevertheless declared that the approach to *aberratio ictus* by Holmes JA in *Mtzhiza* "accord[s] with modern thought and the trend of recent decisions of this court . . ."(67H).

167 For criticism of the transferred intent approach in general, see Snyman 1998 *SACJ* 1 12 ff.

argued that if the law does not establish X's intent by way of a fiction, X in a typical *aberratio ictus* situation would not be guilty of any crime.[168] This argument disappears if – as is the case in modern English and other legal systems – attempt is punishable, because the law can then express its displeasure against X, who had not foreseen the possibility of his blow striking Z, by convicting X at least of attempted murder in respect of Y. It comes as no surprise that even Anglo-American writers are severely critical of the whole doctrine of transferred intent.[169]

Secondly, the argument that "the intention follows the bullet", as the doctrine has on occasion been described,[170] is plainly a fiction; it is what the American writer Prosser[171] calls "an arrant, bare-faced fiction of the kind dear to the heart of the medieval pleader".

Thirdly, since about 1950 our courts have clearly adopted a subjective test to determine intention.[172] The concrete figure approach is more in accordance with the subjective test for intention than the transferred intent approach, which works with a fictitious intent.

Fourthly, the doctrine of transferred intent does not sufficiently take into account the possibility that X might have desisted from executing his act had he known before the time that somebody else might be struck.

Fifthly, the doctrine of transferred intent amounts to an application of the taint doctrine (ie, the *versari in re illicita* doctrine). This doctrine was rejected by the Appellate Division in 1965 in *Bernardus*.[173] The rejection of this doctrine makes it impossible to argue that X is guilty of murdering Z merely because the shot that killed Z was fired in the course of the commission of an unlawful or immoral act, namely shooting at Y or hurling a javelin at him.[174]

If one adopts the concrete figure approach, it follows that in *aberratio ictus* situations one merely applies the ordinary principles relating to culpability (intention and negligence) in order to determine whether X had culpability in respect of Z's death; one does not apply any specific rule (such as "a transferred

---

168 Prosser 1967 *Texas Law Review* 650 653; Ashworth in Glazebrook (ed) *Reshaping the Criminal Law. Essays in honour of Glanville Williams* 77 86.

169 Williams *CL* 135, who refers to the doctrine as a "rather arbitrary exception to normal principles"; *Gordon* 332, who states: "it does seem objectionable to deal with *aberratio ictus* by way of transferred intent, if only because transferred intent is objectionable"; *Ashworth* in Glazebrook (ed) *Reshaping the Criminal Law. Essays in honour of Glanville Williams* 77 87; Prosser 1967 *Texas Law Review* 650, who describes the doctrine as "that curious survival of the antique law"; Husak 1996 *Notre Dame Journal of Law, Ethics and Public Policy* 65 84, who states that "despite my best efforts to provide a charitable and sympathetic interpretation of the doctrine, I am ultimately unable to make much sense of the claim that the culpable states required for murder are the kind of things that can or do transfer"; Karp 1978 *Columbia Law Review* 1249 1629; Stuart *Canadian Criminal Law* 196–197, who describes the doctrine as "an historical aberration".

170 In the American decision of *Batson* (1936) 96 SW 2d 384 389 (Mo).

171 1967 *Texas Law Review* 650.

172 *Supra* V C 10–11.

173 1965 3 SA 287 (A). On the taint doctrine (*versari in re illicita*) see *supra* V A 8.

174 *Mtshiza* 1970 3 SA 747 (A) 751–752; *Raisa* 1979 4 SA 541 (O).

intent rule") additional to the general rules relating to culpability. *Aberratio ictus* should be viewed merely as a description of a set of facts which, like any other set of facts, is to be judged and evaluated according to the ordinary rules relating to culpability.

(*e*) *Judging aberratio ictus situations* From the minority judgment of Holmes JA in *Mtshiza* it is clear that a factual situation in which there is an *aberratio ictus* should be judged as follows:

1 X will normally always be guilty of attempted murder in respect of Y , that is, the person he *wished* to, but did not, kill.

2 As far as X's liability in respect of the person actually struck by his blow (Z) is concerned, there are three possibilities:

   (*a*) If he had foreseen that Z would be struck by the blow, and had reconciled himself to this possibility, he had *dolus eventualis* in respect of Z's death and is guilty of murder in respect of Z.

   (*b*) If X had not foreseen the possibility that his blow might strike Z, or if he had foreseen such a possibility but had not reconciled himself to this possibility, he lacked *dolus eventualis* and therefore cannot be guilty of murder. However, this does not necessarily mean that, as far as Z's death is concerned, X has not committed any crime. If the evidence reveals that he caused Y's death negligently, he is guilty of culpable homicide. This will be the case if the reasonable person in X's position would have foreseen that the blow might strike Z.

   (*c*) Only if it is established that X had neither intention (in these instances mostly in the form of *dolus eventualis*) nor negligence in respect of Z's death, does it mean that X is not guilty of any crime in respect of Y's death.

(*f*) *Aberratio ictus in crimes other than murder and culpable homicide* In the discussion of *aberratio ictus* thus far the only examples used concerned the causing of another's death. However, *aberratio ictus* is not peculiar to cases of murder and culpable homicide: it may also emerge from the facts in charges of other crimes which require intention, such as assault,[175] injury to property and *crimen iniuria*. Furthermore, the same principles must be applied even if X aimed the blow not at a human being (Y) but at an animal, a tree or, for that matter, any other object. The principles are the same if X puts poison into a pond in order to kill birds, and a cow – or even a human being – drinks the poisoned water,[176] or (within the context of *crimen iniuria*) if X sends pornographic photos through the post to Y but the photos are accidentally delivered to Z, who sees the photos and feels offended.

21 *Dolus indeterminatus, dolus generalis*[177] *Dolus indeterminatus* and *dolus generalis* mean the same. If X's act is directed not at a particular person, but at anybody who may be affected by his act, he acts with *dolus indeterminatus* or

---

175 As in *Raisa* 1979 4 SA 541 (O); *Matle* 1984 3 SA 748 (NC) 750–751.

176 *Ncetendaba* 1952 2 SA 647 (R).

177 On these forms of *dolus*, see *Nkombani* 1963 4 SA 877 (A) 892; *Mavhungu* 1981 1 SA 56 (A) 66.

dolus generalis. For example, in *Jolly*[178] X derailed a train and in *Harris*[179] X detonated a bomb in the Johannesburg station. These perpetrators did not care who would be killed in the train or in the station. In both cases X acted with political motives. As far as these perpetrators were concerned, anybody might have been killed by their actions. Intention is obviously present in cases of *dolus indeterminatus* and *dolus generalis.*

Dolus indeterminatus is not a form of intention apart from *dolus directus*, *dolus indirectus* or *dolus eventualis*. It means merely "the intention directed at any indeterminate victim". A person can therefore act with *dolus indeterminatus* and *dolus eventualis* simultaneously. Because in cases of *dolus indeterminatus* and *dolus generalis* X did not care who would be struck by his blow, he can never because of the going astray of the blow (*aberratio ictus*) succeed with a defence that he lacked the intention in respect of the victim actually killed by his blow.

22 Intention in the "wild shootout situations" By using the concept of *dolus generalis* it is easier to answer the seemingly difficult question as to the existence of intention in situations where there is a wild shootout.

Assume that X1, X2 and X3 decide to commit an armed robbery. They are confronted by the police. A wild shootout between the two groups breaks out. X1 as well as a police official are killed in the shootout. Ballistic tests reveal the surprising fact that X1 was not killed by a bullet fired by a police official, but by a bullet fired by X2 (in other words one of X1's own comrades), and that the police official was not killed by one of the robbers, but by a bullet fired by another police official. Can the three robbers be convicted of both murders?

It would seem that the courts answer this question in the affirmative, for the following reasons: X1, X2 and X3 foresaw the possibility that people might be killed in the course of the robbery, and the inference may also be drawn that, by persisting in their plan of action despite this foresight, they reconciled themselves to this possibility.[180] It is submitted that the courts' handling of this type of situation is correct. A group of people who engage in a wild, reckless shootout with another group realise that the course of the action which they have activated may have an unexpected result, and they reconcile themselves with this possibility. It is perfectly possible to construe both *dolus eventualis* and *dolus indeterminatus* on the part of the robbers.

23 Knowledge of unlawfulness It was stated above that intention consists of two elements, the cognitive (knowledge) and the volitional (will).[181] The cognitive element (ie, the knowledge which is required of X) can, for the sake of convenience, be subdivided into two subsections, the first being knowledge of the existence of the circumstances contained in the definitional elements of the

178 1923 AD 176.
179 1965 2 SA 340 (A).
180 *Nhlapo* 1981 2 SA 744 (A); *Lungile* 1999 2 SACR 597 (SCA); *Dhlamini*, unreported, but discussed by De la Harpe and Van der Walt 2003 *SACJ* 207. The liability of the three robbers is also based upon an application of the doctrine of common purpose, which is discussed *infra* VII B 7–16. Mistake relating to the chain of causation ought not to afford any of the robbers a defence, despite the judgment in *Goosen* 1989 4 SA 1013 (A), discussed and criticised *supra* par 19.
181 *Supra* par 2.

crime, and the second, knowledge of the unlawfulness of the act. If X is unaware of the existence of the circumstances contained in the definitional elements, he labours under the type of mistake discussed above.[182] It remains only to discuss the second part of the cognitive element of intention, namely knowledge or awareness of the unlawfulness.

Knowledge of unlawfulness means at least that X is aware that his conduct is not covered by a ground of justification. Here, as with knowledge of the circumstances set out in the definitional elements, the knowledge referred to is of facts, not of law. Secondly, knowledge of unlawfulness also means that X is aware that his conduct constitutes a crime in terms of the law. Here, it is knowledge of the law, not of facts, which is involved. The requirement that X must also be aware of the relevant legal provisions will be discussed below.[183]

Examples of situations where X is mistaken about the existence of a ground of justification are the following:

(*a*) Y leaves his home in the evening to attend a function. When he returns home late at night, he discovers that he has lost his front-door key. He decides to climb into the house through an open window. X, his wife, is woken by a sound at the window. In the darkness she sees a figure climbing through the window. She thinks it is a burglar, the person who has recently raped a number of women in the neighbourhood. She shoots and kills the person, only to discover that it is her own husband whom she has killed. She has acted unlawfully, because she cannot rely on private defence: the test in respect of private defence is, in principle, objective and in a case such as this her state of mind is not taken into account in order to determine whether she has acted in private defence. Although she intended to cause the death of another human being, she will not be guilty of murder, for her intention did not extend to include the unlawfulness of her act. She thought that she was acting in private defence. This is a case of what is known as putative private defence.[184]

(*b*) X takes Y's briefcase in order to use it himself. He is under the impression that Y had given him permission to use it. However, there was a misunderstanding: Y had given no such permission. X will then not be guilty of theft, despite the fact that he had appropriated for himself a movable corporeal thing belonging to another. The act was unlawful, because there was no consent to the taking. (In theft consent to the taking renders the taking lawful.) However, intention was lacking: although X was not mistaken about the presence of the definitional elements (he knew that what he was taking was a movable corporeal thing belonging to another), he was mistaken about the unlawfulness of his conduct. He thought that there was a ground of justification, namely consent, rendering his conduct lawful.

There is ample authority in our case law for the rule that knowledge of unlawfulness forms part of intention.[185]

---

182 *Supra* pars 14–17.

183 *Infra* par 24.

184 *De Oliveira* 1993 2 SACR 59 (A) 63*h–j*.

185 *Ntuli* 1975 1 SA 429 (A) 436F, in which Holmes JA declared: "*Dolus* consists of an intention to do an *unlawful* act"; *Sam* 1980 4 SA 289 (T) 297; *Adams* 1986 4 SA 882

[*continued*]

24 Ignorance or mistake of law[186]

(*a*) *Introduction* As mentioned in the discussion under the previous heading, knowledge of unlawfulness is not restricted to a knowledge of certain facts (awareness of the fact that there are no grounds of justification), but also includes knowledge of the law: in principle X must know that the law forbids his conduct as a crime. Expressed negatively, this means that X must in principle not be mistaken concerning the relevant legal provisions. In both statements above, the words "in principle" were used because, as will be explained later, there ought, in my opinion, to be an exception to the rule that ignorance of the law is a defence: avoidable or unreasonable ignorance of the law ought, in my opinion, not to be an excuse. This, however, is not the position in our case law.

In the discussion which follows the emphasis will initially be on the present law applied by the courts (paragraphs (*b*) to (*e*)). Thereafter (in paragraphs (*f*) and (*g*)) the rules presently applied in our law will be criticized and my individual opinion on the matter will be set out.

(*b*) *The law before 1977* Before 1977 the courts held that ignorance or mistake of law was not a defence, even if it was unavoidable or excusable.[187] This rule was usually expressed in the maxims (hailing from English law) that "ignorance of the law is no excuse" (*ignorantia iuris neminem excusat*) and "everybody is presumed to know the law". The idea that every person is presumed to know the law has been sharply criticised: nobody, not even the most brilliant full-time lawyer, could keep abreast of the whole of the law, even if he reads statutes, government gazettes and law reports from morning to night.

(*c*) *The judgment in* De Blom In 1977 our law on this subject was radically changed as a result of the decision of the Appellate Division in *De Blom*.[188] In this case X was charged *inter alia* with contravening a certain exchange control regulation according to which it was a crime for a person travelling abroad to take jewellery worth more than a certain amount of money out of the country without prior permission. The Appellate Division accepted that culpability was a requirement for this statutory crime, although it did not specify which form of culpability, intention or negligence, was required. X's defence on this charge was that she did not know that such conduct constituted a crime. The Appellate Division held that she was truly ignorant of the relevant prohibition. The Appellate Division upheld her defence of ignorance of the law, and her conviction on this charge was set aside.

Rumpff CJ declared that it had to be accepted that the cliché "every person is presumed to know the law" no longer had any foundation and that the view that "ignorance of the law is no excuse" could, in the light of the present-day view

---

(A) 889D–E; *Campher* 1987 1 SA 940 (A) 955D–E, in which Viljoen JA declared: "Wederregtelikheidsbewussyn is 'n *elementum essentiale* van skuld"; *Collett* 1991 2 SA 854 (A) 859; *De Oliveira* 1993 2 SACR 59 (A) 63*h–i*; *Van Zyl* [1996] 1 All SA 336 (W) 340*a–b*; *Joshua* 2003 1 SACR 1 (SCA); *Mostert* 2006 1 SACR 560 (N) 569*f–g*.

186 See generally Van Rooyen 1974 *THRHR* 18; Rabie 1977 *De Jure* 4; 1985 *THRHR* 332; 1994 *SACJ* 93; Dlamini 1987 *THRHR* 43; 1989 *SACJ* 13.

187 *Werner* 1947 2 SA 828 (A) 833; *Sachs* 1953 1 SA 392 (A) 409; *Tshwape* 1964 4 SA 327 (C); *Lwane* 1966 2 SA 433 (A).

188 1977 3 SA 513 (A).

of culpability, no longer have any application in our law.[189] If, owing to ignorance of the law, X did not know that her conduct was unlawful, she lacked intention; if negligence was the required form of culpability, her ignorance of the law would have been a defence if she had proceeded with the necessary caution to acquaint herself with what was expected of her.[190] The court did not discuss the question whether even unreasonable, avoidable or negligent ignorance of the law also constituted a defence, but a careful perusal of the judgment[191] and of the views of writers quoted by the court with approval, can lead to only one conclusion, namely that a purely subjective test was introduced to determine whether X acted with culpability if charged with a crime requiring intention: mistake of law, even if it is unreasonable, excludes intention.

(*d*) *Meaning of "knowledge"* It is not only if X is convinced that a legal rule exists that he has knowledge of it: he also has such knowledge if he is aware of the possibility that the rule may exist, and if he reconciles himself to this possibility (*dolus eventualis*).[192] Nor need he know precisely the number of the section or statute forbidding the act, or the exact punishment prescribed: for him to be liable it is sufficient that he be aware in general terms that his conduct amounts to a crime.[193] Furthermore, the difference between crimes requiring intention and those requiring only negligence must not be forgotten. It was emphasised in *De Blom*[194] that it is only in respect of the first-mentioned category of crimes that actual knowledge of the legal provision is required for liability. In crimes requiring negligence it is sufficient for the purposes of liability that X failed to exercise the required care and circumspection in acquainting himself with the relevant legal provisions.

(*e*) *Obtaining a legal opinion* Before *De Blom* it was held in a number of cases that it is no defence for X to allege and even prove that before committing the act in question he obtained a lawyer's opinion on the legality of the proposed conduct, if it subsequently appears that the opinion was wrong.[195] However, it would seem that this rule will not survive the decision in *De Blom*: a person who goes to the trouble of obtaining legal opinion before he acts, cannot be put in a worse position than a person who fails to obtain such an opinion. Since, according to *De Blom*, the latter now has a defence if he is ignorant of the law, it would be grossly unfair to refuse that defence to the former.[196] *Bona*

---

189 At 529.

190 At 532. See the application of this principle in *Du Toit* 1981 2 SA 33 (C); *Bailey* 1981 4 SA 187 (N) 190 and *Waglines (Pty) Ltd* 1986 4 SA 1135 (N).

191 See especially 532E–H.

192 *Bezuidenhout* 1979 3 SA 1325 (T) 1330H; *Hlomza* 1983 4 SA 142 (E) 145; *Hlomza* 1987 1 SA 25 (A) 31–32.

193 *Hlomza* 1987 1 SA 25 (A) 32.

194 *Supra* 532F–H.

195 *Sachs* 1953 1 SA 392 (A) 409; *Kaba* 1970 1 SA 439 (T) 445–445; *Colgate-Palmolive Ltd* 1971 2 SA 149 (T) 154–156.

196 *Reids Transport (Pty) Ltd* 1982 4 SA 197 (E) 199; *Hoffman* 1983 4 SA 564 (T) 566; *Barketts Transport (Pty) Ltd* 1986 1 SA 706 (C) 712G. Cf also *Abrahams* 1983 1 SA 137 (A) 147D–E. In cases such as *Longdistance (Pty) Ltd* 1986 3 SA 437 (N), *Waglines (Pty) Ltd* 1986 4 SA 1135 (N) and *Longdistance (Natal) (Pty) Ltd* 1990 2 SA 277 (N) the courts made certain observations concerning the circumstances in which X may rely on a legal opinion obtained by him before he started to act, but in these cases X was

[*continued*]

fide advice obtained from a civil servant on the interpretation of a statute ought to be accepted as a defence.[197]

(*f*) *Criticism of judgment in De Blom* The positive value of the decision in *De Blom* is that it abolished the untenable and illogical presumption that everybody knows the law, as well as the unreasonably harsh rule that ignorance of the law can *never* be a defence. However, it is submitted that the court erred in not placing any limitation on the scope of this defence, and more particularly that it erred in applying a purely subjective test in crimes requiring intention, thereby recognising ignorance of the law as a defence even if such ignorance was *avoidable*. The reasons for this submission are the following:

Firstly, this aspect of the decision is incorrect from a *legal-historical* point of view. Neither Roman[198] nor Roman-Dutch law allowed simply all forms of ignorance of the law to operate as a defence in crimes of intent. The overall impression one gets from a reading of the views of the Roman-Dutch writers on this issue is that they were prepared to recognise ignorance of the law as a defence only if the ignorance was unavoidable (*invincibilis*) or not due to negligence on the part of X.[199]

Secondly, this aspect of the decision cannot be justified from a *legal-comparative* point of view. Not one of the well-known Western legal systems with which the South African law is usually compared goes so far as to recognise even avoidable mistake of law as a ground excluding intention. This in itself is highly significant: a closer scrutiny of these legal systems reveals that the rejection of this defence is by no means a mere coincidence; it is based on a well-reasoned recognition of certain basic values underlying criminal liability – such as the principle that a person is not merely an individual, but also a social being who not only has rights but also certain duties which he owes society.[200]

---

charged with crimes requiring *negligence*, and not intention. In *Claassens* 1992 2 SACR 434 (T) 440 the court held that a client should be entitled to rely on the legal advice which he has obtained from an attorney or an advocate unless there are indications that the advice might be unreliable, such as eg where the advice is obviously absurd or where the lawyer who is consulted is clearly "out of his depth".

197 *Zemura* 1974 1 SA 584 (RA) 592–593.

198 D 22 6 2; D 22 6 9 *pr*; D 22 6 9; D 32 11 4; D 39 4 16 5; D 48 5 39 (38) 2; D 48 10 15 *pr*; *Rein* 215 ff. For a more detailed discussion of the Roman law sources, the corresponding discussion in earlier editions of this book (Snyman's *Criminal Law*) up to and including the 3rd edition may be consulted.

199 Grotius *De Jure Belli ac Pacis* 2 20 43 2; Zoesius *ad* D 22 6 1; Merula 1 4 5 4; Voet 22 6 2–4; Van der Linden 2 1 5; Damhouder 59 8; Matthaeus 27 2 12; Van Leeuwen *Cens For* 1 5 1 4. For a more detailed discussion of the Roman-Dutch law sources, the corresponding discussion in earlier editions of this book (Snyman's *Criminal Law*) up to and including the 3rd edition may be consulted.

200 In Anglo-American law ignorance of the law is not regarded as a defence, except where X relies on a so-called "claim of right". See *Smith and Hogan* 97–101; *Allen* 87–88; *Ashworth* 233 ff. As far as the USA is concerned, see *La Fave* 490–494; *Robinson* 2 373 ff; *Fletcher* 736 ff; s 2.04 (3) of the *Model Penal Code*. For the position in Scottish law, see *Gordon* 1 403 ff.

As far as German law is concerned, s 17 of the criminal code provides that a person acts without "Schuld" (culpability) if at the time of his act he lacked the appreciation of the unlawfulness of his act, provided the ignorance of the law is unavoidable. If it was avoidable it is not a defence, but may lead to mitigation of punishment. See *Jescheck*

[*continued*]

The *third* and perhaps most important objection to the application in *De Blom* of a purely subjective test to determine intention in cases of mistake of law, is that the judgment is based upon wrong *principles*. Implicit in this judgment is that even avoidable or unreasonable mistakes of law exclude intention. This wrong view is based upon the opinion of Professor De Wet and of subsequent writers who followed him, and De Wet's opinion is in turn derived from German criminal-law theory of about the nineteen-twenties. According to this view culpability is purely subjective in character, and even in cases in which X relies on a mistake of law, a purely subjective test is to be applied. This extreme subjective-psychological characterisation of culpability has been rejected even in Germany, the country in which it originated.

It comes as no surprise to find that this view is followed nowhere in the world,[201] because culpability, even in the context of crimes of intent, always has a normative, that is, a judgmental, character. Culpability refers to the grounds upon which X may fairly be *blamed* for his wrongdoing, and blame invariably incorporates a value judgment. It is more than a mere mechanical inquiry into what X knew or did not know. One cannot determine a person's culpability by merely measuring him against, or comparing him to, himself; one must measure him against a standard *outside* himself.[202]

It is submitted that it is wrong simply to allow all mistakes of law as a defence. Apart from the considerations already mentioned which link up with the normative theory of culpability, there have always been other considerations of a practical, utilitarian nature which militate against recognising all mistakes of law as a defence. One of these arguments is that to allow such a defence would lead to a situation comparable to one in which the law loses its objectivity: a

---

and Weigend 449 ff; *Schönke-Schröder ad* s 14; *Maurach-Zipf* ch 37 and 38; *Jakobs* 540 ff; *Roxin* ch 21.

In Switzerland, ignorance of the law is no defence; it may only constitute a ground for the mitigation of punishment, and then only if there is sufficient ground for such ignorance ("aus zureichenden Gründen"). See s 20 of the Swiss *Penal Code*; *Trechsel* 158 ff. In my opinion the latter proviso means that the mistake must be reasonable. Neither is ignorance of the law a defence in the Netherlands, since colourless intention is sufficient. See *Hazewinkel-Suringa-Remmelink* 380 ff; *Van Bemmelen* 125–127; *Politoff and Koopmans* 103–104. In Belgium a mistake of law is a defence only if it was unavoidable, ie, if the mistake was "onoverwinlik", in other words "niet aan de dader kan worden verweten, maw indien hem self geen fout treft mbt . . . het strabaar karakter ervan" – *Van den Wyngaert* 265. According to s 122–3 of the new French *Code Pénal* of 1992, a person is not guilty of a crime if because of a mistake of law he believed that his conduct was lawful, provided the mistake of law was unavoidable ("par une erreur sur le droit qu'elle n'était pas en mesure d'éviter"). In Austria ignorance of the law is a defence only if the ignorance is not blameworthy; it will be blameworthy if X fails to find out what legal rules are applicable to his particular field of operation – see s 9 of the Austrian *Penal Code*; *Triffterer* 430 ff.

In *Appleton* 1982 4 SA 829 (ZS) 831A the Supreme Court of Zimbabwe refused to follow the judgment of the South African Appellate Division in *De Blom*. S 16 of the new Transkeian criminal code (Act 9 of 1983 of Transkei), which was enacted *after* the decision in *De Blom*, stipulates that ignorance of the law is not a defence.

201 See the legal-comparative overview in the previous footnote.

202 See the discussion *supra* V A 9 and 10 of the normative and psychological concepts of culpability.

court would not have recourse to a yardstick applicable to everybody in society. Its yardstick would be the individual accused's own subjective view of what the law is. If this argument were taken to its logical conclusion, it would mean that there would no longer be only one legal system in a particular society, but as many "legal systems" as there were individual members of the society.[203] An argument such as this one, like other utilitarian arguments,[204] is important and cannot simply be dismissed as meaningless.[205]

It comes as no surprise to discover that even the courts themselves have on occasions departed from the above-mentioned subjective *De Blom* test to determine whether X's mistake of law had excluded his intention. In a number of cases, notably *Molubi*[206] and *Coetzee*,[207] the courts have convicted X of crimes requiring intention despite the fact that, because of a mistake of law, he was ignorant of the material provisions of the law; the courts in these cases based their decisions on the consideration that X had embarked on a "specialised activity", that persons who do this should take steps to acquaint themselves with the law applicable to such an activity, and that X had failed to do this and should accordingly not succeed with a defence of ignorance of the law. However, although this "specialised activity rule" was mentioned in *De Blom*, it was meant by Rumpff CJ to apply to crimes of negligence only, for it is merely a reason for holding that X failed to act in a way in which the reasonable person in his position would have acted.[208] One is tempted to speculate whether these cases

---

203 On this argument, see especially *Hall* 382 ff. See also Stribopoulos 1999 *Criminal Law Quarterly* 227 263: "Permitting such a defence would make each person a law unto themselves, allowing their own knowledge of the law to determine its applicability towards them and prejudicing those unfortunate enough to know what the law is."

204 Such as the argument that if ignorance of the law were an excuse, society would become lax in that it would not readily go to any trouble to ascertain the content of the law, for the individual would know all along that he would not be punished if he contravened the law through ignorance.

205 If one disregards the normative character which culpability has even in crimes of intent, and limits culpability to a mere psychological concept, what will a court do if X relies on belief in witchcraft and that he honestly believed that he acted lawfully by killing Y, whom he regarded as a witch who was responsible for the thunderbolt that killed another person? If the whole investigation into culpability revolves solely on X's subjective belief in what the law is, will the court find him not guilty of murder?

206 1988 2 SA 576 (B). In this case the court confirmed X's conviction of common assault despite the fact that X thought that his conduct was justified. For an analysis and criticism of this case, see Snyman 1988 *SACJ* 457 and 1994 *SALJ* 1.

207 1993 2 SACR 191 (T). In this case X, a funeral undertaker, was charged with the unusual common-law crime of violating a corpse. She had been requested by a certain mine authority to remove the heart and lungs of a miner who had died, and she acceded to the request. However, in terms of certain legislation only a medical practitioner is allowed to perform the task of removing organs from a corpse, but X was unaware of these provisions. X was nevertheless convicted of the crime, which is a crime requiring intention. For a discussion of the case, see Snyman 1994 *SALJ* 1.

208 See eg the words "riglyne vir die bepaling van *culpa*" and "redelikerwys verwag [kan] word" at 531H and 532A respectively of *De Blom* 1977 3 SA 513 (A). The same interpretation was placed upon this part of the *De Blom* judgment in *Du Toit* 1981 2 SA 33 (C) 39–40; *Longdistance (Natal) (Pty) Ltd* 1990 2 SA 277 (N) 283F–I; *Claassens* 1992 2 SACR 434 (T) 438*h–i*. Cf also *Adams* 1993 1 SACR 330 (C). For cases in which X was charged with a crime requiring intention and in which the courts may at least by

[*continued*]

should merely be dismissed as unfortunate misinterpretations of *De Blom*, or whether they should be viewed as proof that the courts in certain circumstances consciously or unconsciously treat pleas of ignorance of the law in a way that differs from the rule set out in that case. It is submitted that the latter is indeed the case.

It is and remains a glaring anomaly that in countries abroad in which the incidence of crime does not nearly approach the alarming proportions encountered in South Africa, ignorance of the law is not regarded as an excuse, or otherwise limited as an excuse to situations where the ignorance was unavoidable. In contrast in South Africa, where society is threatened to be engulfed by a crime wave, we follow a rule relating to ignorance of the law which can be described as the most lenient, liberal, "criminal-friendly" in the world! This lamentable state of affairs is all due to the incorrect concept of culpability, and more specifically the psychological concept of culpability, followed in this country.

(*g*) *Suggested law reform* It is submitted that ignorance or mistake of law should operate as a defence which excludes intention only if the ignorance or mistake is reasonable. If X *could* and *should* have known the law, he ought not to be allowed to succeed with a plea of ignorance, for his ignorance would then be unreasonable. This is, for all practical purposes, the same as saying that to succeed as a defence, ignorance of the law must have been unavoidable, and this in turn is for all practical purposes the same as saying X's ignorance should not stem from negligence. There is a duty on every person to acquaint himself with the contents of the law, especially those rules which apply to his particular profession or which deal with a particular specialised activity he is undertaking.[209]

D NEGLIGENCE

1 General It is not only those unlawful acts which are committed intentionally which are punishable. Sometimes the law also punishes unlawful acts which are committed unintentionally, or the unintentional causing of results, namely if X acts or causes a result negligently. Generally speaking, these are cases where X's conduct does not comply with a certain standard of care required by the law. This standard is to be found in what a reasonable person

---

implication have rejected a plea of ignorance of the law on the ground that X *should have* known the law, see *Nel* 1980 4 SA 28 (E) 35E–H (a case which was criticised – correctly, it is submitted – by Milton 1980 *SACC* 305; Van der Merwe 1982 *SALJ* 430 434–435 and Van Rooyen 1982 *De Jure* 361 362); *Lekgathe* 1982 3 SA 104 (B) 108–109; *Madihlaba* 1990 1 SA 76 (T) 80G–H.

209 *Ashworth* 234–235 is completely correct where he declares: "Thus, to argue that a person might be convicted despite ignorance of the law is . . . to forsake the atomistic view of individuals in favour of a recognition of persons as social beings, with both rights and responsibilities within the society in which they live . . . One way of maintaining the general duty to know the law, while allowing exceptions based on respect for individual autonomy, would be to provide that a mistake of law might excuse if it is reasonable." See also Whiting 1978 *SALJ* 1 5, who similarly argues that mistake of law in crimes of intention ought to be a defence only if the mistake is reasonable.

would have foreseen in the particular circumstances and the care which such reasonable person would have exercised in the circumstances.

Whereas intention is often referred to in the legal literature as *dolus*, negligence is often referred to as *culpa*. Intention and negligence are the two forms of culpability. Just as there can be culpability in the form of intention only if at the time of engaging in the conduct X was endowed with criminal capacity, culpability in the form of negligence can likewise be present only if it is clear that at the time of engaging in the conduct X was endowed with criminal capacity. As a rule negligence is a less serious or blameworthy form of culpability than intention.

2 General comparison between intention and negligence In crimes of intention X is blameworthy because he knew or foresaw that his conduct was forbidden and that it was unlawful but nevertheless proceeded to engage in the conduct. In crimes of negligence, on the other hand, X is blameworthy because he did *not* know or foresee something or did *not* do something, although according to the standards of the law he *should have* known or foreseen something or *should have* performed an act. Intention, therefore, always has a *positive* character. X willed or knew or foresaw something. Negligence, on the other hand, always has a *negative* character: X did *not* will or know or foresee something, although according to legal standards he *should have* known or foreseen it.

The test to determine negligence is (subject to certain exceptions which will be explained later) objective. As was pointed out above, the test to determine intention is subjective, since the court must consider X's real knowledge and visualisation of the facts and of the law. When it is said that the test for negligence is objective, what is meant is that the court must measure X's conduct against an objective standard, that is, a standard outside himself. This standard is that which a reasonable person in the same circumstances would have foreseen and would have done.

3 Crimes in respect of which negligence is the form of culpability Culpable homicide and a certain form of contempt of court[210] are the only common-law crimes in respect of which the form of culpability required is negligence. Intention is the form of culpability required in respect of all the remaining common-law crimes. On the other hand, there are numerous statutory crimes in respect of which negligence is the required form of culpability.

4 Test to determine negligence The following test is generally accepted as the complete test to determine negligence:[211]

---

210 Namely contempt of court committed by a newspaper editor in whose paper commentary is published concerning a pending case. See *Harber* 1988 3 SA 396 (A) and *infra* X A 20.

211 *Wells* 1949 3 SA 83 (A) 88; *Kruger v Coetzee* 1966 2 SA 428 (A) 430; *Motau* 1968 4 SA 670 (A) 677; *Van As* 1976 2 SA 921 (A) 927–929; *SANTAM v Nkosi* 1978 2 SA 784 (A) 791–792; *SANTAM Versekeringsmaatskappy v Swart* 1987 4 SA 816 (A) 819–820; *Ngubane v SA Transport Services* 1991 1 SA 756 (A) 776–777; *Barnard v SANTAM Bpk* 1999 1 SA 202 (SCA) 213; *Minister of Safety and Security v Mohofe* 2007 2 SACR 92 (SCA) par 5.

A person's conduct is negligent if

1 the reasonable person in the same circumstances would have foreseen the possibility
   (a) that the particular circumstance might exist; or
   (b) that his conduct might bring about the particular result;
2 the reasonable person would have taken steps to guard against such a possibility; and
3 the conduct of the person whose negligence has to be determined differed from the conduct expected of the reasonable person.

The conclusion that the relevant person was negligent can only be drawn once all three abovementioned requirements have been complied with.

5 Abbreviated way of referring to negligence An abbreviated way of referring to negligence is simply to say that X did not conduct himself as the reasonable person would have conducted himself in the same circumstances, or – expressed even more briefly – that X acted *unreasonably*. Sometimes negligent conduct is briefly referred to by saying "he *must* have done that" or "he *should* have done that" or "he *ought to* have known or foreseen or done that". These everyday expressions are merely other ways of stating that a reasonable person would not have acted in the same way as X did.

6 Negligence both a definitional element and a form of culpability

(*a*) *Dual meaning of negligence* The expression "negligence" has a dual meaning. When somebody says that X was negligent, he in fact alleges two things. In the first place he alleges that X's conduct (act or omission) was performed in a certain way. Secondly, he alleges that X's conduct was blameworthy. In so far as the allegation of negligence refers to the way in which X conducted himself, the negligence forms part of the definitional elements of the crime concerned. In so far as it refers to X's blameworthiness, it constitutes a form of culpability besides intention.

(*b*) *Negligence as a definitional element – objective test* The definitional elements of crimes of negligence require that the commission of the forbidden act or the causing of the forbidden result take place in a certain way, namely a way which falls short of the degree of care or circumspection required by the law in the circumstances. It is this aspect of negligence which is referred to when it is alleged that X's conduct differed from that of a reasonable person. This is the objective test of negligence, in other words the failure to comply with the objective standard of reasonableness.

This objective test cannot be the test of culpability, because culpability deals with X's personal blameworthiness, and the mere objective non-compliance with a certain external standard does not necessarily mean that X was also culpable. Before X can be blamed for his failure to comply with the required standard, his personal knowledge and abilities must be taken into consideration. He can be blamed only if one could have expected of him as an individual to comply with the required standard, and this will be the case only if X, taking into account his personal abilities, knowledge and experience, *could* have complied with the required standard.

That negligence necessarily forms part of the definitional elements becomes clear if what was said above[212] about the definitional elements is kept in mind: the definitional elements contain the minimum requirements for liability necessary to make the definition understandable and meaningful. The definitional elements of a crime of negligence will not be meaningful without reference to negligence in the sense of a "mode of conduct". One cannot, for example, describe culpable homicide merely as "the causing of somebody else's death." It is the *negligent* causing of somebody else's death. For the same reason it was argued above[213] that in the crime of murder intention forms part of both the definitional elements and of culpability; otherwise the definitional elements of murder would simply read: "The causing of somebody else's death." The definitional elements of two different crimes cannot be the same. Since the only difference between murder and culpable homicide is that whereas intention is required for the former negligence is required for the latter, it follows that intention and negligence must form part of the definitional elements of murder and of culpable homicide respectively.

In *Ngubane*[214] the Appeal Court explicitly recognised that negligence "connotes a failure to measure up to a standard of conduct".

(*c*) *Negligence as form of culpability – test not always objective* The mere fact that somebody fails to comply with the objective test, does not necessarily mean that such a person acts culpably. He can be said to have acted culpably only if in the light of all the circumstances the inference can be drawn that he can *personally be blamed* for his failure to comply with the standard of care, and this will be the case only if the legal community could *reasonably have expected* of him to comply with the required standard of care. In short: whether X has complied with the standard of the reasonable person, is a matter pertaining to the definitional elements of the crime; whether he can personally be blamed for his non-compliance, is a matter pertaining to his culpability.[215]

This latter inquiry (into culpability) cannot be undertaken with complete disregard for subjective factors pertaining to X. If subjective factors were never to be taken into consideration in determining negligence, it would mean that negligence would be relevant only as one of the definitional elements of the crime concerned, and that culpability would not be a requirement for the crime. However, neither culpable homicide nor other crimes of negligence can be described as strict liability offences, that is, offences dispensing with the element of culpability. In order to be blamed for his negligence, X must, of course, have had criminal capacity at the time of his conduct, but the inquiry into culpability in crimes of negligence is not limited to an inquiry into X's capacity. Apart from the subjective factors taken into account when inquiring into X's capacity, other subjective factors such as X's physical, intellectual or cognitive abilities ought also to play a role.

---

212 *Supra* III A 1.

213 *Supra* III A 8.

214 1985 3 SA 677 (A) 687E–F.

215 This is also the construction of negligence in German criminal-law theory. See *Jescheck and Weigend* 563; *Schönke-Schröder* n 111 ff *ad* s 15. For more support for this construction of negligence, see *Fletcher* 484–486; Hart *Oxford Essays in Jurisprudence, first series* (1961) 29, 46.

(*d*) *Rejection of purely subjective test* Certain subjective factors must therefore be taken into account. However, this does not mean that the test to determine culpability in the form of negligence is purely subjective. If the test were completely subjective, it would mean that X would only be measured "against himself", that is, against his own standards. One cannot determine a person's blameworthiness by measuring him only against his own standards. A purely subjective "test" would place too high a premium on personal autonomy at the expense of social responsibility. Such a "test" would, in any event, be impractical because a court cannot, in each case in which X is charged with a crime of negligence, undertake a complete inquiry into what knowledge he had, his personal and cultural background, his personal abilities, his degree of irascibility, and so forth.

(*e*) *Telescoped test applied in practice* In everyday life the great majority of people who are endowed with criminal capacity but who fail to act the way the hypothetical reasonable person would have acted in the circumstances, can be blamed for their conduct and are therefore negligent. The percentage of people in this category is so overwhelming that it may perhaps constitute as much as ninety-nine percent of everybody whose negligence has to be established. In practice the inquiry into negligence as part of the definitional elements (objective test) and the inquiry into negligence as a form of culpability (a test which also includes subjective factors) are almost invariably telescoped into one – that is, treated as one test. This is done to such an extent that normally the same conclusion is reached in respect of both these inquiries. This means that in practice it is unnecessary to inquire twice whether X was negligent.

Nevertheless, there are exceptional cases where somebody who has not conducted himself as the reasonable person would have done, cannot personally be blamed for his failure to measure up to the standard of the reasonable person. In such a case negligence as a form of culpability is lacking. In a heterogeneous society such as in South Africa, for example, it is not impossible to come across an unusual case in which an illiterate, unsophisticated person, who has almost never come into contact with modern civilization, picks up a dynamite cap and hands it to his child to play with, with fatal consequences. In a case such as this, subjective factors such as X's lack of experience or knowledge must be taken into account.[216] In this example the law could not reasonably have expected of him to avoid the harmful conduct. There are statements in the case law – including that of the Appellate Division – which indicate that the courts leave a door open for certain subjective considerations to be taken into consideration, although these factors are not formulated in precise terms.[217]

---

216 See the facts in *Ngema* 1992 2 SACR 651 (D), as well as the statements of Hugo J on 656–657, and contrast the approach of the court in this case with that of the Appellate Division in the contentious case of *Mbombela* 1933 AD 269.

217 In *Van As* 1976 2 SA 921 (A) 928D–E Rumpff CJ declared: "Hy [ie, the *diligens paterfamilias*] word 'objektief' beskou by die toepassing van die reg, maar skyn wesenlik sowel 'objektief' as 'subjektief' beoordeel te word omdat hy 'n bepaalde groep of soort persone verteenwoordig wat in dieselfde omstandighede verkeer as hy, met dieselfde kennisvermoë." In *Ngema* 1992 2 SACR 651 (D) 657*f* Hugo J stated: "One must, it seems to me, test negligence by the touchstone of the reasonable person of the same background and educational level, culture, sex and – dare I say it – race of the accused."

[*continued*]

It would therefore not be wrong to describe the test to determine negligence as a "relative objective" or "qualified objective" test. Speaking broadly, it would seem that if X belongs to a *special category* of persons, the test to determine his negligence would be to inquire how the reasonable person *belonging to that category of persons* would have acted in the circumstances. For example, if the question is whether a police officer was negligent in shooting at a fleeing offender during a car chase, the question is how the *hypothetical reasonable police officer* (and not a reasonable person who is not a police officer) would have acted had he found himself in the same circumstances.

7 Negligence in respect of a circumstance Negligence can be a form of culpability in both formally and materially defined crimes. The test to determine negligence set out above was formulated in such a way that it refers to both formally and materially defined crimes. In materially defined crimes the causing of a certain forbidden situation is made punishable. The best example of such a crime is culpable homicide. In this crime the test for negligence is in essence the following: would the reasonable person in the same circumstances have foreseen the possibility that the relevant result (ie, Y's death) may ensue, and if he had foreseen it, would he have taken steps to guard against the result ensuing?

In formally defined crimes, on the other hand, only a specific act or omission is prohibited, irrespective of its consequences. Examples of formally defined crimes in respect of which the required form of culpability is negligence, include the negligent driving of a vehicle[218] and the unlawful possession of a firearm.[219] In formally defined crimes requiring culpability in the form of negligence, the test in essence is the following: would the reasonable person in the same circumstances have foreseen the possibility that the relevant circumstance may exist, and if so, would he have taken steps to guard against such a possibility? In the crime of unlawfully possessing a firearm, for example, the test to determine negligence is whether a reasonable person in the same circumstances would have foreseen the possibility that the article he has in his possession is an arm as defined in the statute, and if he would have foreseen it, whether he would have taken steps to prevent him possessing the article.[220]

In the discussion which follows negligence will, for the sake of brevity, be discussed as far as possible within the context of the best-known of all the crimes involving negligence, namely culpable homicide, which is a materially defined crime (the unlawful, negligent causing of somebody else's death).

8 The "reasonable person" concept In both the first and second leg of the test for negligence set out above,[221] the expression "reasonable person" is used. Before discussing the contents of these two legs of the test, it is necessary first to explain what is meant by the expression "reasonable person".

For more statements indicative of a willingness to consider subjective factors, see *Mara* 1966 1 SA 82 (SR) 83G; *Mpofu* 1969 1 SA 334 (R) 336C; *Malatje* 1981 4 SA 249 (B) 252B.

218 In contravention of s 63(1) of the National Road Traffic Act 93 of 1996.

219 In contravention of s 3 of the Firearms Control Act 60 of 2000.

220 *Duma* 1970 1 SA 70 (N).

221 *Supra* par 4.

The reasonable person is merely a fictitious person which the law invents to personify the objective standard of reasonable conduct which the law sets in order to determine negligence. In legal literature the reasonable person is often described as the *bonus paterfamilias* or *diligens paterfamilias*. This expression is derived from Roman law. *Bonus paterfamilias* literally means "the good father of the family" and *diligens paterfamilias* "the diligent father of the family". (In Roman law it was the conduct of this male, married member of society which was the measure of what the law deemed to be reasonable conduct.) In practice today it is merely a shorthand expression for "the reasonable person". (Since (*a*) we no longer prefer men to women as the measure of ascertaining what reasonable conduct is, and (*b*) we no longer limit the measure of reasonable conduct to how married men would act, these ancient expressions should be avoided. It no longer fits into modern society, and can cause unnecessary confusion.)

In the past the expression "reasonable *man*" was used in legal literature instead of "reasonable person". Since at least 1994, when South Africa obtained a new constitution which emphasises *inter alia* gender equality, the term "reasonable man" ought to be avoided because of its sexist connotation.

By "reasonable person" is meant an ordinary, normal, average person. He or she is the person "of ordinary knowledge and intelligence".[222] He or she is neither, on the one hand, an exceptionally cautious or talented person, nor, on the other, an underdeveloped person, or somebody who recklessly takes chances. The reasonable person finds himself or herself somewhere between these two extremes. The reasonable person is therefore not somebody who runs away from every foreseen danger; he may sometimes take a reasonable risk.[223]

The reasonable person concept embodies an objective criterion. Personal, subjective characteristics such as a person's gender, race, emotional stability or lack thereof, degree of education, or level of superstition or lack thereof, are not taken into account.[224]

However, if X ventures into a field which requires specialised knowledge or skill, his negligence is determined with reference to the reasonable person who does have such specialised knowledge or skill.[225] The more individual circumstances are considered, the more subjective the test becomes. Is there a limit to the circumstances which the court may take into account? It would appear that, in determining negligence, our courts are prepared to take into consideration the *external* factors attendant upon the act (eg the fact that X drove his car while it was raining heavily) but not X's *personal* characteristics (such as his lack of experience, hardness of hearing or irascibility).[226]

---

222 *Mbombela* 1933 AD 269 273.

223 *SANTAM v Nkosi* 1978 2 SA 784 (A) 791H–792E.

224 *Mbombela supra* 272–274; *Mkize* 1951 3 SA 28 (A) 34A–B; *Sed contra Ngema* 1992 2 SACR 651 (D) 657*f*.

225 *Mkwetshana* 1965 2 SA 493 (N) 497; *Shivute* 1991 1 SACR 656 (Nm).

226 Thus, if X "drove recklessly" because his brakes failed unexpectedly, the question is how the reasonable person would have acted in such a crisis (*Southern* 1965 1 SA 860 (N) 861). However, if the reckless driving is due to X's sleepiness (as in *Shevill* 1964 4 SA 51 (RA)), the reaction of the reasonable person who becomes sleepy behind the steering wheel is immaterial.

The reasonable person is not a perfect being or a fully programmed automaton which never errs. He remains a flesh-and-blood human being whose reactions are subject to the limitations of human nature.[227] In a crisis situation, when called upon instantly to make an important decision, he may, like any human being, commit an error of judgment, that is, make a decision which later transpires to be an incorrect one.[228]

9 Reasonable foreseeability Under this heading the first leg (point 1) of the definition of negligence set out above, namely the question whether the reasonable person would have foreseen the possibility that a particular circumstance might exist or that a particular result might ensue, is discussed. This question must be answered affirmatively before one can assume that X was negligent. In practice this is the most important leg or component of the test for negligence. The courts sometimes ask whether the reasonable person would have foreseen the possibility (of the result ensuing) and on other occasions again, whether X ought reasonably to have foreseen the possibility. However, both expressions mean the same: foreseeability by the reasonable person and reasonable foreseeability by X are viewed as the same thing.

It is the (reasonable) *possibility* that the result may follow which must be foreseeable, and not the *probability* that it may happen.[229] Again, the test is one of *reasonable* possibility: far-fetched or remote possibilities are not taken into account. Furthermore, the question is whether the reasonable person would, *in the circumstances in which X found himself*, have foreseen the possibility in question.[230] Our courts do not assess negligence *in vacuo* ("in a vacuum"), but *in concreto*, that is, in the light of the actual circumstances in which X found himself at the time he committed his act. For example, if the question arises whether motorist X was negligent when he ran over and killed a pedestrian in a street *during a heavy rainstorm*, it must be asked what a reasonable person who was driving in a street *during a heavy downpour* would have foreseen. It would be wrong to place the reasonable person behind the steering wheel of a motor car on an occasion when the sun was shining brightly.[231] It is submitted that in answering the question whether the result or circumstance was reasonably foreseeable, a court should also take into consideration the realities peculiar to South Africa, and more specifically the fact that crime and violence is very common in our society, and that the average South African is therefore much more afraid of an attack upon him than, for example, the average resident in first-world countries such as England and Germany.

---

227 *Van As* 1976 2 SA 921 (A) 928. See also *Burger* 1968 4 SA 877 (A) 879: "One does not expect of a *diligens paterfamilias* any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of the racing driver. In short, a *diligens paterfamilias* treads life's pathway with moderation and prudent common sense." For a discussion of the characteristics of the *diligens paterfamilias* with reference to previous decisions, see *SANTAM v Nkosi* 1978 2 SA 784 (A) 791–792; *Bochris Investments (Pty) Ltd* 1988 1 SA 861 (A) 865–866.

228 *Minister van Vervoer v Bekker* 1975 3 SA 128 (O) 132H; *Samson v Winn* 1977 1 SA 761 (C).

229 *Herschel v Mrupe* 1954 3 SA 464 (A) 471, 475–476; *Russell* 1967 3 SA 739 (N) 741.

230 *Van As* 1967 4 SA 594 (A) 600; *Thenkwa* 1970 3 SA 529 (A) 534G–H; *Burger supra* 879D; *Van As* 1976 2 SA 921 (A) 928E.

231 *Van Schoor* 1948 4 SA 349 (C) 350; *Southern supra* 1965 1 SA 860 (N) 861.

Like intention, the negligence must relate to the conduct, all the definitional elements, as well as the unlawfulness of the conduct. According to the definitional elements of culpable homicide, it is Y's death and not merely bodily injury which must have resulted from X's act; accordingly, to be guilty of culpable homicide, X must have been negligent in respect of the death. Where X assaults Y, and Y dies as a result, X will be guilty of culpable homicide only if the reasonable person would have foreseen that Y might die as a result of the assault.[232] Although it is well known that, because of the frailty of the human body, death may be caused by even a mild assault, it is wrong to say that the reasonable person will *always* foresee that even a mild assault, such as a slap, may cause Y's death. In certain exceptional cases (as the judgment of the Appellate Division in *Van As*[233] proves) some unusual physiological characteristic of the victim (such as a thin skull or a weak heart) may make it impossible to foresee that death may result from a mild assault.

It is not necessary for the reasonable person to have foreseen the precise way in which Y would die. It is sufficient that he would have foreseen the possibility of death in general.[234]

10 Reasonable person would have taken steps to avoid the result ensuing Under this heading the second leg (point 2) of the definition of negligence set out above, namely the requirement that the reasonable person would have taken steps to guard against the possibility of the result ensuing, is discussed.

In practice this second leg of the test for negligence is seldom of importance, because in the vast majority of cases the reasonable person who had foreseen the possibility of the result ensuing (ie, who has complied with the first leg of the test), would also have taken steps to guard against the result ensuing. However, there are cases in which the reasonable person who has foreseen the possibility will not take steps to guard against the result ensuing. This is where the foreseen possibility is far-fetched or remote, where the risk of the result ensuing is very small, where the avoidance of the harm requires unpractical precautions or where the cost and effort necessary to undertake the steps do not outweigh the more important and urgent purpose of X's act.[235] An example of such a situation is where a fireman drives a fire-engine down a busy street, not stopping at red traffic lights, in order to save hundreds of people who are trapped in a burning building.

It should be borne in mind that the reasonable person does not automatically run away from every danger he foresees, but sometimes takes reasonable risks.[236] Otherwise it could be argued that driving a motor car is always a

---

232 *Bernardus* 1965 3 SA 287 (A) 296, 298; *Fernandez* 1966 2 SA 259 (A) 264; *Ntuli* 1975 1 SA 429 (A) 436; *Burger* 1975 4 SA 877 (A) 879; *Van As* 1976 2 SA 921 (A) 927–928.

233 1976 2 SA 921 (A). See also *John* 1969 2 SA 560 (RA) 571H.

234 *Bernardus supra* 307; *Motau* 1968 4 SA 670 (A) 677; *Van As* 1976 2 SA 921 (A) 928; It is submitted that the decision in *Goosen* 1989 4 SA 1013 (A) does not detract from this principle. In this case it was held that a mistake relating to the causal chain of events may exclude intention. For criticism of *Goosen*'s case, see *supra* V C 19(*c*).

235 *Herschel v Mrupe* 1954 3 SA 464 (A) 471; *Ngubane* 1985 3 SA 677 (A) 685A–B.

236 *SANTAM v Nkosi* 1978 2 SA 784 (A) 791H–792E.

negligent act, for it is foreseeable that, no matter how careful a driver is, he may possibly cause somebody else's death. In order to determine whether the reasonable person would have guarded against the result ensuing, it may therefore be necessary to balance the social utility of X's conduct against the magnitude of the risk of the foreseeable harm.[237]

11 X's conduct differed from that of the reasonable person It is not necessary to say much about the third leg of the definition of negligence set out above. It only incorporates the self-evident principle that X is negligent if his conduct did not conform to that of the reasonable person by considering what the reasonable person would have foreseen or guarded against.

12 Subjective factors As already emphasised more than once, the test in respect of negligence is in principle objective, because the question in each case is whether the reasonable person would have foreseen the result and guarded against it. However, the objective character of the test is subject to the following qualifications or exceptions:

(1) The rule set out above that the reasonable person should be placed *in the circumstances* in which X found himself at the critical moment itself amounts to a certain degree of individuation or subjectivity of the test.

(2) If the question is whether an *expert* in a certain field was negligent, the test is whether a reasonable expert undertaking such an act would have foreseen the possibility of death.[238] For example, if the question is whether a heart surgeon was negligent in the performance of an operation during which the patient died, the surgeon's negligence cannot be determined by reference to the criterion of the reasonable person, for the reasonable person is for all practical purposes a layman in the medical field.

(3) The criterion for determining the negligence of *children* who nevertheless have criminal capacity is the conduct of the reasonable child in the same circumstances.[239]

(4) If X happens to have *more knowledge* of a certain matter than the reasonable person would have, he cannot expect a court to determine his negligence by referring to the inferior knowledge of the reasonable person. X's superior knowledge must indeed be taken into account.[240] If a blind person

---

237 *Botes v Van Deventer* 1966 3 SA 182 (A) 189–191; *Mkwanazi* 1967 2 SA 593 (N) 596F–H.

238 *Van Schoor* 1948 4 SA 349 (C) 350 (medical doctor); *Hosiosky* 1961 1 SA 84 (W) (pharmacist negligent in the preparation of prescription); *Van As* 1976 2 SA 921 (A) 928E.

239 *T* 1986 2 SA 112 (O) 127C–F.

240 *Van As* 1967 4 SA 594 (A) 600B–C; *Ngema* 1992 2 SACR 651 (D) 657*c–d*. Cf also the definition of the expression "ought reasonably to have known" in s 1(3) of the Prevention of Organised Crime Act 121 of 1998: ". . . a reasonable . . . person having both . . . the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and . . . the general knowledge, skill, training and experience that he or she in fact has". Similar descriptions are also found in s 2(2) of Prevention and Combating of Corrupt Activities Act 12 of 2004 as well as s 1(7) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004.

walking next to the road unexpectedly starts crossing it and he is run over and killed by a motorist, it is conceivable that the motorist may not be regarded as negligent because the reasonable person would not have known that the pedestrian was blind and would therefore not have foreseen his unexpected conduct. If, however, X happened to know that the person walking along the road was a blind man who was inclined to change direction unexpectedly, his negligence is not determined with reference to the reasonable person who lacks this knowledge, but with reference to the conduct of somebody who does have this particular knowledge.

13 Can negligence and intention overlap? Intention and negligence are two different concepts. Negligence is not something *less* than intention, but something *different* from it. The logical result of this should be that intention and negligence can never overlap. However, the Appellate Division took the opposite view. In *Ngubane*[241] the court held that it is wrong to assume that proof of intention excludes the possibility that X was also negligent. The result of this decision is that if X is charged with culpable homicide and it appears from the evidence that he in fact killed Y intentionally, he can be convicted of culpable homicide.

From a theoretical point of view the decision in *Ngubane* is clearly wrong. The argument of the court is contradictory and a study in illogicality.[242] However, it is

---

241 1985 3 SA 677 (A), discussed by Louw 1987 *De Jure* 173 ff. *Ngubane*'s case was followed in *Ramagaga* 1992 1 SACR 455 (B) 465–466; *Seymour* 1998 1 SACR 66 (N) 72*f–g; Jara* 2003 2 SACR 216 (Tk).

242 The points of criticism that may be levelled against this judgment are the following:

Firstly, although, as the court correctly points out (685–686) there are cases of negligence (namely conscious negligence) in which X does foresee the possibility that the result may follow, it is wrong to infer from this, as the court seems to do, that intention and negligence can therefore exist simultaneously. Foreseeing the result is only one leg of the tests in respect of conscious negligence and *dolus eventualis*. One should not forget the second leg of these tests: where there is *dolus eventualis* X reconciles himself to the result flowing from the act. He does not allow himself to be deterred by the prospect of the ensuing result. He decides to proceed with his conduct, no matter what happens. In cases of conscious negligence, on the other hand, something completely different happens. X does *not* reconcile himself to the result following upon the act. He decides that the result will *not* ensue; he does not accept the possibility that it will ensue. One cannot simultaneously reconcile and not reconcile oneself to the result; one cannot simultaneously decide that the result will ensue and that it will not.

Secondly, the court's ultimate conclusion remains incompatible with its initial point of departure – a point of departure which the court was at pains to emphasise – namely that "*dolus* and *culpa* are conceptually different", and that "(t)his difference is so fundamental that it may be conceded that the two *concepts* never overlap" (686C–D, 687E). How one can accept that the two concepts never overlap yet nevertheless conclude that a person who killed intentionally simultaneously also killed negligently, is anything but clear.

Thirdly, the decision may be criticised on the ground that the court manipulated the rules of substantive law in order to solve a typical procedural law problem. The problem which arose in these cases is procedural in nature. X was charged with the wrong crime. The problem could have been solved by the conversion of the trial in the Magistrate's Court on a charge of culpable homicide into a preparatory examination on a charge of murder. If there were difficulties in this regard, the Criminal Procedure Act should be amended to make it easier for a Magistrate's Court to convert such a trial into a preparatory examination. It is wrong to remedy defects in the law of procedure by distorting the logical rules of the general principles of criminal law in order to suit the law of procedure.

unlikely that the courts will depart from this decision, which serves the interests of the practical administration of justice well.

14 Conscious and unconscious negligence Conscious negligence should be carefully distinguished from unconscious negligence.[243] In the case of unconscious negligence X does not foresee the prohibited result. In the case of conscious negligence he does foresee it, but decides unreasonably that it will not ensue. However, as a reasonable person he *should* foresee that the result may ensue. Conscious negligence (*luxuria*) is still a form of negligence, not of intention. If X foresees the possibility and reconciles himself to it (thus, does not decide that it will *not* ensue), there is of course *dolus eventualis*. The difference between *dolus eventualis* and conscious negligence has already been explained in more detail in the discussion of *dolus eventualis* above.[244] In practice almost all cases of negligence are cases of unconscious negligence.

15 Negligence and ignorance or incompetence If X embarked upon an activity requiring specialised knowledge (such as spraying crops with insecticide), but he lacked such knowledge, and his activities resulted in Y's death, then he would be negligent in respect of Y's death, not because of his ignorance, but because he decided to embark upon the activity although he lacked the required knowledge or skill. He should not have engaged in the undertaking: it was reasonably foreseeable that his conduct might result in somebody's death.[245]

If X knew that he was likely to suffer epileptic fits, but nevertheless drove a motor car, and then suffered a fit while driving, thereby causing an accident in which Y died, he would be negligent in respect of Y's death, not because he was an epileptic, but because he decided to drive a motor car when as a reasonable person he should have foreseen that he might suffer a fit while driving.[246]

16 Negligence in respect of unlawfulness Negligence, like intention, must extend to the conduct, all the requirements for the crime contained in the definitional elements, as well as to the unlawfulness of the conduct. Actual awareness of unlawfulness is not required for negligence. It is sufficient that the reasonable person would, in the circumstances, have foreseen the possibility that the circumstances contained in the definitional elements might be present, or that the prohibited result might flow from his action, and that there might be no grounds of justification.

If X is mistaken about a material element of the crime or if he is mistaken about the applicable law, he lacks negligence, provided the mistake is reasonable – in other words, provided the reasonable person would also have been mistaken

---

243 On conscious negligence, see *Ngubane* 1985 3 SA 677 (A) 685; *Humphreys* 2013 2 SACR 1 (SCA) par 15-18, and generally the discussion, with references, *supra* V C 9.

244 *Supra* V C 9.

245 The maxim *imperitia culpae adnumeratur* (*Inst* 4 3 7 – "unskilfulness amounts to negligence") is therefore misleading. X is not punished for his unskilfulness or ignorance, but because he embarked upon an activity for which he was not qualified. The negligence relates to his unreasonable undertaking of the work of an expert or specialist. See *Du Toit* 1947 3 SA 141 (A) 145–146; *Ngema* 1992 2 SACR 651 (D) 657*a–b.*

246 *Victor* 1943 TPD 77 82. Cf also *Trickett* 1973 3 SA 526 (T) 532 (driving while sleepy); *Roopsingh* 1956 4 SA 509 (A) 518 (driving while under the influence of liquor); *Van Rensburg* 1987 3 SA 35 (T) 39C–D.

on that particular point.[247] If X does not know what the law applicable to a certain undertaking is, it is reasonable to obtain a legal opinion from a legal practitioner and to rely on such opinion, provided, first, the opinion relates to the specific act he is about to perform (and not merely generally to a series of analogous activities), and secondly, the opinion is not so obviously far-fetched that any reasonable person in similar circumstances would appreciate that it is wrong.[248]

Equally, if a person undertakes a specialised activity he must make sure that he is aware of the legal provisions applicable to that specialised venture. If, for example, he opens a butchery, he must ascertain the particular health regulations appertaining to that trade. Failure to do so is a ground for a finding of negligence.[249]

17 Attempt and complicity A person can neither intend to commit a crime involving negligence nor be an accomplice to such a crime. Attempt presupposes intention or the directing of the will, and nobody can "intend to be negligent". There is therefore no such thing as attempted culpable homicide.[250]

An accomplice's liability is based *inter alia* on his *intentional* furtherance of the crime (committed by somebody else).[251] One cannot "intentionally further" a crime such as culpable homicide, which requires negligence: the intentional furtherance of death amounts to murder. However, this does not mean that a number of persons who all cause death negligently cannot all be liable for culpable homicide as perpetrators.

E EFFECT OF INTOXICATION

1 Introduction It is well known that the consumption of alcohol may detrimentally affect a person's capacity to control his muscular movements, to appreciate the nature and consequences of his conduct, as well as its wrongfulness, to conduct himself in accordance with his appreciation of the wrongfulness of the conduct, or to resist the temptation to do wrong. It may induce conditions such as impulsiveness, diminished self-criticism, over-estimation of one's own abilities and underestimation of dangers. It may also result in a person's being unaware of circumstances or consequences of which he would have been aware had he been sober. What is the effect, if any, of intoxication on criminal liability?

Intoxication may play a role in various elements of a crime, namely the act, criminal capacity and culpability – and, more particularly, intention. Since the Appellate Division's decision in 1981 in *Chretien*[252] it has been clear that,

---

247 *De Blom* 1977 3 SA 513 (A) 532G; *Du Toit* 1981 2 SA 33 (C) 39C; *Khotle* 1981 3 SA 937 (C) 939.

248 *Longdistance (Pty) Ltd* 1986 3 SA 437 (N); *Waglines (Pty) Ltd* 1986 4 SA 1135 (N); *Longdistance (Natal) (Pty) Ltd* 1990 2 SA 277 (N); *Claassens* 1992 2 SACR 434 (T) 440.

249 *De Blom supra* 532; *Dalindyebo* 1980 3 SA 1049 (Tk) 1054–1055; *Sayed* 1981 1 SA 982 (C) 990A–B; *Khotle supra* 938E–G; *Evans* 1982 4 SA 346 (C) 350B–C.

250 *Kadongoro* 1980 2 SA 581 (R); *Ntanzi* 1981 4 SA 477 (N) 480–482.

251 *Infra* VIII B 12.

252 1981 1 SA 1097 (A).

depending upon the circumstances, the effect of intoxication presently in our law may be as follows:

(1) that X *did not act* in the legal sense of the word;

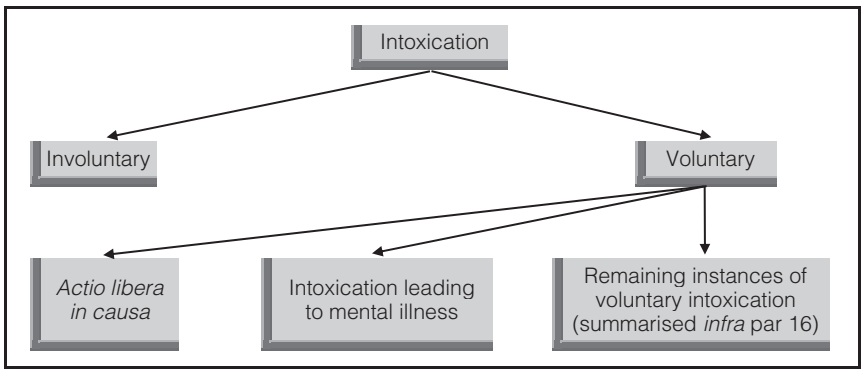
(2) assuming that he did commit an act, that he *lacked criminal capacity*;

(3) assuming that he acted with criminal capacity, that the intoxication *excluded the intention* required for a particular crime; and

(4) assuming that intoxication had no effect on X's liability for the crime, that it may serve as a ground for the *mitigation of punishment*.

What is said here about intoxication resulting from the consumption of alcohol or liquor applies equally to intoxication resulting from the use of drugs.

2 Arrangement of discussion In broad outline, the discussion of the effect of intoxication which follows can be subdivided as depicted in the following diagram.



3 Involuntary intoxication It is necessary first to distinguish between voluntary and involuntary intoxication. By "involuntary intoxication" is meant intoxication brought about without X's conscious and free intervention. For example, Y, who wants to play a trick on X, secretly puts a sedative into his coffee or forces X to swallow liquor, as a result of which he becomes intoxicated. Involuntary intoxication may also include the situation where Y forces X to swallow something against his will, as a result of which X becomes intoxicated. Involuntary intoxication is a complete defence on a charge of a crime committed during the intoxication. The reason for this is that X could not have prevented it, and therefore cannot be blamed for it.[253]

4 *Actio libera in causa* As far as voluntary intoxication is concerned, three different situations have to be clearly distinguished, namely the *actio libera in causa*, intoxication resulting in mental illness and the remaining instances of voluntary intoxication.

Firstly, the *actio libera in causa* is discussed. This is the situation where X intends to commit a crime but does not have the courage to do so and takes to drink in order to gain the necessary courage, knowing that he will be able to

253 Voet 47 10 1; Moorman Inl 2 25, 26; *Johnson* 1969 1 SA 201 (A) 205, 211; *Els* 1972 4 SA 696 (T) 702; *Hartyani* 1980 3 SA 613 (T).

perpetrate the crime once he is intoxicated. In this instance intoxication is no defence whatsoever. It is not even a ground for mitigation of punishment; in fact it would be a ground for imposing a heavier sentence than the normal. X forms the intention to commit the crime when he is still sober, and he uses his inebriated body as an instrument for the purpose of committing the crime. This factual situation, which is difficult to prove, is known as *actio libera in causa*.[254]

5 Intoxication leading to mental illness Certain forms of mental illness, such as *delirium tremens*, may be the result of chronic consumption of alcohol. Here the ordinary rules relating to mental illness set out above[255] apply: X is found not guilty because of mental illness, but the court issues the order which it must make if it had found that at the time of the act X suffered from a mental illness. One of the possible orders which the court may make is that X be detained and treated in a psychiatric hospital.[256]

6 Remaining cases of voluntary intoxication – general The two cases of voluntary intoxication discussed briefly above as well as the cases of involuntary intoxication are seldom encountered in practice, and the rules applicable to them, as set out above, are generally undisputed. Practically all the cases in which intoxication comes into the picture in the daily practice of our courts fall in the next category to be discussed, namely voluntary intoxication not giving rise to mental illness and where X did not partake of alcohol with the exclusive purpose of gaining courage to commit a crime. The controversy surrounding the role of intoxication in criminal law relates primarily to these cases. Unless

---

254 On the *actio libera in causa* see *Ndhlovu (2)* 1965 4 SA 692 (A) 695; *Johnson supra* 211; *Baartman* 1983 4 SA 393 (NC); Rabie 1978 *THRHR* 60; Snyman 1978 *De Jure* 227; Bergenthuin 1986 *SACC* 21. There is, as far as could be ascertained, no reported decision as yet in which X has been convicted on an application of the *actio libera in causa*. This may be because of the difficulty of proving such a situation in court. Perhaps the nearest a court has ever come to a direct encounter with this concept, is in *Baartman supra*. In this case X had declared in front of witnesses that the next day he would drink until he was drunk and that he would then stab and kill Y. The next day he did indeed have a great deal to drink and then stabbed Y. However, the court found that on the day when he stabbed Y, X acted with criminal capacity (400H), knew that his act was wrong (398H), and killed Y intentionally (401C). X was convicted of murder. As the court itself admitted (400H), the conviction for murder was not based on an application of the *actio libera in causa*. The court nevertheless proceeded *obiter* to make certain observations about the *actio libera in causa* which are completely erroneous. It stated that in the light of the decision in *Chretien* it would be wrong to convict somebody who had committed a crime at a stage when he lacked criminal capacity, even though he had previously, while still sober, decided to commit such a crime. This statement is wrong. The court erred, *first,* in disregarding Rumpff CJ's explicit statement in *Chretien* 1981 1 SA 1097 (A) 1105G–H that he was not dealing with the case of an accused who had drunk in order to commit a crime. *Secondly*, and more importantly, the court disregarded the important principle that in an *actio libera in causa* situation X, when he executes his previously formed intention, lacks criminal capacity, and that his liability is based on the principle of antecedent liability: whilst endowed with full criminal capacity, X sets in motion a causal chain of events which result in Y's death. The court's remarks on *actio libera in causa* have quite correctly been criticised by various writers. See Snyman 1984 *SACC* 227; Geldenhuys 1984 *De Jure* 398.

255 *Supra* V B (iii).

256 *Bourke* 1916 TPD 303 307; *Holliday* 1924 AD 250 257–258; *Kaukakani* 1947 2 SA 807 (A) 813.

otherwise indicated, all references to intoxication below are references to intoxication falling within this category. It is these cases that come before our courts daily in such large numbers. For example, X has a couple of drinks at a social gathering and then behaves differently from the way he would if he had not taken any liquor: he too readily takes exception to a remark made by Y and then assaults him, or grabs a knife and stabs him, or damages property.

7 The "unyielding" and the "lenient" approaches to intoxication Over the years there have been two opposing schools of thought regarding the effect that intoxication ought to have on criminal liability.

(1) *Unyielding approach* On the one hand, there is the approach that may be described as the *unyielding* one, which holds that the community will not accept a situation in which a person who was sober when he committed a criminal act is punished for that act, whereas the same criminal act committed by someone who was drunk is excused merely because he was drunk when he committed the act. This would mean that intoxicated people are treated more leniently than sober people.

(2) *Lenient approach* On the other hand, there is the *lenient* approach which holds that if one applies the ordinary principles of liability to the conduct of an intoxicated person there may be situations in which such a person should escape criminal liability on the basis that because of his intoxication he either did not perform a voluntary act, or lacked either criminal capacity or the intention required for a conviction.

In the course of our legal history the approach towards the effect of intoxication has vacillated. One can distinguish four different periods:

(1) Initially, in our common law, the rule was that voluntary intoxication could never be a defence to a criminal charge, but, as a type of concession to human weakness, could at most amount to a ground for the mitigation of punishment.

(2) Throughout the twentieth century until 1981 the courts applied a set of rules that enabled them to reach a conclusion somewhere in the middle between the lenient and the unyielding approaches mentioned above. This middle course was achieved by applying what was known as the "specific intent theory": intoxication could exclude a specific intent which enabled a court to convict an accused of some less serious crime than the one with which he had been charged.

(3) However, with the appellate decision in 1981 in *Chretien* the pendulum clearly swung in the direction of the lenient approach. According to this judgment intoxication could result in a complete acquittal.

(4) The swing towards the lenient approach in *Chretien* created the fear that intoxicated persons might too easily escape conviction, which in turn led to legislation in 1988 aimed at curbing the lenient approach. This reflects the law as it is at present. As will become clear in the discussion which follows, the pendulum once more occupies a somewhat uneasy position *halfway between the lenient and the unyielding approaches*.

8 The judgment in *Chretien*

(*a*) *Background* The leading case on the effect of voluntary intoxication on criminal liability is the decision of the Appellate Division in 1981 in

Chretien.[257] Before 1981 the courts applied the so-called "specific intent theory", which briefly amounted to the following: Crimes could be divided into two groups: those requiring a "specific intent" and those requiring only an "ordinary intent". Examples of the first-mentioned group were murder and assault with intent to do grievous bodily harm. If X was charged with a crime requiring a "specific intent", the intoxication could have the effect of excluding the "specific intent". He could then not be convicted of the "specific intent" crime with which he was charged, but of a less serious crime only, including one in respect of which only an "ordinary intent" was required.

(*b*) *The facts in Chretien* In *Chretien*[258] X attended a party at which he and other persons present consumed a large quantity of liquor. Late that night he got into his motor car and drove off. Other people who had also attended the party were standing in his way in the street. X drove in amongst them. One person was killed and five injured. X was charged with murder in respect of the one who was killed and with attempted murder in respect of the five injured persons. The court found that because of his consumption of alcohol, X had expected that the people in the street would see his motor car approaching and would move out of the way, and that therefore he had no intention of driving into them. On the charge of murder he was convicted of culpable homicide. He could not be found guilty on any of the charges of attempted murder because of the finding that he lacked the intention to kill. The question arose, however, whether he should be found guilty of at least common assault on these five charges of attempted murder. The Appellate Division held that, since in his drunken state he was under the impression that the people in the street would move out of his way, he had not had the intention to commit assault, and that he could therefore not be convicted of assault.

(*c*) *The principles laid down in Chretien* The legal points decided by the Appellate Division (per Rumpff CJ) in this unanimous decision can be summarised as follows:

(1) If a person is so drunk that his muscular movements are involuntary, there can be no question of any act on his part, and although the condition in which he finds himself can be attributed to intoxication, he cannot, on the strength of the muscular movements, be found guilty of any crime.[259]

(2) In exceptional cases a person may, because of the excessive consumption of liquor, completely lack criminal capacity and as a result not be criminally liable at all. This will be the case if he is so intoxicated that he is no longer aware that what he is doing is wrong, or that his inhibitions have substantially disintegrated.[260]

(3) The "specific intent theory" in connection with intoxication is unacceptable and must be rejected.[261] Accordingly intoxication may exclude even an "ordinary intent". It is precisely as a result of the rejection of this theory that X's intoxication in this case was held to be a complete defence even to common assault.

---

257 1981 1 SA 1097 (A).
258 1981 1 SA 1097 (A).
259 See 1104E and 1106E–F.
260 At 1106B–C, 1105F–G.
261 At 1103H–1104A.

(4) The chief justice went out of his way to emphasise that a court should not lightly infer that because of intoxication X had acted involuntarily or was not criminally responsible or that the required intention was lacking, for this would discredit the administration of justice.[262]

(*d*) *Effect of the decision in Chretien* *Chretien* did not change the rules set out above[263] relating to involuntary intoxication, *actio libera in causa* and intoxication leading to mental illness. Before the decision in *Chretien*, it was uncertain whether crimes such as theft, rape, housebreaking, malicious injury to property and *crimen iniuria* were crimes requiring a "specific intent", and therefore whether intoxication could operate as a complete defence on charges of committing these crimes. Because of the rejection of the "specific intent theory", this uncertainty has now disappeared. It may now be accepted that intoxication can be a complete defence not only on a charge of ordinary ("common") assault, but on a charge of any crime requiring intention, such as theft, rape, housebreaking, malicious injury to property, *crimen iniuria* and fraud. Since the decision in *Chretien* it no longer matters whether X's intoxication was due to voluntary or involuntary consumption of alcohol: in both instances the intoxication may result in a complete acquittal.

To summarise, immediately after the decision in *Chretien*, intoxication could have one of the following four effects (the effect of the legislation which followed this judgment, and which will be set out below, is, for the moment, disregarded):

(1) In extreme cases it might result in X not performing an act in the legal sense of the word (in other words a *voluntary act*). He is then not guilty of any crime.

(2) If, despite the intoxication, X could nevertheless perform a voluntary act, the intoxication might result in X lacking *criminal capacity.* He is then similarly found not guilty.

(3) If, despite the intoxication, X could nevertheless perform a voluntary act and also had criminal capacity, the intoxication might result in his lacking the *intention* required for the crime with which he is charged. In such a case he would not necessarily always escape conviction: the evidence might reveal that he was negligent, in which case he might be convicted of a less serious crime requiring culpability in the form of negligence.

(4) If the intoxication did not have any of the above three effects, X must be convicted, but the extent of his intoxication may serve as a ground for the *mitigation of punishment.*

(*e*) *Criticism of the judgment in Chretien* The judgment in *Chretien* was, with respect, completely wrong. The view that voluntary intoxication may lead to a complete acquittal is clearly contrary to *first*, the rules followed for more than two thousand years in our common law, *secondly,* the rules which have always

262 At 1105H, 1106D.
263 *Supra* pars 3, 4 and 5.

been followed in other jurisdictions, especially those in the Anglo-American legal systems,[264] and *thirdly*, and most important of all, sound legal policy.

The court held that the legal convictions of society did not demand that one should depart from the purely legal scientific approach. It also relied on the astonishing assumption that public policy, which demanded that intoxication should not be a complete defence, should yield to legal theory (the so-called "scientific approach"); the court accordingly astonishingly held that intoxication should indeed, in extreme cases, be recognised as a complete defence.[265] This opinion of the court was clearly wide of the mark. Exactly the opposite is the case: the legal convictions of society demand that drunken people should not, because of their intoxication, be treated more leniently than sober people and that intoxication should not be recognised as a complete defence.[266]

The statement of Rumpf CJ that a court should not lightly come to the conclusion that intoxication leads to a complete acquittal, is meaningless. Such a rule would make sense only if there were other rules of criminal law which were of such a nature that a court could indeed "lightly" conclude that there had been compliance or non-compliance with such a rule. However, the truth is that no court can simply "lightly", that is, without very careful consideration of the facts, come to such a conclusion. A court must treat all considerations relating to X's liability seriously. The Appeal Court added this *caveat* simply to soothe its own conscience.

9 Intoxication and crimes of negligence As explained above, in our practice the test to determine negligence is in principle objective. The question is what the reasonable person would have done in the circumstances. Although the reasonable person is not a teetotaller, one can assume that he knows when to stop drinking and that he is not given to over-indulgence. Thus if X is charged with a crime requiring not intention, but negligence, such as culpable homicide or negligent driving, the mere fact that he was intoxicated at the time of the commission of the act can serve as a ground for a finding of negligence. Intoxication here, rather than being a ground for the exclusion of culpability (negligence), will serve to confirm its presence.

If X is charged with murder and the evidence reveals that at the time of the commission of the act he was under the influence of liquor, it is a well-established principle that the court may find that because of his intoxication he lacked the intention to kill; the court can then convict him of culpable homicide if the evidence shows that he was negligent in acting while under the influence

---

264 In the countries within this legal family voluntary intoxication is not regarded as a complete defence. See *Smith and Hogan* 239 ff; *Allen* 147; *Dressler* ch 24.

265 1105F–G.

266 In so far as empirical proof for such an obvious fact should still be required, one may refer to a finding of a research undertaken by what was then known as the Human Sciences Research Council only four years before the Appeal Court delivered its judgment. The survey found that an overwhelming 89% of people questioned were of opinion that the courts should under no circumstances regard voluntary intoxication as a defence. See Van der Bergh *Multipurpose Survey amongst Whites 1975: Views on drugs Legislation and on the excessive use of alcohol and criminal responsibility. Research Finding S-B 94/1977.*

of liquor and that his act was the cause of Y's death. Murder can thus be "reduced" to culpable homicide merely by an application of the general principles of liability.

10 Test to determine intoxication The test which determines whether intention has been excluded by intoxication is subjective.[267] The court must ask itself whether, in the light of all the circumstances, including the degree of intoxication and of possible provocation, X had the intention, for example, to commit murder or assault.[268] A court may also draw certain conclusions about X's state of mind or intention from his conduct during the events in question, but it must be remembered that a court ought not to ascribe the same comprehension and judgment to a drunken person as it does to a normal sober person.

The mere fact that the drunken person does not remember afterwards what he did or intended to do does not necessarily mean that he lacked criminal capacity when he committed the wrongful act. His conduct at the time of the act may lead to the inference that at that time he knew very well what he was doing.[269] It does not automatically follow that, because X had something to drink before the commission of the act, he is entitled to rely on intoxication as a defence. The intoxication can operate in his favour only if it is clear to the court that the liquor had a certain effect on his mental abilities or his conception of the material circumstances surrounding his act.[270]

11 Mistake due to intoxication In crimes requiring intention, a mistake by X regarding the material circumstances or facts of the case may exclude his intention. The mistake may be induced by intoxication, as where X, after having had a couple of drinks in the bar, mistakenly takes Y's umbrella from a stand, believing it to be his own. In such a case, according to the general principles of criminal law, X may rely on his mistake as a ground excluding intention.

12 Effect of intoxication on measure of punishment If the intoxication does not affect X's liability it may serve as ground for the mitigation of punishment.[271]

Intoxication may, however, also serve as a ground for increasing sentence, as, for example, in the *actio libera in causa*,[272] in cases of culpable homicide resulting from driving under the influence of liquor,[273] in crimes of which intoxication is an element, such as driving under the influence of liquor,[274] and where X knows that drinking makes him aggressive, but nevertheless drinks and then, when intoxicated, commits a crime of violence.[275] Section 2 of the Criminal Law Amendment Act 1 of 1988 specifically confers on a court the power to regard intoxication as a ground for increasing the sentence.

---

267 *Tsotsotso* 1976 1 SA 364 (O) 365; *V* 1979 2 SA 656 (A) 665.
268 *V supra* 664–665; *Lombard* 1981 3 SA 198 (A); *Van Vuuren* 1983 1 SA 12 (A) 20.
269 *Chretien* 1981 1 SA 1097 (A) 1104H, 1108C–D; *Adams* 1986 4 SA 882 (A) 902H–I.
270 *Saaiman* 1967 4 SA 440 (A); *Lombard* 1981 3 SA 198 (A).
271 *Johnson* 1969 1 SA 201 (A) 205, 210–211; *Mula* 1975 3 SA 208 (A); *Hlongwana* 1975 4 SA 567 (A); *V* 1979 2 SA 656 (A) 670.
272 *Ndhlovu (2)* 1965 4 SA 692 (A) 695.
273 *Kelder* 1967 2 SA 644 (T) 647C–D.
274 *Kelder supra* 647.
275 *Ndhlovu* 1972 3 SA 42 (N).

13 The crime of "statutory intoxication" The practical result of the judgment in *Chretien*, namely that intoxication could in certain circumstances be a complete defence, has been criticised in various quarters, one of the arguments being that society would never accept a situation where a sober person is punished for criminal conduct, whereas the same conduct committed by a drunken person is pardoned merely because he was drunk. It would mean that drunken people are treated more leniently than sober people. It was argued that the legislature ought to enact a provision to the effect that a person commits a crime if he voluntarily becomes intoxicated and while intoxicated commits an act which would have been a crime but for the rules relating to intoxication laid down in *Chretien*.[276] In section 1 of the Criminal Law Amendment Act 1 of 1988 the legislature created such a crime.

Section 1 of the Criminal Law Amendment Act 1 of 1988 reads as follows:

1. (1) Any person who consumes or uses any substance which impairs his or her faculties to appreciate the wrongfulness of his or her acts or to act in accordance with that appreciation, while knowing that such substance has that effect, and who while such faculties are thus impaired commits any act prohibited by law under any penalty, but is not criminally liable because his or her faculties were impaired as aforesaid, shall be guilty of an offence and shall be liable on conviction to the penalty which may be imposed in respect of the commission of that act.

(2) If in any prosecution for any offence it is found that the accused is not criminally liable for the offence charged on account of the fact that his faculties referred to in subsection (1) were impaired by the consumption or use of any substance, such accused may be found guilty of a contravention of subsection (1), if the evidence proves the commission of such contravention."

14 Desirability of statutory crime It was necessary to create a crime such as this one. Somebody who voluntarily loosens his car's brake cable has no ground for complaining if as a result the car is involved in a collision; and the shipmaster who lifts the ship's anchor cannot later complain if a storm arises and the wind blows the boat onto the rocks. The same principle dictates that somebody who voluntarily starts to drink ought not to have a ground for complaining if in his intoxicated state he commits a wrongful act for which the law calls him to account. A normal person has a power of resistance which, consciously or unconsciously, he is able to exercise in order to overcome the temptation to transgress the norms of society. This power of resistance is the braking power or anchor which is an indispensable component of the cement which binds society and enables it to function in what is deemed to be a normal way. To over-indulge in alcohol is tantamount to openly destroying or endangering this power of resistance, and only somebody who is a total stranger to our society can claim that he does not know this. The retributive and deterrent theories of punishment also demand that the intoxicated perpetrator should not be allowed to hide behind his intoxication in order to escape punishment.[277]

---

276 For examples of similar statutory crimes in other legal systems, see s 323(*a*)(i) of the German, s 287 of the Austrian and s 263 of the Swiss *Penal Codes*.

277 The Afrikaans version of this paragraph was quoted with apparent approval in *Maki* 1994 2 SACR 414 (E) 418–419. See also the remarks in *Pietersen* 1994 2 SACR 434 (C) 439*c*, in which the court rejected the idea that the section is repulsive.

There is, however, much to be said in favour of the view that it would have been better had the legislature limited this crime to instances in which the wrongful act committed while intoxicated involved *violence* to a person or to property. The present crime is, however, so widely worded that it may involve instances in which the "crime" committed while intoxicated involved no violence but only dishonesty or an infringement of another's right of possession, such as theft. Such cases are rare. The protection society needs is not so much against people who become intoxicated and then commit crimes of dishonesty such as theft, but against persons who while intoxicated commit violence, such as murder, assault, rape, robbery or injury to property.

15 Discussion of statutory crime[278]

(*a*) *Requirements in section* The requirements for a conviction of contravening the section can be divided into two groups.

The first group refers to the circumstances surrounding the consumption of the liquor, which is the event which takes place first. This group of requirements comprises the following:

(A1)	the consumption or use by X of
(A2)	"any substance" which
(A3)	impairs his faculties (as described in the section)
(A4)	while knowing that such substance has that effect.

The second group of requirements refers to the circumstances surrounding the commission of the act "prohibited . . . under any penalty", which is the event which takes place secondly. This group of requirements comprises the following:

(B1)	the commission by X of an act prohibited under penalty
(B2)	while his "faculties are thus impaired" and
(B3)	who is not criminally liable because his "faculties were impaired as aforesaid".[279]

(*b*) *Separate crime* If these requirements have been complied with, the section has been contravened, and X is then convicted of this crime. This crime (ie, the contravention of the section) constitutes a separate, substantive crime. If the requirements of the section have been complied with, X is not convicted of the "main crime" which his conduct would seem to indicate or point at (such as assault or injury to property); in fact, if he has been charged with such a "main

278 For a discussion of this crime see generally *Milton and Cowling* F8; *Burchell and Militon* 408 ff; *Hiemstrar-Kruger* 695 ff; Burchell 1988 *SACJ* 274; Paizes 1988 *SALJ* 776 (a particularly illuminating discussion); Snyman 1990 *TSAR* 504; Van der Merwe 1990 *Stell LR* 94; Welch 1990 *SACJ* 268; Coetzee 1990 *SACJ* 285. The courts have also expressed opinions on aspects of the crime. See *Lange* 1989 1 SACR 199 (W); *Hutchinson* 1990 1 SACR 149 (C); *Pienaar* 1990 2 SACR 18 (T); *Mbele* 1991 1 SA 307 (T); *D* 1995 2 SACR 502 (C).

279 In *D* 1995 2 SACR 502 (C) 513 this division of the requirements for the crime was substantially followed.

crime" he must be found not guilty of having committed that crime. The crime which he has committed is not the assault or injury to property, but the crime of "contravening section 1(1) of Act 1 of 1988".

(*c*) *Voluntary consumption of substance* The wording of the section is not clear in all respects. One of the first questions to arise is, whether the section applies if X consumed the substance *involuntarily*. The section does not expressly limit the commission of the crime to cases where X *voluntarily* consumed the substance. Despite the fact that the word "voluntarily" is omitted before the words "consumes or uses", it is submitted that, considering the background and aim of the enactment as well as the unacceptable consequences which will follow from a counter-interpretation, the section should be limited to cases in which X has *voluntarily* consumed the liquor or "substance".[280]

(*d*) *Intoxication excluding capacity* The next question, a very important one, is whether X may be convicted under the section only if his intoxication results in his lacking *criminal capacity*, or whether he may also be convicted if it results in *absence of intention* or in his being *unable to perform a voluntary act.* The section speaks only of impairment of X's "faculties to appreciate the wrongfulness of his acts or to act in accordance with that appreciation". The words quoted undoubtedly mean that X lacks capacity. In *Chretien*'s case[281] the Appellate Division held that intoxication may be a complete defence on three possible grounds: *first*, if it results in X's being unable to perform a voluntary act; *secondly*, if it results in lack of capacity; and *thirdly*, if it excludes the intention that may be required for a conviction.[282] Whereas the section undoubtedly refers to the second of the three possibilities, it is silent on whether the first and third possible effects of intoxication are also covered.

(*e*) *Intoxication excluding intention* It is submitted that cases where intoxication results in lack of intention are not covered by the section. If the legislature had wanted to include such cases, it could easily have mentioned them specifically.

The conclusion that the legislature did not have in mind cases where the intoxication excluded X's intention (which includes X's knowledge of unlawfulness) is strengthened by the repeated use of the word "faculties" in both subsections (1) and (2), and especially in the phrase "but is not criminally liable *because his faculties were impaired as aforesaid*" (italics supplied). The question whether X had intention and knowledge of unlawfulness is not related to his "faculties", but to his *knowledge*. If the legislature had intended to include in the ambit of the section cases where the intoxication excluded X's intention, it would have used the word "knowledge" or words or expressions with a substantially similar meaning (such as "know" or "being aware of") instead of (or in addition to) the word "faculties".

The absence of a reference to intention in the formulation of the section means that the ordinary principles relating to the effect of mistake on liability remain intact: if, for example, X hangs his coat on a row of pegs on the wall when entering a bar and later, after enjoying a number of drinks, takes somebody

---

280 *Mbele supra* 310E–F: "Die voorskrif tref 'n persoon wat . . . *vrywillig* iets aanwend . . ." (italics supplied).

281 1981 1 SA 1097 (A) 1104–1106.

282 See 1104–1106.

else's coat which has the same colour as his own from the row of pegs because in his intoxicated condition he believes the coat to be his own, he would be found not guilty of theft as well as not guilty of contravening this section. Absence of knowledge of unlawfulness therefore remains a defence, even if such absence of knowledge is the result of intoxication.

(*f*) *Intoxication excluding a voluntary act* What about the case where the intoxication results in X's being unable to perform a voluntary act? X would then not be able to perform an "act" in the legal sense of the word; the movements of his body would then take place while he is in a state of automatism.

It may be argued that in referring only to situations which in fact amount to loss of capacity, the legislature intended to exclude situations in which X lacked the required intention as well as situations in which he lacked the ability to perform a voluntary act. The result of such an interpretation would, however, be extraordinary: intoxication resulting in automatism is surely a more intense form of intoxication than that resulting in lack of criminal capacity; if, therefore, the legislature intended to cover the latter situation, it is inconceivable that it could have intended to exclude the former, more serious, form of intoxication. Apart from this, a person who acts involuntarily *a fortiori* also lacks capacity,[283] and, as indicated above, if he lacks capacity the section does apply.

For these reasons, it is submitted that X can be convicted under the section if he were so intoxicated that quite apart from lacking capacity he was not even able to perform a voluntary act.[284]

(*g*) *Intent requirement in section* The words "while knowing that such substance has that effect" in the section make it clear that culpability in the form of intention is required for a conviction. According to general principles, proof of intention in the form of *dolus eventualis* ought to be sufficient for a conviction. It need not be proved that X knew that after the consumption of the alcohol he would commit the *particular* unlawful act which he in fact committed. Such an interpretation would place too difficult a burden upon the prosecution. All that is required is proof that X knew or foresaw that the liquor (or substance) would affect his ability to appreciate the unlawfulness of *any* act (or to conduct himself in accordance with such an appreciation).[285]

(*h*) *Burden of proof upon the state* According to general principles the burden of proving the presence of all the elements of the crime beyond reasonable doubt rests upon the state. One of the elements which the state must prove is that X is not criminally liable for his act (committed while intoxicated) "because his faculties were impaired" (in other words because he lacked capacity at the time he committed the act). This leads to the unusual situation that, in order to secure a conviction of contravening this section, the state must do that which X normally does at a trial, namely try and persuade the court to find that X is *not* guilty of a crime. The state thus bears the burden of proving the opposite of what it normally has to prove.[286]

---

283 *Ingram* 1999 2 SACR 127 (W) 131*a–b*.

284 This is also the conclusion reached by Burchell 1988 *SACJ* 274 277; *Burchell and Milton* 410; Paizes 1988 *SALJ* 776 785; Strauss 353.

285 *Lange* 1989 1 SACR 199 (W) 205*a–c*; *Ingram* 1999 2 SACR 127 (W) 134.

286 Cf the apt remarks of Paizes 1988 *SALJ* 776 781 in this respect.

More particularly, the state must prove that at the time he committed the act, X lacked capacity. The state must prove this beyond reasonable doubt. If, after the evidence has been led, there is merely uncertainty as to whether X lacked capacity at the time of the act, the state has not discharged its burden of proof and X cannot be convicted of contravening the section.[287] If X is charged with a well-known crime such as assault, the evidence reveals that he had consumed a great deal of liquor and the court at the conclusion of all the evidence decides that he cannot be convicted of this crime because of doubt as to whether at the time of the act he had capacity, it does not automatically follow that X can be convicted of contravening this section; mere doubt as to whether X had capacity cannot be equated with proof beyond reasonable doubt that he in fact lacked capacity.[288]

It is here that problems arise in the practical application of the section. It is difficult for the state to prove beyond reasonable doubt that, because of incapacity resulting from intoxication, X cannot be held criminally liable for his act. The courts have warned on various occasions that a court should not easily conclude that at the time of the act X lacked criminal capacity.[289] In *V*[290] the court specifically held that it is wrong to assume that a court could in only highly exceptional circumstances hold that X lacked capacity because of intoxication. In this case it was also held that there is no logical reason why the normal standard of proof in criminal cases was not also applicable to proof of incapacity for the purposes of this statutory crime.

The following unusual situation may arise: if X is charged with assault and the evidence shows that he was only slightly drunk at the time of the act, he will not escape the clutches of the criminal law, because he will then be convicted of assault and the only role the intoxication will play will be to serve as a ground for the mitigation of punishment. If the evidence shows that at the time of the act he was very drunk – that is, so drunk that he lacked capacity, he would likewise not escape the clutches of criminal law, because he would then be convicted of contravening this section. However, if the evidence reveals that at the time of the act he happened to fall into the grey area between "slightly drunk" and "very drunk", he will completely escape the clutches of criminal law; he will then "fall" between the proverbial "two chairs" and it would then be impossible to convict him of any crime. In this way the section could undoubtedly lose much of its effectiveness.[291]

---

287 *Mbele* 1991 1 SA 307 (T) 311; *Griessel* 1993 1 SACR 178 (O) 180*g–j*.

288 *Mbele supra* 311.

289 See the remarks in *Chretien supra* 1106C–D, which have been quoted with apparent approval in *Adams* 1986 4 SA 882 (A) 901I–J; *Mphungathe* 1989 4 SA 139 (O) 144E–145B; *Kensley* 1995 1 SACR 646 (A) 658*i–j*; *September* 1996 1 SACR 325 (A) 332; *Van Zyl* 1996 2 SACR 22 (A) 27*c–e*.

290 1996 2 SACR 290 (C) 295–296.

291 Paizes 1988 *SALJ* 177 781; *Hutchinson supra* 155H–I; *September* 1996 1 SACR 325 (A) 327–328. This unsatisfactory aspect of the section is the result of an unfortunate choice of words in its formulation. One way of overcoming this problem is the following: the words "but is not criminally liable because his faculties were impaired as aforesaid" in the present formulation ought to be replaced by an expression which facilitates the state's burden of proof. An expression such as the following could be used as a substitution for the above expression: "but who is not convicted of the offence because of reasonable doubt whether he had criminal capacity at the time of the commission of the act".

Whether this will in fact happen, will depend upon the degree of proof the courts require for a finding of incapacity at the time of the act. If they require a high degree of proof (in other words if they are of the opinion that it takes much to convince them that X lacked capacity) the operation of the section can be relatively easily evaded. It is submitted that it is unlikely that the legislature could have intended that the section be circumvented so easily, and for this reason the courts ought, in my opinion, not to require an unrealistically high degree of proof of incapacity.

(*i*) *Description of conviction* It is desirable that a court when convicting X of this statutory crime stipulates in the description of the conviction what the initial charge against X was – in other words, of what crime he would have been convicted if he had not been intoxicated.[292] This assists a court which must later consult X's list of previous convictions to ascertain what X's conduct was.

16 Summary of present law As far as the effect of voluntary intoxication on criminal liability is concerned, the legal position at present may be summarised as follows:

FACTS	LEGAL CONSEQUENCES
1 X intentionally drinks heavily in order to give himself courage to commit his intended crime.	The intoxication offers X no defence.
2 X becomes intoxicated involuntarily.	The intoxication offers X a complete defence.
3 X is so intoxicated that he is incapable of committing a voluntary act – in other words, his conduct takes place while he is in a state of automatism resulting from intoxication	In terms of *Chretien*, X is not guilty of the crime with which he is charged. He may, however, be convicted of contravening section 1 of Act 1 of 1988
4 X is so intoxicated that he lacks criminal capacity	Exactly the same as above
5 X is so intoxicated that, although he has criminal capacity, he lacks the intention required for a conviction	In terms of *Chretien*, X is not guilty of the crime with which he is charged. Neither can he be convicted of contravening section 1 of Act 1 of 1988. However, if X is charged with murder, he may, on the ground of negligence, be found guilty of culpable homicide (which is always a tacit alternative charge to a charge of murder)
6 On a charge of committing a crime requiring negligence (such as culpable homicide) the evidence reveals that X was intoxicated while engaging in the conduct	Intoxication does not exclude X's negligence; on the contrary, it serves as a ground for a finding that X was negligent

continued

292 *Oliphant* 1989 4 SA 169 (O); *Maki* 1994 2 SACR 414 (E) 416*a–c*; *Pietersen* 1994 2 SACR 434 (C) 439. *Contra Mbele* 1991 1 SA 307 (T) 310B–D; *Riddels* 1991 2 SACR 529 (O) 531–532. It is submitted that the latter two decisions are incorrect: the decisions in these two cases were influenced by the incorrect assumption that this statutory offence should never have been created.

FACTS	LEGAL CONSEQUENCES
7 Despite his consumption of liquor, X complies with all the requirements for liability, including intention	X is guilty of the crime with which he is charged, but the measure of intoxication may serve as a ground for the mitigation of punishment. In exceptional cases the intoxication may, in terms of section 2 of Act 1 of 1988, serve as a ground for increasing the punishment

F EFFECT OF PROVOCATION

1 General On charges of murder, culpable homicide or assault the evidence often reveals that X's aggressive conduct was immediately preceded by insulting or provocative behaviour on the part of Y, which angered X and led to his aggressive conduct. Had the insulting or provocative conduct of Y or somebody else not taken place, X would not have killed or assaulted Y. There is therefore a material difference between provoked homicide and non-provoked homicide, which is, generally speaking, synonymous with premeditated murder. The question to be discussed here is whether or to what extent X may rely on the provocation as a defence. This question arises almost exclusively in cases in which X is charged with murder.

In the course of our legal history South African courts have changed their stance on this issue on a number of occasions, underlining the fact that the answer to the question as to the effect of provocation on liability has been hotly debated. The answer to this question is somewhat hampered by the absence of any clear judgment on this issue during the last almost 40 years. The last notable judgment on this topic dates from as long ago as 1971.[293] When deciding what the present law on the matter is, one must necessarily read between the lines of judgments dealing with ancillary matters as well as rely on knowledge of everyday practice in criminal trials.

2 Examples of factual situations in which X had been provoked The following are examples of factual situations in which X's act had been preceded by provocation by Y:

(i) X unexpectedly discovers Y committing adultery with his wife, or – put even stronger – raping her. X is outraged by what he sees, loses his self-control and kills Y.

(ii) Y states, within hearing of others as well as X, that X's wife is unfaithful to him (X) because he (X) is impotent. X is in fact not impotent. X becomes so outraged that he loses his self-control and kills Y.

(iii) Y, a homosexual, makes advances towards another man, X. He entices X to commit homosexual acts with him (Y). X, who loathes homosexuality, becomes infuriated with Y and kills him.

Provocation may vary in degrees. In the above three examples the provocation may be described as very strong. Examples of provocation which are less severe, are where, in the course of an argument, Y only swears at X or disparages him. A scenario such as the following often unfolds in evidence in South African

293 *Mokonto* 1971 2 SA 319 (A).

criminal courts: One evening during a weekend X socialises with friends, sharing drinks with them. Y, one of the persons in the group, who is heavily under the influence of alcohol, starts to quarrel with X, in the course of which he insults X. X thereupon draws a knife and stabs Y, killing him.

3 Problems relating to effect of provocation due to wrong definition of murder The reason why our courts have experienced problems concerning the effect that provocation should have on liability for murder, and why they have in the course of years on more than one occasion changed the rules relating to its effect, can be traced to the overbroad definition of murder in our law.

In our law murder consists in the unlawful, intentional causing of another person's death. As far as liability (as opposed to sentence) for murder is concerned, no difference is drawn between premeditated and non-premeditated murder. The absence of such a difference is to be regretted. It has impoverished our law and has resulted in the courts having to grapple with many legal problems which could easily have been avoided. There is a guiding policy consideration behind the arrangement and definitions of the specific crimes, that is known as the "principle of fair labelling". It holds that the definitions of a specific crime should, as far as possible, fairly reflect the moral or legal harm it wishes to punish. This cannot be said as far as the crime of murder in South African law is concerned.

There is a substantial difference between premeditated murder, which is always committed with some evil motive, and the intentional but unpremeditated killing of another person who has provoked X before X acted with aggression. Any reasonable person feels almost instinctively that if X had not been provoked by Y, X would not have killed Y. It would, of course, be wrong to allege that Y then only "got what he deserved", because the law expects every person to exercise self-control. Nevertheless, from a broad moral point of view, every reasonable person would be inclined to extend some recognition for human weakness and therefore to treat X's aggressive act towards Y in a way which differs from the way it would treat the premeditated killing of Y.

This basic premise is reflected in the fact that most other countries or jurisdictions which South African legal writers usually refer to for legal-comparative purposes, recognise two different crimes relating to intentional homicide. Thus in England there is the well-known difference between murder, where the required intention is described (albeit in somewhat ancient language) as "malice aforethought"[294] and voluntary manslaughter, where, although it can be said that X killed Y intentionally, the killing was the result of Y's provocation.[295] Substantially the same differentiated treatment of intentional homicide is found in the USA, where (as every couch potato addicted to television would know) a similar difference is drawn between "first-degree murder" and "second-degree murder". Basically the same differentiated treatment is also found all over Europe. In Germany, for example what in England is known as murder is punished as "Mord" and what in England is known as voluntary manslaughter as "Totschlag". This basic distinction is also found in other European jurisdictions.

---

294 *Smith and Hogan* ch 14.
295 *Smith and Hogan* ch 15; *Allen* 9.3.2.

4 Three possible ways of treating provocation There are three possible ways in which the law may treat the anger or emotional stress following Y's provocation of X.

(*i*) It may treat the provocation as affording X *no defence* whatsoever, although it may serve as a ground for mitigation of punishment.

(*ii*) It may treat the provocation as affording X a *full defence*, resulting in X's leaving the court a free person.

(*iii*) It may follow some *middle course* and treat the provocation as a factor affording X a partial defence, by which is meant that although he is convicted of a crime, the crime of which he is convicted is a less serious one.

5 Provocation ought not to afford X a complete defence Provocation should never be allowed to afford X a complete defence, that is, a defence leading to a complete acquittal, for the following very sound policy consideration: The law by its very nature must treat all people equally. It ought not to differentiate between those who, when provoked, take the trouble to discipline themselves and exercise self-control, on the one hand, and those who do not do it, on the other. If the law were to afford adult, mentally normal people who do not control their tempers a complete defence, it would mean that disciplined people are measured according to a standard to which the undisciplined need not comply. Such a double standard can by no means be justified.[296]

It may be argued with conviction that there was a relatively short period in which our law recognised extreme provocation as a complete defence. This happened when the courts recognised a defence called "non-pathological criminal incapacity". This defence originated in the cases of *Campher*[297] (1987) and *Wiid*[298] (1990) and applied to cases of extreme provocation where X's emotions was allegedly so inflamed that he lacked criminal capacity. In 2002 in *Eadie*[299] the Supreme Court of Appeal practically sounded the death knell for this defence. This defence has already been discussed above[300] and the details of this defence will therefore not be repeated again here. As already pointed out, the decision in *Eadie* is to be welcomed. It confirms that the first way of

---

296 In *Kensley* 1995 1 SACR 646 (A) 658*g–i* Van den Heever JA expressed this principle very well: "Criminal law for purposes of conviction . . . constitutes a set of norms applicable to sane adult members of society in general, not different norms depending on the personality of the offender. Then virtue would be punished and indiscipline rewarded: the short-tempered man absolved for the lack of self-control required of his more restrained brother. As a matter of self-preservation society expects its members, even when under the influence of alcohol, to keep their emotions sufficiently in check to avoid harming others and the requirement is a realistic one since experience teaches that people normally do." Although this statement refers to situations in which X is under the influence of liquor, the same reasoning applies to people acting under the influence of provocation. *Cf* also *Mnisi* 2009 2 SACR 227 (SCA) par 5: "Loss of temper is a common occurrence and society expects its members to keep their emotions sufficiently in check to avoid harming others."

297 1987 1 SA 940 (A).

298 1990 1 SACR 561 (A).

299 2002 1 SA 663 (SCA).

300 *Supra* V B (ii).

treating provocation mentioned above, namely to treat it as a complete defence, can be completely ruled out.

6 Middle course approach to provocation: provocation as a partial defence At this stage of the discussion it is convenient next to consider the third possible approach to provocation mentioned above, namely the so-called middle course approach whereby provocation is treated as a partial defence. This approach was followed by South African courts since the nineteenth century up to roughly 1971, when the Appellate Division delivered the judgment in *Mokonto*.[301]

The middle-course approach found its way into our law through section 141 of the old Transkeian Penal Code of 1886. According to this section, provocation could have the effect of reducing murder to culpable homicide, provided certain requirements were met, such as that X should have lost his self-control as a result of the provocation, that X's retaliatory acts should have taken place before his temper has had an opportunity to cool, that X's reaction should have been proportionate to the provocation and that the provocation should have been of such a nature that any ordinary person in X's position would have lost his power of self-control.[302] In assessing the effect of provocation on liability, a test which included objective criteria (especially the "ordinary person test") was accordingly used.

A very important reason why the courts adopted this test, was that until 1935 the death penalty was mandatory upon a conviction of murder, and the courts understandably felt that a provoked killing could not be treated the same way as an unprovoked one, for which they were obliged to impose the death sentence.

In 1971 the Appellate Division in *Mokonto*[303] declared *obiter* that section 141 of the Transkeian Penal Code had to be confined to the area for which it was enacted. This resulted in the courts turning their back on the middle-course approach. An important point of criticism of this approach was that the presence of objective criteria in it rendered it incompatible with the by then firmly recognised subjective test to determine the intention to murder.

7 Present law: provocation no defence The discussion immediately above brings one to the approach to provocation mentioned above under (*i*) in paragraph 4, which is also the one presently applied by our courts. According to this approach, *provocation affords X no defence* on a charge of murder, although it may furnish X a ground on which he may rely for the mitigation of punishment. Even though the provocation is extreme, it cannot be used to "reduce" the crime from murder to culpable homicide. X must be convicted of murder and

---

301 1971 2 SA 319 (A).

302 *Butelezi* 1925 AD 160. There have been many cases and academic discussions on the merits or demerits of this middle-course approach. Since it no longer applies in our law, these cases and discussions are or mere academic interest. For a detailed discussion of this approach, the discussion of provocation in previous editions of this book may be consulted. For a valuable more recent discussion, see Hoctor *Essays in Honour of C R Snyman* 110; Botha & van der Merwe *LitNet Akademies* 2013 (2) 81.

303 1971 2 SA 319 (A).

the only effect which the provocation may have is to serve as a ground for the mitigation of punishment after X's conviction of murder.[304]

A court may use the provocation as a ground for a finding that at the time of the commission of the murder X's responsibility was diminished in terms of section 78(7) of the Criminal Procedure Act 51 of 1977.[305] Such a finding leads to the imposition of a less severe punishment compared to the punishment X would have received had there been no provocation and reduced responsibility. The reason why provocation may lead to a less severe punishment is the fact that a crime committed in anger or rage due to provocation is morally less reprehensible than one committed in "cold blood".[306]

An important prerequisite for the use of provocation as a mitigating factor in sentencing, is that X should have acted immediately upon the provocation, before there was time for his temper to "cool". Thus if the court is of the opinion that a period which, in the context of the facts of the case, may be regarded as substantial, has elapsed between Y's provocation and X's retaliatory act, the evidence of provocation serves rather as evidence of X's motive for his act than as evidence which may be used as mitigation of sentence.

Evidence of provocation may have the effect of confirming the existence of intention.[307] Evidence of provocation is then nothing more than evidence of the initial reason or motive for X's murder of or assault upon Y. This is especially the case if a reasonable period (the so-called "cooling off" period) elapsed between the provocation and X's assault upon Y.

It is submitted that provocation ought to operate as a ground for mitigation only if there are reasonable grounds for X's anger,[308] which there would be if a reasonable person would also have become enraged in the circumstances. An objective standard ought, therefore, to be applied in deciding whether rage or anger resulting from provocation should operate as a mitigating factor. If a subjective standard were applied, it would lead to unfair results: quick-tempered people would be entitled to hide behind their irascibility or impatience and on that ground receive more lenient sentences. There would then be less incentive for people to curb their emotions. The proponents of a subjective standard forget that what has to be considered when imposing punishment is X's moral blameworthiness, and that this can be ascertained only by bearing in mind what the legal order could reasonably have expected of him.

8 Provocation by conduct Provocation may take the form of either words uttered by Y or by conduct on his part, or a combination of the two. An example of provocation consisting solely in conduct, is the situation where X discovers his wife *in flagrante delicto* – in the course of committing adultery with Y, whereupon he becomes so enraged that he kills Y.

---

304 *Mnisi* 2009 2 SACR 227 (SCA); *Marx* 2009 2 SACR 562 (E) *Ndzima* 2010 2 SACR 501 (ECG) par 30.

305 For a discussion of this subsection, see *supra* V B (iii) 12.

306 *Mokonto* 1971 2 SA 319 (A) 326, 327; *Van Vuuren* 1983 1 SA 12 (A); *Mnisi* 2009 2 SACR 227 (SCA) par 6.

307 See, apart from *Mokonto supra*, also; *Grove-Mitchell* 1975 3 SA 417 (A) 423; and *Lesch* 1983 1 SA 814 (O) 826A.

308 Moorman Inl 2 31; Matthaeus Prol 2 14; Van der Linden 2 1 5; *De Wet and Swanepoel* 136; Van Niekerk 1972 *SALJ* 169 173–174.

9 Effect of provocation in charges of culpable homicide If X is charged with culpable homicide, which requires negligence instead of intention, the provocation will exclude X's negligence only if it is clear that a reasonable person would also have lost his temper and would also have reacted in the way X did. The test to determine negligence is objective, and negligence is determined with reference to the conduct of the fictitious reasonable person. Since it is highly unlikely that a reasonable person would lose his self-control and kill Y, it is also highly unlikely that provocation would ever serve as a ground excluding negligence. In fact, unless the circumstances are exceptional, one can assume that provocation is never a complete defence on a charge of culpable homicide.

10 Effect of provocation in charges of assault If X had been charged with a qualified form of assault, such as assault with intent to do grievous bodily harm, it is difficult to see how evidence of provocation may result in X being convicted, not of the qualified form of assault, but only of common assault. Provocation can no longer, as was the case in our previous law,[309] serve to reduce the qualified form of assault to ordinary assault.

If X is charged with common assault, provocation cannot serve as a complete defence leading to a complete acquittal. There is no less serious crime of which X may be acquitted when charge with common assault. Evidence of provocation may at most serve as a ground for the mitigation of punishment.

G NECESSITY AS A GROUND EXCLUDING CULPABILITY[310]

1 Difference between necessity which excludes culpability and necessity which excludes unlawfulness It was pointed out above[311] in the discussion of necessity as a ground of justification that necessity may serve as either a ground excluding the unlawfulness of the act or as one excluding culpability.

It excludes unlawfulness in the following situation: X finds himself in an emergency situation in which he has to decide which of two opposing interests he must infringe. He decides to infringe the interest which according to the legal convictions of society is the less important, in order to protect that which is of greater importance. If, however, he infringes the greater interest in order to protect the minor one, he acts unlawfully, but this unlawful act may in certain circumstances be excused on the basis that, considering the manner in which the average person would have reacted in the same circumstances, the law could not fairly have expected X to avoid the wrongdoing. He thus cannot be

309 *Khumalo* 1960 2 PH H245 (N); *Lushozi* 1968 1 PH H 21 (T); *Neuboza* 1970 3 SA 558 (O).

310 For a general discussion of necessity excluding culpability, see Bertelsmann 1981 *THRHR* 413 ff; 1982 *THRHR* 412 417–418; Van der Westhuizen 1981 *De Jure* 182 184; 1984 *De Jure* 369 380–381; *Van der Westhuizen* 368–370, 696; *Burchell and Milton* 276–278; *Fletcher* 774 ff, 802 ff, 818 ff; *Jescheck and Weigend* 479 ff; *Schönke-Schröder ad* s 35; *Jakobs* ch 20 I; *Kühl* ch 12 B I; Eser in *Eser and Fletcher* 54–56, 59–60.

311 *Supra* IV C 5.

blamed for the wrongdoing and therefore lacks culpability. In *Bailey* [312] the Appellate Division held unambiguously that necessity can, depending upon the circumstance, be either a ground of justification (ie, a ground excluding unlawfulness) or a ground excluding culpability.

2 Example of necessity which excludes culpability Examples of necessity functioning as a ground excluding culpability have already been given in the discussion referred to above,[313] and the important implication of the distinction between the two forms of necessity regarding the right of the victim to act in private defence against X, has also been pointed out. It was indicated that the most important example of a situation in which X may rely on necessity which negatives culpability is the case where X kills an innocent person in order to ward off a threat to his own life. For example, two shipwrecked persons, X and Y, vie for control of a timber beam which can support only one of them. In order to save his own life X pushes Y away from the beam, so that Y drowns.

Another example is where Z orders X to kill Y and threatens to kill X if he fails to obey the command; X, fearing for his life, kills Y, an innocent person. In both these cases X can rely on necessity as a ground excluding culpability: as already explained, the emergency situation may be the result of either natural events (as in the example of the shipwrecked persons) or somebody else's conduct (as in the second example where X is coerced by Z).

The decisions and factual situations dealing with killing under coercion, especially the important decision of *Goliath*,[314] have already been discussed in the exposition of necessity as a ground of justification above.[315] The reason why, in circumstances such as these, necessity serves as a ground excluding culpability and not as a ground of justification, has similarly been discussed elsewhere.[316] These matters will therefore not be discussed again. It must, however, be emphasised again that the recognition of necessity as a ground excluding culpability is based upon an acceptance and recognition of the normative theory of culpability. The reason why in cases such as these there is no culpability is the following: although X intentionally and with awareness of unlawfulness did wrong, the law could not fairly have expected the average person in the same situation to have avoided the wrongdoing.

H STRICT AND VICARIOUS LIABILITY

(i) STRICT LIABILITY

1 Introduction and description The expression "strict liability" means liability in respect of which the requirement of culpability is dispensed with. It refers to the rule applied by the courts in the past that there are, or may be, certain statutory crimes in respect of which no culpability is required. Strict liability is encountered only in crimes created by statute. It plays no role in common-law crimes; in these crimes culpability is invariably required.

---

312 1982 3 SA 772 (A) 796A.
313 *Supra* IV C 5.
314 1972 3 SA 1 (A).
315 *Supra* IV C 8.
316 *Supra* IV C 5, 8; V A 9–10.

Considering how essential the requirement of culpability is in a civilised legal system, one might assume that it would also be required in respect of all statutory crimes. This is not the case, however. It has been accepted in the past that nothing prevents parliament from creating a crime not requiring culpability. If in creating a statutory crime the legislature expressly stipulates that no culpability – be it intention or negligence – is required for liability, there was nothing a court could do about it. This was the position until at least before the coming into operation of the present Constitution.

However, it seldom happens that the legislature, when creating a crime, expressly stipulates whether culpability is required or not. The legislature is usually simply silent about culpability. The court must then decide whether the legislation should be interpreted in such a way that culpability is required or not. Under the influence of English law the courts have adopted the principle that even when the legislature in creating a statutory crime is silent on the requirement of culpability, a court is nevertheless free to interpret the provision as not requiring culpability. It is this principle which will be discussed here.

2 Decrease in cases favouring strict liability The principle according to which a court is free to interpret a statutory provision creating a crime in such a way that no culpability is required is, and has often been, controversial. One of the most important points of criticism against strict liability is that it should be left to the legislature to exclude the culpability requirement explicitly, if it so wishes, and that it is not the task of the courts to decide whether culpability ought to be required or not. In order to decide whether culpability is required, a court must consider a number of vague and speculative factors which may sometimes lead to conflicting conclusions.

Until roughly the sixties of the past century, the courts often interpreted the definitions of statutory crimes in such a way that no culpability – intention or negligence – was required. However, since about 1970 there has been a significant decrease in the number of cases holding that a statute has created strict liability. As far as could be ascertained, since 1970 there have been only three cases in which a court has interpreted a statute as being one creating strict liability.[317] This decrease can be attributed to the continued criticism of the principle of strict liability, as well as the greater willingness of the courts to hold that the legislature tacitly requires culpability in the form of negligence.

---

317 These decisions are *Makwasie* 1970 2 SA 128 (T); *Ismail v Durban Corporation* 1971 2 SA 606 (N) 610; and *Di Stefano* 1977 1 SA 770 (C). The decision in *Williamson* 1972 2 SA 140 (N) 145, in which it was held that no culpability is required for a conviction of "drunken driving", is obviously wrong and was overruled by the Appellate Division in *Fouché* 1974 1 SA 96 (A) 101–102. The three other decisions are subject to criticism: in these cases the courts could have held that culpability was required in the form of negligence. In *Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council* 1992 2 SACR 181 (N) (the case of the bee in the cool drink bottle) the court held that a certain offence created in a municipal by-law which deals with food and drink had created strict liability, but this decision was reversed on appeal by the majority of the court in *Amalgamated Beverage Industries Natal (Pty) Ltd v City Council of Durban* 1994 1 SACR 373 (A). The Appellate Division held that culpability in the form of negligence was required for a conviction.

3 Strict liability may be unconstitutional Since the coming into operation of the present Constitution it is uncertain whether the principle according to which a court is free to interpret a statutory provision creating a crime in such a way that no culpability is required for liability is compatible with the Constitution. In the USA it is usually accepted that the principle of strict liability is not incompatible with the due process provision in the American Constitution,[318] while it was held in Canada that it does infringe upon the Canadian Charter of Rights and Freedoms, provided that such an interpretation results in imprisonment being imposed upon X (because he is then deprived of his "liberty and security of his person"), but that it is not wrong to place a burden on X to prove that he had not acted negligently.[319]

In South Africa it may be argued that the principle of strict liability is incompatible with the right to a fair trial provided for in section 35(3) of the Constitution, as well as with the right to freedom and security of the person provided for in section 12(1) of the Constitution.[320] Whatever the constitutional status of strict liability may be, it seems clear that it is becoming increasingly difficult for the state to convince a court that a statutory criminal provision has created strict liability.

4 Principles for determination of strict liability A statute may explicitly exclude culpability as a requirement – something which seldom happens.[321] It may also clearly or expressly require it, as in the use of words such as "intentionally", "maliciously", "knowingly", "fraudulently", "recklessly", "wilfully", "allows", "permits", "suffers", as well as, in certain cases, "fails", but generally speaking never if it uses the expression "calculated to".[322] In the vast majority of cases the statute is silent on culpability, and it is then for the courts to determine the intention of the legislature with reference to the principles set out below.

The rules for determining whether a statutory provision creating a crime which is silent about culpability should nevertheless be interpreted as requiring culpability, are the following: As a point of departure one must presume that

---

318 *United States v Balint* (1922) 258 US 250; *Morisette v United States* (1952) 342 US 246; *Dressler* 129–130; *La Fave* 155–157, 246–247.

319 *Motor Vehicles Act Reference* (1985) 23 CCC (3d) 289, [1985] 2 SCR 486 48 CR (3d) 289; *Martin's Annual Criminal Code* 1997 CH 15–CH 16; Stuart *Charter Justice* 50–56; *Wholesale Travel Inc* (1991) 8 CR (4th) 145 (SCC); *R v Hess*; *R v Nguyen* (1990) 59 CCC (3d) 161.

320 In *Coetzee* 1997 1 SACR 379 (CC) 414–422 Kentridge J in his dissenting judgment mentioned this possibility but did not express any definite view on the issue. However, O'Regan J stated it clearly in her judgment that strict liability may be unconstitutional: "[A]s a general rule people who are not at fault should not be deprived of their freedom by the State . . . Deprivation of liberty, without established culpability, is a breach of this established rule"(442*h–i*). Cf also the remarks in *Magagula* 2001 2 SACR 123 (T) 145–146. In this case the court (146*b*) was of the opinion that, in the light of the limitation clause, there may be circumstances in which the Legislature can constitutionally create statutory offences creating strict liability.

321 Cf s 175 of the Liquor Act 27 of 1989 and s 50 (5) of the Sea Fishery Act 12 of 1988.

322 For a detailed discussion of the meaning of these words as they appear in criminal prohibitions, see *LAWSA* 6 111, 377; *Milton and Cowling* 2 II D 2.3.

parliament did not intend to exclude culpability, unless there are clear and convincing indications to the contrary.[323] Such indications may be found in

(*a*) the language and context of the provision;

(*b*) the scope and object of the provision;

(*c*) the nature and extent of the punishment;

(*d*) the ease with which the provision may be evaded if culpability were required; and

(*e*) the reasonableness of holding that culpability is not required.[324]

There is in addition the general rule that a court will not lightly assume that the legislature intended to exclude culpability.[325] Each of these indications or tests will now be considered separately.

5 Discussion of rules for determining whether liability is strict As regards the *first* test mentioned above (namely the *language and context* of the prohibition), the ordinary rules of interpretation of statutes must be followed in order to ascertain the intention of the legislature. One example of the application of these rules is that one must consider the use of similar words or expressions elsewhere in the same Act, as well as the meaning of these words elsewhere in the Act.

As regards the *second* test stated above (namely the *scope and object* of the provision), the consideration is that a court must try to determine whether the crime created is one in the sphere of public welfare. As a rule, the so-called "public welfare offences" always require strict liability. It is difficult to define these offences precisely: generally speaking, they relate to our modern industrial and technological society, and it is often argued that the culpability requirement would be an impediment here. Public welfare, which allegedly demands strict liability, is said to outweigh the individualistic approach to criminal law which insists upon culpability as a fundamental ingredient of liability.

Examples of such offences are to be found in legislation dealing with factories, mining operations, the manufacture and distribution of medicine and drugs, public transport and public sanitary services. Two examples of conduct which may be punishable, which are directly related to public welfare, and which according to the test under discussion ought not to require culpability, are the following: first, an employee at a food canning factory accidentally puts the wrong chemical substance into food as a preservative, thus exposing thousands of people to food poisoning, and secondly, the owner of a heavy truck, mistakenly thinking that his driver has already done the prescribed check of the braking system of the truck, puts a dangerously unroadworthy vehicle on the road.

As regards the *third* test mentioned above (namely the *nature and extent of the punishment*), the idea is that if the Act prescribes a severe punishment, one

---

323 *Arenstein* 1964 1 SA 361 (A) 365; *Arenstein* 1967 3 SA 366 (A) 381; *Oberholzer* 1971 4 SA 602 (A) 610; *De Blom* 1977 3 SA 513 (A) 532; *Amalgamated Beverage Industries Natal (Pty) Ltd v City Council of Durban* 1994 1 SACR 373 (A) 375.

324 *Arenstein* 1964 1 SA 361 (A) 365; *WC and MJ Botha* (*Edms*) *Bpk* 1977 4 SA 38 (T) 42; *Sayed* 1981 1 SA 982 (C) 986; *Du Toit* 1981 2 SA 33 (C) 36; *Evans* 1982 4 SA 346 (C) 349; *Amalgamated Beverage Industries Natal (Pty) Ltd v City Council of Durban supra* 375.

325 *Salmonson* 1960 4 SA 748 (T) 751; *Pretorius supra* 739.

may infer that parliament did not intend to create strict liability, and that the less severe the prescribed punishment, the more probable it is that it meant to exclude culpability.[326]

As regards the *fourth* test mentioned above (namely the *ease with which the prohibition might be evaded if culpability were required*), the consideration is that if the conduct is of such a nature that it would be difficult for the state to prove X's state of mind, this is an indication that parliament did not intend to require culpability. This test is speculative and dependent on the subjective views of the particular judge. The argument that if it is difficult to prove culpability the requirement may be discarded is irreconcilable with sound principles of justice.

The objection to the *fifth* test mentioned above (namely *the reasonableness of holding that culpability is not required*), is that it is always unreasonable to interpret a prohibition in such a way that a person may be punished for an offence when he does not have culpability. Apart from this, the test is a two-edged sword: is it reasonableness towards the individual or reasonableness towards the community on which the criterion is based?

6 Negligence as middle course Intention is not the only form of culpability in our law. Negligence may also be sufficient. A court may hold that the form of culpability required for a particular statutory crime is not intention, but negligence.[327] Whether it is intention or negligence which is required is a matter of interpretation of the relevant statute. By holding that negligence is required, a court avoids the unsatisfactory conclusion that the crime is one of strict liability, while at the same time serving the interests of public welfare by requiring of the individual an objective standard of care. In this way a satisfactory compromise is reached.

7 Intention or negligence? If a court decides that the legislature did not intend to create strict liability, it must decide which form of culpability – intention or negligence – is required for the particular crime. The starting-point is usually that the legislature required intention and that only in exceptional circumstances could it have intended culpability in the form of negligence.[328] This approach is clearly correct. It should be remembered that if the form of culpability required is negligence, far more people are affected by the prohibition than if intention were required.

Among the indications that the legislature intended negligence to be the form of culpability, are the following: the fact that the legislature requires a high degree of circumspection in the performance of a certain activity;[329] the fact

---

326 *Arenstein* 1964 1 SA 361 (A) 366; *Arenstein* 1967 3 SA 366 (A) 382; *Ohlenschlager* 1992 1 SACR 695 (T) 782*f*; *Claassens* 1992 2 SACR 434 (T) 437*g–h*.

327 *Arenstein* 1964 1 SA 361 (A) 366; *Qumbella* 1966 4 SA 356 (A) 359, 364–365; *Qumbella* 1967 4 SA 577 (A) 580; *Fouché* 1974 1 SA 96 (A); *Oberholzer* 1971 4 SA 602 (A) 612; *Amalgamated Beverage Industries Natal (Pty) Ltd v City Council of Durban* 1994 1 SACR 373 (A).

328 *Ohlenschlager* 1992 1 SACR 695 (T) 782, especially 782*i–j*; *Claassens* 1992 2 SACR 434 (T) 438*a–b*. Cf also *Melk* 1988 4 SA 561 (A).

329 *Arenstein* 1964 1 SA 361 (A) 366; *Du Toit* 1981 2 SA 33 (C) 38H–39A; *Melk supra* 578; *Masondo* 1989 3 SA 734 (N) 740; *Claassens supra* 438*h–i*.

that the legislation is aimed at a very dangerous and prevalent social evil;[330] and the fact that the dangerous conduct which the legislature wishes to combat is usually committed negligently (as in road traffic legislation).[331] Otherwise the question of whether intention or negligence is required is answered by considering the same factors, mentioned above, which are considered in order to determine whether culpability is a requirement for the particular statutory crime.

8 Criticism of strict liability In the above[332] discussion of the criteria which the courts apply to determine whether the legislature intended to create strict liability, various points of criticism were levelled at the tests. The criteria are vague and speculative, and even a judge of appeal has described them as "ambivalent considerations".[333] It is difficult to believe that in these cases the courts are really trying to ascertain the intention of the legislature. The truth is that the question as to culpability is mostly not even considered by parliament. The impression one gets is that parliament leaves it to the courts to decide whether culpability is a requirement of the crime. The result is that the courts are taking over the task of the legislature – a task to which they are not suited and which falls outside their scope. In order to decide whether culpability ought to be required, it is often necessary for the court to form some opinion on the socio-political necessity of the provision. This is in conflict with a judge's task of interpreting the law and not making it. The allegedly obstructive effect of the requirement of culpability in the proper implementation of legislation relating to public welfare is also grossly exaggerated.

Possibly the best-founded objection to strict liability is that based on a proper understanding and application of the theories of punishment. According to these theories, it is pointless to punish somebody who lacks culpability: a person is not *deterred* from committing a particular offence if he is in danger of being convicted of it regardless of his knowledge of the surrounding circumstances. Nor is it possible to *prevent* crime on this basis. In addition, the theory of *retribution* cannot find any application where there is no moral blameworthiness. Lastly, there is no room for the *reformative* theory since X has no need of reformation.

It seems that in recent times our courts – especially the Appellate Division – have been unwilling to hold that a statute has created strict liability. As pointed out, it is also often held that though culpability is required, it is culpability in the form of negligence, not intention, which is required. The ideal is that the legislature should state clearly whether it excludes culpability, and if it does not do so, the courts should assume that culpability is required. The courts can further the realisation of this ideal by strictly applying a presumption of culpability – even if it is culpability in the form of negligence – thereby exerting pressure on the legislature to specify any exclusion of culpability clearly and unambiguously.

---

330 *Sayed* 1981 1 SA 982 (C) 987; *Mnisi* 1996 1 SACR 496 (T) 501.
331 *Fouché* 1973 3 SA 308 (NC) 313D–E.
332 *Supra* par 5.
333 Per Holmes JA in *Qumbella* 1966 4 SA 356 (A) 364.

(ii) VICARIOUS LIABILITY

1 Description In primitive legal systems a whole community was sometimes held liable for the misdeeds of one of its members, even though they had no culpability in respect of its commission. In a civilised legal system nobody ought to be held liable for a crime committed not by himself but by another, provided he was not a party to the crime. Only those who acted with culpability ought to be punished.

However, in our law in certain exceptional instances a person may be liable for a crime committed by another. This form of liability is known as vicarious liability. As far as common-law crimes are concerned, one can never be liable for a crime committed by another to which one was not a party and in respect of which one had no culpability. Vicarious liability is possible only in statutory crimes. The legislature may, when creating a crime, expressly declare that certain other people or categories of people will also be guilty of the commission of a crime if, for example, they stand in a certain relationship to the real perpetrator, for example that of employer to employee.

In such cases the legislature may hold an employer liable for crimes committed by an employee, even though the employer was not even aware of the employee's acts, provided those acts were performed by the employee in the course of his employment. Thus the holder of a liquor licence has been held responsible for a barman's acts which contravene the provisions of the Liquor Act.[334] The policy underlying the creation of such vicarious liability is that it will encourage the employer to ensure that his employees' conduct complies with the provisions of the law; he should not be allowed to hide behind his employees' mistakes; their mistakes are imputed to him; he has delegated his powers to them and more often than not gains financially from their activities. Therefore, their actions are deemed to be his actions.

If the legislature creates vicarious liability expressly or by necessary implication, there is, of course, nothing a court can do about it, except to examine whether such a provision is constitutional. Many writers, however, object to the fact that courts sometimes too readily read vicarious liability into a provision which does not expressly create it. It is often accepted that if the legislature created a crime involving strict liability, it also intended to create vicarious liability.[335]

The tests or criteria used to determine whether vicarious liability was created are reminiscent of the tests used to determine whether strict liability was created, namely: the language used by the legislature; the scope and purpose of the prohibition; the measure of punishment; whether the legislature's intention will be frustrated if one assumes that no vicarious liability was created; whether the employer gains financially by the employee's act, and whether only a limited number of people (eg licence holders), as opposed to the community in general,

---

334 *Banur Investments (Pty) Ltd* 1969 1 SA 231 (T); *Sahd* 1992 2 SACR 658 (E) 661, which dealt with the crimes created in ss 160 and 162 of the Liquor Act 27 of 1989.

335 *Weinberg* 1939 AD 71 82–83; *Ex parte Minister of Justice: in re R v Nanabhai* 1939 AD 427 431; *Amalgamated Beverage Industries Natal (Pty) Ltd v City Council of Durban* 1994 1 SACR 373 (A) 380, 385–390.

are affected by the provision.[336] (If only a limited number of people are affected, it is more readily assumed that vicarious liability was created.) The objections to strict liability which were discussed above,[337] apply to vicarious liability too.

336 *Ex parte Minister of Justice: in re R v Nanabhai supra* 430–431; *Steyn* 1964 1 SA 845 (O) 850; *Kamfer* 1965 1 SA 521 (SWA); *Amalgamated Beverage Industries Natal (Pty) Ltd v City Council of Durban supra* 383.

337 *Supra* V H (i) 4–5, 8.

CHAPTER

VI

CRIMINAL LIABILITY OF CORPORATE BODIES

1 Introduction Only a human being can perform an act, as the latter term is understood in criminal law. There is an exception to this general rule: a corporate body can also in certain circumstances engage in conduct and be liable for a crime. The law distinguishes between a natural person on the one hand and a legal *persona*, juristic person, corporation or corporate body on the other. The latter is an abstract body of persons, an institution or entity which can also be the bearer of rights and duties, without having a physical or visible body or a mind. Examples of corporate bodies are companies, universities, Escom, church societies and a local authority.

2 Desirability of punishing a corporate body It is sometimes debated whether it is desirable to punish an entity such as a corporate body which is not, like a natural person, capable of thinking for itself or of forming any intention of its own. It is sometimes said that the idea of blameworthiness inherent in the concept of culpability presupposes personal responsibility – something which an abstract entity such as a corporate body lacks. The corporate body has no physical existence and does not think for itself or act on its own; its thinking and acting are done for it by its directors or servants, and it is argued that it is these persons of flesh and blood who ought to be punished.

On the other hand, there is in practice a great need for this form of liability, especially today when there are so many corporate bodies playing such an important role in society. It is very difficult to track down the individual offender within a large organisation; an official can easily shift blame or responsibility onto somebody else. In any event, other branches of the law, such as the law of contract, acknowledge that a corporate body is capable of thinking and of exercising a will. This form of liability is especially necessary where failure to perform a duty specifically imposed by statute on a corporate body (eg, the duty to draw up and submit certain returns or reports annually), constitutes a crime.[1]

---

1 There has recently been calls for a rethinking of the basis for, and provisions relating to, corporate liability. See Jordaan 2003 *Acta Juridica* 48 70; Borg-Jorgensen and Van der Linde 2011 *TSAR* 452 and 684.

Holding a corporate body criminally liable raises certain procedural questions such as who must be summoned, who must stand in the dock, who must act on the corporate body's behalf during the trial, and what punishment must be imposed. In South Africa the matter has been regulated by statute since 1917. The original section 384 of the Criminal Procedure and Evidence Act 31 of 1917 has been replaced by other sections, and at the moment the matter is governed by the provisions of section 332 of the Criminal Procedure Act 51 of 1977.

3 Liability of corporate body for the acts of its director or servant The section formerly distinguishes between the liability of the corporate body for the acts of a director or servant, and the liability of the director or servant for the "acts" of the corporate body.

An act by the director or servant of a corporate body is deemed to be an act of the corporate body itself, provided the act was performed in exercising powers or in the performance of duties as a director or servant,[2] or if the director or servant was furthering or endeavouring to further the interests of the corporate body.[3] A corporate body can commit both common-law and statutory crimes.[4] It can commit crimes requiring intention, those not requiring intention (that is, crimes requiring negligence)[5] and strict liability crimes.[6]

Acts by a director or servant are held to include not only acts performed by such persons personally, but also acts performed on their instructions or with their express or implied permission.[7] The culpability of the director or servant is similarly ascribed to the corporate body.[8] The word "director" has an extended meaning: it means any person who controls or governs a corporate body or who is a member of a body or group of persons which controls or governs a corporate

---

2 S 332(1). A trust created by a notarial deed of trust is not a corporate body, and cannot be charged in terms of this section – *Peer* 1968 4 SA 460 (N). A company created for an ostensibly lawful purpose, but in reality pursuing an unlawful end is, however, subject to the provisions of this section – *Meer* 1958 2 SA 175 (N).

3 S 332(1). The result of this is that the criminal liability of a corporate body is wider than its liability under civil law. Cf *Bennet and Co (Pty) Ltd* 1941 TPD 194. For examples of acts committed in furthering or endeavouring to further the interests of a corporate body, see *Booth Road Trading Co (Pty) Ltd* 1947 1 SA 34 (N); *Philips Dairy (Pty) Ltd* 1955 4 SA 120 (T); *Barney's Super Service Station (Pty) Ltd* 1956 4 SA 107 (T) 108; *Banur Investments (Pty) Ltd* 1969 1 SA 231 (T) 233–234; *SA Metal and Machine Co (Pty) Ltd* 2010 2 SACR 413 (SCA).

4 S 332(1). Theoretically speaking, a corporate body can therefore be guilty even of murder. Cf the discussion in *Bennet and Co (Pty) Ltd supra*. It is not uncommon for corporate bodies to be charged with and convicted of culpable homicide. See eg *Bennet and Co (Pty) Ltd supra* and *Joseph Mtshumayeli (Pvt) Ltd* 1971 1 SA 33 (RA). In the last-mentioned case a transport company was held liable when one of its employees, a bus driver, caused an accident by allowing a passenger to drive the bus.

5 As in *Bennet and Co (Pty) Ltd supra*; *Joseph Mtshumayeli (Pvt) Ltd supra* and *Ex parte Minister van Justisie: in re S v SAUK* 1992 4 SA 804 (A) 809.

6 S 332(1) – see the phrase "with or without a particular intent". See also *Ex parte Minister van Justisie: in re S v SAUK supra* 807H.

7 S 332 (1).

8 *Ibid.*

body.[9] Where there is no such body or group of persons, the term "director" refers to any person who is a member of the corporate body.[10]

4 Director or servant no longer liable for crimes of corporate body Section 332(5) of the Criminal Procedure Act provides that a director or servant of a corporate body may be convicted of a crime committed by the corporate body, unless she can prove that she did not take part in the commission of the crime and that she could not have prevented it. In *Coetzee*[11] the Constitutional Court held that this provision was unconstitutional because it created a reverse onus which infringed the presumption of innocence in section 35(3)(*h*) of the Constitution and that this violation could not be justified in terms of the limitation clause in section 36(1).

5 Appearance at trial, plea, punishment Who must stand in the dock at the prosecution of a corporate body, who must speak on its behalf and what punishment can be imposed on it? To solve these problems, the section provides as follows: In any prosecution against a corporate body, a director or servant of that corporate body is cited, in her capacity as its representative, as the offender.[12] She may then be treated as if she were the accused.[13] It is she who has to stand in the dock. If she pleads guilty, the plea is not valid unless the corporate body has authorised her to plead guilty, except in the case of minor crimes where a fine may be paid as an admission of guilt.[14] If the corporate body is convicted, the court may not impose any punishment other than a fine, even if the statute which created the crime does not make provision for the imposition of a fine.[15] The fine must then be paid by the corporate body, even if this necessitates the attachment and sale of its property.[16] The reason why a fine is the only punishment which can be imposed is of course the fact that an entity that has no physical existence cannot be thrown into gaol.

6 Association of persons The section further provides that if a member of an association of persons which is not a corporate body commits a crime in the course of carrying on the business or affairs of the association, or while endeavouring to further its interests, any person who is a member of that association at the time of the commission of the crime is deemed to be guilty of the crime, unless she proves, first, that she did not take part in the commission of the crime and, secondly, that she could not have prevented it.[17] If the business or affairs of the association are governed or controlled by a committee or other similar body, these provisions are not applicable to a person who was not, at the

---

9 S 332(10); *Mall* 1959 4 SA 607 (N); *Marks* 1965 3 SA 834 (W).
10 S 332(10).
11 1997 1 SACR 379 (CC). (The judgment was not unanimous.)
12 332(2); *Hammersma* 1941 OPD 39.
13 S 332(2).
14 S 332(2)(*a*); *Lark Clothing (Pty) Ltd* 1973 1 SA 239 (C); *Stojilkovic* 1995 1 SACR 435 (T).
15 S 332(2)(*c*).
16 S 332(2)(*c*).
17 S 332(7). On this subsection, see *Couvaras* 1946 OPD 392; *Limbada* 1958 2 SA 481 (A). An association pursuing an unlawful purpose also falls within the scope of the subsection – *Ismail* 1965 1 SA 452 (N) 458.

time of the commission of the crime, a member of that committee or other body.[18] The association of persons as an abstract entity cannot commit a crime itself, since it is not a corporate body. A partnership is not a corporate body, but is an association of persons for the purposes of the provision in question.[19]

Whether these provisions of section 332(7), which creates the liability just set out, is compatible with the constitution, is very doubtful. These provisions, like those in subsection (5) of section 332, create a reverse onus which violates the presumption of innocence, and this presumption may not be justifiable in terms of the limitation clause. The reasons set out in *Coetzee*[20] for holding that subsection (5) is unconstitutional, may also apply to the present subsection (7).

---

18 S 332(7). The committee or governing body must be elected, and not be a self-appointed "supreme command" – *Ismail supra* 459.

19 *Levy* 1929 AD 312 322; *Solomon v Law Society of the Cape of Good Hope* 1934 AD 407 410; *Couvaras supra*.

20 1997 1 SACR 379 (CC).

CHAPTER

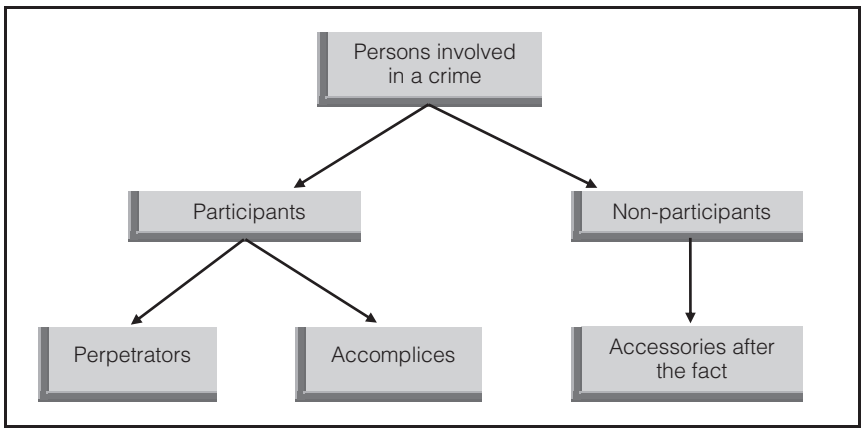
VII

PARTICIPATION AND ACCESSORIES AFTER THE FACT

A GENERAL

1 Introduction In the discussion of criminal liability thus far it has been assumed that only one person was involved in the commission of the crime. However, it is well known that crimes are often committed by a number of persons acting together, as where A, B, C and D agree to rob a store. A first finds out where the money is kept in the store, B then holds up the shopkeeper (Y) with a gun, while C puts the money into a bag and D keeps guard outside the store in order to give timeous warning should the police arrive. One may extend this example by assuming that E had previously promised A, B, C and D a reward for robbing the store; that the shopkeeper Y surprises the robbers by offering resistance when he is threatened; that B then shoots him and that F, who hears about the robbery only afterwards, helps the robbers by disposing of Y's body in a river and by hiding the bag containing the money under his bed for some time. Which of these persons, A to F, is now guilty of murder, robbery or theft? To what extent does the liability of one depend upon that of the other, and can different persons participate in the commission of one and the same crime in varying degrees? It is questions of this nature which will be answered in the discussion which follows.

2 Perpetrator, accomplice and accessory after the fact: an overview The different persons who may be involved in the commission of a crime are divided into three categories, namely perpetrators, accomplices and accessories after the fact. The first two categories, namely perpetrators and accomplices, may jointly be described as participants. They both participate in the commission of the crime because they either commit it themselves or promote its commission. An accessory after the fact is not a participant for he in no way promotes the commission of the crime. The division of persons who may be involved in the commission of the crime may be illustrated as follows in a diagram:



(*a*) *Perpetrator* A person is a perpetrator if (*a*) his conduct, the circumstances in which it takes place and the culpability with which it is carried out are such that he satisfies all the requirements for liability contained in the definition of the crime, or (*b*) if he acted together with one or more persons and the conduct required for a conviction is imputed to him by virtue of the principles relating to common purpose. The latter principles will be discussed in due course. Leaving the doctrine of common purpose aside for the moment, it is clear that in order to determine whether somebody is a perpetrator, one must consider, firstly, the definition of the crime and, secondly, whether that person, in terms of his conduct, the circumstances in which it takes place and the culpability with which it is carried out, complies in all respects with this definition.[1]

(*b*) *Accomplice* The crime of bigamy is committed if a person who is already married, enters into what purports to be a second marriage. Assume that X is a minister of religion who solemnises a marriage while knowing that Y, one of the parties to the new "marriage", is already married. X can then not be a perpetrator to the crime of bigamy, because the crime is defined in such a manner that it can be committed by only a person who is already married and who is a party to a marriage ceremony purporting to bring about a lawful marriage with somebody else. (In other words, the crime can only be committed by the man and/or woman who are "getting married".) What X does, is unlawfully and intentionally to further, facilitate or make possible the commission of a crime committed by somebody else. It would not be to the credit of any legal system to allow somebody in the position of the X in the above example to go unpunished merely because his or her conduct does not comply in every respect with the definition of the crime. In our law such a person is punishable as an accomplice.

An accomplice is somebody who does not satisfy all the requirements for liability contained in the definition of the crime or who does not qualify for liability in terms of the principles relating to common purpose, but who nevertheless unlawfully and intentionally furthers its commission by somebody else.

1 *Williams* 1980 1 SA 60 (A) 63.

He consciously associates himself with the commission of the crime by assisting the perpetrator or co-perpetrators or by giving them advice or supplying them with information or by offering them the opportunity or means to commit the crime or to facilitate its commission.[2]

Certain crimes can only be committed by persons who comply with a certain description. The prohibition may, for example, be directed against only a licence holder, a driver of a motor vehicle, a certain gender, persons practising a certain profession, or persons holding a certain citizenship. Persons not complying with this particular description, but who nevertheless further the commission of the crime by somebody who does comply with it, are accomplices. Again, probably most crimes are defined in such a way that they can be committed by a certain, defined act only, such as sexual penetration, the giving of evidence (perjury), entering into a marriage (bigamy) or possessing a certain article (such as dagga). A person who does not commit this particular act but who, by means of another act, nevertheless promotes or facilitates the commission of this crime is an accomplice to it.

(*c*) *Accessory after the fact* At this stage it is clear that both a perpetrator and an accomplice promote the commission of the crime before it is completed. The accessory after the fact, on the other hand, is somebody who, after the commission of the crime, unlawfully and intentionally helps the perpetrator or accomplice to escape liability.[3] A good example of an accessory after the fact is somebody who had nothing to do with a murder but who, after a murder has been committed, hears about it for first time and then helps the murderer to get rid of the corpse by, for example, throwing it into a river with a heavy stone attached around its neck.

The accessory after the fact comes into the picture only after the crime has already been completed. For this reason it cannot be said that he promotes or facilitates the commission of the crime, and he is therefore not a participant in its commission. If, however, before the commission of the murder he agrees with the murderers to dispose of the corpse, the picture changes completely. He may then himself be a co-perpetrator, if it appears that he acted in a common purpose with the real murderer, or that for other reasons, there was a causal nexus between the assistance he promised and the victim's death.

The rules relating to (co-)perpetrators, accomplices and accessories after the fact are the same in respect of both statutory and common-law crimes.

3 Terminology Before each of the three groups, namely perpetrators, accomplices and accessories after the fact, is discussed in further detail, it is necessary briefly to explain the terminology used in our law on this subject. This is especially necessary if one wants to find one's way about our case law.

(*a*) *Meaning of words and expressions* Before 1980 (and, regrettably, at times even thereafter) the courts, instead of speaking of a perpetrator and an accomplice, used the vague term *socius criminis* (plural *socii criminis*) to refer to both. The courts differentiated between the principal offender (sometimes also

---

2 *Williams supra* 63; *Maxaba* 1981 1 SA 1148 (A) 1156; *Saffier* 2003 2 SACR 141 (SEC) 42*b–d*.

3 *Infra* VII D.

called the "actual perpetrator") on the one hand, and a *socius criminis* on the other. This distinction is futile and ought to be discarded. It is a distinction which has nothing to do with the material difference between perpetrators and accomplices. *Socii criminis* (which can literally be translated as "partners in a crime") include all participants (in other words, all perpetrators and accomplices) excluding the principal offender. If one therefore describes somebody as a *socius criminis*, it means that the basic differentiation between a perpetrator and an accomplice has not yet been drawn. After the acceptance by the Appellate Division in *Williams*[4] of the difference between perpetrators and accomplices, there is no longer any room in our law for the expression *socius criminis*. "Aider and abettor" usually means "an accomplice". If there is more than one perpetrator, they are known as co-perpetrators.[5]

(*b*) *Technical and popular meaning of the word "accomplice"* Confusion may easily arise about the meaning of the word "accessory". This word may have two meanings, depending whether one uses the word in its technical or "popular" meaning. The technical meaning is the one assigned to it above. This is the correct meaning of the term, and the one that will be used throughout in this book. According to the popular meaning of the word, it can refer indiscriminately to all participants (all so-called *socii criminis*). Even the courts sometimes err and use the word in its popular sense. In the public media the word is mostly used in this popular meaning ("any person who helps another in the commission of a crime"). However, in order to avoid confusion, the use of this word in its popular sense should be avoided.

B PERPETRATORS

1 Summary of principles relating to perpetrators The main principles relating to perpetrators may be summarised as follows:

1 A person is a perpetrator if –

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

(*b*) although his own conduct does not comply with that required in the definition of the crime, he acted together with one or more persons and the conduct required for a conviction is imputed to him by virtue of the principles relating to common purpose (set out below).[6]

continued

4 1980 1 SA 60 (A).

5 These are also the terms expressly preferred by Corbett JA in *Khoza* 1982 3 SA 1019 (A) 1031D.

6 *Infra* pars 6–16.

2 If two or more persons act together and they all comply with the above definition of a perpetrator, they are all co-perpetrators. There is no rule to the effect that if two or more people are involved in the commission of a crime only one of them can qualify as a perpetrator and that the other(s) must all fall in a different category.

3 For a person to be a perpetrator, it matters not whether he commits the crime himself or makes use of an agent (human or non-human) to effect the commission. This rule, however, does not apply to crimes which can be committed only with a person's own body, such as the old common-law crime of rape.

In the discussion which follows, the above rules relating to perpetrators will be explained in more detail. Paragraphs 2 to 5 deal with the criteria set out in rule 1(*a*) above. Paragraphs 6 to 16 are devoted to a discussion of the doctrine of common purpose (referred to in rule 1(*b*) above).

2 Co-perpetrators: not necessary to single out principal perpetrator If a number of persons commit a crime together, it is unnecessary to stipulate that only one of them can be the perpetrator, and that the others who help in its commission must necessarily fall into a different category. It is not always practicable to identify one principal perpetrator or, as he is sometimes called, "principal offender" or "actual perpetrator". What criterion should be applied to determine which one of a number of participants qualifies as the principal perpetrator? One cannot allege that the principal perpetrator is the person who himself stabs the victim or, where theft is involved, removes the article, for a person may commit a crime through the instrumentality of another. If a number of people commit a crime and they all comply with the requirements for perpetrators set out above, they are all simply co-perpetrators. A co-perpetrator does not fall into any category other than that of a perpetrator.[7]

Two persons may act in such a way that each contributes equally to the crime, as where (within the context of murder) A takes the victim by the arms, B takes him by the legs and together they throw him over a precipice. One co-perpetrator's contribution may be more or less than that of the other, as where (within the context of murder) A enters a house and shoots and kills Y while B merely keeps guard outside the house. Both are nevertheless co-perpetrators in the commission of the murder, if the conduct of both can be described as the unlawful intentional causing of the death. That one is a perpetrator in no way detracts from the fact that the other is also a perpetrator.

3 Distinction between direct and indirect perpetrators not material The distinction that may be drawn between direct and indirect perpetrators is irrelevant. An indirect perpetrator is somebody who commits a crime through the instrumentality of another. X, for example, hires Z to murder Y. X is then an indirect perpetrator and Z, who plunges a knife into Y's chest, the direct perpetrator. "Direct" perpetrator and "indirect" perpetrator are merely convenient

7 *Williams* 1980 1 SA 60 (A) 63; *Maxaba* 1981 1 SA 1148 (A) 1155; and see generally the discussion in *Maelangwe* 1999 1 SACR 133 (NC) 146 ff; *Kimberley* 2004 2 SACR 38 (E) 42*b–d*; *Buda* 2004 1 SACR 9 (T) 19*g–i*.

terms to use when one is describing a factual situation. The difference between the two has no bearing on a person's liability. In the eyes of the law, Z is nothing more than an instrument which X uses to commit the crime, and X would be guilty even if Z were an innocent agent, because of mental illness, for example. (In the latter case Z would of course not be a direct perpetrator; he would, in fact, not be guilty at all.)

The above-mentioned principle is, however, subject to the following exception: in autographic crimes it is not possible for one person to commit the crime through the instrumentality of another. Autographic crimes are crimes which can by definition be committed only with one's own body. Examples of such crimes are the former common-law crime of rape, before a new statutory definition of the crime was enacted,[8] and other crimes of which sexual intercourse is an element, such as the former common-law crime of incest. For example, if X persuaded Z to have intercourse with Y without her (Y's) consent, and Z in fact did so, X could not be guilty of the former common-law crime of rape, since he did not himself have intercourse with Y.[9]

4 Liability of perpetrator not accessory in nature The liability of a perpetrator or co-perpetrator is based on his own act and his own culpability.[10] Unlike that of an accomplice, his liability is not accessory in character. It does not depend upon the commission of a crime by somebody else: his liability is completely independent.

In *Parry*,[11] for example, X was charged, together with Z, with murdering Z's wife. At the trial Z was found not guilty because of mental illness. It was argued on behalf of X that he, too, ought to be acquitted since there was no guilty principal offender. This argument was deservedly rejected, and X was convicted of murder, for his guilt results from his own act and his own state of mind.

5 Being co-perpetrators of murder by applying ordinary principles of causation Murder is a particularly widely defined crime, because of the requirement of causation. One can cause another's death in many different ways. For reasons that will be set out below,[12] it is submitted that exactly because murder has such a wide definition, it is impossible to be an accomplice to this crime. If two or more people are involved in the commission of a completed murder, all of them are co-perpetrators.

X may be convicted of murder as a perpetrator or co-perpetrator of murder on two possible grounds.

(1) X may be convicted of murder simply by applying the *ordinary principles of liability*, and more particularly the ordinary principles of causation. Here one does not apply any particular special doctrine, and more particularly not the doctrine of common purpose.

---

8 *Saffier* 2003 2 SACR 141 (SEC) 143–145; *Kimberley supra* 42–43.
9 *Gaseb* 2001 1 SACR 438 (NmS) 466*g*; *Saffier* 2003 2 SACR 141 (SEC) 144–146; *Kimberley* 2004 2 SACR 38 (E) 42–43.
10 *Thomo* 1969 1 SA 385 (A) 394; *Nooroodien* 1998 2 SACR 510 (NC) 516*c–d.*
11 1924 AD 401.
12 *Infra* VII C 4.

(2) X may be convicted of murder by applying the doctrine of common purpose. Here one "bypasses", as it were, the causation requirement, which is often very difficult to prove. The first-mentioned ground will be considered first. The second ground, that is, an application of the doctrine of common purpose, is set out in paragraphs 6 to 15 below.

If a number of people kill Y, each of them will, according to the ordinary principles of liability, and more particularly the ordinary principles of causation, be guilty of murder as co-perpetrators if it is clear that, intending to kill Y, each has committed an unlawful act which is causally connected with Y's death. Thus if X takes Y by the arms and Z takes him by the legs and together they throw him over a precipice both of them are co-perpetrators.

If two or more persons decide to murder Y, for all of them to be liable as co-perpetrators it is not necessary that each of them should stab Y or fire a shot at him. It is not even necessary for each of them to touch Y, or be present at the scene of crime. There may, for example, be a causal connection between X's act and Y's death even if he merely transports Z to and from the scene of crime, or supplies him with information about Y's whereabouts, or stands next to him while he attacks Y, ready to help if necessary, or stands guard outside the building while Z does the killing, or merely encourages or incites[13] him to shoot Y, or merely gets him to do it. To be merely a passive spectator or witness of the murder is, of course, insufficient.[14]

If X conspires with one or more other people to murder Y, Y is indeed murdered in execution of the conspiracy and the court can infer from the evidence that there is a causal *nexus* between X's act of conspiracy and Y's death, X is a co-perpetrator of the murder, even though he did not shoot or stab Y himself, or even if he was not even at the scene of crime.[15]

6 Necessity of doctrine of common purpose If a number of people acting together killed Y, it is often very difficult to find with certainty that the acts of each of them contributed causally to Y's death. The facts may be such that there is no doubt that at least one of the group, namely the one who actually shot and killed Y, caused his death, but there are also situations in which the conduct of no single one of the group can with certainty be described as a cause (at least in the sense of *conditio sine qua non*) of Y's death. The latter situation occurs especially where a large number of people together kill Y. It may then be difficult to base their liability for the joint murder on merely an application of the general principles of liability. There is usually no difficulty in finding that everybody's conduct was unlawful and that each member of the group entertained the intention to kill. What is, however, often difficult to establish is that the individual conduct of each member satisfied the requirement of causation.

This may be illustrated by the following example: assume that a group of twenty people decide to kill Y by stoning him to death, and in fact do so. In order to determine whether a particular member of the group caused Y's death according to the ordinary principles, one must apply the *conditio sine qua non*

---

13 *Njenje* 1966 1 SA 369 (RA); *Lamont* 1977 2 SA 679 (RA) 682.
14 *Petersen* 1989 3 SA 420 (A) 425A–B; *Barnes* 1990 2 SACR 485 (N) 491*b*.
15 *Nooroodien* 1998 2 SACR 510 (NC) 518*f–h; Buda* 2004 1 SACR 9 (T) 20.

test and ask the following question: if the act of that particular member of the group were "thought away", would Y nevertheless have died?[16] The answer to this question is obviously "yes", since it is clear that the conduct of the remaining nineteen members of the group would have been sufficient to cause Y's death. Accordingly, one must accept that that particular member of the group did not cause Y's death. The same consideration applies in respect of the other nineteen members of the group. Thus if one were to determine the liability of an individual member of the group with the aid of the ordinary principles of causation, there is a real danger that all twenty members of the group might escape liability for murder because of absence of proof of a causal link between each member's act and Y's death. Such a conclusion would be counter-intuitive, since it is clear that Y would not have died but for the conduct of the group. This argument proves why it is necessary to work with a special doctrine, namely the doctrine of common purpose.[17]

If the doctrine of common purpose did not exist, it would mean that if X wants to murder Y without rendering him guilty of murder, he would easily be able do this by merely ensuring that he does not act alone, but together with a number or other people. X must only ensure that the murder, committed by a number of people, is committed in such a way that a court cannot afterwards identify a "principal perpetrator", such as one who has actually stabbed Y with a knife in his heart, even though it is clear that the murder was committed by an identifiable number of people acting together. This would mean that the more effective the attack is on Y (in that Y is confronted by an attack, not only by a single attacker, but by a number of attackers, who, exactly because there is a number of them, can ensure through a division of labour that the murder is executed more effectively), the smaller (more difficult or impossible) will be the chances of a court convicting any one of the murder. Such a situation will be acceptable to neither the community nor the legal order.

7 The doctrine of common purpose: summary of principles In order to overcome problems such as those set out above in the previous paragraph, the courts apply a specific doctrine to enable it to convict a number of people acting together of murder. This doctrine is known as the doctrine of common purpose.

The main principles relating to this important doctrine may be summarised as follows:

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

2 In a charge of having committed a crime which involves the causing of a certain result (such as murder), the conduct imputed includes the causing of such result.

continued

16 Cf the discussion of this test for causation *supra* III B 7.

17 See also the reasoning in *Mzwempi* 2011 2 SACR 237 (ECM) par 45–46.

3 Conduct by a member of the group of persons having a common purpose which differs from the conduct envisaged in the said common purpose may not be imputed to another member of the group unless the latter knew that such other conduct would be committed, or foresaw the possibility that it might be committed and reconciled himself to that possibility.

4 A finding that a person acted together with one or more other persons in a common purpose is not dependent upon proof of a prior conspiracy. Such a finding may be inferred from the conduct of a person or persons.

5 A finding that a person acted together with one or more other persons in a common purpose may be based upon the first-mentioned person's active association in the execution of the particular criminal act of the other participant(s). However, in a charge of murder this rule applies only if the active association took place while the deceased was still alive and before a mortal wound or mortal wounds had been inflicted by the person or persons with whose conduct such first-mentioned person associated himself.

6 If, on a charge of culpable homicide the evidence reveals that a number of persons acted with a common purpose to assault or commit robbery and that the conduct of one or more of them resulted in the death of the victim, the causing of the victim's death is imputed to the other members of the group as well, but negligence in respect of the causing of the death is not imputed.

7 The imputation referred to above in statement 1 does not operate in respect of charges of having committed a crime which can be committed only through the instrumentality of a person's own body or part thereof, or which is generally of such a nature that it cannot be committed through the instrumentality of another.

These principles will now be explained and analysed in more detail.

8 The doctrine of common purpose – general In order *inter alia* to overcome difficulties relating to causation as explained in paragraph 6 above, the courts apply a special doctrine, called the common purpose doctrine, to facilitate the conviction for murder of each separate member of the group. The essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, then the conduct of each of them in the execution of that purpose is imputed to the others.[18]

The doctrine is couched in general terms and therefore not confined to one type of crime only.[19] However, the best known application of the doctrine – at

18 *Shaik* 1983 4 SA 57 (A) 65A; *Safatsa* 1988 1 SA 868 (A) 894, 896, 901; *Mgedezi* 1989 1 SA 687 (A); *Thebus* 2003 2 SACR 319 (CC) 341*e*.

19 Cases in which the doctrine was applied to crimes other than murder include *Wilkens* 1941 TPD 276 and *Mashotonga* 1962 2 SA 321 (R) (public violence); *Maelangwe* 1999 1 SACR 133 (NC) 147*b–c* (housebreaking); *Peraic* 1965 2 PH H201 (A); *Khambule* 2001 1 SACR 501 (SCA) (robbery); *A* 1993 1 SACR 600 (A) 606*i*–607*a* and *Mitchell* 1992 1 SACR 17 (A) 23 (assault); *Mongalo* 1978 1 SA 414 (O) and *Windvogel* 1998 1 SACR 125 (C) (theft); *Del Ré* 1990 1 SACR 392 (W) (fraud); *Banda* 1990 3 SA 466 (B) 500E

[*continued*]

least in our reported case law – is to be found within the context of the crime of murder. The discussion of the doctrine which follows, will, for the sake of simplicity, therefore be limited to its application to the crime of murder.

The crucial requirement is that the persons must all have had the intention to murder and to assist one another in committing the murder. Once that is proved, the act of X, who actually shot and killed Y, is imputed to Z, who was a party to the common purpose and actively associated himself with its execution, even though a causal relationship between his (Z's) act and Y's death cannot readily be proved.[20] X's act is then regarded as also that of Z.[21]

It is not unjust to impute X's act, which caused the death, to Z. By engaging in conduct in which he co-operates with X's criminal act, Z forfeits his right to claim that the law should not impute to him another's unlawful act. He signifies through his conduct that the other person's (ie, X's) act is also his.[22]

It is, however, only X's *act* which is imputed to Z, not X's culpability. Z's liability is based upon his own culpability (intention).[23] There need not necessarily be a prior conspiracy. The common purpose may also arise spontaneously or on the spur of the moment,[24] and evidence of the behaviour of the different co-accused may lead a court to conclude that this has happened.[25] The operation of the doctrine does not require each participant to know or foresee in detail the exact way in which the unlawful result will be brought about.[26]

The basis of the doctrine used to be the idea that each member of the plot or conspiracy gave the other an implied mandate to execute the unlawful criminal act,[27] and accordingly the liability of those participants in the common purpose who did not inflict the fatal blow depended upon the question of whether the unlawful criminal result fell within the mandate.[28]

9 The judgment in Safatsa In *Safatsa*[29] a crowd of about one hundred people attacked Y, who was in his house, by pelting the house with stones, hurling

---

(treason); *Nkosi* 1998 1 SACR 284 (W); *Khambule supra* 507*e–f*, 508*b–c*; *Motsema* 2012 2 SACR 96 (SGJ) (unlawful possession of firearm); *Mambo* 2006 2 SACR 563 (SCA) (escaping from lawful custody).

20 *Safatsa* 1988 1 SA 868 (A) 896.

21 *Daniëls* 1983 3 SA 275 (A) 323F; *Shaik* 1983 4 SA 57 (A) 65A; *Safatsa* 1988 1 SA 868 (A) 896, 901; *Thebus* 2003 2 SACR 319 (CC) 341–343.

22 See the explanation by *Dressler* 429 of the corresponding principle in American law. The author speaks of "forfeited identity", which means that "she who chooses to aid in a crime forfeits her right to be treated as an individual . . . [she] says, as it were, 'your acts are my acts' ".

23 *Malinga* 1963 1 SA 692 (A) 694.

24 *Mambo* 2006 2 SACR 563 (SCA) 570*f–g*.

25 *Khoza* 1982 3 SA 1019 (A) 1053; *Safatsa* 1988 1 SA 868 (A) 898B; *Maelangwe* 1999 1 SACR 133 (NC) 150–151.

26 *Shezi* 1948 2 SA 119 (A) 128; *Maelangwe supra* 148*e–f*.

27 *Mgxwiti* 1954 1 SA 370 (A) 382; *Motaung* 1961 2 SA 209 (A).

28 *Motaung* 1961 2 SA 209 (A). For cases in which participants in a plot were held to be not liable for the act of murder performed by another participant, because it fell outside the common purpose, see the positions of accused no. 2 and 3 in *Robinson* 1968 1 SA 666 (A) 673D–F; *Chimbamba* 1977 4 SA 803 (RA); *Talane* 1986 3 SA 196 (A); *Mitchell* 1992 1 SACR 17 (A) 23.

29 1988 1 SA 868 (A).

petrol bombs through the windows, catching him as he was fleeing from his burning house, stoning him, pouring petrol over him and setting him alight. The six appellants were part of the crowd. According to the court's finding, their conduct consisted of acts such as grabbing hold of Y, wrestling with him, throwing stones at him, exhorting the crowd to kill him, forming part of the crowd which attacked him, making petrol bombs and setting Y's house alight. In a unanimous judgment delivered by Botha JA, the Appellate Division confirmed the convictions of the six accused who were convicted of murder. The Appellate Division based their convictions on the doctrine of common purpose, since it found that they all had the common purpose to kill Y.

The court rejected the argument advanced on behalf of the accused that they could be convicted of murder only if a causal connection were proved between the individual conduct of each of the accused and Y's death.[30] The court in fact assumed that it had not been proved that the individual conduct of any of the six accused contributed causally to Y's death.[31] It is sufficient that the individual participant actively associated himself with the execution of the common purpose.[32]

10 Active association in common purpose The basis upon which the doctrine operates is the individual accused's active association with the common purpose. The notion of active association is wider than that of agreement. Agreement, whether express or implied, is merely one form of active association.[33] It is seldom possible to prove the existence of a previous agreement between the participants, and it is precisely for this reason that the concept of active association plays an important role as a ground for the liability of each of them.

If there is proof of a previous agreement between the participants (something which can seldom be proven), it is relatively easy to make the inference that each participant associated himself with the others. However, if, as is most often the case, there is no proof of a previous agreement, the following five requirements must, according to the decision of the Appellate Division in *Mgedezi*,[34] be complied with:

(1) X must have been present at the scene where the violence was being committed;

(2) X must have been aware of the assault on Y by somebody else;

(3) X must have intended to make common cause with the person or persons committing the assault;

(4) X must have manifested his sharing of a common purpose by himself performing some act of association with the particular conduct of the others; and

(5) X must have intended to kill Y.

---

30 At 896E.

31 At 894 F–G.

32 At 901.

33 Whiting 1986 *SALJ* 38 39–40; Matsukis 1988 *SACJ* 226 231–232.

34 1989 1 SA 687 (A) 705I–706C. See the application of the principles laid down in this case in *Jama* 1989 3 SA 427 (A) 436; *Barnes* 1990 2 SACR 485 (N) 492; *Nooroodien* 1998 2 SACR 510 (NC) 517–518; *Mbanyaru* 2009 1 SACR 631 (C).

With the exception of the first and third requirements, all these requirements are reasonably obvious. As far as the first requirement is concerned, it must be emphasised that it applies only if there is no proof of a previous agreement to commit the crime.[35] Quite apart from this, this requirement does not detract from the general rule relating to indirect perpetrators – that is, the rule that one person can procure another to commit the crime in his absence.[36]

The third requirement above makes it clear that the particular accused and those performing the actual assault should *consciously* have *shared* a common purpose. The fact that two or more persons happened to have the same goal without being aware of one another is not enough. There must have been conscious co-operation between them.

The mere fact that a person happened to be present at the scene of the crime and was a passive spectator of the events cannot serve as a basis for holding him liable for the crime that has been committed.[37] What is more, the fourth requirement mentioned above is to the effect that even if the passive spectator tacitly approves of the actual perpetrator's criminal act, it still does not afford a basis for inferring that he actively associated himself with the commission of the crime.[38]

Association with a common purpose should not be confused with ratification of another's criminal deed which has already been completed; criminal liability cannot be based on *ex post facto* ratification of another's unlawful act.[39]

11 Difference between prior conspiracy and active association In order to avoid the common-purpose doctrine becoming too wide and thereby leading to unjust results, the following restriction to its operation should be noted: If reliance is placed on a prior agreement or conspiracy between the participants, it is enough to prove that X agreed with the *wide and general* common design of the conspirators. However, if reliance is placed not on a previous conspiracy, but on active association, there must be proof that X associated himself, not with the wide and general common design, but with the *specific act* whereby the other participant(s) committed the crime.[40] Another point of difference between these two "forms" of common-purpose liability is that in cases where liability is based on prior conduct, X need not be present at the scene of the crime at the time of the commission of the crime, whereas his presence at the scene is

---

35 In *Memani* 1990 2 SACR 4 (TkA) 8 it was emphasised that the mere fact that X was present at the scene of the crime but had not performed any act through which he associated himself with the commission of the crime was insufficient to hold him liable for the crime in terms of the doctrine of common purpose.

36 *Yelani* 1989 2 SA 43 (A).

37 *Petersen* 1989 3 SA 420 (A) 425A–B; *Barnes* 1990 2 SACR 485 (N) 491*b*; *Mbanyaru* 2009 1 SACR 631 (C) par 14–16.

38 *Barnes* 1990 2 SACR 485 (N) 492*h*; *Mbanyaru supra* par 14–16.

39 *Thomo* 1969 1 SA 385 (A) 399; *Williams* 1970 2 SA 654 (A) 658–659; *Motaung* 1990 4 SACR 485 (A) 520–521.

40 *Mzwempi* 2011 2 SACR 237 (ECM) par 53, discussed by Hoctor 2011 *SACJ* 202. In this judgment the court was (correctly, it is submitted) critical of the majority decision of the Appeal Court in *Nzo* 1990 3 SA 1 (A), which favoured the wider test for imputation. Hoctor *ibid* and 2011 *Annual Survey of South African Law* 346 *ff*) criticises the court's interpretation of *Nzo*.

required for liability based on active association.[41] A third point of difference is that in cases of liability based on prior agreement no proof that X actively associated himself with the actual commission of the crime at the time of its commission is required.[42] It follows that liability arising from active association is more restrictive in nature than liability arising from a prior agreement.[43]

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

Thus if a number of persons take part in a robbery or housebreaking, and in the course of events one of them kills somebody, the mere fact that they all had the intention to steal, to rob or to break in is not necessarily sufficient to warrant the inference that all of them also had the common purpose to kill. One can steal, rob or break in without killing anybody. Whether the member of the gang who did not directly participate in the shooting or stabbing of or assault upon the deceased also had the intention to murder, must be decided on the facts of the individual case. Such an inference may, for example, be drawn from the fact that that particular member of the gang knew that the assailant carried a revolver or a knife and that he might use it, or knew that there would be people inside the house who would resist the housebreaking.[44] The liability of an associate in a common purpose to commit an unlawful act depends upon his own culpability (intention).[45] The intention of the perpetrator who fired the actual shot that killed Y, cannot be imputed to other members of the group.

13 Application of common purpose doctrine in charges of culpable homicide It is conceptually impossible to intend to be negligent,[46] and therefore one would be inclined to argue that the common purpose doctrine can never be applied to convict people of culpable homicide. However, after the decisions of the Appellate Division in *Nkwenja*[47] and *Magmoed v Janse van Rensburg*,[48] read with *Safatsa*,[49] it is now clear that the doctrine can be applied in charges of culpable homicide in order to overcome difficulties in proving causation.

---

41 *Mzwempi supra* pars 54, 56, 76, 77.
42 *Mzwempi supra* par 54.
43 *Mzwempi supra* par 77.
44 This part of the text was quoted with apparent approval in *Gedezi* 2010 2 SACR 363 (WCC) par 55. For examples of the application of the principle set out in the text, see *Nkomo* 1966 1 SA 831 (A); *Maxaba* 1981 1 SA 1148 (A) 1156; *Phillips* 1985 2 SA 727 (N) 735; *Mbatha* 1987 2 SA 272 (A); *Nzo* 1990 3 SA 1 (A) 5–8; *Mkhize* 1999 2 SACR 632 (W) 638*f–g*. For cases in which the courts have held that one of the members of a gang did not have *dolus eventualis* in respect of Y's death, see *Magwaza* 1985 3 SA 29 (A); *Talane* 1986 3 SA 196 (A) 207–208; *Munonjo* 1990 1 SACR 360 (A); *Molimi* 2006 1 SACR 8 (SCA) 18–21; *Dube* 2010 1 SACR 65 (KZP).
45 *Malinga* 1963 1 SA 692 (A) 694; *Memani* 1990 2 SACR 4 (TkA) 7*b*.
46 *Coetzee* 1974 3 SA 571 (T) 572; *Ntanzi* 1981 4 SA 477 (N) 482F–G.
47 1985 2 SA 560 (A), followed in *Ramagaga* 1992 1 SACR 455 (B).
48 1993 1 SACR 67 (A) 78*b–f*.
49 1988 1 SA 868 (A).

Safatsa[50] made it clear that according to the common purpose doctrine it is the act of causing death – in other words the causal nexus between the one (or perhaps more than one) perpetrator's act and the victim's death – that is attributed to the other members sharing the common purpose, and that this doctrine can never be used to attribute one perpetrator's culpability (intention) to another. Each perpetrator's culpability must be determined independently in order to convict him of murder. The same principle applies to culpable homicide: if it is proved that a number of people had a common purpose to commit a crime other than murder (such as assault, housebreaking or robbery), and that in the course of executing this common purpose the victim has been killed, the one perpetrator's act of causing the death can be attributed to the other members of the common purpose. However, the negligence of one perpetrator can never be attributed to another. Every party's negligence in respect of the death must be determined independently.[51]

14 Common purpose doctrine not applicable to autographic crimes Autographic crimes are crimes that can be committed only through the instrumentality of a person's own body.[52] The common purpose doctrine cannot be applied to crimes that cannot be committed through the instrumentality of another person but can only be committed through a person's own body or part thereof. A good example of such a type of crime is the former common-law crime of rape before it was redefined by the legislature.

Thus, in the days when the common-law definition of rape still applied, that is, when a male person, X, had sexual intercourse with female Y *per vaginam*, while his friend Z assisted him by restraining Y but without himself having intercourse with her, Z could not be a (co-) perpetrator, but only an accomplice to the rape.[53] Possible further examples of crimes that cannot be committed through the instrumentality of another are perjury, bigamy and driving a vehicle under the influence of liquor.

15 Common purpose doctrine is constitutional In *Thebus*[54] the Constitutional Court held that the doctrine is compatible with the Constitution. The doctrine does not infringe X's right to dignity and freedom. It is, according to the court, rationally linked to a lawful aim, namely the combating of criminal activities by a number of people acting together. If the doctrine did not exist, there would have been the unacceptable situation that only the person who had actually committed the principal act (in other words, who actually stabbed Y with a knife in his chest) would have been guilty, whereas those who have intentionally contributed to the commission of the principal act would not have been guilty of the crime committed by the principal perpetrator. The judgment must be welcomed, despite the fact that the grounds advanced by the court for its decision do not always go to the core of the reason for the existence of the doctrine.[55]

---

50 *Ibid.*
51 *Kwadi* 1989 3 SA 524 (NC); *Whitehead* 2008 1 SACR 431 (SCA) 436.
52 *Kimberley* 2004 2 SACR 38 (E) 43*d–e*.
53 *Saffier* 2003 2 SACR 141 (SEC) 143–145; *Kimberley* 2004 2 SACR 38 (E) 42–43.
54 2003 2 SACR 319 (CC). For a very good critical analysis of this judgment, see Friedman 2003 *Annual Survey* 770–774.
55 For the real reasons for the existence of the doctrine, see *supra* par 6. Some of the arguments advanced by the court in par 40 of the judgment are not particularly convincing.

[*continued*]

16 Withdrawal from common purpose Just as association with the common purpose leads to liability, dissociation or withdrawal from the common purpose may, in certain circumstances, negative liability. It is, however, not any kind of withdrawal which has this effect. South African courts have not yet developed very specific rules relating to the circumstances in which withdrawal will effectively terminate X's liability, but it is submitted that the following propositions are a fair reflection of our law on this subject:[56]

Firstly, in order to escape conviction on the ground of a withdrawal from the common purpose, X must have the clear and unambiguous *intention* to withdraw from such purpose.[57]

Secondly, in order to succeed with a defence of withdrawal, X must perform some *positive act* of withdrawal. Mere passivity on his part cannot be equated with a withdrawal, because by his previous association with the common purpose he linked his fate and guilt to that of his companions.

Thirdly, the withdrawal must be *voluntary*.[58] If X withdraws after becoming aware that the police had uncovered the plot, the withdrawal is not voluntary, and in any event is too late and does not constitute a defence.

Fourthly, the withdrawal will amount to a defence only if it takes place *before* the course of events have reached what may be called the "commencement of the execution" – that is, the stage when it is no longer possible to desist from or frustrate the commission of the crime.[59] Whether this stage has been reached depends upon the type of crime envisaged and the attendant circumstances.[60]

Firstly, the argument that there is a "considerable societal distaste for crimes by common design" may be criticized on the ground that the perceptions of society are not decisive in deciding whether a rule of criminal law is constitutional or not. There is also "considerable societal distaste" for the abolition of capital punishment for murder, but the same court held in *Makwanyane* 1995 2 SACR 1 (CC) that a court should not allow itself to be persuaded by society's "tastes or distastes". *Secondly*, the argument that group activities "strike more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals" may be criticized on the ground that Y's right to life in this case would have been equally infringed had she been murdered by the act of a single perpetrator as opposed to the actions of a number of perpetrators. *Thirdly*, the argument that there is a "pressing social need" for the doctrine is vague. There is also a "pressing social need" for the combating of crime committed by a single individual. *Fourthly*, the argument that there is a need for "a strong deterrent for violent crime" is rather meaningless, because there is likewise a great need for deterrence in respect of violent crime committed by a single perpetrator. The court comes somewhat nearer to the crux of the debate when it states that group activities "pose particular difficulties of proof of the result of the conduct of each accused, a problem which hardly arises in the case of an individual accused person."

56 See generally Khuluse 1992 *SACJ* 173; Parmanand 1992 *SACJ* 180; Hales 1992 *SACJ* 187; Paizes 1995 *SALJ* 561.

57 *Singo* 1993 2 SA 765 (A) 772H–I.

58 *Nzo* 1990 3 SA 1 (A) 10; *Beahan* 1992 1 SACR 307 (ZS) 322*a–b*; *Lungile* 1999 2 SACR 597 (SCA) 603*g–h*; *Musingadi* 2005 1 SACR 395 (SCA) 408*i–j*.

59 *Ndebu* 1986 2 SA 133 (ZS) 137A–D.

60 Thus merely to run away (because of timidity or otherwise) after the victim has been physically caught but before he is killed does not qualify as an effective withdrawal from a common purpose to murder. See also the quotation from an American case in *Ndebu supra* 135H–I: "A declared intent to withdraw from a conspiracy to dynamite a building is not enough, if the fuse has been set; he must step on the fuse."

Fifthly, the *type of act* required for an effective withdrawal depends upon a number of circumstances. It is difficult or impossible to formulate in advance general requirements concerning the acts which are applicable in all cases. If it is possible for X to communicate with his companions, his chances of succeeding with the defence of withdrawal are better if he informs his companions of his withdrawal;[61] and if he does this, his chances of succeeding with the defence are stronger if he also endeavours to persuade his companions to desist from their plan. However, for the defence to succeed he need not necessarily succeed in his attempt to dissuade them; neither is it necessary for him actually to frustrate their plan – a mere attempt on his part to do so may be sufficient to qualify as an effective withdrawal. On the other hand, although an attempt to frustrate the commission of the crime is strong evidence of an effective withdrawal, it is not in all circumstances an indispensable precondition for the withdrawal to succeed as a defence.[62] What amounts to dissociation from the common purpose in one case may not amount to dissociation from the common purpose in another. The surrounding circumstances play an important role.

Sixthly, the role played by X in devising the plan to commit the crime has a strong influence on the type of conduct which the law requires him to perform in order to succeed with a defence of withdrawal. Somebody whose role is relatively small (such as a person who has done nothing more than merely agree to assist in the commission of the crime) may more easily escape conviction by withdrawing from the common purpose than someone who has played a prominent role in the planning or conspiracy.[63] Whereas the former may possibly escape liability by simply abandoning the group, a court would probably require the latter to actively attempt to dissuade his companions from proceeding with the plan or to warn the police timeously of the planned commission of the crime so as to enable the police to prevent the crime from being committed.[64] Even if X succeeds with the defence of withdrawal, he may still be convicted of conspiracy (or, depending on the evidence, of incitement) to commit the crime envisaged.

17 The liability of the so-called "joiner-in" The term "joining-in" has been coined to describe the following type of situation: X, acting either on his own or together with others in a common purpose, has already wounded Y lethally. Thereafter, while Y is still alive, Z, who has not previously (expressly or tacitly) agreed with X or his associates to kill Y, arrives at the scene and inflicts an injury on Y which, however, does not hasten his death. Thereafter Y dies as a result of the wound inflicted by X. The person in Z's position is referred to as a "joiner-in". He associated himself with others' common purpose at a

---

61 *Ndebu* 1986 2 SA 133 (ZS) 137C: "The risk which he deliberately took was not related to what he himself might do but what his armed companion might do if challenged or cut off. He had linked his fate and his guilt with that of his armed companion. The mind that needed changing was not his but his companion's." For a case in which the defence of withdrawal succeeded without X informing his companions, see *Nzo supra* 10–11 (X confessed the whole plan of operation to the police).

62 *Chinyerere* 1980 2 SA 576 (RA) 579G–H; *Beahan supra* 322d; *Singo* 1993 2 SA 765 (A) 772.

63 *Musingadi* 2005 1 SACR 395 (SCA) 409*g–i*. Cf *Nomakhlala* 1990 1 SACR 300 (A) 304; *Nduli* 1993 2 SACR 501 (A) 504*e–f*; *Singo supra* 772.

64 *Beahan* 1992 1 SACR 307 (ZS) 324c; *Musingadi supra*.

stage when Y's lethal wound had already been inflicted, although Y was at that time still alive.

In order to characterise the "joining-in" situation properly it is important to bear the following in mind: *Firstly*, if the injuries inflicted by Z in fact hastened Y's death, there can be no doubt that there is a causal connection between Z's acts and Y's death and that Z is therefore guilty of murder. *Secondly*, if Z's assault on Y takes place after Y has already died from the injuries inflicted by X or his associates, it is similarly beyond doubt that Z cannot be convicted of murder for the simple reason that the crime cannot be committed in respect of a corpse.[65] *Thirdly*, if the evidence reveals a previous conspiracy between X (or X and his associates) and Z to kill Y, Z is guilty of murder by virtue of the doctrine of common purpose, since X's act in fatally wounding Y is then imputed to Z. The "joining-in" situation presupposes the absence of a common purpose between X and Z.

Nobody denies that the "joiner-in" is punishable for some crime. The question is merely, of what crime must he be convicted? Before 1990 there was great uncertainty in our law regarding the question whether Z should be convicted of murder as a co-perpetrator or whether he should be convicted of attempted murder only. In 1990 in *Motaung*[66] the Appellate Division considered the different views on the matter and in a unanimous judgment delivered by Hoexter JA ruled that the "joiner-in" could not be convicted of murder, but of attempted murder only. One of the most important reasons advanced by the court for its decision was that at the time that Z performed his own act of injuring Y, all the acts leading to Y's death had already been completed. To convict Z of murder on the ground of his association with such a crime would amount to holding him liable *ex post facto* or retrospectively for acts already completed by others before he performed his own act. Criminal law ought not to recognise such a form of liability; one ought not to be convicted of a crime committed by somebody else merely on the ground of one's ratification of a deed already completed.

It is submitted that the judgment in *Motaung* is correct and should be welcomed. It has brought to an end much uncertainty in our case law as well as a long and involved debate in our legal literature.

C ACCOMPLICES

1 Introduction and definition It is not only where a person complies with the requirements for liability as a perpetrator as set out above that he is punishable. As was seen above, he is also punishable even when these requirements are not met, if he unlawfully and intentionally furthers a crime committed by somebody else by, for example, giving the latter advice or assisting him. He is then an accomplice.

---

65 In such a case Z may possibly be convicted of attempted murder. See *infra* VIII B 8.

66 1990 4 SA 485 (A), followed in *Mbanyaru* 2009 1 SACR 631 (C).

Accomplice liability may be defined as follows:

1 A person is guilty of a crime as an accomplice if, although he does not satisfy all the requirements for liability contained in the definition of the crime and although the conduct required for a conviction is not imputed to him by virtue of the principles relating to common purpose, he unlawfully and intentionally engages in conduct whereby he furthers the commission of a crime by somebody else.

2 The word "furthers" in rule 1 above includes any conduct whereby a person facilitates, assists or encourages the commission of a crime, gives advice concerning its commission, orders its commission or makes it possible for another to commit it.[67]

2 Technical and popular meaning of the term "accomplice" Confusion can easily arise over the meaning of the term "accomplice". It is important to note that the term may have two different meanings, which may be termed the "technical" (or narrow) and the "popular" (or broad) meanings respectively.

In the context of its popular meaning – which is the meaning ordinarily assigned to it in common parlance – it simply refers to everybody who assists the "actual" or "main perpetrator" or who in some way furthers the commission of the crime by the latter, without differentiating between those who qualify as perpetrators as explained above (ie, those whose conduct falls within the definition of the crime or who qualify as perpetrators by virtue of the common purpose doctrine) and those who do not qualify as perpetrators. This popular meaning of the word is accordingly so broad that it also covers what are technically called perpetrators. In its popular sense the word simply refers indiscriminately to everybody who assists in the commission of the crime.[68]

In its technical sense the word has the narrower meaning set out above in the definition in paragraph 1. In terms of this narrower meaning, perpetrators or co-perpetrators, that is, persons who comply in all respects with the definition of the crime, are not included in the concept of "accomplice". In the discussion of accomplices in this book the word is *always used in its (narrow) technical sense*.

3 Requirements for liability as an accomplice For a person to be liable as an accomplice the following requirements must be met:

(*a*) *Accessory nature of liability* Somebody else must have committed the crime. An accomplice's liability is of an accessory or dependent nature. Nobody can be liable as an accomplice if somebody else is not liable as a perpetrator.[69] This implies that a person cannot be an accomplice in respect of his own crime, that is, in respect of a crime committed by himself as a perpetrator. Although it is true that the accomplice's liability stems from his own act and his own

67 This definition was quoted with apparent approval in *Msomi* 2010 2 SACR 173 (KZP) 176*e–g*.

68 Even the courts sometimes use the word "accomplice" in this popular sense, and the vague expression *socius criminis* of which the courts used to be so fond (and regrettably still sometimes use) bears more or less the same meaning.

69 *Williams* 1980 1 SA 60 (A) 63; *Maxaba* 1981 1 SA 1148 (A) 1155; *Wannenburg* 2007 1 SACR 27 (C) 32.

culpability, this is not sufficient. Apart from his own act and culpability there must have been an unlawful act committed by someone else which corresponded with the definitional elements of the relevant crime, and was accompanied by the required culpability.[70]

The perpetrator need not be tried and convicted.[71] It is sufficient that somebody else committed the crime as perpetrator, even though the police cannot find him, or he has in the meantime become mentally ill, or has turned state witness. There seems to be no reason why a person should not also be guilty as an accomplice to the attempted commission of a crime, if the crime which the perpetrator set out to commit has not been completed.[72]

If the "perpetrator" cannot be convicted because, for example, he lacked criminal capacity at the time of the commission of the act, or "acted" involuntarily or was mistaken about a material requirement for the offence (which means that he lacked culpability), nobody can be convicted as an accomplice to the commission of such an "offence".[73] It is submitted that if the perpetrator has been found not guilty on the merits of the case (as opposed to a technical point), nobody can be convicted of having been an accomplice, because there will then not be a crime in respect of which somebody can be an accomplice.

(*b*) *Act or omission which furthers the crime* In order to be guilty as an accomplice, a person must commit an act which amounts to a furthering of the crime committed by somebody else. X furthers or promotes the commission of the crime if, for example, he facilitates, aids or encourages it, gives advice or orders it to be committed.[74] The act may also consist in making it possible for another (the perpetrator) to commit a crime by, for example, placing one's home or property at another's disposal,[75] by acting as interpreter for the perpetrator if he buys or sells illicit goods,[76] by transporting him to the scene of the crime, or by assisting him to hide things which he is not allowed to possess.

---

70 There are different ways in which the liability of an accomplice may be regarded as accessory in nature. According to a certain view, it is sufficient that somebody else committed an unlawful act, even though he lacked culpability. See Van Oosten 1979 *De Jure* 346 359; Ellis 1983 *De Jure* 356 371; Labuschagne 1977 *De Jure* 310 316. However, one would then no longer be speaking of an accomplice to a *crime*. According to the view expressed in the text above, somebody else must have committed an act which conformed to the definitional elements of the crime, which was unlawful and which was committed with the requisite culpability.

71 *Wannenburg* 2007 1 SACR 27 (C) 32*d*. See the discussion by Rabie 1970 *THRHR* 244 254–256, Ellis 1983 *De Jure* 356 367–371 and Van Oosten 1979 *De Jure* 346, who has serious reservations regarding this aspect of the requirement presently under discussion. Of course, if the perpetrator has been found not guilty on the merits there is always the possibility that the person who would otherwise have been charged with being an accomplice could be charged with, and convicted of, attempting to commit the particular crime.

72 *Dettbarn* 1930 CPD 188 191; *De Wet and Swanepoel* 198–199.

73 *Rasool* 1924 AD 44. *Parry* 1924 AD 401. In *Vanmali* 1975 1 SA 17 (N) 23 the court relied on *Parry* as authority for the proposition that "a *socius* can himself be found guilty even where the perpetrator of the acts charged is found to have been incapable, because of insanity, of forming the necessary criminal intent". This statement can only be endorsed if by *"socius"* the court meant a perpetrator or co-perpetrator.

74 *Quinta* 1974 1 SA 544 (T) 547; *Williams* 1980 1 SA 60 (A) 63B–C; *Saffier* 2003 2 SACR 141 (SEC) 42*c; Msomi* 2010 2 SACR 173 (KZP) .

75 *Jackelson* 1920 AD 486; *Wallace* 1927 TPD 557; *Wiese* 1928 TPD 149.

76 *Peerkhan and Lalloo* 1906 TS 798.

The assistance or furthering may be slight, but in accordance with general principles there must be some act. An omission to act positively may qualify as an act only if the person concerned has a legal duty to do something positive.[77]

Generally speaking, conduct such as the following is not sufficient to form the basis for liability as an accomplice: (*a*) the mere failure by somebody who knows that a crime is about to be committed to warn the police or the intended victim;[78] (*b*) the mere failure by somebody who knows that a crime has been committed to notify the authorities about it;[79] (*c*) to be merely a passive spectator of the commission of a crime[80] (unless the "spectator" has previously agreed with the perpetrator that he will help him by standing by and assisting him if necessary); and (*d*) the mere approval of a crime after it has been committed.

Certain crimes, such as incest, bribery and corruption, of necessity require the co-operation of somebody else. Whether both parties are perpetrators, or only one of them, depends upon the definition of the particular crime and, in the case of statutory offences, the intention of the legislature. The wording of a prohibition may be such that both parties are guilty as perpetrators of separate crimes. If it is not possible to charge each one as a perpetrator of a separate crime, the one may be charged as an accomplice to the crime committed by the other as a perpetrator.[81] Thus the buyer of illicit goods may be charged as an accomplice of the seller.[82]

If, however, it is clear that the one party is in fact a victim of the crime, it is usually accepted that he cannot be charged as an accomplice. Thus if X has had sexual intercourse with Y who is below the age of sixteen years with Y's consent, thereby committing "statutory rape", the girl is deemed not to be an accomplice, even though she consented to intercourse, because the very purpose of the prohibition is to protect her.[83] For the same reason the victim of the crime of extortion is not regarded as an accomplice.[84]

(*c*) *Unlawfulness* The act of furthering described above must be unlawful; in other words, there must be no ground of justification for the act.

---

77 *Shikuri* 1939 AD 225 232–233, 239–240 (legal duty based on relationship of employer to employee); *Timol* 1974 3 SA 233 (N) 235–236; *Claasen* 1979 4 SA 460 (ZS) 463–464; *A* 1993 1 SACR 600 (A) 606*h*. Cf also the example mentioned in *Williams* 1980 1 SA 60 (A) 63 of the night-watchman who intentionally omits to sound the alarm because he consciously associates himself with the commission of the crime. See also *Mahlangu* 1995 2 SACR 425 (T) 434–436, in which at least one of the three judges who heard the appeal (MJ Strydom J) *obiter* expressed the opinion (434*g*) that there was a legal duty upon X, an employee at a petrol service station, to warn his employer and owner of the service station that he knows that the service station will be robbed, and that X's omission to do this constituted a ground upon which X may be convicted as an accomplice to the robbery which was committed thereafter.

78 *Mbande* 1933 AD 382 392, but contrast *Mahlangu supra*.

79 *Mbande supra*; *Williams* 1980 1 SA 60 (A) 64F.

80 *Mbande supra* 392–393; *Khoza* 1982 3 SA 1019 (A) 1032H.

81 *Ingham* 1958 2 SA 37 (C); *Kellner* 1963 2 SA 435 (A).

82 *Kellner supra* 444–446.

83 *W* 1949 3 SA 772 (A).

84 *Gokool* 1965 3 SA 461 (N).

(*d*) *Intention* To be liable as an accomplice a person must *intentionally* further the commission of a crime committed by somebody else.[85] Negligence is not sufficient. The shop assistant who simply forgets to close the shop window properly is therefore not an accomplice in respect of the burglary which follows as a result. He will be an accomplice only if, knowing that the burglary is planned, he intentionally omits to close the window properly in order to facilitate the housebreaking. In such a case the housebreaker need not even be aware of the shop assistant's help. It is sufficient that the accomplice intentionally furthers the crime; the perpetrator need not be aware of the accomplice's assistance. In other words, there need not be conscious co-operation between the two.[86]

The principles relating to intention as a requirement for accomplice liability are the same as the principles governing the general requirement of intention in criminal law: *dolus eventualis* is therefore sufficient.[87]

4 Impossibility of being an accomplice to murder It is necessary briefly to discuss the question of whether somebody may be an accomplice to murder. For a person to be an accomplice to murder, he would intentionally have to further somebody else's commission of the crime without his own conduct qualifying as a co-cause of the death. If his conduct is a co-cause of the death, he is a co-perpetrator, since his conduct then falls squarely within the definition of murder. The crucial question is simply: is it possible to *further* the victim's death without simultaneously also *causing* it?

The answer to this question would seem to be in the negative, but in *Williams*[88] the Appellate Division, in a decision which is in sharp contrast with previous decisions of the courts, not only accepted that a person may be an accomplice to murder but also held that one of the accused was guilty as an accomplice to murder. With respect, this finding is wrong, because it is clear that the conduct of the person convicted as an accomplice was in fact a co-cause of the death, and he should therefore have been convicted as a co-perpetrator. In this case the facts were as follows: Z and X were members of the same gang. Z, the accused who was convicted of being an accomplice only, saw X stab Y with a knife. He then grabbed Y by the neck. When he saw another member of the gang, W, charge at Y with the neck of a broken bottle, he did not check him but continued to hold Y in such a way that W could strike at him with the broken bottle. This conduct was a co-cause of death, and Z should therefore not have been convicted as an accomplice but as a co-perpetrator. The court itself explicitly admitted that there was a causal nexus between the "accomplice's" assistance and the commission of the murder.[89]

---

85 *Tshwape* 1964 4 SA 327 (C) 333; *Quinta* 1974 1 SA 544 (T) 547A; *Vanmali* 1975 1 SA 17 (N) 23.

86 *Ohlenschlager* 1992 1 SACR 695 (T) 768*g–h*.

87 *Kazi* 1963 4 SA 742 (W) 749–750.

88 1980 1 SA 60 (A), discussed critically by Whiting 1980 *SALJ* 199; Van Oosten 1980 *De Jure* 156 and Snyman 1980 *TSAR* 188.

89 At 64D–E. In *Khoza* 1982 3 SA 1019 (A) two of the five judges of appeal who heard the appeal accepted that a person could be convicted as an accomplice to murder. See the judgment of Corbett JA at 1033–1034 and that of Botha AJA at 1054. However, not one of these judges convicted the appellant as an accomplice to murder. According to Corbett JA

[*continued*]

Whether it is possible to be an accomplice to a crime defined in terms of causation, such as murder, and related questions dealing with the interpretation of certain statements in *Williams*, have been debated in legal literature. Certain writers are of the opinion that it is impossible to be an accomplice to murder.[90] Others, again, accept the possibility of this form of liability.[91]

If a person may indeed be convicted as an accomplice to murder, one would expect a court to do so at least where a person has committed some act in furtherance of the death but it cannot be proved that there was a causal connection between the act and Y's death. This is exactly what happened in *Safatsa*.[92] In this case, six accused were charged with murder. The contribution of some of them to Y's death was extremely limited. They were part of a crowd of about a hundred people who stoned Y to death. The Appellate Division found that they acted with a common purpose to kill, but that a causal connection between the act of each individual accused and Y's death had not been proved.[93] The court nevertheless convicted them all of murder, that is, as co-perpetrators. If it is indeed possible to be an accomplice to murder, why did the court not convict at least some of the accused in this case as accomplices (as opposed to co-perpetrators)? The judgment in *Safatsa* has effectively excluded the possibility of somebody's being convicted as an accomplice to murder if it is proved that he was a party to a common purpose to kill and that death resulted from the combined conduct of the group of people acting with that common purpose.

It is submitted that it is impossible for somebody to be an accomplice to murder. One cannot "further" Y's death without "causally furthering" it. If there is indeed a difference between "furthering the death causally" and "furthering the death without causing it", that difference is so slight and artificial as to lead to grave difficulties in its application. The assumption that a person may be an accomplice to murder creates only an endless series of problems which blurs a clear picture of the general principles of criminal law.

5 Punishment The same punishment may be imposed on an accomplice as on the perpetrator.[94] This does not mean that a court may not in certain circumstances impose a heavier or a lighter sentence on an accomplice than on the perpetrator, but only that a court is bound by the maximum and minimum sentences which may be prescribed for a particular crime. The extent to which the accomplice has furthered the commission of the crime plays an important role in determining the extent of punishment.[95]

---

he was guilty of attempted murder and according to Botha AJA he was guilty of being a perpetrator of the murder. The remarks of Corbett JA and Botha AJA regarding accomplices to murder are therefore *obiter*.

90 *De Wet and Swanepoel* 201; 192 fn 86; Whiting 1980 *SALJ* 199 201; 1986 *SALJ* 38 54; Kok 1985 *SACC* 56 ff.

91 Van Oosten 1979 *De Jure* 346 355, 1980 *De Jure* 156 160.

92 1988 1 SA 868 (A).

93 At 894 F–G.

94 *Jackelson* 1920 AD 486 490; *Kock* 1988 1 SA 37 (A); *Kimberley* 2004 2 SACR 38 (E) 41*a–b*.

95 *X* 1974 1 SA 344 (RA) 348D–G.

D ACCESSORIES AFTER THE FACT

1 General An accessory after the fact is not a participant, for he neither causes the crime nor furthers it. He comes into the picture only after the crime has been completed, and then helps a perpetrator or an accomplice to escape justice. A good example of an accessory after the fact is a person who for the first time hears about the murder after it has already been completed, and then helps the real murderer by throwing the corpse into a river with a stone tied around its neck.[96]

2 Definition A person is an accessory after the fact to the commission of a crime if, after the completion of a crime, he unlawfully and intentionally engages in conduct intended to enable the perpetrator of, or the accomplice in, the crime to evade liability for his crime, or to facilitate such a person's evasion of liability.[97]

3 Assisting the perpetrator to evade liability An accessory after the fact protects either the (co-)perpetrator or the accomplice. A person qualifies as an accessory after the fact only if his act takes place *after* the crime in respect of which he is an accessory after the fact has already been completed. If X's act of assisting the perpetrator takes place at a time when the crime is still in the process of being committed, he may qualify as a co-perpetrator or accomplice.

X must commit some act whereby he enables a person who has committed a crime to evade liability. An omission may lead to liability if there is a legal duty upon a person to act positively.[98] According to general principles mere passivity is not sufficient to render a person liable as accessory after the fact; more particularly, the mere omission to report a crime that has been committed to the police cannot be construed as conduct amounting to being an accessory after the fact to the crime.[99] Thus X does not commit the crime if he is a witness to the commission of a crime to which he is not a party, and thereafter simply quietly walks away. The position is different if X is a policeman: an omission by him to report the commission of a crime amounts to being an accessory after the fact, provided X intended to assist the actual perpetrator to escape liability.[100]

---

96 *Terblanche* 2011 1 SACR 77 (EC) (X assisted Y, the real murderer, to drag Y's body from one place to another in order to conceal it); *Scott-Crosby* 2008 1 SACR 223 (SCA) par 29 (X threw Y's corpse into a lion cage).

97 *Khoza* 1982 3 SA 1019 (A) 1040C–D; *Velumurugen* 1985 2 SA 437 (D) 447D; *Barnes* 1990 2 SACR 485 (N) 493*e*; *Nkosi* 1991 2 SACR 194 (A) 201*a–d*; *Madlala* 1992 1 SACR 473 (N) 476*a–b*; especially *Morgan* 1993 2 SACR 134 (A) 174*d–e* (*per* Corbett CJ); *Williams* 1998 2 SACR 191 (SCA) 193*c–e*; *Nooroodien* 1998 2 SACR 510 (NC) 526.

98 There is a legal duty on a police officer not to remain passive if a crime is, or has been, committed in his presence; an omission to act positively may lead to liability as an accessory after the fact – *Barnes* 1990 2 SACR 485 (N) 493. *Contra Madlala* 1992 1 SACR 473 (N) 465–476. It would seem that X in this case escaped liability because he lacked intention, and more particularly, knowledge of the commission of the main crime.

99 *Barnes* 1990 2 SACR 485 (N) 493; *Phallo* 1999 2 SACR 558 (SCA) 567*c–d*.

100 *Phakane* 2008 1 SACR 518 (SCA) par 31.

Mere approval or ratification of a crime after it has been committed is not sufficient.[101]

In *Jonathan*[102] three of the five judges of appeal held that the mere fact that X made a false statement when asked to plead in court and in a subsequent declaration before a magistrate, was sufficient conduct to render him guilty as an accessory after the fact.[103] In his statement he attempted to protect the real perpetrator of the crime so that the latter might not be convicted. The remaining two judges of appeal, however, held that the making of such statements was insufficient conduct to render X guilty as an accessory after the fact. They described the idea of an accused being found guilty of a crime, a necessary ingredient of which was committed by him only after he had already appeared in court on a charge to which he had pleaded not guilty, as strange, unacceptable, and in conflict with the elementary principles of the administration of justice.[104] It is submitted, with respect, that the view of the minority of the court is correct. Such conduct at most amounts to perjury or defeating or obstructing the course of justice (or an attempt to commit this crime).

It is not required that the protection or assistance given should be successful. A person is therefore guilty as accessory after the fact even though the corpse is discovered by the police and taken out of the river and the murderer is brought to justice.[105] One may also be an accessory after the fact to the attempted commission of a crime. If Z assaults Y with the intention of killing him and X, aware of Z's intention, afterwards helps him to escape but Y survives the attack, X is an accessory after the fact to attempted murder. (The murder is completed only if Y dies.)[106]

4 Intention The accessory after the fact must render his assistance intentionally. He must know that the person he is helping committed the crime.[107] He must furthermore intend to enable the perpetrator of or accomplice in the offence to evade liability for his offence, or to facilitate such a person's evasion of liability. *Dolus eventualis* may suffice.[108] Although intention is required for the crime of being an accessory after the fact, it is not required that the person who is helped by the accessory after the fact should have committed a crime intentionally. Thus, one can also be an accessory after the fact in respect of a crime requiring negligence, such as culpable homicide.[109]

5 Accessory character of liability The liability of an accessory after the fact, like that of an accomplice, is accessory in character. There can only be an accessory after the fact if somebody else has committed the crime as perpetrator. The

---

101 For this reason the decision in *Jongani* 1937 AD 400 seems to be incorrect.
102 1987 1 SA 633 (A).
103 See the judgment of Jansen JA (with whom Joubert JA and Eloff AJA concurred) at 645B–F.
104 See the judgment of Botha JA (with whom Hoexter JA concurred) at 657C–F.
105 *Pather* 1927 TPD 800.
106 *Lambert* 1927 SWA 32; *Shorty* 1950 SR 280.
107 *Mlooi* 1925 AD 131 148; *Maree* 1964 4 SA 545 (O) 557.
108 *Jonathan* 1987 1 SA 633 (A) 643I–J; *Pakane* 2008 1 SACR 518 (SCA) par 30.
109 *Velumurugen* 1985 2 SA 437 (D).

result is that one cannot be an accessory after the fact to a crime committed by oneself.[110]

This leads to problems in the following type of case: A, B and C are charged with murder. There is no doubt that one or two of them committed it, but it is impossible to establish which of them did so. After the murder they all helped to conceal the body. If none of them can be convicted of murder, can all three of them nevertheless be convicted as accessories after the fact? It is submitted not. Because it cannot be established who committed the murder, none of them may be found guilty of murder. Because none of them is guilty of murder, it would seem to follow that none of them may be convicted as accessory after the fact, for then the possibility cannot be excluded of a person's being convicted as an accessory after the fact in respect of a crime committed by himself.

The courts, however, have decided that all three of the accused in a case of this nature can be convicted as accessories after the fact. In *Gani*[111] the Appellate Division was confronted with precisely this problem. It was held that all three of the accused were guilty as accessories after the fact on the strength of the following argument: the actual (unidentifiable) murderer assisted the other two accused, who were accessories after the fact, in the commission of their acts. In so doing, he participated in the crime of being accessory after the fact to the murder and therefore became an accessory after the fact himself.

The problem with this argument is that the court failed to take account of the fact that the person whom, for the purposes of its argument, it regarded as a murderer had in fact been found *not guilty* of the murder. There was therefore no perpetrator in respect of whose act another accused might be an accessory after the fact, since all three of the accused had been found not guilty of murder. The effect of the judgment remains that the actual murderer is convicted of being an accessory after the fact in respect of a murder which he might have committed himself. Apart from this, the court's reasoning is fallacious in so far as it assumes that a person who participates in another's crime – in other words, who is an accomplice – may be convicted of the same crime (namely being an accessory after the fact) as the one which he furthers. An accomplice should not be found guilty as a perpetrator, but as an accomplice, otherwise the whole purpose of drawing the distinction between perpetrators and accomplices is frustrated. It follows, therefore, that in principle not one of the three accused should have been convicted of being an accessory after the fact.

In *Jonathan*[112] the Appellate Division was confronted with a set of facts of the same nature. After considering the objections to *Gani*'s case, it held, quite surprisingly, that it was not prepared to depart from the reasoning and conclusion reached in that case. The conclusions reached in *Gani* and *Jonathan* remain inconsistent with principle. One has the feeling that in both these cases, the overriding motivation for the conclusions reached by the court is simply the consideration that it does not seem fair to acquit all three accused of being even

---

110 *Gani* 1957 2 SA 212 (A) 220A; *Jonathan* 1987 1 SA 633 (A) 643A.

111 *Supra* 220–222, especially 221D–E. *Gani* 's case was followed in *Naidoo* 1966 1 PH H210 (A); *D* 1966 4 SA 267 (D) 271G.

112 1987 1 SA 633 (A). *Jonathan*'s case was followed in *Munonjo* 1990 1 SACR 360 (A) 364; *Phallo* 1999 2 SACR 558 (SCA) 565–566.

accessories after the fact. The rule adopted in these cases should be regarded as an exception, based on policy considerations, to the rule that one cannot be an accessory after the fact to a crime committed by oneself. The whole problem which faced the court in *Gani* and *Jonathan* could have been solved by convicting all three of the accused of defeating or obstructing the course of justice (or attempting to do so).

If the person who helps the perpetrator after the commission of the offence agrees with him before its commission to assist him thereafter, the picture changes completely. He may then be a perpetrator himself, if his conduct, culpability and personal qualities accord with the definition of the crime, or else he may be an accomplice.[113]

6 Reason for existence questionable In conclusion it may be asked whether the crime of being an accessory after the fact is really necessary in our law. It is submitted that it is not. If one accepts the narrower definition of this crime, as our courts have apparently done now, it is completely overlapped by the crime known as defeating or obstructing the course of justice.[114] Even the Appellate Division has admitted this.[115] Our criminal law will not be the poorer if the crime of being an accessory after the fact disappears.

7 Punishment In terms of section 257 of the Criminal Procedure Act the punishment of an accessory after the fact may not exceed the punishment which may be imposed in respect of the crime committed by the perpetrator. As the accessory after the fact did not participate in the actual crime, he is usually sentenced more leniently than the perpetrator.

---

113 *Maserow* 1942 AD 164 170 (point 2); *Von Elling* 1945 AD 234 240–241.
114 On this crime, see *infra* X B.
115 *Gani supra* 220A.

CHAPTER

VIII

ATTEMPT, CONSPIRACY AND INCITEMENT

A GENERAL

1 Introduction Thus far only the requirements for liability for the completed crime have been considered. However, the law forbids not only the completed crime, but also certain preceding forms of conduct directed at the commission of a crime, namely attempt, conspiracy and incitement to commit a crime. If the prospective criminal is caught at a stage when her conduct as yet constitutes no more than an attempt to commit the crime, or a conspiracy or an incitement to commit it, she may be charged with and convicted of attempt, conspiracy or incitement to commit the crime. These three crimes are known as "inchoate crimes". They may also be described as incomplete or anticipatory crimes, because they are forms of conduct performed in anticipation of the commission of the main crime. Attempt, conspiracy and incitement are all substantive crimes, not rules governing liability, like the rules relating to unlawfulness and culpability.

2 Rationale If one simply applies the retributive theory of punishment, it is difficult to see why these inchoate crimes are punishable: there can only be retribution in respect of harm done, and in these cases no harm has been done as yet. The reason for punishing this anticipatory conduct must be found rather in the relative theories of punishment, and more especially in the preventive and reformative theories. The police are better able to uphold the law and protect the community if they may apprehend criminals who have as yet committed only acts which normally precede the commission of a crime. The maintenance of law and order would suffer seriously if the police were powerless to intervene when they saw people preparing to commit crimes, but could take action against them only once the harm had been done.

The reason for the application of the reformative theory in this connection is that people who commit these anticipatory crimes are as much of a danger to society as those who have completed a crime, and therefore as much in need of reformative treatment. It should be noted that the difference between a completed and an uncompleted crime often depends on factors beyond X's control, as where X places a bomb in a public place but the bomb fails to detonate because the police discover it timeously. X's intention and her need of reform are the same whether the bomb explodes or not.

B ATTEMPT

1 Prohibition of attempt Attempts to commit common-law crimes are punishable in terms of common law.[1] Attempts to commit statutory crimes ought, according to general principles, also to be punishable in terms of common law. In an apparent attempt to eliminate any doubts about the punishability of attempts to commit statutory crimes, section 15(1) of the Riotous Assemblies and Criminal Law Amendment Act 27 of 1914 was promulgated. This has in the meantime been superseded by section 18(1) of the Riotous Assemblies Act 17 of 1956. According to this section, any person "who attempts to commit any offence against a statute or a statutory regulation shall be guilty of an offence and, if no punishment is expressly provided thereby for such an attempt, be liable on conviction to the punishment to which a person convicted of actually committing the offence would be liable".[2]

2 In search of a criterion Mere intention to commit a crime is not punishable. Nobody can be punished for her thoughts. A person can be liable only once she has committed an act, in other words, once her resolve to commit a crime has manifested itself in some outward conduct.[3] However, it is not any outward conduct which qualifies as a punishable attempt. If X means to commit murder, she is not guilty of attempted murder the moment she buys the revolver, and if she means to commit arson she is not guilty of attempted arson the moment she buys a box of matches.

On the other hand, it stands to reason that there does not have to be a completed crime before a person may be guilty of attempt. Somewhere between the first outward manifestation of her intention and the completed crime there is a boundary which X must cross before she is guilty of attempt. How to formulate this boundary in terms of a general rule is one of the most difficult problems in criminal law. A principle which seems to operate satisfactorily in one factual situation often fails to afford a satisfactory criterion in another.

A number of theories or tests have been devised in attempts to find a valid criterion to determine what conduct constitutes a punishable attempt. The criterion which has crystallised in our case law is the following: a court must enquire whether or not X's conduct went further than mere acts of preparation for the commission of the crime, and whether they in fact amounted to acts of execution.

3 Summary of rules relating to attempt The general rules of our law relating to the requirements for punishing an attempt to commit a crime may be summarised as follows:

---

1 Matthaeus Prol 1 5, 48 5 3 10; Voet 48 5 17, 48 8 4; Moorman Inl 1 13, 14; Huber *HR* 6 1 4–9; Damhouder 67 9 and 74 14, 15; Van Leeuwen *Cens For* 5 1 5.

2 The formulation of s 18(1) of Act 17 of 1956 is not very clear. What about offences not contained in "a statute or a statutory regulation" but in, eg, a provincial statutory provision or a municipal by-law? Is an attempt to commit such offences also punishable? It is submitted that it is inconceivable that the legislature could have intended that attempts to commit the latter offences should not be punishable. This is also the opinion of *De Wet and Swanepoel* 168 fn 25.

3 *Nlhovo* 1921 AD 485 495; *Davies* 1956 3 SA 52 (A) 75; *Katz* 1959 3 SA 408 (C) 419.

1 A person is guilty of attempting to commit a crime if, intending to commit that crime, she unlawfully engages in conduct that is not merely preparatory but has reached at least the commencement of the execution of the intended crime.[4]

2 A person is guilty of attempting to commit a crime even though:

(*a*) the commission of the crime is impossible, if it would have been possible in the factual circumstances which she believes exist or will exist at the relevant time;[5]

(*b*) she voluntarily withdraws from its commission after her conduct has reached the commencement of the execution of the intended crime.[6]

In the discussion which follows, these principles will be explained and discussed. Paragraphs 6 and 7 deal with rule 1 above, paragraphs 8 and 9 deal with rule 2(*a*) above, and paragraphs 10 and 11 deal with rule 2(*b*) above.

4 Factual situations In legal literature certain terms have been devised to describe the factual situations which one encounters in cases of attempt:

- *Completed attempt* This is where X has done everything she can to commit the crime, but for some reason the crime is not completed, as where X shoots at Y but misses.
- *Interrupted attempt* This is where X's actions are interrupted, so that the crime cannot be completed. For example, X, meaning to commit arson, pours petrol onto a wooden floor, but is apprehended by a police official just before she strikes a match.
- *Attempt to commit the impossible* This is where it is impossible for X to commit or complete the crime, either because the means she uses cannot bring about the desired result (as where X, intending to murder Y, administers sugar to her in the mistaken belief that it is poison) or because it is impossible to commit the crime in respect of the particular object of her actions (as where X, intending to murder Y while she is asleep in bed, shoots her in the head but Y has in fact died of a heart attack an hour before).
- *Voluntary withdrawal* This is where X of her own accord abandons her criminal plan of action, as where, after putting poison into Y's porridge but before giving it to Y, she has second thoughts and decides to throw the porridge away.

Each of these factual situations will be discussed separately below.

5 Subjective and objective approaches The various theories relating to attempt may be divided into two groups, namely the subjective and objective theories. The subjective theories place all the emphasis on X's intention. If she converts her evil thoughts into deeds by the slightest outward conduct, this is sufficient to render her liable for attempt. According to the objective theories,

---

4 *Agliotti* 2011 2 SACR 437 (GSJ) par 10.2.
5 *Agliotti supra* par 10.2.
6 *Agliotti supra* par 10.2.

mere intention is insufficient. There must be something more, which must necessarily be an objective or external requirement; thus it may be required that the act must be dangerous or harmful.

Neither a purely subjective nor a purely objective approach is consistently applied to all cases of attempt in South Africa. In determining liability for attempt to commit the impossible our law has adopted a subjective approach,[7] whereas liability for interrupted attempt is determined by means of a test which is in principle objective (it distinguishes between acts of preparation and acts of consummation).[8] An objective criterion is also applied by the courts if X voluntarily withdraws from her criminal scheme.[9]

6 Completed attempt As a general rule it may be assumed that if X has done everything she set out to do in order to commit the crime, but the crime is not completed, she is then guilty of attempt. Thus, if X shoots at Y, but misses her, or the bullet hits Y but only wounds her, X is guilty of attempted murder, and if X sends Y a letter containing a deliberate misrepresentation or forbidden information and the police intercept the letter in the post, X is guilty of attempting to commit the relevant crime, for example fraud.[10] If X poisons Y's food, and Y unexpectedly does not eat it, or eats it but is saved by timeous medical treatment, X is guilty of attempt.[11]

In *Nlhovo*[12] X handed poison to Z and asked him to put it into Y's food. Z, however, gave it to Y personally, and the two of them handed it over to the police. It was held that X was not guilty of attempt to commit the crime of administering poison, because his conduct was not sufficiently proximate to the completed crime. It is questionable whether this case was correctly decided. The moment X had done everything to set in motion the causal chain of events which would lead to Y's death, his conduct ought to have qualified as a punishable attempt. Just as X's liability for the completed murder is not dependent upon whether he killed Y with his own hands or used somebody else to do his dirty work for him, his liability for attempt does not depend upon whether he put the poison into Y's food with his own hands or used an intermediary to do it for him. X merely employed ineffective means to attain his goal. As will be shown in the discussion below of attempt to commit the impossible,[13] a person may be convicted of attempt even though the method she used was ineffectual.[14]

The judgment in *Mlambo*[15] is more acceptable. In this case X gave money to Z to buy him (X) dagga, but X was arrested before Z could obtain the dagga. X was convicted of attempting to possess dagga.

---

7 *Infra* par 8.
8 *Infra* par 7.
9 *Infra* par 10.
10 *Lionda* 1944 AD 348; *Laurence* 1975 4 SA 825 (A).
11 *Nlhovo* 1921 AD 485 492. For more cases of completed attempt, see *Pachai* 1962 4 SA 246 (T); *Gcabashe* 1997 2 SACR 106 (N).
12 1921 AD 485.
13 *Infra* par 8.
14 In *Gcabashe supra* it was held that the judgments in *Nlhovo supra* and *Laurence supra* were irreconcilable, and that preference should be given to the judgment in *Laurence*.
15 1986 4 SA 34 (E).

There is no rule that prescribes that X will be guilty of attempt only if she has taken the last step possible in the execution of the crime.[16] If X decides to kill Y by poisoning her slowly over a long period, she is guilty of attempt even on the first occasion when she puts poison into Y's food.[17]

Attempt to commit a crime which consists in being in possession of a certain type of article (such as dagga) is possible,[18] but not attempt to commit a crime consisting in "being found in possession",[19] because X would then have to have the intention "to be discovered by the police while she is committing the crime". If X, who knows that he is HIV-positive, rapes a woman, Y, in the knowledge that by so doing he will transfer the deadly virus to Y, he commits attempted murder, if his act becomes known while Y is still alive.[20] If his act becomes known after Y has already died and it is clear that the deadly virus transferred to Y by X was the cause of death, he may be convicted of murder.

7 Interrupted attempt Most reported cases of attempt deal with this factual situation. Here X's activities are interrupted before she can succeed in completing the crime. Our courts introduced an objective criterion for differentiating between punishable and non-punishable attempt in these types of cases. According to this criterion a distinction is drawn between an act of preparation and one of execution or consummation. If what X did was merely a preparation for the crime, there is no attempt. If, however, her acts were more than acts of preparation and were in fact acts of consummation, she is guilty of attempt.

The leading case dealing with this type of situation is *Schoombie*.[21] In this case X went to a shop in the early hours of the morning and poured petrol around and underneath the door, so that it ran into the shop. He placed a tin of inflammable material against the door, but his whole scheme was thwarted when at that moment a policeman appeared. The Appellate Division confirmed his conviction of attempted arson and in the judgment authoritatively confirmed that the test to be applied in such cases was to distinguish between acts of preparation and acts of consummation.

The disadvantage of this test is its vagueness. In applying it, a court has to distinguish between "the end of the beginning and the beginning of the end". Each factual situation is different and the test as applied to one set of facts is no criterion in a different factual situation. For this reason an analysis of all the cases in which a court has had to draw this distinction will serve no purpose. Each case must be decided primarily on its own merits. In *Katz*[22] it was stated that "a value judgment of a practical nature is to be brought to bear upon each set of facts as it arises for consideration", and in *Du Plessis*[23] the Appellate

16 *Van Zyl* 1942 TPD 291 296; *Thabeta* 1948 3 SA 218 (T) 221–222.
17 *Van Zyl supra* 296; *B* 1958 1 SA 199 (A) 203.
18 *Ndlovu* 1982 2 SA 202 (T) 206D–E; *Mlambo* 1986 4 SA 34 (E) 41–42; *Dube* 1994 2 SACR 130 (N) 137*h–i*.
19 *Ndlovu supra* 206C–D; *Magxwalisa* 1984 2 SA 314 (N) 321–322.
20 *Nyalungu* 2013 2 SACR 99 (T).
21 1945 AD 541 547. The test enunciated in *Schoombie* was confirmed by the Appellate Division in *Du Plessis* 1981 3 SA 382 (A) 399–400.
22 1959 3 SA 408 (C) 422.
23 1981 3 SA 382 (A) 399–400.

Division stated that whether or not there was already an act of consummation is a factual question.

The following factors are material when it has to be decided whether there was a "commencement of the consummation": X's physical proximity to the object or the projected scene of the crime; the interval of time between the moment when X was caught and the expected completion of the crime; the question as to what the natural course of events was likely to have been and the question whether X at all times remained in control of the course of events.[24] Whether X still had the time or the opportunity to change her mind about committing the crime may play a role, but is not a decisive factor.[25]

The following are some examples of how our courts distinguish between an act of preparation (in which case X is not guilty of attempt) and an act of consummation (in which case X is guilty of attempt):

(*a*) *Mere acts of preparation* (ie, cases in which X is not guilty of attempt): X merely prepares the poison which she means to administer to Y later when she is apprehended;[26] a burglar (Y) asks X to buy stolen clothes from her (Y), but X has had time only to look at the clothes when a policeman arrests her;[27] X, trying to obtain possession of explosives which she is not allowed to possess, travels to a place where the explosives are concealed but is arrested hundreds of kilometres from the place of concealment;[28] X, in an attempt to steal a car, walks late at night, armed with a screw-driver, to a car, stands next to the car, directs a flashlight at the car, but is apprehended by a policeman before she is able to do anything to the car;[29] X, in an attempt to steal goods in somebody else's house, has only opened the cupboards and thrown the contents thereof on the floor, when she was caught in the act;[30] X, in an attempt to commit housebreaking, has only stood outside a window and moved the curtains, when she is apprehended.[31]

(*b*) *Acts of consummation* (ie, cases in which X qualifies to be convicted of attempt): X, trying to escape from custody, breaks the glass and wooden frame of the window in her cell;[32] X, trying to break into a house, puts a key into a

---

24 *Van Zyl* 1942 TPD 291 296–297; *Schoombie* 1945 AD 541 548; *Katz* 1959 3 SA 408 (C) 423.

25 In *Schoombie supra* 547–548 it was said that "the last series of acts which would constitute a continuous operation, unbroken by intervals of time which might give an opportunity for reconsideration" forms part of the consummation, but in *B* 1958 1 SA 199 (A) 203 Schreiner JA unjustifiably watered down this useful criterion. Schreiner JA's example of gradual poisoning is an exceptional set of facts, and ought not to derogate from the general rule. It is submitted that one of the fundamental reasons for distinguishing between acts of preparation and acts of consummation is to make allowance for the prospective wrongdoer who decides not to continue with her crime.

26 *Sharpe* 1903 TS 868 873.

27 *Croucamp* 1949 1 SA 377 (A).

28 *Magxwalisa* 1984 2 SA 314 (N) 322.

29 *Josephus* 1991 2 SACR 347 (C).

30 *Newman* 1998 1 SACR 94 (C). It is difficult to agree with the court's finding that there was no act of consummation.

31 *Hlongwane* 1992 2 SACR 484 (N).

32 *Chipangu* 1939 AD 266.

door;[33] X, trying to commit arson, arranges inflammable materials and fuel inside a building;[34] X, trying to do business in a forbidden trade, posts a letter containing an offer;[35] X, trying to rape Y, has as yet only assaulted her;[36] X, trying to steal from Y's handbag, has only opened the handbag hoping the contents will fall out;[37] X, attempting to possess dagga, drives to a place in a bush where an associate has left a sack of dagga for her, leaves the car and walks to the sack.[38]

8 Attempt to commit the impossible In this form of attempt, although X's act is no longer merely an act of preparation but has in fact passed the boundary line demarcating the "commencement of the consummation", it is impossible for X to commit the crime. The impossibility may be due to any one or more of the following factors:

Firstly, X uses the wrong means to achieve her aim, as where X wants to poison Y, but instead of throwing the correct poison into Y's drink, she mistakenly throws a harmless substance into the drink. This type of impossibility is referred to as impossibility of the *means*.

Secondly, X does not have the qualities required in the definition of the crime to commit the crime. A crime may, for example, be so defined that it can be committed by a licence holder only; X, erroneously believing that she is the licence holder, commits an act which would have been a crime had she been the licence holder. This type of impossibility is referred to as impossibility of the *subject*.

Thirdly, the object in respect of which the act is committed is not such as envisaged in the definition of the crime. For instance, X, intending to kill Y, shoots at Y while Y is lying in her bed. Unknown to X, Y has already died from a heart attack some minutes before the shot was fired. This type of impossibility is known as impossibility of the *object*.[39]

Before 1956 there was no certainty in our law as to whether attempt to commit the impossible was punishable or not. In 1956 the matter was settled by the Appellate Division in *Davies*.[40] In this case it had to be decided whether X was guilty of attempt to commit abortion if the foetus which X caused to be aborted were already dead. (The then crime of abortion could be committed in respect of a live foetus only.) The Appellate Division found in favour of the subjective approach and held that X was guilty of attempt.[41] It held that X would have

---

33 *Mtetwa* 1930 NPD 285.
34 *Vilinsky* 1932 OPD 218.
35 *Lionda* 1944 AD 348.
36 *B* 1958 1 SA 199 (A) 204; *W* 1976 1 SA 1 (A).
37 *Agmat* 1965 2 SA 874 (C).
38 *Ndlovu* 1982 2 SA 202 (T) 207.
39 Or X shoots at Y, who is in an armoured vehicle whose armour is so strong that the bullets cannot pierce it, as happened in *Ngcamu* 2011 1 SACR 1 (SCA) par 19.
40 1956 3 SA 52 (A).
41 At 61, 64, 78. Steyn JA dissented. *Davies* was applied *inter alia* in *W* 1976 1 SA 1 (A) (X was convicted of attempted rape after having had intercourse with a woman whom he believed to be alive while she was in fact already dead, in circumstances in which he knew that she would not have consented to intercourse); *Naidoo* 1977 2 SA 123 (N) 128C–D (but contrast *Perera* 1978 3 SA 523 (T)); *Palmos* 1979 2 SA 82 (A); *Ndlovu* 1982 2 SA 202 (T) 207F–G (attempt to possess dagga, which proved to be impossible

[*continued*]

been guilty of attempt even if the woman had not been pregnant provided, of course, that X had believed that she was pregnant and had performed some act intending to bring about an abortion.[42]

In *Davies* the Appellate Division held that it did not matter whether the impossibility resided in the means or in the object: in both cases X was guilty of attempt.[43] Neither in *Davies* nor, as far as is known, in any other case did the question arise whether it would make any difference if the impossibility resided in the subject. It is submitted that there can hardly be any doubt that attempt to commit a crime in such circumstances is equally punishable.

The question arises whether the wide scope of criminal liability for attempt to commit the impossible should not be limited in some way. A consistent application of the strictly subjective approach could in extreme cases lead to ludicrous results. In *Davies* the example was mentioned of the prospective murderer who uses a water pistol to shoot at a life-sized stuffed scarecrow resembling a human being.[44] According to this judgment it must be assumed that this is attempted murder. But what about the superstitious person who believes that she can kill her enemy by prayers or incantations? Following a similar distinction made in German and American law, it is submitted that in cases such as these, where an ordinary person would see no danger to anybody, the "attempt" is too far-fetched to be punishable.[45] The mere fact that, as far as is known, there has never been a reported case of what may be termed "superstitious attempt" in all probability proves that our prosecuting authorities do not regard such cases as punishable.

9 Putative crime In *Davies* Schreiner JA formulated two exceptions to the general rule that attempt to commit the impossible is punishable.[46] The easier of the two to understand is that a statutory crime may conceivably be so defined as to exclude liability for attempt to commit it in circumstances in which it would be impossible to achieve the criminal aim.[47]

The other exception is somewhat more difficult to apply. It was formulated as follows:[48] "If what the accused was aiming to achieve was not a crime an endeavour to achieve it could not, because by a mistake of law he thought that his act was criminal, constitute an attempt to commit a crime."

---

because a policeman was already sitting on the bags of dagga which X meant to take into his possession); *Ndlovu* 1984 3 SA 23 (A) (murderous attack on somebody who was already dead); *Madikela* 1994 1 SACR 37 (BA); *Dube* 1994 2 SACR 130 (N) 138–139.

42 At 64.

43 *Ibid.*

44 At 72G–H ("semelpop").

45 *La Fave* 604 fn 81: "[H]uman laws are made, not to punish sin, but to prevent crime and mischief." Attempt is not punishable in these circumstances in German law ("irreale oder abergläubische Versuch"), although attempt to commit the impossible is usually punishable. The act evokes sympathy with X rather than concern for any possible danger. See *Jescheck and Weigend* 532–533; *Schönke-Schröder* n 13 ff *ad* s 23.

46 *Davies* 1956 3 SA 52 (A) 64.

47 The legislature may, in other words, create a crime and provide that attempt to commit the crime is not punishable, even in situations in which it is impossible for X to commit the prohibited act or cause the prohibited result.

48 *Ibid.*

It is beyond doubt that this at least means that a putative crime is not punishable. A putative crime is a type of crime which does not exist, but which X believes to exist. If X believes that the law regards certain conduct as a crime, whereas it is not criminal, one may speak of a "putative crime". (The word "putative" is derived from the Latin word *putare*, which means "to think".) Adultery, for example, is not a crime. If X commits adultery, mistakenly believing that this type of conduct is a crime, she is, in terms of this exception to the rule, not guilty of attempt. This type of conduct is not a crime in the eyes of the law.

This exception to the "rule in *Davies*" is, of course, very necessary, otherwise it would be possible to seriously undermine the principle of legality by abusing the rules relating to attempt in order to "create", so to speak, new crimes. After all, the limits of liability are determined by the objective rules of the law and not by an individual's conception of the content of the law. The unfounded belief in the existence of a crime is simply a mirror image of a mistake about the law. It is the reverse of the situation where X errs in not knowing that a certain type of conduct is criminally punishable.

This exception (putative crime) operates if X is mistaken about the existence of a crime or the legal nature of one of its definitional elements. She is, in other words, mistaken about the abstract definition of the crime. If she is merely mistaken about the facts, that is, one or more of the concrete circumstances of the case, then she is guilty of attempt.

The difference may be explained by means of the following example: The crime of theft cannot be committed in respect of a *res derelicta*, that is, a thing abandoned by its owner with the intention of getting rid of it. X, a tramp, sees an old mattress lying on the pavement. The mattress was left by its owner next to her garbage container in the hope that the garbage removers would remove it. X appropriates the mattress for herself. X knows that the owner of the mattress had meant to get rid of it. However, X believes that the crime of theft is defined by law in such a way that it can be committed even in respect of property that has been abandoned by its owner (a *res derelicta*). She is then mistaken as to the law (albeit not as to the facts); the second exception to the "rule in *Davies*" comes into operation, and X cannot be convicted of attempted theft.

Contrast the following possible set of facts with the preceding one: X appropriates the mattress mentioned above. She knows very well what the relevant provisions of the law are (ie, that theft cannot be committed in respect of a *res derelicta*). She believes, however, that the mattress merely fell from a lorry when the owner was moving her furniture, and that the owner never meant to get rid of it. In reality, the owner did in fact mean to get rid of it (as in the first example). In such a case X is not mistaken as to the provisions of the law, but as to the facts, and can therefore be convicted of attempted theft.[49]

---

49 In *Palmos* 1979 2 SA 82 (A) 94 X received goods in the mistaken belief that they were stolen. The question arose whether he could be convicted of attempted theft. The Appellate Division answered this question in the negative, since it was of the opinion that X's conduct at most amounted to the commission of a putative crime. The court's conclusion has been criticised, (see Van Oosten 1979 *THRHR* 323; *De Wet and Swanepoel* 174) – correctly, it is submitted. X knew that theft was a crime. He knew that to receive stolen goods amounted to committing theft. He was not mistaken about the legal nature or description of one of the elements of the crime. His mistake related only to the question

[*continued*]

10 Voluntary withdrawal It stands to reason that there is no punishable attempt if X voluntarily withdraws from her criminal plan of action before her conduct constitutes the commencement of the consummation. The question is simply whether a withdrawal after this stage but before completion of the crime constitutes a defence to a charge of attempt.

According to our courts, voluntary withdrawal after the commencement of the consummation is no defence.[50] X is therefore guilty of attempt. Although the courts have confirmed this rule in a number of cases, not a single decision seems to present a clear, unequivocal example of a person's voluntarily withdrawal from committing a crime which she has already started to commit.

Hlatwayo[51] is usually regarded as the most important decision concerning this form of attempt. In this case X was a servant who put caustic soda into her employers' porridge, intending to poison them. Two other servants saw the porridge discolour, realised what was happening and informed another servant who was working outside the house. It was as a result of this that X then threw the porridge away. She was nevertheless convicted of attempted murder. The court held that her acts had already reached the stage of consummation, and that her change of mind did not exclude her liability for attempt. It is submitted that this decision is no authority for the proposition that voluntary withdrawal is no defence, for the simple reason that there was no *voluntary* withdrawal by X. She was caught out by other people and for that reason decided not to proceed with her plan.

In *B*[52] the Appellate Division accepted that it was held in *Hlatwayo* that voluntary withdrawal was no defence, and that the decision was correct. In *Du Plessis*[53] the Appellate Division *obiter* confirmed the rule that voluntary withdrawal after the commencement of the consummation is no defence.

11 Voluntary withdrawal: criticism of punishment It is not disputed that if the withdrawal takes place after the first harm has already been done the attempt ought to be punishable. If, in the course of committing assault, X "withdraws" after having struck the first blow, or if in the course of committing arson, she "withdraws" after the first flames have already damaged the building, the "withdrawal" is too late to afford X a defence. However, the position ought to be different if X withdraws before having inflicted any harm or damage even if her conduct up to that stage can be construed as having already passed the point where the "consummation has commenced". One can take as an example the case where X, wanting to commit housebreaking and theft, has already inserted the key into the door of Y's house. At that stage she reconsiders her conduct, decides voluntarily to desist from her plan, withdraws the key and walks away. Her attempt ought not to be punishable.

---

whether or not the particular boxes, containing certain goods that were delivered to his pharmacy, were stolen. This was not a mistake of law relating to either the existence of the crime or the legal description of one of its elements, but merely a mistake relating to one of the factual circumstances of the case. The case should therefore have been regarded as one of attempt to commit the impossible, which is punishable.

50 *Hlatwayo* 1933 TPD 441; *B* 1958 1 SA 199 (A); *Du Plessis* 1981 3 SA 382 (A) 400.

51 *Supra*.

52 1958 1 SA 199 (A) 203.

53 1981 3 SA 382 (A) 400.

The rule applied by the courts that voluntary withdrawal can never be a defence seems to be based upon the corresponding rule in English law.[54] However, English law in this respect is completely at variance with the approach to voluntary withdrawal in the USA and on the continent of Europe. In the Continental legal systems, voluntary withdrawal before the completion of the crime is treated as a defence,[55] and in the USA there is an increasing tendency to deviate from the original English-law approach in favour of the Continental one.[56]

If one considers the reasons for punishing acts of attempt it is not difficult to understand why the above-mentioned legal systems regard voluntary withdrawal as a defence. The rationale for punishing attempt is to be found in the relative theories of punishment. If somebody voluntarily withdraws from her criminal scheme it means she has already been *deterred* from committing the crime and its commission has already been *prevented*. There is no danger to society. As for the *reformative* theory, there is nobody to be reformed because X has already reformed herself. One of the basic reasons for distinguishing between acts of preparation and acts of consummation is that a person ought not to be punished as long as there is still a possibility that she may change her mind for the better.[57]

Apart from these considerations, there are the following additional reasons for decriminalising attempt if there was a voluntary withdrawal: *Firstly*, the law ought to encourage prospective wrongdoers not to transgress. It cannot do this by punishing people who decide to abandon their criminal plans. The prospective criminal should know that she will be rewarded if she voluntarily abandons her criminal project. *Secondly*, voluntary withdrawal proves that X did not in fact have the intention at all material times to complete her act; in other words, X's intention was not so strong as to "motivate" her to complete the crime.[58] After all, for a conviction of attempt to commit a crime the state must prove that X had intention to commit the *completed* crime, and not merely an intention to attempt to commit the crime.

---

54 *Ashworth* 466.

55 Germany: s 24 of the *Penal Code*; *Schönke-Schröder ad* s 24 ff; *Jescheck and Weigend* 536 ff; *Maurach-Gössel-Zipf* 48 ff; *Kühl* ch 16; the Netherlands: see s 45 of the *Penal Code*; *Hazewinkel-Suringa-Remmelink* 403 ff; *Noyon-Langemeijer-Remmelink* 299 ff; France: s 121–5 of the new *Penal Code* of 1994; *Merle and Vitu* 489; Belgium: s 51 of the *Penal Code*; Switzerland: s 21 and 22 of the *Penal Code*; Austria: s 16 of the *Penal Code*.

56 *La Fave* 604 ff; s 5.01(4) of the *Model Penal Code*; *Fletcher* 184 ff; *Robinson* 1 363 ff; Crew 1988 *American Criminal Law Review* 441. At 444 the author shows that roughly half of the American jurisdictions recognise voluntary withdrawal as a defence.

57 This is possibly exactly what Watermeyer CJ had in mind in *Schoombie* 1945 AD 541 547–548 when he spoke of "the last series of acts which would constitute a continuous operation, *unbroken by intervals of time which might give an opportunity for reconsideration*" as acts of consummation (italics supplied).

58 See *Fletcher* 184 ff. This writer's discussion deals not only with the position in Continental legal systems, but also with the latest reforms taking place in the USA. He states (195): "It seems that the defence of voluntary abandonment will eventually become a standard feature of American penal codes." The American writer *Dressler* 405 likewise argues that voluntary withdrawal ought to be a defence. See also Crew 1988 *American Criminal Law Review* 441. Labuschagne 1995 *Stell LR* also supports the view that voluntary withdrawal ought to constitute a defence to a charge of attempt.

The court's unwillingness to recognise voluntary withdrawal as a defence to a charge of attempt is difficult to reconcile with their willingness to recognise voluntary withdrawal from a common purpose to commit a crime or from a conspiracy as a defence.[59]

12 Intention A person can be guilty of attempt to commit a crime only if she had the intention to commit that particular crime.[60] "Intention" in this connection bears the same meaning as intention to commit the completed crime, and *dolus eventualis* is therefore sufficient.[61] Negligent attempt is notionally impossible: one cannot attempt, that is, intend to be, negligent. For this reason there is no such thing as attempt to commit culpable homicide.[62]

13 Punishment A lesser punishment is usually imposed for attempt than for the completed crime. The most important reason for this is that, from the viewpoint of the retributive theory of punishment, either no harm or less harm (compared to the completed crime) has been caused.

C CONSPIRACY

1 Prohibition of conspiracy Conspiracy to commit a crime is punishable in terms of section 18(2)(*a*) of the Riotous Assemblies Act 17 of 1956. The section provides as follows:

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

Although conspiracy is punishable in terms of an old statute dealing with riotous assemblies, the crime of conspiracy as defined in the act is not limited to acts relating to riotous assemblies. The definition is wide enough to cover conspiracy to commit any crime.

2 Purpose of prohibition One of the most important reasons for criminalising conspiracies to commit crimes is the consideration that the mere agreement by a number of people to commit a crime, even though the conspiracy is not yet executed, creates a danger to society. The will of a number of people to commit crime is a greater potential danger than the will of a single person to commit a crime. The one person encourages another to the commission of a crime. A conspiracy leads to a mutual, fraternal spirit amongst the conspirators which makes it difficult for one of them to change her mind, or to persuade the other members of the group to desist from the commission of the crime. Conspirators are usually also able to initiate more ambitious criminal ventures than single individuals.

---

59 *Nomakhlala* 1990 1 SACR 300 (A); *Nzo* 1990 3 SA 1 (A) 10; *Beahan* 1992 1 SACR 307 (ZS); *Nduli* 1993 2 SACR 501 (A) 504; and see generally *supra* VII B 16.

60 *Schoombie* 1945 AD 541 547; *Du Plessis* 1981 3 SA 382 (A) 400.

61 *Huebsch* 1953 2 SA 561 (A) 567; *Botha* 1959 1 SA 547 (O) 551–552.

62 *Ntanzi* 1981 4 SA 477 (N) 482 F–G; *Naidoo* 2003 1 SACR 347 (SCA) 356*g*.

3 Successful conspiracy Section 18(2)(*a*) does not differentiate between a successful conspiracy (ie, one followed by the actual commission of the crime) and one not followed by any further steps towards the commission of the crime. It is theoretically possible to charge and convict a person of contravening this provision even if the crime envisaged has in fact later been committed. Our courts have, however, indicated that this provision ought to be utilised only if the envisaged crime has not been committed.[63] If the conspiracy has been followed by the commission of the envisaged crime, it is better to charge the conspirators as co-perpetrators of, or accomplices to, the commission of the main crime.

On the other hand, there is no absolute prohibition on the state to charge somebody with conspiracy if the main crime has in fact been committed. For example, where there are a number of co-perpetrators and the prosecutor is of the opinion that it might be difficult to prove that one of them has committed the main crime whereas there is clear evidence that she participated in the conspiracy, she may be charged with conspiracy only while the others may be charged with having committed the main crime.[64] It would, of course, be wrong to convict somebody of both the conspiracy and the main crime, since these two crimes merge (just as a successful attempt to commit a crime merges with the completed crime).

4 The act

(*a*) *The actual entering into an agreement* In South African law the crime of conspiracy can be committed only if what the parties agree to do is a crime. There can be a conspiracy only if there is a definite agreement between at least two persons to commit a crime.[65] The mere fact that X and Y have the same intention does not mean that there is, therefore, a conspiracy between them. Before there can be a conspiracy, X and Y must agree with one another to commit a crime,[66] and the act consists in entering into an agreement. This idea is often expressed by the statement that "there must be a meeting of minds".[67] If X breaks into a house and Y, completely unaware of X's existence and therefore of her plans, breaks into the same house on the same occasion, neither of them is guilty of conspiracy, even though they both have the same intention.

(*b*) *Pretended consent not sufficient* There is no conspiracy if one of the two parties only pretends to agree but in fact secretly intends to inform the police of the other party's plans so that she may be apprehended.[68] A trap can therefore not be convicted of conspiracy; what is more, the other party who seriously wishes to agree to commit a crime cannot be convicted of conspiracy either, because there was no true agreement between at least two persons to commit a crime.

---

63 *Khoza* 1973 4 SA 23 (O) 25; *Fraser* 2005 1 SACR 456 (SCA) par 7; *Libazi* 2010 2 SACR 233 (SCA) par 19.

64 *Basson* 2000 1 SACR 1 (T) 15; *Tungata* 2004 1 SACR 558 (Tk) 564.

65 *Alexander* 1965 2 SA 818 (C) 821; *Cooper* 1976 2 SA 875 (T) 879; *Sibuyi* 1993 1 SACR 235 (A) 249*e*.

66 *B* 1956 3 SA 363 (E) 365; *Moumbaris* 1974 1 SA 681 (T) 687.

67 Cf *Moumbaris supra* 687A–B: "A conspiracy is thus not merely a concurrence of wills but a concurrence resulting from agreement"; *Zwane (3)* 1989 3 SA 253 (W) 262C–D; *Agliotti* 2011 2 SACR 437 (GSJ) par 9.2.

68 *Harris* 1927 NPD 330 347–348; *Moumbaris supra* 687.

(*c*) *Implied conspiracy* The conspiracy need not be express; it may also be tacit. However, there is a tacit conspiracy only if the other party consciously agrees to the scheme.[69] If, while X is robbing a bank, Y, who has not previously reached an agreement with X, spontaneously associates herself with X's conduct by facilitating matters for her, a tacit conspiracy between X and Y will be construed only if X is prepared to accept Y's assistance. There can be no conspiracy if X does not want to have anything to do with Y. A court may infer the existence of a conspiracy from persons' conduct, provided that the inference is the only reasonable one to be drawn from the facts.[70]

(*d*) *Mere knowledge insufficient* Since knowledge is only one aspect of intention, it follows that mere knowledge of the existence of a conspiracy is insufficient to warrant a conviction for conspiracy. For example, a person who merely overhears a telephone conversation in which two people agree to commit a crime is not a party to the conspiracy; neither is she a party if she is merely present while others conspire but does not expressly or by conduct make herself a party to the agreement.[71]

(*e*) *"Umbrella spoke conspiracy"* A conspiracy may come into being by way of what has been described as an "umbrella spoke conspiracy". Here somebody in the middle (the "umbrella's centre") discusses and independently agrees with different people (the "umbrella's spokes") on different occasions.[72] If X, a political activist, establishes a secret organisation aimed at forcibly overthrowing the government and for this purpose approaches other people one by one (*inter alia* first Y, then Z) and persuades them to join the organisation, she is the person in the middle, and Y and Z are co-conspirators with her. The fact that Y and Z join at different times and places does not mean that they are not members of the same conspiracy. It is not necessary for the one to know the others' identity, but each should know that the organisation also has, or will have, other members.

(*f*) *"Chain conspiracy"* The conspiracy may also come into being in a way comparable to the links of a chain. Here B enters into an agreement with A, then C joins up with B, then D with C, and so forth.[73] A typical example of a "chain conspiracy" is furnished by the unlawful activities of a series of people or syndicates who smuggle illicit articles, such as drugs, from abroad, then sell them to agents, who sell them to retailers, who in turn sell them to the consumer.

(*g*) *Direct communication between all conspirators not required* It follows from what has been said above that, for a conspiracy to come into existence, it is not necessary for the one conspirator to know the identity of all the other conspirators. She must, however, be aware of their existence. The conspirators need not be in direct communication with each other. If X agrees with Y to commit a crime together with Y and Z, and Z in turn agrees with Y to commit a crime together with X and Y, there is one conspiracy between X, Y and Z and all three may be jointly charged with conspiracy. X is therefore deemed to have

---

69 *Agliotti supra* par 9.3.
70 *Khoza* 1973 4 SA 23 (O) 25; *Cooper supra* 879G; *Agliotti supra* par 9.4.
71 *Nooroodien* 1998 2 SACR 510 (NC) 520*c*.
72 Snyman 1984 SACC 3 13.
73 *Ibid*.

conspired with Z too. X need not have known Z's identity, but she must have been aware of her existence. It follows from this that any person who joins an organisation whose aim or one of whose aims is to commit a crime or crimes, whilst aware of its unlawful aim or aims, or remains a member after becoming aware of them, signifies by her conduct her agreement with the organisation's aims and thereby commits conspiracy.[74]

(*h*) *General aspects of act of conspiracy* The parties need not agree about the exact manner in which the crime is to be committed.[75] There is not yet a conspiracy if the two parties are still negotiating with each other. As soon as they have reached agreement the crime of conspiracy is complete, and it is unnecessary to prove the commission of any further acts in execution of the conspiracy.[76] Abandonment of the scheme after this stage is no defence.[77]

5 Intention The requirement of intention may be divided into two components: first, X must have the intention to conspire with another, and secondly, she must intend to commit a crime or to assist in its commission. If X sells Y an article which she (X) knows will be used by Y to commit a crime, her mere knowledge is not sufficient ground for construing a conspiracy. A conspiracy may be construed only if a court is satisfied that Y was also *aware* of X's knowledge. Only then can one speak of "a meeting of minds".[78]

6 Punishment According to the wording of section 18(2) of the Riotous Assemblies Act 17 of 1956 the conspirator is liable to the same punishment as the person convicted of committing the crime. A lighter punishment ought to be imposed for conspiracy than for the main crime because conspiracy does not usually result in the same harmful consequences as the commission of the main crime. If a minimum sentence is prescribed for the main crime, a court is not bound to impose that sentence for conspiracy but may impose a lighter one.[79]

D INCITEMENT

1 Prohibition of incitement Incitement to commit a crime is punishable in terms of section 18(2) of the Riotous Assemblies Act 17 of 1956, the relevant portions of which read as follows:

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

---

74 *Cooper* 1976 2 SA 875 (T) 879; *Twala* 1979 3 SA 864 (T) 872; *Zwane (3) supra* 256F–G, 262D–F.

75 *Adams* 1959 1 SA 646 (Sp Ct); *Cooper supra* 879H; *Du Toit* 2004 1 SACR 66 (T).

76 *Sibuyi* 1993 1 SACR 235 (A) 249*d–e*; *Du Toit supra* 77*h; Agliotti* 2011 2 SACR 437 (GSJ) par 9.5

77 For criticism of the rule that abandonment cannot be a defence, see Snyman 1984 *SACC* 3 23–24.

78 *Agliotti* supra par 9.7. See the discussion of the intent requirement by Snyman 1984 *SACC* 15 ff.

79 *Nel* 1987 4 SA 950 (T) 961D–E.

The section speaks of "incites, instigates, commands or procures". In the discussion which follows all these acts will, for the sake of convenience, be referred to as "incitement".

2 Successful and unsuccessful incitement The definition of the crime does not distinguish between successful and unsuccessful incitement. The crime is formulated widely, because liability for incitement does not depend on whether Y had indeed committed the crime to which she was incited. The Appeal Court has held that a person ought only to be charged with contravening section 18(2)(*b*) if the incitement has been unsuccessful.[80] If the incitement has been successful, X may be charged as co-perpetrator or accomplice to the commission of the main crime.[81] However, nothing in the wording of the section prevents the state from charging someone with incitement, even though there is evidence that the main crime has indeed been committed.[82]

3 Purpose of prohibition The most important reason for the prohibition of incitement is to enable the authorities who have to maintain law and order to thwart crime at an early stage, before any real damage has been done. The law tries to discourage people who incite others to commit crimes by threatening with punishment any act whereby one person influences the mind of another to commit a crime.[83]

4 The act of incitement

(*a*) *Influencing another to commit a crime* The crux of the act of incitement is that *X comes into contact with Y and influences or seeks to influence Y verbally or by conduct to commit a crime*.[84] In the leading case in *Nkosiyana,*[85] Holmes JA described the act as follows: "[A]n inciter is one who reaches and seeks to influence the mind of another to the commission of a crime".

Incitement is a purely formally defined crime in the sense that the crime is completed the moment X influences Y in some or other way to commit the crime. No causal relationship between X's words and any subsequent action by Y is required. X's liability does not depend on whether she (X) indeed managed to influence Y to commit the crime, whether Y agreed to do what X requested her to do, whether, as a result of the incitement, Y had started doing something towards the commission of the crime, or whether Y in fact committed the crime as a result of the incitement. Whether Y was indeed influenced by X, or was at all susceptible to influence, is irrelevant, just as it is irrelevant whether Y indeed committed the crime as a result of the incitement.[86] The fact that Y, though

---

80 *Milne and Erleigh (7)* 1951 1 SA 791 (A) 823. Also see O 1952 3 SA 185 (T).

81 *Khoza* 1973 4 SA 23 (O) 25; *Smith* 1984 1 SA 583 (A).

82 Where a number of people together committed a crime, and the prosecutor feels that it may be difficult to prove that one of them, X, committed the main crime, while it would be relatively easy to prove that X indeed committed incitement to commit the crime, the prosecutor may, eg, decide to charge X with incitement only, and not with the commission of the main crime. See *Basson* 2000 1 SACR 1 (T) 15. This decision deals with liability in respect of conspiracy, but the argument of the court is equally valid as far as incitement is concerned.

83 *Zeelie* 1952 1 SA 400 (A) 405D–E; *Nkosiyana* 1966 4 SA 655 (A) 659.

84 *Zeelie supra* 405–506; *Nkosiyana supra* 658H.

85 1966 4 SA 655 (A) 658H.

86 *Nkosiyana supra*. In this case Y was a police trap who was never susceptible to any incitement.

having criminal capacity, was unintelligent and did not understand the contents of X's words properly, offers X no defence.

(*b*) *Ways in which incitement may be committed* Incitement may be committed in many different ways. The act of incitement may be *explicit* or *implied.* An example of implied incitement is when a prostitute makes a certain movement with her body in order to incite a man to sexual intercourse.[87] Incitement may be committed by either *words* or an *act,* and the verbal incitement may be in oral or written form.

The following are examples of how X can commit the crime explicitly: X *suggests to* Y that Y should commit a crime; or *requests*, *instructs, encourages*, *implores*, *persuades*, or *hires* Y, *puts pressure on* Y; or *bribes* Y, as when X promises Y a gift or some or other advantage if Y commits the crime.

In some older decisions the view was expressed that X can be guilty of incitement only if the incitement contains an element of persuasion; there must in other words be an initial unwillingness on the part of Y which is overcome by argument, persuasion or coercion.[88] However, in 1966 the Appeal Court held in *Nkosiyana*[89] that such an element of persuasion was not required.

It follows that incitement can be committed even in respect of someone who had already decided to commit the crime, and in respect of whom no incitement or even persuasion was therefore necessary (the so-called *omni modo facturus*). The focus therefore is only on X's conduct, and not on Y's reaction or her susceptibility to any influencing. It follows that if X incites Y to commit a crime, and Y decides not to accept X's suggestion but to reject it, X will still be guilty of incitement.

(*c*) *Conduct that does not qualify as incitement* X's conduct does not qualify as incitement if X merely describes to Y the pros and cons of a proposed commission of a crime by Y, or merely raises Y's curiosity about the possibility of the commission of a crime, or merely arouses greed on the part of Y (eg to obtain Z's money).[90] Thus if X merely tells Y how easy it is to embezzle money in a specific organisation, or how easily someone who has done it escaped being caught, X's words do not necessarily amount to incitement to theft. Neither do X's words which amount merely to the expression of an opinion, a wish or a desire, necessarily qualify as incitement. Thus if X merely informs Y that it would be a good thing if Z should die, one cannot beyond reasonable doubt make the deduction that X was trying to influence Y to kill Z. It is not sufficient for X merely to create a motive in Y to commit a crime.

(*d*) *The concretisation requirement* In order to commit incitement, X's words which he addresses to Y should not be too vague or equivocal. They must be sufficiently concrete or specific, so that Y will know what she is incited to do. An extreme example of "inciting words" which are too widely formulated to amount to punishable incitement, is when X says to Y: "Commit crimes!"

---

87 *Zeelie supra* 410; *F* 1958 4 SA 300 (T) 306.

88 *Sibiya* 1957 1 SA 247 (T) 250; E 1957 4 SA 61 (G) 63; R 1958 3 SA 145 (T) 147. *Contra Port Shepstone Investments (Pty) Ltd* 1950 2 SA 812 (N).

89 1966 4 SA 655 (A). For a more detailed exposition of the ways in which incitement can be committed, see Snyman 2005 *THRHR* 374 430–435.

90 *Schönke-Schröder* note 5–9 ad a 30; *Kühl* ch 20 par 178.

Such a statement cannot qualify as incitement, because Y does not know which crimes she is spurred on to commit, or who or what should be the object of her criminal acts. The same is true of unspecified expressions such as "You should teach her a lesson!" or "You should not let your chances of putting her in her place slip through your fingers!"

It is submitted that there are two elements of X's words that must be expressed sufficiently concretely before the statement can qualify as punishable incitement. The first is the *description of the crime* to which Y is incited, and the second the *description of the identity of the victim (Z) or object in respect of which the crime is to be committed*.[91]

First, the *type of crime to be committed by Y must* be adequately specified. It may be either an explicitly defined crime or a crime that falls within an identifiable group of crimes, such as crimes of dishonesty (fraud; forgery and uttering; theft by false pretences) or crimes of violence (ordinary or qualified assault, murder). X need not necessarily name the crime that he wants Y to commit explicitly, that is, by its proper and full legal appellation (such as "defeating or obstruction of the course of justice", or in the case of a statutory crime "contravention of section A of Act B of year C"). It is sufficient if X uses words that would reasonably be understood as a synonymous description of the crime to which Y is incited. It is therefore sufficient if X, instead of using the word "robbery", urges Y to "hit Z over the head, grab his money and run away with it"

It is not necessary for X to specify the finer details of the commission of the crime, such as the precise time, place and manner of execution, as these factors normally depend on events or circumstances that are only subsequently ascertainable. It is sufficient for X merely to specify the essential dimensions of the crime or type of crime, without specifying the finer modalities relating to its commission.

Secondly, X must specify the *person, group of persons or object in respect of which the crime should be committed.* Y has to be a specific person or someone from a specifiable group, such as people exercising a specific profession, holding a specific office, living in a specific geographical area, belonging to a specific racial group, or performing a specific activity, such as driving a motor car. X may leave the decision to Y as to which individual within the group to choose as her victim. It follows that if X merely exhorts Y: "Commit theft!" or "Commit murder!" without supplying any further particulars about the victim of the crime, the words do not qualify as incitement.[92]

What is *not required* is that X should know the identity of the person or persons incited. In fact, incitement can be directed even at a crowd of unknown people.[93] X may therefore commit incitement by uttering the inciting words in

---

91 German-law sources discuss the requirement of concretisation comprehensively. See *Jescheck* and *Weigend* 688; ch 20 par 188; Geppert 1997 Jura 303; 359; *Schönke-Schröder* notes 17 and18 ad a 26. For a more detailed exposition of this requirement in the SA legal literature, see Snyman 2005 *THRHR* 428 435–438.

92 *Kühl* ch 20 pars 90–192; *Maurach*, *Gössel* and *Zipf* 343.

93 In *R v Segale* 1960 1 SA 721 (A) the Appeal Court upheld a conviction of incitement in a situation where the people who were incited to commit the crime were not one particular person or a group of persons, but, in the words of the court, "the whole of the non-European

[*continued*]

the course of a speech to people whom she does not even know.[94] X may also commit incitement if her words are contained in a publication or pamphlet and it is accordingly impossible for her to know the identity of the readers.[95]

The question arises whether X commits incitement if she tells Y: "Commit shoplifting!" or "Rob petrol stations!" The shops from which Y should steal or the petrol stations to be robbed are not specified. It is submitted that in cases such as these there is enough specification of both the type of crime and the object of the crime, and that X accordingly commits incitement. If the leader of a terrorist group calls on members of the group to rob banks in order to obtain money for the group, such an injunction is sufficient to render the leader of the group punishable for incitement to robbery, even though the further particulars concerning the way in which the crime should be committed are not specified by the leader, but left to the individual members of the group to decide.

(*e*) *Incitement by omission not possible* Is it possible to commit incitement by means of an omission? Y, for example, plans to commit a crime. X knows this, but deliberately refrains from discouraging Y from committing the crime. Can X's omission be regarded as an act of incitement? It is submitted that this question should be answered in the negative.[96] However, the position would be different if X had a legal duty to act positively in the circumstances and to advise Y against his planned action, such as where X is a police officer.

5 Intention

(*a*) *General* Incitement can never be committed negligently. The form of culpability required is intention. X must have the intention to come into contact with Y and to incite Y to commit the crime.[97] X must intend to arouse in Y the intention to commit the crime, as well as the intention to put the criminal plan into action. *Dolus eventualis* is sufficient. The requirement that X must endeavour to arouse in Y the intention to commit the crime implies that it is impossible to incite somebody to commit a crime of negligence, such as culpable homicide.

(*b*) *X must believe that Y will have the required intention* X must know that Y will also act with the intention to commit a crime.[98] If X knows that Y is under a misconception with regard to one or more of the material elements of the crime, and that Y, should she act as requested, would therefore merely be an innocent go-between, X lacks the required intention to incite Y. Assume that X asks Y to make a certain entry in a register. X knows that the entry is false. Y

---

labour force of the Witwatersrand" (731A). In this case people were incited to go on strike as part of a demand for higher pay, although this was in contravention of certain statutory provisions.

94 *S v Peake* 1962 4 SA 288 (C).

95 *Q v Most* [1881] 7 QBD 244. It is submitted that the statement made by certain people in the South African political debate, namely "Kill the Boer, kill the farmer!" is without doubt punishable as incitement to murder. The statement contains sufficient identification of the type of crime that must be committed, namely murder, as well as sufficient identification of the group of people who are to be the victims, namely that part of the South African population knows as the "Boere". As indicated above, it is not required that X should know the identity of the people whom she incites to commit the crime.

96 This is also the view of German writers who discuss this question. See *Geppert* 1997 Jura 365; *Schönke-Schröder* note 8 ad a 26; *Jescheck* and *Weigend* 691; *Kühl ch* 20 par 178.

97 *Nkosiyana* 1966 4 SA 655 (A) 658.

98 *Milne and Erleigh (7)* 1951 1 SA 791 (A) 822.

does not know this, and X knows that Y does not know this. X can then not be found guilty of incitement.[99] The requirement in section 18, namely that X has to incite Y to commit a *crime*, is then not complied with. However, in such a case X may be charged and convicted as an indirect perpetrator if Y indeed makes the entry, on the ground that X used Y as only an innocent instrument to commit the crime.

(*c*) *Exceeding the limits of the incited crime* X's liability for incitement is limited to the incitement contained in her words of incitement. If Y commits a more serious crime not covered by X's words of incitement, X is not liable for the commission by Y of the more serious crime. If, for example, X incites Y to commit ordinary assault but Y thereafter commits assault with the intention to do grievous bodily harm, X cannot be found guilty of incitement to assault with the intention to do grievous bodily harm, as X's intention did not encompass the aggravating element of the crime committed by Y. The position is the same if X incites Y to commit theft, but Y thereafter goes further and commits robbery: X is then not criminally liable for incitement to commit the more serious crime of robbery.

If X incites Y to commit a more serious crime, such as robbery, but Y actually commits only theft (a less serious crime, the elements of which are contained in robbery), X can nonetheless still be found guilty of incitement to robbery, because incitement is completed the moment X has incited Y. The precise course of events thereafter does not influence X's culpability.

(*d*) *Incitement subject to a condition* The question arises whether X's words would qualify as incitement if that which X urges Y to do is subject to a condition. For example, X urges Y to go to Z and demand that Z gives her (Y) money. The words of incitement further stipulate that should Z refuse to give Y the money, Y must then assault Z and get the money by means of violence. It is submitted that such conduct by X amounts to incitement to robbery. In *Dick*[100] the then Rhodesian court expressly held that incitement which is subject to a condition nevertheless amounts to punishable incitement, and it is submitted that the position in South Africa is the same. In instances of conditional incitement, X so to speak "sows the seed" of the crime in Y's mind, and afterwards X does not have any control over the course of events. In these situations X's intention to incite is present in the form of *dolus eventualis.*

6 Incitement to commit the impossible What is the position if X incites Y to perform an act that cannot possibly amount to a crime? For example, X incites Y to put her hand in Z's pocket and steal money from the pocket. X believes that there is money in Z's pocket, but there is in fact no money in it. It is submitted that in a situation such as this X commits incitement to theft. In

---

99 *Milne and Erleigh supra* 822; *Segale* 1960 1 SA 721 (A) 731.

100 1969 3 SA 267 (R) 268G–H. In this case X asked Y first to give Z a certain substance, in the hope that it would induce Z, a woman who had previously lived with X, to return to X. However, X added that, should the substance not have the desired effect, Y must kill Z. X was found guilty of incitement to murder. In the English decision *Shephard* [1919] 2 KB 125, X said to Y, a pregnant woman, that she should kill the baby if it were born alive. The court found that X was guilty of incitement to murder, even though, at the moment when he uttered the words, it was not certain whether the baby would be born alive, and the words of incitement were thus subject to a condition.

situations such as these the courts ought to apply the same rule they apply in attempts to do the impossible. In attempts to do the impossible the courts apply a subjective approach: X is found guilty of attempt despite the fact that what she strives to attain is not physically possible.[101]

7 Chain incitement It is possible for X to commit incitement even though she does not incite Y1 to commit the crime herself, but to get somebody else, Y2, to commit the crime. It is also possible for X to commit incitement if she incites Y1 to go to Y2 and then request Y2 to incite Y3 to commit the crime. In such a situation one speaks of a "chain incitement". Chain incitement is in essence incitement to incitement. For example, woman X asks her son, Y1, to obtain a professional killer, Y2, to kill her husband, Z. The number of "links" in the "chain" makes no difference to X's liability for incitement. Recognition of the principle of chain incitement flows from the rule that incitement can also take place vicariously, that is, through the use of an intermediary.

In order to be guilty of incitement in the above examples, X need not know the identity of each of the links in the chain; more particularly, it is not required that she knows the identity of the final or main perpetrator. X may leave it to the next person in the row (or link in the chain) to decide who should be the main perpetrator.[102]

8 Impossible to incite a person who lacks criminal capacity Incitement is only possible in respect of someone who is endowed with criminal capacity. If X incites Y, who is mentally ill or a child lacking capacity, to commit a crime, knowing that Y is mentally ill or that she lacks capacity, X does not commit incitement. In the words of section 18(2)(*b*), X does not get somebody to "commit a crime", because a person who lacks criminal capacity cannot commit a crime. However, if Y does commit the act which she has been incited to commit, X may be found guilty as an indirect perpetrator, that is, somebody who commits the crime through the instrumentality of another.

9 Relationship between incitement, conspiracy and attempt

(*a*) *Attempt to commit incitement* Attempt to commit incitement is possible. The following are examples of conduct that amount to attempt to commit incitement: If X posts a letter to Y in which she incites Y to commit a crime, but the letter is intercepted in the post and does not reach Y, X's conduct amounts to attempt to commit incitement.[103] This is a case of so-called "completed attempt". X also commits attempted incitement if she utters inciting words at Y, but Y is deaf and therefore does not hear the words, or if Y is mentally ill and therefore does not understand the contents and meaning of the words, or if Y puts the inciting words in writing and hands the paper to Y, but Y is illiterate and thus cannot read what was written.

(*b*) *Incitement to attempt* Incitement to commit, not the main crime, but to attempt to commit the main crime, is also possible, as in the following example: X gives Y a firearm loaded with blank cartridges and asks Y to shoot Z. X

---

101 *Supra* VIII B 8. The leading case on this subject is *Davies* 1956 3 SA 52 (A). Support for the proposition stated in the text may also be found in *Dick* 1969 3 SA 267 (R) 269B–H.

102 *Kühl* ch 20 par 188; *Schönke-Schröder* note 13 ad a 26. For more particulars on "chain incitement", see Snyman 2005 THRHR 563 568–569.

103 *Nkosiyana* 1966 4 SA 655 (A) 650A.

knows that the gun is loaded with blank cartridges, but Y does not know this. If Y should aim the gun at Z and pull the trigger, it would be impossible for Y to kill Z, and Y would thus merely commit attempted murder. It is submitted that in this situation, X commits incitement to attempted murder.

(*c*) *Overlapping between incitement and attempt* In some earlier cases the view was held that incitement can never amount to an attempt,[104] but this view was – quite correctly – not followed by the Appellate Division in *Port Shepstone Investments (Pty) Ltd.*[105] It is submitted that certain acts of incitement may simultaneously qualify as attempts to commit the main crime. Whether this is the case, depends on the circumstances of each case. If X's conduct whereby she incites Y is so close to the commission of the main crime that it qualifies as attempt in terms of the rules governing attempt, the conduct may be punishable as attempt. For example, X incites Z, who is armed, to murder Y. Z is already in Y's presence. X's conduct is, in respect of time and place, so close to completion of the main crime that it may qualify as an act of execution (as opposed to a mere act of preparation), and thus as attempt.

(*d*) *Overlapping between incitement and conspiracy* If X incites Y to commit a crime, and Y agrees to do so, there is a conspiracy between X and Y. There seems to be no reason why conspiracy to commit incitement is not possible. Likewise there seems to be no reason why incitement to commit conspiracy is not possible; in fact, the inciter usually tries to obtain the incited person's cooperation or consent to commit the crime. In *Zeelie*[106] Schreiner JA was of opinion that it is wrong to assume that all conspiracies necessarily imply mutual incitement between the parties, "for the party who first opened negotiations may have proceeded so tentatively and the other party may have been so predisposed to concurrence that there may . . . have been nothing amounting to an offer or proposal, which I take to be the minimum required for an incitement".

10 Punishment Section 19(2)(*b*) of the Riotous Assemblies Act 17 of 1956 provides that if the inciter is found guilty, she "is liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable". This provision determines only the maximum punishment for incitement.

Normally the inciter gets a lighter punishment than the actual perpetrator, just as someone who only attempts to commit the crime or only conspires to do so, gets a lighter punishment than the actual perpetrator. Committing these acts merely anticipates the commission of the eventual completed crime. In fact, the inciter's conduct is even further removed from the eventual completed commission of the crime than that of the conspirators, and their conduct is again further removed from the eventual committing of the crime than that of the person who is only attempting to commit the crime.

However, there may be cases in which a court may decide that the inciter deserves a heavy punishment, such as where the evidence reveals that she was the master brain behind a whole criminal scheme, that she manipulated other poor, unintelligent or unsophisticated people to do her dirty work, or that she enriched herself financially through the commission of the criminal scheme.

---

104 *Sharpe* 1903 TS 868 875; *Misnum* 1906 TS 216 218–219; *Nhlovo* 1921 AD 485.
105 1950 4 SA 629 (A) 639.
106 1952 1 SA 400 (A) 402C–F.

PART TWO

SPECIFIC CRIMES

CRIMES AGAINST THE STATE AND THE ADMINISTRATION OF JUSTICE

CHAPTER

IX

CRIMES AGAINST THE STATE

A HIGH TREASON

1 Definition A person commits high treason if, owing allegiance to the Republic of South Africa, she unlawfully engages in conduct within or outside the Republic, with the intention of

(*a*) overthrowing the government of the Republic;

(*b*) coercing the government by violence into any action or inaction;

(*c*) violating, threatening or endangering the existence, independence or security of the Republic; or

(*d*) changing the constitutional structure of the Republic.[1]

---

1 The precise reasons for this definition are to be found in the discussion which follows of the requirements for the crime. For an exposition of the definitions of this crime in the old Roman-Dutch, namely authorities, the case law and by modern South African authors, see *Mayekiso* 1988 4 SA 738 (W) 742–750. The definition offered in the text relies heavily on the excellent definition in clause 2(1) of the draft bill "to codify the law relating to the common-law crimes of high reason, sedition and public violence" drawn up in 1976 by the SA Law Commission (RP 17/1976). The relevant portions of the definition read as follows:

"2. (1) Any person who, owing allegiance to the Republic, commits an act, within or outside the Republic, with the intention of–

(*a*) unlawfully impairing, violating, threatening or endangering the existence, independence or security of the Republic;

(*b*) unlawfully changing the constitutional structure of the Republic;

(*c*) unlawfully overthrowing the government of the Republic; or

(*d*) unlawfully coercing by violence the government of the Republic into any action or into refraining from any action,

shall be guilty of the crime of high treason . . .

[*continued*]

This definition reflects the law immediately before the coming into operation of the present Constitution of 1996. Certain provisions of the Bill of Rights in the Constitution may result in at least certain aspects of the above definition no longer being valid. In the discussion which follows, the common law relating to high treason will be analysed without considering the provisions of the Bill of Rights, but at the end of the discussion of the crime, in paragraph numbered 11, the question as to the possible influence of the Bill of Rights on the contents of the crime will be discussed.

---

(2) Without derogating from the general purport of subsection (1)–

(*a*) any person referred to in that subsection who within or outside the Republic unlawfully and intentionally–

(i) takes up arms against the Republic;

(ii) takes part in an armed revolt or rebellion against the Republic or instigates such revolt or rebellion;

(iii) causes any part of the Republic to secede from the Republic or attempts to concert with others to cause any part of the Republic so to secede;

(iv) joins or performs service under an enemy that wages war against the Republic;

(v) assists an enemy at war with the Republic or makes propaganda for such enemy or supplies such enemy with information that may be useful to it in its war effort against the Republic;

(vi) after becoming aware of any act by any other person that constitutes high treason in terms of this section, fails to report such act forthwith to the police or other authorities, unless he has reason to believe that the police or other authorities are already aware thereof; or

(*b*) being a citizen of the Republic who, when the Republic is in a state of war, leaves the Republic and settles in the territory of the enemy of the Republic,

shall be guilty of the crime of high treason.

(3) Without restricting the circumstances in which any person owes allegiance to the Republic, any person who is a citizen of the Republic or is domiciled or resident in the Republic or is the holder of a valid South African passport shall owe allegiance to the Republic."

It is submitted that, although the bill containing the above definition was not submitted to parliament, this definition of the crime (especially the provisions of clause 2(1)) is, in broad outline, worth following. It succeeds in succinctly and accurately describing the salient elements of the crime in our law. It should be borne in mind that the members of the seven-member commission that drew up the definition included both a judge of appeal who subsequently became Chief Justice (Rabie, JA, as he then was) and a judge-president (James, JP, the then Judge-President of Natal). In *Banda* 1990 3 SA 466 (B) 479B Friedman J described this definition as "excellent" and in fact defined the crime (479D) in terms substantially similar to those in the definition of the law commission quoted above.

As far as par (*b*) in the definition in the text is concerned, the view taken in s 2(1)(*d*) of the definition given by the law commission, namely that the coercion of the government should be *by violence*, is adhered to. If violence is not required in this way of committing the crime, the definition of the crime becomes too wide and vague. On the other hand it should be noted that violence is required in the definition only in cases of coercion of the government. There is no general rule that violence against the state is a necessary element of treason (*Mayekiso* 1988 4 SA 738 (W)). As far as par (*c*) in the definition in the text is concerned, the law commission in s 2(1)(*a*) of its definition speaks of "impairing, violating, threatening or endangering" (the existence etc of the Republic). It is submitted that "impair" and "violate" mean substantially the same and that it is, therefore, unnecessary to incorporate both terms into the definition.

2 Elements of the crime The elements of the crime are the following: (*a*) the perpetrator must *owe allegiance* to the Republic; (*b*) *conduct* (act or omission); (*c*) *unlawfulness*; and (*d*) *intention*.

3 Historical High treason stems from the Roman law crime known originally as *perduellio*, and later as *crimen laesae maiestatis*. After the fall of the Roman republic, in other words during the time of the emperors, *crimen laesae maiestatis* was used not merely to describe high treason but also as a generic term to describe all the ways in which the *maiestas* or supreme power of the state or emperor could be impaired. The term *crimen laesae maiestatis* had both a broad and a narrow connotation. According to the broad connotation it referred to all crimes against the state or the supreme power (*maiestas*) within the state. According to its narrow connotation it referred to only one of the crimes against the state, namely high treason.[2]

The Roman-Dutch authorities also regarded *perduellio* or high treason as a species (in fact the most important species) of the genus *crimen laesae maiestatis*. The other species of the genus were sedition, *crimen laesae venerationis* (impairment of the dignity of the head of state), and a variety of other acts whereby the state's *maiestas* was impaired, such as coining and the raising of a private army.[3] In both Roman and Roman-Dutch law these different forms of *crimen laesae maiestatis* were ill-defined, and their descriptions frequently overlapped.

4 *Maiestas* no longer required A feature of the definition of the crime in Roman-Dutch law is the rule that the crime could be committed against only a state possessing *maiestas*. This term, though somewhat vague, denoted in principle the idea of supreme power or sovereignty. A state which recognised a still higher authority within its territory did not possess *maiestas*, and, therefore, high treason could not be committed in respect of such a subordinate state.[4] It is submitted that this problem is now merely of academic importance, for since at least 1961 it has been settled beyond all doubt that South Africa is a sovereign independent state, no longer acknowledging any higher authority. For this reason it is unnecessary today to require that the state should possess *maiestas*.[5]

5 The perpetrator Only persons owing allegiance to the Republic can commit high treason.[6] The category of people owing allegiance to the Republic is wider than the category of people who are citizens of the Republic. Persons who owe allegiance to South Africa include citizens, people who have sworn an

---

2 On Roman law, see D 48 4; C 9 8; Gonin 1951 *THRHR* 1 ff.

3 Voet 48 4 2, 3; Moorman 1 3 1, 2; 1 4 3, 1 2 8; Decker 4 33 1; Matthaeus 48 2 2, 48 2 1 7; Van der Linden 2 4; Van Leeuwen *Cens For* 5 2 1, *RHR* 5 3 1; Huber *HR* 6 15.

4 Huber *HR* 6 15 4–6, 8; Moorman 1 2 1, 2, 5, 7, 12; Voet 48 4 1, 2; Matthaeus 48 2 1 1–6; *Christian* 1924 AD 101; *Banda* 1989 4 SA 519 (B) 521–522.

5 Snyman 1979 *De Jure* 167 169–170; 1980 *SALJ* 14 17–18.

6 *De Jager v Attorney-General of Natal* (1907) 1904–1907 All ER 1008 (PC); *Neumann* 1949 3 SA 1238 (Sp Ct); *Mange* 1980 4 SA 613 (A) 619F; *Tsotsobe* 1983 1 SA 856 (A) 866–867; *Magxwalisa* 1984 2 SA 314 (N) 323E; *Gaba* 1985 4 SA 734 (A); *Passtoors* (unreported, WLD 15.05.1986, discussed by Snyman 1988 *SACJ* 1 ff). For a detailed discussion of this requirement see Snyman 1988 *SACJ* 1.

oath of allegiance to this country,[7] people who are domiciled here and also people who are resident here although they do not intend to stay permanently. In order to prove that a person owes allegiance to the Republic it is sufficient for the state to prove that she was resident here.[8]

The category of persons who do not owe allegiance includes[9] foreigners who have never set foot in the Republic, casual tourists from abroad who visit the country for a brief period only, foreign businessmen or -women who visit the Republic for a brief period of time for business reasons, and the crews of foreign aircraft or ships who stay in the country for a brief period of time while they wait for a flight back or, for example, for repairs to the aircraft or ship to be completed.

It is submitted that the rationale for the requirement lies simply in the undesirable practical consequences which would flow from its absence, coupled with considerations such as birth in the country or the voluntary performance of an act (such as entering the country and residing there) which tend, broadly speaking, to *associate a person with the character, aspirations and fortunes of that country*.[10] This latter consideration explains why, for example, members of a foreign diplomatic mission in the Republic do not owe allegiance to the Republic even though they may reside here for a relatively long time, and why a person who is neither a citizen of a country nor resident there may be deemed to owe it allegiance if she is in possession of a passport of that country which she uses abroad.[11]

It is submitted that migrant labourers from abroad working and residing in South Africa, as well as the huge number of illegal immigrants who find themselves in this country, owe allegiance to the Republic.

6 Acts of high treason

(*a*) *Role of intention in determining whether there is a treasonable act* It is impracticable to posit a certain type of act as a requirement for the crime, because the hallmark of high treason is not a certain type of act but the hostile intent with which an act is committed. Any act, however innocent it may seem to be when viewed objectively, may constitute high treason if it is committed with the necessary hostile intent.[12]

From a dogmatic point of view, high treason is a good example of a crime which is structured in such a way that the intention cannot be regarded as exclusively forming part of the element of culpability. It also forms part of the definitional elements of the crime. Put differently, the intention forms part of the "wrongdoing" in the structure of the crime. ("Wrongdoing" comprises all the

---

7 *Ex parte Schwietering* 1948 3 SA 378 (O); *Neumann supra*.
8 *Passtoors supra*; *Zwane (3)* 1989 3 SA 253 (W) 256I.
9 *Prozesky* (1900) 21 NLR 216 218; *Badenhorst* (1900) 21 NLR 227 288; *Neumann supra* 1256, 1264, 1265; *Geyer* (1900) 17 SC 501 506. See further the detailed discussion by Snyman 1988 *SACJ* 1, especially 7–15.
10 Snyman 1988 *SACJ* 1 16.
11 *Joyce v DPP* [1946] 1 All ER 186 (HL).
12 *Viljoen* 1923 AD 90 92; *Wenzel* 1940 WLD 269 272; *Mardon* 1947 2 SA 768 (Sp Ct) 774; *Adams* 1959 1 SA 646 (Sp Ct) 666; *Hogan* 1983 2 SA 46 (W) 57C; *Banda* 1989 4 SA 519 (B).

requirements for liability other than culpability. In a broad sense it is equivalent to what the courts call the *actus reus*.) Otherwise it is impossible to identify the conduct which must be unlawful. It is exactly the presence or absence of X's intention or knowledge which determines whether conduct which, viewed from the outside, may be completely innocent, yet nevertheless constitutes an act of high treason.

This point may be illustrated as follows: Y asks X, who is walking in a street in Pretoria, to show her the way to the Union Buildings. X does this. Has X in so doing committed high treason? Here one has to distinguish between the following two possibilities: Had X not known who Y was, and had she thought that Y was merely a tourist who wished to admire the Union Buildings' architecture, she has obviously not committed high treason. If, on the other hand, she had recognised Y as the person who was striving to overthrow the government by violence, and who wanted to get to the Union Buildings in order there to kill the head of state as part of her scheme to overthrow the government, and had she nevertheless proceeded to explain to her how to reach the Union Buildings, she has indeed committed high treason. Viewed objectively, that is, from the outside, there is nothing to indicate that X had committed the crime. It is only X's subjective state of mind (knowledge, intention) that brings her act within the definitional elements of the crime.[13]

(*b*) *Committing high treason by omission* Even an omission to act which is accompanied by the requisite hostile intent constitutes high treason. Every person who owes allegiance to the state and who hears or otherwise becomes aware of the fact that high treason is being committed or that there is a plan to commit it, has a duty to communicate this fact to the authorities as soon as possible. Failure to do so constitutes high treason.[14]

(*c*) *Acts of high treason in time of war* High treason may be committed in times of both war and peace. The following are examples of high treason committed in times of war: assisting the enemy by fighting for it against the Republic[15] or against one of its other enemies;[16] furnishing information to the enemy;[17] committing acts of sabotage against the Republic, thereby weakening the Republic's resistance;[18] broadcasting propaganda on behalf of the enemy;[19] providing invading enemy forces with food, shelter or military equipment,[20] or voluntarily accepting a post under the command of the enemy, for example, as

---

13 This principle is important for the purposes of the systematic description of the general requirements of criminal liability: it proves that subjective considerations are not limited to the determination of culpability, but also in determining wrongdoing – ie, the unlawful act complying with the definitional elements (see *supra* III A 7–8; IV A 10). This is one of the considerations which proves the untenability of the psychological theory of culpability (see *supra* V A 9, 10).

14 *Labuschagne* 1941 TPD 271 275; *Banda* 1990 3 SA 466 (B) 512A–B.

15 *Badenhorst* (1900) 21 NLR 227; all the "Cape Treason Trials" reported in 1901 (vol 18) *CLJ* 164; *Leibbrandt* 1944 AD 253.

16 *Mardon* 1947 2 SA 768 (Sp Ct) (during the Second World War X fought for Germany against Russia).

17 *Leibbrandt* 1944 AD 253 281.

18 *Leibbrandt supra* 281.

19 *Holm* 1948 1 SA 925 (A); *Strauss* 1948 1 SA 934 (A).

20 *Boers* (1900) 21 NLR 116.

guard, interpreter,[21] or even as a cook.[22] A South African subject who in time of war leaves the Republic and settles in enemy country also commits treason, for she thereby places herself under the enemy's protection and owes the enemy allegiance.[23]

(*d*) *Acts of high treason in times of peace* Examples of high treason committed in times of peace are the following: organising, taking part in or instigating an armed revolt or rebellion against the Republic;[24] inviting an attack by an outside enemy;[25] taking up arms to coerce the government to follow a certain course of action or to refrain from certain action;[26] endeavouring to bring about the unconstitutional secession of a certain area of the Republic from the rest of the Republic;[27] murdering, or attempting, conspiring or inciting to murder the political or military leaders of the country;[28] plotting the overthrow of the government or the replacement of the constitution by unconstitutional means,[29] attempting to overthrow or endanger the government by undergoing military training abroad and, upon returning to the Republic, setting out to achieve these aims by, for example, committing acts of sabotage, attacking a police station or establishing a secret military base,[30] and concealing quantities of weapons in a certain place for later use by people wishing to overthrow the government.[31]

(*e*) *General* Violence against the state, either actual or contemplated, is not a necessary element of the crime.[32] The act of high treason may be committed either within or outside the territory of the Republic of South Africa.[33]

7 Unlawfulness It is this element of the crime which prevents a member of an opposition party, who strives for a change of government or of the constitution in a lawful, constitutional way, from committing high treason.[34] An act which would otherwise amount to treason may be justified by coercion, provided the circumstances are such that the rules governing this defence are complied with.

8 Intention The intention which must accompany the act can be described as the definitive element of high treason. It is known as *animus hostilis* or hostile intent.[35]

---

21 *Vermaak* (1900) 21 NLR 204 (count 15); *Randelhoff* (1907) 22 NLR 59.
22 *Dohne* (1901) 22 NLR 176.
23 *Bester* (1900) 21 NLR 237 239; clause 2(2)(*b*) of the bill mentioned and quoted *supra* fn 2.
24 *De Wet* 1915 OPD 157. (The rebellion of 1914.)
25 *Phillips* (1896) 3 OR 216 (the Jameson raid into the Transvaal).
26 *Erasmus* 1923 AD 73; *Viljoen* 1923 AD 90.
27 *Erasmus supra* 89, where Kotzé JA speaks of the overthrow *in totum vel pro parte* of the existence or independence of the state.
28 D 48 4 1; Moorman 1 3 6; Voet 48 4 3; *Endemann* 1915 TPD 142 147.
29 *Leibbrandt supra*; *Lubisi* 1982 3 SA 113 (A) 124F.
30 *Tsotsobe* 1983 1 SA 856 (A); *Lubisi supra* and cf *Mange* 1980 4 SA 613 (A).
31 *Passtoors* (unreported, WLD 15.05.1986), discussed by Snyman 1988 *SACJ* 1 ff.
32 *Mayekiso* 1988 4 SA 738 (W) 751D.
33 *Strauss supra* 937; *Neumann* 1949 3 SA 1238 (Sp Ct) 1248–1249.
34 *Banda* 1990 3 SA 466 (B) 474.
35 On *animus hostilis* see D 48 4 11; Voet 48 4 3; Matthaeus 48 2 2; Moorman 1 3 2, 4; 1 4 3; *Erasmus* 1923 AD 73; *Viljoen* 1923 AD 90 92, 97; *Christian* 1924 AD 101 105; *Gomas* 1936 CPD 225 228; *Leibbrandt* 1944 AD 253 278 ff; *Banda* 1990 3 SA 466 (B) 474–479.

All authorities agree that hostile intent is present if it is X's intention to overthrow the state itself.[36] For the purposes of high treason the government is completely identified with the state,[37] therefore, X acts with hostile intent if she intends to overthrow the government unlawfully.

What is the position if X commits her act not with the intention of overthrowing the government, but in order to achieve a goal which seems to be less serious, such as merely to endanger the state's security or independence, or merely to coerce the state (government) to adopt a certain course of action? In *Erasmus*[38] the Appellate Division rejected the narrow interpretation of hostile intent, according to which such intent must be limited to an intention to overthrow the government; instead, the court accepted a broader interpretation of the term, according to which the meaning of hostile intention may include an intention to achieve a goal which may at first glance appear to be less drastic or dangerous, as explained above.

> A fair interpretation of the relevant authorities is that hostile intent comprises the following, namely an intention (unlawfully) (*a*) to overthrow the government of the Republic; (*b*) to coerce the government by violence into any action or inaction; (*c*) to violate, threaten or endanger the existence, independence or security of the Republic; or (*d*) to change the constitutional structure of the Republic.[39]

It is submitted that although violence is not a general prerequisite for a conviction of this crime,[40] it ought to be required where X has the intention as described in (*b*) above, otherwise the definition of the crime would be too wide and vague. A hypothetical example of an act committed with the intention of coercing the government into a certain course of action is where X and her co-perpetrators arrest high-ranking government officials (such as cabinet ministers), hold them hostage and threaten to kill them if the government refuses to yield to certain demands of X such as to release certain prisoners from gaol.[41] A hypothetical example of an act committed with the intention of unlawfully changing the constitutional structure of the Republic, is where X commits an act aimed at replacing a democratic, multi-party form of government set out in the constitution, with a dictatorship, without achieving such a transformation in a constitutional way, that is, without first obtaining in an election or a referendum the consent of the population to such a change.

---

36 Voet 48 4 3; Moorman 1 3 4, and generally all the authorities referred to in the previous footnote.

37 *Leibbrandt supra* 280, 281; *Zwane (3)* 1989 3 SA 253 (W) 258; *Banda* 1990 3 SA 466 (B) 474I–J.

38 1923 AD 73.

39 Matthaeus 48 2 2 9; Moorman 1 3 2, 18, 19; Van der Linden 2 4 2; *De Wet* 1915 OPD 157 158; *Erasmus* 1923 AD 73 82, 88; *Wenzel* 1940 WLD 269 271; *Leibbrandt* 1944 AD 253 261, 280; *Neumann* 1949 3 SA 1238 (Sp Ct) 1263; *Zwane (3)* 1989 3 SA 253 (W) 259–260; *Banda* 1990 3 SA 466 (B) 479. See also cl 2(1) of the bill quoted *supra* fn 1.

40 *Mayekiso* 1988 4 SA 738 (W) 751D.

41 Cf *Erasmus* 1923 AD 73, in which X did not have the intention to overthrow the government, but only to coerce the government to yield to their demands in an industrial dispute.

X's motive must not be confused with her intention. Her motive (ie, the ultimate aim of her conduct) may be to create a society or a constitution which in her opinion is more just than the existing one, but this will not avail her, if, in fact, she harbours a hostile intent, as described above.[42]

9 Conviction of attempt, conspiracy, incitement, or of being an accomplice or accessory after the fact is unlikely The state need not actually be overthrown before high treason is committed. If it were a requirement for the crime that the state must cease to exist or lose its independence through the act, it would be impossible to commit the completed crime, because there would then be no state or government left to prosecute such an "act of high treason". All acts of high treason are essentially attempts to destroy the existence, independence or safety of the state. These acts are nevertheless punishable as completed, and not attempted, high treason.

It is, therefore, difficult to envisage a case which would amount to only attempted high treason. One can think of only one example in which X might be convicted of attempted high treason: this is where X commits a treasonable act (such as attacking a police station with rocket launchers) whilst under the impression that she owes allegiance to the state, whereas she in fact owes *no* allegiance to the state. This would be a case of attempting to commit the impossible.[43] This example is, however, exceptional. If one disregards this rather theoretical possibility and concentrates on the typical case which serves before the courts, one must conclude that in practice attempted high treason virtually never occurs.[44]

Because of the wide definition of the crime not only attempt, but also conspiracy and incitement to commit high treason are unlikely to occur in practice. With the exception of the unusual example mentioned above (where X wrongly thinks that she owes allegiance) such acts are simply acts of high treason.[45] For the same reason no difference is made in high treason between perpetrator, accomplice and accessory after the fact, because every person who, with hostile intent, assists in the perpetration of the crime, whether before or after the event, complies with the wide definition of the crime.[46]

10 Punishment Until 1997 a court could impose the death sentence upon somebody convicted of high treason, but in that year section 277(1)(*b*) of the Criminal Procedure Act, which provided for the imposition of the death sentence, was repealed by Act 105 of 1997. The term of imprisonment which a court may impose upon a conviction of high treason is discretionary.

11 Effect of Bill of Rights on existing legal provisions relating to high treason There is a close relationship between the definition of high treason

---

42 *Leibbrandt supra* 281; *Lubisi* 1982 3 SA 113 (A) 124H; *Zwane (3)* 1989 3 SA 253 (W) 257B; *Banda* 1990 3 SA 466 (B) 476B–C.

43 This would be a case where the impossibility resides in the subject – see *supra* VIII B 8.

44 *Wenzel* 1940 WLD 269; *Banda* 1990 3 SA 466 (B).

45 *Leibbrandt supra* 273, 288, 289 in which it was held that the signing of a blood oath to overthrow the government is, in itself, high treason; *Zwane (3) supra* 256F–G; *Banda supra* 474C–F.

46 *Adams* 1959 1 SA 646 (Sp Ct) 660–661; *Banda supra* 474F.

applicable in a particular state and the form of government of such a state. The provisions of Roman-Dutch law relating to high treason were created in Rome about two thousand years ago, during a time when the form of government in Rome was strictly autocratic. These provisions were created to protect and enhance the autocratic form of government of the time. The writers on Roman-Dutch law lived for the most part at a time when the form of government was likewise autocratic, and these writers were accordingly content simply to accept uncritically the Roman-law provisions relating to *perduellio* (high treason). The principles relating to high treason thus set out above are the principles which applied in South Africa until the coming into operation of the Constitution of 1996.

The vaguer the definition of an element of a crime, the more difficult it becomes for a legal subject to ascertain beforehand what concrete conduct falls within the ambit of the crime. In this way the important *ius certum* rule of the principle of legality, which is linked to an accused's right to a fair trial,[47] is infringed.

What is disconcerting about the definition of the crime set out and discussed above, is the vague, nebulous nature of certain aspects of the definition, such as the rule that any conduct committed with the intent to threaten or endanger the independence or security of the state (by which is meant the government)[48] constitutes high treason. It is quite conceivable that a government may resort to this aspect of the definition of the crime as a pretext for suppressing activities it perceives to be a threat to its future. In this way basic rights such as the right to freedom of expression,[49] the right to assemble or to demonstrate,[50] and the right to make political choices freely[51] may be prejudiced. Intentionally to omit to pay income tax (or even merely to pay it timeously) is an example of conduct which is ostensibly far removed from what would ordinarily be regarded as treasonable conduct. Yet, can conduct such as this not conceivably be construed as an act aimed at endangering the independence or security of the government?

It is not contended that the whole crime of high treason is unconstitutional or has no right of existence. Any self-respecting state will introduce measures to protect its continued existence and to combat by way of the criminal sanction efforts aimed at overthrowing the constitution or the body politic. There can be no objection to regard acts such as waging war against the Republic, providing aid to an enemy waging war against the Republic, unlawfully disclosing military secrets to the enemy or attempting to overthrow the lawful government by force, as treasonable acts.

A possible way of changing the common-law definition of high treason given above[52] in order to render it compatible with the Constitution, is to change the

---

47 S 35(3), especially 35(3)(*a*) and (*l*) of the Constitution of 1996. On the *ius certum* rule of the principle of legality, see *supra* I F 9.

48 *Supra* par 8.

49 S 15(1) and 16(1) of the Constitution.

50 S 17 of the Constitution.

51 S 19(1) of the Constitution.

52 *Supra* par 1.

phrase numbered (*c*) in the definition, which contains so many vague concepts, by the addition of the following words at the end thereof: "provided the conduct is of such a nature that it there is a *real* possibility that it will *seriously* violate, threaten or endanger the existence, independence or security of the Republic". (The reason why two words in the sentence have been italicised is merely to draw attention to how the possibly overbroad expressions in the phrase may be rendered constitutional.)

B SEDITION

1 Definition Sedition consists in unlawfully and intentionally:

(*a*) taking part in a concourse of people violently or by threats of violence challenging, defying or resisting the authority of the state of the Republic of South Africa; or

(*b*) causing such a concourse.[53]

2 Elements of the crime The elements of the crime are the following: (*a*) *taking part in, or causing a concourse of people*; (*b*) which is aimed at *violently* (*c*) *challenging, defying or resisting the authority of the state*; (*d*) *unlawfulness and* (*e*) *intention*.

3 Historical In Roman and Roman-Dutch law sedition or "oproer" was undoubtedly regarded as a form of *crimen laesae maiestatis*, but there is considerable contradiction amongst the Roman-Dutch writers on: (*a*) whether it formed a separate crime *eo nomine*, and, if so, (*b*) in what way it differed from the other species of *crimen laesae maiestatis*. Sometimes it was regarded as being the same as high treason and at other times it was confused with public violence.[54]

4 Sedition and other crimes against the state It is now settled that sedition constitutes a separate crime against the state. It differs from high treason in the

---

53 The definition is based on the definition of sedition contained in the "Bill to codify the law relating to the common-law crimes of high treason, sedition and public violence" drawn up in 1976 by the SA law commission (RP 17/1976) but which was not submitted to parliament. See the remarks on this bill *supra* IX A 1 fn 1. This definition is a true reflection of our common law, as will appear from the discussion which follows. It is submitted that it is unnecessary to refer in the definition to the state's *maiestas*, for the reasons advanced *supra* IX A 4. In *Twala* 1979 3 SA 864 (T) 869 and *Zwane (1)* 1987 4 SA 369 (W) 374G–H the following "elements" of the crime were required: "A gathering which is unlawful, with intent (not necessarily hostile) to defy or subvert the authority (*maiestas*) of the state." It is submitted that this cannot be accepted as a definition of the crime, for reasons that will appear later in the discussion of the crime. See the criticism of this definition of the crime by Snyman 1980 *SALJ* 14 17 ff.

54 *Seditio* is treated in D 48 4 as a form of *crimen laesae maiestatis*, and is illustrated by the case of a number of people gathering in the city with weapons or sticks, or occupying public places or temples: D 48 4 1. This illustration is repeated by the Roman-Dutch writers. Voet 48 4 3 and Moorman 1 3 4 include sedition in their discussions of high treason. Both Moorman 1 3 5 and Matthaeus 48 2 2 5 distinguish between the ringleaders and inciters of the *turba* (crowd) on the one hand, and the other members of the *turba* on the other: the people in the first category are guilty of high treason, but those in the latter category are not. Matthaeus *ibid* seems to treat sedition as a form of high treason. Van der Linden 2 4 5, however, treats sedition as a form of public violence.

following respects: (*a*) For high treason a hostile intent (*animus hostilis*) as defined above[55] is required, whereas for sedition only an intention to resist or challenge the authority of the state is required.[56] (*b*) High treason can be committed by one person, whereas sedition can be committed only by a number of persons acting together. (*c*) High treason can be committed only by somebody who owes allegiance to the Republic, whereas sedition can be committed even by somebody who owes no such allegiance. Sedition differs from public violence in that it is aimed at the authority of the state, whereas public violence is aimed at public peace and tranquillity.[57]

The interests protected by the three crimes of (*a*) high treason, (*b*) sedition and (*c*) public violence, namely (*a*) the existence, independence and safety of the state, (*b*) the authority of the state and (*c*) public peace and tranquillity respectively, are sometimes difficult to distinguish from one another, and, therefore overlapping of these offences is not uncommon. Sedition, for example, often involves a disturbance of public peace, order and tranquillity, and an offender may then be charged with either of these two crimes. The arbitrary nature of the distinction between high treason and sedition is particularly evident if one considers that challenging the state's authority can in all probability not be divorced from acts by which the government is coerced into a certain line of action or which threaten its safety. If this is so, then there is no difference in this respect between the two crimes.[58]

5 Number of persons taking part Sedition can be committed only if a number of people gather together or, as it is sometimes expressed, if there is a "concourse of persons".[59] In *Twala*[60] the view was expressed that even two persons are sufficient to commit the crime. It is submitted that more than two people are required. If one reads the authorities carefully, it is clear that a mere unlawful gathering of a number of people – especially when there are only two people – falls short of what is understood as sedition in our common law. Something more sinister, menacing or threatening, definitely involving more than just two persons, is required.[61] It is neither possible nor feasible to specify, as a requirement, a certain minimum number of persons: the precise number of people depends upon circumstances such as time and place and the behaviour and demands of the persons gathered together. It is best simply to speak of an unspecified number of persons, and to keep in mind that Matthaeus[62] required at least ten.

---

55 *Supra* IX A 8.

56 *Endemann* 1915 TPD 142 147; *Viljoen* 1923 AD 90 92, 97.

57 *Viljoen supra* 94, 98; *Twala supra* 868. As to public violence, see *infra* IX C.

58 *Viljoen supra* 94; *Malan* 1915 TPD 180 183, and see Snyman 1980 *SALJ* 14 19.

59 *Endemann supra* 147, 151; *Malan supra* 185.

60 1979 3 SA 864 (T) 869F.

61 Matthaeus 48 2 2 5 speaks of a "*tumultus*", "*turba*" or "*coetus multitudinis*"; Van der Linden 2 4 5 of "oproer"; Moorman 1 3 4 of "toevloet van volk tot oproer", and Damhouder 63 of "commotie". In *Endemann supra* 147, 151 the court spoke of "a concourse of people", or "something in the nature of an insurrection" (152). In *Viljoen supra* 98 the Appellate Division described the crime as "a tumult or commotion" or "a rebellion". See the discussion by Snyman 1980 *SALJ* 14 20–21.

62 48 2 2 5.

6 Violence or threats of violence A reasonable interpretation of our authorities is that the gathering of people must be accompanied by violence or threats of violence.[63] The view expressed in *Endemann*,[64] *Twala*[65] and *Zwane*[66] that violence is not a necessary requirement for sedition cannot be endorsed. If people gather unlawfully but disperse peaceably at the request of the police they can hardly be guilty of sedition. It is submitted that the act must be accompanied by actual or threatened violence in order to amount to sedition. If one carefully considers the examples of sedition mentioned in the authorities, as well as the cases of sedition in our case law, it is clear that the acts were always accompanied by real or threatened violence.[67] The view of the Transvaal court in the three cases cited, that sedition need not be accompanied by violence, is in conflict with the common-law sources already referred to and leads to the conclusion that gatherings may amount to sedition merely because they are unlawful or aimed against the government. One can, however, agree with the view expressed in *Zwane (1)*[68] that the gathering need not necessarily be riotous.

7 Challenging the state authority The mere fact that a number of people gather with the intention of committing a crime or of breaking the law is not yet sufficient to constitute sedition; for the crime to be committed there must be mutual conduct by a group of persons whereby the authority of the state is challenged.[69] Although it is mostly the case, the defiance of the state need not necessarily take place openly in the sense that the mutual defiance of the state takes place in the face of the police.[70] In *Zwane (3)*[71] the court held that the state could charge the accused with sedition on the strength of the following facts: they set up a so-called "people's court" in which they unlawfully tried and sentenced other people, thereby subjecting them to an unlawful judicial system in defiance of the state's authority to enforce its laws by means of the official, lawful judiciary, police, prosecuting and other authorities empowered to carry out sentences.

8 Causing a concourse A peculiarity of the crime is that not only those who take part in the gathering but also those who incite, instigate or arrange it are guilty of the crime, provided that the gathering or "riot" does in fact follow upon

---

63 Van der Linden 2 4 5 requires for sedition "het aanwenden van middelen van geweld en dwang". D 48 4 1, which exercised such a strong influence on our common-law writers, spoke of "*quo armati homines cum telis lapidibusve in urbi sint*". See the echoes of this text in Matthaeus 48 2 2 5 and Damhouder 63. Even the illustration in Damhouder's discussion of sedition portrays an armed fight. *Hunt-Milton* 53 likewise requires "some element of violence or threats of violence". Clause 3 of the bill referred to *supra* fn 1 requires "persons violently resisting or defying the authority of the Republic".

64 1915 TPD 142 147.

65 1979 3 SA 864 (T) 869G. For criticism of this aspect of the decision, see Snyman 1980 *SALJ* 14 21–22.

66 *Zwane* (*1*) 1987 4 SA 369 (W) 372G–H; *Zwane (3)* 1989 3 SA 253 (W) 261C.

67 See eg the references to violence or threatened violence mentioned in *Zwane (3)* 1989 3 SA 253 (W) 291B–C, 297C–D, 298D–G, 308B, 315I–317D.

68 1987 4 SA 369 (W) 374G.

69 *Zwane (3)* 1989 3 SA 253 (W) 261E.

70 *Zwane (3)* 1989 3 SA 253 (W) 261F.

71 1989 3 SA 253 (W).

the incitement or instigation.[72] It is for this reason that the definition of the crime which was given above included the "causing of a gathering". If, however, one incites or conspires with others to hold a gathering, but the gathering does not materialise, one can be charged with incitement or conspiracy to commit sedition.[73]

9 Unlawfulness Participation in the gathering, like the gathering itself, must be unlawful. The unlawfulness may be excluded by *inter alia* coercion or consent by the state, for example, where the participant is a "police spy". It is immaterial whether the gathering takes place in a public or a private place.[74]

10 Intention The aim of the people taking part in the gathering or causing it must be to defy, challenge or resist the authority of the state.[75] For the purposes of this crime the authority of the state is not limited to its executive arm but may also include its judicial organs.[76] Each individual member of the gathering must know that the other participants, or a substantial number of them, have the same aim in mind, because the participants must act "in concert".[77] Of course, it is not required that they should in fact succeed in breaking down the authority of the state: the intention to do so, or to challenge or resist the state's authority, is sufficient.

C PUBLIC VIOLENCE

1 Definition Public violence consists in the unlawful and intentional commission, together with a number of people, of an act or acts which assume serious dimensions and which are intended forcibly to disturb public peace and tranquillity or to invade the rights of others.[78]

2 Elements of the crime The elements of the crime are the following: (*a*) an *act*; (*b*) by a *number of people*; (*c*) which assumes *serious proportions*; (*d*) which is *unlawful* and (*e*) *intentional*, including more specifically an intention (*e*(*i*)) to *disturb the public peace and order by violent means*, or (*e*(*ii*)) to *infringe the rights of others*.

3 Interest protected It is chiefly by isolating and examining the interests which the law seeks to protect in this crime that one is able to distinguish this crime from other common-law crimes against the state. The interests protected

---

72 D 48 4 1; Damhouder 63; Matthaeus 48 2 5; *Endemann supra* 147, 152; *Malan supra* 185; *Viljoen supra* 93; clause 3 of the bill referred to *supra* fn 2. Cf also Snyman 1980 *SALJ* 14 21. There must be a causal nexus between the incitement and subsequent riot – *Malan supra* 184.

73 *Endemann* 1915 TPD 142 147; *Malan* 1915 TPD 180.

74 *Twala* 1979 3 SA 864 (T) 869F–G.

75 *Endemann supra* 147; *Viljoen* 1923 AD 90 97; *Twala supra* 869.

76 *Zwane (1)* 1987 4 SA 369 (W) 375–376.

77 *Endemann supra* 151.

78 A definition of the crime which substantially agrees with the one given in the text was quoted with apparent approval in *Mlotswha* 1989 4 SA 787 (W) 794. See also *Le Roux* 2010 2 SACR 11 (SCA) par 5. For a definition which corresponds exactly with the one given in the text, see *Whitehead* 2008 1 SACR 431 (SCA) par 38.

here are public peace and tranquillity or, as it is sometimes expressed, "public peace and security".[79] These interests may sometimes overlap with the interests involved in other crimes against the state. A precise separation of the crimes is not always possible. If the concerted action by a number of people also impairs or challenges the authority of the state, sedition is committed, and if the acts are accompanied by a hostile intent, as this term is understood in high treason, then the latter crime is committed.[80] Section 17 of the Constitution provides that everyone "has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions". However, if the demonstration does not take place peacefully, as provided in section 17, the participants in the demonstration may render themselves guilty of public violence.

4 Overlapping with other crimes Public violence overlaps with a number of other crimes such as assault, malicious injury to property, arson and robbery.[81] At least one of these crimes is usually committed in the course of the commission of public violence,[82] yet because of the dangerous dimensions of the conduct X is charged, not with one of these crimes, but with public violence.

5 Number of persons taking part Public violence, like sedition, cannot be committed by a single person acting on her own. Public peace and tranquillity must be disturbed by a *number* of people acting in concert.[83] It is impossible to specify the minimum number of people required. This will depend upon the circumstances of each case, having regard to the character and dimensions of the disturbance of the peace. Thus, in some cases three to five persons have been held to be sufficient to commit the crime,[84] whilst in other cases where, for example, the quarrel was of a restricted nature and duration and the disturbance of the peace did not take on serious dimensions, six, eight and even ten people have been considered insufficient.[85]

6 Acting in concert The participants in the conduct disturbing the peace must act in concert, that is, with a common purpose.[86] Once it is established that X knowingly took part in a disturbance which had as its aim the endangering of public peace or security it is unnecessary to prove specifically what particular act of violence was committed by her or by each of the individual participants.[87] The ordinary principles relating to the application of the doctrine of common purpose also apply to this crime.[88] No premeditation or preconceived plan is required.[89] The common purpose may evolve spontaneously or tacitly.

---

79 *Salie* 1938 TPD 136 139.
80 *Viljoen* 1923 AD 90 98.
81 *Tshayitsheni* 1918 TPD 23 29.
82 *Cele* 1958 1 SA 144 (N) 153H; *Kashion* 1963 1 SA 723 (R) 724G.
83 *Ndaba supra* 151–152, 156; *Cele supra* 152F–G.
84 *Terblanche* 1938 EDL 112 (5 regarded as sufficient); *Clarke* 1961 R and N 652 (3 to 4 persons regarded as sufficient).
85 *Mcunu* 1938 NPD 229 (6 regarded as insufficient); *Salie supra* (8 regarded as insufficient); *Nxumalo* 1960 2 SA 442 (T) (10 regarded as insufficient).
86 *Mei* 1982 1 SA 299 (O) 302–303.
87 *Wilkens* 1941 TPD 276 289; *Lekoatha* 1946 OPD 6 10.
88 *Le Roux* 2010 2 SACR 11 (SCA) par 14.
89 *Ndaba* 1942 OPD 149 151–152; *Cele supra* 152F–G.

7 Instances of conduct constituting public violence The following are instances of conduct constituting public violence: faction fighting,[90] violent resistance to the police by a mob[91] (provided the police are acting lawfully);[92] rioting;[93] forcible coercion by strikers of other workers,[94] and the breaking up and taking over of a meeting.[95]

The conduct may take place on either public or private property.[96] It is not necessary that the participants be armed.[97] There must be violence or threats of violence.[98] The crime can be committed even though there is no actual disturbance of public peace or security, or invasion of the rights of others. It is sufficient if the conduct is *intended* to disturb the peace or invade rights.[99]

8 Serious dimensions The mere disturbance of the peace, or a threatened or intended disturbance of the peace even by a number of people, is not sufficient to constitute the crime.[100] The violence or intended violence by the group must further assume serious or dangerous dimensions.[101] Though vague, this criterion is necessary to prevent abuse of the crime. It may be abused by using it as a convenient way of bringing quarrelsome people to justice, when several of them were involved and identification was difficult.[102]

The safety of persons other than the participants is relevant here, and their safety will be threatened only if the disturbance of the peace is of a serious nature. Various factors may cause the conduct to assume serious dimensions. One of the most important has already been mentioned above, namely the number of people involved.[103] Mere weight of numbers is not, however, conclusive. Other factors include the time, locality and duration of the fight, the cause of the quarrel, the status of the persons engaged in it, the way in which it ended, whether the participants were armed or not, and whether there were actual assaults on people or damage to property committed.[104]

9 Unlawfulness Both the acts of the group regarded as such and the participation of the individual in the group must be unlawful. The individual's participation may, for example, not be unlawful if she was coerced into joining the

---

90 *Salie* 1938 TPD 136; *Ngubane* 1947 3 SA 217 (N); *Xybele* 1958 1 SA 157 (T).
91 *Segopotsi* 1960 2 SA 430 (T); *Samaai* 1986 4 SA 860 (C).
92 *Ndwardwa* 1937 TPD 165 167.
93 *Dingiswayo* 1985 3 SA 175 (Ck); *Khumalo* 1991 4 SA 310 (A).
94 *Cele* 1958 1 SA 144 (N).
95 *Wilkens* 1941 TPD 276; *Claassens* 1959 3 SA 292 (T).
96 *Cele supra* 152F; *Segopotsi supra* 436–437.
97 In *Wilkens supra* eg the accused were unarmed.
98 *Cele supra* 152G; *Mei* 1982 1 SA 299 (O) 302B–C.
99 *Cele supra* 153C–E; *Xybele supra* 159A; *Segopotsi* 1960 2 SA 430 (T) 433E. According to *Xybele supra* 159 and *Segopotsi supra* 433 a mere show of strength, which must clearly lead to general fear and clashes, is sufficient to constitute the crime.
100 *Salie* 1938 TPD 136; *Nxumalo* 1960 2 SA 442 (T).
101 *Cele supra* 152; *Nxumalo supra* 444E–F; *Le Roux* 2010 2 SACR 11 (SCA) par 14.
102 *Salie supra* 139–140.
103 *Supra* par 5.
104 On these factors in general, see *Salie supra* 138–139; *Ngubane supra* 218–219; *Usayi* 1981 2 SA 630 (ZS) 633H–634A; *Mlotswha* 1989 4 SA 787 (W).

group, and the group's conduct may, for example, be justified by private defence.[105]

10 Intention The individual participant must be aware of what the group is doing or aiming to do, and her participation in the group must be intentional.[106] There must also be a common purpose amongst the members of the group to forcibly disturb public peace and tranquillity.[107]

105 *Mathlala* 1951 1 SA 49 (T) 57–58.
106 *Kashion* 1963 1 SA 723 (R) 727.
107 *Supra* pars 5 and 6.

CHAPTER

X

CRIMES AGAINST THE ADMINISTRATION OF JUSTICE

A CONTEMPT OF COURT

1 Definition Contempt of court consists in unlawfully and intentionally

(*a*) violating the dignity, repute or authority of a judicial body or a judicial officer in his judicial capacity; or

(*b*) publishing information or comment concerning a pending judicial proceeding which constitutes a real risk of improperly influencing the outcome of the proceeding or to prejudice the administration of justice in that proceeding.[1]

2 Elements of the crime The elements of the crime are the following: (*a*) (*i*) *the violation of the dignity, etcetera of the judicial body or judicial officer; or* (*ii*) *the publication of information or commentary concerning a pending judicial proceeding, etcetera*; (*b*) *the administration of justice by the courts;* (*c*) *unlawfulness; and* (*d*) *intention*.

3 Unusual features of crime The crime is characterised by the following unusual features:

- *Firstly*, contempt of court manifests itself in a variety of forms, some of which have requirements all of their own (eg the requirement in cases of publication of information which has the tendency to prejudice the outcome of a case that the case must still be pending (*sub iudice*)). Because of this the crime can in a sense be subdivided into a number of "sub-offences", which

1 In the previous edition of this book part (*b*) of the definition read as follows: "publishing 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". This former definition in this book was quoted with apparent approval in *Bresler* 2002 2 SACR 18 (C) 24–25 and *Moila* 2005 2 SACR 517 (T) 533*c*. The reason for changing the wording of part (*b*) is to be found in the judgment of the Supreme Court of Appeal in *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* [2007] 3 All SA 318 (SCA), discussed infra par 8.

often have requirements of their own. These particular forms of the crime will be discussed separately below. In fact, the expression "contempt of court" can be regarded as a collective noun for a number of different crimes that have certain features in common.

- *Secondly*, certain cases of contempt of court are dealt with, not by the ordinary criminal processes, but by civil law. These are cases where there has been non-compliance with a court order in a civil case, and where the litigant in whose favour the court has made the order seeks to implement it by requesting the court to punish the defaulting party for contempt of court if the order is not complied with. It has now been settled, however, that these so-called cases of "civil contempt" also constitute the crime of contempt of court: the Director of Public Prosecutions is free to charge a person with contempt of court in these cases too.
- A *third* peculiarity of this crime is that its perpetration may sometimes call for a drastic procedure in terms of which a judge or magistrate may convict and punish somebody for contempt of court committed inside the court in the presence of the judge or magistrate.

During the period after (and even shortly before) the introduction of the new Constitution with its Bill of Rights, the field of application of this crime had shrunk, especially because of the right to freedom of expression and of assembly and demonstration enshrined in sections 16 and 17 of the Constitution. Conduct such as demonstrations in favour of a certain verdict in front of courts, or criticism of courts and judges seem, nowadays, not to lead to prosecutions for contempt, unless there are exceptional circumstances. As a result the older case law dealing with this crime, which tended to overprotect the judiciary, should be read with caution and reservation, and a readiness to adapt the law to the new human-rights dispensation in terms of the new Constitution.

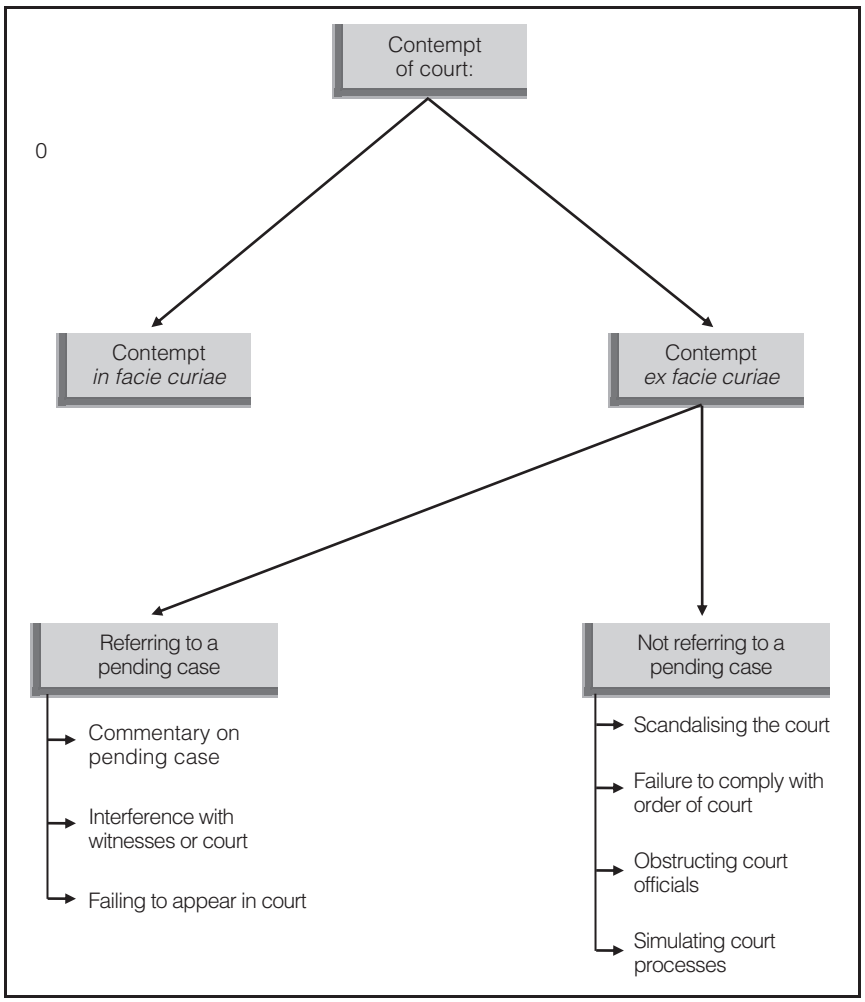
4 Rationale of the crime There is a difference between an attack on the dignity or reputation of a judicial officer in his private capacity, and an attack on his dignity or reputation in his official capacity. Only the latter conduct, being a public injury and not just a private injury, can amount to contempt of court.[2] The rationale of the crime is not to vindicate the dignity of the individual judicial officer but to protect the administration of justice. If the dignity and authority of a court or judicial officer are undermined, the public's respect for the administration of justice and, thus, for the whole legal order, suffers. The courts' very existence and functioning are, after all, in the interests of the whole community.[3] Furthermore, courts of law must be able to come to a proper decision without improper or extraneous influences.

---

2 *Tromp* 1966 1 SA 646 (N) 652G–H.

3 On the rationale of the crime, see *Tobias* 1966 1 SA 656 (N) 659–660; *Van Niekerk* 1970 3 SA 655 (T) 657; *Van Niekerk* 1972 3 SA 711 (A) 720H; *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 2 SA 1 (A) 29; *Mamabolo* 2001 1 SACR 686 (CC) pars 18, 19, 24, 25, 45; *Bresler* 2002 2 SACR 18 (C) 25. It is important not only that a court should be impartial, but also that it should "be universally thought so" (*Attorney-General v Crockett* 1911 TPD 893 931; *Attorney-General v Baker* 1929 TPD 996 999) and, therefore, attempts to influence it extraneously are prohibited.

5 Classification of different types of conduct constituting contempt The crime can be committed in many ways. The following is a convenient way of classifying the different ways in which the crime can be committed:



These different ways in which the crime can be committed will now be discussed.

6 Contempt *in facie curiae* It is convenient firstly to differentiate between contempt *in facie curiae* and contempt *ex facie curiae*. Contempt of court *in facie curiae* means contempt of court committed "in the face of the court", in other words in the presence of the presiding officer (judge or magistrate) while the court is in session. Contempt *ex facie curiae* means contempt committed "outside the face of the court", in other words *not* in the presence of the presiding officer while the court is in session.

Contempt of court *in facie curiae* is committed when a person who is inside the court insults the presiding judicial officer (judge or magistrate) or otherwise misbehaves in a manner calculated to violate the dignity of the court or judicial

officer while the court is engaged in its proceedings or, as it is sometimes said, "in open court".[4] The wrongful conduct must be intentional.[5]

A peculiarity of this form of the crime is that the presiding officer (judge or magistrate) has the power summarily to act against the alleged offender. In the case of other crimes there is usually a lapse of time – at least months – between the commission of the alleged crime and the trial of the alleged offender. However, if somebody commits contempt *in facie curiae*, the presiding officer may *there and then* act against him by subjecting him to an immediate trial for contempt of court and, if he is convicted, imposing a punishment upon him. The High Court may do this by virtue of its inherent common-law powers,[6] whereas the Magistrate's Court has this power by virtue of the provisions of section 108 of the Magistrates' Courts Act.[7] Failure to obey an order to appear in court is not contempt *in facie curiae*.[8] Before the presiding officer can convict X, he must first inform X of the misconduct allegedly constituting the offence.[9] X should be afforded an opportunity to advance reasons why he should not be convicted, at least where his action is not so unequivocal as to show that he undoubtedly intended to be contemptuous.[10]

Some illustrations of contempt *in facie curiae* are: shouting at witnesses while cross-examining them,[11] for a member of the public who is in the court to

---

4 See *Magerman* 1960 1 SA 184 (O) 189D–E, where s 108 of the Magistrates' Courts Act 32 of 1944, dealing with contempt *in facie curiae*, was construed as envisaging the presence "in or near the court" of the person behaving contemptuously. For a discussion of the meaning of the phrase "*in facie curiae*", see also *Butelezi* 1960 1 SA 284 (N) 285–286. The mere failure of a legal representative to appear at the court on the day of the trial does not amount to contempt *in facie curiae – Mbaba* 2002 1 SACR 43 (E).

5 *Clark* 1958 3 SA 394 (A) 400; *Pitje* 1960 4 SA 709 (A). On the intention requirement for this crime generally, see *infra* par 20. Although the terms "wilful" and "deliberate" are the terms usually employed by the courts, this does not detract from the general rule that intent may also be present in the form of *dolus eventualis – Lavhengwa* 1996 2 SACR 453 (W) 465–466.

6 *Clark supra.*

7 Act 32 of 1944; *Nene* 1963 3 SA 58 (N) 59–60; *McKenna* 1998 1 SACR 106 (C). A Magistrate's Court does, however, have jurisdiction to hear a charge of the common law crime of contempt of court, committed *ex facie curiae*, brought before it by way of summons – *Tobias* 1966 1 SA 656 (N); *Mabaso* 1990 1 SACR 675 (T) 677. A magistrate does not have the power to force a legal representative to continue to defend an accused if the legal representative withdraws from the case and, therefore, a failure by the legal representative to continue with the defence as instructed by the magistrate does not constitute contempt – *Van Wyk* 2000 2 SACR 693 (O) 700*b–c*. The crime created in s 108 is in reality wider than the common-law crime, since the mere "misbehaviour" in the place where the court is held is also punishable in terms of s 108 – *Lavhengwa* 1996 2 SACR 453 (W) 465–466.

8 *Magerman* 1960 1 SA 184 (O) 189; *Nene* 1963 3 SA 58 (N) 59–60. Neither does the mere failure of a legal representative to appear in court after a postponement of a case constitute contempt *in facie curiae*. Conduct of this nature may be punished as contempt *ex facie curiae – Canca* 2000 2 SACR 284 (E). A refusal of an attorney to re-enter the courtroom when instructed to do so by magistrate is similarly not contempt *in facie curiae – Mathoho: in re da Silva Pessegueiro v Tshinanga* 2006 1 SACR 388 (T).

9 *Mkize* 1962 2 SA 457 (N) 461; *Moshoeu* 2007 1 SACR 38 (T).

10 *Shapiro* 1987 2 SA 482 (B) 487; *Pillay* 1990 2 SACR 410 (CkA) 418; *Nel* 1991 1 SA 730 (A) 750A–B.

11 *Benson* 1914 AD 357, and cf *Zungo* 1966 1 SA 268 (N).

shout remarks at the magistrate;[12] conducting a case while under the influence of liquor,[13] continually changing one's seat and talking in court,[14] grabbing a court document and tearing it up,[15] shouting in court and swearing at the magistrate;[16] laughing at a magistrate;[17] and entering the court carrying posters, shouting slogans and making defiant statements.[18] However, merely "snoozing" in court is not necessarily contempt: it may amount to merely "a trivial breach of court etiquette".[19] It has also been held that if X has merely forgotten to switch off her cell phone while in court, and the cell phone rings, she does not commit the crime; in this type of situation X's lack of guilt is more the result of absence of intention.[20]

The courts have held that the power of a court summarily to punish X in cases where this form of the crime is committed is essential in order to uphold the dignity and authority of the court,[21] but they have also emphasised that this power is an extremely drastic weapon, which should not be resorted to lightly but with only the utmost care and circumspection.[22] In cases of this nature the presiding officer is prosecutor, witness and judge all at the same time. The accused is normally undefended and the hearing is usually charged with an emotional atmosphere. Trivial contempt is best ignored,[23] and affording X an opportunity to apologise against withdrawal of the charge of contempt may often uphold the dignity of the court just as well as a conviction for contempt.[24] If an unrepresented accused is under the influence of liquor in court, it is advisable not to continue with his trial, but rather to postpone the trial and to charge the accused of contempt in the usual way. The reason for this is that one can hardly expect an accused who is under the influence of liquor to defend himself.[25]

7 Constitutionality of punishing contempt *in facie curiae* Is the practice of punishing a person summarily for contempt of court *in facie curiae* compatible with the Constitution?

In *Lavhengwa*[26] the Court (*per* Claassen J) examined this question thoroughly and came to the following conclusions: There is a definite need in both the Supreme and the Magistrate's Courts for the power to punish contemptuous conduct summarily.[27] This summary procedure is necessary to prevent the flow of court proceedings from being undermined. Thus, if a magistrate issues an

---

12 *Solomons* 2004 1 SACR 137 (C).
13 *Duffey v Munnik* 1957 4 SA 390 (T).
14 *Nxane* 1975 4 SA 433 (O).
15 *Mongwe* 1974 3 SA 326 (T); *Poswa* 1986 1 SA 215 (NC).
16 *Ntsane* 1982 3 SA 467 (T).
17 *Poswa* 1986 1 SA 215 (NC).
18 *Senyane* 1993 1 SACR 643 (O).
19 *Nyalambisa* 1993 1 SACR 172 (Tk) 177*e*.
20 *Sonpra* 2004 1 SACR 278 (T); *Molapo* 2004 2 SACR 417 (T).
21 *Silber* 1952 2 SA 475 (A) 480G; *Nel* 1991 1 SA 730 (A) 752H–J.
22 *Sokoyi* 1984 3 SA 935 (NC) 941–942; *Nel supra* 749*g–h*; *Lizzy* 1995 2 SACR 739 (W).
23 *Mathoho: in re da Silva Pessegueiro v Tshinanga* 2006 1 SACR 388 (T).
24 *Tobias* 1966 1 SA 656 (N) 666; *Poswa* 1986 1 SA 215 (NC) 220–221.
25 *Nqula* 2005 1 SACR 283 (E).
26 1996 2 SACR 453 (W).
27 474*h–i*.

interlocutory order (such as an order that a certain question put to a witness is inadmissible) but the legal practitioner appearing before him refuses to accept the order, it is necessary for the magistrate to have the power to act summarily against the practitioner.[28]

As far as the argument that in these types of cases the magistrate is both witness, prosecutor and judge is concerned, the court held that the magistrate's power to act summarily against an alleged offender *in facie curiae* does violate X's right to equal protection and benefit of the law,[29] but that this violation is reasonable and justifiable in an open and democratic society in terms of the limitation clause in the Constitution.[30]

The court further held that the summary procedure is not a violation of X's right to be informed of the charge with sufficient detail to answer it,[31] *inter alia* because in practice X usually knows very well what his alleged misconduct is, and also because the limitation clause[32] may be applicable in this respect.[33] Neither does the summary procedure infringe upon X's right to be presumed innocent and to remain silent,[34] *inter alia* because no onus is placed upon X, and also because the limitation clause would apply to any possible infringement.[35]

The court further held that the summary procedure does not necessarily violate X's right to the services of a legal practitioner,[36] *inter alia* because it depends on the circumstances of each case whether it is practical and affordable for the state to afford X the services of such a practitioner.[37] *Lavhengwa*'s case was followed in later cases.[38]

8 Publication of information regarding a pending case From here the discussion of this crime is devoted to instances of contempt of court committed *ex facie curiae*. These instances can be subdivided into two groups, namely acts which refer to pending cases and those that do not refer to any pending cases. One of the most important ways in which contempt of court *ex facie curiae* referring to pending cases is committed, is by the publication of information or comment about a pending case.

This form of contempt is committed if a person publishes, either by the written or the spoken word, information or comment about a case which is still pending (*sub iudice*). The test applied previously in this type of contempt was particularly wide: the test was whether the words published tended to prejudice

---

28 469–475.
29 S 9(1) of the Constitution.
30 S 36(1) of the Constitution.
31 S 35(3)(*a*) of the Constitution.
32 S 36(1) of the Constitution.
33 477–482. For a similar opinion, see *Hunt-Milton* 200. Cf also the Canadian decisions *Re Layne and the Queen* (1985) 14 CCC (3d) 149, especially at 161, and *Cohn* (1985) 15 CCC (3d) 150.
34 S 35(3)(*h*) of the Constitution.
35 485–487.
36 S 35(3)(*f*) of the Constitution.
37 488–492.
38 *Bresler* 2002 2 SACR 18 (C); *Solomons* 2004 1 SACR 137 (C) 142*d–e*; *Ntshwence* 2004 1 SACR 506 (Tk).

the outcome of the case.[39] It was immaterial whether the statement complained of had reached the ears of the tribunal, and, if so, whether the tribunal had in fact believed or been influenced by it.[40]

The abovementioned wide test to determine whether contempt has been committed, has been criticised, and in *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)*[41] the Supreme Court of Appeal held that this wide test to determine prejudice to the judiciary was unconstitutional, being especially incompatible with the constitutional right to free speech. The court accordingly introduced a new, narrower test to determine prejudice. According to the court the words of the commentary will amount to contempt only if there is a demonstrable relationship between the publication of the words and the prejudice for the administration of justice;[42] there must be a real risk of substantial prejudice if the publication takes place.[43] This narrower test must be welcomed as more fair than the previous wide test.

The existence of this form of contempt of court is not incompatible with the provisions of section 16(1) of the Constitution, which provides for the right to freedom of expression, including the freedom of the press and other media, as well as the right to receive or impart information. Although the rule does infringe on the right created in section 16(1), the infringement is reasonable and justifiable in an open and democratic society, as provided in the limitation clause in section 36(1) of the Constitution. The whole concept of a "fair trial" presupposes a trial in which the court decides on the issues before it on the basis of the evidence placed before it, and not on the basis of statements or opinions in the media. Generally speaking, before the case has been finally disposed of by the courts the media, therefore, ought not to have the right to publish information on the case which would have a real influence on its outcome, but which was not produced as evidence to the court hearing the case. "Trial by newspaper" is and remains a real danger to a fair and impartial disposal of an issue in the judicial process. If the present type of conduct were not punishable, a newspaper would be free to "convict" an accused, as it were, whereas the court may find her not guilty. The perception is then raised that the court's finding is wrong, whereas in reality it is correct.

Furthermore, even if one assumes that the judge or magistrate is capable of leaving out of consideration information published in the press, and that he in fact does so, there is still the further consideration that "justice must not only be done, but must manifestly be seen to be done". Parties to a case, and even outsiders, must be satisfied that the court's conclusion is based upon information laid before the court in an admissible way only, and not upon information or comment concerning the merits of the issue published in the media. Once the media

---

39 *Van Niekerk* 1972 3 SA 711 (A); *Harber* 1988 3 SA 396 (A).

40 *Van Niekerk* 1972 3 SA 711 (A) 724; *Harber supra* 420J–421A. In the latter case the Appellate Division stated that the rule against the prejudging of issues in pending proceedings is not absolute, for a discussion in a law journal of legal issues decided in a case on appeal would generally not constitute contempt of court; it would not tend to interfere *improperly* with the administration of justice. See 422I, 423G–H.

41 [2007] 3 All SA 318 (SCA), discussed by Hoctor 2008 *SACJ* 101.

42 Par 16.

43 Par 19.

is allowed to publish information and comment on a pending case, there will always remain at least a suspicion in the mind of the public and of a party to the case that the court, in coming to its conclusion, was influenced by outside factors.

9 Interference with witnesses or presiding officer X commits contempt of court if he improperly influences or attempts to influence a judge, magistrate, assessor, party to a case, complainant or accused, witness, interpreter or legal representative in a case in the decision he has to make in the case, the evidence he has to give, or generally the way in which he has to conduct himself during the trial.[44] The act may take the form of intimidating the person concerned, bribing or attempting to bribe him, or privately communicating or attempting to communicate with a judge or magistrate with the intention of influencing him to act in a certain way or to come to a certain conclusion. However, peacefully demonstrating outside a courtroom in support of a certain conclusion in a court case being conducted inside the court, is nowadays in terms of the Constitution of 1994 not regarded as contempt of court, but as a legitimate expression of freedom of speech.

10 Failure to appear in court According to the common law a person also commits contempt of court if he has been summoned to attend a trial as witness or accused but intentionally fails to appear at the court.[45] However, it is more customary to punish such conduct as contraventions of specific statutory provisions.[46]

11 Scandalising the court From here the discussion deals with ways in which the crime can be committed without there being any pending case. The first such way to be discussed is the conduct known as "scandalising the court".

This form of contempt is committed by the publication, either in writing or verbally, 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.[47] 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.[48] It does not matter whether the attack is directed at a particular judicial officer or at the administration of justice through the courts generally.[49] 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 (eg a letter), even though no third party is aware of the communication.[50]

---

44 *Attorney-General v Crockett* 1911 TPD 893 927.

45 *Keyser* 1951 1 SA 512 (A); *Cronje* 1955 3 SA 319 (SWA) 320.

46 See ss 55 and 187–188 of the Criminal Procedure Act 51 of 1977 and s 5(2) of the Magistrates' Courts Act 32 of 1944.

47 *Olivier* 1964 3 SA 660 (N); *Tobias* 1966 1 SA 656 (N) 660G–H; *Mamabolo* 2001 1 SACR 686 (CC); *Bresler* 2002 2 SACR 18 (C) – a case in which X launched a racist attack upon the magistrate, who belonged to a different racial group as himself. See also *Moila* 2005 2 SACR 517 (T) 533*i*–534*a*.

48 *Mamabolo supra* par 43.

49 *Tromp* 1966 1 SA 646 (N) 653C.

50 *Attorney-General v Crockett* 1911 TPD 893 927; *Mans* 1950 1 SA 602 (C) 605–606.

Anything spoken or written imputing corrupt or dishonest motives or conduct to a judge in the discharge of his official duty, or reflecting in an improper or scandalous manner on the administration of justice, falls within the ambit of this form of contempt.[51] It has been held that this type of contempt is also committed by exhorting the judiciary to embark on a course of action which is in clear conflict with its duties, for example, asking the judiciary to refuse to give credit to a certain class of evidence, irrespective of its intrinsic merits.[52]

The courts emphasise, however, that every citizen and every news medium such as a newspaper are at liberty to discuss the proceedings in a court, or the general administration of justice by the courts, freely and openly. Such discussion or debate in fact safeguards the public's respect for and confidence in the courts.[53] The criticism or debate must, however, be conducted in a fair and moderate manner, and the right to free discussion must not be abused by, for example, unbridled vituperative utterances vilifying the judiciary or ridiculing them.[54] An honest and temperate expression of a dissenting opinion regarding, for example, the perennial topic of inequality of sentences will not constitute contempt of court.[55]

12 Punishing scandalising the court is constitutional – the judgment in *Mamabolo* In *Mamabolo*[56] the Constitutional Court held that the punishment of scandalising the court as a form of contempt of court is constitutional.

According to the judgment in *Mamabolo*, the judiciary has to have the trust of the public, otherwise it cannot function properly. For this reason there must be a special safeguard to protect the judiciary against vilification.[57] What are protected are not the private interests of the members of the court, such as their individual feelings, their self-esteem, reputation or status, but the public interest, and more particularly the public confidence in the administration of justice.[58] The freedom to debate the merits of judgments or the affairs of the judiciary in general does not mean that attacks, however scurrilous, can with impunity be made on the judiciary. A clear line must be drawn between acceptable criticism of the judiciary as an institution, and of its individual members, on the one hand, and on the other hand statements that are downright harmful to the public interests by undermining the legitimacy of the judicial process. The ultimate object of punishing this form of contempt is that courts must be able to attend to the proper administration of justice while having the confidence of the public.[59]

---

51 *Torch Printing and Publishing Co (Pty) Ltd* 1956 1 SA 815 (C) 819; *Tobias supra* 660G–H.

52 *Van Niekerk* 1972 3 SA 711 (A) 721–722.

53 *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 2 SA 1 (A) 25G–H; *Mamabolo* 2001 1 SACR 686 (CC) pars 1, 27.

54 *Van Niekerk* 1970 3 SA 655 (T) 657; *Van Niekerk* 1972 3 SA 711 (A) 719–720; *Moila* 2005 2 SACR 517 (T) 534–535.

55 *Torch Printing and Publishing Co (Pty) Ltd supra* 822F.

56 2001 1 SACR 686 (CC).

57 Par 19.

58 Pars 18, 19, 24, 25, 45.

59 Pars 32, 45.

In South Africa the right to freedom of expression is, according to the court, not an unqualified right and one ranking above all others.[60] Relying on section 1 of the Constitution, the Court stated that the right to freedom of expression cannot be said automatically to trump the right to human dignity.[61] To decide whether X in a particular case committed the crime, the question is whether his words or conduct was, objectively speaking, likely to result in the administration of justice being brought into disrepute.[62]

However, the court added a rider to its finding that scandalising the court is constitutional. This is that a court should not be quick to infer that X's words or conduct amounted to the commission of the crime.[63] The scope for conviction of this form of the crime is very narrow. There must be a "clear case of impeachment of judicial integrity";[64] the conduct must "really [be] likely to damage the administration of justice".[65]

13 Criticism of judgment in *Mamabolo* The judgment in *Mamabolo* is open to criticism. The main criticism of the punishment of scandalising the court remains: that is, that the standing of, and respect for, the judiciary should be based upon the inherent merits of the performance of the judiciary itself. Then ordinary reasonable people will not even deign to take seriously criticism that might be levelled at the judiciary. In the words of the American court in *Bridges v California*[66] "an enforced silence, however limited, solely in the name of preserving the dignity of the Bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect".

Furthermore, the definition of this form of the crime is particularly vague and accordingly difficult to reconcile with the *ius certum* provision of the principle of legality.[67] Expressions such as "scurrilous abuse" and "scandalous" are emotionally charged.[68]

To the above criticism of the judgment may be added the contentious rule, endorsed by the court, that for a conviction it is not even necessary to establish that the administration of justice was *actually* brought into disrepute; all that is required is that the words or conduct should objectively have the *tendency* to bring the administration of justice into disrepute. This is a disconcertingly wide and vague test, open to misuse. The subjective opinions of people as to whether certain words have the tendency described, may vary widely.[69]

---

60 Par 41.
61 *Ibid.*
62 Pars 43, 44, 50.
63 Par 45.
64 *Ibid.*
65 Par 45.
66 (1941) 314 US 252.
67 *Supra* I E 9.
68 Sachs J in his separate judgment correctly spoke of the "archaic vocabulary which fits most uncomfortably into contemporary constitutional analysis", adding that "[t]hey evoke another age with other values, when a strong measure of awe and respect for the status of the sovereign and his or her judges was considered essential to the maintenance of the public peace" – par 70.
69 It is submitted that if scandalising the court should remain punishable, it is better to apply the stricter test favoured by Sachs J in his separate judgment (par 75), and favoured in the

[*continued*]

14 Failure to comply with an order of court A party to a civil case against whom a court has given an order, and who intentionally refuses to comply with it, commits contempt. Such contempt is, however, hardly ever charged as a criminal offence by the state, and it is left to the party in whose favour the order has been given to apply to court, if he so wishes, to convict the defaulting party.[70] Such an application is merely a way of enforcing the court order because if the application is successful the sentence, such as imprisonment, is almost always suspended on condition that the defaulting party comply with the order in the manner prescribed by the court.[71] Although this form of contempt is usually referred to as "civil contempt" because it is usually dealt with by civil law only, there is nothing to prevent the Director of Public Prosecutions from indicting for criminal contempt of court in such a case if he thinks the circumstances merit public prosecution.[72]

15 Obstructing court officials Persons who intentionally interfere with or hinder court officials, such as sheriffs or messengers of the court in the execution of their duties, commit contempt of court, because such acts violate the dignity and authority of the court.[73] However, it is customary to punish such conduct as the contravention of specific statutory provisions.[74]

16 Simulating court processes It is contempt of court to send to a debtor, for the purpose of obtaining payment of a debt, a document which is not a legal document emanating from a court of law but which is calculated to mislead the debtor into thinking that it is.[75] It is similarly contempt for a person to hold himself to be an officer of the court, such as an attorney, advocate or sheriff, if he is not in fact such an officer.[76]

17 Administration of justice by the courts Contempt of court can be committed only if the conduct or words impinge upon the administration of justice *in or by the courts*. It is not committed if the conduct or words are aimed at the executive branch of government or its servants, unless the criticism at the same time imports disrespect of the courts.[77] Thus, it is not contempt to criticise a person or body for its performance of a purely administrative function,[78] as, for example, where X's scornful words are found to be in fact aimed at the police.[79]

USA (*Bridges v California* (1941) 314 US 252, that the words should not merely have the tendency to harm, but that they should constitute a "real and substantive threat" to the administration of justice.

70 *Beyers* 1968 3 SA 70 (A) 78–81; *Benator* 1984 3 SA 588 (Z) 592–593; *Kerkhoff v Minister of Justice and Constitutional Development* 2011 2 SACR 109 (NGHP), which also deals with issues of proof.

71 *Tromp v Tromp* 1956 3 SA 664 (N) 667.

72 *Beyers supra* 80–81.

73 *Phelan* 1877 K 5 8; *Tromp* 1966 1 SA 646 (N) 652F.

74 See the crime created in s 107 of the Magistrates' Courts Act 32 of 1944.

75 *Incorporated Law Society v Sand* 1910 TPD 1295.

76 *Incorporated Law Society v Wessels* 1927 TPD 592.

77 *Thooe* 1973 1 SA 179 (O) 180; *Gibson* 1979 4 SA 115 (D) 121, 126.

78 *Botha* 1953 4 SA 666 (C); *Dhlamini* 1958 4 SA 211 (N); *Thooe supra* 180–181.

79 *Sachs* 1932 TPD 201 203–204. Mere disagreement with a judgment does not constitute contempt – *Sachs supra* 204; *Metcalf* 1944 CPD 266 268.

18 Unlawfulness Privileged statements, such as those made by members of parliament in parliament, do not amount to contempt.[80]

Neither does fair comment on the outcome of a case, or on the administration of justice in general, amount to contempt of court. For the law and the administration of justice to enjoy the confidence of the public, public debate on matters pertaining to these subjects is in a democratic society not only permissible but also vital and necessary.[81] The famous words of Lord Atkin in *Ambard v Attorney-General of Trinidad*[82] have been quoted with approval by the South African courts:[83] "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men." For comment to be fair it must be reasonable, *bona fide* and moderate, and made in the interests of the better administration of justice.

19 Intention Subject to the qualification relating to the liability of the press discussed below,[84] the crime can be committed only intentionally.[85] *Dolus eventualis* is sufficient; it is in fact most often this form of intent which is present when contempt is committed.[86] In order to ascertain whether X had the necessary intention, his words must be considered in the context in which they were employed.[87]

Intention to commit contempt is absent if X's seemingly insulting behaviour is a result of forgetfulness, ignorance, absent-mindedness, inadvertence or excitement.[88] A litigant or his legal representative has a right, in proper circumstances, to apply for the recusal of a judge or magistrate from a hearing of a case, and, if the application is made in the honest belief in the truth of the allegations (and also with the necessary respect) no contempt is committed.[89]

20 Intention sometimes not required There is one noticeable exception to the rule that intention is required to constitute the crime. This is where an editor of a newspaper or another branch of the media is charged with contempt of court because of the publication of a report or statements potentially prejudicial to a court case which is *sub iudice*. The fact that he is unaware of what is published, or that he is unaware that a court case is pending in connection with the published information and hence lacks the necessary intention is no defence because in his case negligence suffices for a conviction.[90]

There are strong policy considerations underlying this rule. It is extremely difficult, if not impossible, to refute an allegation by the editor, proprietor or

---

80 See s 59 and 71 of the Constitution of the Republic of South Africa 108 of 1966.
81 *Tromp* 1966 1 SA 646 (N) 653; *Van Niekerk* 1970 3 SA 655 (T) 656–657.
82 [1936] 1 All ER 704 (PC) 709.
83 *Torch Printing and Publishing Co (Pty) Ltd supra* 821G; *Van Niekerk* 1970 3 SA 655 (T) 657A; *Mamabolo* 2001 1 SACR 686 (CC) pars 1, 27.
84 *Infra* par 21.
85 *Gibson* 1979 4 SA 115 (D) 121; *Pillay* 1990 2 SACR 410 (CkA) 416*d* and see also the decisions referred to in the next 3 footnotes.
86 *Sokoyi* 1984 3 SA 935 (NC); *Nel* 1991 1 SA 730 (A) 745G–H.
87 *Van Staden* 1973 1 SA 70 (SWA) 75.
88 *Sonpra* 2004 1 SACR 278 (T); *Moshoeu* 2007 1 SACR 38 (T).
89 *Luyt* 1927 AD 1 4–5; *McLoughlin* 1929 CPD 359 361; *Silber* 1952 2 SA 475 (A) 481.
90 *Harber* 1988 3 SA 396 (A) 418D–E.

publisher of a newspaper that he was unaware of the fact that a case was pending, or of what appeared in his newspaper. The general common-law rule requiring intent dates back to an era before mass communication media came into being. The interests of the individual litigant or judicial officer who has been injured or prejudiced by the unlawful publication cannot be measured against the far-reaching sphere of influence of such mass news media with their large networks of informants. Since the press has a tremendous influence on public thinking, it bears a proportionately heavier responsibility than an ordinary individual to ensure the correctness of what it publishes.[91] It is submitted that the above rule that negligence may be a sufficient form of culpability applies to not only a newspaper editor's liability for contempt of court but also to that of the owner, publisher, printer and distributor of a newspaper.[92] The individual reporter's liability, however, is based on intention.[93]

B DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

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.[94]

2 Elements of the crime The elements of the crime are the following: (*a*) *conduct* (*b*) which amounts to *defeating or obstructing* (*c*) the *course or administration* of justice and which takes place (*d*) *unlawfully* and (*e*) *intentionally*.

3 Appellation The crime developed from the provisions of the Roman *lex Cornelia de falsis*,[95] although today it covers a wider field than the original *lex*.[96]

The designation of the crime has not always been consistent in practice. Sometimes it has been described as "defeating" the course of justice ("verydeling van die regspleging"),[97] sometimes as "obstructing" the course of justice ("belemmering van die regspleging"),[98] sometimes as "defeating *and* obstructing . . .", [99] and sometimes as "defeating *or* obstructing . . .".[100] How correct the designation of the crime in the charge sheet is will depend upon the nature of the conduct which X is alleged to have committed. This will be explained more fully below in paragraph 5. It is submitted that the Afrikaans expression "dwarsboming van die gereg", which is sometimes used as a description of the

91 *Harber supra* 418B–D, 426B; Snyman 1988 *De Jure* 150 154–156.
92 Snyman 1988 *De Jure* 150 156. This question was specifically left open in *Harber supra* 418E–F.
93 *Van Staden* 1973 1 SA 70 (SWA); *Harber: in re S v Baleka* 1986 4 SA 214 (T) 220I (this is the judgment of the court *a quo* in the *Harber* case *supra*); Snyman 1988 *De Jure* 150 156–157.
94 *Burger* 1975 2 SA 601 (C) 611–612; *Pakane* 2008 1 SACR 518 (SCA) par 34.
95 D 48 10 1; Voet 48 10; Matthaeus 48 7 1; Van der Keessel 48 10.
96 *Burger supra* 605–611; *Greenstein* 1977 3 SA 220 (RA) 223–224.
97 Eg *Bekker* 1956 2 SA 279 (A); *Du Toit* 1974 4 SA 679 (T).
98 Eg *Kiti* 1994 1 SACR 14 (E).
99 Eg *Foye* (1886) 2 BAC 121.
100 Eg *Watson* 1961 2 SA 283 (R) 286; *Bazzard* 1992 1 SACR 302 (NC) 303.

crime,[101] bears the same meaning as "defeating the course of justice", and that the expression "stremming van die regspleging", which is also sometimes used,[102] bears the same meaning as "obstructing the course of justice". A reference to the *ends* of justice[103] in the description of the crime should, however, be avoided, since this unduly restricts the scope of the crime, which deals with interference in the course or administration of justice and can be committed even though justice does triumph in the end.[104]

4 Overlapping The crime may overlap with a considerable number of other crimes, such as contempt of court (which is but a species of the present crime), perjury, fraud or forgery, extortion, obstructing the police in the course of their duties, and being an accessory after the fact to another crime.[105]

5 Difference between defeating and obstructing There is a difference between "defeating" and "obstructing" the course of justice. The latter connotes something less than the former.[106] A person can be found guilty on a charge of defeating the ends of justice only if it is proved that justice has in fact been defeated. This will be the case where it is proved that an innocent person has been convicted or a guilty one discharged or, in a civil case, an order has been made which would not have been made if the wrongful conduct had not taken place.[107]

Because it is usually difficult to prove that the course of justice has in fact been defeated, it is customary to charge conduct falling within the ambit of this crime as defeating *or* obstructing the course of justice (or attempting to do so). In charges of "defeating or obstructing the course of justice" or of "attempting to defeat or obstruct the course of justice" it is not necessary that the ultimate verdict should be one of defeating only or of obstructing only (or attempting to do either of these). In other words, a charge of "defeating or obstructing the course of justice" (or attempting to do so) is one of a single offence, not one involving two distinct alternative offences.[108]

The course of justice can be obstructed in many ways, for example, where a trial has to be delayed or postponed, or where the police or prosecution authorities are made to waste time and energy investigating the wrong charge or the wrong person.

6 Ways in which the crime can be committed Defeating or obstructing the course of justice (or attempting to do so) can be committed in a variety of ways, of which the following are examples: unlawfully inducing (or attempting to induce) a witness to give false evidence in court,[109] or to refuse to give

---

101 Eg *Tanoa* 1955 2 SA 613 (O); *Bazzard supra*.
102 Eg *Afrikaanse Pers-Publikasie (Edms) Bpk v Mbeki* 1964 4 SA 618 (A) 628.
103 As eg in *Cassimjee* 1989 3 SA 729 (N).
104 *Greenstein supra* 223–224. The end result of the act is, therefore, not material for the purposes of this crime.
105 *Gani* 1957 2 SA 212 (A) 220.
106 *Burger supra* 612; *Greenstein supra* 224.
107 See the clear distinction drawn between "defeating" and "obstructing" in *Burger supra* 612A and *Greenstein supra* 224.
108 *Mdakani* 1964 3 SA 311 (T) 312H.
109 *Zackon* 1919 AD 175; *Port Shepstone Investments (Pty) Ltd* 1950 4 SA 629 (A).

evidence,[110] or to give false information to the police,[111] or to abscond (so as not to be able to give evidence at a trial);[112] soliciting a complainant by unlawful means to withdraw a charge;[113] soliciting a prosecutor by unlawful means not to prosecute;[114] improperly influencing a party to a civil case;[115] improperly seeking to influence the judiciary by exhorting them not to give any credence to certain types of evidence, contrary to their duties,[116] and unlawfully releasing a prisoner.[117] The crime is also committed when a prospective witness demands money as a *quid pro quo* for absconding (or not absconding), or for giving false or even true evidence,[118] and when a person tampers with documents or exhibits in a case in order to prevent true evidence being placed before court,[119] or misleads (or attempts to mislead) the police in order to prevent detection of a crime that might otherwise be revealed to the police.[120] It may furthermore be committed by the fabrication of false evidence.[121]

The crime may be committed by either a positive act or an omission.[122] However, the mere false denial of liability by a suspect when questioned by the police does not in itself amount to attempting to defeat or obstruct the course of justice.[123]

If a motorist warns other motorists of the presence of a speed trap by flashing his lights, he interferes with the due administration of justice, and according to the decision in *Naidoo*[124] commits an attempt to defeat the course of justice. However, in *Perera*,[125] in which the facts were materially the same, it was held that the person committing this act 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. In as far as these two decisions are irreconcilable it is submitted that the latter should be followed. This type of conduct is in effect nothing more than a warning to other people to obey the law.

Laying a false criminal charge against another may also constitute the crime (or an attempt to commit it).[126] While lying to the police may amount to obstruction of the administration of justice, the crime is not committed by a mere refusal to answer questions put by the police or to refuse to co-operate with the police

---

110 *Gabriel* (1908) 29 NLR 750 752 (count (*a*)).
111 *Neethling* 1965 2 SA 165 (O) 167.
112 *Gabriel supra* 752 (count (*b*)); *Burger supra* 609 (example 11).
113 *Vittee* 1958 2 PH H348 (T); *Du Toit* 1974 4 SA 679 (T).
114 *Burger supra* 607. Cf also *W* 1995 1 SACR 606 (A) (X, a state prosecutor, withdrew a case against a woman in return for sexual intercourse with her).
115 *Pokan* 1945 CPD 169 171.
116 *Van Niekerk* 1972 3 SA 711 (A) 725–726.
117 *Nhlapo* 1958 3 SA 142 (T) 143; *Burger supra* 610 (example 14).
118 *Cowan* 1903 TS 798, especially 805.
119 *Mdakani* 1964 3 SA 311 (T) 316; *Neethling supra* 168.
120 *Andhee* 1996 1 SACR 419 (A); *Mshumpa* 2008 1 SACR 126 (EC) par 70
121 *Tanoa* 1955 2 SA 613 (O); *Daniels* 1963 4 SA 623 (E); *Mdakani supra*.
122 *Gaba* 1981 3 SA 745 (O) 751; *Binta* 1993 2 SACR 553 (C) 561*g–h*.
123 *Cassimjee* 1989 3 SA 729 (N).
124 1977 2 SA 123 (N).
125 1978 3 SA 523 (T).
126 *Mene* 1988 3 SA 641 (A) 664 F–G (overruling *Sauerman* 1978 3 SA 761 (A)).

in obtaining evidence against oneself or another. This is because in most cases there is no legal duty on the individual to assist the police.[127]

7 No pending case necessary It is not a requirement for the crime that the conduct allegedly constituting it should have been committed in relation to a specific pending case.[128] It is, in fact, not even necessary that a court case be envisaged by the police or a private litigant at the time of X's conduct.[129] It is sufficient that X subjectively foresees the possibility that his conduct may, in the ordinary course of events, lead to the case being prosecuted or at least being investigated by the police.[130] However, there must be a possibility of a real court case, either civil or criminal, ensuing, because, as will be pointed out below, the crime is not committed if X merely plays the fool with the police by telling them that a crime has been committed whereas X knows that no crime has in fact been committed.[131] If a driver whose motor vehicle has been involved in a collision goes to the police shortly after the accident and falsely informs them that his car has been stolen, to allay suspicion of himself, he commits the crime of attempting to defeat or obstruct the course of justice.[132]

8 The course or administration of justice In *Bazzard*[133] it was held that the course or administration of justice which must be obstructed in order to constitute this crime refers to a process which is destined to eventuate in a court case between parties or between the state and its subjects. Accordingly, the mere wasting of time and energy of certain officials such as the police or the personnel of the Director of Public Prosecutions' office does not constitute obstructing the course of justice. In this case X phoned the police and told them that he had kidnapped a girl whom he was going to kill unless a ransom was paid to him. As a result thereof the police launched a search and traced X, who admitted to them that he had in fact not kidnapped anyone. He had not falsely accused anybody of having committed a crime, and he had not put in motion any legal process. He tried only to play the fool with the police by reporting to them a non-existing or fictitious crime. The court found that he had not committed the crime.[134] X in this case could have been convicted of fraud.[135]

The case of *Bazzard* must be distinguished from a factual situation such as the following: X was involved in a crash with his car, caused by his own negligence. (He collided with a stationary vehicle in which there were no passengers.) In an

---

127 *Binta* 1993 2 SACR 553 (C) 563; Cf also *Kiti* 1994 1 SACR 14 (E).
128 *Zackon* 1919 AD 175 181; *Mdakani supra* 315, 317.
129 *Neethling supra* 167–168; *Burger supra*; *Greenstein supra* 224–226.
130 *Thompson* 1968 3 SA 425 (E) 427; *Burger supra* 612–613.
131 *Bazzard* 1992 1 SACR 303 (NC).
132 *Neethling supra* 168; *Burger supra*.
133 1992 1 SACR 303 (NC), discussed by Snyman 1992 *SACJ* 335.
134 Snyman 1992 *SACJ* 335 at 341 points out that, assuming that this decision is correct, it points to a deficiency in the rules of our criminal law, and that the legislature ought to create an offence similar to the one created in s 5(2) of the Criminal Law Act of 1967 in England which makes it an offence for a person to cause any wasteful employment of the police by knowingly making to any person a false report tending to show that an offence has been committed.
135 *Minister of Safety and Security v Howard* 2009 2 SACR 536 (GSJ) 545*g*.

attempt to escape the consequences of his deed, he goes to the police and falsely claims that his car has been stolen.[136] (Such a false allegation implies that another person caused the crash.) In such a situation the actual crash with all the damage caused, will inevitable come to the notice of the police and a real court case between two parties or between the state and a possible accused is destined to ensue. Such conduct does amount to the commission of the crime. (In *Bazzard*'s case no such real court case involving a charge of kidnapping was destined to ensue, for the simple reason that no actual kidnapping had in fact taken place.)

The interest protected here is the due administration of justice by the superior or inferior courts in either civil[137] or criminal judicial proceedings. The crime cannot be committed in respect of administrative proceedings.[138]

9 Intention X must subjectively have foreseen the possibility that his conduct might defeat or obstruct the administration of justice.[139] He must have been aware of the fact that it might thwart or interfere with judicial proceedings which were to take place in the future, or would at least hamper or forestall the investigation of an offence.[140] Where X's conduct consists in interfering with witnesses he must be aware of the fact that the person he is approaching and influencing is in fact a prospective witness.[141] If his conduct consists in fabricating evidence, laying a false charge or telling falsehoods to witnesses with a view to influencing them, he must know (or at least foresee the possibility) that the allegations he is propounding are in fact false.[142]

10 Attempt If someone deliberately supplies the police or a witness with 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.[143] Charges of attempting to defeat or obstruct the course of justice in fact seem to be more common than charges alleging actual defeat or obstruction. "Attempting to defeat or obstruct the course of justice" can be described as "unlawfully doing any act in the furtherance of an intention to defeat or obstruct the administration of justice",[144] provided the act is one of execution and not one of mere preparation. On a charge of attempting to defeat or obstruct the course of justice, it is no defence to allege that the prosecution would have failed in any event because of some other shortcoming in the state case, despite the conduct complained of. The ultimate result of the proceedings which were interfered with by X is immaterial.[145]

---

136 Cf *Mene* 1988 3 SA 641 (A) 664F–G.
137 As in *Pokan* 1945 CPD 169.
138 *Nhlapo* 1958 3 SA 142 (T); *Thompson supra*.
139 *Zackon* 1919 AD 175 182; *Hirschhorn* 1934 TPD 178 181.
140 *Neethling* 1965 2 SA 165 (O) 168; *Burger* 1975 2 SA 601 (C) 617.
141 *Port Shepstone Investments (Pty) Ltd* 1950 4 SA 629 (A) 637F.
142 *Zackon supra* 179; *Bekker* 1956 2 SA 279 (A) 281F.
143 *Maree* 1964 4 SA 545 (O) 558; *Viljoen* 1970 1 SA 14 (T) 16–17.
144 *Tanoa* 1955 2 SA 613 (O) 615; *Maree* 1964 4 SA 545 (O) 558.
145 *Neethling supra* 168H; *Greenstein* 1977 3 SA 220 (RA) 224.

C PERJURY

1 Definition Perjury consists in the unlawful and intentional making of a false statement in the course of a judicial proceeding by a person who has taken the oath or made an affirmation before, or who has been admonished by, somebody competent to administer or accept the oath, affirmation or admonition.[146]

2 Elements of the crime The elements of the crime are the following: (*a*) *the making of a declaration*; (*b*) which is *false*; (*c*) *under oath or in a form equivalent to an oath*; (*d*) *in the course of a judicial proceeding*; (*e*) *unlawfulness* and (*f*) *intention*.

3 Origin In Roman and Roman-Dutch law the crime was known either as *periurium* or as a form of one of the *crimina falsi*.[147]

4 False statement The statement constituting perjury can be either verbal or in the form of an affidavit.[148]

The statement must be false. In English law objective falsity is not required: subjective falsity is sufficient.[149] This means that if a person thinks he is lying and intends making a false statement but he is in fact unwittingly telling the truth, the crime of perjury is nevertheless committed (provided the other requirements for the crime are complied with). In South Africa it has as yet not been decided whether it is subjective or objective falsity which is required, but it is submitted that the weight of authority favours objective falsity for the following reasons: firstly, our courts describe perjury as being committed if a *false* statement is made,[150] and, secondly, the legislature also speaks of the making of a false statement when dealing with procedural provisions relating to perjury in

---

146 The precise reasons for this definition appear from the discussion of the different requirements which follow. It is submitted that the definition in *Hunt-Milton* 131 and *Burchell and Milton* 704 is incorrect inasmuch as these authors hold the view (*a*) that "subjective falsity" is sufficient to constitute the crime (cf the discussion *infra* par 4) and (*b*) that the statement should be made "before a competent tribunal" (cf the discussion *infra* par 7). For the same reasons it is submitted that the definition in *Gardiner and Lansdown* 2 1098 (which was referred to with approval in *Hassa* 1939 NPD 161 and *Carse* 1967 2 SA 659 (C)) is incorrect.

147 For the Roman law on this subject, see D 48 10 *pr*, 1, 2; D 48 10 9 3; D 48 10 27; D 47 20 4; D 47 13 2. Perjury and subornation of perjury were punishable in Roman law in terms of the *lex Cornelia de falsis*. For the Roman-Dutch law on the subject, see Voet 12 2 32; Van Leeuwen *RHR* 4 33 14; Decker 4 33 14; Moorman 1 1 14. These authors generally discussed only the punishment of perjury, not the requirements for the crime. More attention is devoted to the requirements for the crime by Van der Keessel 48 10 8 and Van der Linden 2 3 3.

148 *Jarrard* 1939 EDL 102; *Beukman* 1950 4 SA 261 (O) 264A.

149 *Archbold* 28–163 ff.

150 Eg *April* (1894) 4 EDC 177: "To constitute perjury a false statement must be made wilfully"; *Amonda Ayar* (1905) 26 NLR 96 100: "Perjury consists of a wilful . . . false declaration upon oath"; *McIntosh* (1910) 4 BAC 63 64, in which the court agreed with the statement that "it must . . . be proved that the matter sworn . . . is false".

the Criminal Procedure Act.[151] Cases where the truth is told by a witness who intends to lie may be punished as attempted perjury[152] or as defeating or obstructing the course of justice (or attempting to do so).

The false statement may be express or implied, which means that the prosecution may rely on an innuendo in the words of X to prove that he made a false statement. In *Vallabh*,[153] for example, it was held that the words of a witness "I have already stated what I heard" fairly imply that he heard nothing more. If the prosecution relies on an innuendo, the inference sought to be drawn from X's words must be a necessary inference. Furthermore, the inference must appear from the evidence led during the judicial proceedings, and cannot be based on extraneous statements or affidavits.[154]

5 Statement need not be material The false statement need not be material to any issue to be decided in the proceedings during which it is made. As a result of legislation, since 1935 it is no longer necessary for the prosecution to allege or prove the materiality of the statement.[155]

6 In the course of a judicial proceeding Perjury can be committed only if the statement is made in the course of a judicial proceeding.[156] The judicial proceeding may be of either a criminal or a civil nature.[157] False statements made during the proceedings of an administrative tribunal will not constitute perjury.[158] Although the term "judicial proceeding" is not confined to proceedings in a court of law, it nevertheless refers to proceedings in which rights are legally determined and liability imposed by a competent authority on a consideration of facts and circumstances placed before it.[159]

If the statement is not actually made during the judicial proceedings, it is submitted that it can be regarded as having been made "in the course of" such proceedings only (*a*) if the law permits it to be used as evidence at a judicial proceeding, and (*b*) if such use is contemplated as a possibility by the maker of the statement at the time when the statement is made.[160] According to this test, statements made in an affidavit to be used in a civil application qualify,[161] but

---

151 See s 101(1) of the Criminal Procedure Act 51 of 1977, which states that it is not necessary to allege or prove "that the *false* evidence or statement was material to any issue" (italics supplied). See also s 256 of the previous Criminal Procedure Act 56 of 1955. The proviso to s 256, requiring independent "competent and credible evidence as to the *falsity* of the statement", was, however, not re-enacted in the new s 208. *De Wet and Swanepoel* 435 requires objective falsity, but in *Hunt-Milton* 139 subjective falsity is deemed satisfactory.

152 It is then a case of attempt to commit the impossible. See *supra* VIII B 8.

153 1911 NPD 9 12.

154 *Matakane* 1948 3 SA 384 (A) 391–393; *Wallace* 1959 3 SA 828 (R) 829–830.

155 S 20 of the General Law Amendment Act 46 of 1935, replaced by s 319(1) of the Criminal Procedure Act 56 of 1955, replaced by s 101(1) of the Criminal Procedure Act 51 of 1977.

156 *Ah Chee* 1912 AD 231 237; *Carse* 1967 2 SA 659 (C) 660.

157 Eg *Mahomed Hossain* 1913 CPD 841; *Du Toit* 1950 2 SA 469 (A).

158 *Ah Chee* 1912 AD 231 241; *Carse* 1967 2 SA 659 (C).

159 *Beukman* 1950 4 SA 261 (O) 263. See the criteria for a judicial proceeding suggested in *Carse* 1967 2 SA 659 (C) 663–664.

160 *Beukman supra* 266; *Hunt-Milton* 146.

161 *Du Toit* 1950 2 SA 469 (A); *Beukman supra* 264, 266A.

not a statement made on oath in which a false criminal charge is laid,[162] nor extra-judicial affidavits made to the police in the course of their investigation into an alleged crime.[163]

7 Court need not have jurisdiction As far as can be ascertained it has not yet been decided whether perjury can be committed only if the judicial proceedings take place before a court having jurisdiction. Certain older decisions, following English law, required for perjury that the statement should be made "before a competent jurisdiction",[164] but these words were usually added *obiter*. It is submitted that lack of jurisdiction, be it territorial or as regards the subject matter, is no defence to a charge of perjury.[165] One can accept that if a false statement is made before a "tribunal" which cannot be described as a court of law, no perjury is committed, as where a group of prisoners of war "try" their own comrades for violating a code of conduct drawn up by themselves, or where "witnesses" "testify" before a so-called "people's court" or "bundu court".[166]

8 On oath, affirmation or admonition Perjury is committed only if the false statement is made on oath[167] or in a form allowed by law to be substituted for an oath, namely an affirmation in the place of an oath,[168] or an admonition to speak the truth in the case of certain classes of persons, such as young children.[169] Perjury can, therefore, not be committed during a legal representative's address to the court. The official who administers the oath or admonition, or who accepts the affirmation, must be competent to do so.[170]

9 Unlawfulness An otherwise unlawful false statement may conceivably be justified by coercion.[171] The fact that the false statement was made by X in an unsuccessful attempt to put up a defence is no justification for an otherwise unlawful perjury,[172] although it is unusual to indict a person for perjury in such cases. The reason why prosecutions are unusual in these cases is that the conviction and punishment which follow are generally deemed to be sufficient punishment for the perjury itself. Another consideration in this regard is the practical difficulty of prosecuting each and every accused who gives false evidence; if this were to be done, the courts would be inundated with prosecutions for perjury.[173]

---

162 *Beukman supra* 264C, 266A.
163 *Beukman supra* 365–366.
164 *Adendorff* (1884) 3 EDC 403; *Martheza* (1885) 3 HCG 456 457; *Lalbhai* (1909) 19 CTR 751.
165 According to s 101(2) of the Criminal Procedure Act 51 of 1977 it is unnecessary to allege in a charge of *inter alia* perjury the jurisdiction of the court, or to state the nature of the authority of the court or tribunal.
166 Cf *Zwane (3)* 1989 3 SA 253 (W).
167 On oaths, see s 162 of the Criminal Procedure Act 51 of 1977.
168 S 163 of the Criminal Procedure Act 51 of 1977.
169 S 164 of the Criminal Procedure Act 51 of 1977.
170 *Mahomed Hossain* 1913 CPD 841 844.
171 *Baxter* 1929 EDL 189 190–191; *Mokwena* 1948 4 SA 772 (T) 773, in which coercion was incorrectly regarded as a ground excluding culpability.
172 *Malianga* 1962 3 SA 940 (R) 943.
173 Cf *Matakane* 1947 3 SA 717 (O) 724; "Witnesses daily commit perjury in our Courts with the greatest aplomb."

10 Intention Perjury can be committed intentionally only.[174] X must know[175] or at least foresee the possibility that his statement may be false. In the latter case he has the requisite culpability if he acts recklessly in not caring whether the statement is correct or false and in failing to qualify his statement.[176] Mere inadvertence or carelessness is, however, not sufficient.[177] As the culpability must refer to all the elements of the crime, X must also be aware of the fact that he is under oath,[178] affirmation or admonition, and that his statement is made in the course of judicial proceedings.[179]

D SUBORNATION OF PERJURY

1 Definition Subornation of perjury consists in unlawfully and intentionally inducing another person to make a false statement on oath, affirmation or admonition and in the course of a judicial proceeding, which statement is in fact made by the other person.[180]

2 Discussion of crime The crime is strictly speaking superfluous, because all cases of subornation of perjury could be treated as incitement to commit perjury. Subornation of perjury, however, coincides only with cases of successful incitement to perjury, because the crime is not committed unless the false evidence is in fact given by the person suborned.[181] If the person induced to give false evidence in fact does not give such evidence because he either refuses, or agrees but reneges, or is not called as a witness, the inducer could be charged with merely attempted subornation of perjury, or with incitement to commit perjury, or with defeating or obstructing the course of justice (or attempting to commit this crime). Subornation may overlap with the crime of defeating or obstructing the course of justice.[182]

Apart from the element of inducement, the other elements of the crime, namely (*a*) false statement, (*b*) on oath, affirmation or admonition, (*c*) in the course of a judicial proceeding, (*d*) unlawfulness, and (*e*) intention are the same as in the crime of perjury discussed above.[183] It is not clear whether the party suborned should himself be aware of the fact that the evidence he is asked to give is false, but the better view seems to be that such knowledge is not required.[184]

---

174 *Mokwena* 1948 4 SA 772 (T) 773; *Bushula* 1950 4 SA 108 (E) 116.
175 *Mokwena supra* 773; *Bushula supra* 116F, 117F.
176 *Bushula supra* 116–117. On the problems surrounding proof of *dolus eventualis* in charges of perjury, see *Bisset* 1990 1 SACR 292 (ZS).
177 *Mokwena supra* 773.
178 *Shongwe* 1966 1 SA 390 (RA) 393C–D.
179 It is submitted that the opposite view held in *Shongwe supra* 393, 399 is incorrect.
180 Except for the requirement that another person must be induced the definition of the crime is the same as that of perjury (*supra* X C 1). The few reported cases of subornation are: *Meyer Yates* (1897) 4 OR 134; *Cupido* 1939 1 PH H69 (C); *Kganare* 1955 1 PH H106 (O); *Wallace* 1959 3 SA 828 (R) 829E–F; *Bester* 1966 4 SA 432 (RA), and *Kature* 1967 1 PH H125 (RA).
181 *Hunt-Milton* 151–153.
182 *Zackon* 1919 AD 175 179; *Mtshizana* 1965 1 PH H80 (A).
183 The requirement that the suborner must be aware of the falsity of the evidence was stressed in *Cupido supra* and *Kganare supra*.
184 *Wallace supra*.

E MAKING CONFLICTING STATEMENTS UNDER DIFFERENT OATHS (CONTRAVENTION OF SECTION 319(3) OF ACT 56 OF 1955)

1 Background It became clear long ago that it was often very difficult to prove that a person had committed common-law perjury. As a result many persons who ought to have been punished for making false declarations under oath escaped convictions of perjury. The mere fact that somebody made two conflicting statements under two different oaths did not necessarily mean that he had committed perjury. He could be convicted only if the state proved that one of the statements was false, and that he knew that it was false – thus, that he had intended to lie. This was often very difficult to prove. X might have changed his mind, or at least could allege as a defence that he had changed his mind. When investigating the commission of a crime, the police usually take affidavits from people who are able to throw light on the alleged commission of the crime. It can be extremely embarrassing to the prosecution if a person who has made such an affidavit subsequently gives evidence in court and in the course of such evidence makes statements that are in conflict with the contents of his previous affidavit to the police.

2 Content of section To overcome this and certain other difficulties (such as proving that the statement was made in the course of legal proceedings)[185] a new statutory offence was created, which is often referred to simply as "statutory perjury". It was originally contained in section 131(3) of Act 31 of 1917 (the old Criminal Procedure Act). In 1955 it was re-enacted in section 319(3) of the Criminal Procedure Act 56 of 1955. When in 1977 this Act was replaced by the new Criminal Procedure Act 51 of 1977 the said section 319(3) was not revoked and replaced by a section in the new Act. Section 319(3), therefore, still applies today. It reads 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."

3 What the state has to prove The state need prove only (*a*) that X on two different occasions made two statements under oath, and (*b*) that the statements conflict with each other.[186]

As far as (*a*) is concerned, it is immaterial whether one or both of the oaths are in writing or oral; neither does it matter whether either was made in the course of a legal proceeding.[187] The section speaks only of statements under oath, but it would appear that the section is also contravened if one or both of the statements

---

185 Cf the discussion in *Shole* 1960 4 SA 781 (A) 789.
186 *Mahomed* 1951 1 SA 439 (T) 442; *Shole supra* 789; *Kibi* 1978 4 SA 173 (E) 175.
187 *Ex parte Minister of Justice: in re R v Bhyala* 1943 AD 135; *Mahomed supra* 441G–H.

are made after an affirmation or declaration to speak the truth, since section 2 of the Interpretation Act 33 of 1957 provides that where the word "oath" occurs in a statute, it includes an affirmation or declaration to speak the truth.

The two statements must be contained in two different oaths. Making conflicting statements under the same oath does not constitute the crime. If (as is customary in practice) after an adjournment of the court a witness resumes his evidence which he started to give before the adjournment, and is warned by the judicial officer that he is still under oath, his evidence after the adjournment is not evidence under another or a different oath, as contemplated by the section.[188]

In order to prove that a witness made an extra-judicial statement *under oath* the state must prove that the oath was administered and the statement made in accordance with the provisions of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 and the regulations regarding the form of the oath and the way in which it has to be administered, which are promulgated from time to time in terms of section 10(*b*) of this Act.[189] The person administering the oath must have the necessary authority to do so. A discussion of who are justices of the peace and how the oath has to be administered falls outside the scope of this book.

As regards requirement (*b*) mentioned above, namely that the statements must conflict with each other, the state need not prove which statement is false.[190] Whether or not the statements do conflict is for the most part a question of fact.[191] In *Ramdas*[192] the Appellate Division held that the two statements must not be capable of reconciliation, and that they must be mutually destructive. If the second statement consists in only a denial that the first statement was made, there are not two conflicting statements.[193]

4 Onus on accused probably unconstitutional According to the present formulation of the section the state need not prove that at the time of the making of each of the two statements X believed that what he was saying was untrue. In other words, the state need not prove that X intentionally told the untruth. An onus is placed on X to prove the absence of any intention to lie; more particularly X must prove that on both occasions he believed that what he was saying was the truth. Is this onus placed upon X constitutional?

It is submitted that this onus is unconstitutional, since it conflicts with section 35(3)(*h*) of the Constitution, which grants X the right to be presumed innocent. It is submitted that section 319(3) creates a reverse onus which is not reasonable and justifiable.[194] It is submitted that the normal rule relating to the onus of

---

188 *Butelezi* 1952 1 SA 511 (O).

189 Cf *Rajah* 1955 3 SA 276 (A); *Shole supra*; *Khan* 1963 4 SA 897 (A); *Khoza* 1973 4 SA 511 (T); *Bacela* 1988 2 SA 665 (E). It is evident from the latter case that a statement under oath will not qualify for the purposes of this section if the person making the statement was coerced to do so.

190 *Mahomed* 1951 1 SA 439 (T) 442.

191 *Shole supra* 789; *Mazwai* 1979 4 SA 484 (T) 486.

192 1994 2 SACR 37 (A) 40*e* (criticized by Louw 1994 *SACJ* 395).

193 *Mofokeng* 1957 2 SA 162 (O).

194 Cf *Zuma* 1995 1 SACR 568 (CC); *Bhulwana* 1995 2 SACR 748 (CC); *Mbatha* 1996 1 SACR 371 (CC); *Julies* 1996 2 SACR 108 (CC); *Coetzee* 1997 1 SACR 379 (CC); *Ntsele* 1997 2 SACR 740 (CC).

proof in criminal matters applies also to prosecutions for contravening section 319(3). This means that the state bears the onus of proving intention. If the state has led evidence that X had made two conflicting statements, in certain cases the *prima facie* inference can, depending upon the facts, be drawn that during at least one of the two occasions X realised that he was not speaking the truth.

5 Difference between common-law and statutory perjury To sum up, there are the following points of difference between the two crimes: (*a*) In common-law perjury only one statement comes into the picture, whereas in statutory perjury there are two. (*b*) Common-law perjury can be committed in the course of a legal proceeding only; in statutory perjury neither of the statements need be made in the course of a judicial proceeding (although at least one of them usually is).

F MAKING FALSE STATEMENTS IN AN AFFIDAVIT (CONTRAVENTION OF SECTION 9 OF ACT 16 OF 1963)

1 Definition Section 9 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 provides that any person who, in an affidavit, affirmation or solemn or attested declaration made before a person competent to administer an oath or affirmation or take the declaration in question, has made a false statement knowing it to be false, commits an offence. According to the same section he is liable to the penalties prescribed by law for the offence of perjury.

2 Discussion of crime This section is applicable if somebody intentionally makes a false affidavit or declaration as specified in the section outside a court, in other words, not in the course of a legal proceeding.[195] This does not mean that if the statement is subsequently used in a legal proceeding the section can, therefore, not be contravened. It means only that the crime is completed as soon as the false statement is made, and that it does not matter what use is subsequently made of it, or for what purpose it was made.[196] The section is not applicable to false statements made under oath by a witness in the course of a trial in a court.[197] The requirement of intention is specifically stated in the section.[198]

G ESCAPING FROM CUSTODY

1 General There are, generally speaking, three offences or groups of offences relating to escaping from lawful custody, namely the common-law offence of escaping, contravention of section 51 of the Criminal Procedure Act 51 of 1977 and contravention of certain provisions of the Correctional Services Act 111 of 1998.

---

195 *Mpofana* 1970 2 SA 72 (C).
196 *Du Toit* 1950 2 SA 469 (A).
197 *Opperman* 1969 2 SA 181 (T).
198 On this requirement, see *Theron* 1968 4 SA 61 (T) 62.

2 The common-law crime of escaping In terms of the common law it is a crime to escape from a prison or other place of lawful detention. People who assist in the escape, rescue a prisoner from gaol or harbour an escaped prisoner are similarly guilty of an offence in terms of the common law.[199] However, the common-law offence is of little importance, since statutory offences that cover the same misconduct have long since been enacted.

3 Escaping and aiding escaping before incarceration Section 51 of the Criminal Procedure Act 51 of 1977 deals with escape after a lawful arrest but before the arrested person is lodged in a prison or police cell. Section 51(1) provides that any person who escapes or attempts to escape from custody after he has been lawfully arrested and before he has been lodged in any correction facility, police-cell or lock-up, commits an offence. The custody must be lawful.[200]

Section 51(2) provides that any person who rescues or attempts to rescue from custody any person after he has been lawfully arrested and before he has been lodged in any correctional facility, police-cell or lock-up, or who aids such person to escape or to attempt to escape from such custody, or who harbours or conceals or assists in harbouring or concealing any person who escapes from custody after he has been lawfully arrested and before he has been lodged in any correctional facility, police-cell or lock-up, commits an offence.

The punishment for these crimes is the same as those provided for in the Correctional Services Act 111 of 1998 for escaping from lawful custody. This punishment will be set out in the discussion below of the relevant sections of that Act.

4 Offences created in Correctional Services Act relating to escaping Section 117 of the Correctional Services Act 111 of 1998 provides that any prisoner who escapes from custody, commits a crime. A prisoner who conspires with any person to procure his or her own escape or that of another prisoner, or who assists or incites any prisoner to escape, also commits a crime. Further, any prisoner who is in possession of any document or article with intent to procure his or her own escape or that of another prisoner, commits a crime. A prisoner who in any manner collaborates with a correctional or custody official or any other person to leave the prison without lawful authority or under false pretences, also commits a crime. The punishment for these crimes is a fine or imprisonment for a period not exceeding ten years or to imprisonment without the option of a fine or both.[201]

---

199 Voet 48 3 9; Damhouder 18; Matthaeus 47 16 4; Van der Linden 2 4 7; *Msuida* 1912 TPD 419.

200 *Mafora* 2010 1 SACR 269 (NWM) par 10; *Evilio* 2012 1 SACR 367 (SGHJ). In *Busuku* 2006 1 SACR 96 (E) the court emphasized that where X had escaped after he had been lodged in police cells, he should not be charged under s 51 of the Criminal Procedure Act, but with contravention of section 117 of the Correctional Services Act 111 of 1998. This crime is set out later in the text.

201 If the provisions of the Adjustment of Fines Act 101 of 1991 are taken into account, the maximum fine that may be imposed is R120 000 × 10 = R1.2 million in the case of a Magistrate's Court which is not a Regional Court, and in the case of a Regional Court R600 000 × 10 = R6 million.

Section 115 of the same Act deals with aiding escapes. It provides that any person who conspires with or incites a prisoner to escape, or who assists a prisoner in escaping or attempting to escape from any correctional centre or from any place where he or she may be in custody, commits a crime. A person who, for the purpose of facilitating the escape of any prisoner, supplies any other person with any document, disguise or any other article, also commits a crime. A person who harbours or conceals or assists in harbouring or concealing an escaped prisoner, commits a crime. The punishment for these acts is the same as the punishment for contravention of section 117.

CRIMES AGAINST THE COMMUNITY

CHAPTER

XI

SEXUAL CRIMES

A GENERAL

1 Introduction The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereafter referred to as "the Act") consolidates all crimes relating to sexual matters.

The Act repeals the common-law crime of rape[1] and replaces it with an expanded statutory crime of rape, which is applicable to all forms of sexual penetration without consent, irrespective of the gender of the perpetrator or the victim.[2] It repeals the common-law crime of indecent assault[3] and replaces it with a statutory crime of sexual assault, applicable to all forms of sexual violation without consent.[4] It repeals other common-law crimes dealing with the commission of sexual acts, namely incest, bestiality and intercourse with a corpse,[5] and replaces these crimes with new statutory crimes.[6] It repeals large portions of the Sexual Offences Act 23 of 1957[7] and replaces them with newly formulated sexual crimes. It also creates a number of new sexual crimes not formerly known in our law.

It is noticeable that the Act does not penalise a certain type of act which deals directly with sexual matters: that is the intentional or negligent infection of another person with the HIV virus. The fact that this type of conduct is not rendered punishable, must be regretted. However, if X, who knows that he is HIV-positive, rapes a woman Y in the knowledge that by so doing he will transfer the deadly virus to Y, he commits attempted murder, if his act becomes

1 S 68(1)(b).
2 S 3, discussed *infra* XI B.
3 S 68(1)(b).
4 S 5, discussed *infra* XI D.
5 S 68(1)(b).
6 S 12, 13 and 14, discussed *infra* XI K, L and M.
7 S 68(2) read with the Schedule to the Act.

known while Y is still alive.[8] If his act becomes known after Y has already died and it is clear that the deadly virus transferred to Y by X was the cause of death, he may be convicted of murder.

A full discussion of every provision of this Act falls outside the scope of this book. Only those parts of the Act which deal with the substantive criminal law, that is, those sections defining the most important crimes, will be discussed. Provisions dealing primarily with procedural or administrative matters, such as those dealing with HIV testing of alleged offenders and the national register of sexual offenders, will not be discussed.

2 Description of perpetrator and complainant The style used in this book is to refer to the perpetrator of a crime as "X" and the victim or complainant as "Y". In the formulations of the definitions in the Act the legislature refers to the perpetrator as "A" and to the complainant as "B". For the sake of consistency of style, the letters "A" and "B" will not be used in the discussion of the crimes which follow. Instead the use of the letters "X" and "Y" (and "Z", when referring to a third party) will be retained. The letters "A", "B" and "C" will be used only in cases of direct quotations of for example definitions in the Act.

3 Attempt, conspiracy, incitement, assistance Section 55 provides that any person who (*a*) attempts; (*b*) conspires with another; (*c*) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person to commit any sexual offence in terms of the Act, is guilty of an offence. What the section does is to criminalise all anticipatory conduct (attempt, conspiracy and incitement) in respect of the sexual crimes as well as all conduct by accomplices to the commission of such crimes.

The section is entirely unnecessary, since the provisions of section 18 of the Riotous Assemblies Act 17 of 1956 already criminalises such anticipatory conduct in respect of all statutory crimes,[9] whereas the conduct of accomplices to crimes are punishable in terms of the common law.[10] Presumably the legislature decided to insert this section in order to ensure that all such anticipatory conduct in respect of sexual crimes as well as all assistance by an accomplice to the commission of sexual crimes is contained within this one Act.

This aspect of every sexual crime discussed below should be kept in mind throughout when reading the discussions of the crimes, since reference to these aspects of the crimes will not be made again in the discussion of each crime. To reiterate in the discussion of every sexual crime that attempt, conspiracy, incitement and the rendering of assistance to or in respect of such crimes is punishable, would amount to unnecessary repetition. What attempt, conspiracy, incitement and accomplice liability entail has already been set out in detail above.[11]

4 Punishment It is customary for the legislature when creating crimes to stipulate the maximum punishment, for example, the maximum number of years of imprisonment which may be imposed if a person is convicted of having committed a crime created in the Act. The present Act is unusual in that there are,

---

8 *Nyalungu* 2013 2 SACR 99 (T).
9 *Supra* VIII.
10 *Supra* VII C.
11 *Supra* VIII (attempt, conspiracy and incitement); VII C (accomplices).

generally speaking, no provisions in the sections creating crimes which set out the maximum punishment which a court may impose after a conviction. However, section 56A(1) of the Act provides that if a court has convicted a person of an offence in terms of the Act and a penalty is not prescribed in respect of that offence in terms of the present Act or any other Act, it (the court) may impose a sentence as provided for in section 276 of the Criminal Procedure Act 51 of 1977 which the court considers appropriate and which is within that court's penal jurisdiction.

To understand the reason for the insertion of this provision, it is necessary to consider the judgment of the Supreme Court of Appeal in *Director of Public Prosecutions, Western Cape v Prins.*[12] In this case the Supreme Court of Appeal dealt with a challenge by X that some of the most important provisions in the Act which purported to create crimes, did in fact not create crimes because there were no penalty clauses in respect of these crimes, in other words, because the legislature failed to insert provisions clearly stating what the (maximum) punishments for these "crimes" were. The court dismissed this challenge, on the ground of the provisions of section 276(1) of the Criminal Procedure Act 51 of 1977. This subsection provides that a person convicted of a crime may receive any of a number of sentences listed, such as imprisonment, a fine and correctional supervision. The court held that section 276(1) was a general provision empowering courts to impose sentences in respect of all crimes, both common-law and statutory, where there is no other provision in law prescribing the sentence or maximum sentence that could be imposed for a specific crime. The extent of the punishment is in the discretion of the court, subject only to provisions limiting a court's powers of punishment, as is the case in Magistrate's Courts.

To sum up, if a court has convicted X of any of the crimes which will be discussed below, the punishment is simply in the court's discretion, subject only to that particular court's penal jurisdiction, that is, the maximum punishment which that court may impose for any crime.

As far as the new statutory crime of rape, as well as certain of the new sexual crimes against children and mentally disabled persons are concerned, the provisions of the Criminal Law Amendment Act 105 of 1997 apply.[13] These provisions provide for certain minimum sentences to be imposed in certain circumstances upon a person convicted of the crimes mentioned. The provisions relating to rape will be discussed below at the end of the discussion of rape.

B RAPE

1 Definition Section 3 of the Act provides that any person who unlawfully and intentionally commits an act of sexual penetration with another person without the latter's consent, is guilty of the offence of rape.

The expressions "sexual penetration" and "consent" are further defined in section 1 of the Act. These latter definitions are fairly long and will be quoted

12 2012 2 SACR 183 (SCA), discussed by Terblanche and Jordaan 2012 *SACJ* 379.
13 See the Schedule to this Act.

and discussed below under the discussions of the elements of the crime to which they refer.

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

3 Rape in terms of the common law Before the coming into operation of the present Act rape was a common-law crime. It consisted in a male having unlawful and intentional sexual intercourse with a female without her consent.[14]

The slightest penetration by X of Y was sufficient, and it was immaterial whether semen was emitted.[15] X could only have been a male and Y (the complainant) could only have been a female. By "intercourse" was meant the insertion by the male of his penis into the woman's vagina. If he inserted his penis into her anus, he did not commit rape, but indecent assault.[16] However, in 2007, shortly before the new Act came into operation, the Constitutional Court in *Masiya v Director of Public Prosecutions*[17] extended the definition of the common-law crime of rape by including within its ambit also penetration by a male's penis into the woman's anus. This decision is, with all respect, incorrect, as it violated the principle of legality: the same ratio underlying the principle that no court may create a crime (only parliament may do so) also dictates that no court, not even the Constitutional Court, has the power to extend the ambit of an existing crime to include within its definition situations formerly falling outside the definition. Only parliament has the power do so. The judgment was quite correctly criticised.[18] However, since parliament did intervene by the creation of the new statutory crime of rape, it is unnecessary to discuss the unfortunate judgment in *Masiya* further. As far as the requirements for the crime of rape is concerned, this judgment is now merely of academic importance, although it remains of importance as far as the principle of legality is concerned

The intercourse had to take place without the woman's consent. This requirement, which in practice amounted to the most important of all the requirements which the state had to prove in order to obtain a conviction, coincided for all practical reasons with the corresponding requirement in the new statutory crime of rape, which is discussed below.

4 General remarks concerning statutory crime of rape One of the reasons, perhaps the most important one, why the legislature has decided to create a new definition of rape, is to "deal adequately, effectively and in a non-discriminatory manner with many aspects relating to . . . the commission of sexual offences" and also to give greater recognition to the right to equality enshrined in the Bill of Rights.[19]

---

14 *Gaseb* 2001 1 SACR 438 (NmS) 451*g–h*.
15 *Blaauw* 1999 2 SACR 295 (W) 299*c*.
16 *M (2)* 1990 1 SACR 456 (N).
17 2007 2 SACR 435 (CC).
18 For a detailed criticism of the judgment, see Snyman 2008 *SALJ* 677, as well as the criticism of this judgment in the course of the discussion of the principle of legality *supra* I F 11, 12. See also Hoctor 2007 *SACJ* 78, who criticises the judgment of Ranchod AJ in the Transvaal court in this case.
19 See the 4th and 6th "whereas" in the Preamble of the Act.

Before the enactment of the present Act the common-law definition of rape was criticised as archaic, illogical, discriminatory, irrational, unjust and unconstitutional.[20] This line of argument is incorrect. There was and is a purely rational reason for treating non-consensual penile penetration of a woman's vagina on a different footing from such penetration of her anus:

Firstly, males and females are created differently in that below the waist males have only one orifice which can be sexually penetrated, namely the anus, whereas females have two, namely the anus as well as the vagina. To regard this difference as amounting to discrimination or inequality is incorrect. It would amount to "putting God in the dock" because He (of She or evolution or whoever or whatever one believes to have created the world and mankind), by creating two different types of people, failed to obey the (present "politically correct") principle that there ought to be no differences between people.

Secondly, the function of a woman's vagina and that of her anus are fundamentally different: the way in which the human species procreates is by the male discharging his semen into the woman's vagina, as opposed to her anus. *Penile penetration of the vagina may result in the woman becoming pregnant*. This results in the woman's vagina playing a privileged role in her biological makeup. The vagina cannot simply be lumped together with her anus as just another orifice that happens to form part of her anatomy. If the privacy of her vagina is violated by penile penetration, the possible consequences for her are much more serious than if her anus is violated by such penetration: the distinguishing feature of penile penetration through the vagina, as opposed to such penetration via the anus, is the *risk of pregnancy*.

Although it is not disputed that non-consensual anal intercourse is traumatic, abhorrent and demeaning for the woman (as well as, for that matter, for the male who is penetrated through his anus), non-consensual penile penetration of the vagina violates the most personal of all the parts of a woman's body. It infringes her whole being and identity as a woman, as opposed to a man. Accordingly *vaginal and anal penetration deserve to be treated separately*. The Constitutional Court in *Masiya v Director of Public Prosecutions*[21] was completely correct in refusing to agree with the decision of the Transvaal Court in the same case (as well as with the regional magistrate who initially heard the case) that the common-law definition of rape was unconstitutional.

Though the courts have no right to extend the definition of existing crimes, parliament does have this right, and exercised this right in enacting the Act presently under discussion. As far as the crime of rape is concerned, in terms of the Act it no longer matters whether it is the vagina or the anus which is penetrated, whether the perpetrator is a male or a female, whether the victim (complainant) is a female or a male (as where male X inserts his penis into another male Y's anus), or whether the penetration is by a penis or by a finger, some other part of X's body or even by some object or part of an animal's body. Even non-consensual penetration of Y's mouth may in certain circumstances amount to the commission of the crime.

---

20 *Masiya v Director of Public Prosecutions supra* par 10, 71, where the remarks of the magistrate who heard the case, as well as of Ranchod J, who delivered the judgment of the Transvaal court, are referred to.

21 *Supra* par 32.

All these acts now amount to rape. The legislature has obviously not given much recognition to the "principle of fair labelling", and lumped together under one single heading a number of dissimilar acts which differ substantially from one another in character. The general public will presumably continue to think of rape as non-consensual penile penetration by a male of a woman's vagina. Non-consensual penile penetration of one male by another male via the anus could have been treated as a separate crime called "male rape".

5 Sexual penetration The act consists in X committing an act of "sexual penetration" in respect of Y.

(*a*) *Definition of "sexual penetration" in the Act* The expression "sexual penetration" is defined in section 1(1) as follows:

> "sexual penetration" includes any act which causes penetration to any extent whatsoever by –
>
> (*a*) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
>
> (*b*) any other part of the body of one person, or any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
>
> (*c*) the genital organs of an animal, into or beyond the mouth of another person,
>
> and "sexually penetrates" has a corresponding meaning.

The words "**genital organs**" as they appear in the Act are further defined in section 1(1) as including "the whole or part of the male and female genital organs, and further includes "surgically constructed or reconstructed genital organs".

(*b*) *The words "which causes penetration"*

The use of the word "causes" 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 the old common law crime of rape, 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.[22] The use of the word "causes" does not mean that "sexual penetration" is limited to cases where X uses another person to perform the act of penetration. The word "causes" should be read together with the word "includes" in the beginning of the definition.

Read thus, and also considering the wide import of the word "causes", it is clear that sexual penetration includes all the situations in which X performs the penetration of Y himself or herself, that is, with his or her own body or by himself or herself using some object to perform the penetration. The expression "which causes penetration" should be read as a *genus* of which the actual penetration of Y by X is merely a species. Put differently, for X to perform the penetration himself or herself is just one of a number of ways in which "an act which

22 Van der Bijl 2010 *SACJ* 224. For a contrary view, see Roux and Courtenay 2011 *THTHR* 286.

causes penetration" is committed. Furthermore, the use of the word "causes" also means that a female can be convicted of raping a male.[23]

(*c*) *Acts falling within the definition of "sexual penetration"*

If one analyses the definition of "sexual penetration" quoted above, one can list a large number of acts which qualify as acts of sexual penetration for the purposes of the Act. In order to systematise to some extent the wide range of possible acts which qualify under the definition, in the discussion which follows a distinction will be drawn between:

(*i*) acts committed by a male in respect of a female;

(*ii*) acts committed by a female in respect of a male;

(*iii*) acts committed by a male in respect of another male; and

(*iv*) acts committed by a female in respect of another female.

When considering the different acts listed below, it must be assumed throughout that Y is *not* a consenting party to the commission of the act.

(*i*) *Acts committed by a male in respect of a female*

1 X, a male, inserts his penis into the vagina of female Y. The slightest penetration is sufficient.[24] It is not required that there should be any emission of semen or that Y should have become pregnant as a result of X's act. This act may be described as the most classic illustration of rape. In fact, under the old common law it was the only act which qualified as an act of rape.

2 X, a male, inserts his penis into the anus of female Y. Once again, it is immaterial whether there is an emission of semen.

3 X, a male, inserts his penis into the mouth of female Y. The insertion of a penis into the mouth of another person is known as *fellatio*. It is immaterial whether there is an emission of semen. Insertion by X of his penis into Y's nose or ear does not fall within the definition.

4 X, a male, inserts any other part of his body into the vagina or anus of female Y. For example, X places his tongue into female Y's vagina. Such conduct is referred to as *cunnilingus*. The expression "any other part of the body" in the definition must obviously be interpreted in the light of which part of the male person's body is anatomically capable of penetrating a woman's vagina or anus. Thus, to embark for a moment into the realms of sexual fantasy, X's conduct also complies with the definition if he inserts his finger, toe, nose or perhaps even ear into Y's vagina or anus.

The insertion by X of some part of his body other than his penis into Y's *mouth* does not qualify, because paragraph (*b*) of the definition, which deals with the insertion of "any other part of the body", speaks only of insertion into "the genital organs or anus of another person". No mention is made in paragraph (6) of the mouth of the other person. Thus, if male X merely sticks his finger into female Y's mouth, his conduct does not qualify, although he may render himself guilty of assault.

---

23 This will be explained below in paragraph XI B 5 (*c*) (ii) 7, 8.

24 Cf the words "to any extent whatsoever" which follow immediately upon the word "penetration" in the definition of "sexual penetration" in s 1(1).

5 X, a male, inserts "any object" into Y's vagina or anus. Objects such as a stick, pen, pencil, carrot, peeled banana or sex toy come to mind. The insertion by X of "any object" into Y's *mouth* does not qualify, because paragraph (*b*) of the definition, which deals with the insertion of "any object", speaks only of insertion into "the genital organs or anus of another person". No mention is made in paragraph (6) of the mouth of the other person. The insertion of an object into Y's mouth may, of course, amount to assault.

6 X, a male, inserts "any part of the body of an animal" into the vagina or anus of female Y. The expression "any part of the body of an animal" is wide enough to include not only the animal's genital organ but also other parts of the animal's anatomy, such as the animal's ear, horn, or tail. To insert an animal's ear or tail into Y's mouth is not an act falling within the definition. The insertion by X of the genital organs of a live animal into Y's vagina, anus or mouth, simultaneously amounts to the commission by X of the new statutory crime of bestiality, created in section 13 of the Act, which will be considered below.[25]

7 X, a male, inserts the genital organ of an animal, for example, a male animal's penis, into the *mouth* (as opposed to the vagina or anus) of Y, a female. To insert a part of the body of an animal other than the animal's genital organs into Y's mouth, is not an act falling within the definition; this flows from the wording of subparagraph (*c*) of the definition of "sexual penetration", which mentions only an animal's genital organs. The insertion by X of the genital organ of an animal into the mouth of female Y simultaneously amounts to the commission of the new statutory crime of bestiality, created in section 13 of the Act, which will be considered below.[26]

8 X, a male, has a surgically constructed or reconstructed penis, which he inserts into the vagina, anus or mouth of female Y.

9 What is the position if X, a male, does not himself insert any part of his body or any other object into female Y's vagina, anus or mouth, but *causes* such a penetration to take place through the instrumentality of a third party, Z? For example, X forces Z to perform the penetration upon Y by threatening to kill him (Z) if he does not execute the command, and Z, fearing for his life, does as he is instructed. X thus compels Z to perform an act of sexual violation. The phrase "any act which causes penetration . . . by . . . the genital organs of one person into . . . the genital organs . . . of another person" at the beginning of the definition of "sexual penetration" in section 1(1) is so wide that it would seem to include this type of behaviour. However, the problem is that section 4 criminalises exactly this form of conduct. If one were to assume that such conduct is covered by section 3, it would mean that the provisions of section 4 are rendered nugatory. It is a basic principle of the interpretation of statutes that a statutory provision should not be interpreted in such a way as to render certain provisions (in this case the whole of section 4) redundant. It is, therefore, submitted that this type of conduct should be punished as a contravention of section 4, and not of section 3.[27]

---

25 *Infra* XI L.
26 *Infra* XI L.
27 For a discussion of the crime created in section 4, see *infra* XI C.

(*ii*) *Acts committed by a female in respect of a male*

1 X, a female, places her genital organ into the mouth of Y, a male. In other words, X effects a *cunnilingus* between her and Y.

2 X, a female, places the penis of male Y into her mouth. In other words, X effects a *fellatio* between her and Y.

3 X, a female, places another part of her body, such as her finger, into the anus of Y, a male.

4 X, a female, places an object such as a pen or a sex toy into the anus of Y, a male.

5 X, a female, places any part of the body of an animal, such as the animal's tail, into the anus of Y, a male.

6 X, a female, places the genital organ of an animal, such as a male animal's penis, into the anus or mouth of Y, a male.

7 What is the position if X, a female, does not herself insert any part of her body or any other object into the anus or mouth of Y, a male, but *causes* such a penetration to take place through the instrumentality of a third party, Z? For example, X forces Z to perform the penetration upon Y by threatening to kill him (Z) if he does not execute the command, and Z, fearing for his life, does as he is instructed. The third party may also be a female, in which case the object inserted into Y depends upon what a woman is anatomically capable of inserting into male person Y's orifices. It is submitted that in this set of facts the position is the same as that discussed above under the analogous act numbered 9 under the above heading "(i) *Acts committed by a male in respect of a female"*, and that such conduct is not punishable as rape. The reasons for this submission are set out above under the act numbered 9. Forced penetration should be punished as contravention of section 4 and not of section 3.

8 X, a female, places the penis of male person Y into her (X's) vagina, anus or mouth, or generally manipulates their respective bodies or bodily movements in such a way that X's actions result in Y penetrating her (X's) vagina, anus or mouth with his penis. It should be remembered that the legislature contemplated the phenomenon of a female raping a male, no matter how difficult it may be to contemplate. This flows from the ideology underlying the Act, namely that male and female should be treated exactly equally, that is, to brush any possible differences between the sexes "under the carpet", as it were. (This, in turn, forms part of the wider prevailing philosophy of "political correctness", which holds that there are or ought to be no differences between people, and that this point of departure should be maintained at all costs, even if it is at odds with reality.) The wording of paragraph (*a*) of the definition of "sexual penetration" in section 1(1) is wide enough to include such conduct. The female is then the rapist and the male the complainant. The easiest way of contemplating this type of conduct is to imagine the female as big and strong and the male as physically weak (and the whole event as evidence of a rather *rara avis*).

9 The question arises whether an act of sexual penetration as envisaged by the legislature takes place in the following type of situation: X, a female, places a part of male person Y's body other than Y's genital organ, such as Y's finger, into her vagina or anus, or generally manipulates their bodies or

bodily movements in such a way that the actions result in Y's inserting a part of his body such as his finger into her vagina or anus. It is submitted that such conduct does fall within the definition, because the provisions of paragraph (*b*) of the definition of "sexual penetration" is wide enough to cover such conduct.

If the conduct described under the previously numbered act (act numbered 8 under (*ii*)) amounts to rape (as indeed it does, as explained above), then the conduct described under the present heading must also qualify, because of the similarities in the wordings of paragraphs (*a*) and (*b*).[28] It is furthermore submitted that the position is the same if female X does not forcibly place a part of male person Y's body into her vagina or anus, but forces Y to insert some other object such as a pen, a banana or a sex toy into her vagina. The same arguments set out above apply to this type of situation.

(*iii*) *Acts committed by a male in respect of another male*

1 X, a male, inserts his penis into the anus of Y, another male. It matters not whether there is an emission of semen. This type of conduct, previously known as "sodomy", can also informally be described as "male rape". If Y has consented to the act, no crime is committed.[29]

2 X, a male, inserts his penis into the mouth of Y, another male.

3 X, a male, inserts another part of his body, such as his finger, into the anus of Y, another male. If X inserts his finger into Y's mouth, his act does not qualify.

4 X, a male, inserts an object such as a pen or a sex toy into the anus of Y, another male. If X inserts a sex toy in the form of, say, a plastic penis, into the mouth of Y, another male, his act does not qualify.

5 X, a male, inserts a part of the body of an animal, such as the animal's tail, into the anus of Y, another male.

6 X, a male, inserts the genital organs of an animal, such as the penis of a male animal, into the anus or mouth of Y, another male.

7 X, a male, has a surgically constructed or reconstructed penis which he inserts into the anus or mouth of Y, another male.

8 What is the position if X, a male, does not perform the act of insertion into some orifice of Y, as set out above, himself but forces or coerces a third party, Z, to perform the act? Z may be either a male or a female, provided the type of act she performs is possible, considering the respective anatomies of males and females. It is submitted that the position is the same as that described above under the analogous act numbered 9 under the above heading "(i) *Acts committed by a male in respect of a female"*. Such forced penetration should be punished as contravention of section 4 and not of section 3, otherwise the provisions of section 4 are rendered redundant.

---

28 Further support for the submission that the present type of conduct does fall within the definition is the fact that section 4, which criminalises compelled rape, is only applicable to situations where a third person is compelled to perform the act on the complainant. In the factual situation presently under discussion there are only two parties involved.

29 *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 557 (CC).

(*iv*) *Acts committed by a female in respect of another female*

1 X, a female, inserts her genital organs into the mouth of Y, another female.

2 X, a female, inserts some part of her body, such as her finger, into the vagina or anus of Y, another female.

3 X, a female, inserts some object like a pen or a peeled banana into the vagina or anus of Y, another female.

4 X, a female, inserts some part of the body of an animal, such as an animal's tail or a male animal's penis, into the vagina or anus of Y, another female.

5 X, a female, inserts the genital parts of an animal into the mouth of Y, another female.

6 What is the position if X, a female, does not perform the act of insertion into some orifice of Y as set out above herself, but forces or coerces a third party, Z, to perform the act? Z may be either a male or a female, provided the type of act that Z performs is possible considering the respective anatomies of males and females. It is submitted that the position is the same as that described above in the analogous act numbered 9 under the above heading "(i) *Acts committed by a male in respect of a female"*. Such forced penetration should be punished as contravention of section 4 and not of section 3, otherwise the provisions of section 4 are rendered redundant.

6 Absence of consent

(*a*) *Definitions in Act relating to absence of consent*

The act of sexual penetration set out above must take place without the consent of the complainant. The word "consent" as used in the definition of the crime is defined in section 1(2) as "voluntary or uncoerced agreement". Section 1(3) contains a long and important provision dealing with the interpretation of the words "voluntary or uncoerced". It reads as follows:

> "(3) Circumstances . . . in respect of which a person ("B") (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration . . . include, but are not limited to, the following:
>
> (*a*) Where B (the complainant) submits or is subjected to such a sexual act as a result of –
>
> (i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or
>
> (ii) a threat of harm by A against B, C or D or against the property of B, C or D;
>
> (*b*) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;
>
> (*c*) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that –
>
> (i) B 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; or

continued

(*d*) where B is incapable in law of appreciating the nature of the sexual act, including where B 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 B's consciousness or judgement is adversely affected;

(iv) a child below the age of 12 years; or

(v) a person who is mentally disabled."

The word "sexual act" which appears in this subparagraph is defined in section 1(1) as including an act of sexual penetration or sexual violation, and the word "complainant" is defined in the same subsection as "the alleged victim of a sexual offence".

(*b*) *Discussion of definitions relating to absence of consent*

The contents of the above definitions do not contain anything new as far as the legal rules relating to this matter are concerned. They merely codify the common-law rules in respect of the absence of consent which applied in the previous common-law crime of rape.

If Y (the complainant or victim) had offered physical resistance or loudly proclaimed his or her opposition (or both) to the proposed intercourse, there is, of course, no problem in holding that the act of sexual penetration took place without consent. It is, however, wrong to assume that a court may find that the act took place without Y's consent only if he or she had offered actual physical resistance or had expressly stated or shouted his or her opposition to the act. Just as Y's consent to the act may be signified either expressly or tacitly (by implication), her refusal to consent may, likewise, be signified either expressly or tacitly.

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 intercourse.

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) and each of them will now be discussed.

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

The first factor which leads the law not to recognise ostensible consent by Y as valid consent for the purposes of rape, is the existence of force, intimidation or threats of harm emanating from X in respect of Y or somebody else. 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 or somebody else, the law does not regard such consent as valid consent.

Centuries ago it was a requirement for a conviction of rape that the intercourse should have taken place violently. In our present law rape is no longer limited to such instances; the crime may be committed even though X had not used any real violence. If, as a result of either actual violence or fear of future violence, Y's will is so overborne by fear or intimidation that he or she no longer offers any outward resistance, such absence of resistance cannot be construed as valid consent to intercourse. If, as a result of the violence or threats thereof, Y decides simply to acquiesce in his or her fate, there is, in the eyes of the law, no consent, because there is a substantial difference between mere submission and real consent.[30] On the other hand, an objection raised by Y only after intercourse is of no effect if it appears that before the act Y was in fact a willing party.[31]

It is beyond dispute that fear aroused by threats of physical violence against Y results in the law not regarding the consent as voluntary and valid. Both threats by X that he or she will kill Y if Y does not submit to intercourse and threats of physical harm to Y serve to render any "consent" which may follow such threats invalid. However, the provisions of section 1(3)(*a*) goes further and stipulates that even force, intimidation or threats of harm not against Y, but against some *third party*, may render the ostensible consent invalid. It matters not whether the third party is a close family member of Y, such as his or her child or spouse, or a close friend. In fact, the subsection is so widely worded that it may even include threats against somebody whom Y has never even met.

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

The word "harm" in paragraph 3(*a*)(ii) 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 intercourse with him (X), and Y, not wanting her husband to know about the infidelity, submits to the intercourse, her submission cannot be construed as valid consent. This is a case of intimidation of Y by X.

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

Section 1(3)(*b*) speaks of cases "where there is an abuse of power or authority by (X) to the extent that (Y) is inhibited from indicating his or her unwillingness or resistance to the sexual act . . ." This provision refers to cases where Y is not threatened by physical violence, but X expressly or tacitly uses the position of power which he or she exercises over Y to influence Y to consent. For example, Y is an employee who takes his or her orders from X; X threatens to dismiss Y from his or her job, or to withhold a promotion from Y to which Y is entitled, if Y refuses to consent to the intercourse with X. Y's absence of resistance in this type of situation cannot be construed as valid consent, since there is no voluntary consent.

---

30 *K* 1958 3 SA 420 (A) 421G; *Z* 1960 1 SA 739 (A) 745E; *F* 1990 1 SACR 238 (A) 249.
31 *M* 1953 4 SA 393 (A) 397–398.

It has been held that if X, a policeman, threatens Y to lay a charge against her (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.[32] In *S*[33] it was even held that X, a policeman, committed rape when he had intercourse with Y in circumstances in which he had not threatened Y with some or other form of harm, but Y believed that X had the power to harm her and X had been aware of this fear. It is, therefore, clear that if X is somebody like a policeman who is in a position of power over Y, Y's "consent" will not be regarded as valid if the evidence reveals that she apprehended some form of harm other than physical assault upon her.

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

Section 1(3)(*c*) refers to cases in which "consent" is obtained by fraud. These provisions merely codify the principles already previously recognised in the common law.

In the old 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,[34] or fraud in respect of the nature of the act to which she "agreed"[35] (*error in negotio*), as when she was persuaded that the act was not sexual intercourse but some medical operation.[36] 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 loves her, that he is a famous pop star, sport hero, the owner of a flashy sports car or a multimillionaire, Y believes X's story and on the strength of such a misrepresentation she agrees to intercourse with X, her consent is valid and rape is not committed. In particular, consent is deemed to be valid where the woman is misled not about the nature of the act of sexual intercourse but about the results which will follow on such intercourse.[37]

The use of the word "including" in section 1(3)(*c*) should be noted. The word implies that there may be cases other than those specifically mentioned in section 1(3)(*c*), where fraud may vitiate the consent. Consider in this respect the following situation: X is HIV-infected, 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, X's consent should not be regard as valid consent.[38]

---

32 *Volschenck* 1968 2 PH H283 (D), *Botha* 1982 2 PH H112 (E).
33 1971 1 SA 591 (A).
34 *C* 1952 4 SA 117 (O) 121.
35 *Williams* 1931 1 PH H38 (E); *K* 1966 1 SA 366 (RA), *Williams* [1923] 1 KB 340 (X was a singing-teacher who pretended to improve Y's breathing technique by having intercourse with her); *Flattery* [1877] 2 QBD 410.
36 *Williams* 1931 1 PH H38 (E).
37 *K* 1966 1 SA 366 (RA) 368 (X represented to Y that intercourse with her would cure her of her infertility problem).
38 For a similar view, see Le Roux 2000 *De Jure* 293 310.

(*iv*) *Inability by Y to appreciate nature of 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". Once again these provisions contain no principles which have not already been recognised previously under the common law.

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.[39] 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".[40]

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.[41] What has to be considered is Y's true age, not his or her mental age. If, as in *S*,[42] Y's real age is 16 but her mental age is only 8, the presumption does not operate.

Paragraph (v) of subsection (3)(*d*) provides that the consent is not valid if Y is "a person who is mentally disabled".[43] The expression "person who is mentally disabled" is defined in section 1(1) as

> "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".

(*v*) *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.

---

39 *Ryperd Boesman* 1942 1 PH H63 (SWA); *C* 1952 4 SA 117 (O) 120.

40 For the recognition of this principle under the previous common law, see *Ryperd Boesman supra*, *K* 1958 3 SA 420 (A) 422, 424–426.

41 The same rule applied in common law. See *Z* 1960 1 SA 739 (A) 742.

42 1951 3 SA 209 (C).

43 *Cf* the facts in *Mayisela* 2013 2 SACF 129 (NGP). There is no indication in the judgment whether X was charged with rape in terms of the common law or in terms of the 2007 statute.

7 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.[44] However, this does not mean that unlawfulness is, therefore, not an element of the crime. Unlawfulness is an element of all crimes. As far as the present crime is concerned, unlawfulness may be excluded by the ground of justification known as official capacity. This will be the case if, for example, X is a medical doctor who treats Y for some ailment connected with Y's genital organs, and who in the course of the examination inserts his or her finger or some object into Y's vagina or anus: or who performs these actions in respect of female Y very shortly after Y had lodged a complaint of having been raped, in order to ascertain whether, for example, there has been any injury to her vagina.

8 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.[45] *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 to have sexual penetration.[46] 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.[47] 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.[48]

9 Sentence

(*a*) *General*

After the decision of the Constitutional Court in *Makwanyane*[49] the death sentence is no longer a competent sentence to be imposed upon a conviction of rape. It is similarly no longer possible for a court to order corporal punishment to be imposed upon X.[50] Since the imposition of a fine is not an apt type of sentence for this crime, the only type of sentence which remains is imprisonment. Before 1997 the courts had a free discretion as to the length of the period of imprisonment. It is well known that the incidence of rape in South Africa is alarmingly high. Statistics relating to the prevalence of the crime has already been

---

44 See the discussion of the relationship between the definitional elements and unlawfulness *supra* III A 5.

45 *K* 1958 3 SA 420 (A) 421; *Z* 1960 1 SA 739 (A) 743A, 745D. Although these cases relate to the old common-law crime of rape, according to general principles they also apply to the new crime. For a critical appraisal of the present law on this subject, see Smythe, Pithey and Artz 2.4.1.

46 *Z supra* 745E–F.

47 *Z supra* 743A–B, 745G–H.

48 *Z supra* 745, 746C; *K* 1958 3 SA 420 (A) 425H; *J* 1989 1 SA 525 (A) 530.

49 1995 2 SACR 1 (CC).

50 *Williams* 1995 2 SACR 251 (CC).

given above in the discussion of the crisis of the criminal justice system in South Africa.[51]

As a reaction to the high crime level section 51 of the Criminal Law Amendment Act 105 of 1997 was enacted. This makes provision for minimum sentences to be imposed for certain crimes, such as rape, in certain circumstances. It is clear from section 68(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with the Schedule to this Act, that the provisions of section 51 of Act 105 of 1997 apply also to the newly defined statutory crime of rape.

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

(*b*) *Imprisonment for life must sometimes be imposed*

Section 51(1) of the abovementioned Act provides that a Regional Court or a High Court must sentence a person convicted of rape to imprisonment for life in the following circumstances:

(1) where Y was raped more than once by X or by any co-perpetrator or accomplice;

(2) where Y was raped by more than one person and such persons acted with a common purpose;

(3) where X is convicted of two or more offences of rape or compelled rape but has not yet been sentenced;

(4) where X knows that he has acquired the "immune deficiency syndrome or the human immunodeficiency virus";

(5) where Y is below the age of 16 years;

(6) where Y is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable;

(7) where Y is mentally ill as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007;

(8) where the rape involved the infliction of grievous bodily harm.

(*c*) *Other minimum periods of imprisonment must sometimes be imposed*

If one of the circumstances set out immediately above are not present, X does not qualify for the mandatory imprisonment for life. However, section 51(2) of the Act provides that in such a situation a High or regional Court is nevertheless obliged to impose the following minimum periods of imprisonment:

(1) ten years in respect of a first offender;

(2) fifteen years in respect of a second offender;

(3) twenty years in respect of a third or subsequent offender.

(*d*) *Avoidance of minimum sentences*

There are always cases where a court is of the opinion that the imposition of one of the above minimum periods of imprisonment would, considering the

51 *Supra* I D 2 (*d*).

specific circumstances of the case, be very harsh and unjust. In subsection (3)(*a*) of section 51 the legislature has created a mechanism whereby a court may be freed from the obligation of imposing one of the minimum sentences referred to above. According to this subsection a court is not bound to impose imprisonment for life or for one of the minimum periods of imprisonment set out above, if there are *substantial and compelling circumstances* which justify the imposition of a lesser sentence than the prescribed one. If such circumstances exist, a court may then impose a period of imprisonment which is less than the period prescribed by the legislature.

The crucial words in the Act relating to the avoidance of mandatory minimum sentences are the words "substantial and compelling circumstances". In grappling with the interpretation of this important expression, the courts initially came to conclusions which were not always harmonious.[52] However, in *Malgas*[53] the Supreme Court of Appeal considered the interpretation of the words and formulated a relatively long list of rules to be kept in mind by courts when interpreting the words.[54] Without setting out all these rules, it may be stated that perhaps the most important of them provides that if a court is satisfied that the circumstances of the case render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.[55]

In *Dodo*[56] the Constitutional Court held that the introduction by the legislature of minimum sentences in section 51 is not unconstitutional.

C COMPELLED RAPE

1 Definition Section 4 defines this crime as follows:

> "Any person ("A") who unlawfully and intentionally compels a third person ("C"), without the consent of C, to commit an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of compelled rape."

2 Elements of crime The elements of this crime are the following: (*a*) compelling a person (Z) (*b*) to commit an act of sexual penetration with another person (Y) (*c*) without the consent of either Y or Z; (d) unlawfulness and (*f*) intention.

3 General remarks concerning the crime 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

---

52 See the cases referred to in *Gqomana* 2001 2 SACR 28 (C), which was decided just before the Supreme Court of Appeal delivered the judgment in *Malgas infra*. For an analysis of the case law before the decision in *Malgas infra*, see Terblanche 2001 *SACJ* 1.

53 2001 1 SACR 469 (SCA).

54 See par [25] of the judgment (481*f*–482*g*).

55 See rule I in par [25] of the judgment (482*e*–*f*).

56 2001 1 SACR 594 (CC).

causes penetration . . . by . . . the genital organs of one person into . . . the genital organs . . . of another person" 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 6 was inserted *ex majore cautela* by the legislature to make doubly sure that compelled sexual assault is indeed criminalised.

4 Compelling a third person This element is largely self-explanatory. By "third person" is meant somebody other than the perpetrator X (who is the "first person") and the complainant Y (who is the "second person" and the victim of the crime, because it is he or she who is sexually penetrated). 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 penetration 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.[57]

5 The commission of an act of sexual penetration with another person The definition of the expression "sexual penetration" has already been quoted and discussed in detail above in the discussion of the corresponding element in the crime of rape.[58]

6 Without the consent of either the third party or the complainant The doubling of the absence of consent in the definition should be noted. The definitions in section 1 relating to the absence of consent have already been quoted and discussed in detail above in the discussion of the corresponding element of the crime of rape.[59] Section 56(1) provides that whenever an accused person is charged with the present 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". It is, therefore, perfectly possible for a husband to commit this crime with his own wife, as where he compels Z to have sexual intercourse with his (X's) wife Y without Y's consent.

7 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.

8 Intention The contents of this element have already been set out above in the discussion of the corresponding element in the crime of rape.[60]

9 Sentence The provisions in the Criminal Law Amendment Act 105 of 1997 relating to the imposition of certain minimum periods of imprisonment in certain circumstances apply not only to the crime of rape but also to the present crime.[61] Part I of Schedule 2 of the 1997 Act contains separate provisions relating to compelled rape. Because of the technical intricacies of these provisions they

---

57 A more complete picture of the rules applying to force or duress in criminal law can be gathered by consulting the discussion of necessity (of which coercion is but a species) *supra* IV C.

58 *Supra* XI B 5.

59 *Supra* XI B 6.

60 *Supra* XI B 8.

61 S 68(2) read with the Schedule to the Act.

will not be set out here; it is sufficient to state that to a large extent they resemble the corresponding provisions relating to the crime of rape, which has already been set out above.[62]

D SEXUAL ASSAULT

1 Definition Section 5 of the Act defines this crime as follows:

> "(1) A person ("A") who unlawfully and intentionally sexually violates a complainant ("B") without the consent of B, is guilty of the offence of sexual assault.
>
> (2) A person ("A") who unlawfully and intentionally inspires the belief in a complainant ("B") that B will be sexually violated, is guilty of the offence of sexual assault."

The expressions "sexually violates" and "without the consent" are further defined in section 1 of the Act. The latter definition, relating to the absence of consent, has already been quoted and discussed in detail above in connection with the crime of rape.[63] The definition of the expression "sexually violates" will be quoted and discussed below under the discussions of the element of the act ("sexual violation").

2 Elements of crime The elements of the crime are the following:(*a*) an act of "sexual violation" of another person; (*b*) without the consent of the latter person; (*c*) unlawfulness; and (*d*) intention.

3 Purpose of crime The purpose of this crime is to criminalise sexual acts which fall short of actual (non-consensual) penetration of Y. If there is actual penetration (as this word is defined in the Act) the crime of rape is committed. If the act falls short of penetration, sexual assault may be committed.

4 The previous crime of indecent assault The crime created in section 5 of the Act replaces the previous common-law crime of indecent assault. This latter crime is repealed by section 68(1)(*b*) of the Act.

Indecent assault at common law consisted in unlawfully and intentionally assaulting, touching or handling another in circumstances in which either the act itself or the intention with which it is committed was indecent.[64] It covered many diverse types of indecent actions, ranging from actual physical assault upon the genital organs of Y, to a mere touching of Y's so-called "erogenous zones" without Y's consent. Thus, if male person X merely placed his hand over one of female person Y's breasts, above her clothes, without her consent and without injuring her, he committed the crime. Either the act itself, objectively viewed, or X's intention had to be indecent. It was not necessary that Y's private parts

---

62 *Supra* XI B 9.

63 *Supra* XI B 6.

64 Snyman *Criminal Law* 4 ed 436. For a more detailed discussion of the common-law crime, the discussion of the crime in Snyman's 4th ed 426–439 or in *Burchell and Hunt* 691–698 may be consulted. Support for the propositions further in the text relating to this crime may all be found in Snyman's discussion of the crime in the 4th ed of his book.

should actually have been touched; any action whereby X aimed with some part of his or her body at Y's private parts was sufficient. X could be either a male or a female and the same applied to Y. Sexual intercourse with a female or a male *per anum* without consent constituted indecent assault.[65]

5 The act: sexual violation

(*a*) *General*

At the outset of the discussion of this crime it is necessary to note the terminology used by the legislature. The Act distinguishes between "sexual assault" and "sexual violation". These two concepts are not identical. "Sexual assault" is the name given to the crime, whereas "sexual violation" is the description of the act rendered punishable in terms of this crime

The act which is made punishable in this crime is either:

(*i*) the actual "sexual violation" of another person; or

(*ii*) the inspiring of a belief in the complainant that he or she will be sexually violated.

The discussion which follows (under the above heading of "5 Sexual violation") deals with the first way in which the crime can be committed, namely the actual sexual violation. The inspiring of a belief of sexual violation is discussed below in paragraph numbered 6.

(*b*) *Definition of "sexual violation" in the Act*

The expression "sexual violation" is defined in a fairly long definition in section 1(1) of the Act. The definition reads as follows:

> "**sexual violation**" includes 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

continued

65 *M (2)* 1990 1 SACR 456 (N) – intercourse *per anum* with a female; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 557 (CC) – intercourse *per anum* with a male.

(*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."

(*c*) *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. The remarks above[66] in the discussion of the acts criminalised in the crime of rape, relating to the words "which causes . . ." in the definition of that crime, also apply to the interpretation of the wording of the definition presently under discussion.

(*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* . . ." (italics supplied), 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* . . ." (italics supplied). Sexual assault, in other words, does not deal with penetration,[67] but with "contact" between two persons, as will be explained hereafter.

(*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. An example which comes to mind in this respect is where X has a stick in his hand and inserts the one point of it into Y's anus. "Indirect contact" may also exist in X spraying aerosol paint onto Y's private parts.[68]

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

In the discussion under this subheading the different types of acts included in the definition of "sexual violation" are listed. They are numbered and set out in the sequence in which they are referred to in the definition of "sexual

66 *Supra* XI B 5(*b*).
67 This is specifically stated in the second last phrase in the definition of "sexual violation".
68 *Cf* X's act in *D* 1998 1 SACR 33 (T).

violation". When reading the different acts listed below, it should be assumed throughout that the acts take place without Y's consent.

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

1 X, who may be either a male or a female, effects a contact between his or her genital organ and any part of the body of Y, who may likewise be either a male or a female. In this situation it is X's genital organ which touches Y's body.

2 X, who may be either a male or a female, effects a contact between the genital organ of Y, who may likewise be either a male or a female, and any part of his or her own body. In this situation it is Y's genital organ which touches X's body.

3 X, who may be either a male or a female, effects a contact between his or her anus and any part of the body of Y, who may likewise be either a male or a female. In this situation it is X's anus which touches Y's body.

4 X, who may be either a male or a female, effects a contact between the anus of Y, who may likewise be a male or a female, and any part of his or her own body. In this situation it is Y's anus which touches X's body.

5 Female X effects a contact between her breasts and any part of the body of Y, who may be either a male or a female. In this situation it is female X who is the active party. It does not matter whether X's breasts are naked or covered in clothing.

6 X, who may be either a male or a female, fondles the breasts or places his or her hand over the breast or breasts of female Y. In this situation X is the active party and female Y is the passive party. It does not matter whether X's breasts are naked or covered in clothing.

7 X, who may be either a male or a female, causes or effects a physical contact between the genital organs or anus of Y, who may be either a male or a female (or the breast(s) of female Y) and any part of the body of an animal.

8 X, who may be either a male or a female, causes or effects a physical contact between the genital organs or anus of Y, who may be either a male or a female (or the breast(s) of female Y) and any object, including any object resembling or representing the genital organs or anus of a person or an animal. Thus, if X causes female Y's breasts to touch a piece of furniture or a wall, X's act falls within the definition.

9 What is the position if X, who may be either male or female, does not make contact with Y with his or her (X's) genital organ, anus or (in the case of a woman) breasts himself or herself, but causes a third party, Z, to make such contact? For example, X pushes, shoves or forces Z in such a way that the contact described in the definition takes place. X forces or compels Z to perform an act of sexual violation. The phrase "any act which causes . . . " at the beginning of the definition of "sexual violation" is so wide that it would seem to include this type of behaviour. After all, to compel or force a third party to perform the act is merely one way of causing the sexual violation.

However, if one considers the provisions of section 6 of the Act, it is clear that the legislature intended such conduct to be punished under a

separate heading, namely that of "compelled sexual assault". This latter crime will be discussed below.[69] However, section 6 is limited to compelled sexual violation between X and a third *person*, that is, a human being. Section 6 speaks only of the sexual violation of "a complainant", and the word complainant can surely be only a human being. Section 6 does not say anything about compelled sexual violation consisting in contact between Y and an animal or "any object, including any object resembling or representing the genital organs or anus of a person or an animal". It is therefore submitted that forced contact remains punishable as sexual assault in terms of section 5. For example, if X forcefully thrusts male Z's penis, which is uncovered, Z being naked, against the body of an animal, or against a piece of furniture or a wall, or against a sex toy representing a woman's vagina, X's conduct falls within the definition of the crime of sexual assault created in section 5 of the Act.

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

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

1 X, who may be either a male or a female, places his or her mouth on female Y's vagina.

2 X, who may be either a male or a female, causes Y's penis to come into physical contact with his or her mouth. If the penis penetrates X's mouth, the act falls within the definition of the conduct punishable as rape.

3 X, who may be either a male or a female, places his or her mouth on the anus of Y, who may be either a male or a female.

4 X, who may be either a male or a female, places his or her mouth on female Y's breast.

5 X, who may be either a male or a female, places his or her mouth on the mouth of Y, who may be either a male or a female. This means that if one person kisses another without the latter's consent, he or she commits the crime of sexual assault. This is surprising. Under the common law such conduct did not necessarily amount to indecent assault.[70] It may be doubted whether a person who merely kisses another against the latter's will necessarily always performs the act with a sexual motive.

6 X, who may be either a male or a female, places his or her mouth on "any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could be used in an act of sexual penetration".[71] The tenth word from the end of this quotation, namely "which", refers to the words "any other part of the body" at the beginning of the quotation. The expression "sexual penetration" is defined separately in section 1(1) and has already been quoted and discussed above in the discussion of rape.[72] Examples of "part(s) of the body

69 *Infra* XI E.
70 *Mayo* 1969 1 PH H26 (R).
71 Par (*a*)(ii)(*cc*)(*aaa*) of the definition of "sexual violation".
72 *Supra* XI B 5.

of another person . . . which could be used in an act of sexual penetration" are a person's fingers or toes. Thus, if X sucks Y's toes (without Y's consent) his or her conduct also falls within the definition of the act constituting the present crime.

7 X, who may be either a male or a female, licks or touches with his or her mouth the abdomen, back or buttocks of Y, who may be either a male or a female. The licking or touching with the mouth of any part of Y's body other than Y's genital organs, anus or breasts qualifies, as long as that part of Y's body which is licked or touched with the mouth is such that the licking or touching "could . . . cause sexual arousal or stimulation".[73] What is intended in the phrase just quoted is sexual arousal or stimulation of X, and not of Y.[74]

8 X, who may be either a male or a female, performs the same act as that described immediately above, but the licking or touching is in respect of "any other part of (Y's) body . . . which could . . . be sexually aroused or stimulated thereby."[75] The sexual stimulation referred to here is not that of X, but of Y.

9 X, who may be either male or female, places Y's mouth against a plastic sex toy representing "the genital organs or anus of a person" or of an animal.[76]

10 X places Y's mouth against the genital organs or anus of an animal.

11 What is the position if X does not perform the act described above in acts numbered 1 to 10 himself or herself, but forces a third party, Z, to perform the act? For example, X forces Z to place his or her mouth against the vagina or anus of Y. It is submitted that such conduct is not punishable as contravention of section 5 (sexual assault), but of section 6 (compelled sexual assault), which is discussed below.[77] If it were punishable as a contravention of section 5, the provisions of section 6 would be rendered nugatory. It is furthermore submitted that if X forces Y to masturbate himself or herself, X's conduct is punishable as contravention of section 7 (compelled self-sexual assault), and that X should then not be charged under the present section.

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

According to paragraph (*b*) of the definition of "sexual violation", the crime can also be committed by any act which causes "the masturbation of one person by another person". An example of such conduct is where X uses his own hands to cause a masturbation by Y.

It is submitted that if X forces a third party, Z, to cause a masturbation of Y, the conduct is not punishable as contravention of section 5 (sexual assault), but of section 6 (compelled sexual assault). A different interpretation would mean that section 6 would be rendered redundant.

---

73 See par (*a*)(ii)(*cc*)(*bbb*) of the definition of "sexual violation".

74 Cf the difference in wording between par (*a*)(ii)(*cc*)(*bbb*) and par (*a*)(ii)(*cc*)(*ccc*) in the definition of "sexual violation".

75 Par (*a*)(ii)(*cc*)(*ccc*) of the definition of "sexual violation".

76 Par (*a*)(ii)(*dd*) of the definition of "sexual violation".

77 *Infra* XI E.

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

According to paragraph (*c*) of the definition of "sexual violation" the crime can also be committed by "the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person". An example in this respect is where X, who may be either a male or a female, places a plastic representation of a penis into Y's mouth.

(*viii*) *"Subjective indecency" not sufficient*

The wording of the definition of the crime refers to conduct which may be described as "indecent" from an objective point of view, that is, viewed from the outside, without having regard to X's motive or intention. What is the position if X performs an act in respect of Y which is not objectively indecent, that is, which cannot be brought under the description of the conduct set out in the definition of "sexual violation", but which is nevertheless performed by X with an indecent intention. Say, for instance, that, as happened in the case of *F*,[78] X hits Y, who is lying naked on his stomach, on his (Y's) buttocks with a stick, and while doing so, states that he (X) is obtaining sexual gratification by performing this act. Under the old common-law crime of indecent assault it was held in *F*'s case that X is guilty of indecent assault, but it would seem that X cannot, when performing a similar act, be found guilty of committing the new statutory crime of sexual assault. Although his intention or motive was indecent, the act, objectively viewed, was not.

(*ix*) *Importance of the word "includes"*

The third 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. Acts which can fall under the statutory definition of "sexual violation" have been discussed immediately above. Examples of acts which do not fall under this statutory definition (or which at least cannot readily be construed as falling thereunder), but which nevertheless amount to "sexual violation", are the following:

1 X lifts the dress of Y, a woman, in order to see what it looks like under the dress;

2 X puts his hand under the dress of Y, a woman, but does not succeed in making any contact with Y's body.

3 X, a male, aims with his hand to the genital organ, breast or buttock of Y, a fully clad woman, but he does not succeed in making contact with Y's body because Y or somebody else prevents him from doing this.[79]

6 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.[80] 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

78 1982 2 SA 580 (T).
79 *Curtis* 1926 CPD 385 389–390; *A* 1993 1 SACR 600 (A) 607*g–j*.
80 S 5(2).

below[81] in the discussion of that crime, assault can be committed in two ways, namely

(*a*) by an act which infringes Y's bodily integrity – something which usually takes the form of the actual application of force to Y; and

(*b*) 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.[82]

However, subsection (2) of section 5, which describes this way of committing the crime, does not set out the prerequisites for holding that the inspiring of a belief that sexual violation will take place amounts to a sexual violation. 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, and which will be set out and explained in the discussion of assault below,[83] also apply to the way in which sexual assault may be committed. To avoid unnecessary repetition, all these rules will not be set out here in detail again. In an abbreviated form, they may be described as follows:

1 The threat must be one of *immediate* violence. Thus, a threat to violate Y sexually the next day, is not sufficient.

2 The threat must be one of *personal* violence against Y. A threat of violence not against Y, but against somebody else, is not sufficient. Nor is a threat of violence or damage to property belonging to Y or somebody else sufficient.

3 Y must *subjectively* believe that he or she will be sexually violated. If, for whatever reason, Y does not fear the threat, the crime is not committed.

4 Y's subjective fear *need not be reasonable*.

5 The threat need not necessarily consist in some physical act or gesture. A *verbal* threat is sufficient.

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

7 Absence of consent The act of sexual violation as set out above must take place without the consent of the complainant. The word "consent" as used in the definition of the crime is defined in section 1(2) as "voluntary or uncoerced agreement". Section 1(3) contains a long and important provision dealing with the interpretation of the words "voluntary or uncoerced". This provision has already been quoted and discussed in detail above in the discussion of the corresponding requirement in the crime of rape[84] and this definition and discussion will accordingly not be repeated here. When consulting the said discussion, the expression "sexual act" must be read as referring to "sexual violation", as opposed to "sexual penetration".[85]

---

81 *Infra* XV A 4.

82 In point 2.2.2 of the "Memorandum on the Objects of the . . . Bill" attached to the Bill (which later became the Act), the following is stated: "Sexual assault is a form of assault and all principles applicable to assault common (*sic*) are also applicable to the specific forms of assault, in this case sexual assault."

83 *Infra* XV A 4 (*c*).

84 *Supra* XI B 6.

85 Cf the definition of "sexual act" in s 1(1), which stipulates that this expression refers to either an act of sexual penetration or an act of sexual violation.

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.

8 Unlawfulness An act which complies with the definitional elements of the crime may possibly be justified on the ground of justification known as necessity in the form of duress, as where a third party, Z, threatens to kill or seriously injure X if he (X) does not commit an act of sexual violation against Y, and where X yields and commits the act.

9 Intention Intention is specifically mentioned in the definition of the crime in section 5 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[86] in the discussion of the corresponding element in the crime of rape, also apply to the element of intention in this crime. In order to have intention in the legal sense of the word (*dolus*), X must be aware of the fact that his conduct is not covered by a ground of justification.[87]

E COMPELLED SEXUAL ASSAULT

1 Definition Section 6 defines the crime of compelled sexual assault as follows:

> "A person ("A") who unlawfully and intentionally compels a third person ("C"), without the consent of C, to commit an act of sexual violation with a complainant ("B"), without the consent of B, is guilty of the offence of compelled sexual assault."

2 Elements of crime 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 either the third person or the complainant; (*d*) unlawfulness and (*e*) intention.

3 Reason for crime's existence It is doubtful whether it was at all necessary to create this crime. Its provisions coincide with the wide formulation of the crime of sexual assault in section 5. In particular, the words " . . . any act which causes . . . contact between the . . . genital organs . . . of one person . . . and the body of another person" in the definition of "sexual violation" in section 1(1) are wide enough to include conduct by X whereby he or she compels a third party to perform the sexual violation. Presumably section 6 was inserted *ex majore cautela* by the legislature to make doubly sure that compelled sexual assault is indeed criminalised.

4 Compelling a third person This element is largely self-explanatory. By "third person" is meant somebody other than the perpetrator X (who is the "first person") and the complainant Y (who is the "second person" and the one who is sexually violated). A typical example of the commission of this crime is where

---

86 *Supra* XI B 8.
87 *D* 1998 1 SACR 33 (T).

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.[88] In the discussion above of the crime of sexual assault, it was pointed out a number of times that if X forces Z to perform an act which amounts to a sexual violation upon Y, and Z yields to the pressure and does as instructed, X should not be convicted of sexual assault, that is, contravention of section 5, but of compelled sexual assault, that is, contravention of section 6. A different interpretation of the wording of section 5 would render the provisions of section 6 nugatory.

5 The commission of an act of sexual violation with another person The definition of the expression "sexual violation" has already been quoted and discussed in detail above in the discussion of the corresponding element in the crime of sexual assault.[89]

6 Without the consent of either the third party or the complainant The definitions in section 1 relating to the absence of consent have already been quoted and discussed in detail above in the discussion of the corresponding element of the crime of rape.[90] 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". It is, therefore, perfectly possible for a husband to commit this crime in respect of his own wife, as where he compels Z to commit an act of sexual violation in respect of his wife Y without Y's or Z's consent.

7 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.

8 Intention The contents of this element have already been set out above in the discussion of the corresponding element in the crime of rape.[91]

F COMPELLED SELF-SEXUAL ASSAULT

1 Definition Section 7 of the Act defines the crime of compelled self-sexual assault as follows:

> "7. A person ("A") who unlawfully and intentionally compels a complainant ("B"), without the consent of B, to –
> (*a*) engage in –
> (i) masturbation;
> (ii) any form of arousal or stimulation of a sexual nature of the female breasts; or
> (iii) sexually suggestive or lewd acts, with B himself or herself;

continued

88 A more complete picture of the rules applying to force or duress in criminal law can be gathered by consulting the discussion of necessity (of which coercion is but a species) *supra* IV C.
89 *Supra* XI D 5.
90 *Supra* XI B 6.
91 *Supra* XI B 8.

(*b*) engage in any act which has or may have the effect of sexually arousing or sexually degrading B; or

(*c*) cause B to penetrate in any manner whatsoever his or her own genital organs or anus, is guilty of the offence of compelled self-sexual assault."

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

3 General remarks on the crime This crime differs from the crime of compelled sexual assault defined in section 6 in the following respect: section 6 deals with situations in which there are three parties, the first one being the perpetrator (X), the second one the person in respect of whom the crime is committed (Y), and the third one the party who is compelled to perform the act (Z). The crime created in section 7, however, deals with situations in which there are only two parties, namely the perpetrator (X) and the victim (Y). X compels Y to perform the "indecent" act upon Y himself or herself.

4 Compelling somebody else This element is largely self-explanatory. A typical example of conduct punishable under this section is where X tells Z that he will kill him if, for example, he does not masturbate himself, where it is impossible for Z to escape his dilemma and where Z ends up yielding to the pressure and performs the deed.[92]

5 Conduct proscribed in definition The acts described in the definition all amount to acts whereby X, who may be either a male or a female, forces Y, who may likewise be either a male or a female, to stimulate himself or herself sexually. There are some rather vague expressions in parts of the definition, such as "suggestive or lewd acts" and "sexually degrading". These expressions should be interpreted *eiusdem generis*, that is, in the light of the meanings of other more concrete instances mentioned in the definition, as well as the general purpose of section 7 as a whole. 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 in his or her vagina or anus.

6 Absence of consent The definitions in section 1 relating to the absence of consent have already been quoted and discussed in detail above in the discussion of the corresponding element of the crime of rape.[93] 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". It is, therefore, perfectly possible for a husband to commit this crime in respect of his wife.

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

---

92 For a more complete picture of the rules applying to force or duress in criminal law, see the discussion of necessity (of which coercion is but a species) *supra* IV C.

93 *Supra* XI B 6.

8 Intention The contents of this element has already been set out and discussed above in the discussion of the corresponding element in the crime of rape.[94]

G COMPELLING ANOTHER TO WATCH SEXUAL ACTS

1 General Sections 8 and 21 create a number of crimes consisting in compelling another person (Y) to be in the presence of or watch X commit a sexual offence or sexual act with another or while X engages in an act of self-masturbation. The two sections are identically worded, except that section 8 is applicable to cases where Y is 18 years or older, whereas section 21 in applicable where Y is a child. The word "child", as used in section 21, is defined in s 1(1) as a person under the age or 18 years. Because of the similarity in the wording of these two sections, it is feasible to discuss them together.

2 Compelling Y to watch sexual offence According to subsection (1) of both these sections X commits a crime if he or she unlawfully and intentionally compels or causes Y to be in the presence of or watch X commit a sexual offence. The expression "sexual offence" is defined in section 1(1) as any offence in terms of certain chapters and sections of the Act. All the sexual offences discussed in this book fall within the ambit of this definition. The crime is also committed if X compels Y to be in the presence of or watch, not X, but a third party, Z, commit the crime, or while X and Z together commit a crime. Y should not have consented to being present or to watching the deed.[95] It matters not whether the compelling of Y to be present or watch the deed is for the sexual gratification of X or of Z or without any motive of sexual gratification. X may be either a male or a female, and the same applies to Y.

3 Compelling Y to watch sexual act According to subsection (2) of both sections 8 and 21, X commits a crime if he or she unlawfully and intentionally compels or causes Y to be in the presence of or watch (*a*) X while he or she engages in a sexual act with Z or another person (W) or (*b*) Z while he or she engages in a sexual act with W. The expression "sexual act" is defined in section 1(1) as an act of either sexual penetration or an act of sexual violation. The two latter expressions are both further defined in section 1(1) and these definitions have already been quoted and discussed above.[96] Y should not have consented to being present or to watch the deed. It matters not whether the compelling of Y to be present or watch the deed is for the sexual gratification of X or Z or without any motive of sexual gratification. X may be either a male or a female, and the same applies to Y.

4 Difference between above two crimes The difference between the crime created in subsection (1) and that created in subsection (2) is the following: Subsection (1) speaks of a "sexual offence". This implies that all the requirements for liability, including absence of consent by the victim, must be present. Subsection (2), however, speaks of only a "sexual act" – an expression which

94 *Supra* XI B 8.
95 *Pretorius* 2013 1 SACR 261 (WCC).
96 *Supra* XI B 5 (sexual penetration); XI D 5 (*b*) (sexual violation).

means either sexual penetration or an act of sexual violation. Such a sexual act can be committed even if the person in respect of whom it is committed is a consenting party. Thus, if X forces another to watch the commission of a crime such as rape, to which the victim has not consented, subsection (1) is contravened. If, however, X forces another to watch as he performs an act of sexual penetration or violation *with* the consent of the person in respect of whom the act is committed, it is subsection (2) that is contravened.

5 Compelling Y to watch self-masturbation According to subsection (3) of both sections 8 and 21, X commits a crime if he or she compels or causes Y to be in the presence of or watch X or another person (Z) engage in an act of self-masturbation. Y should not have consented to being present or to watch the deed. It matters not whether the compelling of Y to be present or watch the deed is for the sexual gratification of X or Z or without any motive of sexual gratification. X may be either a male or a female, and the same applies to Y.

H EXPOSING GENITAL ORGANS, ANUS OR BREASTS ("FLASHING")

1 General Sections 9 and 22 create crimes consisting in exposing the genital organs, anus or female breast to another person, Y, without Y's consent. Section 9 is applicable to cases where Y is 18 years or older, whereas section 22 in applicable to cases where Y is a child. The word "child", as used in s 22, is defined in section 1(1) as a person under the age or 18 years.

The two sections are identically worded, except for the following point of difference: in the case of the crime created in section 9 (exposure to a person 18 years or older), the exposure must take place without the consent of Y, whereas in the case of the crime created in section 22 (exposure to a person under the age of 18), the crime is committed even if Y had consented to the exposure. Because of the degree of similarity in the wording of these two sections, it is feasible to discuss them together. This type of behaviour is sometimes referred to as "flashing".

The conduct punishable in terms of these sections overlaps certain conduct punishable under the common-law crime of public indecency. It is noticeable that section 68(1), which repeals certain common-law crimes such as rape and indecent assault, does not repeal the common-law crime of public indecency. Thus, if X exposed his or her genital organs in public, he or she may be charged with either contravention of these sections of the Act, or with the common-law crime of public indecency.

2 Requirements of crime According to these sections, X commits a crime if he or she unlawfully and intentionally exposes or displays his or her genital organs or anus to Y. If Y is 18 years of older, he should not have consented to the exposure. X may also be a female, and in such a case she likewise commits the crime if she exposes her breasts to X without his or her consent. X also commits the crime if it is not his own genital organs or anus which he displays to Y, but that of a third party, Z. X furthermore commits the crime if he or she does not perform the exposure himself or herself, but causes somebody else to perform the exposure. It matters not whether the exposure is performed for the sexual gratification of X or of Z or without any motive of sexual gratification. X may be either a male or a female, and the same applies to Y.

Nowhere in the wording of sections 9 or 22 is it required that Y should have felt degraded or disgusted by X's conduct. It follows that the crime is committed even if Y enjoys the unexpected sight of X's naked genitals or breasts.

3 Unlawfulness The unlawfulness of X's deed may be excluded by necessity, as where the building in which X finds himself is on fire and X, who happens to be naked in his bathroom when the fire breaks out, rushes naked out of the building and is seen by other people. Furthermore, the legal convictions or *boni mores* of society do not regard topless bathing on certain beaches (of which there are but a few in South Africa) as unlawful.

4 Intention As far as the requirement of intention is concerned, X must know that his or her genital organs, anus or breasts is exposed, that he or she is being seen in this condition by Y, and that Y did not consent to what happens.

I DISPLAYING CHILD PORNOGRAPHY

1 Discussion of crime According to section 10, X commits a crime if he or she unlawfully and intentionally exposes or displays child pornography to Y. Y must be 18 years or older. If Y is younger than 18, a different section of the Act, namely section 19, is contravened. The expression "child pornography" is further defined in section 19.[97] X commits the crime not only if he or she displays the pornography himself or herself, but also if he or she causes another person to perform the displaying. The crime is committed irrespective of whether Y consents to the displaying or not. It matters not whether the exposure is performed for the sexual gratification of X or of a third person, Z, or without any motive of sexual gratification. X may be either a male or a female, and the same applies to Y.

J ENGAGING SEXUAL SERVICES FOR REWARD (PROSTITUTION)

1 Definition Section 11 defines this crime as follows:

> "11 A person ("A") who unlawfully and intentionally engages the services of a person 18 years or older ("B"), for financial or other reward, favour or compensation to B or to a third person ("C") –
>
> (*a*) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or
>
> (*b*) by committing a sexual act with B,
>
> is guilty of engaging the sexual services of a person 18 years or older."

2 Elements of crime The elements of the crime are the following: (*a*) "engaging" (*b*) the "services" (*c*) of a person 18 years or older (*d*) in order to commit a sexual act (*e*) for reward (*f*) unlawfulness and (*g*) intention.

---

97 For a critical analysis of this definition, see Terblanche and Mollema 2011 *SACJ* 283.

3 General observations about the crime The section under discussion here codifies the well-known crime of prostitution. The briefest definition of prostitution is "sex for reward". Both parties consent to the act. If the passive party does not consent, rape is committed if the active party continues with the sexual penetration. Prostitution is truly mankind's oldest profession, having been practised throughout recorded history. The law may approach this phenomenon from a number of different perspectives.

Firstly, the law may hold the view that prostitution *should not be punished* at all, but should be allowed without any interference. Such an approach is unacceptable in almost all societies, for the following reasons: prostitution promotes sexual licentiousness and immorality in general; contributes to the spread of venereal diseases; degrades women; and leads to other crimes closely connected to prostitution, such as intimidation, corruption and dealing in and using drugs.

Secondly, the law may prohibit prostitution in all its forms and on all levels. The objection to such an approach is that no statute has ever been able to change human nature. It has been said that every person who walks on this earth carries in himself or herself a volcano – that is the sexual urge – which periodically threatens to erupt. Experience has taught that such an absolute prohibition could never work in practice. A large part of society will always find ways to satisfy its sexual urges, and legal provisions will not deter such persons or make it impossible for them to do so. Moreover, there is merit in the argument often advanced that the law should not criminalise actions of two adults performed in the private of their homes or rooms and with mutual consent, which does not cause any harm to any other person or society.

A *third* approach is one which is a *compromise* between the two approaches described above. (The two approaches set out above may be described as representing the two extreme approaches to the subject.) According to this third approach, prostitution is *allowed*, but its practice is *curbed*, first, by means of administrative measures, such as the licencing of prostitutes and brothels, and in some cases even the drawing up of geographical borders within which they have to operate. A second way of curbing free prostitution is by enacting measures which make it difficult for prostitutes to ply their trade. Examples of such measures are: prohibiting prostitutes from advertising their services; prohibiting the keeping of a brothel; prohibiting prostitutes or somebody else on their behalf to entice others to use their services; prohibiting people from bringing would-be customers into contact with prostitutes; or prohibiting people from enticing, for example, women, especially young and destitute women, to become prostitutes. According to this third approach, it is usually not a crime to be a prostitute or to have intercourse with a prostitute, but their operations are severely hampered in practice.

Before 1988 South African law, broadly speaking, followed the third approach set out above, However, in 1988, surprisingly, the law governing prostitution was amended in such a way that the "compromise approach" was replaced by a total prohibition on prostitution. Thus, since 1988, South African law favoured the second approach set out above.

4 Prostitution and the Constitutional Court Before the Act presently under discussion was enacted, the matter was governed by the provisions of section

20(1)(*a*A) of the old Sexual Offences Act 23 of 1957 (which was replaced by the provisions of the Act presently under discussion). Section 20(1)(*a*A) provided that any person who has unlawful carnal intercourse with another person for reward, commits a crime. This old crime was worded in such a way that it was the prostitute offering his or her services for payment who committed the crime, and not the person who had intercourse with the prostitute and who paid him or her for the "service". Taking into account that in practice prostitutes are mainly female, the question arose whether section 20(1)(*a*A) did not amount to unfair discrimination against women, because it is mostly, if not always, women who are punished for their actions, whereas the man who had intercourse with her, was not criminally liable.

In *Jordan*[98] the Constitutional Court considered the constitutionality of section 20(1)(*a*A). With a majority of 6 to 5 judges the court found that the section was indeed constitutional. The majority decision was based on the argument that the section is worded in such a way that both a male and a female prostitute may transgress the provision, which means that the provision was, therefore, gender neutral. Furthermore, the majority of the court found that both the man who pays a woman for sex, and the woman who receives such payment, commit a crime. According to the court the man is liable as a *socius criminis*, that is, an accomplice, in terms of the common law, because he enables or promotes the commission of the crime by the woman. The man may, furthermore, also be guilty of incitement or conspiracy to commit the crime. Accordingly, there is no discrimination against women, as both the man and the woman may be prosecuted. Even if some form of discrimination could be construed, such discrimination, according to the court, is justified, as the whole aim of the prohibition of prostitution was to prohibit commercial sex, with all the concomitant social maladies in its wake. The contents of section 11 of the present crime are based upon the conclusion reached by the majority of judges in the *Jordan* case.[99]

The majority decision is open to criticism. The overwhelming majority of prostitutes are women, and the men who pay them for their services are in practice never charged as accomplices to the commission of the crime, or of conspiracy or incitement. The majority decision is surprisingly conservative in its approach to enforcing morality, and it is difficult to reconcile the majority judgments with the liberal attitude of the very same court in respect of consensual sex between people of the same sex in *National Coalition for Gay and Lesbian Equality v Minister of Justice.*[100]

5 X and Y may be either male or female A notable aspect of the definition of the present crime is that its wording is so wide that X may be either a male or a female, and the same applies to Y. Accordingly, a female who obtains a male for sex for reward renders herself guilty, as much as a male who obtains a female for the same purpose. X and Y may also both belong to the same sex.

---

98 2002 2 SACR 499 (CC).

99 See the comments in par 2.2.3 of the memorandum attached to the Bill before it was adopted by Parliament.

100 1998 2 SACR 553 (CC). For criticism of the *Jordan* case, see Jivan and Perumal 2004 *SACJ* 368; Knoetze 2003 *TSAR* 558.

This section targets both the prostitute and the client who engages the services of the prostitute.[101]

6 "Engaging" The act consists in "engaging" the services of another. The act of "engaging" may consist in an express request by X to Y to commit a sexual act with him or her, or in tacit conduct on the part of X. Thus, the conduct of a female (or even a male?) who makes certain suggestive movements with her (or his) body in public, sending out a "message" or "code" to somebody else that she or he is available for sex for reward, may be sufficient to comply with the requirement of "engaging the services".[102]

7 "Services" The word "services" is not defined in the Act. Its meaning must be coloured by the words "sexual act" later in the definition.

8 A person older than 18 years Y must be a person who is older than 18 years of age. This does not mean that if X pays Y, who is younger than 18 years, to have sex with him or her, he or she is not guilty of any crime. X will then render himself or herself guilty of contravening section 17, which will be discussed below.[103] Section 17 is worded exactly the same as section 11, except that the expression "a person 18 years or older" is replaced by the expression "a child complainant".

9 For the purpose of engaging in a sexual act According to paragraph (*a*) of the definition X commits the crime if he or she engages the services of another "for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not". This means that the crime is completed the moment X has obtained the services of another person, even if the actual sexual act has not yet taken place. In this respect the definition of the crime resembles that of corruption, which is equally committed even if X is apprehend after making or accepting an offer, but before the other party could perform his or her part of the deal.[104] In this respect it also resembles the crime of incitement to commit a crime.[105] This means that X commits the crime even if the other party is a police trap, who agrees only ostensibly to the commission of the sexual act, but whose real intention is not to perform the act but to inform the police of X's conduct.

"Sexual act" is defined in section 1(1) as an act of sexual penetration or an act of sexual violation. The latter two expressions are both further defined in long definitions in section 1(1). These definitions have already been quoted and discussed above.[106] If one bears the meanings of these expressions in mind, it is

---

101 See point 2.2.3 of the "Memorandum on the Objects of the . . . Bill": "This clause (s 8) targets the client of an adult prostitute. In the case of *S v Jordan* the Constitutional Court held that the law already criminalises a client if he or she engages the services of a prostitute. This clause, therefore, not only confirms the existing law, but also addresses the unacceptable consequences of the selective application of the law, as pointed out by the Constitutional Court, whereby the clients are not arrested, charged and prosecuted for contraventions of this nature."

102 *Zeelie* 1952 1 SA 400 (A) 410.

103 *Infra* XI N 4 (*b*).

104 *Infra* XIII A.

105 *Supra* VIII D.

106 *Supra* XI B 5 (sexual penetration); XI D 5 (sexual violation).

clear that the crime is committed even if the sexual act does not consist of full penetration, but some "lesser" sexual act, such as masturbation or an act causing only sexual stimulation. In fact, the definition of the present crime, read with the definitions of "sexual penetration" and "sexual violation", is so wide that X commits it even if he only asks Y for permission to kiss him or her in return for payment of money![107]

10 ". . . by committing a sexual act . . ." According to paragraph (*b*) of the definition X commits the crime also if he or she engages the services of another "by committing a sexual act with B". As pointed out above, "sexual act" is defined in section 1(1) as either an act of sexual penetration or one of sexual violation.

11 For reward, favour or compensation X must engage the services of another "for financial or other reward, favour or compensation". Since the reward is not limited to monetary or patrimonial reward, the conduct of X, a female, falls within the definition also if, for example, she agrees to have sex with Y, a male, on condition that Y moves certain heavy furniture for her in her apartment or takes her dog for a walk in the park.

The reward, favour or compensation need not necessarily be to Y's advantage. It may likewise be to the advantage of a third party, Z. Thus, the conduct of X, a female, falls within the definition also if, for example, she agrees to have sex with Y, a male, on condition that Y moves certain heavy furniture in the apartment of Z, a female friend of X, or that Y takes Z's dog for a walk in the park.

12 Liability of prostitute The section does not expressly criminalise also the activity of Y, the prostitute. However, it is clear that Y's conduct enables X to perform his activity and therefore, according to the general principles relating to accomplice liability, Y may be convicted of being an accomplice to the crime committed by X.[108]

13 Unlawfulness Apart from coercion, the unlawfulness of the conduct may be excluded by official capacity, such as where Y is a police trap.

14 Intention X must know that Y is 18 years or older, that the act in respect of which Y is engaged, is a "sexual act" as defined in the Act, and that Y has agreed to the act for reward or compensation.

15 Is the crime an anachronism? The entire present law regarding the criminalisation of prostitution is an anachronism. One merely has to glance at the numerous smalls in the press to realise how many women, and also men, advertise their sexual "services" to realise that the decision in *Jordan,* according to which prostitution is a crime, is of little or no practical effect. These advertisements might not expressly speak of sex, but only somebody who is a complete stranger to the ways of the world would fail to understand their implicit sexual connotations. Nevertheless, prosecutions for prostitution are virtually non-existent. The majority decision in *Jordan* cannot be endorsed.

---

107 See par (*a*)(ii)(*bb*) of the definition of "sexual violation" in s 1(1).

108 For an exposition of the liability of an accomplice, see *supra* VII C. Cf also the reasoning in *Jordan* 2002 2 SACR 499 (CC) par 14.

K INCEST

1 Definition Section 12 (1) defines the crime of incest as follows:

> "**12.** (1) 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 will be quoted and discussed below in paragraph 5.

2 Elements of crime 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 adoptive relationship; (*c*) unlawfulness and (*d*) intention.

3 General remarks on the crime Generally speaking, section 12 merely codifies the common-law crime of incest. There is, however, the following significant difference between the old and the new crime: the act prohibited under the old common-law crime was limited to actual sexual intercourse in the "old", conventional traditional sense of the word, that is, the penetration of the female's vagina by the male's penis, whereas the act prohibited under the new statutory crime is much wider, because the definition of "sexual penetration" in section 1(1) includes such acts as penetration of Y's anus or mouth by X's penis, the insertion of some other part of X's body, such as his finger or any object, into Y's vagina, anus or mouth and even the insertion of the genital organs of an animal into Y's vagina, anus or mouth.

The Act does not spell out all the finer details relating to what is meant by consanguinity, affinity and adoptive relationship for the purposes of incest. It is reasonable to presume that the courts will, as far as these points of detail are concerned, follow or at least consult the previous cases dealing with the former common-law crime. For this reason these cases or sources are still important; they will be referred to below.

4 Act of sexual penetration The expression "sexual penetration" is defined in section 1(1) and has already been quoted and discussed in detail above in the discussion of rape.[109]

5 People who may not lawfully marry each other because of a too close relationship of consanguinity, etc 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.

---

109 *Supra* XI B 5.

(*a*) *Definition in section 12(2)*

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."

(*b*) *Consanguinity and affinity: General*

According to the common law, when assessing the prohibited degrees of consanguinity or affinity, no distinction is drawn (*a*) between legitimate and illegitimate offspring,[110] or between (*b*) relatives of the full blood and relatives of the half blood.[111] Consanguinity (or blood relationship) exists between all persons who have a common ancestor. Affinity exists between a husband and the blood relations of his wife, or between a wife and the blood relations of her husband. There is no relationship between the blood relations of the one spouse and the blood relations of the other spouse.

(*c*) *Consanguinity*

The word "ascendants" means "ancestors" and "descendants" refers to offspring. In the common law the prohibited degrees of consanguinity included ascendants and descendants in the direct line *ad infinitum*, and it is reasonable to assume that the position is the same under the present Act. Examples of such relationships are father and daughter,[112] mother and son[113] and grandfather and granddaughter.

As far as collaterals are concerned, the expression "first degree of descent" in subsection (2)(*a*)(ii) means one generation. Examples of collaterals that fall within the prohibited degrees are brother and sister,[114] uncle and niece, but not two first cousins, because neither of them is related to the common ancestor in the first degree.

(*d*) *Affinity*

The position in our common law regarding relationships of affinity is as follows: A relationship of affinity can be established by only a legally recognised marriage and not by a polygamous marriage or the customary union between blacks.[115] The prohibited degrees of affinity are the following:

---

110 *Piet Arends* (1891) 8 SC 176 177.

111 *Blaauw* 1934 SWA 3 5; *Botes* 1945 NPD 43; *Mulder* 1954 1 SA 228 (E).

112 As in *D* 1972 3 SA 202 (O); *M* 1999 2 SACR 548 (SCA).

113 As in *A* 1962 4 SA 679 (E).

114 As in *Troskie* 1920 AD 466. As to the prohibited degrees of consanguinity generally, see the discussion in *Shasha* 1996 2 SACR 73 (Tk) 75.

115 *Ncube* 1960 2 SA 179 (R) 180; *Major* 1968 2 PH H186 (R). See also the discussion in *Shasha* 1996 2 SACR 73 (Tk) 75.

Relations by marriage in the ascending and descending line *ad infinitum*, for example, a man and his former mother-in-law or daughter-in-law. The termination by death or divorce of the marriage which has created the relationship of affinity does not remove the above-mentioned prohibition of intermarriage.[116]

According to common law a man could not marry those blood relations of his deceased or divorced wife whom she would have been prohibited from marrying if she had been a man, and the rule applied *mutatis mutandis* to a widowed or divorced woman.[117] However, section 28 of the Marriage Act 25 of 1961 provides that a widower may marry his deceased wife's sister or any female related to him through his deceased wife in a more remote degree of affinity than her sister, other than an ancestor or descendant of the deceased wife. The same applies *mutatis mutandis* to a widow and the position is the same if the marriage was not dissolved by the death of the one spouse but by divorce.

According to the common law as interpreted by our courts, X commits incest if he has intercourse with a woman who is not his wife even if she is related to him by collateral affinity while the marriage creating the affinity still subsists, as where he has intercourse with his wife's sister (or the latter's daughter) while he is still married to his wife.[118] The reason for this view is that the easing of the prohibited degrees of affinity in the Marriage Act 25 of 1961 applies only if the marriage is no longer in existence. As long as it exists, the prohibition of entering into a marriage remains and, therefore, X commits incest if, for example, he has intercourse with his wife's sister while he is still married. As soon as X is divorced from his wife, intercourse between him and the sister of the wife he divorced no longer constitutes incest.

It is regrettable that intercourse even in these circumstances is to be regarded as incest, because such intercourse can be regarded as mere adultery – something which is not punishable. To this should be added the consideration that punishing intercourse between *affines* (people related to each other merely through marriage) rests on insecure foundations, because such intercourse does not involve the mixing of blood within one's own family.[119] Judging by the light sentences imposed by our courts for this type of incest, it is clear that even the courts do not attach much moral reprehensibility to this type of conduct.[120] It is submitted that this type of intercourse should be decriminalised.

(*e*) *Adoptive relationship*

The Child Care Act[121] prevents an adoptive parent from marrying his adopted child, and sexual intercourse between them will, therefore, constitute incest.[122]

---

116 *Botes* 1945 NPD 43 46; *Mulder supra* 229B–C.

117 *K* (1875) 5 Buch 98; *Paterson* 1907 TS 619, and see the discussion in *Mulder supra* 229A–B and *Shasha supra*.

118 *Van Wyk* 1931 TPD 41 44; *Botes* 1945 NPD 43; *Mulder* 1954 1 SA 228 (E); *Shasha* 1996 2 SACR 73 (Tk) 75–77.

119 See the discussion in *Hunt-Milton* 236, especially par (8), as well as Labuschagne 1985 *THRHR* 435 447.

120 In *Paterson* 1907 TS 619, which was a case of intercourse between a man and his wife's sister, the "sentence" was imprisonment until the rising of the court, the court finding no substantial difference between such intercourse and mere adultery.

121 74 of 1983. See s 20(4).

122 *M* 1968 2 SA 617 (T) 621.

However, as there is no prohibition of marriage between an adoptive child and the blood-relation of his adoptive parent, intercourse between an adopted son and, for example, the daughter of his adoptive parent is not incest.

6 Unlawfulness The intercourse 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.[123] If the woman has not consented to intercourse, the crime of rape is committed.

7 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.[124]

L BESTIALITY

1 Definition Section 13 defines this crime as follows:

> "**13**. A person ("A") who unlawfully and intentionally commits an act–
> (*a*) which causes penetration to any extent whatsoever by the genital organs of –
> (i) A 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 A; 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."

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

3 General remarks on crime This crime codifies the common-law crime of bestiality, which is repealed by section 68(1)(*b*) of the Act, although some of the acts described in the definition, such as the masturbation of an animal, did not form part of the common-law crime. X may be either a male or a female, and the animal may likewise be either male or female. The crime is committed not only if X performs the act himself, such as where he inserts his own penis into the vagina or anus of an animal, but also where he causes another person, Y, to do so, as where he coerces Y to do so.

4 Constitutionality of crime In *M*[125] the Free State court held that the existence of this crime is not unconstitutional. More particularly, the existence of the crime is, according to the court, not contrary to section 9(3) of the Constitution,

---

123 In *Botes* 1945 NPD 43 both the man and the woman were held to be guilty of incest.
124 *Pieterse* 1923 EDL 232.
125 2004 1 SACR 228 (O).

which prohibits discrimination based on sexual orientation, section 12(1), which states that everyone has the right to freedom and security of the person, or section 14, which provides that everyone has the right to privacy. The court emphasised that society regards this type of conduct as unnatural and contrary to good morals. The decision relies fairly heavily on the community's perception regarding this type of crime.[126] The latter aspect of the judgment creates a problem. In dealing with other constitutional issues, such as the question whether the death sentence is constitutional, community perceptions are not allowed to cloud the issue by overruling what would otherwise be the meaning of a provision in the Constitution.

There are arguments favouring the view that the crime's existence is unconstitutional. The crime is seldom committed, and almost always out of the sight of other people. The people who commit the deed are mostly people suffering from some psychological disability and who are in need of help. This help cannot take the form of punishment by a criminal court. Inasmuch as there may possibly be injury to the animal, such causing of injury can be punished by using the criminal prohibitions dealing with cruelty to animals in the Animal Protection Act 71 of 1962. The court's argument that the animal cannot consent to the deed[127] seems unrealistic, especially if one takes into consideration that millions of animals are slaughtered annually for human consumption, without noticeably affecting the community's perceptions relating to what conduct towards animals is acceptable. The last word on the constitutionality of the crime must still be spoken by the Constitutional Court.[128]

---

126 See 238*c*.

127 See 236*b*–*c*.

128 Carnelly and Hoctor 2004 *Obiter* 506 are of the opinion that the judgment in *M*'s case is correct, ie, that the criminalisation of bestiality is constitutional because it upholds human dignity (516). It is difficult to see how punishing X for committing a sexual act with an animal has anything to do with the dignity of either X or that of society. How can human dignity be said to be infringed – and that without any justification – if X satisfies his sexual urges against the body of a donkey out of sight of anybody? And is it X's dignity which criminalisation must uphold or that of society, although nobody even saw X performing his act? At 517 the authors further state that "the crime infringes on the individual's autonomy" and that "the pursuit of autonomy requires the state . . . to put in place laws which protect people from the consequences of their own vulnerability". It is difficult to agree with this argument. Inasmuch as the individual's autonomy plays any role in the issue, it rather serves the case in favour of decriminalisation rather than criminalisation. The argument furthermore ascribes a paternalistic role to the state, enforces morality, and is irreconcilable with the liberal views relating to sexual autonomy which does not entail any harm to other people expressed in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 556 (CC). More realistic are the views on *M*'s case by Grant 2004 *Annual Survey* 667–668, who is skeptical about the correctness of the decision. He states (668): "If . . . one considers the criminal proscription of sodomy and the criminal proscription of bestiality one is left wondering how exactly they differ from a constitutional point of view. If the message of *National Coalition* is that private sexual conduct which causes no harm to others and which may or may not be viewed as repugnant by a segment of society, cannot, without another justification, simply be proscribed, then it is difficult to see how bestiality can legitimately be proscribed while sodomy may not . . . I struggle to see . . . this point of distinction . . ."

M SEXUAL ACT WITH A CORPSE

1 Definition Section 14 defines this crime as follows:

> "A person who unlawfully and intentionally commits a sexual act with a human corpse is guilty of the offence of committing a sexual act with a corpse".

2 Discussion of crime The definition is largely self-explanatory and hardly needs any elucidation. The expression "sexual act" is defined in section 1(1) as "an act of sexual penetration or an act of sexual violation". The expressions "sexual penetration" and "sexual violation" have already been quoted and discussed above.[129]

Because of the wide definition of *inter alia* "sexual violation",[130] even kissing a corpse on the mouth would seem to fall within the definition of the crime – a surprising state of affairs. Must one assume that the loved ones of a person who has just died, who had cared for him or her for a long time and just give the recently deceased person a last kiss as an expression of love and piety, render themselves guilty of committing this crime? Shakespeare's Juliet kissed her beloved Romeo for the last time on his mouth after he had died. Will a modern Juliet who does the same thing commit a crime?[131] It is submitted that the legislature could never have intended such an extraordinary result and that such cases ought not to be punishable. They ought to be treated as situations in which the defence of *de minimis non curat lex* applies.[132]

N SEXUAL OFFENCES AGAINST CHILDREN

1 General 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 intercourse with children below the age of 16 years, even with their consent. Some of the further crimes are defined in great detail, but they will be discussed in outline only.

2 Consensual sexual penetration of children

(*a*) *Definition* Section 15(1) defines this crime as follows:

> "15. (1) A person ("A") who commits an act of sexual penetration with a child ("B") is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child."

---

129 *Supra* XI B 5; XI D 5.

130 See par (*a*)(ii)(*bb*) of the definition of "sexual violation" in s 1(1).

131 Shakespeare *Romeo and Juliet* V 3. The temptation is great to mention some further examples. See Genesis 50:1, which contains a description of Joseph kissing his late father Jacob just after the latter has died; Shakespeare's *Titus Andronicus* V 3, shortly before the end of this act, as well as Shakespeare's *Julius Caesar* III 2, where, immediately after Caesar's death, Antony cries out: "And they would go and kiss dead Caesar's wounds".

132 On this defence, see *supra* IV J.

The word "child" in the definition is defined in section 1(1) as "a person 12 years or older but under the age of 16 years".

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

(*c*) *General remarks on this crime* This is a very important crime, which is usually referred to as "statutory rape". The expression "statutory rape" is in fact expressly used in brackets as a description of this crime in the heading used in the Act to describe the crime created in section 15. If X commits an act of sexual penetration with a child below the age or 12, he or she will be guilty of rape, because any ostensible "consent" by such a young child is regarded by the law as invalid.[133] Sexual penetration of a child between the ages of 12 and 16 is criminalised, because such a child is not yet mature enough properly to 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.

(*d*) *Statutory rape in the old legislation* This type of conduct was punishable also before the present Act came into operation. It was criminalised in terms of section 14 of the Sexual Offences Act 23 of 1957. The present Act repeals and replaces the old section 14.

(*e*) *Child between the ages of 12 and 16 years* The child in respect of whom the sexual penetration is performed (Y) must be between the ages of 12 and 16 years of age at the time of the commission of the act.

(*f*) *When both X and Y are children at the time of the act* This situation causes certain problems. The definition of the crime in subsection (1) does not require X to be above a certain age. However, subsection (2) provides that if X is also a child, that is, "a person 12 years or older but under the age of 16 years", as the word "child" is defined in section 1(1), the institution of a prosecution must be authorised in writing by the national director of public prosecutions, and that both X and Y must then be prosecuted.

The criminalisation of intercourse between two consenting children between 12 and 16 years has been criticised on the grounds that it is not abnormal for adolescents in this age group to experiment with sex and that such conduct is developmentally significant and normative. To punish adolescents for such conduct is not only detrimental to the development of a proper understanding of and healthy attitude to sexual behaviour, but also incompatible with a number or rights enshrined in the Constitution, such as the childrens' rights to dignity, privacy and bodily and psychological integrity, as well as the constitutionally recognised principle that a child's interests are of paramount importance in every matter concerning this child.[134] In *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*[135] the Constitutional

133 See the discussion *supra* XI B 6 (b) (iv).
134 S 28(2) of the Constitution.
135 CCT 12/13 [2013] ZACC 35 (not yet reported at the time of writing).

Court agreed with this criticism and declared section 15 invalid to the extent that it imposes criminal liability on children under the age of 16 years. The court expressly stated that its order is not applicable to cases where X is 16 or 17 years of age. The court gave parliament 18 months to correct the defects in the section. At the time of the writing of this edition parliament has not yet amended the section, but it is reasonable to assume that it will be amended to accord with the decision of the Constitutional Court.

(*g*) *Commission of an act of sexual penetration* The conduct punishable under the section presently under discussion is "sexual penetration". The expression "sexual penetration" is defined in section 1(1) and has already been quoted and discussed in detail in the discussion of the corresponding element in the crime of rape.[136] It is sufficient to note once again that the perpetrator (X) may be either a male or a female and that the child in respect of whom the penetration is committed (Y) may likewise be either a male or a female. The act includes penetration of the child's vagina, anus or mouth. The penetration may also be performed with another part of the body such as a finger or a toe, and even with an object, such as a sex toy, a stick, or the genital organs of an animal or another part of the body of an animal.

(*h*) *Two special defences* Tucked away near the end of the Act is an important provision in section 56 setting out two defences which X may rely on when charged with this crime.

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

  According to section 56(2)(*a*) it is a valid defence for somebody charged with this crime to contend that the child (Y) deceived X into believing that he or she was 16 years or older at the time of the alleged commission of the crime, and that X reasonably believed that Y was 16 years or older. However, this provision does not apply if X is related to Y within the prohibited degrees of blood, affinity or an adoptive relationship as set out in the definition of incest.[137] 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.

  For this defence to succeed, both a subjective and an objective test applies. Firstly, the test is subjective in the sense that X must have believed that the young person was already at least 16 years of age. Secondly, as a result of the use of the word "reasonably" in section 56(2)(*a*), the test is objective in the sense that the reasonable person in the circumstances would also have had the belief that X was already at least 16 years of age. If X merely looked at Y and decided that he or she was already 16 years of age, there are not yet enough grounds for the defence to succeed. Y should have behaved in such a way that it could be construed as a deception of X. The section provides that Y should have deceived X into believing that he or she (Y) was already

136 *Supra* XI B 5.

137 S 56(3). For the meaning of the words "prohibited incest degrees of blood, affinity or an adoptive relationship", see the discussion of incest *supra* XI K 5.

16 years old. A further discussion of the interpretation to the word "deceive" just given appears below in the discussion of the intention requirement of this crime.[138]

- *Second defence: X and Y both children*

  According to section 56(2)(*b*) it is a valid defence for somebody charged with this crime to contend that both X and Y[139] were "children" (ie, persons between the ages of 12 and 16 years)[140] and the age difference between them was not more than 2 years at the time of the alleged commission of the crime. Thus, if X was 15 years old at the time of the act, he or she will have a valid defence if Y was 13 years old at that time, but not if Y was 12 years old at that time. It is common knowledge that sex between children under the age of 16 often occurs. Before both children under the age of 16 are charged with the commission of the crime, the director of public prosecutions must consent in writing to the prosecution.[141] The decision of the Constitutional Court in the *Teddy Bear Clinic* case[142] discussed above will lead to some form of amendment of this subsection in order to make it harmonise with an amended section 15.

(*i*) *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 into the child's vagina, anus or mouth.

(*j*) *Intention* The requirement of intention is not specifically mentioned as an element of the crime. It is, in fact, very noticeable that 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. Y may, for example, be particularly large and physically well developed for her age. The question whether X can rely on a mistake relating to Y's age is complicated by the creation in section 56 of the first special defence on which X may rely. This defence, as indicated above, amounts to Y having deceived X into believing that he or she was 16 years or older at the time of the alleged commission of the crime, coupled with the fact that X reasonably believed that Y was already 16.

It is submitted that, although intention is not specifically mentioned in the definition as an element of the crime, it is nevertheless impliedly required in the words "and the accused person reasonably believed that the child was 16 years or older" in section 56(2)(*a*). The inclusion of the word "reasonably" is to be

---

138 *Infra* XI N 2 (*j*).

139 The wording of s 56(2)(*b*) actually reads: ". . . a valid defence . . . that both the accused persons were children . . ." It must be remembered that s 15, which creates this crime, provides in subs 2(*a*) that if both X and Y are children, ie between 12 and 16 years, both must be charged with contravening s 15.

140 See the definition of "child" in s 1(1).

141 S 15(2)(*a*).

142 CCT 12/13 [2013] ZACC 35. See *supra* under the discussion in XI N 2 (*f*).

regretted, because in terms of the general principles applying to intention and more particularly X's knowledge, a mistaken belief excludes intention even if such a belief is unreasonable.[143] The use of the word "reasonable" brings an objective element into an inquiry which is usually purely subjective.

Furthermore, much depends upon how the courts will interpret the word "deceive" as it appears in the wording of the first special defence in section 56(2)(*a*). A wide interpretation of this word is preferable, because such an interpretation will enable the courts to reach a conclusion largely compatible with the general principles applying to intention, and more particularly of X's knowledge. By a wide interpretation is meant an interpretation which does not limit the word "deception" to active, express deception, but which includes implied deception, that is, deception by conduct.[144] It is also submitted that "deceive" ought to be interpreted in such a way that Y need not necessarily consciously or intentionally have deceived X.

3 Consensual sexual violation of children

(*a*) *Definition* Section 16(1) defines this crime as follows:

> "16. (1) A person ("A") who commits an act of sexual violation with a child ("B") is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child."

The word "child" in the definition is defined in section 1(1) as "a person 12 years or older but under the age of 16 years".

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

(*c*) *General remarks on this crime* 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 difference between acts amounting to sexual penetration and those amounting sexual violation has already been set out above[145] in detail and it is unnecessary to repeat it here.

Everything that was said above in the discussion of consensual sexual penetration of a child in contravention of section 15, applies also to the present crime, with the sole exception that the conduct criminalised does not consist of sexual penetration but of sexual violation. The two special defences created in section 56, and which have already been quoted and discussed, apply also to this crime. The same remarks apply to the elements of unlawfulness and intention, as well

---

143 *Supra* V C 15.

144 For a similar opinion, see *Milton and Cowling* E3–6. The judgments in *T* 1960 4 SA 685 (T) and *M* 1997 2 SACR 340 (O) seem to support a wide interpretation of "mislead", and more particularly an implied deception.

145 *Supra* XI B 5; XI D 5.

as to the consent of the director of public prosecutions which must be obtained if X is also below the age of 16 years of age. As in the other crime, X may be either male or female and the same applies to Y.

As already pointed out above,[146] the definition of "sexual violence" in the Act is so wide that it may even include X's touching Y's mouth with his (X's) own mouth, in other words, X's kissing of Y. This amounts to an unjustifiable overreach of the prohibition. In *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*[147] the Constitutional Court declared section 16 invalid to the extent that it imposes criminal liability on children under the age of 16 years. The court gave parliament 18 months to correct the defects in the section. The reason for this decision has already been set out above. At the time of the writing of this edition parliament has not yet amended the section, but it is reasonable to assume that it will be amended to accord with the decision of the Constitutional Court.

4 Sexual exploitation of children

(*a*) *General* Section 17 creates a number of crimes relating to the sexual exploitation of children. These crimes are defined in great detail. What follows is only a summary of the section's provisions. In the discussion of the section that follows it should be borne in mind throughout that the word "child", as used in the section, means a person under the age of 18 years.[148]

(*b*) *Sexual exploitation of child* Subsection (1) of section 17 creates a crime which is worded substantially the same as the crime created in s 11 which creates the crime of prostitution. This latter section has already been quoted and discussed in detail above.[149] There are only two differences between the wordings of these two sections. The first is that, whereas section 11 refers to "a person 18 years or older", section 17(1) refers to "a child complainant". The second point of difference is that the words "with or without the consent of B" appear in section 17(1), whereas they do not appear in section 11. In essence section 17(1) provides that any person who engages the services of a child 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. The words "with or without the consent of B" means that male person X commits the crime if he obtains the services of Y for sex for reward, even if Y is a consenting 17-year-old girl.

(*c*) *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.

(*d*) *Furthering the sexual exploitation of child* According to subsection (3), any person who allows or permits the commission of a sexual act by Z with a

---

146 *Supra* XI D 5 (*v*).
147 CCT 12/13 [2013] ZACC 35, not yet reported at the time of the writing of this edition.
148 See the definition of "child" in s 1(1).
149 *Supra* XI J.

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.

(*e*) *Benefiting from sexual exploitation of 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.

(*f*) *Living from the earnings of sexual exploitation of 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.

(*g*) *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.

5 Sexual grooming of children

(*a*) *Conduct criminalised* Under the heading of "sexual grooming of 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[150] – to indulge in a sexual act or to diminishing his or her resistance to the performance of such acts. Examples of such acts are the following: to display an article intended to be used in the performance of a sexual act to Y; to display pornography to Y; to describe the commission of any act to Y with the intention to reduce his unwillingness to perform a sexual act; to persuade Y to travel to any part of the world in order to commit a sexual act there; and to discuss or explain with Y the commission of a sexual act.

6 Displaying pornography to children

(*a*) *Conduct criminalised* Under the heading "Exposure or display of or causing exposure or display of pornography to children", section 19 prohibits a person from unlawfully and intentionally exposing or displaying child pornography[151] to persons younger than eighteen years. It also criminalises the exposure of films or publications to children that, in terms of the Films and Publications Act 65 of 1996, have been given certain specific classifications because of the explicit sexual nature of the films. The section also prohibits a person from exposing children to publications which are not suitable to them because of the sexual content of the publications.

7 Using children for, or benefiting from, child pornography

(*a*) *Conduct criminalised* Section 20 creates the crime of using a child – that is, a person below the age of eighteen years[152] – for child pornography, or

---

150 See the definition of "child" in s 1(1).

151 What constitutes child pornography is to be found in s 20(1)(a) and (b). See the discussion of the crime created in s 20 *infra* XI N 7.

152 See the definition of "child" in s 1(1).

benefiting from such conduct. The section targets different role-players who are actively involved in obtaining children and using them in order to create child pornography.

Subsection (1) *inter alia* prohibits a person from engaging a child (Y) for the purpose of making child pornography. It matters not whether Y consents to the act or not, or whether Y receives financial or other reward for his or her proposed conduct, or whether anybody else receives such reward. The subsection also criminalises the actual making of the child pornography. Among the acts listed as instances of child pornography are (a) an act depicting Y engaged in an act that constitutes a sexual offence; (b) an act of sexual penetration or sexual violation; (c) an act of self-masturbation; and (d) sexually suggestive or lewd acts.

Subsection (2) is aimed at punishing all role-players who benefit in any manner from their involvement in child pornography.

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

(*a*) *Conduct criminalised* Section 21 criminalises conduct whereby X unlawfully and intentionally causes or compels a child, Y, to witness the commission of a sexual offence as defined in section 1(1), a sexual act as defined in the same subsection or an act of self-masturbation. It does not matter for whose sexual gratification X performs the act.

9 Failure to report sexual offence against children

(*a*) *Conduct criminalised* Section 54(1) provides that a person who has knowledge that a sexual offence has been committed against a child, must report such knowledge immediately to a police official. Section 54 (2) provides that a person who fails to report such knowledge is guilty of an offence. This provision is of special importance to people in certain professions, such as police officials, social workers and even medical doctors.

O SEXUAL OFFENCES AGAINST MENTALLY DISABLED PERSONS

1 General Mentally disabled persons constitute a group of persons who are particularly vulnerable to sexual exploitation. Because of their mental disability, they do not understand the nature, character or consequences of sexual acts committed in respect of them, and as a rule do not report their sexual exploitation to other people or the authorities. They are in the hands of others who care for them and who sometimes find themselves in situations in which it is easy to exploit their mental disability by committing sexual acts in respect of them. Consequently mentally disabled people need particular protection by the law.

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

> **"'person who is mentally disabled'** means 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 wording of paragraphs (*a*) to (*c*) of the definition are reminiscent of the basic requirements for criminal capacity and linked thereto, the requirements for a successful reliance on the defence of mental illness set out in section 78(1) of the Criminal Procedure Act 51 of 1977.[153]

The provisions of chapter 4 are long and complicated. They merely mirror the corresponding provisions in section 17 to 20 of the Act, which deal with the sexual exploitation and grooming of children and measures to protect children against acts of a sexual nature. A full exposition and discussion of these provisions (ie, sections 23–26) fall outside the scope of this book. What follows is a summary of its main provisions.

2 Sexual exploitation of mentally disabled persons Section 23 deals with the sexual exploitation of mentally disabled persons. The section largely resembles the corresponding provisions relating to the sexual exploitation of children set out in section 17 and already summarised above.[154] Thus, X commits a crime if he or she engages the services of a mentally disabled person Y so that he or she (X) may commit a sexual act with Y. X also commits a crime if he or she offers the services of Y to a third party, Z, for financial or other reward so that Z may commit a sexual act with Y.

Subsection (3) provides that X commits a crime if he or she intentionally allows the commission of a sexual act by Z with Y, while X is a care-giver parent, guardian, curator or teacher of X. The word "care-giver" is further defined in subsection 1(1) an "any person who, in relation to a person who is mentally disabled, takes responsibility for meeting the daily needs of or is in substantial contact with such person".

Further subsections prohibit X from benefiting from the sexual exploitation of Y, from living from the earnings of the sexual exploitation of Y, or from promoting sex tours for Y.

3 Sexual grooming of mentally disabled persons Section 24 criminalises the sexual grooming of mentally disabled persons. The section mirrors the corresponding provisions of section 18, which deals with the sexual grooming of children, and which have already been summarised above.[155] The section criminalises a long list of acts which all amount to requesting, influencing, inviting, persuading, encouraging or enticing a mentally disabled person (Y) to indulge in a sexual act or to diminish his or her resistance to such acts. Examples of such acts are the following: to display an article intended to be used in the performance of a sexual act to Y; to display pornography to Y; to describe the commission of any act to Y with the intention to reduce his unwillingness to perform a

153 *Supra* V B (iii) 2.
154 *Supra* XI N 4.
155 *Supra* XI N 5.

sexual act; to persuade Y to travel to any part of the world in order to commit a sexual act there; and to discuss or explain with Y the commission of a sexual act.

4 Exposure or display of pornography or harmful material to mentally disabled persons Section 25 criminalises the exposure or display, or the causing of such exposure or display, of pornography or harmful material to mentally disabled persons. The section mirrors the corresponding provisions of section 19, which deals with the exposure or display of pornography to children. This latter section has already been summarised above.[156] Instead of the word "children" as used in section 19, the expression "persons who are mentally disabled" is used in section 25.

5 Using mentally disabled people for pornographic purposes Section 26 criminalises the use of mentally disable people for the purpose of creating or producing any image or publication which, for example, displays the mentally disabled person engaged in the commission of a sexual offence, sexual penetration, sexual violence, self-masturbation or sexually suggestive or lewd acts.

6 Failure to report sexual offence against mentally disabled person Section 54(2)(*a*) provides that a person who has knowledge that a sexual offence has been committed against a person who is mentally disabled, must report such knowledge immediately to a police official. Subsection 2(*b*) provides that a person who fails to report such knowledge is guilty of an offence.

156 *Supra* XI N 6.

CHAPTER

XII

CRIMES AGAINST THE FAMILY

A BIGAMY

1 Definition Bigamy is committed if a person who is already married is unlawfully and intentionally a party to a marriage ceremony purporting to bring about a lawful marriage between himself (or herself) and somebody else.[1]

2 Elements of crime The elements of the crime are the following: (*a*) professing *to be a party to a marriage ceremony* which brings about a lawful marriage; (*b*) the perpetrator *must be married*; (*c*) *unlawfulness*; and (*d*) *intention*.

3 Rationale Nowadays the most important rationale for punishing bigamy is the fact that it is an abuse of the legal institution of marriage.[2] The crime may be committed by either a male or a female.

4 Subsistence of valid marriage The crime can be committed only if X is, at the time of the second "marriage", already lawfully married and if his marriage is still in subsistence.[3] A valid marriage will obviously not be in subsistence at the time of the "second marriage" if the first marriage has been dissolved by divorce or by the death of the other spouse before the "second marriage" is entered into. Neither will there at that stage be a valid marriage if the first marriage was void *ab initio* (eg because the parties were related to each other within the prohibited degrees of consanguinity). A valid marriage will, however, be in subsistence if

---

1 One is tempted to define the crime simply as "the unlawful, intentional entering into a marriage by a person who is already married". On closer scrutiny such a definition appears to be unacceptable, because of the rule of the law of husband and wife that someone who is already married and whose marriage is still in subsistence cannot validly enter into another marriage. The second (bigamous) marriage is void. Thus, viewed correctly, bigamy does not consist in entering into a second marriage (because this is impossible), but in being a party to a marriage ceremony which purports to bring about an otherwise lawful marriage.

2 Moorman 2 14 1–3; *Nkabi* 1918 SR 160 167. Another rationale is the injury done to X's spouse, or even the injury done to the person whom X purports to marry, in cases where that person is unaware that X is in fact already married. It is therefore a crime both against the community and against an individual.

3 S 237 of the Criminal Procedure Act 51 of 1977; *McIntyre supra* 808, 821.

the first marriage was merely avoidable, because such a marriage is regarded as valid until it is annulled.

5 Second marriage ceremony The crime is committed the moment X purports to enter into a second marriage by going through the necessary marriage ceremony.[4] The ceremony must comply with the formal requirements for a marriage ceremony. The crime is not committed if the second purported marriage is "solemnised" by a person who is not an authorised marriage officer in terms of the law.[5]

This "second marriage" is, of course, void, but it is not clear whether it is an essential of the crime that this "second marriage" would otherwise have been a valid marriage (that is, if it were not already void because of its bigamous nature). Assume, for example, that the parties to the "second marriage" may not marry each other because they are related within the prohibited degrees of consanguinity. Here one is not dealing with a formal defect in the marriage ceremony, but with a material incompetence of the two parties to marry each other. In English law the latter type of incompetence is no bar to a conviction of bigamy,[6] and it is submitted that the position in South Africa is the same.[7]

If the party with whom X is purporting to enter into a "second marriage" is aware that X is already married, he or she is an accomplice (if he or she is unmarried) or a co-perpetrator (if he or she is also already married).

6 Customary marriages and civil marriages Section 2(1) of the Recognition of Customary Marriages Act 120 of 1998 provides that a valid customary marriage (that is, a marriage according to customary law) is for all purposes recognised as a marriage. From this provision it would seem to follow that X commits bigamy if, being married according to customary law, he enters into a civil marriage, and conversely, if being married according to civil law, he enters into a customary marriage. This conclusion is strengthened by the provisions of section 3(2) of the Act, which provide that no spouse in a customary marriage is competent to enter into a civil marriage during the subsistence of such a customary marriage. It is likewise strengthened by the provisions of section 10(4) of the same Act, which provide that no spouse of a civil marriage is, during the subsistence of such marriage, competent to enter into any other marriage. It is clear that the intention of the legislature is that all civil marriages should remain monogamous.[8]

---

4 *Nkabi* 1918 SR 160 162.

5 *Jacobs* 1926 OPD 184 186. It is submitted that X is in such a case guilty of attempted bigamy.

6 *Brawn* (1843) 1 Carr and Kir 144; *Allen* (1872) LR 1 CC 367; *Robinson* [1938] 1 All ER 301; *Archbold* 31–8.

7 This is also the opinion of *Hunt-Milton* 266–267; *De Wet and Swanepoel* 279; *Burchell and Milton* 771.

8 The conclusion in the text is likewise strengthened by the provisions of s 10(1), which provides that a man and a woman between whom a customary marriage subsists are competent to contract a civil marriage with each other, provided neither of them is a spouse in a subsisting customary marriage with any other person. Apart from this, not to regard such "mixed system marriages" as bigamy would be to discriminate against people who enter into a second civil marriage while already being married according to civil law – conduct which is punishable as bigamy. Such discrimination would be difficult to justify in the light of the provisions of the Act referred to above.

7 Unlawfulness There must be no justification for X's conduct. The unlawfulness may conceivably be excluded by coercion (necessity).

8 Intention The crime can be committed intentionally only.[9] X must be aware, at the time of the second purported marriage, that he is still married. More particularly, he must not be under the impression that his marriage has been dissolved by the death of his spouse or by divorce.[10]

B COMMON-LAW ABDUCTION

1 Definition A person, either male or female, commits abduction if he or she unlawfully and intentionally removes an unmarried person below the age of 18 years, who may likewise be either male or female, from the control of his or her parents or guardian and without the consent of such parents or guardian, intending that he or she or somebody else may marry or have sexual intercourse with the minor.[11]

2 Elements of crime The elements of the crime are the following: (*a*) the *removal* (*b*) of an *unmarried person below the age of 18 years* (*c*) *from the control of his or her parents or guardian* (*d*) with the *intention of marrying or having sexual intercourse with the minor* (*e*) *without the consent of the parents or guardian* (*f*) *unlawfulness* and (*g*) *intention*.

3 Person below the age of 18 years The person in respect of whom the crime is committed must be an unmarried minor.[12] Before 2005, it was beyond dispute that, in terms of the common law, "minor" meant a person below the age of 21 years. However, section 17 of the Children's Act 38 of 2005 now provides that a male of female child reaches the age of majority when they are 18 years of age. It is submitted that section 17 of this Act also has an effect on the definition of this crime in that the term "minor", as used in the former accepted definition, now means somebody below the age of 18 years.

4 Origin and character In Roman-Dutch law the crime was known as *raptus* or *schaking*.[13] The crime dates from a period in history when minor women played a very subservient role in society, and were to a large extent subjected to the authority of their parents or guardians. They enjoyed little freedom of movement, and were often regarded by their parents as economic assets. The purpose of the crime was to prevent strangers from removing minor girls from the parents' control, thereby depriving the parents of their rights – economic or

---

9 Van der Linden 2 7 3 ("voorbedachtelijk"); Van der Keessel 48 5 6. Intention was assumed to be a requirement in *Lees* 1927 EDL 314 318, 322.

10 *Lees supra*.

11 *Nel* 1923 EDL 82 83; *Kahn* 1928 CPD 328 332; *Hlapo* 1944 OPD 166 168; *Churchill* 1959 2 SA 575 (A) 578, 580; *Sita* 1954 4 SA 20 (E) 22. The reason for the insertion of the words "person below the age of 18 years" instead of "minor" is to be found in the provisions of s 17 of the Children's Act 38 of 2005, discussed below in par 3.

12 Voet 48 6 6; *Jorgenson* 1935 EDL 219 223.

13 C 9 13; Voet 48 6 4–6; Matthaeus 48 4 2; Moorman 2 17; Van der Keessel 48 6 7; Van der Linden 2 7 4; Van Leeuwen *RHR* 4 36 4.

otherwise – in respect of the girl. The crime protected especially the parents' right to give consent to the girl's marriage. The crime's field of application was later extended also to protect the parents' rights in respect of minor boys.

In modern society minor girls and boys are, of course, more independent of parental authority. Today the crime still protects the parents' right to consent to the minor's marriage and to exercise control over where she stays. Since mere seduction is not to be equated with abduction, the crime does not necessarily protect the parents' control over the minor's sex life; the boyfriend who takes away a minor girl from her parental home, where she is staying, with her consent, has intercourse with her with her consent and shortly thereafter returns her to her parental home, does not commit the crime. The crime therefore serves only a limited purpose nowadays.[14] Nevertheless the crime is not completely without foundation even today: it punishes at least unscrupulous people who entice young people away from their parental homes in order to place them at the disposal of others for sexual purposes (often at a price and with the consent of the young person).

5 Legal interest protected The crime represents a wrong committed against the parents or guardian of the minor, and not against the minor, because the latter's consent to the acts of the wrongdoer is no defence.[15] The interests protected here are twofold, namely the factual exercise of control over the minor, and the parents' or guardian's right to consent to the minor's marriage. These correspond to what are probably the two most important requirements for the crime, namely (*a*) that there must be a physical removal of the minor from the control of the parents, and (*b*) that the removal must be without the consent of the person or persons whose consent to the minor's marriage is necessary. If the minor does not consent to the taking X may, apart from abduction, also be guilty of kidnapping or, if he has sexual intercourse with her without her consent, rape.

6 The perpetrator and the minor Both the person who commits the crime and the person in respect of whom the crime is committed may be either male or female.[16] In the vast majority of reported cases on the crime the perpetrator (X) was a male and the minor (Y) a female. For this reason the perpetrator (X) will, in the discussion which follows, be referred to in the masculine form and the minor (Y) in the feminine form.

7 The removal The act consists in removing the minor from the control of his or her parents or guardian. Whether the minor is physically removed by force or, after a request by the wrongdoer, decides to accompany him voluntarily is

---

14 See the discussion in *Hunt-Milton* 555.

15 *Hanna* 1937 TPD 236 239; *Bezuidenhout* 1971 4 SA 32 (T) 35C–D.

16 Voet 48 6 4; Moorman 2 17 3; Van der Keessel 48 6 7. There seems to be no reason why the crime cannot be committed by a male in respect of a male where a minor boy is taken away for the purpose of homosexual practices. Such a case is explicitly mentioned by Van der Keessel 48 6 7 as abduction. The minor must be under the control of somebody else (*Tobie* (1899) 16 CLJ 45 (O) 48; *Hlapo supra* 168); the crime would therefore not be committed if a father removed his own daughter for the purpose of intercourse. For a case where abduction was committed by a female, see *Adams* 1911 CPD 863 867–868.

immaterial.[17] (In practice the minor is almost invariably a willing party.) X need not necessarily accompany the minor when she leaves her home: it is sufficient if she leaves her home herself after arranging with X to meet him somewhere.[18] The removal may also take place constructively, if the minor, who is already away from home, is persuaded not to return.[19]

8 The removal must be from the parents' or guardian's control Y must be removed from her parents' or guardian's control. The control of the parents or guardian over the minor is not limited to the time when she is in her parents' home. The minor remains under the parents' control even if she goes to visit a friend, or goes on holiday with somebody else, or stays at another place such as a boarding school or with relatives. In the latter case the parents exercise their control through the head of the boarding school or the relative concerned, who are persons *in loco parentis*.

There may be cases, however, where the parent or guardian has completely relinquished control over the minor, as where the minor has left the parental home and the parents neither know, nor are even concerned about, the minor's whereabouts.[20] In such cases the minor cannot be abducted, since there is no parental or guardian's control which is infringed.[21] Nor can abduction be committed if the minor has left home of her own accord, and X's conduct towards her does not amount to any active assistance or encouragement to her to escape from her parents' control.[22]

9 Purpose of removal must be to marry or have intercourse with minor The crime is committed only if the removal takes place with a certain purpose. This purpose is that somebody (usually X himself) either marries Y or has sexual intercourse with her.[23] For the crime to be completed, proof of actual marriage or intercourse between the parties is not required. Mere proof of intention to achieve one of these aims is required.

However, the mere temporary removal of a girl from her home in order to facilitate sexual intercourse is not abduction. X must intend to remove Y either permanently or at least for a substantial period. If X wishes to have intercourse with Y, but it is impractical for him to do this at Y's home, the couple then drive away to some other place in order to have sexual intercourse, and immediately or shortly after intercourse has taken place X returns Y to her home, he does not commit abduction. Such conduct may amount to seduction, but mere seduction is not the same as abduction.[24] (Seduction is, in fact, not a crime at all.) In

---

17 *Feelander* 1926 TPD 157 161; *Ismail* 1943 CPD 418 420.

18 As in *Nel* 1923 EDL 82 83; *Jorgenson supra* 220, 223.

19 This happened in *Killian* 1977 2 SA 31 (C) 32. In this case X and the minor had been in each other's company since the afternoon but, as the minor had her parents' consent to be absent during the day, it was held (35A–B, 37A–B) that the removal took place at about 23h00 only, when the minor ought to have returned home, but was persuaded by X to spend the night with him. At that stage they were already at his home.

20 As in *Bezuidenhout* 1971 4 SA 32 (T) 34.

21 *Jorgenson supra* 223; *Bezuidenhout supra* 35.

22 As in *Pearston* 1940 OPD 153; *Cornick* 1957 2 PH K140 (C).

23 *Mhlongo* 1942 NPD 134; *Churchill* 1959 2 SA 575 (A) 580.

24 *Sashi* 1976 2 SA 446 (N) 447; *Killian* 1977 2 SA 31 (C) 32, 35; *L* 1981 1 SA 499 (B) 500.

order to differentiate between seduction and abduction the law requires X to have the intention to remove Y for at least a substantial period.[25] Whether the removal in fact lasts a substantial period, is immaterial; all that is required is that X should intend the removal to be for such a period.[26]

The intention to marry or have intercourse with Y must be present at the time of the removal. If the minor is removed for an innocent purpose, and it is only afterwards that X decides to have intercourse, the crime is not committed.[27]

In most cases X intends to marry or have intercourse with Y herself, but abduction can equally be committed if it is envisaged that Y be married to or have sexual intercourse with a third person.[28] Whether the marriage or the sexual intercourse in fact takes place is immaterial; all that is required is that marriage or sexual intercourse be contemplated by X at the time of removal of the minor from control.[29]

10 Without the consent of parents or guardian The removal must take place without consent. The consent which must be absent is not that of Y, but that of her parents or guardian,[30] because the crime is not committed against Y, but against her parents or guardian. Even if Y herself solicited the abduction or induced X to take her away, this affords him no defence if the parents did not consent.[31] There must be consent both to the physical removal of Y from control and to the further purpose of the removal, namely marriage or intercourse. In order to obtain a conviction, the state must prove that neither of the parents consented to the removal. If one of them consented, a crime is not committed. After all, the consent of both is required if Y wishes to marry.

There are conflicting decisions on whose consent must be lacking if Y is removed not while she is under the direct control of her parents in her parental home but while she is, for example, spending a holiday with relations or staying in a boarding school. Is it sufficient for a conviction that the consent of the person *in loco parentis* is lacking, without enquiring whether the parents consented?[32] It is submitted that the consent of both the parents or guardian (who has the *de iure* right to withhold consent to the minor's marriage) and the person who has custody of the minor (and who, thus, exercises *de facto* control over the minor) must be lacking. The reason for this is that the crime relates to both the *de iure* right of a parent or guardian to consent or withhold consent to

---

25 *Killian supra* 32, 35; *L supra* 500.

26 In *Lesia* 1978 3 SA 930 (B) a removal of three days was not regarded as sufficient. This case is irreconcilable with *Churchill supra* 580 and *Killian supra* 36H. In the latter case a period of only ten hours was held to be sufficient.

27 *Sashi* 1976 2 SA 446 (N) 447.

28 As in *Ncedani* 1908 EDC 243 and *Adams* 1911 CPD 863.

29 *Hanna* 1937 TPD 236 241.

30 *Jorgenson* 1935 EDL 219 223; *Hlapo* 1944 OPD 166 172.

31 *Clark* 1914 TPD 50 52; *Kahn* 1928 CPD 328 333; *Hanna* 1937 TPD 236 237. In *Kahn* and *Hanna* Y misinformed X that she was pregnant, thereby inducing him to marry her. In *Clark* Y threatened to commit suicide unless X took her away.

32 In *Hlapo* 1944 OPD 166 and *Nortje* 1955 2 PH H138 (O) eg it was held that it is only the guardian's consent which is in question, whereas in *Van Zyl* 1944 SWA 1 and *Thomas* 1925 EDL 248 it was held that it is the consent of the person *in loco parentis* which is in question.

the minor's marriage and the *de facto* control over the minor.[33] It is also submitted that if the parents are divorced and the court has awarded the custody of the minor to one parent, abduction is committed when the consent of the custodian spouse is lacking, the consent of the non-custodian spouse being irrelevant.[34] It is furthermore submitted that the crime cannot be committed in respect of a minor who has neither parents nor a guardian.[35]

11 Unlawfulness There must be no justification for X's conduct. The unlawfulness may conceivably be excluded by coercion (necessity).

12 Intention The form of culpability in this crime is intention. In terms of the general principles of liability, X's intention must relate to all the definitional elements as well as the unlawfulness. X must therefore know that the person he is taking is an unmarried minor,[36] that she is still in somebody else's control,[37] and that the parent or guardian has not consented to the removal.[38]X must have this knowledge at the time of the removal. *Dolus eventualis* suffices.[39]

---

33 To assume that the crime could be committed where the parents consented but the person who exercised *de facto* control did not, would mean that the crime could be committed against somebody who had no *de iure* right to consent to the minor's marriage. Conversely, to assume that the crime could be committed where the custodian consented but the parents did not would mean that there could be abduction where there was no infringement of the *de facto* control over the minor. This aspect of the crime is discussed in detail by Snyman 1972 *THRHR* 265.

34 If this were not so, abduction could be committed without there being any breach of the *de facto* control over the minor, namely where the custodian spouse consented to the removal but the non-custodian spouse withheld consent. See Snyman 1972 *THRHR* 265 274–277.

35 Snyman 1972 *THRHR* 265 279.

36 *Jorgenson* 1935 EDL 219 223; *Churchill* 1959 2 SA 575 (A) 578.

37 *Jorgenson supra* 223.

38 *Sita* 1954 4 SA 20 (E) 23A.

39 *Killian* 1977 2 SA 31 (C) 32, 36.

CHAPTER

XIII

CRIMES AGAINST PUBLIC WELFARE

A CORRUPTION

1 Introduction Even if a country has the best possible statutes and legal rules, any attempts by its government to construct a fair and prosperous dispensation for its citizens would fail if corruption within its society were rife. Corruption erodes moral values as well as the credibility of public authorities and its organs, undermines legal certainty and faith in the rule of law, leads to a dysfunctional public and private sector, endangers the free market economy, creates a breeding ground for organised crime, results in some people becoming rich at the expense of others, increases levels of poverty, impedes economic development, destroys the pillars of democracy, creates a culture of dishonesty and leads to lack of faith in a country's leaders.

Corruption is presently punishable in terms of the Prevention and Combating of Corrupt Activities Act 12 of 2004. This is a very long and detailed act. Given the style, scope and aim of this book, it is impossible to set out here its provisions comprehensively. The Act contains a general crime of corruption, followed by a long list of specific crimes of corruption pertaining to specific classes of persons or situations only. In the discussion which follows, the emphasis will be on the general crime of corruption.

In formulating the specific crimes of corruption, the legislature simply repeated large portions of the formulation of the general crime, adding only a few provisions facilitating a section's application to a specific class of persons or a specific type of situation. There is, accordingly, a large measure of repetition in the Act. The discussion which follows will aim at avoiding such repetitions by not discussing each specific crime of corruption in detail, but in outline only. An understanding of the elements of the general crime would make it fairly easy to understand the legislature's intention in the formulations of the specific crimes.

2 Historical In the common law the crime presently known as corruption was known as bribery.[1] This common-law crime could be committed by or in

1 *Patel* 1944 AD 511 521; *Chorle* 1945 AD 487 492; *Gouws* 1975 1 SA 1 (A).

respect of a state official only. In order to punish bribery of people who were not state officials but, for example, agents or representatives in private enterprises, the Prevention of Corruption Act 6 of 1958 created a separate statutory crime. The Corruption Act 94 of 1992 replaced both the common law and the abovementioned Act 6 of 1958. The 1992 Act was in turn replaced by the Prevention and Combating of Corrupt Activities Act 12 of 2004.

The most important principles for liability for corruption in the 2004 Act can also be found in the earlier provisions relating to corruption and bribery, although the terminology used to describe them may be different. For this reason cases relating to the previous crimes of bribery and corruption may still be of value in order to throw light on the meaning of the corresponding requirements in the 2004 Act.

3 The general crime of corruption: definition in the Act Section 3 of the Act contains the formulation of the general crime of corruption. The section reads as follows:

> Any person who, directly or indirectly –
> (*a*) accepts or agrees or offers to accept* any gratification* from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
> (*b*) gives* or agrees or offers to give to any other person any gratification*, whether for the benefit of that other person or for the benefit of another person,
> in order to act, personally or by influencing another person so to act, in a manner –
> (i) that amounts to the –
> (*aa*) illegal, dishonest, unauthorised, incomplete, or biased; or
> (*bb*) misuse or selling of information or material acquired in the course of the,
> exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
> (ii) that amounts to –
> (*aa*) the abuse of a position of authority;
> (*bb*) a 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.

The words in the definition indicated with an asterisk are in turn further defined in sections 1 and 2. These definitions will be given below in the discussions of the different elements of the crime.

If one analyses the language of the definition by provisionally "cutting out" conjunctive words or phrases, it is possible to construe an abbreviated definition which reads as follows:

"Anybody who
(*a*) accepts any gratification from anybody else, or
(*b*) gives any gratification to anybody else
in order to influence the receiver to conduct herself in a way which amounts to the unlawful exercise of any duties, commits corruption."

4 Corruption by giver and corruption by recipient Corruption can be committed in many ways. If one attempts to make statements about corruption which are applicable to all instances of the crime, one becomes entangled in long and diffuse formulations which are not easy to understand immediately. In order to overcome this problem, discussions of the crime usually distinguish between the two most important ways in which the crime 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 a gratification (benefit) to another party and the latter accepts it as inducement to act in a certain way. Both parties – the giver as well as the recipient – commit corruption. *The expression "corruption by a giver" refers to the conduct of the giver, and "corruption committed by the recipient" refers to the conduct of the party who accepts the gratification.* 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, as Y. In discussions of the previous corresponding crimes, one sometimes comes across the expression "active corruption" and "passive corruption". "Active corruption" refers to the conduct whereby X gives a gratification to Y, and "passive corruption" to the conduct of the recipient (Y) of the gratification from X.

The word "gives" includes an *agreement* by X to give the gratification to Y, or the *offering* by X to give it to Y. The word "accepts" in turn includes an *agreement* by Y to accept the gratification or the *offering* by Y to accept it.[2]

In the Act the legislature distinguishes between these two forms of corruption not only 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 by the recipient is set out in the subdivision of the section marked (*a*), while corruption committed by the giver is set out in the subdivision marked (*b*). The legislature employs the somewhat illogical sequence of first setting out the crime committed by the recipient and thereafter the crime committed by the giver. In the discussion which follows, the same sequence will be adopted.

Corruption by the giver is, in principle, merely a mirror image of corruption by the recipient. The same requirements apply to both these forms of corruption, provided certain terms used in describing the one are replaced by other terms when setting out the other. In order to avoid duplication, corruption by the giver will, in the discussion which follows, not be discussed in such detail as corruption by the recipient. The emphasis will be on corruption by the recipient. It is in the discussion of this form of corruption that the different requirements or elements of the crime will be identified and explained.

---

2 S 3(*a*) and (*b*).

5 General crime: corruption committed by the recipient

(*a*) *Elements of crime* The elements of the general crime of corruption committed by the recipient are the following:

(*i*) the *acceptance* by Y (the act);

(*ii*) of a gratification;

(*iii*) in order to act in a certain way (the inducement);

(*iv*) unlawfulness;

(*v*) intention.

Each of these elements will now be discussed.

(*b*) The *acceptance* The act consists in Y's accepting a gratification from X. The legislature employs two ways of broadening the meaning of "accept":

Firstly, the Act provides that certain acts which precede the acceptance, namely merely an *agreement* by Y to accept the gratification or merely an *offer* by Y to accept it, satisfies the present requirement.[3] It follows that, for the purposes of the crime of corruption, no distinction is made between the substantive crime (stem crime), on the one hand, and conspiracy or incitement to commit the substantive crime, on the other hand. Since the mere making of an offer already constitutes an act of corruption, it is not necessary for the state to prove the existence of a definite agreement between the corruptor and the corruptee, nor need it prove the payment of a *quid pro quo* by the corruptee.[4]

Secondly, the Act provides that the words or expressions "accept", "agree to accept" and "offer to accept", as used in the Act, include the following:

(*i*) to demand, ask for, seek, request, solicit, receive or obtain a gratification;

(*ii*) to agree to commit the acts listed under (*i*);

(*iii*) to offer to commit the acts listed under (*i*)[5].

The following factors or considerations do *not* form part of the requirement of the act of corruption (or of any other requirement for the crime) and therefore *offer neither X nor Y a defence*:

(*i*) *The fact that Y does not accept the gratification "directly", but only "indirectly"*.[6] It is therefore immaterial whether Y makes use of an intermediary to receive the gratification.

(*ii*) *The fact that Y did not in actual fact subsequently perform the act which X had induced her to perform*.[7] If Y had accepted the gratification but the entire evil scheme was exposed and Y arrested by the police before she could fulfil her part of the agreement with X, Y is nevertheless guilty of the crime. It is therefore incorrect to allege that the crime is completed only after Y had done what she agreed to do. It is completed at a much earlier stage, namely the moment X consents to accepting the gratification.

---

3 S 3(*a*)*b*).
4 *Selebi* 2012 1 SACR 209 (SCA) par 97.
5 S 2(3)(*a*).
6 S 3.
7 S 25(*c*).

(*iii*) *The fact that the corrupt activity between X and Y was unsuccessful*. Unlike, for example, murder, corruption is not a crime which consists in the actual infringement of the protected interest. It is sufficient that there is merely a threatened infringement of such an interest.[8] How far Y has proceeded with her plans before she is caught, may of course have a bearing on the sentence; the same principle according to which mere attempt to commit a crime is punished more leniently than the actual commission of the completed crime, applies here. The fact that the state or private enterprise involved did not suffer any prejudice or loss as a result of X or Y's conduct similarly affords X or Y no defence.

(*iv*) *The fact that Y accepts the gratification but that she, in actual fact, does not have the power or right to do what X wishes her to do.*[9] Therefore, if X gives Y a gratification in the belief that Y will give her (X) a driver's licence to which she is not entitled, but it appears that it is not Y who must decide upon the granting of a driver's licence but Z, such a mistake will afford neither X nor Y a defence.

(*v*) *The fact that what X requested Y to do accorded with Y's duties*, and that X accordingly did not request Y to do something "improper". In the common law this consideration afforded neither X nor Y a defence. The reason for this rule was that it was bribery even to "bribe an official to do her duty".[10] Thus, if X had given public prosecutor Y an amount of money in order to prosecute Z of some crime, but Y would in any event have prosecuted Z because she had the power to do so and also because there was sufficient evidence at her disposal of the commission of the crime by Z, both X and Y would have rendered themselves guilty of the crime. It is submitted that the same principle applies to the 2004 act. Such conduct accords with one or more of the following "aims" set out in section 3(ii), (iii) and (iv): "in order to act . . . in a manner . . . that amount[s] to . . . the abuse of a position of authority . . .or . . . the violation of a legal duty or a set of rules; or "in order to act . . . in a manner . . . designed to achieve an unjustified result" or "in order to act . . . in a manner . . . that amounts to any other unauthorised or improper inducement to do or not to do anything."

(*c*) The *gratification* Section 1 contains a long definition of the word "gratification". It provides as follows:[11]

> "In this Act, unless the context indicates otherwise . . .
> **'gratification'**, includes –
> (*a*) money, whether in cash or otherwise;

continued

8 Other examples of such a type of crime are high treason and the negligent driving of a vehicle. Cf *supra* III A 9.

9 S 25(*a*).

10 *Lavenstein* 1919 TPD 348 382–383; *Patel* 1944 AD 511 521–523; *Van der Westhuizen* 1974 4 SA 61 (C) 63.

11 S 1(iii).

(*b*) any donation, gift, loan, fee, reward, valuable security,[12] property[13] or interest in property of any description, whether movable or immovable, or any other similar advantage;

(*c*) the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage;

(*d*) any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation;

(*e*) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

(*f*) any forbearance to demand any money or money's worth or valuable thing;

(*g*) any other service or favour or advantage of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and includes the exercise or the forbearance from the exercise of any right or any official power or duty;

(*h*) any right or privilege;

(*i*) any real or pretended aid, vote, consent, influence or abstention from voting; or

(*j*) any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage".

It is clear that the word "gratification" as used in the Act has a very broad meaning. The use of the word "includes" means that the meaning of "gratification" is not limited to the contents of the terms set out in the definition quoted above. The words "any other service or favour or advantage of any description" in paragraph (*g*) of the definition makes it clear that "gratification" is not limited to a corporeal or patrimonial benefit. It is submitted that the word "gratification" as used in the Act is wide enough to include information.[14] It is further submitted that it is also wide enough to include sexual gratification, as where Y, a male traffic officer, catches female motorist X committing some traffic offence, and then offers not to fine or prosecute her if she has intercourse with him.[15]

---

12 "Valuable security" is defined in s 1 as "any document –
(*a*) creating, transferring, surrendering or releasing any right to, in or over property;
(*b*) authorising the payment of money or delivery of any property; or
(*c*) evidencing the creation, transfer, surrender or release of any such right, the payment of money or delivery of any property or the satisfaction of any obligation".

13 This word is defined in s 1 as "money or any other movable, immovable, corporeal or incorporeal thing, whether situated in the Republic or elsewhere and includes any rights, privileges, claims, securities and any interest therein and all proceeds thereof".

14 The word "information" is specifically mentioned in the definition of the general crime in section 3. See subdivision (i)(bb) of s 3.

15 *W* 1991 2 SACR 642 (T). In this case X was convicted of contravention of s 2(*a*) of the Prevention of Corruption Act 6 of 1958. This Act is one of the forerunners of the present Act.

(*d*) In order to act in a certain manner (the "inducement" element):

(*i*) *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. This means she must accept the gratification with a certain aim or motive.

(*ii*) *The aims* The different aims set out in the Act are the following:

(*aa*) "[I]n order to act . . . in a manner . . . that amounts to the . . . illegal, dishonest, unauthorised, incomplete, or biased . . . exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation".

(*bb*) "[I]n order to act . . . in a manner . . . that amounts to the 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".

(*cc*) "[I]n order to act . . . in a manner . . . that amounts to the abuse of a position of authority, a breach of trust, or the violation of a legal duty or a set or rules".

(*dd*) "[I]n order to act . . . in a manner . . . designed to achieve an unjustified result".

(*ee*) "[I]n order to act . . . in a manner . . . that amounts to any other unauthorised or improper inducement to do or not to do anything". According to section 1 the word "inducement" "includes to persuade, encourage, coerce, intimidate or threaten to cause a person".

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

(*iii*) *General principles applicable to the aims* The following general principles apply to the aims set out above:

(*aa*) The expression "to act" appears in each of the aims. Section 2(4) provides that this expression includes an omission.

(*bb*) It is irrelevant whether Y plans to achieve this aim personally or whether she plans to achieve this aim by influencing another person to act in a certain manner.[16] Therefore, Y may make use of an intermediary to achieve the aim.

(*cc*) The aims apply in the *alternative*. It is sufficient for the state to prove that Y had only one of these aims in mind when she accepted the gratification.

(*dd*) It is irrelevant whether Y accepted the gratification for her own benefit or for the benefit of someone else.[17] Therefore, the fact that Y receives money from X in a corrupt way with the aim of using the money to provide for her sick child, affords her no defence.

---

16 See the phrase in s 3 between (*b*) and (i).
17 S 3(*a*) and (*b*).

(*ee*) This element (namely that Y must receive the gratification in order to act in a certain way) overlaps with the fifth and last element of the crime, namely the intention requirement. The words "in order to" refer to Y's intention. This overlapping is not strange, because corruption is a crime of double intention. Y must have not only the intention of receiving the gratification, but also the further intention to receive it *in order to act in a certain way in future.*[18]

(*ff*) The fact that Y did not in actual fact have the power to act in the manner in which she was induced to act, affords Y no defence.[19] Therefore, if Y receives money from X as inducement to grant X a certain licence, but it appears that it is in actual fact somebody else in some higher position in the particular government department or private enterprise whose task it is to decide upon the granting of that licence, Y nevertheless commits corruption.

(*iv*) *Proof of the existence of the inducement* In section 24(1) the Act creates a presumption facilitating the task of the state to prove that Y received the gratification in order to achieve one or more of the aims set out above. The cumbersome and detailed formulation of the presumption[20] can be summarised as follows:

If it is proved that Y had accepted the gratification from another person who sought to obtain a contract, licence, permit, etcetera, it is presumed

---

18 Other examples of crimes of double intent are abduction, where, apart from an intent to remove the minor, X must also have an intent to marry or have sexual intercourse with her, housebreaking with intent to commit a crime and assault with intent to commit a crime.

19 S 25(*a*). The same principle applied to crimes which were forerunners of the present crime. See *Chorle* 1945 AD 485 496; *Shaik* 2007 1 SACR 142 (D) 158*a–b*.

20 The precise wording of s 24(1) is as follows: (1) Whenever a person is charged with an offence under Part 1 or 2, or section 21 (in so far as it relates to the aforementioned offences) of Chapter 2, proof that that person, or someone else at the instance of that person –

(*a*) accepted or agreed or offered to accept any gratification from; or

(*b*) gave or agreed or offered to give any gratification to,

any other person –

(i) who holds or seeks to obtain a contract, licence, permit, employment or anything whatsoever from a public body, private organisation, corporate body or other organisation or institution in which the person charged was serving as an official;

(ii) who is concerned, or who is likely to be concerned, in any proceedings or business transacted, pending or likely to be transacted before or by the person charged or public body, private organisation, corporate body, political party or other organisation or institution in which the person charged was serving as an official; or

(iii) who acts on behalf of a person contemplated in subparagraph (i) or (ii),

and, if the State can further show that despite having taken reasonable steps, it was not able with reasonable certainty to link the acceptance of or agreement or offer to accept or the giving or agreement to give or offer to give the gratification to any lawful authority or excuse on the part of the person charged, and in the absence of evidence to the contrary which raises reasonable doubt, is sufficient evidence that the person charged accepted or agreed or offered to accept such gratification from that person or gave or agreed or offered to give such gratification to that person in order to act, in a manner –

[then follows a precise repetition of the "aims" already formulated in s 3(i), (ii) (iii) and (iv) and which have already been quoted above in paragraph 6(*d*)(ii) in the text].

that Y accepted the gratification in order to achieve one or more of the aims set out in the definition of the crime, provided

(*aa*) the state can show that despite having taken reasonable steps, it was not able with reasonable certainty to link the acceptance of the gratification to any lawful authority or excuse on the part of the person charged; and

(*bb*) there is no evidence to the contrary which raises reasonable doubt.

Before the present Constitution with its Bill of Rights came into effect, the legislature often inserted presumptions into statutes in order to facilitate the task of the state to obtain a conviction. Since then many of these presumptions have been declared unconstitutional because it was incompatible with the presumption of innocence. In the formulation of the present presumption, the legislature took care to formulate it in such a way that it would not be easy to declare it unconstitutional.

As far as requirement numbered (*aa*) in the summarised formulation of the presumption above is concerned, it must be kept in mind that the state must normally prove that Y had no "lawful authority or excuse" for accepting the gratification. Sometimes members of the public must pay certain fees in order to receive certain documents, such as passports or driver's licences, from the state. An official does not commit the crime if she receives the payment from a member of the public in return for the granting of the document concerned. However, sometimes it may be difficult for the state to determine whether, in terms of the rules applying to her work, Y was entitled to receive the money for her conduct. For the presumption to come into operation, it is not sufficient that the state merely alleges that it (the state) does not know whether the acceptance of the money was lawful or not. The state must go further and prove, firstly, that it took reasonable steps to get an answer to this question and, secondly, that in spite of these reasonable steps, it was unable to determine with reasonable certainty whether there were lawful grounds for Y to accept the money (gratification).

As far as requirement numbered (*bb*) in the summarised formulation of the presumption above is concerned, the insertion of these words may be regarded as an attempt by the legislature to prevent the presumption being declared unconstitutional. The expression mentioned under (*bb*) amounts to the placing of a procedural duty on Y to create a reasonable doubt as to whether she has accepted the gratification *as inducement* to act in a certain way, as set out in the section. Y must ensure that, either in the course of her own evidence or in the course of evidence given by another, a doubt arises as to whether she received the gratification as inducement to act in the way she acted. Such a "duty to create a doubt" cannot be equated to a reverse onus, and it is submitted that in this way the legislature has ensured that the presumption is constitutional.

The reason for the insertion of these words (ie, these under requirement numbered (*bb*) above) into the section becomes clear if one considers the judgment of the Constitutional Court in *Manamela*.[21] In this case, in which

21 2000 1 SACR 414 (CC).

the court considered the constitutionality of the presumption created in section 37 of the General Law Amendment Act 62 of 1955, the Court held that these words (in the phrase set out in (*bb*) in the above abbreviated formulation of the presumption) should be "read into" the section to prevent it being unconstitutional. It is highly probable that it was exactly this judgment which served as model for the insertion of this phrase into the subsection. It is submitted that, because of the insertion of these words, the presumption is constitutional.

(*e*) *Unlawfulness* The element of unlawfulness is not expressly mentioned in the definition of the crime, but must nevertheless be read into it. Unlawfulness, that is, the requirement that the act should be unjustified, is a requirement or element of every crime. The general meaning of "unlawfulness" is "contrary to the good morals or the legal convictions of society".[22] This implies that Y's conduct is not covered by a ground of justification.

An act which would otherwise amount to corruption, would not be unlawful if X or Y acted under compulsion. X or Y would then be entitled to rely on necessity as a ground of justification. A person acting as a trap does not act unlawfully if she agrees to receive a gratification from another person in order to trap the latter person in the act of committing (active) corruption.[23] It is submitted that certain officials or employees, such as porters or waiters, do not act unlawfully if they receive small amounts of money from the public as "tips" for services which they perform satisfactorily. Such conduct is "socially adequate" or acceptable; it accords with the good morals or legal convictions of the community. The same applies as regards the receiving of gifts of a reasonable scope by employees at occasions such as weddings or retirement or completion of a "round number" of years' work (eg 20 years' service). (The acceptance of a "golden handshake" which is disproportionate to the services rendered may well be unlawful.)

If clients or prospective clients of a business accept an invitation for dinner by the business, such conduct is usually regarded as acceptable business practice. However, if such clients accept an invitation for a luxury holiday overseas, such conduct should, it is submitted, not be regarded as acceptable and ought to amount to the commission of corruption. However, between these two examples, the first being regarded as in accordance with the legal convictions of society but the second not, lies a "grey area". One thinks in this regard of the acceptance by a client of an invitation to a luxury box at a sporting venue, accompanied by all kinds of "perks", such as free food and drinks. Presumably such conduct amounts to an acceptable way in which the free-market economy operates, and is therefore presumably not contrary to the legal convictions of the community. Yet where exactly the border lies between what is acceptable practice and what amounts to corruption, may be difficult to decide.

(*f*) *Intention* It is beyond doubt that the legislature did not intend to create a crime of strict liability, that is, one in which no form of culpability is required. As far as the form of culpability is concerned, it is intention, as opposed to

---

22 *Supra* IV A 8; *Selebi* 2012 1 SACR 209 (SCA) par 8. On the element of unlawfulness in corruption generally, see also the remarks in *Shaik* 2007 1 SACR 142 (D) 158*c–d*.

23 *Ernst* 1963 3 SA 666 (T) 668A–B; *Ganie* 1967 4 SA 203 (N).

negligence, which is required.[24] Words or expressions such as the following used in section 3, presuppose the requirement of intention: "accept", "agree", "offer", "inducement", "in order to . . .", "dishonest", "biased" and "designed".

Corruption is a crime of double intent: Y must have not only the intention of accepting the gratification, but must furthermore also have the intention of acting in a certain manner in future in return for the gratification. Y must have the required intention at the moment he receives the gratification.

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.[25] A person has knowledge of a fact not only if she is convinced of its existence, but also if she foresees the possibility of the existence of the fact but is reckless towards it; in other words she does not allow herself to be deterred by the possibility of the existence of such a fact.[26] She then has intention in the form of *dolus eventualis*.

The Act contains a provision which expressly applies the principle set out immediately above 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 only if she has actual knowledge of the fact, but also if the court is satisfied that she believes that there is a reasonable possibility of the existence of that fact and she fails to obtain information to confirm the existence of the fact. This provision in reality contains no new principle; it is merely an application of the general rule that intention in respect of a circumstance can also exist in the form of *dolus eventualis*;[27] more specifically, that "wilful blindness" amounts to knowledge of a fact and, accordingly, intention. These principles have previously been accepted in our case law.[28] The omission mentioned in section 2(1) ("has failed to . . .") must be construed as an intentional omission on the part of Y. It cannot be applied to a negligent omission.

The fact that Y accepted the gratification without intending to perform the act which she ostensibly undertook to perform, affords Y no defence.[29] If Y, who is a member of a commission who must award a tender, accepts money from X as inducement to award the tender to X, the fact that Y received the money without the intention of actually awarding the tender to X or to influence the other members of the commission to do so, affords Y no defence. The Act provides so expressly,[30] but in reality the principle was applied even in respect of crimes which were the forerunners of the present crime.[31]

According to the rules relating to corruption in the corresponding crimes of corruption or bribery before the present Act came into operation, Y committed corruption by the recipient even if it was not proven that X intended to influence Y to act in a certain way. What was important was that Y should have

---

24 *Selebi* 2012 1 SACR 209 (SCA) par 8, 9.
25 *Supra* V C 1, 2.
26 *Supra* V C 6–8; *Selebi supra* par 9.
27 *Supra* V C 6–8.
28 *Meyers* 1948 1 SA 375 (A) 382; *Bougarde* 1954 2 SA 5 (C) 7–9; *Ex parte Lebowa Development Corporation Ltd* 1989 3 SA 71 (T) 101.
29 S 25(*b*).
30 S 25(*b*).
31 *Roets* 1954 3 SA 512 (A) 515–516.

believed that she was being corrupted. If the evidence revealed that X never had the intention to influence Y to act improperly, Y was nevertheless guilty of this form of the crime if she (Y) believed that she was being bribed.[32] Y was accordingly guilty even if she knew that X was under a false impression that she (X) had to pay money to her (Y) in order to act in a certain way, whereas in actual fact it was not necessary for X to pay such money. In order to ensure Y's conviction, it was in other words not necessary for the prosecution to prove that Y's intention or knowledge included X's intention or knowledge.

Does this rule apply also to the crime created in the 2004 Act? It is submitted that the answer to this question is positive. In the definition in the 2004 Act the legislature requires nowhere that Y should have known what X's intention of knowledge or even motive was. The formulation reads merely: "Any person who . . . accepts . . . any gratification . . . in order to act . . . in a manner which . . ." The rule of interpretation that requires an act to be construed as far as possible in the light of the common law, can also serve as support for the view advocated here.

(*g*) *Accomplice liability and accessories after the fact* Section 20 creates a separate crime punishing accomplices and accessories after the fact in respect of corruption. Under the title "Accessory to or after offence", the section provides (in abbreviated form): "Any person who, knowing that property . . . forms part of any gratification which is the subject of an offence [in terms of certain sections of the Act] (*a*) enters into . . . any dealing in relation to such property . . . or (*b*) uses . . . or holds, receives or conceals such property . . . is guilty of an offence". The section is completely unnecessary, because the common-law rules relating to the liability of accomplices and accessories after the fact are wide enough to cover situations of people assisting in the commission of a crime before or after its commission.

(*h*) *Attempt, conspiracy and inducing* Section 21 provides that any person who (*a*) attempts, (*b*) conspires or (*c*) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person to commit an offence in terms of the Act, is guilty of an offence. The section is unnecessary. A person who aids or abets another to commit a crime can be convicted of being a co-perpetrator or an accomplice in the commission of the crime in terms of the ordinary common-law principles of criminal liability. Furthermore, section 18 of the Riotous Assemblies Act 17 of 1956 already provides for the punishment of people who attempt to commit "any offence, whether at common law or against a statute . . ."

(*i*) *Punishment* A person convicted of the general crime of corruption is liable to the following sentences:

(*aa*) If she is sentenced by a High Court, an unlimited fine or imprisonment for life.[33] In terms of the provisions of section 1(1)(*b*) of the Adjustment of Fines Act 101 of 1991, imprisonment as well as a fine may be imposed.

---

32 See *Gouws* 1975 1 SA 1 (A) 12–13, which was decided at the time when corruption (bribery) was still a common-law crime. Cf also the following words in the definition of the previous crime of corruption in s 1(1)(*b*)(i) of Act 94 of 1992: "whether the giver or offeror of the benefit has the intention to influence the person upon whom such power has been conferred . . . so to act or not".

33 S 26(1)(*a*)(i).

(*bb*) If she is sentenced by a Regional Court, an unlimited fine or imprisonment for a period not exceeding 18 years.[34] If the provisions of section 1(1)(*a*) of the Adjustment of Fines Act 101 of 1991 are taken into consideration, the maximum fine that may be imposed by a Regional Court is 18 × R20 000 = R360 000. In terms of the provisions of section 1(1)(*b*) of the abovementioned Act of 1991, a fine as well as a sentence of imprisonment may be imposed.

(*cc*) If she is sentenced by a Magistrate's Court, an unlimited fine or imprisonment for a period not exceeding five years.[35] If the provisions of section 1(1)(*a*) of the Adjustment of Fines Act 101 of 1991 are taken into consideration, the maximum fine that may be imposed by a Magistrate's Court is 5 × R20 000 = R100 000. In terms of the provisions of section 1(1)(*b*) of the abovementioned Act of 1991, a fine as well as a sentence of imprisonment may be imposed.

In addition to any fine which a court as mentioned above may impose, a court may also impose a fine equal to five times the value of the gratification involved in the crime.[36]

6 General crime of corruption: corruption by the giver

(*a*) *General* Corruption by the recipient, discussed above, deals with the *acceptance* by Y of a gratification given to her by X. Corruption by the giver, on the other hand, deals with the *giving* of a gratification by X to Y. Corruption by the giver is but a mirror image of corruption committed by the recipient. One must merely replace the word "accept" with the word "give". Exactly because corruption by the giver is but a mirror image of corruption by the recipient, it is unnecessary to repeat once again, in the course of discussing corruption by the giver, all the rules dealing with the crime discussed above under corruption by the recipient. The discussion of corruption by the giver which follows can therefore be summarised very briefly. Unless otherwise indicated, all the rules governing corruption by the recipient apply *mutatis mutandis* (that is, by replacing in each instance the word "accept" with the word "give") also to corruption by the giver. It is more or less only in the requirement of the act that corruption by the giver is structured differently from corruption by the recipient.

(*b*) *Elements of crime* The elements of the general crime of corruption committed by the giver are the following:

(*i*) the *giving* by Y to X (the act);

(*ii*) of a *gratification;*

(*iii*) in order to influence Y to act in a certain way (the inducement);

(*iv*) unlawfulness;

(*v*) intention.

Each of these elements will now be discussed.

---

34 S 26(1)(*a*)(ii).
35 S 26 (a)(*a*)(iii).
36 S 26(3).

(*c*) *The giving by X to Y* The act consists of X giving a gratification to Y. The legislature employs two ways of broadening the meaning of the word "give":

Firstly, it provides that certain conduct by X which precedes the giving, namely mere *conspiracy* to give or a mere *offer* to give, also satisfies the requirement of the act (that is, the "giving").[37]

Secondly, the Act provides that the words "give or agree or offer to give" as used in the Act, include the following:

(*i*) to promise, lend, grant, confer or procure the gratification;

(*ii*) to agree to lend, grant, confer or procure the gratification;

(*iii*) to offer to lend, grant, confer or procure such gratification.[38]

The further aspects of the requirement of an act which were discussed above in the corresponding requirement in corruption by the recipient,[39] apply *mutatis mutandis* also to corruption by the giver.

It is not a requirement for the crime of corruption by the giver that X should have succeeded with her plan of action. Considerations such as the following therefore afford X no defence: the fact that Y, although she created the impression that she would accept the offer, in actual fact had no intention of doing what X asked her to do;[40] the fact that Y did not do what X requested her to do;[41] the fact that Y did not have the power to do that which she was requested by X to do;[42] the fact that Y rejected X's offer; the fact that Y agreed but thereafter changed her mind and decided not to do what X had requested her to do; and the fact that Y found it impossible to do that which she had undertaken to do.

(*d*) *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 paragraph 5(*c*) in the discussion of that form of corruption.

(*e*) *In order to act in a certain manner (the inducement element)* This requirement is the same as the corresponding requirement for corruption committed by the recipient, and has already been discussed above.[43] The part of the section dealing with this element is badly worded, but it is nevertheless clear that what the legislature intended to say was the following: "any person who . . . gives . . . any gratification . . . in order *to induce the recipient to* act . . . in a manner that amounts to . . ." The words in italics, which express the meaning of the provision more clearly, do not appear in the text of the section, but are clearly implied.

(*f*) *Unlawfulness* This requirement is the same as the corresponding requirement for corruption by the recipient, and has already been discussed above.[44]

---

37 S 3(*b*).
38 S 2(3)(*b*).
39 *Supra* par 5(*b*).
40 S 25(*b*).
41 S 25(*c*).
42 S 25(*a*).
43 *Supra* 5(*d*).
44 *Supra* 5(*e*).

(*g*) *Intention* This requirement is the same as the corresponding requirement for corruption by the recipient, and has already been discussed above.[45]

(*h*) *Accomplices, accessories after the fact, attempt, conspiracy and incitement* These aspects of corruption by the giver are the same as the corresponding aspects of corruption by the recipient, and has already been discussed above.[46]

(*i*) *Punishment* The penalties prescribed for corruption by the giver are the same as those prescribed for corruption by the recipient, and have already been set out above.[47]

7 Corruption relating to specific persons or events As from section 4 onwards the legislature has created a variety of specific crimes of corruption, each relating to a specific class of person or event. As already explained, it is an impossible task to discuss each of these specific crimes in this book in detail. It is, in any event, largely unnecessary, as large portions of the definition of these crimes – and more specifically the long description of the "inducement element" – are worded exactly the same as the general crime of corruption defined in section 3; these provisions have already been discussed in some detail above. What follows is an abbreviated version of each of these specific crimes.

(*a*) *Corruption in respect of public officers* Section 4 creates a crime limited to corruption of public officers. "Public officers" are defined exhaustively in section 1. A typical example of such an officer is a civil servant. The "act" which Y is induced to perform (in the phrase ". . . in order to act . . . in a manner . . . that amounts to . . .") is defined in section 4(2) as including a large number of specified acts.

(*b*) *Corruption in respect of foreign public officials* Section 5 creates a crime limited to corruption of "foreign public officials". This term is defined more specifically in section 1. It includes *inter alia* somebody who holds a legislative, administrative or judicial office of a foreign state.

(*c*) *Corruption in respect of agents* Section 6 creates a crime limited to corruption of agents. "Agent" is defined in section 1 as "any authorised representative who acts on behalf of his or her principal and includes a director, officer, employee or other person authorised to act on behalf of his or her principal". Corruption committed by business people in the private sector can be criminalised under this section.

The following is an example of corruption in the private sector: X, who works for manufacturing company A, is charged with the duty of selling A's products to wholesalers. Y works for wholesale company B and is charged with buying the type of products manufactured by company A for company B, so that company B may sell them to retailers. In order to influence Y to buy company A's products for company B to the exclusion of similar types of articles manufactured by other manufacturers, X gives Y the gift of an overseas family holiday. X then commits corruption by the giver while Y commits corruption by the recipient.

---

45 *Supra* 5(*f*).
46 *Supra* 5(*g*) and (*h*).
47 *Supra* 5(*i*).

(*d*) *Corruption in respect of members of the legislative authority* Section 7 creates a crime limited to corruption of members of the legislative authority. The act which the member is induced to perform is further defined in section 7(2). It includes exerting any improper influence over the decision making of any person performing his or her functions as a member.

(*e*) *Corruption in respect of 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 to give her money, in order to persuade her not to give a judgment according to the objective evaluation on the merits of the case, but to disregard the merits and give judgment in favour of a certain party. If someone corrupts a judicial officer, the conduct can also be punished as contempt of court.

(*f*) *Corruption in respect of the prosecuting authority* Section 9 creates a crime limited to corruption of the members of the prosecuting authority. The act which Y is induced to perform is further defined in section 9(2). An example of a case resorting under this heading, is where X gives Y, the prosecutor in a criminal case, money in order to persuade Y to destroy or hide the docket in which the particulars of the prosecution's case are contained, so that it can be reported missing, which will result in the prosecution not being successful. The type of conduct criminalised under this heading may overlap with the common-law crime of defeating or obstructing the course of justice.

(*g*) *The receiving or offering of unauthorised gratification by a party to an employment relationship* Section 10 creates a crime which is limited to corruption committed in the course of an employment relationship. If, for example, an employer (Y) accepts a gratification as inducement to promote one of her employers to the exclusion of others who may also merit promotion, she (Y) may be charged with a contravention of this section.

(*h*) *Corruption in respect of witnesses* Section 11 creates a crime limited to corruption in respect of somebody who is a witness in a court case.

(*i*) *Corruption in respect of contracts* Section 12 creates a crime limited to corruption committed within the context of the entering into of contracts. A person who, for example, gives or accepts a gratification in order to obtain a contract from either the state or a private enterprise, or improperly to influence the price to be agreed upon contravenes this section.

(*j*) *Corruption in respect of the granting of tenders* Section 13 creates a crime 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 to the exclusion of other persons who also submitted tenders.

(*k*) *Corruption in respect of auctions* Section 14 creates a crime limited to corruption committed in relation to auctions. An example of conduct resorting under this heading is where X gives money to Y, an auctioneer, in order to influence Y to conduct the bidding process at an auction in such a way that a certain person is favoured or prejudiced.

(*l*) *Corruption in respect of sporting events* Section 15 creates a crime limited to corruption committed in the context of sporting events. A person 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 of this type of corruption is where 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 the outcome which X wants it to have.

(*m*) *Corruption in respect of gambling or games of chance* Section 15 creates a crime limited to corruption committed in relation to gambling or games of chance. An example of the commission of this type of corruption is where Y is in charge of determining the winner of a gambling competition, and X gives money to Y in order to persuade Y to manipulate the operation of the scheme in such a way as to ensure that X is announced as the winner of the competition.

8 Failure to report corrupt conduct Section 34 creates an important crime which consists in the failure by a person in a position of authority who knows or ought reasonably to have known that certain crimes created in the Act have been committed, to report the commission of such crimes 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. Because of the use of the words "who knows or ought reasonably to have known" in the section, the form of culpability required for this crime is either intention or negligence.

B EXTORTION

1 Definition The crime of extortion is committed when a person unlawfully and intentionally obtains some advantage, which may be of either a patrimonial or a non-patrimonial nature, from another by subjecting the latter to pressure which induces her to hand over the advantage.[48]

2 Elements of the crime The elements of the crime are (*a*) the *acquisition* of (*b*) a *benefit* (*c*) by applying *pressure*; (*d*) a *causal link* (between the pressure and the acquisition of the benefit); (*e*) *unlawfulness* and (*f*) *intention*.

3 Origin, wrongdoer This crime is derived from the crime known in common law as *concussio* or "*knevelry*".[49] It would appear that some of the old authorities were of the opinion that only a public official could commit the crime,[50] but in *G*[51] the Appellate Division held that anybody could commit it. X need not even pretend to be a public official.[52]

---

48 The definition corresponds materially to that advanced in *Hunt-Milton* 681. See further the *dicta* in *J* 1980 4 SA 113 (E) 116. S 1 of the General Law Amendment Act 139 of 1992 has resolved the formerly vexed question relating to whether or not the advantage should be restricted to something of a patrimonial nature: the section expressly provides that any advantage may be extorted, "whether or not such advantage was of a patrimonial nature".

49 D 47 13; Voet 47 13 1; Matthaeus 47 7 1; Van der Linden 2 4 8; Van Leeuwen *RHR* 4 33 8; Van der Keessel 47 13 1; Huber *HR* 6 17 7.

50 Van der Linden *ibid*; Van Leeuwen *ibid*; Van der Keessel *ibid*; Huber *ibid*.

51 1938 AD 246.

52 *Richardson* 1913 CPD 207 212–213; *G supra* 250.

4 Pressure X must acquire the advantage by exerting some form of pressure on Y to which the latter submits. This pressure takes the form of threats or intimidation that some harm will befall Y. The threat may, for example, be one of bodily harm, in which case extortion and robbery may overlap,[53] or of defamation,[54] dismissal[55] or – as frequently happens – of arrest or prosecution.[56]

The threat need not necessarily be that something *positive* will happen to Y. Thus, to threaten to refuse to hand back Y's property suffices.[57] The threat may be that some third party will suffer.[58] It may furthermore be express or implied by words or deeds.[59] Where a police official arrests a person and suggests that if the arrestee pays her (the official) money she may arrange to free her, there is usually an implied threat that non-payment will result in further detention.[60]

5 The advantage Before 1989 there were conflicting decisions on the question of whether the advantage should be restricted to something of a patrimonial or financial nature.[61] "Patrimonial" in this connection means "which can be converted into or expressed in terms of money or economic value". In 1989 the Appellate Division held that the crime should indeed be restricted to instances where the advantage was of a patrimonial nature.[62] The legislature was (correctly, it is submitted) obviously not satisfied with this decision and in section 1 of the General Law Amendment Act 139 of 1992 enacted a provision which in effect overturned the decision of the Appellate Division. The section provides that at criminal proceedings at which an accused is charged with extortion it shall, in respect of the object of the extortion, be sufficient to prove that any advantage was extorted, whether or not such advantage was of a patrimonial nature. An example of an advantage which is not of a patrimonial nature is sexual gratification.[63]

Some decisions have held that X cannot extort an advantage which is due to her.[64] It is submitted that these decisions are wrong. The crime may be committed even if the advantage is "due to X": by securing the advantage on the earlier

---

53 *Ex parte Minister of Justice: in re R v Gesa; R v De Jongh* 1959 1 SA 234 (A) 240E.
54 *Ngqandu* 1939 EDL 213.
55 *Farndon* 1937 EDL 180.
56 *Lepheana* 1956 1 SA 337 (A); *Gokool* 1965 3 SA 461 (N).
57 *Mntoninthsi* 1970 2 SA 443 (E) 444H (threat to withhold certain agricultural services).
58 *Lepheana supra* (threat of harm to Y's wife).
59 *K* 1956 2 SA 217 (T); *Gokool* 1965 3 SA 461 (N) 464–465.
60 *K supra* 218E–F. In many cases where a demand is made by a public official known to Y to have powers the exercise of which could harm her, an implied threat can be construed from the mere demand and the relationship between the parties: *Muller* 1934 NPD 140; *Mtirara* 1962 2 SA 266 (E). Contrast, however, *Linda* 1966 1 SA 41 (O), which is probably an incorrect decision.
61 In *Potgieter* 1977 3 SA 291 (O) and *Von Molendorff* 1987 1 SA 135 (T) it was held that the advantage had to be of a proprietary nature, whereas in *Munyani* 1972 1 SA 411 (RA) and *J* 1980 4 SA 113 (E) it was held that even non-proprietary prejudice suffices.
62 *Ex parte Minister van Justisie: in re S v J en S v Von Molendorff* 1989 4 SA 1028 (A).
63 *J* 1980 4 SA 113 (E).
64 *Mahomed* 1929 AD 58 67; *Jansen* 1959 1 SA 777 (C); *Mntoninthsi* 1970 2 SA 443 (E) 444H.

occasion instead of waiting until a (possible) later occasion to obtain it, she has secured an advantage. The law should not sanction payments induced by threats.[65]

6 Acquisition of advantage The crime is not completed until the advantage has been handed over to or acquired by X: if she is apprehended after the threat or intimidation but before the acquisition of the advantage, she is guilty of attempted extortion only.[66]

7 Causation Just as in robbery there must be a causal link between the violence and the obtaining of the property, so in extortion there must be a causal link between the threats or intimidation and X's acquisition of the advantage.[67] If Y hands over the advantage not as a result of the threat or intimidation but for some other reason, for example, because Y has arranged for X to be trapped by the police, X commits attempted extortion only.[68]

8 Unlawfulness The threat or intimidation must have been exercised unlawfully. In order to determine this, one must look at the way in which the threat was made and the results envisaged. Thus, if employees threaten their employer that they will strike unless they receive a salary increase, the pressure is not exercised unlawfully if the employees are lawfully entitled to strike in terms the relevant rules of labour law. If employer X discovers that employee Y has stolen money from her firm and threatens to lay a charge of theft with the police unless Y returns the money, the pressure is not exercised unlawfully because X is entitled by law to lay a charge of theft with the police. On the other hand, although it is lawful for a police official to tell an arrested criminal that she will have her prosecuted, it is unlawful for her to say that she will have her prosecuted *unless* she pays her (the police official) an amount of money.[69]

9 Intention X must intend her words or conduct to operate as a threat,[70] she must intend Y to see it as a threat,[71] she must intend to gain some advantage as a result of the threat, and she must know that the threat is illegal.[72] This latter requirement means that X must know that she is not entitled to the advantage[73] or that she has no authority to exact it[74] (in cases where the assumption of authority is inherent in the alleged threat). X's motive is irrelevant.

---

65 For a similar view, see *Hunt-Milton* 693; Labuschagne 1985 *De Jure* 315 326; 1977 *SACJ* 194.
66 *Lazarus* 1922 CPD 293; *Mtirara* 1962 2 SA 266 (E); *J supra*.
67 *Mahomed* 1929 AD 58 67, 69–70; *Farndon* 1937 EDL 180 184–185.
68 *Lazarus* 1922 CPD 293; *Lutge* 1947 2 SA 490 (N).
69 *N* 1955 2 SA 647 (T) 656; *Lepheana* 1956 1 SA 337 (A); *K* 1956 2 SA 217 (T); *Gokool* 1965 3 SA 461 (N) 463H.
70 *N supra* 655.
71 *Ngqandu* 1939 EDL 213 215.
72 *Mutimba* 1944 AD 23 32; *Mtirara* 1962 2 SA 266 (E) 267E–F.
73 *Geffen* 1944 CPD 86 89–90; *Zwakala* 1966 2 PH H378 (T).
74 *Farndon* 1937 EDL 180 187; *Mutimba supra* 32.

C DRUG OFFENCES

1 General The most important crimes relating to drugs are created in the Drugs and Drugs Trafficking Act 140 of 1992[75] – hereinafter called "the Act". One of the purposes of this Act – which is also the only purpose of interest to substantive criminal law – is "[t]o provide for the prohibition of the use or possession of, or the dealing in, drugs".[76]

2 Two most important crimes created in Act The two most important crimes created in the Act (and the only two that will be discussed in this book) are (*a*) dealing in drugs and (*b*) the use or possession of drugs. Dealing in drugs is a more serious crime than possessing or using drugs. "Use or have in possession" is not treated in the Act as two separate crimes but as a single crime. The crime consisting in the use or possession of a drug will be considered first.

3 Three categories of drugs The Act divides drugs into three categories, namely:

(*a*) dependence-producing substances;

(*b*) dangerous dependence-producing substances; and

(*c*) undesirable dependence-producing substances.[77]

The drugs or substances falling under each of these categories are listed in great detail in Schedule 2 of the Act. More severe punishment is prescribed for the possession, use of or dealing in of the substances listed under (*b*) and (*c*) than for the possession, use of or dealing in of the substances listed under (*a*). Among the substances listed under (*b*) are coca leaf, morphine, opium and opiates. Among the substances listed under (*c*) are cannabis (dagga), heroin and Mandrax.

4 Unlawful possession or use of drug

(*a*) *Definition* Section 4 provides that no person shall use or have in her possession (*a*) any dependence-producing substance or (*b*) any dangerous or undesirable dependence-producing substance, unless . . . (there then follows a number of what might be called "statutory grounds of justification", that is, circumstances in which the use or possession is justified, such as where X is a patient who has acquired or bought the substance from a medical practitioner or pharmacist).

Section 13 provides that any person who contravenes the provisions of section 4 (*a*) or (*b*) shall be guilty of an offence and section 17 lays down the penalties for such offences.

The crime of possession of a drug is not unconstitutional. The fact that the legislation does not provide for the lawful possession of dagga by people such

---

75 Before 1993, when this Act came into operation, the crimes were governed by the provisions of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971.

76 See the long title of the Act.

77 S 1 s v "drug".

as Rastafarians, who use it for religious or other purposes, does not mean that the prohibition on the possession of drugs is unconstitutional.[78]

(*b*) *Elements of crime*

The elements of this crime are (*a*) the act, that is, *possession or use*; (*b*) a *drug*; (*c*) *unlawfulness* and (*d*) *intention*.

(*c*) *The act – possession or use* As far as the meaning of the word "use" is concerned, the word is largely self-explanatory and can hardly be elucidated by further definition. Clearly the smoking, inhalation, injection or ingestion of drugs will amount to use of the drug.

We next consider the meaning of the term "possession". There are two ways in which the prosecution may prove that X possessed the drug. The first is by proving possession in the ordinary juridical sense of the word. The second is by relying on the extended meaning given in section 1 to the word "possess".[79] Each of these two ways of proving possession will now be examined.

(*i*) *Possession in ordinary juridical sense* The meaning of "possess" in legal terminology has already been discussed in some detail above.[80] What follows, is a brief summary of the rules relating to the meaning of "possession". Possession consists of two elements, namely a physical or corporeal element (*corpus* or *detentio*) and a mental element (*animus*, that is, the intention of the possessor).[81] 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.[82]

The *animus* element of possession relates to the intention with which somebody exercises control over an article, and differs according to the type of possession. "Possession" may have different meanings in different statutes and in different branches of the law, and these differences are reflected in the different meanings of the *animus* element in each particular type of possession. In private law "possess" may be restricted to situations where X exercises control over an article with the intention of keeping or disposing of it as if she were the owner, as opposed to keeping it (temporarily or otherwise) on behalf of somebody else. This is called *possessio civilis*.[83] This is the narrow meaning of

---

78 *Prince v President of the Law Society of the Cape of Good Hope* 2002 1 SACR 432 (CC).

79 Previously there was a third way in which the prosecution could prove possession, namely by relying on a presumption of possession created in s 20. This section provided that if it is proved that any drug was found in the immediate vicinity of X, it shall be presumed that she was found in possession of such drug, unless she proves the contrary. However, this presumption is unconstitutional and no longer applicable – *Mello* 1999 2 SACR 255 (CC).

80 *Supra* II C.

81 *Binns* 1961 2 SA 104 (T) 107; *Dladla* 1965 3 SA 146 (T) 148G–H; *R* 1971 3 SA 798 (T) 800; *Adams* 1986 4 SA 882 (A) 890–891; *Ndwalane* 1995 2 SACR 697 (A); *Mosoinyane* 1998 1 SACR 583 (T) 591–592; *Mello* 1998 1 SACR 267 (T) 272*c–g*.

82 Cf *Singiswa* 1981 4 SA 403 (C).

83 *R supra* 801; *Ndwalane supra* 702.

"possession". There can be no doubt that if X's possession of the substance amounts to this form of possession, she is guilty of contravening the provision presently under discussion (provided, of course, the other requirements are also complied with).

(*ii*) *The extended meaning of possession* What is the position if X does not exercise control over the drug in order to keep it for herself, but merely to look after it (temporarily or otherwise) on behalf of somebody else? The answer to this question is to be found in the extended meaning of the word "possession" in section 1. This section provides that the word "possess" includes, in relation to a drug, "to keep or to store the drug, or to have it under control or supervision". Here the *animus* element is wider: all that is required is that X exercise physical control over the thing. This type of possession is called *possessio naturalis*.

Here it is not required that X exercise control over the thing with the intention of keeping or retaining it as an owner. She need not even intend to acquire some benefit for herself by her control over the thing. It is sufficient if she exercises control over it for the benefit of somebody else.[84] Thus, even if X, in keeping dagga, acts only as a custodian, messenger or servant for somebody else, she nevertheless "possesses" it for the purposes of the Act. The use of the word "includes" in the definition of "possess" makes it clear that this extended meaning of the word does not exclude the narrow meaning of the word (*possessio civilis*) explained above under (i), but complements it. Under this extended definition of "possession" drugs may be possessed by more than one person simultaneously, the one possessing it in the narrow sense of the word (*possessio civilis*) and the other possessing it in the extended meaning of the word (*possessio naturalis*).[85]

Attempt to possess is possible.[86]

(*d*) *The drug* The crime is committed if what is possessed or used is either a dependence-producing substance, a dangerous dependence-producing substance or an undesirable dependence-producing substance, as these terms are defined in the Act.[87]

(*e*) *Unlawfulness* In terms of the general principles of criminal liability the possession or use of the drug must be unlawful. The unlawfulness may be excluded, for example, by necessity.[88]

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 crime. Since they are set out in great detail in the section, they will not be fully described here. The following are some examples of these "statutory grounds of justification": the possession or use is not unlawful if X is a patient who has acquired or bought the drug from a medical practitioner, dentist, veterinarian or pharmacist, or if she is a medical practitioner,

---

84 *Quinta* 1984 3 SA 334 (C) 338.
85 *Mkize* 1975 1 SA 517 (A) 523E.
86 *Ndlovu* 1982 2 SA 202 (T) 206–207; *Mlambo* 1986 4 SA 34 (E) 41–42.
87 See *supra* par 3.
88 Cf *Collett* 1991 2 SA 854 (A).

veterinarian, dentist, pharmacist or wholesale dealer in pharmaceutical products who has acquired, bought or collected the drugs in accordance with the Medicines and Related Substances Act 101 of 1965.

(*f*) *Intention* Culpability in the form of intention is required for this crime.[89] Thus, the porter who has packets and suitcases under her control, but is unaware that there is dagga in one of the packets, cannot be found guilty of possessing the dagga.

(*g*) *Punishment* The punishment for using or possessing a dependence-producing substance is any fine the court may deem fit to impose, or imprisonment for a period not exceeding five years, or both such fine and such imprisonment.[90] The punishment for using or possessing a dangerous or undesirable dependence-producing substance (such as dagga) is any fine the court may deem fit to impose, or imprisonment for a period not exceeding 15 years, or both such fine and such imprisonment.[91]

5 Dealing in drugs

(*a*) *General* The second important crime created in the Act is dealing in drugs. This is a more serious crime than the use or possession of drugs, and heavier sentences are prescribed for it. This is understandable: if there were no dealer, there would be no drugs available to be used or possessed. Apart from this, the dealer commits her prohibited acts for personal gain, whereas the addict who merely uses and possesses the drug lacks this motive.

> (*b*) *Definition* Section 5 provides that no person shall deal in (*a*) any dependence-producing substance or (*b*) any dangerous or undesirable dependence-producing substance, unless . . . (there then follows a number of what might be called "statutory grounds of justification", that is, circumstances in which acts which would otherwise amount to "dealing in" are justified, such as where X has acquired the substance as a medical practitioner and administers it to a patient or is a pharmacist or an employee of a pharmacist).

Section 13 provides that any person who contravenes section 5(*a*) or (*b*) commits an offence and section 17 lays down the penalties for the offence.

(*c*) *Elements of crime* The elements of the crime are (*i*) the act, that is, *dealing in*; (*ii*) a *drug*; (*iii*) *unlawfulness* and (*iv*) *intention*.

(*d*) *The act – dealing in* There is more than one way in which the prosecution may prove that X dealt in drugs. The first is by proving that there was a

---

89 *Blauw* 1972 3 SA 83 (C) 84; *Majola* 1975 2 SA 727 (A) 736; *Lombard* 1980 3 SA 948 (T); *Gentle* 1983 3 SA 45 (N) 46H; *Collett* 1991 2 SA 854 (A).

90 S 17(*b*) read with s 13(*c*). If the provisions of s 1(*a*) of the Adjustment of Fines Act 101 of 1991 are taken into consideration, the maximum fine is 5 × R120 000 = R600 000 in the case of a Magistrate's Court which is not a Regional Court, and in the case of a Regional Court R600 000 × 5 = R3 million.

91 S 17(*d*) read with s 13(*d*). If the provisions of s 1(*a*) of the Adjustment of Fines Act 101 of 1991 are taken into consideration, the maximum fine is 15 × R120 000 = R5.4 million in the case of a Magistrate's Court which is not a Regional Court, and in the case of a Regional Court 15 × R600 000 = R9 million.

"dealing in" in the ordinary, *conventional sense* of the word. The second is by relying on the *extended meaning* of the expression "deal in" given in the Act. Previously there was a third way of proving that X dealt in drugs, namely by relying on one or more of a number of *presumptions* of "dealing in" created in the Act. However, these presumptions are incompatible with the Constitution and no longer apply.[92]

Each of these ways of proving "dealing in" will now be explained.

(*i*) *Conventional meaning of* "*dealing in*" The most obvious meaning of "deal in" is to buy and sell, but it may also have the wider meaning of "doing business" or "performing a transaction of a commercial nature".[93] If a person, on a charge of dealing in dagga, is found in possession of a large quantity of dagga and is unable to furnish a reasonable explanation of such possession, the inference can be drawn that she was indeed dealing in such dagga. This follows from the application of basic legal principles and common sense, and does not involve the application of any presumption of dealing.[94]

(*ii*) *Extended meaning of* "*deal in*" *given in Act* The expression "deal in" in relation to a drug is defined in section 1 as including "any act in connection with the transhipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug".[95]

There have been conflicting decisions about the meaning of "supply", but in *Solomon*[96] the Appellate Division resolved most of the uncertainties. The court held that the legislature intended the word "supply" to cover only activities relating to the furnishing of drugs ("verskaffingsaktiwiteite") and not to their acquisition ("verkrygingsaktiwiteite"). This means that an agent or intermediary who procures drugs for a buyer at the latter's request and for the latter's own use but who is apprehended before she delivers them to the buyer, is not guilty of dealing in such drugs but only of possessing them.[97]

The word "manufacture", which occurs in the definition of "deal in", is further defined in section 1 as "the preparing, extraction or producing of the substance" and the word "sell", which is linked to "sale" in the definition of "deal

---

92 *Bhulwana* 1995 2 SACR 748 (CC), which declared the presumption in s 21(1)(*a*)(i) (possession of more than 115 gram dagga) unconstitutional; *Julies* 1996 2 SACR 108 (CC), which declared the presumption in s 21(1)(*a*)(iii) (possession of undesirable dependence-producing substance) unconstitutional; *Ntsele* 1997 2 SACR 740 (CC), which declared the presumption in s 21(1)(*b*) (being the owner etc of cultivated land on which dagga plants were found) unconstitutional; *Mjezu* 1996 2 SACR 594 (NC), which declared the presumptions in s 21(1)*(c*) and (*d*) unconstitutional. As far as the remaining presumption in s 21(1)(*a*)(ii) (drug found in or near school) is concerned, it is more than doubtful that it could still be constitutional.

93 *Oberholzer* 1941 OPD 48; *Congo* 1962 3 SA 988 (N).

94 *Mathe* 1998 2 SACR 225 (O) 229.

95 The definition corresponds to the definition of "deal in" in s 1 of the previous Act 41 of 1971, although the sequence of the terms is not the same.

96 1986 3 SA 705 (A), applied in *Jackson* 1990 2 SACR 505 (E).

97 In *Beja* 1978 1 SA 395 (E) it was held that there is no dealing in dagga if X and Y smoke a dagga pipe together and the one, after smoking it, hands it to the other. If the owner of dagga "delivers" it to another merely to keep it in custody for her, he does not "deal in" dagga – *Walker* 1978 4 SA 588 (C). Mere possession of dagga in order to barter it for something else does not amount to "dealing in" – *Bodigelo* 1982 3 SA 568 (NC).

in", is further defined in section 1 as including "to offer, advertise, possess or expose the drug for sale, to dispose of it, whether for consideration or otherwise, or to exchange it". A person who purchases dagga for her own use from another does not, without more ado, perform an act in connection with the "supply" or "sale" of dagga, and is therefore not guilty of dealing in dagga but only of possessing it.[98] "Cultivate" means to further the growth of a plant, to stimulate or promote its growth.[99]

(*e*) *The drug* The crime 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, and according to the definition of the crime X is charged with.

(*f*) *Unlawfulness* According to the general principles of criminal liability the act of "dealing in" must be unlawful, that is, not capable of being justified. The unlawfulness may be excluded by, for example, necessity in the form of coercion.

However, quite apart from the grounds of justification flowing from the general principles, section 5 of the Act explicitly mentions a number of grounds of justification for the purposes of this crime. Since they are set out in great detail in the section, they will not be fully set out here. The following are some examples of these "statutory grounds of justification": X's act is not unlawful if she 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 of such medical practitioner, veterinarian or dentist and if she (X) administers it to a patient or animal. Nor does she act unlawfully if she is a medical practitioner, dentist or pharmacist who prescribes, administers, acquires, imports, or sells the substance in accordance with the requirements of the Medicines and Related Substances Control Act 101 of 1965.

(*g*) *Intention* Culpability in the form of intention is an element of this crime.[100] X must be aware that the substance is a substance as described in the Act, that her conduct amounts to "dealing in" the substance (as this term is defined in the Act) and that her conduct is unlawful.

(*h*) *Punishment* The punishment for dealing in a dependence-producing substance is any fine the court may deem fit to impose or imprisonment for a period not exceeding 10 years, or both such fine and such imprisonment.[101] The punishment for dealing in either a dangerous or an undesirable dependence-producing drug (which includes dagga) is imprisonment for a period not

---

98 *Bushinelo* 1982 3 SA 456 (T).

99 *Guess* 1976 4 SA 715 (A). It is submitted that merely to water a single dagga plant (with the necessary intention) amounts to "dealing in" it – *Kgupane* 1975 2 SA 73 (T); Snyman 1975 *SALJ* 372. *Contra Van der Merwe* 1974 4 SA 310 (E) and *Van Zyl* 1975 2 SA 489 (N). It is submitted that the latter two judgments are incorrect. This was also the opinion of the court in *Danster* 1976 3 SA 668 (SWA) 671.

100 *Job* 1976 1 SA 207 (NC); *Ngwenya* 1979 2 SA 96 (A) 100; *Hlomza* 1983 4 SA 142 (E); *Jacobs* 1989 1 SA 652 (A) 656B.

101 S 17(*c*). If the provisions of s 1(*a*) of the Adjustment of Fines Act 101 of 1991 are taken into consideration, the maximum fine is 10 × R120 000 = R1.2 million in the case of a Magistrate's Court which is not a Regional Court, and in the case of a Regional Court 10 × R600 000 = R6 million.

exceeding 25 years, or both such imprisonment and such fine as the court may deem fit to impose.[102]

6 Certain other provisions in Act There is not enough space in this book to set out and discuss the further provisions in the Act – including further crimes created in the Act. It suffices merely to draw attention to some of the following further crimes created in the Act. It is a crime to manufacture any scheduled substance (that is, a substance included in Part I or II of Schedule I) or supply it to any other person, knowing or suspecting that any such substance is to be used in or for the unlawful manufacture of any drug.[103] It is also a crime for any person to acquire any property, knowing that such property is the proceeds of a drug offence or the conversion of property derived as a result of the commission of a drug offence.[104] The Act further provides for forfeiture orders to be issued by a court when convicting an accused of a drug offence[105] and also contains an elaborate set of provisions for the confiscation of property derived from dealing in drugs or the laundering of the proceeds of dealing in drugs.[106]

D UNLAWFUL POSSESSION OF FIREARMS OR AMMUNITION

1 General The Firearms Control Act 60 of 2000 (hereafter called "the Act") regulates the control of firearms and ammunition and related matters.[107] The Act creates a large number of crimes relating to firearms. A discussion of all of them falls outside the scope of this book. The only crimes that will be discussed here are (*a*) the unlawful possession of a firearm; (*b*) the unlawful possession of a prohibited firearm (a crime which is closely related to the previous one); and (*c*) the unlawful possession of ammunition.

2 Unlawful possession of firearm

(*a*) *Definition* Section 3 provides that no person may possess a firearm unless she holds a licence, permit or authorisation issued in terms of the Act for that firearm. Nor may any person possess a muzzle loading firearm unless she has been issued with the relevant competency certificate.

Section 120(1)(*a*) makes it clear that a person is guilty of a crime if she contravenes section 3, and section 121, read with Schedule 4, sets out the punishment for this crime.[108]

---

102 S 17(*e*). If the provisions of s 1(*a*) of the Adjustment of Fines Act 101 of 1991 are taken into consideration, the maximum fine is 25 × R120 000 = R3 million in the case of a Magistrate's Court which is not a Regional Court, and in the case of a Regional Court 25 × R600 000 = R15 million.

103 S 3 read with the definition of "scheduled substance" in s 1, as well as s 13(*b*).

104 S 6 read with s 14(*a*).

105 S 25.

106 See ch 5 of the Act, and the discussion of these provisions in *Milton and Cowling* F3 – 103–112.

107 This Act repeals and replaces the Arms and Ammunition Act 75 of 1969.

108 The forerunners of the present sections creating the crime can be found in s 2, read with s 39(1)(*h*), of the Arms and Ammunition Act 75 of 1969. For a discussion of the crime in terms of the previous legislation, see *Milton and Cowling* B1.

(*b*) *Elements of crime* The elements of the crime are (i) the *possession* of (ii) a *firearm*, (iii) *unlawfulness* and (iv) *culpability*.

(*c*) *Possession* The meaning of the word "possession" as used in the law has already been discussed in detail above,[109] and the discussion which follows should be read together with that discussion. The word "possess" is not defined in the Act. In the previous Arms and Ammunition Act 75 of 1969, which was repealed and replaced by the present Act, the word "possession" was defined as including custody.[110] Accordingly, under the previous Act, "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*).[111]

Can one, in the absence of a provision in the present Act stating that "possession" includes "custody" (or similar words or expressions indicating that "possession" includes *possessio naturalis*), assume that the meaning which the term had in the previous Act still applies to the term as used in the present Act? It would be extraordinary if the word "possess" in the present Act were to be construed narrowly as meaning only *possessio civilis*. Considering the purpose of the Act as set out in the Preamble as well as section 2, it is submitted that there can be no doubt that the legislature intended that even possession by a person who merely keeps or guards the firearm temporarily for somebody else (*possessio naturalis*) should also be punishable.[112]

If a number of people commit a robbery with a common purpose to commit robbery but only one of them has the detention of the firearm used, proving that the other participants in the robbery also unlawfully possessed a firearm may be difficult. The mere fact that they commit a robbery with a common purpose using a firearm but that only one of them has physical detention, does not necessarily mean that all of them possess the firearm illegally. Such a deduction can only be made if the court finds that the robber who has the detention intended to possess it not only for himself but also on behalf of the other(s), and that the other(s) had the intention that the robber having the detention should exercise the physical detention on their behalf. Such a conclusion cannot automatically be made from the mere fact that the participants acted with a common purpose, because such common purpose may equally exist in a situation in which the robber having the detention of the firearm intended to possess it for himself alone.[113]

(*d*) *Firearm* Section 1 gives a long, technical definition of the word "firearm". The section defines it as any:

---

109 *Supra* II C.

110 S 1(1) of Act 75 of 1969; *Motsema* 2012 2 SACR 96 (SGJ) par 16.

111 *Dlepu* 1978 3 SA 106 (T); *Ndwalane* 1995 2 SACR 697 (A) 702.

112 See eg the words "[t]he purpose of this Act is to . . . prevent the proliferation of illegally possessed firearms and . . . to prevent crime involving the use of firearms" in s 2. It is difficult to see how this purpose can be achieved if a person who keeps or guards a firearm only temporarily for somebody else could not be convicted of the unlawful possession of a firearm.

113 *Nkosi* 1998 1 SACR 284 (W); *Motsema* 2012 2 SACR 96 (SGJ); *Kwanda* 2013 1 SACR 137 (SCA).

(*i*) device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ft-lbs);

(*ii*) device manufactured or designed to discharge rim-fire, centre-fire or pin-fire ammunition;

(*iii*) device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm within the meaning of paragraph (*a*) or (*b*);

(*iv*) device manufactured to discharge a bullet or any other projectile of a calibre of 5.6 mm (.22 calibre) or higher at a muzzle energy of more than 8 joules (6ft-lbs), by means of compressed gas and not by means of burning propellant; or

(*v*) barrel, frame or receiver of a device referred to in paragraphs (*a*), (*b*), (*c*) or (*d*), but does not include any device contemplated in section 5. This latter section contains a list of devices which are not regarded as firearms. Included in this list are an antique firearm and an airgun.

Section 5(1) specifically states that a number of devices listed in the subsection are not regarded as firearms. The list includes an antique firearm, an airgun, a paintball gun, a flare gun, and certain other technically defined mechanisms such as "any explosive powered tool manufactured specifically for use in industrial application, including line-throwing guns and impex-type building pistols".

The expression "muzzle loading firearm" is also defined in section 1, but will not be set out here due to the length of the definition.[114]

(*e*) *Unlawfulness* The possession must be unlawful, that is, not covered by a ground of justification such as necessity. As already stated above, the crime is, in terms of section 3, 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.[115]

(*f*) *Culpability* The legislature does not specify whether intention or negligence is required for liability. There is certainly no reason to believe that no culpability is required – in other words that this is a strict liability offence. If X had intention she would certainly be guilty, but the question is whether she can also be convicted if the form of culpability proved against her is not intention, but merely negligence. It is submitted that culpability in the form of negligence suffices for a conviction. The reason for this is that 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 unlawful possession of firearms as widely as possible.[116] Accordingly X

---

114 In the light of the increased technical nature of the various definitions of a "firearm" in the Act, it may, in borderline cases, be necessary for the prosecution to lead expert evidence on the nature of the firearm in question – *Filani* 2012 1 SACR 508 (ECG).

115 S 96(1), read with s 95.

116 *Mnisi* 1996 1 SACR 496 (T); *Sotsu* 2001 1 SACR 428 (Tk) 431*c–d*. The submission in the text is strengthened by the following considerations: the wording of the Preamble of

[*continued*]

ought not without more ado to succeed with a defence that she was temporarily keeping the firearm for somebody else and that she believed that this other person had a licence to possess the firearm, whereas such other person in fact had no such licence. She would succeed with such a defence only if the court can find that in the particular circumstances X's belief was reasonable.[117]

Intention to possess a firearm includes an awareness on the part of X that she possesses the firearm unlawfully. If she *bona fide* believes that her possession is lawful, she lacks awareness of unlawfulness and intention, even if her belief proves to be mistaken.[118]

(*g*) *Punishment* According to section 121 read with Schedule 4, the punishment for the crime is a fine or imprisonment for a period not exceeding 15 years. If the provisions of section 1(*a*) of the Adjustment of Fines Act 101 of 1991 are taken into consideration, the maximum fine is 15 × R120 000, that is, R1.8 million in the case of a Magistrate's Court which is not a Regional Court, and in the case of a Regional Court 15 × R600 000, that is R9 million. If the provisions of section 1(*b*) of the latter Act are taken into account, a fine as well as imprisonment may be imposed.

3 Unlawful possession of a prohibited firearm

(*a*) *Definition* Section 4(1) provides that certain listed firearms and devices are prohibited firearms and may not be possessed or licensed in terms of the Act. Section 120(1)(*a*) makes it clear that a person is guilty of a crime if she contravenes section 4, and section 121, read with Schedule 4, sets out the punishment for this crime.

(*b*) *General remarks on this crime* The crime created in section 4(1) resembles the crime created in section 3 and discussed immediately above, but differs from that crime in that the object of the possession is not a "firearm" as set out in the discussion of the above crime, but a "prohibited firearm". The Act draws a distinction between a "firearm" and a "prohibited firearm". Whereas a firearm is a lethal weapon, the arms and devices falling under the heading "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 is prescribed for the crime of possessing a prohibited firearm than for the possession of a firearm which is not a prohibited firearm (the maximum period of imprisonment is 25 years instead of 15 years).

(*c*) *Elements of crime* The elements of the crime are (*i*) the *possession* of (*ii*) a *prohibited firearm*, (*iii*) *unlawfulness* and (*iv*) *culpability*. The contents of elements (*i*) and (*iv*) are the same as in the crime of unlawfully possessing a

---

the Act, and especially the third statement in the Preamble, which mentions that "the increased availability and abuse of firearms . . . has contributed significantly to the high levels of violent crime in our society"; the purposes of the Act as explicitly mentioned in s 2, especially par (*b*), which states that the purpose of the Act is to "prevent the proliferation of illegally possessed firearms and . . . to prevent crime involving the use of firearms"; the severe maximum sentence of 15 years (s 121, read with Sch 4), which is *five* times higher than the maximum sentence prescribed in the present Act's forerunner!

117 Indirect authority for this view can be found in *Mukwevho* 2010 1 SACR 349 (SDT) 357*f–h.*

118 *Majikazana* 2012 2 SACR 107 (SCA) par 23.

firearm, discussed above. The only elements which differ from the corresponding ones in the previously discussed crime are element (*ii*), that is, the element relating to the object of the possession, namely a "prohibited firearm", and element (*iii*), which relates to the unlawfulness of the possession.

(*d*) *Prohibited firearm* Section 4(1) contains a long list of firearms and devices which are prohibited firearms. Without giving a complete list of them all, the following are some of the devices contained in this list: any fully automatic firearm; any gun, cannon, mortar or launcher manufactured to fire a rocket, grenade or bomb; any projectile or rocket manufactured to be discharged from a cannon, recoilless gun or mortar, or rocket launcher.

(*e*) *Unlawfulness* The possession must be unlawful, that is, not covered by a ground of justification such as necessity. Section 4(1) provides that possession of a prohibited firearm may be lawful in the circumstances set out in sections 17, 18(5), 19 and 20(1) (*b*). Sections 17 and 18(5) refer to firearms and ammunition in private collections, section 19 refers to such articles in public collections and section 20(1)(*b*) to firearms used for use in theatrical, film or television productions.

(*f*) *Punishment* According to section 121 read with Schedule 4, the punishment for the crime is a fine or imprisonment for a period not exceeding 25 years. If the provisions of section 1(*a*) of the Adjustment of Fines Act 101 of 1991 are taken into consideration, the maximum fine is 25 × R120 000, that is, R3 million in the case of a Magistrate's Court which is not a Regional Court, and in the case of a Regional Court 25 × R600 000, that is R15 million.If the provisions of section 1(*b*) of the latter Act are taken into account, a fine as well as imprisonment may be imposed.

4 Unlawful possession of ammunition

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

(*a*) holds a licence in respect of a firearm capable of discharging that ammunition;

(*b*) holds a permit to possess ammunition;

(*c*) 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

(*d*) 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, according to subsection (2), this limitation does not apply to (*a*) a dedicated hunter or dedicated sports person who holds a licence, or to (*b*) the holder of a licence to possess a firearm in respect of ammunition bought and discharged at an accredited shooting range.

These 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.[119]

---

119 Ss 95 and 96.

Section 1 defines "ammunition" as "a primer or complete cartridge", and the word "cartridge" in turn is defined in the section to mean "a complete object consisting of a cartridge case, primer, propellant and bullet".

The punishment for the unlawful possession of ammunition is a fine or imprisonment for a period not exceeding 15 years. If the provisions of section 1(*a*) of the Adjustment of Fines Act 101 of 1991 are taken into consideration, the maximum fine is 15 × R120 000, that is, R1.8 million in the case of a Magistrate's Court which is not a Regional Court, and in the case of a Regional Court 15 × R600 000, that is R9 million.If the provisions of section 1(*b*) of the latter Act are taken into account, a fine as well as imprisonment may be imposed.

5 Certain other crimes created in Act Among the many further crimes relating to firearms and ammunition created in the Act are (briefly defined) the following:

(*i*) to be aware that somebody else possesses a firearm illegally and to fail to report this to the police;[120]

(*ii*) to cause bodily injury to a person or damage to property by negligently using a firearm;[121]

(*iii*) to discharge a firearm in a manner likely to injure or endanger the safety or property of somebody else;[122]

(*iv*) to have control of a loaded firearm in circumstances where it creates a risk to the safety or property of another and not to take reasonable precautions to avoid the danger;[123]

(*v*) to handle a firearm while under the influence of a substance which has an intoxicating or a narcotic effect;[124]

(*vi*) to give control of a firearm to a person whom she knows, or ought to have known, to be mentally ill, or to be under the influence of a substance which has an intoxicating or a narcotic effect;[125]

(*vii*) to point a firearm at another person[126] (this crime is discussed separately below);[127]

(*viii*) to discharge a firearm in a built up area or public place;[128]

(*ix*) to fail to lock away a firearm which a person has in her possession in a prescribed safe, strong-room or device for the safe-keeping;[129] and

(*x*) 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.[130]

---

120 S 120(2)(*a*).
121 S 120(3)(*a*).
122 S 120(3)(*b*).
123 S 120(3)(*c*).
124 S 120(4).
125 S 120(5).
126 S 120(6).
127 *Infra* XV C.
128 S 120(7).
129 S 120(8)(*a*).
130 S 120(8)(*b*).

E CONCEALMENT OF BIRTHS

1 Contents of crime This crime was unknown in our common law. In South Africa it has been a crime since 1845.[131] It is presently governed by the provisions of section 113 of the General Law Amendment Act 46 of 1935.

> Subsection (1) provides that any person who, without a lawful burial order, disposes of the body of a newly born child with intent to conceal the fact of its birth, whether the child died before, during or after birth, is guilty of a crime.

It is not a crime against life, for it is applicable only if the child is already dead.[132] If a living child is exposed or simply left to her fate X may be guilty of the common-law crime of "exposing an infant" (*crimen expositionis infantis*).[133]

If a living child is left to her fate and she dies X may, of course, be guilty of murder or culpable homicide, depending on whether the prosecution can prove that X caused the death intentionally or negligently. The present crime nevertheless stands in a particular relationship to the crimes against life, because a conviction of this crime is a competent verdict on a charge of murder or culpable homicide in terms of sections 258 and 259 of the Criminal Procedure Act.

The person committing the crime need not necessarily be the mother of the child. It may be any person. The words "disposes of" imply an act committed with the intention of permanently concealing the child's corpse. If it is left at a place where, to X's knowledge, it will be found by other people there is no "disposal of" the corpse.[134]

The expression "the body of a child" is not defined in the act. The question arises at what stage the foetus may be regarded as a "child". In *Matthews*[135] it was held that a foetus qualifies as a "child" for the purposes of the Act only if it has reached a stage of development "sufficient to have rendered its separate existence apart from its mother a reasonable probability".[136]

The disposal of the child's body must be accompanied by a certain intention, namely to conceal the fact of its birth. If this intention is present the intention relating to the act, namely "to dispose of the body of the child", will also be present.

2 Evidential provisions The provisions of subsections (2) and (3) are of evidential importance only. Subsection (2) provides that whenever a person disposes

---

131 When s 1 of Ord 10 of 1845 (C) made it criminal.

132 *Oliphant* 1950 1 SA 48 (O) 51; *Maleka* 1965 2 SA 774 (T).

133 This crime is discussed *infra* XIV D.

134 *Dema* 1947 1 SA 599 (E) 600. In *Smith* 1918 CPD 260 X was charged under the forerunner of the present Act. It was held that transporting a corpse in a suitcase from one place to another amounted to "disposal" of the corpse. Contrast, however, *Molefe* 2012 2 SACR 574 (GNP) where X had merely lied to a sister at a clinic that she had given birth. This conduct was held not to amount to a "disposal" of the body of a child.

135 1943 CPD 8.

136 In *Manngo* 1980 3 SA 1041 (V) the fetus was only three months old, and the court held that the crime cannot be committed in respect of it, because "the offence cannot be committed unless the child has arrived at that stage of maturity at the time of birth that it might have been born a living child".

of the body of any child which was recently born, other than under a lawful burial order, she will be deemed to have disposed of the body with intent to conceal the fact of the child's birth, unless it is proved (which means "unless the accused proves") that she had no such intent. (This shifting of the onus of proof may be unconstitutional.) Subsection (3) provides that a person may be convicted in terms of subsection (1) although it has not been proved that the child in question died before its body was disposed of. This subsection does not mean that the crime can be committed in respect of a living child too. It means only that it is not necessary for the state to prove that the child died before it was concealed.[137]

3 Punishment The punishment is a fine or imprisonment for a period not exceeding three years. If the provisions of section 1(*a*) of the Adjustment of Fines Act 101 of 1991 are taken into account, the maximum fine is R360 000 (3 × R120 000). If the provisions of section 1(*b*) of the latter Act are taken into account, a fine as well as imprisonment may be imposed.

F PUBLIC INDECENCY

1 Definition Public indecency consists in unlawfully, intentionally and publicly engaging in conduct which tends to deprave the morals of others, or which outrages the public's sense of decency.[138]

2 Elements of crime The elements of this crime are the following: (*a*) *conduct* (*b*) *in public* (*c*) *which tends to deprave the morals of others or which outrages the public's sense of decency* (*d*) *unlawfulness and* (*e*) *intention*.

3 Origin The crime was unknown in Roman and Roman-Dutch law, though some forms of what is today known as public indecency may have been punished as other crimes, such as the vague *crimina extraordinaria*.[139] The crime is a creation of the courts in the Cape Colony during the previous century, under the influence of English law. The most influential decision in this regard was *Marais*,[140] decided in 1888.

4 Constitutional dimensions of crime Section 16(1) of the Constitution provides that everyone has the right to freedom of expression, which includes *inter alia* freedom of artistic creativity. The recognition of this right may result in certain types of conduct being no longer punishable which, before the coming into operation of the Constitution, were punishable as public indecency. Examples of such types of conduct that come to mind are females appearing topless on public beaches and a striptease exhibition in a nightclub.

---

137 *Oliphant supra* 51.

138 This definition is based on that in *Hunt-Milton* 271, which was followed in *F* 1977 2 SA 1 (T) 4. That an act which outrages the public's sense of decency or propriety may also be classed as indecent appears from *B and C* 1949 2 SA 582 (T); *B and C* 1949 1 PH H74 (T), and *F supra* 4.

139 In *Marais* (1888) 6 SC 367 370 and *Hardy* (1905) 26 NLR 35 the courts sought to base the existence of the crime on the fact that it was analogous to some of the *crimina extraordinaria* mentioned by Voet 47 11.

140 *Supra*.

Another ground upon which the constitutionality of the crime, or aspects thereof, may perhaps be challenged, is the vagueness of the expressions "which tends to deprave the morals of others" and "which outrages the public's sense of decency" in the definition of the crime. Because of the vagueness of these expressions, the definition or part thereof may possibly be incompatible with the *ius certum* rule in the principle of legality.[141]

On the other hand, the infringement of rights such as the right to free expression may be justified in the light of the public's interest not to be confronted by displays such as nudism, the exposure of people's genitalia, or sexual intercourse in public places to which the public have a right of access. The discussion of the crime which follows is based on the assumption that the crime is constitutional.

5 Indecent conduct Although any form of indecency in public may constitute the crime, the most common ways in which it is committed are by an improper exposure of the body[142] and by sexual intercourse in public.[143] Conduct is regarded as indecent if it has the tendency to deprave the morals of others[144] or if it outrages the public's sense of decency and propriety.[145] Whether the conduct in fact depraves the morals of others is immaterial. No actual depravation is required, but only that the act should have an objective tendency to deprave.[146] In applying the test a court should have regard to the effect of the conduct at that particular time and place on the average reasonable member of society who is "neither a prude nor a libertine".[147]

6 Conduct in public One of the most important elements of the crime is the requirement that the conduct take place "in public".[148] This does not mean that the conduct should necessarily take place in a public place, or in a place to which the public normally has access (although in such cases the element of publicity is satisfied).[149] The crime is also committed if the conduct takes place in a private place, such as a flat or a private dwelling, in such circumstances that it may be perceived by members of the public from either a public place, such as a road,[150] or even from some other private place, such as another flat or dwelling.[151] In the latter case the people who may see X must, as far as X is concerned, be ordinary members of the public.[152] The fact that the conduct is not actually perceived by more than one person does not affect X's liability.[153]

---

141 *Supra* I F 9.
142 As in *Marais supra* and *B* 1955 3 SA 494 (D).
143 As in *Arends* 1946 NPD 441; *B and C* 1949 2 SA 582 (T).
144 *Marais supra* 370; *Meinert* 1932 SWA 56 60; *W* 1953 3 SA 52 (SWA) 53.
145 *B and C* 1949 2 SA 582 (T); *F* 1977 2 SA 1 (T) 4.
146 *Publications Control Board v William Heinemann Ltd* 1965 4 SA 137 (A) 150; *F supra* 7.
147 This expression was used in *Publications Control Board v William Heinemann Ltd supra* 150. See also *F supra* 8; *Buren Uitgewers (Edms) Bpk v Raad van Beheer oor Publikasies* 1975 1 SA 379 (C). Cf also the discussion in *L* 1991 2 SACR 329 (C).
148 On this requirement, see *Arends supra* 443; *B supra* 497.
149 *Arends supra* 443; *Cooke* 1939 TPD 69 73.
150 *Marais supra* 370; *Manderson* 1909 TS 1140 1142.
151 *B* 1955 3 SA 494 (D) 497F.
152 *B supra*.
153 *Marais supra* 371.

All that is required is a reasonable possibility that members of the public may see, hear or otherwise perceive her conduct.[154]

7 Unlawfulness An otherwise unlawful exposure of the body may be justified by, for example, necessity (as where X is forced to rush naked into a crowded street because of a fire in her house).

8 Intention The crime can only be committed intentionally,[155] and the intention of X must refer to all the elements of the crime. This implies that X must appreciate that her conduct is taking place in public,[156] and that her behaviour may tend to deprave the morals of others or outrage the public's sense of decency.

G VIOLATING A GRAVE[157]

1 Definition Violating a grave consists in unlawfully and intentionally damaging a human grave.

2 Origin The crime is derived from the crime of *sepulchri violatio* in Roman law, by which the violation or desecration of *res religiosae* ("religious objects") was punished.[158] In modern South African law there are no longer *res religiosae*,[159] and the reason for punishing the violation of a grave today is the affront to the family or friends of the deceased or the community's feelings of decency.[160]

3 Overlapping with other crimes The crime may overlap with malicious injury to property or theft. It will overlap with theft only if parts of the tombstone or grave are removed, not if the corpse is removed: theft of a corpse is not possible, because a corpse is a *res extra commercium* (an object which cannot be commercially disposed of).[161]

4 The prohibited act The crime is committed not only when the coffin or human remains within a grave are disturbed,[162] but also when there is any destruction of or injury to a tombstone, monument or other part of a grave above

---

154 *B supra* 497; *Manderson supra* 1143.
155 *B* 1955 3 SA 494 (D) 497.
156 *Arends* 1946 NPD 441 443–444.
157 See generally De Vos 1952 *SALJ* 296 ff; Labuschagne 1991 *De Jure* 141; Hoctor and Knoetze 2001 *Obiter* 171; Christison and Hoctor 2007 *Obiter* 23.
158 D 47 12 7, 47 12 3 7, 47 12 11. See generally also D 47 12 3 and Inst 2 1 9. The Roman-Dutch writers no longer regarded a tomb as a *res religiosa* (Van Leeuwen *RHR* 2 1 9; Van Leeuwen *Cens For* 1 2 1 14; Huber *HR* 2 1 28), yet still regarded the violation of a grave as a crime (Matthaeus 47 6 1, 2; Van Leeuwen *Cens For* 1 5 5 2; Voet 47 12; Moorman 1 7 9; Damhouder 102).
159 *Cape Town and Districts Waterworks Co Ltd v Executors of Elders* (1890) 8 SC 9 12.
160 De Vos *ibid* 303; Huber *HR* 2 1 28.
161 *VerLoren van Themaat* 101; Klopper 1970 *THRHR* 38.
162 As in *Letoka* 1947 3 SA 713 (O) 716; *Sephume* 1948 3 SA 982 (T) (removal of part of corpse "to make medicine"); *Eshowe Local Board v Hall* 1923 NPD 233 (corpse removed from one grave to another).

the surface of the earth.[163] It is not necessary that parts of the body or the tombstone be removed.[164]

5 Unlawfulness The violation must be unlawful. The exhumation of a body may, for example, be sanctioned by statute or a judicial order. It would seem that it is not unlawful to plough over very old and unidentifiable graves, especially if that portion of the grave above the ground consists of only a small mound.[165] The basis for punishing the violation of a grave, namely the affront to the deceased's relatives, falls away in this case.

6 Intention X must have the intention of disturbing, destroying or damaging the grave. This is lacking if X does not realise that the object she is damaging is in fact a human grave.[166]

H VIOLATING A CORPSE

1 Definition This crime consists in unlawfully and intentionally violating a corpse.

2 Discussion of crime Although there is little authority in our case law on this crime, there can be no doubt that there is such a crime in our law. In *Scott-Crossley*[167] and *Coetzee*,[168] for example, X was convicted of this crime. There is a need for this crime. If, for example, Z has killed Y and thereupon X, who had nothing previously to do with Z, comes upon the scene and kicks the dead body of Y or burns or stabs it, X will be liable to be convicted of the crime. X may be convicted of this crime only if at the time of her action she knew that Y was already dead, that is, a corpse.

163 Voet 47 12; Damhouder 102.
164 *Letoka supra* 716.
165 Cf *Dibley v Furter* 1951 4 SA 73 (C).
166 D 47 12 3; Voet 47 12 1 3; *Letoka supra* 716–717.
167 2008 1 SACR 223 (SCA) par 33.
168 1993 2 SACR 191 (T), discussed by Snyman 1994 *SALJ* 1.

CRIMES AGAINST A PERSON

CHAPTER
XIV

CRIMES AGAINST LIFE

A MURDER

1 Definition Murder is the unlawful and intentional causing of the death of another human being.[1]

2 Elements of crime The elements of the crime are the following: (*a*) *causing the death* (*b*) of *another person* (*c*) *unlawfully* and (*d*) *intentionally*.[2]

3 General Because there are many different ways in which a person can cause another's death unlawfully and intentionally, the crime of murder in South African law covers a wide field. The moral reprehensibility of the intentional causing of another's death may vary from case to case. At the one extreme there is the case where X kills Y cold-bloodedly, with premeditation and out of hatred. At the other extreme there is the situation where X and Y drink liquor together, Y acts provocatively towards X, a quarrel ensues, Y slaps X across the face whereupon an enraged X kills Y. Then there is also the situation in which X gives Y, who suffers from cancer and endures excruciating pain, a lethal injection in order to release him from his suffering;[3] the situation where X, at Y's request, assists him to commit suicide;[4] and even the situation where X stumbles upon Y in the act of committing adultery with his (X's) wife, and an enraged X then kills Y. According to South African law, in all these situations X is liable to be convicted of murder.

---

1 *Ndhlovu* 1945 AD 369 373; *Valachia* 1945 AD 826 829; *Sigwahla* 1967 4 SA 566 (A) 570–571; *Ntuli* 1975 1 SA 429 (A) 436–437.

2 Strictly speaking, the first element ought to be subdivided into (i) an *act or omission* (ii) which *causes* (iii) the *death*, but in the discussion which follows these three requirements will, for practical reasons, be telescoped into the one element set out under (*a*).

3 *Hartmann* 1975 3 SA 532 (C).

4 *Hibbert* 1979 4 SA 717 (D).

It would have been much better if the crime of murder were graded in our law. This is the position in other legal systems. In the USA there is the well-known difference between "murder in the first degree" and "murder in the second degree". Within the field of the intentional causing of death, English law likewise distinguishes between murder and voluntary manslaughter, German law between *mord* and *totschlag* and Dutch law between *moord* and *doodslag*. Similar or analogous differences between different crimes reflecting different types of intentional causing of death are to be found in most other legal systems. The present definition of murder in South African law is an oversimplification of something which is more complex than one might initially tend to think. If, like the other legal systems mentioned above, our law had recognised two different crimes by which the unlawful, intentional killing of somebody else were punished, our courts would not have experienced so many problems in deciding what the effect of provocation on liability was. Provoked homicide could, in principle, then simply have been treated as falling under the less serious form of intentional homicide.

4 Causing the death The act consists in a voluntary act or omission which causes the death of another human being. The concepts of a voluntary act or omission and of causation were discussed in detail above.[5] The following is a very brief summary of these rules: X must either commit a voluntary positive act (*commissio*) or there must be a voluntary omission (*omissio*) on his part in circumstances in which there is a legal duty on him to act actively. The act or omission is voluntary if X is capable of subjecting his bodily movements to his will or intellect. This act or omission qualifies as the cause of Y's death if it is both the factual and legal cause of the death. It is the factual cause of death if it is a *conditio sine qua non*, that is, an indispensable condition, of the death, which means that X's conduct cannot be thought away without Y's death disappearing at the same time. It is the legal cause of Y's death if a court is of the view that there are policy considerations for regarding it as the cause of Y's death. In this respect one or more of a number of theories of legal causation is used, such as the individualisation theories (proximate cause), the theory of adequate causation, or the *novus actus interveniens* theory.

5 Another human being Neither suicide nor attempted suicide is a crime.[6] This does not mean, however, that to instigate, assist or put another in a position to commit suicide can never be criminal. In certain circumstances such conduct can amount to murder or culpable homicide since the instigator's conduct may be causally related to the death,[7] or otherwise, it may amount to attempted murder.

The human being killed must have been a live human being. To "kill" an unborn foetus and separate it from the mother's body is treated in our law as abortion, not murder. Various tests may be used to ascertain whether a child was born alive, such as to ascertain whether the child breathed, whether it had an independent blood circulation, or whether it had been completely expelled from

5 *Supra* II A, II B and III B.
6 *Grotjohn* 1970 2 SA 355 (A) 363; *Gordon* 1962 4 SA 727 (N) 729H.
7 *Grotjohn supra* 364–365; *supra* III B 20.

the mother's body. Section 239(1) of the Criminal Procedure Act 51 of 1977 lays down that a child is deemed to have been born alive if it is proved that it breathed, whether it had an independent circulation or not, and that it is not necessary to prove that the child was at the time of its death entirely separated from its mother's body. There is, therefore, a presumption of live birth if a child has breathed.

Whether this presumption is rebuttable has not been decided. It is submitted that it is rebuttable.[8] The relevant section is merely of procedural importance, and does not lay down substantive law. It facilitates the task of the prosecution in cases where the child has breathed – something which is ordinarily not difficult to prove. The hydrostatic test, according to which the lungs are placed in water to determine whether they float, is employed. The section does not state when a child is born alive, but merely how it may be proved that it was born alive. It therefore remains possible for X to prove that even if it breathed the child was in fact dead before it was completely expelled from the mother's body. The wording of the section is ambiguous: an irrebuttable presumption of live birth is not the only inference to be drawn. The very fact that the wording of the section is ambiguous is the more reason for interpreting it in X's favour.

6 Unlawfulness The killing must be unlawful. Certain grounds of justification such as private defence (which includes self-defence), necessity, official capacity or obedience to orders, may justify an otherwise unlawful killing. These grounds of justification have already been discussed in detail above.[9] It is sufficient to reiterate here that consent to the killing by the deceased does not exclude the unlawfulness of the killing.[10] Neither is euthanasia a ground of justification.[11]

7 Intention The form of culpability required is intention.[12] The (unlawful) negligent causing of another's death is culpable homicide. The requirement of intention has already been discussed in detail above.[13] In that discussion the emphasis was on the requirement of intention for murder; it is therefore unnecessary to discuss it again.

The rules relating to the element of intention may very briefly be summarised as follows: The intention requirement is satisfied not only if X has the direct intention (*dolus directus*) to kill Y, but also if he merely foresees the possibility of Y being killed and reconciles himself to this possibility (*dolus eventualis*). The test in respect of intention is purely subjective. This subjective mental state may nevertheless be inferred from the objective facts proved by the state. Awareness of unlawfulness is an integral part of intention. A mistake concerning a material element of the crime (such as the requirement that it is a *human being* that must be killed) excludes intention. X's motive is irrelevant.

---

8 This is also the opinion expressed in *De Wet and Swanepoel* 228.
9 *Supra* IV.
10 *Robinson* 1968 1 SA 666 (A).
11 *Hartmann* 1975 3 SA 532 (C) 535; *Nkwanyana* 2003 1 SACR 67 (W) 72.
12 See the authorities *supra* fn 1.
13 *Supra* V C.

8 Punishment

(*a*) *General* The death sentence used to be a competent sentence for murder, but in 1995 in *Makwanyane*[14] the Constitutional Court held that this form of punishment is unconstitutional, because it amounts to an unjustifiable violation of *inter alia* the right to life, the right to dignity and the right not to be subjected to cruel, inhuman or degrading punishment. Before 1997 the court had a free discretion as to the period of imprisonment to be imposed upon a conviction of murder. It is a well-known fact that the incidence of murder has increased alarmingly since about 1990 (when a moratorium was first placed upon the execution of death sentences). Statistics relating to the prevalence of the crime has already been given above in the discussion of the crisis of the criminal justice system in South Africa.[15]

As a reaction to the high crime level, section 51 of the Criminal Law Amendment Act 105 of 1997 was enacted. This makes provision for minimum sentences to be imposed for certain crimes, such as murder, in certain circumstances. Subsection (6) of section 51 provides that the minimum sentences (to be set out below) are not applicable in respect of a child who was under the age of 16 years at the time of the commission of the crime.

(*b*) *Imprisonment for life must sometimes be imposed* Section 51(1) of the abovementioned Act provides that a Regional Court or High Court must sentence a person convicted of murder to imprisonment for life in the following circumstances:

(1) if the murder was planned or premeditated;

(2) if Y was a law enforcement officer (such as a member of the police) who has been murdered while performing his functions as a law enforcement officer, irrespective of whether he was on duty or not;

(3) if Y was somebody who has given or was likely to give material evidence at a criminal proceeding with reference to any crime referred to in Schedule 1 of the Criminal Procedure Act 51 of 1997 (this Schedule contains a list of crimes which may be described as serious);

(4) if Y's death was caused by X in committing or attempting to commit (or after having committed or attempted to commit) rape or compelled rape;

(5) if Y's death was caused by X in committing or attempting to commit (or after having committed or attempting to commit) robbery with aggravating circumstances;

(6) if the murder was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy;

(7) if Y was killed in order to unlawfully remove any part of his body;

(8) Y's death resulted from certain crimes mentioned in the Witchcraft Suppression Act 3 of 1957.

The existence of such a punishment as imprisonment for life (which has replaced the death sentence as the maximum sentence that can be imposed upon a

---

14 1995 2 SACR 1 (CC).
15 *Supra* I D 2 (*b*).

conviction of murder) must, however, be taken with a pinch of salt, since somebody who has received such a punishment may be released on parole.[16]

(*c*) *Other minimum periods of imprisonment must sometimes be imposed* If one of the circumstances set out immediately above are not present, X does not qualify for the mandatory imprisonment for life. However, section 51(2) of the Act provides that in such a situation a high or regional court is nevertheless obliged to impose the following minimum periods of imprisonment:

(1) fifteen years in respect of a first offender;

(2) twenty years in respect of a second offender;

(3) twenty five years in respect of a third or subsequent offender.

(*d*) *Avoidance of minimum sentences* There are always cases where a court is of the opinion that the imposition of one of the above minimum periods of imprisonment would, considering the specific circumstances of the case, be very harsh and unjust. In subsection (3)(*a*) of section 51 the legislature has created a mechanism whereby a court may be freed from the obligation of imposing one of the minimum sentences referred to above. According to this subsection a court is not bound to impose imprisonment for life or for one of the minimum periods of imprisonment set out above, if there are *substantial and compelling circumstances* which justify the imposition of a lesser sentence than the prescribed one. If such circumstances exist, a court may then impose a period of imprisonment which is less than the period prescribed by the legislature.

The crucial words in the Act relating to the avoidance of mandatory minimum sentences are the words "substantial and compelling circumstances". In grappling with the interpretation of this important expression, the courts initially came to conclusions which were not always harmonious.[17] However, in *Malgas*[18] the Supreme Court of Appeal considered the interpretation of these words and formulated a relatively long list of rules to be kept in mind by courts when interpreting the words.[19] Without setting out all these rules, it may be stated that perhaps the most important of them provides that if a court is satisfied that the circumstances of the case render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.[20]

In *Dodo*[21] the Constitutional Court held that the introduction by the legislature of minimum sentences in section 51 was not unconstitutional.

---

16 S 73(6)(*b*)(iv) and (vi) of the Correctional Services Act 111 of 1998 provides that a person who has been sentenced to life imprisonment may not be placed on parole until he has served at least 25 years of the sentence, but on reaching the age of 65 years a prisoner may be placed on parole if he has served at least 15 years of such sentence. This means that if X was sentenced to life imprisonment when he was 50 years of age, he may be released after only 15 years in prison.

17 See the cases referred to in *Gqomana* 2001 2 SACR 28 (C), which was decided just before the supreme court of appeal delivered the judgment in *Malgas infra*. For an analysis of the case law before the decision in *Malgas infra*, see Terblanche 2001 *SACJ* 1.

18 2001 1 SACR 469 (SCA).

19 See par 25 of the judgment (481*f*–482*g*).

20 See rule I in par 25 of the judgment (482*e*–*f*).

21 2001 1 SACR 594 (CC).

B CULPABLE HOMICIDE

1 Definition Culpable homicide is the unlawful, negligent causing of the death of another human being.[22]

2 Elements of crime The elements of the crime are the following: (*a*) *causing the death* (*b*) of *another person* (*c*) *unlawfully* and (*d*) *negligently*.

3 Difference between culpable homicide and murder Culpable homicide differs from murder merely in the form of culpability required: whereas negligence is required for culpable homicide, intention is required for murder. The first three elements of the crime set out above in paragraph 2 are exactly the same as in the crime of murder. They have already been dealt with in the discussion of murder as well as of the general principles of liability.[23] The only element of the crime that merits separate consideration is the form of culpability required, namely negligence.

4 Culpability – negligence The form of culpability required for this crime is negligence. The contents of the concept of negligence, as well as the test to determine negligence, have already been fully discussed above.[24] It is sufficient merely to reiterate here, by way of summary, that the test for negligence is, in principle, objective. The court must ask itself (*a*) whether the reasonable person in the same circumstances would have foreseen the possibility that Y's death may result from X's conduct; (*b*) whether the reasonable person would have taken steps to guard against such a possibility; and (*c*) whether X's conduct deviated from what the reasonable person would have done in the circumstances.

Where it has been proved that X, charged with murder, killed the deceased unlawfully, 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.[25] It is, admittedly, usually easy to draw this conclusion in cases of assault resulting in death, yet there is no general presumption that in every case of assault which results in death X ought to have foreseen that death might result, and that he was therefore negligent.[26]

There is a certain type of case in which the courts, even though X, at first glance, would seem to have had an intention to kill Y, convict X of culpable homicide. These are cases where X, in killing, exceeds the bounds of a ground

---

22 *Ntuli* 1975 1 SA 429 (A) 436A; *Burger* 1975 4 SA 877 (A) 878H; *Crossberg* 2008 2 SACR 317 (SCA) par 83.

23 As to the requirement that there must be an act or omission which is the cause of Y's death, see *supra* II and III B. As to the requirement that it is another human being that must be killed, see *supra* XIV A 5. As to the requirement of unlawfulness, see *supra* IV.

24 *Supra* V D.

25 *Bernardus* 1965 3 SA 287 (A); *Mtshiza* 1970 3 SA 747 (A) 752; *Ntuli supra* 436–437; *Burger supra* 878–879.

26 *Van As* 1976 2 SA 921 (A) 927–928, in which a conviction of culpable homicide involving an assault was set aside by the Appellate Division. It was found that when X slapped Y's cheek he could not reasonably have foreseen that Y (a very fat man), when hit, would fall backwards, knock his head and die.

of justification such as private defence (self-defence). X is then convicted, not of murder, but of culpable homicide. Previously these cases were referred to as the "partial excuse cases": it was said that the reason why X is convicted of culpable homicide (and not of murder) in such cases is that, although there was an intention to kill, this intention is "not entirely but to some extent excusable".[27] However, a closer examination of these cases reveals that in these cases intention to kill (in the technical sense of the word which the courts apply) is absent because X lacked awareness of unlawfulness. As explained above,[28] awareness of unlawfulness is an indispensable component of the concept of intention as employed in criminal law. Although X directs his will at killing Y, because of factors such as excitement or over-eagerness he fails to appreciate that he is in fact acting unlawfully.[29] This is the real reason why *dolus* or intention to kill in its proper legal connotation is lacking. Furthermore, the "partial excuse rule", according to which a person may be guilty of culpable homicide even though he had an "intention to kill", is irreconcilable with the clear view of the Appellate Division, especially in a later judgement such as *Ntuli*,[30] that the form of culpability in culpable homicide is not intention, but negligence.

In a number of cases the question arose whether X could be convicted of culpable homicide if he was charged with this crime, but the evidence revealed that he in fact had the intention to kill. Different divisions of the supreme court came to different conclusions on this issue, but in *Ngubane*[31] the Appellate Division resolved the differences by holding that it is wrong to assume that if X acted intentionally it is impossible to find that he was also negligent. This means that in this type of case X may be found guilty of culpable homicide despite the fact that he killed Y intentionally. This matter was elucidated in the discussion above of negligence.[32]

5 No attempt A person cannot intend to be negligent, and since intention is required in an attempt to commit a crime there is no such crime as attempted culpable homicide.[33]

C ADMINISTERING POISON OR ANOTHER NOXIOUS SUBSTANCE

1 Definition This crime consists in unlawfully and intentionally administering poison or another noxious substance to another person.

2 Discussion of crime The crime has a very limited application, since it generally overlaps with the much more familiar crimes of murder and culpable homicide (where Y dies as a result of the poison),[34] attempted murder[35] and

27 Eg *Hercules* 1954 3 SA 826 (A) 832F; *Mhlongo* 1960 4 SA 574 (A) 580H.
28 *Supra* V C 23.
29 Snyman 1971 *THRHR* 184; Botha 1975 *THRHR* 41.
30 1975 1 SA 429 (A) 436–438.
31 1985 3 SA 677 (A).
32 *Supra* V D 13.
33 *Ntanzi* 1981 4 SA 477 (N) 482F–G; *Naidoo* 2003 1 SACR 347 (SCA) 345*g*.
34 *Matthews* 1950 3 SA 671 (N).
35 *Tshabalala* 1921 AD 13 16; *Maseko* 1950 1 SA 586 (A).

assault.[36] Prosecutions for this crime are therefore rare. In some cases the crime has been described as administering poison "with intent to cause grievous bodily harm",[37] but it would seem that this intention is only a factor which may aggravate punishment and is not an essential element of the crime.[38]

X must have been aware of the fact that the substance he was dealing with was or contained poison or some other noxious substance, and he must at least have foreseen the possibility that someone might consume it.[39] Indirect administration, that is, leaving the poisonous substance in some place where Y afterwards picks it up and swallows it, is sufficient.[40] Administration is usually effected by cunning or stealth, but may also be effected by force.[41] The poison or other noxious substance must be administered to another *person*. To administer it to an animal constitutes malicious injury to property or attempt to commit that crime.

D EXPOSING AN INFANT

1 Definition The crime of exposing an infant consists in the unlawful and intentional exposure and abandonment of an infant in such a place or in such circumstances that its death from exposure is likely to result.[42]

2 Discussion of crime In Roman-Dutch law there was a crime known as *crimen expositionis infantis*. This included, *firstly*, cases where someone abandoned a child in order to avoid parental responsibilities but without the intention to kill, in a place where it was likely to be found. *Secondly* it included cases where someone abandoned a child with the intention of killing the child or at least with a reckless disregard for the child's survival.[43]

Prosecutions for the common-law crime are rare. As far as can be ascertained the only reported case in which someone was charged with this crime is *Adams*.[44] In this case X was convicted of the crime. There is, however, no reason to doubt that the crime still exists in our law. In *dicta* in later cases[45] it was assumed that the crime still existed, and sections 258(*d*) and 259(*c*) of the Criminal Procedure Act provide that a conviction of this crime is a competent verdict on charges of murder and culpable homicide respectively.

---

36 *Marx* 1962 1 SA 848 (N).
37 *Kelaman* (1897) 14 SC 329; *Tshabalala supra; Maseko supra*.
38 *Kelaman supra* 333.
39 *Dames* 1951 2 PH H140 (C). The poison or noxious substance need not necessarily be administered with an intent to kill or to cause grievous bodily harm; the purpose may be less sinister, eg to give somebody a "love potion": *Jack* 1908 TS 131 133.
40 *Kelaman supra*; *Dames supra*.
41 Where Y dies, his willingness to accept the noxious drug is no defence: *Matthews supra* 674A.
42 This definition is based on the description of the crime in *Adams* (1903) 20 SC 556; *Hunt-Milton* 484. "Exposing an infant" is the name for the crime used in ss 258(*d*) and 259(*c*) of the Criminal Procedure Act 51 of 1977.
43 Matthaeus 47 16 2; Huber *HR* 6 13 32; Moorman 2 7; Van Leeuwen *RHR* 4 34 4; Van der Linden 2 5 12.
44 (1903) 20 SC 556.
45 *Oliphant* 1950 1 SA 48 (O) 50 and *Bengu* 1965 1 SA 298 (N) 303.

The most important reason why prosecutions for this crime are rare is that if the child dies as a result of abandonment and exposure the person abandoning the child can be charged with murder (or culpable homicide, if the death was caused negligently). Another reason may be that the crime always overlaps with attempted murder if death does not ensue, for, although X must at least foresee the possibility that the child may die, attempted murder is committed even if it does not, for example, where it is fortuitously seen and saved by some passer-by.[46]

The child must be alive at the time of exposure. If the child is already dead, X may, depending upon the circumstances, contravene section 113 of the General Law Amendment Act 46 of 1935, which deals with concealment of births.[47]

46 As in *Adams supra*. It is submitted that in *Meleka* 1965 2 SA 774 (T) X could have been charged with this crime.

47 *Oliphant supra*. On this statutory crime, see *supra* XIII E.

CHAPTER

XV

CRIMES AGAINST BODILY INTEGRITY

A ASSAULT

1 Definition Assault consists in any unlawful and intentional act or omission

(*a*) which results in another person's bodily integrity being directly or indirectly impaired, or

(*b*) which inspires a belief in another person that such impairment of her bodily integrity is immediately to take place.[1]

2 Elements of crime The elements of the crime are the following: (*a*) *conduct which results in another person's bodily integrity being impaired* (or the *inspiring of a belief in another person that such impairment will take place*); (*b*) *unlawfulness* and (*c*) *intention*.

3 Origin The crime of assault, as it is known in South Africa today, was unknown in our common law. Conduct which would, today, be punished as assault, was punished as a form of *iniuria*.[2] Under the influence of English law assault in our law developed into a separate substantive crime. An *iniuria* committed against another's *dignitas* (dignity) is punished in our law as *crimen iniuria*; an *iniuria* against another's reputation (*fama*) is punished as criminal defamation. Assault is nothing other than an *iniuria* committed against another's bodily integrity (*corpus*).[3] That the crime of assault can be committed in two

1 The reasons for this definition will become apparent in the discussion *infra* par 4 (especially 4(*d*) in the text). The (*b*) part of the definition in the text is based on the following principle, formulated by Schreiner J in *Sibanyone* 1940 JS 40 (T), and followed in *Miya* 1966 4 SA 274 (N) 276–277; *Mahlakwane* 1968 2 PH H331 (O); *Gondo* 1970 2 SA 306 (R) 307D–E and *Mngomezulu* 1972 2 PH H96 (N): ". . . for an assault to be committed when no physical impact takes place there must be a threat of immediate personal violence in circumstances that lead the person threatened reasonably to believe that the other intends and has the power immediately to carry out the threat." Further reasons for the definition in the text will become clear in the discussion of the crime that follows directly.

2 D 47 10; Voet 47 10; *De Villiers* 78–80.

3 *Jack* 1908 TS 131 132–133; *Marx* 1962 1 SA 848 (N) 853.

distinct ways, namely by the application of force or by the inspiring of a belief in Y that force is to be applied to her, is largely due to the influence of English law and the distinction drawn in that system between "assault" and "battery".[4] These two English-law crimes have fused into the single crime of assault.[5] The strong influence of English law in the nineteenth century is also responsible for the development of a number of qualified forms of assault, namely assault with intent to do grievous bodily harm, assault with intent to commit another offence, and indecent assault. "Ordinary" assault, which does not fall into one of these categories, is also known as "common assault".

4 The conduct: causing impairment of another's bodily integrity

(*a*) *General* The conduct which is criminalised by this crime can take different forms. The most common way in which the crime is committed, is by applying force to Y's body.[6] This way of committing the crime is so common and well-known, that many sources refer to the act merely as "the application of force".[7] However, this description of the act is not wide enough to cover all the ways in which the crime can be committed. In order to understand this statement properly, it is feasible to consider, firstly, the different ways in which the crime can be committed.

(*b*) *The application of force* The most common way in which the crime is committed is by the application of force by X to Y's body. This may happen either directly or indirectly.

(*i*) *Direct application* Direct application of force occurs when X applies physical force with a part of her body to a part of Y's body, thereby striking or at least touching a part of Y's body (*vis corporis corpori afflicta*). The direct application of force coincides with the meaning of the word "assault" in general parlance, as well as the layman's view of what force entails. For example, X punches Y with her fist, slaps her in her face, kicks her, or trips her. Subject to the *de minimis* rule,[8] the slightest contact with Y's body may be sufficient to constitute this crime. For example, the courts have held that X commits assault merely by walking to Y and knocking Y's hat from his head without his consent,[9] or by X merely taking the arm of Y, a girl, without her consent.[10] In cases

4 *Jolly* 1923 AD 176 179, 184; *Marx supra* 851.
5 *Jolly supra* 179.
6 Van der Bijl 2012 *SACJ* 1 20 argues that the definition of assault should be widened so that the concept of "impairment of another's bodily integrity" include serious emotional abuse, and that any conduct which has a detrimental effect on Y's psyche or sensory feelings should be regarded as an infringement of bodily integrity. Serious verbal abuse which effectively disturbs mental tranquillity should, according to her, be brought within the ambit of the first leg of the definition of assault. It is submitted that concepts such as "impairment of sensory feelings" and "emotional abuse" are too vague to serve as tools to determine criminal liability.
7 *Hunt-Milton* 406; *LAWSA* 6 par 262; *Burchell and Milton* 680.
8 *Supra* IV J. For a case of assault where the *de minimis* rule was applied, see *Bester* 1971 4 SA 28 (T). For cases of assault where the court refused to apply this rule, see *Maguire* 1969 4 SA 191 (RA) 192, 193A and *Schwartz* 1971 4 SA 30 (T). Also see the remarks in *A* 1993 1 SACR 600 (A) 607.
9 *Herbert* 10 CTR 424.
10 *Gosain* 1928 TPD 516.

of indecent assault, it was held that the mere touching of another person may suffice, as where a man merely places his hand on a woman's breast without her consent.[11]

(*ii*) *Indirect application* Force can also be applied *indirectly.* This happens if X does not use a part of her body to apply force to a part of Y's body, but uses an instrument or other strategy for this purpose, such as when X hits Y with a stick, throws stones at Y, causes a train to derail in order to harm the passengers,[12] lets a vicious dog loose on Y, snatches away a chair that Y was going to sit on from under Y so that Y falls to the floor, spits in Y's face, empties a glass of water (or beer) on Y, or when Y, a hiker, gets lost in thick mist, asks X the way, and X then deliberately shows Y a way that will cause her (Y) to fall over a precipice.[13]

Since the slightest touch may amount to assault, it is not a requirement of the crime that X should actually injure Y. It is not even required that Y be conscious of the application of force upon her, because assault can be committed even in respect of somebody who is unconscious, extremely drunk or asleep, as when X cuts off some of Y's hair while Y is asleep.[14]

The assault may also consist in X's administering poison or some other harmful substance, such as a narcotic drink, to Y without Y being aware that she is imbibing the substance, as where X secretly mixes a drug in Y's coffee. In *Marx*[15] X gave three glasses of wine each to two children, aged five and seven years. After drinking the wine the children became ill. The younger was, for example, unable to walk and was in a semi-conscious condition. X was found guilty of assault.[16] In *A*[17] the Appellate Division held that to force another person to drink any substance, constitutes a violation of her physical integrity, and amounts to an assault upon her. The court held that this is so not only if the substance is harmful or unpleasant to drink (as where it consists in urine), but even if it is harmless, as where it is pure water.

Assault may be committed through the instrumentality of a third party. If X orders Z to assault Y and Z executes the order, X commits assault.[18] X commits the crime even if she forces Y by means of threats to injure herself (Y, herself), by stabbing herself with a knife.[19] In *B*[20] X was convicted of assault in the following circumstances: she observed Z (who was her lover) assaulting Y, her child, who was two and a half years old. As the mother of Y she was under a legal duty to protect Y, but failed to do so. In allowing Z to assault Y, she was also (ie, in addition to Z) liable for the assault upon Y – despite the fact that she

---

11 *M* 1961 2 SA 60 (O).
12 *Jolly supra.*
13 *Savage* (1990) 91 Cr App R 317 (CA).
14 D 47 10 33 2.
15 1962 1 SA 848 (N).
16 Also see D 47 10 15 pr. This type of conduct is also mentioned by Voet 47 10 7 (example (vi)) as an example of *iniuria.* According to the Romans, *iniuria* was also committed by causing another person's room to be filled with smoke. (D 47 10 44).
17 1993 1 SACR 600 (A) 607*d.*
18 *A* 1993 1 SACR 600 (A) 609*f–g.*
19 *A supra* 609*i–j.*
20 1994 2 SACR 237 (E) 248.

herself performed no positive act. It follows that this crime can in certain circumstances be committed *even by an omission*.[21]

(*c*) *Inspiring fear that force will be applied* Assault may further be committed without there being any direct or indirect physical contact or impact on Y's body, namely when X inspires fear or a belief in Y that force is immediately to be applied to her. Typical examples of this form of assault are the following: X waves her fists in front of Y's face; X pulls a knife out of her pocket and pretends that she is going to stab Y; or X brandishes a firearm and aims it at Y.

The following are the requirements for liability in respect of this form of assault:

(*i*) *Personal violence* There must be a threat of violence against *the person* of Y, that is, against Y's body. Thus, a mere threat to damage Y's property is not sufficient.

(*ii*) *Immediate violence* It must be a threat of immediate violence. A mere threat to inflict harm on Y sometime in the future, is not sufficient.[22] A conditional threat does not amount to assault if X is lawfully entitled to act in the way that she is threatening to act. Thus, X does not commit assault if she merely threatens to use force if she (X) should be attacked, because this merely amounts to a threat to defend herself.[23] However, if the condition is that violence would be applied unlawfully, it could well amount to assault if, on account of the threat, Y is prevented from doing what she is lawfully entitled to do. Thus, in *Dhlamini*[24] X was convicted of assault in the following circumstances: he stood twenty paces from Y's hut and threatened to attack Y with sticks and stones if Y should dare to come out of his hut. Y was for all practical purposes a prisoner in his own hut.

(*iii*) *Subjective test* The mere fact that X is able to carry out her threat is not sufficient. The test is whether Y (the person who was threatened) believed that X intended to carry out the threat, and also that X was able to do so.[25] The essence of this form of assault is the intentional inculcation of fear of bodily harm in Y. The test is subjective in the sense that one must have regard to Y's state of mind, and what she believed would happen. If Y does not fear the threat of violence, no assault is committed, even though X is capable of carrying out her threat and intends to do so.[26] Whether X is in fact capable of carrying out her threat, is immaterial. Thus, if X aroused fear in Y, the fact that the firearm

---

21 A further hypothetical example of assault through an omission is the following: X comes out of his house and finds that his dog is biting Y. X intentionally refrains from ordering the dog to stop the biting, thereby causing the biting to continue. It is submitted that X likewise commits assault by means of an omission in the following example: X sees that her enemy, Y, who is blind, is going to fall into a manhole while walking on the pavement. To prevent Y from falling into the manhole, X merely has to shout "Stop!" or to call Y's name. X nevertheless intentionally refrains from doing anything, and as result Y falls into the manhole. Public policy dictates that in such a case there is a legal duty upon X to warn Y timeously about the manhole.

22 *Fick* 1945 GWL 11; *Miya* 1966 4 SA 274 (N) 276D.

23 *Bates* 1903 TS 513; *Miya supra* 277.

24 1931 1 PH H57 (T). Also see *Ximba* 1969 2 PH H223 (N).

25 See the cases referred to *supra* fn 1, as well as *Mtimunye* 1994 2 SACR 482 (T) 485*a–b*.

26 *Supra* fn 1; *Mtimunye supra* 485*a–b.*

with which X threatened Y was unloaded, or loaded with blank cartridges,[27] would not afford X a defence. As will be pointed out below in the discussion of the requirement of intention in assault, X must also know that Y believes that the firearm is loaded, and realise that fear has been inspired in Y.

(*iv*) *Words sufficient to constitute assault* According to earlier definitions of assault,[28] the crime could be committed by mere threats only if the threat was delivered "by an act or a gesture". According to this requirement mere verbal threats would, thus, not have been sufficient. It is submitted that this view is incorrect. There is no logical reason why fear aroused by mere verbal threats could not also be sufficient to constitute the crime (provided, of course, that the other requirements for the crime were also met). It is possible that gestures may sometimes not have the desired effect, while words could very well have it. What is important, is not *how* the fear is inspired, but *whether* it is inspired.

If X falsely tells Y, who is blind, that she (X) has a gun pointed at her and intends to shoot her, then X's conduct ought to qualify as an assault. If Y turns a corner to be confronted by a motionless robber, X, who, with gun in her hand, commands "Hands up", or if X phones Y and tells her that there is a bomb planted below her house which she (X) is about to detonate any minute, there is no reason why such threats should not qualify as an act constituting this form of assault. In 1998 in *Ireland*[29] the House of Lords held that words alone may constitute assault, Lord Steyn stating that "[a] thing said is also a thing done".[30] In this case the court held that X committed assault even though he said nothing: X made a series of "silent telephone calls" to women, as a result of which they suffered significant psychological symptoms.

(*v*) *Fear need not be reasonable* The earlier definitions of the crime[31] required that for assault to be committed by threats of violence Y's fear of attack had to be based on reasonable grounds. In other words, a reasonable person should also have become frightened. However, as far as is known, there is no case in which X was acquitted merely because Y's fear was unreasonable. It is submitted that the fear need not be reasonable. If reasonableness were required, it would be almost impossible to commit this form of assault in respect of unduly timid, superstitious or credulous people, and this would be undesirable from a policy point of view.

(*d*) *Definition of prohibited behaviour: Causing impairment of bodily integrity* From the discussion in paragraphs (*b*) and (*c*) above it is clear that the prohibited conduct in this crime may vary considerably. It is submitted that a description of the conduct element in terms of "the application of force to Y's body" is too narrow to encompass all the different ways in which the crime can be committed. Such a narrow definition is irreconcilable with (*a*) the rule that even the slightest non-consensual touching of Y may be sufficient to constitute "violence", (*b*) the recognition in our law of certain cases of indirect "violence" as sufficient to constitute assault, as where X secretly administers a drug to Y by, for example, throwing a pill in her coffee, and (*c*) the rule that the crime can

---

27 As in *Pasfield* 1974 2 PH H92 (A).
28 *Gardiner en Lansdown* 2 1570.
29 [1998] AC 147.
30 At 162.
31 See the cases mentioned *supra* fn 1.

be committed by a mere omission. Furthermore, (*d*) the rule that the crime may be committed by mere words can hardly be reconciled with the idea that all assaults amount to the application of violence: for example, Y, who has lost her way in thick mist, asks X to direct her where to go; X then directs her to walk in a certain direction, while knowing that such a direction leads to a precipice; Y thereupon falls over this precipice. It is unrealistic to talk of "the application of force" in any of the four instances just mentioned.

In answering the question whether certain conduct constitutes violence, one should not become obsessed with the specific techniques or "type of act" which X employs. The focus should rather be on the consequences of X's behaviour, and more particularly, whether the conduct resulted in an impairment of Y's bodily integrity. If this is indeed the case, there is an act of assault, irrespective of whether there was a commission or omission on X's part; irrespective of whether there was a physical application of force by X to Y's body or merely a verbal threat by X; and irrespective of whether Y experienced any physical pain. If X cuts Y's hair while Y is sleeping, without Y having consented to the act and without Y experiencing any touching of her body, X still commits assault, even though there was no "violence". "Violence" is a slippery and elusive concept.

It is therefore submitted that assault should not be regarded as a formally defined crime but as a materially defined crime, that is, a crime that consists in the *causing* of a certain result. Assault namely consists of any commission or omission *resulting* in a certain state of affairs – namely an impairment of Y's bodily integrity.[32]

5 Unlawfulness The causing of an impairment of Y's bodily integrity must be unlawful. There must, in other words, be no justification for X's conduct. Examples of grounds of justification which render the conduct lawful are private defence; necessity (as where X, fleeing a burning building about to collapse, bumps against Y who happens to stand in her way); official capacity (as where a police official uses force to arrest a criminal); consent (as where X, a surgeon, performs an operation on Y with the latter's consent; or where X bumps against Y in the course of a sporting contest in respect of which Y has voluntarily consented to take part).

6 Intention X must have intended to apply force to the person of another, or to threaten her with immediate personal violence in the circumstances described above. This implies that she must have been aware of Y's fear. If, for some reason, she believed that her threats would not be taken seriously by Y, she lacked the required intention.[33] *Dolus eventualis* is sufficient,[34] but, of course, not negligence. There is no such crime in our law as negligently causing bodily injury.[35]

---

32 Snyman 2004 *TSAR* 448. In the new definition of the crime of battery in the proposed codification of English criminal law, the crime is likewise defined in terms of the causation of a certain consequence: "A person is guilty of an offence if he intentionally or recklessly causes injury to another" – *Legislating the Criminal Code: Offences against the Person and General Principles* (Law Commission Consultation Paper no 218). See par 4 of the draft code.

33 *Mtimunye* 1994 2 SACR 482 (T) 485.

34 *Sinzani* 1979 1 SA 935 (E); *Erasmus* 2005 2 SACR 658 (SCA) par 10.

35 *Steenkamp* 1960 3 SA 680 (N) 684.

If the assault is accompanied by an intention to commit some other crime, such as theft, rape or murder, the separate crime of assault with intent to commit such a crime (theft, rape or murder) is committed. After the Appellate Division decision in *Chretien*[36] one must now assume (somewhat reluctantly) that intoxication may, if the circumstances warrant it, exclude the intention to commit even ordinary ("common") assault.

7 Attempt The previous definition of the crime[37] equated an attempt to apply force to the person of another with a threat to apply such force. Accordingly the view has been propounded that there is no such thing as attempted assault, all attempts to assault being complete assaults. It is submitted that this proposition is incorrect. It is based on the fallacious idea that every threat of bodily harm will give rise to a corresponding fear of such harm on the part of the threatened person. In certain situations, however, this does not happen; then, it is submitted, there is only attempted assault, for example, where Y is unaware of the threats because she is asleep or drugged; where she does not understand or appreciate them because she is drugged, or where, although she is aware of the threats and comprehends them, she is completely unperturbed by them because she knows it is only a toy pistol that X is pointing at her.

Another example of attempted assault is where X, intending to assault Y, applies force to Y in the belief that Y is alive, whereas Y is in fact already dead. (This would amount to an attempt to commit the impossible.) In *Sikhakane*[38] it was held that there is such a crime as attempted indecent assault. Indecent assault has in the meantime been replaced by the new statutory crime of sexual assault.

8 Assault with intent to do grievous bodily harm Under the influence of English law a number of qualified forms of assault, that is, assault that is qualified by an intention to achieve a certain goal, have developed in our law. Each of these qualified forms is in fact a separate, substantive crime, not merely an aggravated form of assault. In order to distinguish assault from the qualified forms of assault, assault which is not qualified is sometimes referred to as "common assault" or "ordinary assault".

The most important of these crimes is the one known as assault with intent to do grievous bodily harm. All the requirements for an assault set out above apply to this crime, but in addition there must be intent to do grievous bodily harm. Whether grievous bodily harm is in fact inflicted on Y is immaterial in determining liability[39] (though it is usually of great importance for the purposes of sentence). It is simply the intention to do such harm that is in question.

Whether X in fact had intent to do grievous bodily harm is a factual question. Important factors which may indicate that X had such an intention are, for example, the nature of the weapon or instrument used, the way in which it was used, the degree of violence, the part of the body aimed at, the persistence of the attack, and the nature of the injuries inflicted, if any.[40] The crime may be

---

36 1981 1 SA 1097 (A).
37 *Gardiner and Lansdown* 2 1570.
38 1985 2 SA 289 (N).
39 *Joseph* 1964 4 SA 54 (RA); *Dube* 1991 2 SACR 419 (ZS) 424.
40 *Melrose* 1985 1 SA 720 (ZS); *R* 1998 1 SACR 166 (T) 169*i*–170*c*; *Mdau* 2001 1 SACR 625 (T) 626–627; *Bergh* 2006 2 SACR 225 (N) 231*h*–*i*; *Zwezwe* 2006 2 SACR 599 (N) 603*b*–*d.*

committed even though the physical injuries are slight. In *Joseph*,[41] for example, 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. Conversely, the crime committed may be mere common assault even though bodily harm of a serious nature has in fact been inflicted.[42] *Dolus eventualis* is sufficient.

The somewhat vague expression "grievous bodily harm" has seldom been explained in more precise terms by the courts. It need not necessarily be of a permanent or dangerous nature.[43] Thus, merely twisting Y's arm or merely attacking her with fists – even if the blows are aimed at her head – is not necessarily indicative of an intention to do grievous bodily harm.[44] However, such an intention can be inferred if X kicks Y in her face with a heavy boot while Y is lying prostrate,[45] if X administers electrical shocks to the body of Y,[46] if X lets loose a vicious dog on Y and the dog bites Y,[47] or if X throws acid in Y's face.[48] X may be found guilty of assault with intent to do grievous bodily harm even though she did not use any instrument such as a knife when she attacked Y, but used her hands or fists only.[49]

X may be convicted of assault with intent to do grievous bodily harm on the ground of not only actually inflicting violence on Y's body, but also on the ground of a threat to inflict grievous bodily harm on Y.[50] The rule which applies in this respect is the same as in common (ordinary) assault.

9 Assault with intent to commit another crime There are various other qualified forms of assault, each constituting a separate offence, consisting of an assault with intent to commit some other crime, for example, assault with intent to commit rape, robbery or murder. Obviously, all the requirements for an ordinary assault mentioned above are applicable to these crimes too. In addition, there must be an intention to commit the further crime.

Whether the existence of all these forms of assault with intent to commit some other crime is necessary can be questioned, since they almost invariably amount to nothing more than attempts to commit the further crime (eg attempted rape or attempted murder). One of the very few instances where assault with intent to murder does not overlap with attempted murder is where X means to murder Y by poisoning her, but events have not yet reached the stage where Y has swallowed the poison. This will be an attempt to murder, but not assault with the intent to murder.[51]

---

41 1964 4 SA 54 (RA). Intentionally pointing a rifle at a person and firing it, albeit with blank cartridges, with intent to frighten that person constitutes only common assault – *Pasfield* 1974 2 PH H92 (A).
42 *Bokane* 1975 2 SA 186 (NC); *R* 1998 1 SACR 166 (T) 169*i*–170*c*.
43 *Mdau* 2001 1 SACR 625 (T).
44 *Bokane* 1975 1 PH H101 (NC); *Mgcineni* 1993 1 SACR 746 (E).
45 *Dube* 1991 2 SACR 419 (ZS); *Petzer* 1992 1 SACR 633 (A).
46 *Madikane* 1990 1 SACR 377 (N).
47 *Smith* 2003 2 SACR 135 (T).
48 *Erasmus* 2005 2 SACR 658 (SCA).
49 *Bergh* 2006 2 SACR 225 (N) 231–232.
50 *Mtimunye* 1994 2 SACR 482 (T) 484*i*–*j*.
51 *Ken* 1966 4 SA 514 (N) 518; *Benjamin* 1980 1 SA 950 (A) 958.

B INTIMIDATION

1 General The Intimidation Act 72 of 1982, as amended, criminalises certain forms of conduct amounting to intimidation. The Act creates two crimes relating to intimidation. The first one is created in section 1(1) and the second in section 1A(1). The purpose of these crimes is to punish people who intimidate others to conduct themselves in a certain manner, such as not to give evidence in a court, not to support a certain political organisation, not to pay their municipal accounts or to support a strike action. The crime may overlap with certain other crimes, such as extortion and assault.

It is well known that intimidation is rife in South Africa, but it is a pity that very few people seem to be prosecuted for the crimes created in this Act. One of the reasons for this is that many people who have been subjected to intimidation are, precisely because of the intimidation, afraid of laying criminal charges of intimidation or of testifying about the commission of the crime in a court.

2 Crime created in section 1(1) Section 1(1) of the Intimidation Act 72 of 1982, as amended, provides as follows:

> "Any person who –
> (*a*) without lawful reason and with intent to compel or induce any person or persons of a particular nature, class or kind or persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint–
> (i) assaults, injures or causes damage to any person; or
> (ii) in any manner threatens to kill, assault, injure or cause damage to any person or persons of a particular nature, class or kind; or
> (*b*) acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication–
> (i) fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person;
> (ii) . . . (deleted)
> shall be guilty of an offence"

The punishment for the crime is imprisonment for a period not exceeding ten years or to a fine or to both such fine and such imprisonment. If the provisions of the Adjustment of Fines Act 101 of 1991 are taken into account, the maximum fine that may be imposed is R120 000 × 10 = R1.2 million in the case of a Magistrate's Court which is not a Regional Court, and in the case of a Regional Court R600 000 × 10 = R6 million.

Subsection (2) of section 1 provides that X bears the onus of proving the existence of a lawful reason as referred to in subsection (1), unless a statement clearly indicating the existence of such a lawful reason has been made by or on behalf of X before the close of the case for the prosecution. If X's act is covered

by a ground of justification such as private defence, necessity or official capacity, she will obviously have a lawful reason for her conduct. This onus placed on X is in all probability unconstitutional, as it is incompatible with the presumption of innocence set out in section 35(3)(*h*) of the Constitution.[52]

3 Discussion of crime created in section 1(1) Paragraph (*a*) of section 1(1) punishes the commission of a certain act, whereas paragraph (*b*) punishes the causing of a certain condition. Paragraph (*a*) therefore creates a formally defined crime whereas paragraph (*b*) creates a materially defined crime (ie, a result crime). In order to obtain a conviction of the crime created in paragraph (*b*) the prosecution need not necessarily prove that the prohibited result (ie, that a person fears for her safety, etc) necessarily ensued. Instead of the actual ensuing of the result, it is sufficient that "it might reasonably be expected that the natural and probable consequences" of the conduct would be that a person fears for her safety or that the other possible consequences which are mentioned ensue. An example of conduct punishable under section 1(1)(*b*) is where an accused, after being convicted and sentenced, tells the judge or magistrate that if she comes out of prison, she will kill her (the judge or magistrate).

Paragraph (*b*) is wide enough to cover cases where X had already committed the particular act aimed at intimidating a certain group of people, but has not yet succeeded in bringing the intimidatory message to the attention of the group. An example of such action is where X had drawn up and printed a pamphlet but has not yet succeeded in distributing the pamphlet among the members of the group of people she wishes to influence. Paragraph (*b*) is also wide enough to cover cases where, because of the very intimidation, the victims of the intimidation are not prepared to come forward and give evidence that X's conduct resulted in their fearing for their own safety or, for example, the safety of their property.

Paragraph (*a*) expressly requires intention for a conviction of the crime created in that paragraph. As far as the crime created in paragraph (*b*) is concerned, intention is not expressly required. The words in that subsection "that it might reasonably be expected that the natural and probable consequences thereof would be that . . ." embodies an objective test, which is difficult to square with the subjective test which the courts apply to determine the existence of intention. The use of the words "that it might reasonably be expected" in the paragraph means that X could be guilty of the crime created in the paragraph only if the reasonable person would have foreseen the result as the natural and probable consequence of her conduct. It follows from this that, in order to secure a conviction of contravention of this paragraph, it is sufficient to prove culpability in the form of negligence.

The crime created in section 1(1)(*b*) in particular is disconcertingly widely formulated. It not only overlaps cases of assault in the form of the inspiring of fear of immediate personal violence, but may even be construed as creating

---

52 Cf the decisions of the Constitutional Court in cases such as *Zuma* 1995 2 SA 642 (CC); *Mbatha* 1996 1 SACR 371 (CC); *Bhulwana* 1995 2 SACR 748 (CC); *Julies* 1996 2 SACR 108 (CC); *Ntsele* 1997 2 SACR 740 (CC). In *Motshari* 2001 1 SACR 550 (NC) 554*c–d* the court *obiter* regarded the onus placed on X by s 1(2) as unconstitutional, and in *Tsotsi* 2004 2 SACR 273 (NC) 242*f* the court agreed with this view.

some form of negligent assault.[53] In *Motshari*[54] it was held that section 1(1)(*b*) does not apply to a mere quarrel between live-in lovers taking place within the confines of their dwelling-place. The courts have expressed the view that in matters involving private quarrels the prosecution should rather charge X with having committed a common-law crime (such as assault) or with having contravened a provision of the Domestic Violence Act 116 of 1998 instead or resorting to a prosecution under section 1(1)(*b*).[55]

In *Cele*[56] the court described the provisions of section 1(1)(*b*) as "an astonishing piece of legislation" and "far-reaching", and held that the wording of the provision should therefore be interpreted restrictively. Although the section does not require intention for a conviction under section 1(1)(*b*), it must, according to the court, be proven that X uttered the words forming the subject-matter of the accusation with the intention that they should mean what they profess to mean. In this case X said to Y: "We will crucify you". The court held that, given the context in which they were uttered, the words did not amount to the commission of the crime, because X did not mean the words to mean literally what they meant, but only what they meant figuratively, and that the words only amounted to "a meaningless threat uttered in the heat of the moment". One can agree with the court's exposition of the law, but the correctness of the application of the rules to the facts, that is, the interpretation placed upon the words by the court, can be seriously questioned.[57]

4 The crime created in section 1A(1) Section 1A(1) of the Act creates a second crime of intimidation by providing as follows:

> "Any person who with intent to put in fear or to demoralize or to induce the general public, a particular section of the population or the inhabitants of a particular area in the Republic to do or to abstain from doing any act, in the Republic or elsewhere–
> (*a*) commits an act of violence or threatens or attempts to do so;
> (*b*) performs any act which is aimed at causing, bringing about, promoting or contributing towards such act or threat of violence, or attempts, consents or takes any steps to perform such act;

continued

53 In *Motshari supra* 554*i–j* the court quotes a writer (Mathews) as speaking of the "cosmic scope" of the offence. Plasket and Spoor 1991 *Industrial Law Journal* 747 752, state: "As astonishing is the fact that any attempt to commit a crime against a person or property can be converted into the offence of intimidation." In *Holbrook* [1998] 3 All SA 597 (E) 601*b–c* the court stated: "The section is so widely couched that it may well be construed that a person who throws a cat into a swimming pool may well be guilty of an offence if the owner of the cat or any other person, previewing the event, would fear for the cat's safety." The court also remarked (603*b–c*) that "our *prima facie* view is that the section is an unnecessary burden on our statute books and its objectives could probably be attained by the enforcement of common-law sanctions". This view of the crime was endorsed by the court in *Motshari supra* 556*a*.

54 2001 1 SACR 550 (NC) 560*b–c*.

55 *Motshari supra* 556*a*, 560*b*; *Holbrook supra* 602–603.

56 2009 1 SACR 59 (N) par 11, 13.

57 In his discussion of the judgment Hoctor 2009 *SACJ* 92 and 2009 *Annual Survey of SA Law* 310 is likewise sceptic about the correctness of the conclusion reached by the court.

(*c*) conspires with any other person to commit, bring about or perform any act or threat referred to in paragraph (*a*) or act referred to in paragraph (*b*), or to aid in the commission, bringing about or performance thereof; or

(*d*) incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or threat,

shall be guilty of an offence.

The punishment for the crime is a fine which the court may, in its discretion, deem fit, or imprisonment for a period not exceeding 25 years, or both such fine and such imprisonment. If the provisions of the Adjustment of Fines Act 101 of 1991 are taken into account, the maximum fine that may be imposed is R120 000 × 25 = R3 million in the case of a Magistrate's Court which is not a Regional Court, and in the case of a Regional Court R600 000 × 25 = R15 million.

Section 1A(2) and (3) places an onus upon X of proving that she lacked the intention of achieving the purposes set out in subsection (1). It is submitted that this onus is unconstitutional since it is incompatible with the presumption of innocence set out in section 35(3)(*h*) of the Constitution.

The word "violence" in section 1A is defined in subsection (4) as including the infliction of bodily harm upon or the killing of, or endangering of the safety of, any person, or the damaging, destruction or endangering of property.

5 Discussion of crime created in section 1A(1) The crime created in section 1A(1) largely overlaps the crime created in section 1(1). However, the two crimes do not completely overlap: intimidation of an individual (as opposed to a group of persons) is covered by section 1(1) only. In section 1A(1) the emphasis is on intimidation of the general public, a particular section of the population or the inhabitants of a particular area.[58] This crime covers a wider field of conduct than the crime created in section 1(1), and the punishment prescribed for a contravention of it is also more severe than that prescribed for a contravention of section 1(1).

C POINTING A FIREARM

1 Definition Section 120(6) of the Firearms Control Act 60 of 2000 provides that it is a crime 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.

58 One of the reasons for the insertion of the words "general public, a particular section of the population or the inhabitants of a particular area" in s 1A(1) is probably the judgment in *Mohapi* 1984 1 SA 270 (O), which drew attention to certain deficiencies in the earlier definition of the statutory crime.

Although the subsection creates two different crimes, they are so closely related that it is convenient to discuss them as a single crime.

2 Element of crime The elements of the crime are the following: (*a*) the *pointing* of (*b*) a *firearm* or other specified article (*c*) at *any person* (*d*) *unlawfully* and (*e*) *intentionally*. The crime created in this subsection may overlap with the crime of assault in the form of the inspiring of fear of immediate personal violence.

3 "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: (*a*) that X fired a shot; (*b*) that the firearm or article was loaded; or (*c*) 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. It may, *firstly*, be interpreted *narrowly*, as meaning the pointing of the firearm at Y in such a way that, if discharged, the bullet would hit Y. It may, *secondly*, be interpreted more *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.

In *Xabendlini*[59] the Supreme Court of Appeal held – correctly, it is submitted – that it is the *broad* interpretation which is the correct one. Such an interpretation is more in accordance with the intention of the legislature, namely to protect the public from the dangers inherent in the handling of firearms. Furthermore, 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. Further, the narrow construction of the expression would make it unduly difficult for the state to prove the commission of the crime, 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 missed her by millimetres.

4 A firearm, etcetera What must be pointed is a firearm, an antique firearm or an airgun (paragraph (*a*)); or anything which is likely to lead a person to believe that it is a firearm, an antique firearm or an airgun (paragraph (*b*)). The Act gives a long, technical definition of the word "firearm". This definition has already been set out above in the discussion of the crime of unlawfully possessing a firearm,[60] and will therefore not be repeated here. The effect of paragraph (*b*) of subsection (6) is that X may commit the offence even if she points a toy pistol at Y, provided the toy pistol is such that it is likely to lead a person to believe that it is a real pistol.

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.

---

59 Case no 608/10 [2011] SASCA 86, 27 May 2011. See par 7 of the judgment. In this case the court preferred the broad interpretation followed in *Humphries* 1957 2 SA 233 (N) 234D-G and *Hans* 1998 2 SACR 406 (E) 411-412 and rejected the narrow approach followed in *Van Zyl* 1993 1 SACR 338 (C) 340*g*.

60 *Supra* XIII D 2 (*d*).

6 Unlawfulness The requirement of unlawfulness is not specifically mentioned in the definition of the offence in subsection (6), 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[61] or if X is a police officer lawfully effecting an arrest.

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. In *Hodgkinson*[62] it was held – correctly, it is submitted – that intention is a requirement for a conviction of this crime.

This means that X must know, *first,* that what she is handling is a firearm, antique firearm, airgun or anything which is likely to lead a person to believe that it is such an article. *Secondly*, X must be aware of the fact that 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. *Thirdly*, she must be aware of the fact that there is no "good reason" for her conduct and that it is unlawful, that is, not covered by a ground of justification.

Mere negligence is not sufficient. It is submitted that, according to general principles, intention in the form of *dolus eventualis* is sufficient. The fact that X did not intend to kill or injure Y is, of course, no defence, for the conduct proscribed in the subsection is limited to the mere pointing of a firearm at somebody else, and in the absence of any provision to the contrary in the wording of the crime, the intention required for a conviction does not refer to circumstances not included in the definitional elements of the offence.

8 Punishment According to section 121, read with Schedule 4 of the Act, the punishment for the crime is a fine or imprisonment for a period not exceeding ten years. If the provisions of section 1(*a*) of the Adjustment of Fines Act 101 of 1991 are taken into consideration, the maximum fine is R120 000 × 10 = R1.2 million in the case of a Magistrate's Court which is not a Regional Court, and in the case of a Regional Court R600 000 × 10 = R6 million. If the provisions of section 1(*b*) of the latter Act are taken into account, a fine as well as imprisonment may be imposed.

---

61 In *Van Antwerpen* 1976 3 SA 399 (T) X pointed a firearm at Y, his assailant. The court refused to allow X's defence of private defence on a charge of pointing a firearm. The court suggested that if X had *fired* a warning shot, he could have relied on private defence, but not if he merely pointed the firearm. This reasoning is strange, since the pointing of the firearm is a less dangerous or harmful method of averting an attack than firing a shot. For valid criticism of this case, see Van Oosten 1977 *De Jure* 179; *Visser, Vorster and Maré* 186–187; *Visser and Van der Westhuizen* 194–196.

62 2010 2 SACR 511 (NG) par 27. In par 28 the court erroneously relied on the words "without good reason" in the definition of the crime as ground for deciding that intention is required. These words do not refer to the culpability requirement, but to the requirement of unlawfulness.

CHAPTER

XVI

CRIMES AGAINST DIGNITY AND REPUTATION

A *CRIMEN INIURIA*

1 Definition *Crimen iniuria* consists in the unlawful, intentional and serious violation of the dignity or privacy of another.[1]

2 Elements of crime The elements of the crime are the following: (*a*) the *infringement* of the *dignity or privacy* of another (*b*) which is *serious*, (*c*) *unlawfulness* and (*d*) *intention*.

3 Origin, overlapping According to the traditional common-law interpretation, an *iniuria* consisted in the unlawful and intentional violation of the *dignitas, fama* (reputation) or *corpus* (physical security) of another.[2] The crime of *crimen iniuria* is committed when the first of these three legal interests is violated.[3] If the second and third interests are impaired, the crimes committed are criminal defamation and assault (in its various forms) respectively.

The crime may overlap with criminal defamation if the conduct complained of constitutes impairment of both another's dignity and of his reputation.[4] X may then be charged with either of these crimes.[5] It may also overlap with assault, for an act which impairs bodily security may also impair dignity.[6] To kiss a woman

1 *Sharp* 2002 1 SACR 360 (Ck) 372*b*; *Mostert* 2006 1 SACR 560 (N) 571*b–c*. The reason why the definition mentions both dignity and privacy as the interests violated by the crime is explained *infra* par 4. On the requirement that the violation must be serious, see *infra* par 10.

2 D 47 10 2; Voet 47 10 1; *De Villiers* 27; *Jack* 1908 TS 131 132; *Umfaan* 1908 TS 62 66; *Chipo* 1953 4 SA 573 (A) 576B.

3 *Jana* 1981 1 SA 671 (T) 675.

4 *Chipo supra* 614E; *Walton* 1958 3 SA 693 (R) 696.

5 *Xabanisa* 1946 EDL 167 169; *Chipo* 1953 3 SA 602 (R) 614.

6 *S* 1955 3 SA 313 (SWA); *Brereton* 1971 1 SA 489 (RA).

without her consent may amount to either assault or *crimen iniuria*.[7] Sexual assault may also constitute *crimen iniuria*.[8]

4 Interests protected The interests protected by this crime are usually designated by the term *dignitas*, but this is a technical term and it would be wrong to restrict its meaning to "dignity" as ordinarily understood.[9] *Dignitas* is a vague term, which broadly covers all objects protected by the rights of personality, other than reputation and bodily integrity.[10] The word *dignitas* is merely a formal, collective description of all the rights or interests protected here. In view of their divergent characters it is difficult, if not impossible, to reduce all these rights or interests to one single concept.

For example, it can be argued that the concept of privacy cannot be included in the concept of dignity. It is submitted that this argument is correct, for the right to privacy can be infringed without Y's being aware of it, whereas an infringement of a person's dignity or right to self-respect is conceivable only if Y is aware of X's act. This distinction between privacy and the other possible elements of *dignitas* is borne out by the decisions of the courts: this is the only acceptable explanation for the fact that in the "peeping Tom" cases (which are cases of invasion of privacy) the courts regard it as immaterial that Y was unaware of being watched.[11] In cases of impairment of a person's dignity (self-respect or mental tranquillity) awareness by Y of X's conduct is essential, and Y's personal reaction is in fact taken into account.[12]

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.

Nevertheless, the courts undoubtedly regard both dignity and privacy as being protected by this crime (*crimen iniuria*). Therefore, if one must use the technical term *dignitas* as a description of the interests protected, one should view it as including both a person's dignity and his privacy. For this reason the Latin word *dignitas* was avoided in the definition of the crime given above; in its place the words "dignity" and "privacy" were used.

The exact meaning of "dignity" has never been defined by the courts, though a fair inference may be drawn from case law that "dignity" includes both "self-respect" and "mental tranquillity".[13]

5 Violation of dignity in general The crime can be committed either by word or by deed. Although many or perhaps most cases of *crimen iniuria*

---

7 Cf *M* 1947 4 SA 489 (N) 492; *S* 1955 3 SA 313 (SWA) 315.
8 Cf the facts in *S* 1948 4 SA 419 (G); *Muvhaki* 1985 4 SA 302 (Z).
9 *Holliday* 1927 CPD 395 400.
10 *Umfaan supra* 66–67; *Holliday supra* 402.
11 *Holliday supra*; *Daniels* 1938 TPD 312.
12 *Sackstein* 1939 TPD 40 44; *Olakawu* 1958 2 SA 357 (C) 359–360.
13 See *Holliday* 1927 CPD 395 400 ("self-respect"), 401 ("right to tranquil enjoyment"); *Terblanche* 1933 OPD 65 68; *Tanteli* 1975 2 SA 772 (T) 775 ("his proper pride in himself"). The description of *dignitas* in *De Villiers* 24 (which was quoted with approval in the leading case of *Umfaan supra* 67) is as follows: "that valued and serene condition in his social and individual life which is violated when he 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".

involve some taint of sexual impropriety, the crime is not confined to insults of such a nature. Again, 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. An attack, not against Y himself, but against some group to which he is affiliated (eg his language group, his religion, race or nationality) will normally not constitute a violation of his *dignitas*, unless there are special circumstances from which an attack on his self-respect can be deduced.[14]

6 Violation of dignity – subjective dimensions The act consists in the violation of another's dignity or privacy. In order to determine whether there has been an infringement of another's dignity, both a subjective and an objective test are applied.

The subjective test is the following: In instances of infringement of dignity (as opposed to infringement of privacy) Y must (*a*) be aware of X's offending behaviour and (*b*) feel degraded or humiliated by it.[15] Dignity, self-respect and mental tranquillity describe subjective attributes of a person's personality. For example, the mental tranquillity of the timid will be more easily disturbed than that of the robust. In addition, an individual's self-respect is intimately connected with his particular station in life and his moral values.[16] 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.[17]

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 reason (such as broad-mindedness or consent) Y did not take any offence at (ie, did not in any way feel aggrieved or humiliated by) X's behaviour, a court will not convict X of the crime.[18]

In cases which do not deal with violation of Y's dignity, but with his privacy, a different criterion applies: here the state need not prove that Y was aware of X's conduct. Thus if X peeps at Y while Y is busy undressing, it is accepted that X had violated Y's privacy even if Y was unaware of the fact that X was peeping at him.

7 Violation of dignity – objective dimension In cases of infringement of privacy (as opposed to dignity), a different rule from the one set out above 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

---

14 *Tanteli* 1975 2 SA 772 (T) (uttering disparaging words about Y's home language).

15 *Van Tonder* 1932 TPD 90 94; *S* 1964 3 SA 319 (T) 321B; *A* 1993 1 SACR 600 (A) 610*e–f*.

16 Particular attention was paid to Y's subjective reaction to X's conduct in *Kaye* 1928 TPD 463 465; *Sackstein* 1939 TPD 40 44; *Olakawu* 1958 2 SA 357 (C) 359–360.

17 D 47 10 3 1; Voet 47 10 4 *pr*; Huber *HR* 6 8 3; *Holliday supra* 401–402. For cases of *crimen iniuria* committed in respect of young children, see *Schoonberg* 1926 OPD 247; *Payne* 1934 CPD 301; *S* 1948 4 SA 419 (G).

18 *Curtis* 1926 CPD 385; *Van Tonder supra*; *Olakawu supra* 360G; *A supra* 298.

of whether Y is aware of being watched or not.[19] 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 offence, whereas another may be more robust or broad-minded and not feel affronted 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 offence at conduct that would not affront a reasonable person, the law should not assume that the crime has been committed.

8 Instances of violation of dignity The crime can be committed in many ways, and what follows is not an exhaustive list. It may be committed by the indecent exposure of a person's body in the presence of others.[20] It can also be committed by communicating to somebody else a message containing, expressly or impliedly, an invitation to or a suggestion of sexual immorality or impropriety,[21] or by sending indecent photos to a woman.[22] A mere declaration of love or affection in circumstances in which there is no suggestion of sexual impropriety is not ordinarily considered to be an impairment of the dignity of the recipient, however unwelcome or irritating it may be.[23] The crime can be committed by addressing Y in language which humiliates or disparages Y, such as calling Y a "kaffir"[24] or a "piccanin",[25] or to call a woman a "whore"[26] or a "bitch".[27]

The uttering of words constituting vulgar abuse or gross impertinence may constitute the crime, provided that the circumstances are sufficiently serious.[28] One such case is *Momberg*,[29] in which X received a parking ticket from Y, a traffic officer. Because he thought this was unjust, he publicly swore at and abused Y. He was convicted of the crime.

Unlike the crime of criminal defamation,[30] it is not required for a conviction of *crimen iniuria* that X's injurious words or conduct should have come to the attention of people other than Y. The reason for this is that Y's dignity may be infringed even if a third party was unaware of it. On the other hand, the fact that

---

19 *Holliday* 1927 CPD 395; *Daniels* 1938 TPD 312.
20 Eg *J* 1953 3 SA 494 (E); *A* 1991 2 SACR 257 (N).
21 Eg *Olakawu* 1958 2 SA 357 (C) 360; *Walton* 1958 3 SA 693 (R).
22 *James* 1960 R and N 159.
23 *Sackstein* 1939 TPD 40 43, 44; *Olakawu supra* 360B–C.
24 *Steenberg* 1999 1 SACR 594 (N).
25 *Mostert* 2006 1 SACR 560 (N) 573*a–b.*
26 *Ryan v Petrus* 2010 1 SACR 274 (E) 280*i–j.*
27 *Ryan v Petrus supra* 281*b*-282*f*. *Contra Sharp* 2002 1 SACR 360 (Ck) 372. It is submitted that *Sharpe* was wrongly decided, for the reasons set out in *Ryan v Petrus supra* 281*b*–282*f*. The use of the word "bitch" cannot merely be regarded as vulgar abuse.
28 Voet 47 10 8; *Walton supra*; *S* 1964 3 SA 319 (T). For cases in which vulgar abuse was regarded as sufficiently serious to warrant a conviction, see *Lewis* 1968 2 PH H367 (T); *Momberg* 1970 2 SA 68 (C); *M* 1979 2 SA 25 (A).
29 1970 2 SA 68 (C).
30 *Infra* XVI B.

X's words were uttered in the company of others who heard them is not completely irrelevant: it is a factor affecting the gravity of the infringement of Y's dignity. It is conceivable that Y may not feel particularly aggrieved if X's words did not come to the notice of any third party, but that he will feel aggrieved if they did indeed come to other people's notice.

Assaults which violate Y's dignity also constitute *crimen iniuria*, although a charge of *crimen iniuria* will be laid only if the impairment of dignity is more serious than the impairment of bodily security,[31] as in *Ndlangisa*,[32] where X spat in Y's face. If a stranger kisses or embraces a woman without her consent he may, depending upon the circumstances, commit *crimen iniuria*,[33] and the same applies to persons staring at or following a woman.[34] Depending upon the circumstances, the position might be the same if Y is a male.

Crimen iniuria is a materially defined crime (a result crime). What is punished in terms of this crime is not a particular type of act, but any conduct that results in Y's dignity or privacy being impaired.[35] The crime can also be committed through an omission, as where X, a policeman on duty, sees Z behaving in a way that impairs Y's dignity, but, contrary to the legal duty resting on him as a policeman, fails to stop X from continuing with his behaviour.[36]

9 Infringement of privacy This manner of committing the crime merits separate treatment since some of its facets are governed by rules of their own, as will presently be seen. The most common form of infringement of privacy constituting *crimen iniuria* is the so-called "peeping Tom" case, as where a man peeps through a window or other aperture at a woman undressing.[37] Another illustration is the planting of a listening-in device in a person's private apartment and listening in to his private conversations.[38] 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 addressed to him, and by generally prying into his private life in an unwarranted manner, by means of apparatus such as cameras, telescopes or "bugging devices".

The right of privacy is, however, not an unlimited right, and in certain circumstances intrusions on a person's privacy or what he regards as his privacy will be allowed by the law. What these circumstances will be is extremely difficult to predict, and in deciding the point a court will have to take into consideration the prevailing *boni mores* or modes of thought in society at a given place and time.[39] In *I*[40] it was held that X, a private investigator, did not commit the crime when, at the instance of a suspicious spouse, he peeped through Y's window into a room where the other spouse was in bed with Y. He was trying to obtain

---

31 *Brereton* 1971 1 SA 489 (RA), where a woman was stripped of some of her clothes.
32 1969 4 SA 324 (E).
33 *Gosain* 1928 TPD 516; *S* 1955 3 SA 313 (SWA).
34 *Van Meer* 1923 OPD 77; *Mtetwa* 1966 1 PH H250 (T).
35 *A* 1991 2 SACR 257 (N) 273*f–g* (confirmed on appeal in *A* 1993 1 SACR 600 (A) 610).
36 *A* 1991 2 SACR 257 (N) 273 (confirmed on appeal in *A* 1993 1 SACR 600 (A) 610).
37 *Holliday* 1927 CPD 395; *Daniels* 1938 TPD 312; *R* 1954 2 SA 134 (N).
38 *A* 1971 2 SA 293 (T).
39 *A* 1971 2 SA 293 (T) 299; *I* 1976 1 SA 781 (RA) 786, 788.
40 *Supra*.

evidence of adultery which the suspicious spouse wanted to use in a subsequent divorce case. His purpose in intruding on Y's private sphere was merely a *bona fide* attempt to obtain evidence of adultery, and he went no further than was necessary for his purpose. The court held that in the circumstances of the case his infringement of Y's privacy was not unlawful.

In cases of unwarranted intrusion on privacy, as opposed to cases where Y's dignity is violated, it is immaterial whether Y is aware of the intrusion.[41] In addition, X is guilty of the completed crime even if, for example, the woman happens to be fully clad while she is being watched through her bedroom window, or the conversation which the "bugging device" overhears does not reveal anything shameful or scandalous.[42] This is because the mere unwarranted intrusion on Y's privacy is here sufficient to constitute the crime.

10 Violation of dignity or privacy must be serious *Crimen iniuria* is punishable only if the violation of Y's dignity or privacy is of a sufficiently serious or reprehensible character to merit punishment in the interests of society.[43] In *Walton*[44] the court stated: "In the ordinary hurly-burly of everyday life a man must be expected to endure minor or trivial insults to his dignity." Although the requirement that the violation of the *dignitas* should be serious may be vague, it is nevertheless necessary.[45]

It is difficult to propound hard and fast rules for distinguishing the trivial *iniuriae* from the serious ones. What is of a sufficiently serious character depends to a large extent upon the modes of thought and conduct prevalent in a particular community at a particular time and in a particular place[46] and is, in principle, determined by an objective test.[47] Much will depend upon the relationship

---

41 *Holliday* 1927 CPD 395 401–402; *Daniels* 1938 TPD 312.

42 *A* 1971 2 SA 293 (T) 298C.

43 *S* 1955 3 SA 313 (SWA) 316; *Jana* 1981 1 SA 671 (T) 676A; *Seweya* 2004 1 SACR 387 (T). It has sometimes been explicitly stated that the test of gravity is whether the conduct is likely to have results that may detrimentally affect the interests of the state or the community – *Walton* 1958 3 SA 693 (R) 695; *Momberg* 1970 2 SA 68 (C) 71H; *Jana* 1981 1 SA 671 (T) 676A. For a critical discussion of this requirement see Van der Berg 1988 *THRHR* 54 ff.

44 1958 3 SA 693 (R) 695. See also *S* 1964 3 SA 319 (T) 322H: "Now, not every insulting word can be made the subject of a criminal charge. Chaos in the courts would otherwise result."

45 In *Bugwandeen* 1987 1 SA 787 (N) 796A the Natal court, after an examination of the authorities, rejected the requirement that the *iniuria* be serious in order to be punishable, stating that this requirement was so nebulous as to lead to arbitrariness in its application. It is submitted, with respect, that the court's view is incorrect. It is hardly reconcilable with the court's own statement immediately afterwards that the impairment of dignity should be "real and substantial"; that *iniuriae* of a trivial nature should be excluded on the principle *de minimis non curat lex*; and that "[i]n deciding whether the *injuria* . . . merits a conviction of *crimen injuria*, the Court has to some extent to pass a value judgment in regard to the reprehensibility . . . viewed in the light of the principles of morality and conduct generally accepted as the norm in society" (796B–D). Why should a court employ these criteria if even slight *iniuriae* were punishable? It would seem that the difference between the court's approach and that advocated above (*viz* that only serious *iniuriae* are punishable) is more a matter of terminology than of substance.

46 *Walton* 1958 3 SA 693 (R) 695–696; *A* 1971 2 SA 293 (T) 299A–B.

47 *Olakawu supra* 360G; *A* 1971 2 SA 293 (T) 298.

between the parties, such factors as the age and sex of X and Y, the persistence of the conduct complained of, the degree of publicity attached to the conduct, the relative social positions of the two parties, the fact that the insult is addressed to a public official such as a traffic officer or a policeman who is acting in his official capacity,[48] or the fact that the insult has a racial connotation.[49] If a woman is insulted by a stranger, this will be viewed more seriously than when she is insulted by somebody she knows.[50] If a man indecently exposes himself to young and immature girls this may be viewed in a more serious light than such conduct directed at adult women.[51]

11 Unlawfulness Several possible grounds of justification may negative the otherwise unlawful character of the act, for example, consent,[52] necessity and self-defence.[53] If someone violates another's privacy the infringement may also be justified by the fact that he is acting in an official capacity or with legal authority (eg a policeman searching a house for evidence of a crime).

12 Intention The crime can be committed intentionally only, and negligence can never be sufficient.[54] Intoxication may result in X's not being aware that he is violating Y's dignity or privacy.[55] X must know that he is violating Y's dignity, and this implies that he must know that Y did not consent to his conduct.

B CRIMINAL DEFAMATION

1 Definition Criminal defamation consists in the unlawful and intentional publication of matter concerning another which tends to injure his reputation.[56]

2 Elements of crime The elements of the crime are the following: (*a*) the *publication* (*b*) of *a defamatory allegation* concerning another (*c*) *unlawfully* and (*d*) *intentionally*.

3 Origin The crime, which is known as "criminal defamation" in order to distinguish it from civil defamation, is a form of *iniuria*. It differs from other forms of *iniuriae* in that it is not a person's bodily security (corpus) which is injured, nor his *dignitas* (dignity), but his good name or reputation (*fama*) amongst his fellow-men.[57] For about a century it was uncertain whether verbal

---

48 *Momberg* 1970 2 SA 68 (C); *Bugwandeen* 1987 1 SA 787 (N). In *Sharp* 2002 1 SACR 360 (Ck) X called Y, a female police officer, a "bitch". The court held (372) that X had not committed *crimen iniuria* because Y must have been called such a name on different occasions in the course of exercising her profession. It is submitted that this judgment is incorrect. Police officers, including female officers, are also entitled to protection of their dignity.

49 *M* 1979 2 SA 25 (A) 28; *Bugwandeen supra*.

50 *Van Meer* 1923 OPD 77 80; *Olakawu supra* 359, 360F.

51 *Kobi supra* 1108; *M* 1915 CPD 334 340.

52 *Curtis* 1926 CPD 385 388–389; *Heyneke* 1959 2 PH H185 (O).

53 *Ndlangisa* 1969 4 SA 324 (E).

54 *S* 1964 3 SA 319 (T) 321. For cases of *dolus eventualis*, see *A* 1971 2 SA 293 (T) 299F and *K* 1975 3 SA 446 (N) 451.

55 *Sharp* 2002 1 SACR 360 (Ck) 372*h–i*.

56 *Hoho* 2009 1 SACR 276 (SCA) par 23.

57 For the classification of *iniuriae* in our common law, see *supra* XV A 3.

defamation (slander) was criminal. In 1951 this uncertainty was resolved in *Fuleza*[58] when the Appellate Division held that it was. Though the crime is of Roman-Dutch origin,[59] English law has exerted a considerable influence on its development, especially via the civil cases of defamation. Criminal defamation covers both defamation in writing (libel) and verbal defamation (slander).[60]

4 Existence of crime confirmed Before 2009 it was uncertain whether the crime existed in our law. Various writers argued that the crime no longer existed or that it ought no longer to exist.[61] Prosecutions for this crime are rare, despite the fact that defamation of other people occurs daily. Since 1953 there has been no reported judgment in which a person has been convicted of this crime.[62] People who are defamed may claim damages from the alleged defamer in the civil courts. In everyday life many people are defamed, sometimes seriously, by others without the defamer being prosecuted for criminal defamation in the criminal courts. The impression one gets is that the prosecuting authorities charge people with criminal defamation only if the defamed person is a prominent person in society, such as a politician or a judge.[63] It is hard to justify this tendency towards "selective prosecution".

In 2009 the question whether the crime still exists and whether its existence is compatible with the provisions of the Constitution came before the Supreme Court of Appeal in *Hoho*.[64] In a unanimous judgment the court held that the crime had not ceased to exist because of disuse, that there are no good reasons why it should not still exist, and that its existence is not incompatible with the provisions of the Constitution.

The problem with this decision, however, is that it has not removed the criticism that in everyday legal practice the criminal law does not protect every person's right to a good reputation on an equal basis. The South African prosecuting authorities, who are already hard pressed to prosecute everybody with committing the many serious crimes committed in this country, will hardly waste their precious time to prosecute people who have defamed others who do not hold a prominent position in society.

If the Supreme Court of Appeal had held that the crime should be restricted to cases in which a person seriously defames another, there might perhaps still have been a rational ground for the restriction of prosecutions to really serious instances of the violation of another's reputation, as where prominent people in

---

58 1951 1 SA 519 (A).

59 D 47 10; Huber *HR* 6 10 1, 2; Van Leeuwen *RHR* 4 37 1; Voet 47 10; Matthaeus 47 4; Van der Keessel 47 10; Decker 4 37 1.

60 *Japel* 1906 TS 111; *McIver* 1929 TPD 574. Examples of libel are to be found in *Shaw* (1884) 3 EDC 323 and *MacDonald* 1953 1 SA 107 (T).

61 Van den Berg 1989 *SALJ* 276; Labuschagne 1990 *THRHR* 391; *Burchell and Milton* 741. See also the discussion in *Hoho* 2009 1 SACR 276 (SCA) par 16, 32

62 *Hoho supra* par 8.

63 Cf *Revill* 1970 3 SA 611 (C) (judge defamed); *Modus Publications (Private) Ltd* 1998 2 SACR 465 (ZS) (President Mugabe of Zimbabwe defamed). In *Hoho supra* the speaker of the Eastern Cape legislative assembly, members of that body as well as cabinet ministers were defamed.

64 2009 1 SACR 276 (SCA), discussed by Hoctor 2013 *Obiter* 125; 2008 *SACJ* 254; Freedman 2009 *SACJ* 471.

society are defamed. However, the court in *Hoho* expressly held that violations of other peoples reputations are criminal even if the degree of violation is not serious.[65] The court held that, in order to prevent non-serious cases coming before court, courts can apply the *de minimis rule*.[66] It is, however, difficult to understand how serious defamation committed against an ordinary person who does not occupy a prominent position in society, will not be prosecuted merely by applying the *de minimis* rule. It is almost certain that prosecutions for this crime will in practice be restricted to cases of defamation which are of a serious nature. It is very difficult to agree with the court's decision that even non-serious instances of defamation still falls within the ambit of the crime.

5 Publication of defamatory matter A person's good name or reputation (*fama*) 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.[67] If the conduct comes to the notice of Y only, it can at most amount to *crimen iniuria* if Y's *dignitas* has been impaired. 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.[68] Mere "vulgar abuse" is not likely to lower the reputation of the person to whom it is addressed, and this would therefore ordinarily not amount to defamation.[69]

6 Unlawfulness The publication of defamatory matter which is otherwise *prima facie* unlawful may be justified on the grounds (*a*) that it is the truth and that, in addition, it is for the public benefit that it be made known;[70] (*b*) that it amounts to fair comment,[71] or (*c*) that the communication is privileged.[72] These grounds of justification do not differ from the well-known defences available to the defendant in a civil defamation action.

8 Intention 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. This implies that X must intend the communication to come to the notice of somebody other than the person to whom it is addressed, and that he must intend the allegation to refer to Y (not to somebody else). If he thinks that his words are covered by the defences of truth and public interest, fair comment or privilege, he lacks the necessary intention.[73]

---

65 *Hoho supra* par 21-22.
66 On this rule, see *supra* IV J.
67 *Mabona* 1935 TPD 407; *Gibson* 1979 4 SA 115 (D) 142.
68 *McIver* 1929 TPD 574 578; *Revill* 1970 3 SA 611 (C) 615–616.
69 *Walton* 1958 3 SA 693 (R) 696.
70 *Revill supra*. An accused who relies on this defence must plead it expressly – s 107 of the Criminal Procedure Act 51 of 1977.
71 *Shaw* (1884) 3 EDC 323 325; *Modus Publications (Private) Ltd supra* 154*h.*
72 *Ginsberg* 1934 CPD 166 178; ss 58 and 71 of the Constitution of the Republic of South Africa 108 of 1996.
73 D 47 10 3 2; *Maisel v Van Naeren* 1960 4 SA 836 (C) 840.

CHAPTER

XVII

CRIMES AGAINST FREEDOM OF MOVEMENT

A KIDNAPPING

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.[1]

2 Elements of crime The elements of the crime are the following: (*a*) the *deprivation* of (*b*) a person's *freedom of movement* (or *the parental control* in the case of a child) which takes place (*c*) *unlawfully* and (*d*) *intentionally*.

3 Appellation The crime is derived from the *lex Fabia de plagariis* in Roman law,[2] and was known in common law as *plagium*.[3] In South Africa it has in the past been given many names, such as "manstealing", "womanstealing", "childstealing", "*plagium*", "kidnapping", and in Afrikaans "menseroof", "kinderroof", "ontvoering", "vryheidsberowing" and "kinderdiefstal".[4] It is submitted

---

1 This definition basically follows that given in *Hunt-Milton* 539, which was accepted as correct as far as childstealing (a *species* of kidnapping) is concerned in *Blanche* 1969 2 SA 359 (W) 360D. The definition of *Hunt-Milton* was followed in *Mellors* 1990 1 SACR 347 (W) 350*i–j*. The definition in the text was quoted with apparent approval in *Els* 1986 1 PH H73 (A). In *F* 1983 1 SA 747 (O) 751–752 the Afrikaans version of the definition given in the text was quoted with apparent approval. However, the definition quoted in these authorities used the word "child" instead of the phrase "person under the age of 18 years", which appear in the definition in the text. The reason why the word "child" has been replaced by the words "person under the age of 18 years" in the definition in the text is the provisions of section 17 of the Children's Act 38 of 2005, quoted and explained *infra* par 6.

2 D 48 15; C 9 5; C 9 20.

3 On Roman-Dutch law, see Voet 48 15 Matthaeus 48 12; Moorman 3 3 4; Van der Linden 2 6 3; Van Leeuwen *RHR* 4 38 4. See also the discussion in *Lentit* 1950 1 SA 16 (C) 20–24.

4 For cases where the term "manstealing" was employed, see *Motati* (1896) 13 SC 173 178; *Van Niekerk* 1918 GWL 89; *Mncwango* 1955 1 PH H2 (N); *Jackson* 1957 4 SA 636 (R); *Mabrida* 1959 1 R and N 186. In *Motati* the court stressed that the word "man" (in the term "manstealing") was used in the generic sense of "a human being". In *Levy* 1967

[*continued*]

that the most satisfactory description of the crime is simply "kidnapping", this being the term which most readily conveys to the layman the character and most important essentials of the crime.[5] A human being cannot be the object of theft, and therefore this crime is not a form of theft; descriptions of the crime such as "manstealing", "womanstealing" and "childstealing" ought therefore to be avoided. It is submitted that the best Afrikaans equivalent of "kidnapping" is "menseroof".[6]

The crime can be committed in respect of a man, woman or child.

4 Relation to other crimes It is now firmly established that "childstealing" is not a separate crime but merely a species of kidnapping.[7] The result of the inclusion of childstealing in the crime of kidnapping is that kidnapping has now assumed a dual character: it may infringe either of two interests, namely a person's freedom of movement or a parent's or custodian's control over a child. Where a child is removed without either her own consent or that of her parents both these interests are, of course, infringed.

Kidnapping should not be confused with abduction.[8] The latter crime is committed against parental authority over a minor, whereas kidnapping is in principle committed against a person's freedom – and more particularly freedom of movement. In abduction the minor is removed in order to enable someone to marry her or to have sexual intercourse with her, whereas in kidnapping X's motive for removing Y is immaterial: for the crime to be committed, it is sufficient if X intends to deprive Y of her freedom of movement or Y's parents or custodians of their control. Often X's motive in depriving Y of her freedom is to demand a ransom for her release,[9] but the existence of such an "ulterior purpose" is no requirement for liability, although it is almost invariably a ground for imposing a more severe sentence.[10]

If X demands a ransom, she may also be guilty of extortion.[11]

5 Interest protected Although the interest protected is usually described as "the liberty of another"[12] it is clear that by the term "liberty" is meant liberty in the sense of freedom of movement only.[13] However, the law undoubtedly

---

1 SA 351 (W) and *Long (1)* 1969 3 SA 707 (R) the term "kidnapping" was used but in *Long* 1970 2 SA 153 (RA) 161C the term *plagium* was specifically preferred. Gane, in his translator's note to Voet 48 15, even speaks of "girlstealing", "boystealing" and "babystealing". Some Afrikaans descriptions of the crime are "vryheidsberowing" (*De Wet and Swanepoel* 2 ed 255), "menseroof " (*De Wet and Swanepoel* 4 ed 271; Van der Linden 2 6 3; *Gomba* 1963 4 SA 831 (G) 832) and "kinderroof " (*Lentit supra* 17, 26).

5 This term is also employed by the legislature in part III of the 2nd Schedule to the Criminal Procedure Act 51 of 1977.

6 This is also the term used in the Afrikaans text of part III of the 2nd Schedule to the Criminal Procedure Act 51 of 1977.

7 *Motati supra* 178; *Levy supra* 354C; *Long* 1970 2 SA 153 (RA) 158G, 159F.

8 On abduction, see *supra* XII B.

9 *Levy supra*; *Blanche supra*; *Long supra*; *Naid* 1974 3 SA 706 (A).

10 *Levy supra* 353E; *Naidoo supra* 715–716.

11 Cf *Naidoo supra* 715H.

12 *Motati* (1896) 13 SC 173 178; *Levy* 1967 1 SA 351 (W) 352H, 353.

13 *Naidoo supra* 715F, where the Appeal Court referred to the crime as "the unlawful and intentional deprivation of liberty *of movement*" (italics supplied).

recognises that the crime can also in certain circumstances be committed against a person who consents to her own removal. This is where a child who already has the ability to form an independent judgment of her own consents to her own removal from her parents' or custodians' control. Thus, in *Lentit*[14] it was assumed that Y, a seventeen-year-old girl, was removed willingly, but X's conviction of kidnapping was nevertheless upheld on appeal. Although the term "child" is invariably employed in cases of "childstealing", it is clear that "child" in this respect always means a minor. Where the child has herself consented to her removal it would be inexact to describe the legal interest violated by the crime as freedom of movement. What is violated in such cases is the control exercised over a child by her parents or custodians.

6 Meaning of the words "child" or "minor" Although the word "child" is always used in cases of so-called childstealing, it would appear that the word "child" always meant "a minor". Before 2005 there was no doubt that the word "child" denoted somebody who was a minor in terms of the common law, that is, a person below the age of 21 years. However, section 17 of the Children's Act 38 of 2005 now provides that a child, whether male or female, becomes a major upon reaching the age of 18 years. The effect of this provision on the definition of kidnapping is that the word "minor" as used in the (former) "traditional" definition now means somebody under the age of 18 years.

7 Parent cannot commit crime in respect of own child A parent cannot commit the crime in respect of his or her own child. Accordingly, if the father and natural guardian of a child, having divorced his wife, removes the child from her care in order to keep her in his own care, he does not commit the crime. This is true even if the court awarded the custody and control of the child to the mother.[15] However, this does not mean that the divorced father can with impunity remove a child from the care of the mother to whom the court has awarded custody and control, since by so doing he infringes a court order, and may be guilty of contempt of court.

8 Deprivation of freedom of movement The removal is usually effected by force, but forcible removal is not a requirement.[16] The removal may also be effected by craft or cunning, as in *Long (2)*,[17] where X pretended to be a photographer's assistant who had to fetch a little girl from her school to photograph her, and in this way obtained possession of the girl. The crime can also be committed even though there is no physical removal, as where Y is concealed or imprisoned where she happens to be.[18]

9 Duration of deprivation usually irrelevant It is still not perfectly clear whether deprivation of freedom or control, as described above, must last for a specific period of time, and, if so, how long this period must be. The duration of the deprivation has been regarded as a material element of the crime in some

---

14 1950 1 SA 16 (C) 18. See also *Van Niekerk* 1918 GWL 89.
15 *Hoffman* 1983 4 SA 564 (T).
16 *Fraser* 2005 1 SACR 455 (SCA) 462*g–h*.
17 1969 3 SA 713 (R). See also *Naidoo* 1974 3 SA 706 (A).
18 *Long* 1970 2 SA 153 (RA) 158B, 160B; *Mellors* 1990 1 SACR 347 (W).

cases,[19] and rejected as such in others.[20] The weight of authority seems to favour the view that this "time factor" is immaterial. It is submitted that this is the correct view. The only relevance which the time factor may have (apart from affecting sentence) is in distinguishing kidnapping from some cases of assault involving only a "transient and incidental seizure" of a person for a short period.[21] Deprivation for a short period of only some hours ought, therefore, to be sufficient. Where X has kidnapped Y with the object of demanding a ransom it seems illogical to require that Y's captivity should last for more than a short period. X's very purpose is to obtain the ransom money as soon as possible, and then to release Y as soon as possible.[22] The "time element" may sometimes be of importance in providing evidence of X's intention.[23]

10 Unlawfulness An otherwise unlawful deprivation of freedom may be justified by, for example, official capacity (as where a police officer lawfully arrests someone) or by consent of the person removed, unless she is a child.

11 Intention X must know that Y has not consented to the removal, or, if Y is a child, that her parents or custodians have not consented.[24] X need not intend to deprive Y permanently of her freedom of movement; it is sufficient if she intends to release Y upon payment of a ransom, even if this takes place after a few hours.[25] X's motive in depriving Y of her freedom of movement or the parents or custodians of their control is immaterial for the purposes of liability, although it may affect the degree of punishment.[26]

---

19 *Mncwango* 1955 1 PH H2 (N); *Jackson* 1957 4 SA 636 (R) 637 (overnight detention held to be too short); *Mabrida* 1959 1 R and N 186 (detention of 24 hours "at the most" held to be too short).

20 *Blanche* 1969 2 SA 359 (W) 360; *Long* 1970 2 SA 153 (RA) 161; *Dimuri* 1999 1 SACR 79 (ZH) 84. In *Blanche* the fact that the deprivation lasted only eight hours was held to be immaterial. In *F* 1983 1 SA 747 (O) 752 a removal of only 40 minutes was held to be sufficient. In *Mellors* 1990 1 SACR 347 (W) a deprivation lasting two and a half hours was regarded as sufficient for a conviction.

21 *Long* 1970 2 SA 153 (RA) 158B; *Dimuri supra* 90*c–d*.

22 This also seems to be the principle underlying the judgment in *Blanche supra*.

23 *Long supra* 161A; *Mellors supra* 351.

24 *Van Niekerk* 1918 GWL 89 91.

25 *Long* 1969 3 SA 713 (R) 715–716.

26 Thus, in *Motati* (1896) 13 SC 173 177 X's motive in removing the girl was to employ her as a nurse, and in *Lentit* 1950 1 SA 16 (C) the 17-year-old girl was taken away to look after two small children. In *Levy supra* and *Long supra* the motive was to demand a ransom.

CRIMES AGAINST PROPERTY

CHAPTER
XVIII

CRIMES RELATING TO APPROPRIATION OF PROPERTY

A THEFT

1 Definition A person commits theft if he unlawfully and intentionally appropriates movable, corporeal property which

(*a*) belongs to, and is in the possession of, another;

(*b*) belongs to another but is in the perpetrator's own possession; or

(*c*) 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.[1]

1 The precise reasons for this definition of the crime appear from the discussion which follows. The following definition put forward in *Gardiner and Lansdown* 2 1652 has been accepted as correct in various decisions, such as *Von Elling* 1945 AD 234 236; *Harlow* 1955 3 SA 259 (T) 263; *Sibiya* 1955 4 SA 247 (A) 250–251, and *Kotze* 1965 1 SA 118 (A) 125: "Theft is committed when a person, fraudulently and without claim of right made in good faith, takes or converts to his use anything capable of being stolen, with intent to deprive the owner thereof of his ownership or any person having any special property or interest therein of such property or interest." This definition is unacceptable. It was, for all practical purposes, taken over from s 1 of the English Larceny Act of 1916, which did not reflect Roman-Dutch law, and which in any event no longer applies even in England. Necessary requirements such as unlawfulness and intention are not mentioned, or are clothed in unacceptable, outdated and vague expressions such as "fraudulently" and "without claim of right made in good faith". The definition formulated in *Hunt-Milton* 579, on the other hand, is too short. It reads: "Theft consists in an unlawful *contrectatio* with intent to steal of a thing capable of being stolen." This is no real definition, but a *petitio principii*. The reader remains in the dark about the meaning of *contrectatio*, "intent to steal" and

[*continued*]

2 Elements of crime The elements of the crime, applicable to all forms of the crime, are the following: (*a*) an *act of appropriation*; (*b*) in respect of a *certain type of property*; (*c*) which takes place *unlawfully* and (*d*) *intentionally* (including an *intention to appropriate*).

3 Unusual aspects of crime What is today regarded as theft in our law differs in some important respects from what is regarded as theft in other legal systems, and in all probability even from what an ordinary lay person would regard as theft. It is feasible right at the outset to emphasise these unusual aspects of the crime.

In the *first* place, theft in our law is not limited to acts in respect of other people's property which is in their possession. It also comprises acts in respect of other people's property which happens to be in X's own possession or control. The following is an example of this type of theft: Fearing that his house may be burgled while he is away on holiday, my neighbour requests me to keep a bottle of precious wine belonging to him in my house and to look after it while he 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. I then commit theft of the wine. This type of conduct, which consists in appropriating someone else's property already in X's possession or control, is known as *embezzlement*.[2] Unlike most other legal systems, embezzlement in our law is not a separate crime, but merely a form of theft. In the above definition of theft in paragraph 1, instances of embezzlement are covered by the words in paragraph (*b*): "belongs to another but is in the perpetrator's own possession". Because theft comprises cases of embezzlement, it is not correct to define theft in our law in terms of the *removal* of another's property.

A *second* unusual characteristic of the crime in our law is that it can be committed even if X takes back his own property which is temporarily in another's

---

"thing capable of being stolen". The definition in *Hunt-Milton* is based partially on the classical model for the definition of the crime. The definition in the text is based on the "appropriation model" for the crime. There is more than enough authority in the case law for the use of the appropriation model. For other, short definitions of theft, see *Jona* 1961 2 SA 301 (W) 316G; *De Jager* 1965 2 SA 616 (A) 617 and *Visagie* 1991 1 SA 177 (A) 181H–I: "'n Bondige, en aldus onvolledige, omskrywing van diefstal is die wederregtelike, opsetlike toe-eiening deur 'n persoon van iemand anders se roerende liggaamlike saak."

Generally speaking the definition given in the text above covers the most important requirements for the crime as it developed in Roman-Dutch law. However, our courts have developed a further form of theft which departs from the general requirements for the crime contained in the definition given above to such an extent that it cannot be accommodated in the definition given above. This form of theft can be described as "the unauthorised appropriation of trust funds". If one endeavours to incorporate also the latter form of theft into the general definition of the crime, such an all-embracing definition will be so long that it will no longer qualify as a "definition" (in the sense of a concise résumé of the requirements for the crime) of the crime. For this practical reason no attempt was made to formulate a definition of the crime which also expressly covers the appropriation of trust funds. Snyman in his *A Draft Criminal Code for South Africa* formulated a definition which also covers the appropriation of trust funds (see s 15.1 of the *Draft Code*). However, this definition, which is very complete, is so long that it covers two pages!

2 *Infra* par 12.

lawful possession, as where X, who has borrowed money from Y, has pledged his watch to Y as security for the payment of the debt, and then, before paying his debt to Y, withdraws it from Y's possession without his consent. In the above definition of the crime this type of conduct is covered by the words in paragraph (*c*). This form of theft may be described as the *unlawful arrogation of the possession* of a thing.[3] Since such conduct also amounts to theft, it is incorrect to describe theft in our law in terms of the appropriation of *somebody else's* property.

4 Latin expressions sometimes used Since at least approximately 2000 the courts have consistently described the essence of theft as an unlawful, intentional *appropriation* of certain kinds of property. In the past they often used the old Latin terminology used in the classical texts of Roman and Roman-Dutch law. The act in theft was referred to as *contrectatio*, the requirements of unlawfulness and awareness of unlawfulness as *fraudulosa* and the intention requirement as *animus furandi*. The use of this Latin terminology has become outdated and should be avoided. The courts still sometimes use these Latin expressions. They sound learned and presumably impress a lay person, but ultimately these high-sounding, grandiloquent and allegedly untranslatable Latin words evade the real issue, namely what exactly the conduct and the intent are which are made punishable in terms of this crime.[4]

The crucial requirements of the crime are nowadays simply described with the aid of the concept of appropriation. The requirement of an act is described as an act of appropriation and the additional intention required for a conviction of the crime as an intention to appropriate. This model is applied in the legal systems on the European continent and to a large extent also in English law after 1968. The concept of appropriation is flexible enough to encompass all the different ways in which the crime can be committed according to our common law sources. It is also perfectly reconcilable with what our courts regard as constituting theft. It is susceptible to systematic analysis, and the word "appropriation" is (unlike *contrectatio*) also readily understandable to a lay person. What exactly the concept of appropriation entails will become clear when the act of appropriation and the intention to appropriate are discussed below.[5]

5 Different forms of theft Theft can be committed in various ways. One can distinguish the following four forms of committing the crime:

(*a*) *The removal of property* X commits this form of theft if he removes Y's property, which is in Y's (or somebody else's) possession, and appropriates it. This form of theft comes nearest to the ordinary lay person's view of what theft comprises. This form of theft is set out in subparagraph (*a*) of the definition of theft given above.

(*b*) *Embezzlement* X commits this form of theft if he appropriates Y's property which happens already to be in X's possession or control. This form of theft is set out in subparagraph (*b*) of the definition of theft given above.

---

3 *Infra* par 13.

4 The views expressed in this regard in *Harper* 1981 2 SA 638 (D) 665 are in agreement with the view adopted in the text.

5 *Infra* pars 7(*b*) and 10(*b*).

(*c*) *Arrogation of possession* X commits this form of theft if he takes his own property from the possession of Y, who has a right to its possession which prevails against the owner, for example, by virtue of a lien or a pledge. Here X steals, as it were, his own property. The following is an example of the commission of this form of the crime: X wishes to borrow money from Y. Y is prepared to lend X the money only if X gives him his (X's) watch as security for the repayment of the debt. X gives Y his watch and Y lends X the money. In terms of the agreement, X will get his watch back only after he has repaid Y the amount of money owing. However, before X has repaid Y the money, X takes the watch into his own possession without Y's consent. This type of theft was known in Roman law as *furtum possessionis*. This form of theft is set out in subparagraph (*c*) of the definition of theft given above.

(*d*) *Theft of credit, including the unlawful appropriation of trust funds* X commits this form of theft if he steals money in the form of credit. In most cases the credit has been entrusted to X with the understanding that it is to be used in a certain way, whereupon X then violates the terms under which he is to use it by employing it for some other purpose – usually for his own advantage. What makes this form of theft so different from other forms of the crime is that X commits theft despite the fact that what he steals is neither a corporeal thing nor does it belong to somebody else. It differs from the ordinary principles governing theft to such an extent that it cannot be accommodated under the definition of the crime given above without radically amplifying the ordinary meaning of the words.

6 Arrangement of discussion The further discussion of the crime will be arranged as follows: Firstly, in paragraphs numbered 7 to 10, there will be a discussion of the four general elements of the crime identified above. In this discussion no distinction will be made between the different forms of theft, since the four requirements mentioned apply to all the forms of theft.

Thereafter, in paragraphs numbered 11 to 15, the four different forms of theft, namely the removal of a thing, embezzlement, the unlawful arrogation of possession and theft of credit will be discussed. In this discussion the emphasis will be on those *particular rules* which apply to each of these particular forms of the crime only. Finally, in the paragraphs numbered 16 and 17, the question whether a difference is drawn between perpetrators, accomplices and accessories after the fact in theft is discussed.

7 The requirement of an act

(*a*) "*Appropriation*" *preferable to contrectatio* In Roman and Roman-Dutch law the act required to commit theft was described as a *contrectatio*. *Contrectatio* originally meant the handling or touching of a thing. Our courts still use the term *contrectatio* as a description of the act, but it is clear that our law has long since reached the stage where a thing can be stolen without necessarily being touched or physically handled: one need think only of the situation where X chases the chickens of Y, his neighbour, off Y's property and onto his own without even touching them. In the theft of credit too, there is as a rule no physical contact with any specific notes or coins.

continued

(*b*) *Act of appropriation*[6] In theft in the form of the removal of property the act of appropriation consists in any act in respect of property whereby X:

(*i*) deprives the lawful owner or possessor of his property; and

(*ii*) himself exercises the rights of an owner in respect of the property.[7]

X thus behaves as if he is the owner or person entitled to the property whereas he is not, and in so doing he exercises control over the property himself in the place of the person having a right to it.[8]

An act of appropriation consists of two components: a negative component (namely the exclusion of Y from his property) and 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 if he merely points out to Z a certain property as one belonging to him (X) whereas in fact it belongs to Y, then "sells" the thing to Z, but his (X's) fraudulent conduct is discovered before Z is able to remove the thing. In a set of facts such as this the real owner, Y, has not yet been excluded from the control over his property, and therefore there has been no compliance with the negative component of the appropriation requirement, although the positive component has been complied with.[9]

For the same reason X will not be convicted of completed theft if he is apprehended before he has succeeded in depriving Y of his thing, although he was already in the process of committing acts indicating that he has arrogated to himself the rights of an owner over the thing. An example of such a case is where X, wishing to steal Y's motor car, is apprehended while he is still tampering with the electrical wiring below the steering column but has not yet succeeded in starting the car. He can, however, be convicted of attempted theft.[10]

The view held in some earlier cases that for theft to be committed it is sufficient that there be an assumption of control, *even if Y was not deprived of his property*,[11] is incorrect.[12] If this is all that is required to constitute an act of theft, it would be impossible to distinguish between attempted and completed theft. In the example quoted in the previous paragraph of X being apprehended in Y's motor car, X has already "assumed" control of the car; it is nevertheless clear that he is not guilty of completed theft, but only of attempted theft.

The principle that the mere assumption of control over an article is not sufficient to constitute an act of theft, and that it is further required (for completed

---

6 For a detailed exposition of the concept of appropriation, see Snyman 1975 *THRHR* 29 37–38.

7 *Tau* 1996 2 SACR 97 (T) 102*a–b*; *Nkosi* 2012 1 SACR 87 (GNP) par 20.

8 Snyman 1975 *THRHR* 29 37–38; *Loubser* 64.

9 *Nkosi* 2012 1 SACR 87 (GNP) par 20. It is submitted that it is this principle that underlies the acquittals in *Makonie* 1942 OPD 164 and *Strydom* 1952 2 SA 397 (T).

10 *Jacobs* 1955 2 PH H187 (W); *Josiya* 1970 4 SA 549 (R).

11 *M* 1982 1 SA 309 (O) 312C–D; *Hunt-Milton* 593–596.

12 *Tau* 1996 2 SACR 97 (T); *Nkosi* 2012 1 SACR 87 (GNP) par 20.

theft) that X by his conduct should have excluded Y from his property, is clearly underlined by two judgments, namely *Tau*[13] and *Mzandi*[14]

In *Tau*[15] X exercised control (or at least assumed control) over a piece of raw gold, but the security in the smelting house of the gold mine in which the act took place was so tight that he would never have succeeded in removing the raw gold from the smelting house. The court held that X had not committed theft of the raw gold because he had never succeeded in excluding Y (the gold mine which owned the raw gold) from exercising control over it.[16]

In *Mzandi*[17] X broke into a house, placed articles such as a hi-fi set in a bag and placed it underneath a bed. However, he never removed the article from the house. Apparently his intention was to return later, when it was safer for him, and then to collect the bag, but this never happened. The court correctly held that X had not committed theft of the articles but at most attempted theft, because the real owner had never lost control of his articles. Although X had exercised the rights of an owner, the real owner had never been deprived of the articles.

The fact that appropriation consists of the two components mentioned above does not mean that all acts of appropriation necessarily consist of two separate events. It means only that one cannot assume that there has been a completed act of appropriation unless X's exercising of the rights of an owner in respect of the property has also led to Y being actually deprived of his property. In the vast majority of instances of theft Y's exclusion from his property and X's exercising of the rights of an owner take place by means of a single act. However, in exceptional cases the negative component of the appropriation may be separated from the positive component, as where X throws objects off a moving train and picks them up later. If he is apprehended after throwing them off the

---

13 1996 2 SACR 97 (T).

14 2011 1 SACR 253 (WC).

15 1996 2 SACR 97 (T), discussed by Snyman 1998 *TSAR* 118. *Tau*'s case was followed in *Nkosi supra* par 20 and *Mekula* 2012 2 SACR 521 (ECG) par 6–7.

16 See 102*b–c*, *g–h*, *i–j*. It is submitted that the judgment in *Ncube* 1998 1 SACR 174 (T) is completely erroneous. In this case it was held that X had committed completed theft merely on the strength of evidence that he had moved or lifted a carton box from the back of an open delivery vehicle with the intention of stealing it, before the police arrested him. The judgment is wrong inasmuch as the court regarded the mere assumption of control as sufficient for a conviction of completed theft (175). Y, the driver of the delivery van, was never deprived of the box. She must have been very surprised to learn afterwards that somebody had been convicted of theft of a carton which was on the back of her delivery van but which she was never deprived of, and which she had never even suspected to have disappeared (cf the evidence on 176*b*)! More acceptable is the judgment in *Newman* 1998 1 SACR 94 (C), in which the court refused to convict X even of attempted theft in the following circumstances: he broke into a house, and in an apparent attempt to steal, had only opened the cupboards in the house and thrown the contents on the floor, when he was apprehended by the police. The court correctly did not work with the concept of *contrectatio* but instead required an act of appropriation (98*b*). It is clear that at the time he was apprehended X had already assumed control of the articles, although he had failed to deprive Y of the articles. The judgment in *Nkosi* 2012 1 SACR 87 (GNP) par 20 follows the law as set out in the text.

17 2011 1 SACR 253 (WC).

train but before collecting them from the ground, he can at most be convicted of attempted theft.[18]

The exposition of the act of appropriation thus far has been limited to cases of theft in the form of the removal of property. In cases of theft in the form of embezzlement it is only the positive aspect of appropriation that matters; the negative component of the concept, which consists of Y's exclusion from the property, in reality plays no role, because in these cases Y does not have control or possession of the property – X already has control of the property.

Theft is not a crime that can only be committed by X with his own hands or body. The act of appropriation can also be committed indirectly, that is, through the instrumentality of another.[19] X may even use the owner (Y) himself as an innocent instrument, as where he makes Y, who is unaware of the relevant facts, believe that an article belonging to Y in fact belongs to him (X), and induces Y to hand it to him (X).

8 Property (things) capable of being stolen Theft can be committed only in respect of certain types of property (or things). However, as will be pointed out, there are certain exceptions to this rule. To qualify as property capable of being stolen, the property must comply with the following requirements:

(*a*) The property must be *movable*. An example of immovable property is a farm. Therefore, one cannot steal part of a farm by moving its beacons or fences.[20] 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[21] and trees cut down to be used as firewood.[22]

(*b*) The property must be *corporeal*, that is, an independent part of corporeal nature. Thus, one can steal neither an idea,[23] nor "board and lodging".[24] If X unlawfully (ie, without consent) "takes over" "an idea" discovered or invented by Y dealing with, for example, how to build a certain type of machine, or unlawfully copies an architectural plan drawn up by Y, representing it as his own, or if X, a musician, sings a tune composed by Y on a CD representing it as his own composition, X cannot be charged with theft of such an idea, patent, "plan" or "tune". Y may take legal action against X for X's violation of copyright, patent right or some principle of intellectual property law. It is also conceivable that X may render him guilty of fraud if he fraudulently represents a plan or tune

---

18 Cf the facts in *De Swart* 1948 1 PH H49 (C): X wanted to steal clothes from a house by, firstly, throwing them out of the window and then, later, collecting them outside the house. However, it was proved only that he had thrown them out of the house. He was correctly not found guilty of theft.

19 *Karolia* 1956 3 SA 569 (T); *Bergh* 1975 3 SA 359 (O) 369H; *Graham* 1975 3 SA 569 (A).

20 On the rule that movable property cannot be stolen, see D 47 1 1 8; D 47 2 25 *pr*; Inst 2 6 7; Voet 47 2 3; Matthaeus 47 1 1 8.

21 *Skenke* 1916 EDL 225.

22 *Williams* 7 HCG 247. See further *Hendricks* 17 CTR 470 (lead piping detached from a house); *Shandu* 1927 TPD 786.

23 *Cheeseborough* 1948 3 SA 756 (T).

24 *Renaud* 1922 CPD 322.

to be his own whereas it is in fact not his own. It follows that claims or rights cannot be stolen, and that mere breach of contract cannot amount to theft.[25]

The rule that only corporeal property is capable of being stolen should, however, be viewed circumspectly. Since Roman times the law has recognised the possibility that an owner may steal his own thing from a possessor (*furtum possessionis*, or "the unlawful arrogation of the possession of a thing").[26] Yet is it really the thing itself that is stolen here? While it is true that the act is here directed at a corporeal thing, what is infringed is the possessor's right of detention, which is a right and not a thing. Furthermore, as will be seen in the discussion below of the theft of money, the courts have long recognised that when money is stolen by the manipulation of cheques, banking accounts, funds, false entries, and so forth, it is not corporeal things such as specific notes or coins which are stolen but something incorporeal, namely "credit".[27]

In *Harper*[28] it was held that shares (as opposed to share certificates) could be stolen. The court stated that the idea that only corporeal property could be stolen was due to the rule of Roman law that there had to be some physical handling (*contrectatio*) of the property, and added that once the courts have moved away from the requirement of a physical handling, the reason for saying that there can be no theft of an incorporeal object in any circumstances would seem to have fallen away. However, the basic rule is discarded only in cases of theft of money or credit – which will be discussed below.[29]

Can electricity be stolen? There are two opposing judgments on this matter. In *Mintoor* (1996)[30] it was held that electricity cannot be stolen. The court based its decision on *inter alia* the consideration that electricity is not a particular material, but a situation of tension or movement of molecules. It is a form of energy. A cyclist who holds onto a moving truck can be said to "appropriate" for himself the truck's "energy", but he does not commit theft of the "power" or "energy".[31]

In *Ndebele* (2012),[32] on the other hand, the court ruled that it can be stolen, because the energy in electricity amounted to an appropriation of a characteristic of a thing, namely an electron. The court based its finding on reasoning analogous to the reasoning in previous decisions which held that money in the form of credit may be stolen.

It is submitted that the decision in *Mintoor* is to be preferred and that electricity is accordingly not to be regarded as a thing capable of being stolen in

---

25 *Gebhard* 1947 2 SA 1210 (G); *Matlare* 1965 3 SA 326 (C). On the problems relating to theft of information through a computer, see *Van der Merwe* 195–199, Skeen 1984 *SACC* 262; Ebersöhn 2004 *THRHR* 22.

26 *Infra* par 13.

27 See eg *Kotze* 1965 1 SA 118 (A) 123; *Graham* 1975 3 SA 569 (A) 576. See further *infra* par 15.

28 1981 2 SA 638 (D) 666. See also *Kimmich* 1996 2 SACR 200 (C) 210*f–g*.

29 *Infra* par 15.

30 1996 1 SACR 514 (C).

31 S 27(2) of the Electricity Act 41 of 1987 provided that any person who abstracts, branches off or diverts any electric current or uses such current commits an offence and is liable on conviction to the penalties which may be imposed for theft.

32 2012 1 SACR 245 (GSJ).

terms of the common-law crime of theft.[33] Such a view accords better with the cardinal principle of legality in criminal law,[34] according to which a court may not create a crime or substantially alter the meaning or scope of the elements of an existing crime, especially by means of analogy. It may be conceded that, given the large-scale unlawful appropriation of electricity in this country, there is a great need for the criminalisation of this type of conduct. When *Mintoor* was decided in 1996, the Electricity Act 41 of 1987 which then applied, contained a provision in section 27(2) stating that any person who abstracts or diverts any electric current commits an offence and is liable on conviction to the penalties which may be imposed for theft. This Act of 1987 was replaced by a new Electricity Regulations Act, 4 of 2006, which for some inexplicable reason does not contain a similar provision.

It is submitted that if the legislature fails to criminalise this type of conduct, it is not the task of the courts to fill this vacuum merely because they think it would be a good thing to criminalise such conduct. It is the task of the legislature to do this. It is not the task of a court to fill what it considers gaps in legislation by itself creating a crime or extending the scope of an existing crime by analogy. *Iudicis est ius dicere, sed non dare* – the task of a court is not to create law, but to apply it. This is one of the cornerstones of our democratic Constitution, namely that the lines of demarcation between the tasks of the legislature, the executive and the judicial branches of government should not become blurred. The judgment in *Ndebele* will lead to the concept of "a thing capable of being stolen" becoming too abstract and wide. It may lead to the mere unauthorised use of an idea, a plan (such as an architectural design), information, the plot of a story or the tune which a successful pop artist sings, also amounting to theft. Such a situation would be untenable. Where is one then to draw the line?

(*c*) The property must be *in commercio*, that is, available in commerce or capable of forming part thereof. 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:

(*i*) *Res communes*, that is, property belonging to everybody, such as the air, the water in the ocean or in a public stream.[35]

(*ii*) *Res derelictae*, that is, property abandoned by its owners with the intention of ridding themselves of it.[36] Property which a person has merely lost, such as money which has fallen out of a person's pocket, is not a *res derelicta*, because such a person did not have the intention to get rid of it.

---

33 In her discussion of the *Ndebele* judgment Jordaan 2012 *SACJ* 316 expresses a similar concern about the unacceptable consequences of the decision. However, for a contrary view, see D'Oliveira 2012 *THRHR* 312, who welcomes the decision in *Ndebele*, describing it as "long overdue and realistic".

34 *Supra* I F 11.

35 *Laubscher* 1948 2 PH H46 (C); *Mostert* 2010 1 SACR 223 (SCA) par 22–23, discussed by Van der Schyff and Van der Walt 2012 *SACJ* 297.

36 D 47 2 43 5; *Madito* 1970 2 SA 534 (C); *Rantsane* 1973 4 SA 380 (O); *Cele* 1993 2 SACR 52 (N) 54*i*.

It can normally be accepted that articles thrown out by householders in garbage containers or thrown onto rubbish dumps are *res derelictae*.

(*iii*) *Res nullius*, that is, property belonging to nobody although it can be the subject of private ownership, such as wild animals or birds.[37] 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.[38]

(*d*) 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*).[39] If property belongs to two or more joint owners, the one can steal from the other(s).[40]

9 Unlawfulness The unlawfulness of the appropriation may be excluded by grounds of justification such as consent, presumed consent (*negotiorum gestio*)[41] and necessity.

In practice the only ground of justification which is regularly encountered is consent. The appropriation is not unlawful where Y consents to it, even if X is unaware of such consent or thinks that no consent has been given.[42] Where Y, as part of a prearranged plan to trap X, fails to prevent X from gaining possession of the property, although he knows of X's plans, there has been no valid consent to the taking. Y has merely allowed it in order to trap X.[43] Where Y hands over his property because he is threatened with personal violence if he refuses, there is similarly no consent and the taking amounts to theft.[44] The position is the same where consent is obtained by fraud or false pretences.[45]

10 Intention requirement

(*a*) *General* It is firmly established that the form of culpability required for theft is intention. The intention to steal is sometimes referred to as *animus furandi*. The crime can never be committed negligently. According to the general principles of intention, the intention (and more particularly X's knowledge) must relate to the act, the definitional elements of the crime as well as the unlawfulness. The Supreme Court of Appeal has endorsed this view when, in a unanimous judgment by five judges in *Boesak*[46], it held that "(t)he intent to steal . . . is present where a person (1) intentionally effects an appropriation

37 D 47 2 26 *pr*; *Mafohla* 1958 2 SA 373 (R) (wild kudu); *Mnomiya* 1970 1 SA 66 (N) 68 (no theft of honey or wild bees).
38 Inst 2 1 13–14; *Maritz* (1908) 25 SC 787 (fish in a river); *Sefula* 1924 TPD 609 610 (animals in zoo); *S* 1994 1 SACR 464 (W) (snake removed from zoo).
39 *Infra* par 13.
40 D 47 2 45; Voet 17 2 28; 47 2 4; *Pretorius* 1908 TS 272; *MacLeay* 1912 NPD 162.
41 Eg while my neighbour is away on leave his house is threatened by flood waters. I take his furniture and store it in my house until he returns.
42 D 47 2 48 3; D 47 2 46 8; Inst 4 1 8; Matthaeus 47 1 1; Huber *HR* 6 5 20.
43 Inst 4 1 8; *Ex parte Minister of Justice: in re R v Maserow* 1942 AD 164; *Sawitz* 1962 3 SA 687 (T).
44 *Ex parte Minister of Justice: in re R v Gesa; R v De Jongh* 1959 1 SA 234 (A).
45 *Ex parte Minister of Justice: in re R v Gesa; R v De Jongh supra* 240; *Hyland* 1924 TPD 336; *Stanbridge* 1959 3 SA 274 (C) 280; *Heyns* 1978 3 SA 151 (NC).
46 2000 1 SACR 633 (SCA) par 97.

(2) intending to deprive the owner permanently of his property or control over his property (3) knowing that the property is capable of being stolen, and (4) knowing that he is acting unlawfully in taking it". The act of appropriation, the property requirement and the requirement of unlawfulness have all been discussed above. In the discussion which follows the intention in respect of each of these three basic requirements will be discussed separately.

(*b*) *Intention in respect of the act, ie intention to appropriate* All authorities agree that intention in respect of the act does not consist merely in X's knowledge or awareness that he is, generally speaking, "performing some or other kind of act" in respect of the property. Even an awareness by X that he is *handling* the property or *exercising control over it*, is not sufficient, even if such awareness is accompanied by knowledge that the property belongs to somebody else and that such other person has not consented to the handling of the property. All authorities agree that, in order fully to describe the intention required for theft, some further intention, apart from that mentioned above, is required. If no such additional intention were required, conduct such as the following, which by general agreement ought not to be punishable as theft, would indeed qualify as theft: (*a*) X maliciously conceals Y's property so that he cannot find it;[47] (*b*) X temporarily uses Y's property without his permission but returns it;[48] (*c*) X takes Y's property without his permission and keeps it as pledge in order to bring pressure to bear upon Y to repay a debt he owes X;[49] or (*d*) X simply damages Y's property or sets fire to it.

To qualify as theft, X's state of mind must encompass something more than merely the knowledge, described above, relating to the property and the unlawfulness, and something more than mere knowledge relating to the act in the sense "that X knows that he is handling an article or is in the process of gaining control of it" or something similar. This additional intention refers to the objective which X aims to achieve by means of his act; unlike the intention relating to the property and the unlawfulness, it relates to X's will (conative element of intention) and not his knowledge of existing facts (cognitive element of intention).

It is now firmly established in our law that the additional intention referred to above consists of an intention to appropriate the property. This intention best describes the mental state which is characteristic of a thief. Such a description of the intention requirement is completely reconcilable with our case law; the courts, including the Supreme Court of Appeal,[50] regularly use the expressions "appropriate" and "intention to appropriate" in their descriptions of the crime.

What was said above[51] in respect of the act of appropriation applies *mutatis mutandis* to the intention to appropriate: just as the act of appropriation presupposes both (a) an exclusion of Y from his property (negative component), and (b) X's exercising of the rights of an owner (positive component), so the intention to appropriate encompasses both (a) the intention of depriving Y of is

---

47 *Lessing* 1907 EDC 220; *Engelbrecht* 1966 1 SA 210 (C).
48 This is not theft – *infra* par 14.
49 This is not theft – *infra* par 10(*c*).
50 *Visagie* 1991 1 SA 177 (A) 181; *Boesak* 2000 1 SACR 633 (SCA) par 97.
51 *Supra* par 7(*b*).

control over the property (negative component) and (b) the intention of exercising the rights of an owner over the property himself, instead of Y (positive component).

(*c*) *Intention permanently to deprive the owner* The intention of depriving the owner of his property (negative component) is further qualified in an important respect, namely that X must intend *permanently* to deprive the owner of his property. Only then does X have the intention to appropriate the property. Where he intends to deprive Y of his property only temporarily he at all times respects and recognises Y's ownership or rights in respect of the property. This is contrary to the very essence of appropriation. The usual meaning of "appropriate" is "to make something your own"; this, however, cannot be said to happen where X intends presently to restore the property to Y substantially intact.

This aspect of the concept of intention to appropriate has an important practical result, namely that to use property temporarily with the intention of restoring it to the owner (*furtum usus*) does not amount to an appropriation and therefore does not constitute theft. This result is in complete harmony with the law applied in the courts, which requires an intention permanently to deprive the owner of his property.[52] The meaning of "intention to appropriate" is therefore wide enough to include an intention permanently to deprive Y of his property.

Where X takes Y's property without his consent, not in order to deal with it as if he were the full owner, but merely to keep it as a pledge or security in order to bring pressure to bear upon Y to repay a debt which Y owes X, X does not commit theft: he remains willing to restore the property to Y as soon as Y has paid his debt, and therefore has no intention of unlawfully appropriating it.[53]

(*d*) *Overlapping of theft and injury to property* There is one type of situation where an application of the requirement of intention to appropriate may result in a conclusion in respect of which there may be differences of opinion. This is where X destroys Y's property before there can be any question of its utilisation by X. One of the rights of an owner is to destroy his own property, and, if X destroys Y's property, it may be argued that in so doing X has assumed the rights of an owner in respect of the property and has therefore appropriated it. In this way acts which in reality amount to injury to property are punished as theft. It is submitted that the borderline between theft and injury to property is not watertight in all respects, and that in cases such as these where property is destroyed, there is a limited field in which these two crimes overlap. It is submitted that in order to decide whether, in such a case, X should be charged with theft or injury to property, one has to decide whether it is the appropriation or the destruction aspect of X's conduct that is most evident.[54]

If one requires an intention permanently to deprive the owner of his property without also requiring an intention to appropriate, it is not possible satisfactorily to demarcate theft from acts which do not amount to theft. It will then be

---

52 *Supra* par 10(*f*). The leading case is *Sibiya* 1955 4 SA 247 (A).

53 *Van Coller* 1970 1 SA 417 (A).

54 For examples of cases in which X has been charged with theft but the evidence revealed that he had only destroyed the property, see the cases referred to *infra* fn 55.

impossible satisfactorily to distinguish between theft and cases of damage to property. There are instances where the aspect of damage or destruction in X's act is far more evident than the aspect of appropriation or theft, and where X should not be convicted of theft but rather of injury to property.

Examples of such instances would be where X, out of spite against his neighbour Y against whom he harbours a grudge, on a visit to Y snatches a glass flowerpot belonging to Y and throws it out of the window onto the stoep where it breaks into pieces; or where X drives Y's cattle over a precipice, causing them to be killed, without performing any further act in respect of the cattle. In these instances X also entertains the intention permanently to deprive the owner of his property, but it would seem clear that he does not commit theft. There are, in fact, certain cases in which the courts (correctly, it is submitted) refused to convict X of theft despite the fact that he did in fact have the intention permanently to deprive the owner of his property.[55] The conclusion reached by the courts in these cases is completely reconcilable with the requirement that X must have the intention to appropriate the property.

(*e*) *No intention to derive a benefit required* Roman and Roman-Dutch law attempted to distinguish theft from acts not amounting to theft by requiring that X should have had an intention of deriving a benefit from his dealing with the property. This requirement is expressed by the words *lucri faciendi gratia*.[56] Under the influence of English law the common-law requirement of *lucrum* was abandoned at an early stage in the development of the crime in South Africa.[57]

Because the old *lucrum* requirement no longer forms part of our law, it follows that a generous motive on the part of X, such as a wish to distribute the stolen goods amongst the poor, does not exclude the intention to steal.[58] The *lucrum* or advantage referred to in this old requirement is simply the converse

---

55 Cf the following cases in which it was held that merely killing another's livestock or merely destroying another's property is not theft, but injury to property: *Maruba* 1942 OPD 51; *Van der Walt* 1946 GWL 42; *Kama* 1949 1 PH H66 (O); *Kula* 1955 1 PH H66 (O); *Dlomo* 1957 2 PH H184 (E); *Blum* 1960 2 SA 497 (E) (In this case X seized his neighbour, Y's, dogs who were trespassing on his property and causing damage. Shortly thereafter the dogs jumped from Y's truck and X omitted to search for them. The dogs disappeared. The court held that X had not committed theft by allowing the dogs to disappear. In this case X did have the intention permanently to deprive Y of his dogs. The only explanation for X's acquittal must be that the court tacitly assumed that, apart from an intention permanently to deprive the owner, X also had to have an intention to appropriate.) *Kinqa* 1962 2 SA 401 (E); *Vilakazi* 1967 2 PH H280 (N). In cases such as *Lessing* 1907 EDC 220, *Hendricks* 1938 CPD 456 and *Engelbrecht* 1966 1 SA 210 (C) X was found not guilty of theft despite the fact that he clearly had an intention permanently to deprive the owner of his property. In these cases X simply threw Y's article away because he was angry with Y, but without having had any intention to appropriate the article. These cases are completely reconcilable with the requirement that X should have the intention to appropriate the property.

56 D 47 2 1 3. See also D 47 2 55 1; Damhouder 110 3; Moorman 3 2 2; Voet 47 2 1; Huber *HR* 6 5 *pr*; Van der Linden 2 6 2.

57 *Laforte* 1922 CPD 487 499; *Kinsella* 1961 3 SA 519 (C) 526; *Engelbrecht* 1966 1 SA 210 (C) 211–212; *Dreyer* 1967 4 SA 614 (E) 619–620. The clearest rejection of the requirement is in *Kinsella supra*.

58 *Kinsella supra* 526.

of the disadvantage or prejudice suffered by Y: because an intention to derive a benefit is no longer required in our law, it follows *e contrario* that no intention to prejudice Y is required.

(*f*) *Intention in respect of the property* This aspect of the requirement of intention means that X must know that what he is taking or that at which his 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 himself but in respect of which somebody else has a right of possession which prevails against his (X's) right of possession. If X believes that his action is directed at a *res nullius* or a *res derelicta*, whereas the particular piece of property is in fact not a *res nullius* or a *res derelicta*, he lacks the intention to steal and cannot be convicted of theft.[59] If X believes that the property he is taking belongs not to another, but to himself, he likewise lacks the intention to steal.[60]

(*f*) *Intention in respect of unlawfulness* The requirement that the intention must also relate to the unlawfulness requirement means that X must know that Y has not, or would not have, consented to the removal of the property.[61] The intention to steal is also lacking where, although he knows that Y has not or would not have consented, X thinks that he has a right to take the property. These cases are usually referred to as "claim of right" cases. X is here mistaken about the rules of private law.[62]

11 Removal of a thing

(*a*) *General* Thus far the four general requirements which apply to all forms of theft have been considered. Next, the particular forms of theft are considered in more detail. The first, and most obvious, form of theft is the removal of a thing. Here, X removes property belonging to Y which is in Y's or somebody else's possession from Y's or the other person's possession and appropriates it. It is unnecessary to discuss the property requirement, the unlawfulness requirement and the intention requirement as they apply to this particular form of theft, since the principles relating to these three requirements set out above apply without any qualification to this form of the crime. Only the requirement of the act requires further elucidation. As in all forms of theft the act here also consists of an appropriation of the property, but unlike embezzlement, the appropriation

---

59 *Griffin* 1962 4 SA 495 (E) 497; *Rantsane* 1973 4 SA 380 (O) (X removed a mattress cover from a dustbin under the impression that the owner had thrown it away); *Randen* 1981 2 SA 324 (ZA) 325H; *Cele* 1993 2 SACR 52 (N) 55*a–b*. X's knowledge may also exist in the form of *dolus eventualis*. The opposite opinion expressed in *Aitken* 1988 4 SA 394 (C) 401 is, with respect, incorrect and was justifiably criticised – see Oosthuizen 1990 *TSAR* 681.

60 *Ndhlela* 1956 2 SA 4 (N); *Riekert* 1977 3 SA 181 (T) 183.

61 *Sibiya* 1955 4 SA 247 (A) 257; *Herholdt* 1957 3 SA 236 (A) 257; *Heller* 1971 2 SA 29 (A) 46; *Harper* 1981 2 SA 638 (D) 669H–670A, 671F. For more cases in which X was found not guilty because he was unaware that he was acting unlawfully, see *Thebe* 1981 1 SA 504 (B) (X thought that he had the right to take and eat the carcase); *Speedy* 1985 2 SA 782 (A) (X thought that he was entitled to catch his neighbour's goats as a "fine" for trespassing).

62 *De Ruiter* 1957 3 SA 361 (A); *Latham* 1980 1 SA 723 (ZRA).

must here be accompanied by a *removal* of the property from somebody else's possession. It is necessary, briefly, to discuss the removal requirement.

(*b*) *Border between attempted and completed act of appropriation* Whether or not X removed a thing from another person's control is a factual question. What is of importance is not so much the touching, handling or other physical act in respect of the property; neither is the distance it has been removed from where it had originally been necessarily the most important consideration. The decisive criterion is whether X succeeded in gaining control over the property. X gains control over a thing which had not previously been in his own possession or control only if he excluded Y from his control over the thing. Since the thief and the owner have conflicting claims to the property, they cannot both simultaneously exercise control over it; the precise moment at which the owner loses control and the thief gains it is a question of fact.

If X takes Y's thing and carries it away but is apprehended shortly thereafter, before he can succeed in conveying the thing to the precise locality he had in mind, the question arises whether X should be convicted of completed or attempted theft. The test to distinguish between completed and attempted theft is the same as the test to distinguish between a completed and an uncompleted act of appropriation: the question is always whether, at the time X was apprehended with the property, Y had already lost control of the property and X had gained control of it in Y's place. The answer to this question depends upon the particular circumstances of every case, such as the nature of the property, the way in which a person normally exercises control over such type of property, and the distance between the places where the property was taken and where X was caught with it. The mere fact that at the time he was caught, X had already assumed control of the property, does not necessarily mean that he had already committed a completed act of appropriation; the test to determine whether there was a completed act of appropriation is not an assumption of control, but the exercising of control in Y's place – something which is possible only if Y had *lost* control over the property in X's favour.[63]

(*c*) *Theft from a self-service shop* It is sometimes difficult to determine exactly when Y's control ceases and X's commences. This problem is illustrated by the contradictory decisions arising from cases where, in self-service shops, people remove articles from shelves and conceal them in their clothing with the intention of stealing them but are apprehended by shop assistants before they pass through check-out points. In some cases[64] it has been held that this constitutes completed theft, and in others[65] that only attempted theft has been committed. The test to be applied in cases of this nature is the same as the general test to determine whether there was an act of appropriation: one should enquire whether, at the time he was apprehended, X's conduct had already reached a

---

63 *Kumalo* 1952 2 SA 389 (T); *Koopman* 1958 3 SA 68 (G). *Tau* 1996 2 SACR 97 (T) 102. For cases in which the handling of the property had reached the stage where X had already gained control of the property in place of Y (and has therefore been convicted of completed theft), see *Mohale* 1955 3 SA 563 (O) 564, 565; *Tarusika* 1959 R and N 51.

64 *Bertinotti* 1961 1 PH H79 (F); *Xinwa* 1970 2 PH H171 (NC); *Uirab* 1970 2 PH H172 (SWA); *M* 1982 1 SA 309 (O); *Dlamini* 1984 3 SA 196 (N).

65 *Khumalo* 1975 4 SA 345 (N); *Mquabuzana* 1976 1 SA 212 (E).

stage where he exercised effective control over the article. This stage would have been reached only if the owner had lost control over the article.

The latest trend in our case law is to convict X of completed theft if, in a self-service shop, he concealed articles in his clothing and was apprehended before he could pass through the check-out point (assuming that he had the intention to steal).[66] The reason for convicting X of completed theft seems to be the following: although the owners of self-service shops usually take steps to ensure that clients do not surreptitiously remove articles without paying for them, it is practically impossible to keep an eye on all clients at all times. If somebody, intending to steal, has concealed an article in or under his clothing in a self-service shop and is apprehended before he can pass through the check-out point, his apprehension is to a certain extent the result of chance: the security officer who apprehended him might, for example, have been performing his duties in another part of the shop, in which case the client would have succeeded in escaping with the article without paying. For this reason it cannot be said that, in practical terms, the shop owner exercised full and effective control over everything in the shop.[67]

Furthermore, there is merit in the argument that the moment X concealed the article in his clothing, it ceased to be visible to the shop owner and that exactly for this reason the shop owner, from that moment, ceased to exercise control over the article. Viewed in this light, the decisions in which X was convicted of completed theft cannot be faulted.[68] It is submitted, however, that if X is apprehended in a shop or business where the security measures are so tight that it is practically impossible for him to remove articles without being caught, he commits only attempted theft, because in such circumstances the owner retains control over everything on the premises at all times even though X may have placed an article in his trouser pocket temporarily.[69]

12 Embezzlement X commits theft in the form of embezzlement (sometimes also called "theft by conversion") if he appropriates another's (Y's) property which is already in his (X's) possession. The property, unlawfulness and intention requirements in this form of theft need not be discussed, since the principles relating to these requirements set out above apply without qualification to this form of theft. Only the requirement of an act of appropriation needs further explanation.

The possessor commits theft as soon as he commits an act of appropriation in respect of the property with the necessary intention to appropriate. Since in cases

---

66 *M supra*; *Dlamini supra*; Van Oosten 1985 *SACC* 149 ff. On drawing an inference that X, who was apprehended before reaching the check-out point, intended to steal the article found concealed in his clothing, see *Lujaba* 1987 1 SA 226 (A).

67 *Tau* 1996 2 SACR 97 (T) 102*g–h*.

68 The judgment in *Mekula* 2012 2 SACR 521 (ECG), however is incompatible with the above approach. In this case X hid a bottle of whisky in a self-service shop under his clothing, but was apprehended by a security guard before passing the till. The court held that, though he assumed control over the bottle, the owner of the shop was not excluded from his property and therefore X could not be convicted of completed theft but only of attempted theft. It is submitted that this decision is wrong, for the reasons set out above relating the theft from a self-service shop.

69 *Tau supra* 102*i–j*.

of embezzlement X already has possession of the property, the act of appropriation in these cases does not consist of both a positive and a negative component as explained above, but only of a positive component, that is, the actual exercising of the rights of an owner over the property. In principle it is immaterial whether X came into possession of the property because it was entrusted to him or whether it came into his possession by chance, as where somebody else's animal walked onto his land.

The following are examples of acts of appropriation by a person already in possession of the property: X consumes the property, as where he eats another's food or burns another's firewood; or X sells the article,[70] or donates it to somebody, or exchanges it for something else, or uses it to pay his debts. Certain acts, such as branding cattle or the pledging of an article to somebody, do not necessarily amount to acts of appropriation, but are normally regarded as strong indications of the commission of such an act. If, at the time of pledging the article X has no intention of paying his debt, thereby regaining possession of the article, it is easy to deduce that he appropriated it.[71] If, however, he intends paying the debt and believes that he will be in a financial position to do so, it cannot be concluded that he appropriated the article, because his act then amounts to the mere temporary use of somebody else's thing – conduct which does not constitute theft.

If X has come into possession of another's article in an innocent way and thereafter finds out that it is in fact a stolen article, he commits theft if, after such discovery, he sells the article or commits some other act of appropriation in respect of it.[72] A person who finds property which somebody else has lost and then appropriates it, may also be guilty of theft. This is especially so if the owner or lawful possessor can easily be traced, as where the owner's name and address appear on the lost property.[73]

If X buys an article from Y on instalment and in terms of the agreement Y remains the owner thereof until X has paid the last instalment, it follows that X is not the owner of the article he possesses. If, before the last instalment is paid, X disposes of the property without Y's consent, he may be convicted of theft.[74]

In all the above examples of acts of appropriation X performed some positive act in respect of the property. Whether X appropriated property in cases where he merely omitted to act is more problematic. For example, he merely fails to restore the article to the owner on the date agreed on,[75] or merely falsely denies that he is in possession of it.[76] The mere decision by X not to restore Y's article does not constitute an act of appropriation, since mere thoughts or decisions are not punishable.[77] On the other hand it is unrealistic to require that, in order to

---

70 Eg *Attia* 1937 TPD 102; *Markins Motors (Pty) Ltd* 1958 4 SA 686 (N).
71 *Viljoen* 1939 OPD 52; *Van den Berg* 1979 3 SA 1027 (NC).
72 *Attia supra*; *Markins Motors (Pty) Ltd supra*.
73 *Luther* 1962 3 SA 506 (A); *Cele* 1993 2 SACR 52 (N).
74 *Van der Westhuizen* 1965 1 SA 773 (T); *Burstein* 1978 4 SA 699 (T) 604; *Van Heerden* 1984 1 SA 667 (A).
75 As in *Motete* 1943 OPD 55 – X was found not guilty of theft.
76 As in *Kumbe* 1962 3 SA 197 (N) – X was found not guilty of theft.
77 *Groenewald* 1941 OPD 194 198–199; *Motseremedi* 1965 2 SA 220 (O) 221–222.

commit theft, the possessor must necessarily first touch or physically handle the article. Much depends upon the circumstances of each case, as well as X's intention. It is submitted that in certain circumstances it is perfectly possible to construe an act of appropriation from the mere omission to act in a positive way or from the mere failure to supply the correct information to somebody who inquires about the property. If, for example, a shop owner X intentionally fails to hand over to customer Y the change to which Y is entitled, he commits theft. It is therefore submitted that it is perfectly possible to commit theft by means of an omission.

13 Unlawful arrogation of possession (*furtum possessionis*) In these cases the owner steals his own thing by removing it from the possession of a person who has a right to possess it which legally prevails over the owner's own right of possession, such as a pledgee or somebody who has a lien over the property to secure payment of a debt.[78] In *Roberts*,[79] for example, X took his car to a garage for repairs. The garage had a lien 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*[80] 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 a certificate of indemnification. His intention in removing the goods was to claim for their loss from the railways afterwards. He was found guilty of theft.

14 Unlawful temporary use of a thing not theft The situation dealt with here is where X takes Y's property without his permission with the intention of using it temporarily and thereafter returning it to Y in substantially the same condition. Such conduct was regarded as a form of *furtum* in Roman and Roman-Dutch law; it was known as *furtum usus*. This expression means "theft of the use of a thing", since it is not the thing itself, but only its use which is "stolen".

In cases of *furtum usus* X does not intend to deprive Y of his property permanently. His intention is to utilise it temporarily. If one applies the English-law criterion of "intention permanently to deprive the owner" (an intention which, as was seen above,[81] is included in the intention to appropriate) one is forced to conclude that *furtum usus* falls outside the ambit of theft. This is precisely what was decided by our courts, which, since the previous century, have followed English law with regard to this aspect of theft. The leading case in this respect is *Sibiya*,[82] in which the Appellate Division held that *furtum usus* is not a form of theft. After this decision the legislature attempted to fill the gap left in our law by this judgment, and in section 1 of the General Law Amendment Act

78 D 47 2 66 *pr*; Inst 4 1 10, 14; Voet 47 2 4; Matthaeus 47 1 1 8; Vinnius 4 1 10; *Thomas* 1922 EDL 194; *Rudolph* 1935 TPD 79; *Roberts* 1936 1 PH H2 (G); *Janoo* 1959 3 SA 107 (A). In *Nkambula* 1980 1 SA 189 (T) 191 it was emphasised that the right of possession must be a "geldige retensiereg of wettige houerskap van die saak".

79 *Supra*.

80 *Supra*.

81 *Supra* par 10(*g*).

82 1955 4 SA 247 (A).

50 of 1956, created a new statutory crime. This crime will be discussed under a separate heading below.[83]

If X uses another's property temporarily and thereafter abandons it, without caring whether the owner will ever get it back, he runs the risk of being convicted of theft. He commits theft if the inference can be drawn from the evidence that he had foreseen the possibility that Y will never get his property back and if he had reconciled himself to this possibility. X will then be held to have had the intention permanently to deprive in the form of *dolus eventualis*.[84]

The rule that the unlawful temporary use of a thing is not theft is furthermore subject to the following qualification: if X removes *res fungibiles* (ie, articles which are consumed by use, but which can be replaced by a similar article, such as a case of tomatoes, a bag of coal or a can of oil) belonging to Y without Y's consent and uses it, it is no defence for X to allege that he intended to replace the article with a different but *similar* one.[85] Thus, in *Shaw*[86] X removed certain sacks of coal and wood belonging to his employer. He later replaced them with similar sacks of coal and wood. He was nonetheless convicted of theft.

15 Theft of credit, including the unauthorised appropriation of trust funds[87]

(*a*) *General* The fourth form of theft, namely theft of credit, will now be considered. This form of the crime constitutes a particular way in which money can be stolen.

No one will deny that money can be stolen, and where X unlawfully takes cash (notes, coins) from Y's possession and appropriates it to himself there is usually no difficulty in regarding such conduct as theft: X here commits theft by virtue of the general principles applicable to the crime. Notes and coins are,

---

83 *Infra* XVIII B.

84 *Vilakasi* 1999 2 SACR 393 (N) 397–398. In *Laforte* 1922 CPD 487 X removed Y's car from his garage without his permission. He went for a drive in the car intending to return it, but on the return journey collided with a lamp-post. Without notifying anyone, and regardless of whether or not the car was returned to the owner, X abandoned the vehicle at the scene of the accident. He was found guilty of theft. For similar cases, see *Roberts* 1932 CPD 87 92; *Dorfling* 1954 2 SA 125 (E) 126–127; *Engelbrecht* 1966 1 SA 210 (C) 212E; *Van den Berg* 1979 3 SA 1027 (NC). Contrast, however, *W* 1994 2 SACR 777 (N). In this case X abandoned a vehicle which he had removed without intention. He was, however, not convicted of theft. The court declared at 780*f–g* that "to leave a motor vehicle with its number plates and its serial and engine numbers intact cannot, without more, constitute the sort of abandonment contemplated in [the] passage from the [judgments in *Sibiya* and *Laforte*]". The suggestion is that the vehicle may probably be discovered by somebody and that the true owner will then be traced. Whether this train of thought is correct in the light of the spate of theft of motor cars in this country, is debatable. One of the ways in which Y can be deprived of his property is if X destroys it.

85 *Koekemoer* 1959 1 PH H131 (O); *Rusike* 1961 2 PH H254 (R) (both these cases dealt with the theft of petrol); *Herholdt* 1957 3 SA 236 (A) 257; *Berliner* 1966 4 SA 535 (W) 537; *Heller* 1971 2 SA 29 (A) 46 (all the latter cases dealt with the theft of money, which is also a *res fungibilis*).

86 1960 1 PH H184 (G).

87 See generally *Hunt-Milton* 605–615; *Burchell and Milton* 554–560; *Loubser passim*; 1978 *De Jure* 86 ff.

after all, corporeal property, and in this set of facts X is not the owner of the notes or coins.

The most obvious meaning of "money" is corporeal notes or coins. However, "money" may also have a less obvious and more abstract meaning, namely "credit". By "credit" is usually meant a right to claim money from a bank, because the bank is the owner of the money which is in the bank,[88] whereas the bank's client only has a right to claim from the bank. In modern business usage 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. In these cases one can hardly describe the money in issue as tangible, corporeal articles. It would be more correct to describe it as "economic assets", "an abstract sum of money", "a unit representing buying power", or (the word which will be used in the discussion which follows) "credit".

Theft of money in the form of credit, and especially credit entrusted to somebody, was unknown in common law. It is a creation of our courts. One of the most important ways in which this form of theft can be committed is the unauthorised appropriation of trust funds. However, this is not the only way in which credit may be stolen. X can commit theft of credit even if it were not entrusted to him. Most of the discussion which follows will, however, be devoted to the appropriation of trust funds.

(*b*) *Theft of credit which is not entrusted to somebody* Before considering the unauthorised appropriation of trust funds, cases of theft of credit not entrusted to a person are considered.

Assume that Z opens a cheque account at a bank and that he deposits R500 into the account. The bank then becomes the owner of the R500. Z only acquired a right to claim the money from the bank. If the bank issues a cheque book to Z and Z writes out a cheque of R100 in favour of Y and hands the cheque over to Y, it means that Z instructs the bank to pay Y R100 upon presentation of the cheque to the bank, and to diminish his (Z's) claim of R500 against the bank by R100. If X intercepts the cheque and without any authorisation deposits the cheque into his own account, and the bank pays the R100 into X's account, that which is stolen by X is in fact Z's right to claim R100 from the bank. X nevertheless, according to our law, commits theft of the R100 despite the fact that the R100 is not a corporeal thing (tangible coins or notes), but merely a right to claim from the bank – something which (like all rights) is incorporeal.

It is submitted that X also commits theft of credit if he unlawfully comes into possession of Y's credit card, discovers the secret number (the "PIN" number) that Y has to use in order to draw cash from an automatic teller machine, and then uses Y's credit card and secret number to draw cash for himself from an automatic teller machine.[89] If X uses Y's credit card, which he has unlawfully obtained, in a shop to buy himself goods, X is usually charged with fraud, because he has made a misrepresentation to the shop owner that the credit card belongs to him.

---

88 *Kotze* 1965 1 SA 118 (A) 124H.
89 Botha 1990 *SACJ* 231 236.

(*c*) *Theft of credit entrusted to somebody* Generally speaking, theft of credit entrusted to X takes place if credit has been entrusted to X to be applied by him for a certain purpose, and contrary to the conditions in terms of which the funds have been entrusted to him, he then applies the funds for another purpose – mostly for his own benefit. What makes this form of theft unique is that here X commits theft despite the fact that what he steals is neither corporeal property nor property belonging to somebody else.

A feature of this form of theft is that it amounts to certain forms of breach of contract qualifying as theft. The Appeal Court has expressly admitted that this is a distinctive form of theft.[90]

This form of theft is so far removed from other forms of the crime that it cannot be accommodated under the general definition of theft given above, without radically extending the ordinary meaning of the words in the definition. For this reason there is much to be said for the view that here one is not dealing with theft as it originally developed in Roman-Dutch law, but rather with another, separate crime. Nevertheless it is important to bear in mind that in practice somebody who has committed an act falling within the ambit of this form of the crime is charged with *theft*, and not with a crime under a different name, and that if the prosecution is successful, he will be convicted of *theft*.

(*d*) *Unauthorised appropriation of cash entrusted to somebody* Before discussing theft of *credit* entrusted to somebody, consideration is firstly given to how the present form of theft can be committed in respect of *cash*, that is, corporeal coins or notes.

Assume that Y gives X an amount of cash with instructions to use it to pay Y's debt to his (Y's) creditor. X receives the money, but instead of paying Y's creditor with it, he spends it on liquor and a holiday for himself. Usually X combines the cash he receives from Y with his own cash, with the result that, in terms of the principles of private law, X becomes the owner of the cash he received. Nevertheless according to our law X commits theft of the money if he uses it to his own advantage.[91] In these types of cases the rule that one cannot steal one's own property is no bar to a conviction. According to our courts, X receives the money "in trust", because he was not free to dispose of it as he wished. X had to apply the money for Y's benefit. Y, according to the courts, has a "special interest or property" in the money.[92] X's conduct is not merely a breach of contract, giving Y the right to institute a civil action for the repayment of the money, but also constitutes a crime.

The same principles are applied if Y buys something in a shop and gives the shopkeeper, X, an amount of cash which is more than the price of the item purchased. X now has to give Y change, but then intentionally gives Y less than

---

90 *Kotze* 1965 1 SA 118 (A) 123F; *Verwey* 1968 4 SA 682 (A) 687; *Reynecke* 1972 4 SA 366 (T) 384D. On this form of theft see also *Milne and Erleigh (7)* 1951 1 SA 791 (A) 865C; *Manuel* 1953 4 SA 523 (A) 526; *Gathercole* 1964 1 SA 21 (A) 25; *Heller* 1971 2 SA 29 (A) 42; *Graham* 1975 3 SA 569 (A) 576; *Harper* 1981 2 SA 638 (D) 666–671; *Visagie* 1991 1 SA 177 (A) 182–183; *Kimmich* 1996 2 SACR 200 (C) 210–211.

91 See the authorities referred to in previous footnote.

92 *Manuel* 1953 4 SA 523 (A) 526H; *Scoulides* 1956 2 SA 388 (A) 394G–H; *Kotze* 1965 1 SA 118 (A) 125–126; *Graham* 1975 3 SA 569 (A) 577E–F.

he should, or fails to give Y any change at all. The money paid by Y to X is regarded as money given to X "in trust". X is under an obligation to return the correct amount of change to Y. An intentional omission to do so amounts to the theft of the money X has to pay back. In *Scoulides*[93] Schreiner JA explained this principle as follows: "in a case like the present the purchaser hands over the banknotes, not in order to make the seller unconditionally the owner thereof, but only in order to make him the owner if and when the goods and right change are tendered". There is, in any event, a second reason why in this type of case X commits theft of the change: his conduct amounts to the dishonest accounting of money entrusted to him. (It will be pointed out below[94] that the mere dishonest accounting of trust money can in itself constitute theft.)

(*e*) *Unauthorised appropriation of credit entrusted to X* The type of situation considered above dealt with theft of cash (coins or notes), that is, money in the most obvious sense of the word. Next the question how theft can be committed through the unauthorised appropriation, not of cash, but of credit, will be considered.

Assume that Y is a widow whose mental faculties are diminishing fast because of old age, and that X has undertaken to administer Y's financial affairs. As trustee of Y's estate, it is X's duty to receive all funds due to Y and then to deposit them in a banking account of her behalf or to invest them for her at a favourable interest rate. Z makes out a cheque in X's favour, but the funds which the cheques represent are not given to X in his personal capacity, but in his capacity as Y's trustee. The funds are due to Y and are to be utilised for Y's benefit. Z hands over the cheque to X. (The reason the cheque has not been made out in Y's favour and handed over to her is the fact that Y's financial affairs are now handled by X.) X receives the cheque, but in violation of his duties as a trustee, he deposits the cheque into his own account in order to extinguish his own private debt. In this set of facts X is, according to the law relating to trusts, himself the owner of the funds (or expressed technically more correctly: it is he who has the claim against the bank) which the cheque represents. Nevertheless, according to our courts, X commits theft by converting the funds to his own private use.[95]

The recognition of such conduct as theft amounts to a broadening of the traditional principles governing the crime. This is evident from the fact that it is the trustee who is the holder of the account; it is he who has a legal claim against the bank. He is contractually bound to administer a sum of money on behalf of somebody else for a specific purpose, but breaches the terms of the contract by disposing of the money for his own benefit. The complainant usually no longer has any ownership in the money. The trustee breaches the law by failing to fulfil his contractual obligation. This is, in fact, a situation where the breach of contract amounts to theft. What the trustee is stealing is neither a concrete movable corporeal thing (such as notes and coins), nor credit, that is, a legal claim which

---

93 1956 2 SA 388 (A) 394.

94 *Infra* par 15(*g*).

95 *Milne and Erleigh (7)* 1951 1 SA 791 (A) 866C; *Manuel* 1953 4 SA 523 (A) 526; *Kotze* 1965 1 SA 118 (A) 124; *Heller* 1971 2 SA 29 (A) 42; *Graham* 1975 3 SA 569 (A) 576; *Visagie* 1991 1 SA 177 (A) 182–182.

somebody else has against the bank and which he, the trustee, then disposes of in breach of his obligation. It is, after all, the trustee himself who (according to the law relating to trusts) has the legal claim against the bank. What he in fact steals is an abstract sum of money which he is bound by contract to administer or dispose of on behalf of his client for a specific purpose but which he then disposes of for his own benefit, in breach of the obligation.[96]

Although this extension of the ambit of the crime has been criticised,[97] it is now firmly established that money in the form of credit can be stolen, and people are regularly convicted of such theft. What is important, according to the courts, is to consider the economic effect of X's conduct, for example, the reduction of Y's bank credit.[98]

(*f*) *Two possible defences* If money or credit is entrusted to X to be applied by him for a certain purpose but he applies it for a different purpose, there are two possible defences on which he can rely to escape being convicted of theft.

(*i*) *First defence: the existence of a liquid fund* Where X holds money in trust on Y's behalf, or receives money from Y with instructions that it be used for a specific purpose, and X uses the money for a different purpose, he does not commit theft if, at the time he uses the money, he has at his disposal a liquid fund large enough to enable him to repay, if necessary, the money which is supposed to accrue to Y, but which is, in fact, used for a different purpose.[99] The reason for this is that "the very essence of a trust is the absence of risk".[100] A liquid fund is a fund from which money can be withdrawn without delay. An agreement with a bank that the bank will allow an overdraft constitutes such a liquid fund.[101]

(*ii*) *Second defence: money received as part of a debtor-creditor relationship* A distinction is drawn between money held in trust for somebody and money held by an agent or debtor by virtue of a debtor-creditor relationship.[102] This distinction is of great importance in cases in which somebody receives money from another as an agent.

---

96 Loubser 1978 *De Jure* 86 89; *Hunt-Milton* 607–610.

97 *De Wet and Swanepoel* 325 ff; Coetzee 1970 *THRHR* 369.

98 *Solomon* 1953 4 SA 518 (A) 522G; *Sibiya* 1955 4 SA 247 (A) 261; *Reynecke supra* 386C–D; *Scoulides* 1956 2 SA 388 (A) 394G; *Kimmich* 1996 2 SACR 200 (C) 210*a–b*, *h–i*. In *Kotze* 1965 1 SA 118 (A) the Appeal Court held that if X receives cheques in respect of funds due to Y, and should deposit the funds which the cheques represent in favour of Y, but in fact deposits the cheques in settlement of his own private debts, he commits theft.

99 *Wessels* 1933 TPD 313; *Visagie* 1991 1 SA 177 (A) 184.

100 *Incorporated Law Society v Visse* 1958 4 SA 115 (T) 118.

101 *Wessels supra* 315. In *Visagie supra* the Appeal Court doubted *obiter* whether the existence of a liquid fund will *always* offer a trustee a defence. According to the court, this will depend on the circumstances of each case. However, the court admitted that the existence of such a fund will always be strong evidence that X lacked the intention to appropriate the funds entrusted to him.

102 The distinction is derived from s 183 of the old Transkeian Penal Code of 1886, which was described in *Golding* (1896) 13 SC 210 215 as "fairly stating the law of the Colony proper in regard to thefts by agents". This section has regularly been followed by the courts. See eg *Reynecke* 1972 4 SA 366 (T) 384. On the origin and application of the section, see *Loubser* 195 ff; 1978 *De Jure* 86 93.

Where X is an agent who holds money for another *in trust*, the spending of the money by X will amount to theft, unless, as pointed out above, he has a liquid fund of at least equivalent proportions from which to draw.[103] However, where Y lends money to X, and X receives the money as part of a *debtor-creditor relationship*, whereupon he spends the money for a purpose which differs from the purpose for which the money was originally given to him, he does not commit theft. In such a case it is assumed that the person who handed over the money, or on whose behalf it is held, relies upon X's creditworthiness and personal responsibility. If X spends the money he does not commit theft, provided he duly enters the debt on the account which he must render to the creditor.[104]

Whether the money is held in trust or under a debtor-creditor relationship is a question of fact, which in practice may be very difficult to answer. The answer to this question depends upon the intention of the parties when they enter the agreement. However, the parties seldom consciously consider this difference when entering an agreement. One can agree with the statement in *Hunt-Milton*[105] that "the basic question which has to be asked is: did the person entitled (Y) visualize and expressly or impliedly authorize that X should use the money without retaining an equivalent liquid fund? If the answer is yes, it is debtor-creditor money; if no, it is 'trust' money".

Some examples from our case law of money considered by the courts to be held in trust are the following: money handed over to an attorney;[106] money handed over to an auctioneer;[107] money handed over to a liquidator under the Farmers' Assistance Act 48 of 1935;[108] and money handed over to an agent with instructions to be used for a very specific purpose.[109] Some examples of money held to be money held in terms of a debtor-creditor relationship are the following: money received by a bank from a client;[110] and money received by a broker.[111]

(*g*) *The dishonest accounting of trust funds, or failure to account for such funds* If money is entrusted to X and he intentionally omits to account for what he does with the money, or intentionally gives a false account of what he did with the money, he commits theft, provided the circumstances are such that the inference may be drawn that he appropriated the money for himself.[112] In such cases the fact that he had a liquid fund at his disposal does not offer him a defence.

---

103 *Weiss* 1934 AD 41; *Solomon* 1953 4 SA 518 (A) 522–523; *Manuel* 1953 4 SA 523 (A) 526; *Le Roux* 1959 1 SA 808 (T); *Gathercole* 1964 1 SA 21 (A) 25; *Harper* 1981 2 SA 638 (D) 666–671.

104 *Golding supra* 215. *Satisky* 1915 CPD 574 579; *Graham* 1975 3 SA 569 (A) 576C–D.

105 *Hunt-Milton* 608.

106 *Fraser* 1928 AD 484.

107 *Le Roux* 1959 1 SA 808 (T).

108 *Reynecke* 1972 4 SA 366 (T).

109 *Fouché* 1958 3 SA 767 (T).

110 *Kearny* 1964 2 SA 495 (A) 502–503.

111 *McPherson* 1972 2 SA 348 (E).

112 S 183 of the old Transkeian Penal Code, followed in *Golding* (1896) 13 SC 210.

(*h*) *Appropriation of overpayments* Assume that, at the end of a month, employer Y erroneously pays his employee, X, two cheques instead of one, resulting in X receiving twice the salary he is entitled to. If X, aware of the mistake, deposits the double salary in his banking account and spends the money which he knows is not due to him, he commits theft according to our case law. It cannot be suggested that Y has merely trusted X's creditworthiness and has merely created a creditor-debtor relationship, for the simple reason that such a relationship is not created by mistake. It must be accepted that an implied relationship of trust has been created and that X has received the money under a certain condition, namely that it should be returned to Y. In any event, even if one accepts that the overpayment has resulted in a debtor-creditor relationship, X still commits theft since he omits to account properly for the money he has received.[113]

(*i*) *The unlawful* "*temporary*" *use of money* Assume I have to give Z R100 urgently. I discover that I do not have my wallet with me at my office. However, I know that Y, who works in the office next to me, has a R100 note in the top drawer of his desk. I go to Y's office, ascertain that he is not there, open the drawer of his desk and remove the R100 without his consent. I then give the R100 to Z. Assume that I have always had the intention to give Y another R100 note, and that in fact I do so. Would I have committed the crime of theft of the R100?

The courts' answer to this question would be "yes", for the following reason: Money, according to the courts, is a *res fungibilis*, that is, a thing that is consumed by use although it may be replaced by another similar type of thing. In the discussion above[114] of the unlawful temporary use of a thing it was stated that X commits theft (as opposed to the mere non-criminal temporary use of a thing) if he removes a *res fungibilis* (such as a can of oil or a bag of coal) belonging to Y without Y's consent with the intention of later replacing it with another similar thing. The same rule applies if X removes money belonging to Y without his consent with the intention of later replacing it with other money of the same value.[115]

This rule applied by the court may, however, be criticised. The *res fungibilis* exception to the rule that the temporary use of another's property is not theft leads to inequitable results. Apart from this, the courts' view that the unlawful temporary use of money constitutes theft is irreconcilable with the courts' own view that in the case of theft of money, what is appropriated should not be viewed as corporeal notes or coins but as "an abstract sum of money" or "a unit representing buying power" ("credit"). If X at all times intends to pay Y back

---

113 In *Graham* 1975 3 SA 569 (A) X was the managing director of a company which received a cheque for more than R37 000 from Y. The amount was not owing. X knew this, but nonetheless allowed the cheque to be paid into the company's bank account, and used the money to settle the company's debts. The company was financially unsound and its bank account was overdrawn. He was convicted of theft.

114 *Supra* par 14.

115 *Milne and Erleigh (7)* 1951 1 SA 791 (A) 865; *Herholdt* 1957 3 SA 236 (A) 257; *Visagie* 1991 1 SA 177 (A) 183.

an equal amount of money, he does not have the intention of permanently depriving Y of the money's value.[116]

16 Theft a continuing crime; no accessories after the fact The rules relating to participation and accessories after the fact in respect of theft are highly unsatisfactory. The reason for this is, first, the disregard, especially in the earlier cases, of the concept of appropriation and in particular of the intention to appropriate and, secondly, the incorporation into our law of the rule that theft is a continuing crime (*delictum continuum*).

The rule that theft is a continuing crime means that the theft continues to be committed as long as the stolen property remains in the possession of the thief or somebody who has participated in the theft or somebody who acts on behalf of such a person.[117] This rule was unknown in our common law[118] and was introduced into our law in 1876 by Lord De Villiers in *Philander Jacobs*.[119] Since then this rule has been regularly applied in our case law.[120]

The rule has two important effects. The first is procedural in nature: if X steals the property in an area falling outside the territorial jurisdiction of the court he is nonetheless guilty of theft and may be tried and convicted if he is found in possession of the stolen property within the court's territory;[121] since the crime continues as long as he possesses the property; his possession of the property while inside the court's territory means that he commits the offence inside the territory over which the court has jurisdiction and that the court can therefore try him for theft committed inside its jurisdiction.

The second effect of the rule that theft is a continuing crime is that, generally speaking, our law draws no distinction between perpetrators and accessories after the fact. As pointed out above,[122] an accessory after the fact is somebody who helps the perpetrator at a stage when the original crime *has already been completed.* Since theft is a continuing crime, the person who after the commission of the theft assists the thief (who is still in possession of the property) to conceal the property does not qualify as an accessory after the fact, because his assistance is rendered at a time when the original crime (theft) is still uncompleted. The person rendering the assistance is therefore guilty of theft, and not merely of being an accessory after the fact.[123]

---

116 See the justifiable criticism of the rule applied by the courts by Loubser 1978 *De Jure* 86 91.

117 *Attia* 1937 TPD 102 106; *Von Elling* 1945 AD 234 246.

118 See the discussion of this rule in *De Wet and Swanepoel* 349, in which the application of the rule in our law is strongly criticised.

119 1876 Buch 171.

120 *Mlooi* 1925 AD 131 138; *Harmse* 1944 AD 295 300; *Von Elling* 1945 AD 234 245–246; *Bhardu* 1945 AD 813 825; *Sexaba* 1957 4 SA 280 (E) 281; *Brand* 1960 3 SA 637 (A) 640–641; *Kruger* 1989 1 SA 785 (A) 793D–E; *Cassiem* 2001 1 SACR 489 (SCA) 492–493.

121 *Makhutla* 1968 2 SA 768 (O); *Kruger supra* 793; *Dayizana* 1989 1 SA 919 (E).

122 *Supra* VII D.

123 *Brett and Levy* 1915 TPD 53 (X sold wagons for another in full knowledge that they had been stolen); *Mlooi supra* 138, 142; *Harmse supra* 330; *Von Elling supra* (at the request of Y, who had stolen the vehicle, X drove it from one garage to another with the intention of concealing it from the owner: he was convicted of theft as a perpetrator); *Bhardu supra*; *Naryan* 1998 2 SACR 345 (W) 356.

Another reason why a person can, as a rule, not be convicted of being an accessory after the fact to theft is the fact that somebody who, after the commission of the original theft, assists the thief to conceal the property also has the intention permanently to deprive the owner, and, especially in the earlier cases, the courts were so blinded by the requirement of intention permanently to deprive the owner that they did not require any intention to appropriate the property. If one assumes that an intention to appropriate is required for theft, it is indeed possible to differentiate between, on the one hand, the person who intentionally appropriates the property, and on the other, the person who, without entertaining any intention to appropriate, thereafter assists the previous person by merely temporarily looking after the property or concealing it.

One of the very few instances where, in terms of the rules applied by the courts, it would, by way of exception, indeed be possible to be guilty of being an accessory after the fact to theft, is where X assists Z, the original thief, at a stage after Z had already gotten rid of the stolen property, by concealing Z himself from the police or by assisting him to escape. Since Z is no longer in possession of the stolen property at the time that X renders his assistance, he (Z) is not busy committing the "continuous" crime of theft, and therefore X's assistance can, according to general principles, be sufficient to render him guilty of being an accessory after the fact to theft.

If X agrees with Y, the actual thief, before the theft is committed that after the property is taken he will receive it (perhaps at a price) and in fact does, then X is in any event according to general principles not merely an accessory after the fact but in fact a co-perpetrator.[124] In this case X's act did not commence only after Z had obtained the property but already before Z had committed his act. If, on the other hand, X has innocently come into possession of property but discovers afterwards that it is stolen and then commits an act of appropriation in respect of the property, he commits an independent act of theft.[125]

17 No difference between perpetrators and accomplices in theft Just as the courts generally do not differentiate between perpetrators and accessories after the fact when it comes to theft, they do not differentiate between perpetrators and accomplices in this crime. The reason for this unfortunate equation of the two groups of participants can once again be traced to the courts' disregard of the importance of the requirements of an act of appropriation and an intention to appropriate. If one ignores the appropriation concept model for this crime, applying (as the courts did) only the classical and English-law model for the crime, it is not possible to distinguish between perpetrators and accomplices.

Assume that X carries Y's box containing bottles of wine out of Y's house and later drinks all the wine himself. As a favour to his friend X, Z only gives him advice as to how to get hold of the wine (or merely stands guard while X removes the wine) but never receives the wine himself. If one adopts the appropriation concept model, it is easy to draw a distinction in this set of facts between a perpetrator and an accomplice: X is a perpetrator because he appropriated

---

124 *Mlooi supra* 138; *Ex parte Minister of Justice: in re R v Maserow* 1942 AD 164 170; *Von Elling supra* 240–241.

125 *Attia* 1937 TPD 102 105–106; *Bazi* 1943 EDL 222 226; *Kumbe* 1962 3 SA 197 (N) 199.

the wine, but Z is only an accomplice because he neither committed an act of appropriation nor had an intention to appropriate, although he intentionally gave X advice or assisted him and in so doing furthered the commission of the crime. The mere rendering of assistance to or facilitation of another's act of appropriation does not in itself constitute an act of appropriation.

"Appropriate" means "to make something your own". If, as in the above hypothetical set of facts, Z only assists X to "make the wine X's", it cannot be said that Z had also appropriated the wine – that is, "made it his own". If, on the other hand, one does not apply the appropriation concept model but requires only a *contrectatio* committed with the intention permanently to deprive the owner of the thing, the two categories of participants (perpetrators and accomplices) merge: Z must then be regarded as a perpetrator too, since his conduct and intention, like that of X, also complies with these requirements. Even if one assumes that theft is a continuous crime, it ought still to be possible, by applying the appropriation concept model, to distinguish between a perpetrator (ie, a person who (continuously) appropriates the thing) and an accomplice (ie, somebody who only assists without himself also appropriating the thing).[126]

The unjustified equation of perpetrator, accomplice and accessory after the fact described above must be regretted. In other crimes a distinction is drawn between these three groups of persons, and there is no reason why theft should be an exception. The confusion in our case law on this issue can be traced directly to the courts' adoption of the wrong model for the definition of the crime.

B REMOVAL OF PROPERTY FOR USE

1 Background It was pointed out above[127] that the temporary use of another's property without consent (*furtum usus*) was treated as a form of theft in both Roman and Roman-Dutch law (although some of the Roman-Dutch writers were of the opinion that such use by somebody who was already in possession of the property should no longer be punishable). In *Sibiya*[128] the Appeal Court finally decided that such conduct was not a form of theft and was not punishable. In an obvious attempt to make such conduct punishable section 1(1) of the General Law Amendment Act 50 of 1956 was enacted.

2 Definition Section 1(1) of the General Law Amendment Act 50 of 1956 reads as follows:

"Any person who, without a *bona fide* claim of right and without the consent of the owner or the person having control thereof, removes any property from the control of the owner or such person with intent to use it for his own purposes without the consent of the owner or any other person competent to give such consent, whether or not he intends throughout to return the property

continued

126 *De Wet and Swanepoel* 357.
127 *Supra* XVIII A 14.
128 1955 4 SA 247 (A).

to the owner or person from whose control he removes it, shall, unless it is proved that such person, at the time of the removal, had reasonable grounds for believing that the owner or such other person would have consented to such use if he had known about it, be guilty of an offence and the court convicting him may impose upon him any penalty which may lawfully be imposed for theft."

3 Elements of crime The elements of the crime are the following: (*a*) the *removal* of (*b*) *property* (*c*) from *control* (*d*) *unlawfully, that is, without consent* (*e*) with *intent to use it*.

4 Criticism of formulation The subsection is very badly formulated.[129] According to the long title of the Act its aim is *inter alia* "to declare the unlawful appropriation of the use of another's property an offence". The legislature did not succeed in its aim of punishing this type of conduct.

In common law *furtum usus* could be committed in two ways:

1. It could be committed by *extra-contractual borrowing*, that is, where X takes and removes Y's property which is in Y's possession without consent and uses it temporarily. In other words, X uses it with the intention of giving it back to Y after the use. An example of this type of situation is where X takes and removes Y's motor car, which is in Y's possession, without Y's consent, drives the car, and then brings it back to Y.
2. It could be committed by *extra-contractual use* of the thing, that is, where X, who is already in possession of the property because it has, for example, been entrusted to him for safekeeping, uses the property temporarily without the owner's (Y's) consent. An example of this type of situation is the following: Y goes on holiday but fears that his lawnmower may be stolen while he is away. He accordingly asks X, his neighbour, to keep it for him and to look after it while he is away. The agreement between X and Y in no way implies that X may use the lawnmower. X nevertheless uses the lawnmower to cut his lawn while Y is away.

If the legislature wanted to restore the common law, it succeeded only partially in its goal.

As far as *extra-contractual borrowing* is concerned, the subsection only indirectly succeeds in covering such conduct: what the subsection punishes is not the unauthorised *use* of another's property but the *removal* of another's property in order to use it without consent. The emphasis is not on the use but on the removal. If X removes property in order to use it without consent but in fact never uses it, he nevertheless contravenes the subsection.

As far as *extra-contractual use* is concerned, it is difficult for the state to prove that the unauthorised use of property by somebody already in possession of it contravenes the subsection, because in most (though not all)[130] cases in

---

129 See the criticism by De Wet in *De Wet and Swanepoel* 339–342 as well as in 1956 *THRHR* 250 ff; Naudé 1961 *THRHR* 285; Snyman 1977 *SACC* 11 18 ff; 2001 *SACJ* 217; Burchell 2001 *SACJ* 225.

130 "The person who has the detention may or may not be in control of the article depending on the circumstances under which he acquired the article. Such factors as the management

[*continued*]

which X is in control of property, the control is of such a nature that use by X of the property cannot be said to involve a removal from another's control, since X already has control of the property.

The subsection is formulated in typical positivistic style. The legislature seemed to lack faith in the courts' ability to apply the general principles of criminal law. It laboriously tried to cram all the rules relating to unlawfulness (ie, the absence of consent) and culpability into the subsection.[131] However, in doing so it inadvertently created opportunities for X to escape its provisions. The section ought to be re-enacted simply to read that any person who unlawfully and intentionally uses another's movable, corporeal property, irrespective of whether it is in his possession or not, without the consent of such person or of the person having the control of such property, commits an offence.

5 Removal What the subsection punishes is not the unauthorised *use* of another's property (as was the case in common law) but the *removal* of another's property in order to use it without consent. The emphasis is not on the use but on the removal.[132] If X removes property in order to use it without consent but in fact never uses it, he nevertheless contravenes the subsection. On the other hand, if X uses Y's computer or television set throughout the year without Y's consent without ever removing it from where it is placed, he does not contravene the subsection. This is not reconcilable with the legislature's declared aim as expressed in the long title of the Act, namely "to declare the unlawful appropriation of the use of another's property an offence".

6 Property Though the word "property" is not defined in the legislation, it is clear from the history and purpose of the provision that the word must be confined to property capable of being stolen, that is, movable, corporeal articles which form part of commercial life.[133]

7 Somebody else's control The word "control" used by the legislature plays a very important role in the construction of the crime. What is punishable is not the removal for use of property which is in another's *possession*, but such removal which is in another's *control*.

The word control has been described as "an unfortunate word of wide and ambiguous import".[134] X can have control over an article even if it is not in his

---

of the article and the regulation of its use must be taken into account. In order to determine these matters we must look to the nature of the article and the use to which it is intended to be put" – per Diemont J in *Seeiso* 1958 2 SA 231 (GW) 233G–H, endorsed by the Supreme Court of Appeal in *Rheeder* 2000 2 SACR 558 (SCA) 564. Both these cases are examples of situations in which X was convicted of contravening the subsection despite his having some form of control over the property. In *Rheeder supra* 564*b–c* the Supreme Court of Appeal held that the word "control" as used in the subsection must be restricted to full control, that is physical possession together with the final discretion ("geoorloofde seggenskap") over it. See the discussion of this case *infra* par 7.

131 The culpability requirement is covered by the following phrases: "without a *bona fide* claim of right" and "unless it is proved that such person . . . had reasonable grounds for believing that the owner . . . would have consented to such use".

132 *Dunya* 1961 3 SA 644 (O); *Motiwane* 1974 4 SA 683 (NC); *Schwartz* 1980 4 SA 588 (T) 592.

133 For a discussion of property capable of being stolen, see *supra* XVIII A 8.

134 *Seeiso* 1958 2 SA 231 (GW) 233H.

presence, as where he parks his car in the street and then works in his office some distance away. Although the words "possession" and "control" do not have the same meaning, they are nevertheless closely related in meaning. This is the reason why most cases of extra-contractual use (ie, the use of a thing by somebody who is already in possession of the property) falls outside the ambit of the provision.

There may be cases where somebody who can be said to have some type of control over the property, may contravene the subsection. This is where he does not have full control over the property, but only partial control over it, such as where he is only a depository, that is, where he merely has the *detentio* of the property. If X leaves his coat for a few hours in the care of a depository at an airport while he does something else, the person who has the "control" over the coat has no right to wear it himself to fend off the cold. Again, if X leaves his car at a garage for service, the mechanic at the garage who has the "control" over the car may not drive it to the next town to visit his girlfriend. To ascertain whether a person contravenes the subsection when he takes and uses property placed in his control for his own private purposes, depends upon the circumstances of each case, including the nature of the property, the way it is usually utilised and especially the terms under which the owner has placed it in such a person's hands.[135]

Thus, in *Seeiso*[136] it was held that X contravened the provision in the following circumstances: Y, the owner of a car, delivered it to X to have the seating of the car upholstered. Y locked the steering wheel and took the key of the car with him. X then broke the lock of the steering wheel, started the car by meddling with the ignition wiring of the car and then drove around in it. It was held that the terms of the agreement between X and Y was not such that X obtained the "control" (as this word is used in the subsection) of the car.

Again, in *Rheeder*[137] X, who was a police officer in charge of storage premises where stolen motor vehicles found by the police were stored until they could be handed back to their lawful owners, used some of the vehicles for private purposes, such as using one as a wedding car and undertaking a trip in it to the Kruger National Park. He was convicted under the subsection, the Supreme Court of Appeal holding that the word "control" as used in the subsection should be strictly interpreted as meaning not only mere physical possession, but *complete* control, that is, physical possession together with the legitimate final discretion as to its use ("liggaamlike besit met gepaardgaande geoorloofde seggenskap oor die voertuig").[138] According to the court X had control over the vehicles in a restricted administrative capacity only.[139] By narrowing the meaning of the word "control" as used in the subsection, the Supreme Court of Appeal in this case made it easier for the state to obtain a conviction in cases of extra-contractual use.

---

135 *Rheeder* 2000 2 SACR 558 (SCA) 564*b–e*.
136 1958 2 SA 231 (GW).
137 2000 2 SACR 558 (SCA), discussed by Snyman 2001 *SACJ* 217; Burchell 2001 *SACJ* 225 (who criticises the judgment).
138 At 564*b–c*.
139 At 565*c–d*.

Cases resembling extra-contractual borrowing (ie, where X removes property for use in circumstances in which the property is in somebody else's possession) are easier to accommodate within the ambit of the provision. Once again it is important to bear in mind that it is immaterial whether X in fact uses the property. The mere removal of the property with the required intention is sufficient to render X guilty (assuming, of course, that the other requirements for liability have also been complied with).

8 Unlawfulness, that is, absence of consent One of the most important reasons for the (unnecessary) complicated structure of the crime is the curious double way in which consent must be absent. X does not contravene the subsection if he removes Y's property without Y's consent in order to use it. He contravenes it only if he removes it without Y's consent in order to use it without his consent. If X removes the property without consent but with the intention of using it with consent, he is not guilty. Neither is he guilty if he removes it with consent but intends to use it later without consent. Thus, if X takes Y's computer without his consent but intends to phone him later to ask his consent, he is not guilty.

What is the position if X has obtained Y's "consent" to the removal of the property, but such "consent" was based upon false pretences? In *Schwartz*[140] X requested Y to lend him (X) his (Y's) motor car so that he (X) could transport a spare wheel to another motor car one and a half kilometres away. Relying on this pretence, Y lent X his motor car. However, at the time that X made the request, he already intended to drive much further with the car, and in fact did so. The court held that although X had misled Y about the reason for borrowing the car, Y's consent to the taking of the car had been a valid consent and that X had accordingly not contravened the section. It is submitted that this decision is wrong. In cases of theft and theft by false pretences, consent obtained by fraud or false pretences is not regarded as valid consent.[141] There is no reason why the same principles ought not to apply to the crime created in this section.[142]

9 Intent The crime created in the subsection is a crime of double intent. X must, *firstly*, have the intent to remove the property and, *secondly*, the intent to use it for his own purposes without consent.

(*a*) *Intent to remove* The intent requirement is referred to in a clumsy way by the legislature. The first aspect of the requirement mentioned above, namely the intent to remove, is not mentioned at all. However, in the light of the history

---

140 1980 4 SA 588 (T).

141 As to theft, see *supra* XVIII A 9, and as to theft by false pretences, see *infra* XIX C.

142 There can be no doubt that in enacting this section the legislature intended to rectify what was perceived to be a *lacuna* in the law relating to theft. The section must therefore be interpreted in the light of the provisions of the common law. Just as the word "property", as used in this section, must be interpreted as bearing the same meaning as "thing" or "res" in the crime of theft (ie, a movable corporeal thing *in commercio*), the word "consent" as used in the section must be interpreted as bearing the same meaning as the corresponding term in the common-law crime of theft. Thus, if X borrows Y's laptop computer pretending merely to show it to his wife, and Y, relying on this pretence, consents to X's removal of the typewriter, whereas X already at the time of the request intended to type a whole book with it, and in fact does so, Y's "consent" should not be regarded as valid consent, and X should be convicted of contravening the section.

and background of this statutory offence, one must assume that a mere negligent removal cannot sustain a conviction. X must be aware that it is a movable, corporeal thing that he is removing. He must also know that the owner or the person having control thereof has not consented to the taking. This aspect of the intent requirement is implied in the old-fashioned expression used by the legislature "without a *bona fide* claim of right".

If X thinks that the owner or person having the control of the property would have consented to the taking, he has a defence, but, typical of the outdated way in which the intent requirement is expressed in the legislation, this belief must be reasonable. The requirement of a reasonable belief stems from the era before our courts have adopted a subjective test for intent, and highlights the outdated style of formulation of the subsection. What is more, the onus of proving the existence of a reasonable belief is placed on X. It is submitted that this shifting of the onus is unconstitutional.[143]

(*b*) *Intent to use the thing without consent* The second component of the intent requirement is the intent which X must have of doing something with the property, namely to use it for his own purposes without consent. Once again the clumsy formulation leads to certain consequences which are difficult to reconcile with the broad intent of the legislature (expressed in the long title of the Act) to punish the unlawful appropriation of the use of another's property. The state must prove that X not only removed the property without consent, but also that he intended to use it without consent. Thus, if X removes the property without consent but with the intention of using it with consent, he is not guilty. Neither is he guilty if he removes with consent but intends to use it later without consent. On the other hand, if X removes property with intent to use it without consent but in fact never uses it, he contravenes the subsection.

The subsection further requires that X must intend to use the property "for his own purposes". Strictly speaking, X does not contravene the subsection if he intends to use the property for somebody else's benefit, for example, where he removes Y's lawnmower in order to cut, not his (X's) own lawn, but Z's. This restriction of the ordinary meaning of the word "use" is foreign to the provisions of the common law relating to *furtum usus*. Nevertheless, there seems to be no reason for departing from the ordinary, plain meaning of the words "for his own purposes", and for this reason it is submitted that X does not contravene the subsection if in the abovementioned example he removes the lawnmower merely to cut Z's lawn.

As far as the meaning of the word "use" is concerned, it must be borne in mind that merely keeping property in one's possession is not the same as using it.[144] To "use" a thing implies that a person deals with it in such a way that it still exists afterwards. If X uses the property in such a way that he in fact consumes it, this amounts to appropriation of the property and thus to theft, as where he drinks another's bottle of wine or uses another's battery until it is flat.

---

143 The reasons for this submission may be found in the following decisions of the Constitutional Court relating to analogous statutory provisions: *Bhulwana* 1995 2 SACR 108 (CC); *Mbatha* 1996 1 SACR 371 (CC); *Julies* 1996 2 SACR 108 (CC); *Coetzee* 1997 1 SACR 379 (CC); *Ntsele* 1997 2 SACR 740 (CC).

144 *Mtshali* 1960 4 SA 252 (N); *Terblanche* 2007 1 SACR 545 (C) 554–555.

C ROBBERY

1 Definition Robbery consists in theft of property by unlawfully and intentionally using:

(*a*) violence to take the property from somebody else; or

(*b*) threats of violence to induce the possessor of the property to submit to the taking of the property.[145]

It is customary to describe the crime briefly as "theft by violence".[146] Though incomplete, such a description does reflect the essence of the crime.

2 Elements of the crime The elements of the crime are the following: (*a*) the *theft of property* (*b*) through the use of either *violence or threats of violence* (*c*) *a causal link* between the violence and the taking of the property (*d*) *unlawfulness* and (*e*) *intention.*

3 Origin and character Robbery or *rapina* was regarded in common law as an aggravated form of theft, namely theft by means of violence.[147] Today it is regarded as a separate crime, distinct from theft, although all the requirements for theft apply to robbery too. These requirements will not be repeated here. It is sufficient, as far as these requirements are concerned, to point out the following: as in theft, only movable corporeal property *in commercio* can form the object of robbery.[148] The owner must not, of course, have consented to the taking, and X must have known that consent was lacking. Thus, he does not commit robbery if, using violence, he takes property belonging to another in the *bona fide* though erroneous belief that it is his own property which he had lost but has now found.[149]

4 Violence It follows from the definition of robbery that the crime can be committed in two ways, namely by means of either violence or threats of violence.

As far as the real use of violence is concerned, it must be directed at the person of Y, that is, against his physical integrity.[150] The violence may be slight, and Y need not necessarily be injured. Robbery is also committed if X injures Y and then deprives him of the property while he (Y) is physically out of action, provided that at the time of the assault X already had the intention of putting Y out of action and then taking the property.[151]

5 Threats of violence Robbery can be committed even though there is no real violence directed at Y; a threat of physical harm directed at Y if he does not

---

145 The definitions in *Hunt-Milton* 642 and *Burchell and Milton* 817 are substantially similar.

146 Eg *Sitole* 1957 4 SA 691 (N) 693B; *Ex parte Minister of Justice: in re R v Gesa; R v De Jongh* 1959 1 SA 234 (A) 238C–D; *Benjamin* 1980 1 SA 950 (A) 958H.

147 Van Leeuwen *RHR* 4 38 2; Voet 47 8 1 *pr*; Matthaeus 47 2 1 1; Huber *HR* 6 6 1; Van der Keessel 47 8 1; Van der Linden 2 6 3.

148 On the meaning of "property" in the definition of theft, see *supra* XVIII A 8.

149 Matthaeus 47 2 1 2; Huber *HR* 6 6 3; *Fisher* 1970 3 SA 446 (RA) 447C; *Johnson* 1977 4 SA 116 (RA); *Mafadza* 1987 2 SA 113 (V).

150 *Pachai* 1962 4 SA 246 (T) 249; *Duarte* 1965 1 PH H83 (T).

151 *Mokoena* 1975 4 SA 295 (O); *L* 1982 2 SA 133 (T).

not hand over the property or acquiesce in its removal, is sufficient.[152] In such a case Y simply submits to the taking of the property because of the threats. It is therefore not required that Y be put out of action.

As far as could be ascertained, the courts have not yet expressly held what the nature of the threat should be in order to lead to a conviction of robbery. It is submitted that only a threat which would lead to a conviction of assault qualifies as a threat for the purposes of robbery.[153] This means that the threat should comply with the following requirements:

(*a*) The threat must be one of *physical* violence. A threat, not of physical violence, but merely of damaging Y's property or of infringing his reputation (such as a threat by X that he will reveal to Y's spouse that Y has committed adultery) is insufficient to lead to a conviction of robbery, although it may amount to extortion.

(*b*) The threat must be one of *immediate* violence. A threat only to use violence some day in the future is insufficient.

(*c*) The threat must be one of physical violence *against Y himself.* A threat of violence against somebody else (such as Y's spouse or child) is therefore insufficient to lead to a conviction of robbery, although it may amount to extortion.

The threat of violence may be express or implied. If X, dressed like a robber, waylays Y and Z in a shop's office, orders Y to hand over money and assaults Z to prevent him from escaping, the assault may be viewed as an implied threat by X of physical harm to Y if he does not hand over the money.[154] Whether Y's will is overcome by fear must, it is submitted, be judged subjectively: it ought not to be a defence to aver that a reasonable person would not have succumbed to the threats.

6 Causal link between violence and taking The property must be obtained by X *as a result of* the violence or threat of violence.[155] The premise is that the violence must precede the taking, and that robbery is not committed if the violence is used to retain a thing already stolen or to facilitate escape. If this happens, X commits theft and assault.[156] The converse is also true: if X assaults Y, after the assault discovers that Y has by chance dropped some of his property, and only then for the first time forms the intention of taking the property, he does not commit robbery if he picks up the property and appropriates it; he may, however, be charged with and convicted of assault and theft.[157]

The rule, stated earlier, that the violence must precede the taking must, however, be qualified: robbery may in certain circumstances be committed even

---

152 *Ex parte Minister of Justice: in re R v Gesa; R v De Jongh* 1959 1 SA 234 (A) 958–959; *Moloto* 1982 1 SA 844 (A) 850B–C; *Kgoyane* 1982 4 SA 133 (T).

153 On assault in the form of threats of violence, see *supra* XV A 4(*c*).

154 *MacDonald* 1980 2 SA 939 (A), but contrast *Elbrecht* 1977 4 SA 165 (C).

155 *Moerane* 1962 4 SA 105 (T) 106D; *Pachai supra* 249F–G; *Marais* 1969 4 SA 532 (NC) 533A, and cases in next footnote.

156 *Ngoyo supra* 463–464; *Marais supra* 533B–C; *L* 1982 2 SA 768 (ZH) 770.

157 *Moerane supra*; *Marais supra*; *Jabulani* 1980 1 SA 331 (D); *Matjeke* 1980 4 SA 267 (B).

though the violence follows the completion of the theft. This will be the case if, having regard to the time and place of X's act, there is such a close link between the theft and the violence that they may be regarded as connecting components of one and the same action. Thus, in *Yolelo*[158] X was found in possession of Y's property before he could leave Y's house. X's ensuing assault on Y was regarded as so closely connected with the process of taking the property that X was convicted of robbery.

In *Pachai*[159] X made threatening telephone calls to a shopkeeper Y. When X later threatened Y in his shop, Y handed him the goods he demanded, not because he feared X, but because he had previously arranged with the police to set a trap for X. X was convicted of attempted robbery only.

7 Property need not be in Y's immediate vicinity The property need not be taken from the person of Y or in his presence. The lapse of time between the violence and the taking, as well as the distance between the place where the violence occurred and the place of taking, is only of evidential value in deciding whether the violence and the taking formed part of the same continuous transaction, and whether there was a causal link between the violence and the taking.[160] In *Ex parte Minister van Justisie: in re S v Seekoei*[161] the Appeal Court confirmed the rule that the property need not be taken in the presence of the victim. In this case X attacked Y and forced her to hand him the keys of 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 Appeal Court held that X should have been convicted of robbery: the fact that he did not take the property in Y's presence afforded him no defence.

8 The bag-snatching cases If X snatches Y's handbag out of her hands in a sudden and unexpected movement (with no resistance from Y, because it happened unexpectedly), X commits robbery, and not merely theft.[162] In this type of case X knows very well that he can gain possession of the handbag only if he snatches it from the woman in a quick and unexpected movement. 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 ordinarily

---

158 1981 1 SA 1002 (A) 1015. It is submitted that X's act of appropriation in this case was not yet complete at the time that he was discovered by Y. It would have been complete only once he had left the house taking the stolen goods. An act of appropriation is complete only once X has gained full control over the property, and X has not yet gained full control if he is surprised by the owner of the house at a stage where he has merely placed the goods in a certain room of the house. At that stage he can at most be guilty of attempted theft. For this reason it is submitted that the conviction of robbery in this case is not contrary to the general rule that the taking should not precede the violence. *Yolelo*'s case was followed in *Nteco* 2004 1 SACR 79 (NC) 84.

159 1962 4 SA 246 (T). See also *Davies* 1956 3 SA 52 (A) 60.

160 *Dhlamini* 1975 2 SA 524 (D), discussed by Forsyth 1975 *SALJ* 377 ff.

161 1984 4 SA 690 (A), discussed by Matzukis 1985 *SALJ* 251 ff.

162 *Sithole* 1981 1 SA 1186 (N) 1190; *Mofokeng* 1982 4 SA 147 (T); *Witbooi* 1984 1 SA 242 (C); *Mohamed* 1999 1 SACR 287 (O). *Contra Mati* 2002 1 SACR 323 (C). In *Salmans* 2006 1 SACR 333 (C), however, the same Cape Court declined to follow *Mati*, holding that such conduct constitutes robbery.

carrying or holding it, or if X intentionally uses force to prevent or forestall resistance which he thinks might be offered to the taking if Y were to become aware of his intentions.[163] In this respect the courts apply what has been described as the concept of "anticipated resistance" in order to treat bagsnatching as robbery.[164] Any force applied to the person of Y, however slight, is sufficient to constitute robbery.[165]

If Y does offer resistance, because, for example, she clings to her handbag while X drags her, there is, of course, no difficulty in holding that there is actual violence and that X is liable for robbery.[166] It is, however, not required that Y should actually have offered resistance to the taking.[167]

If X snatches a bag protruding from Y's jacket pocket, without any violence directed at the person of Y, he is guilty of theft only.[168] It is submitted that if Y merely balances an object on her head or in the palm of her hand without holding or clutching it with her hand, and X simply snatches it away and runs away with it, no robbery, but only theft, is committed, because there is no violence directed at the person of Y.

9 Punishment

(*a*) *General* In the discussions above of the punishment for rape[169] and murder,[170] the prescribed minimum sentences for those crimes were set out. Section 51 of the Criminal Law Amendment Act 105 of 1997 also lays down minimum sentences for robbery. In the discussions above of the punishment for rape and murder it was pointed out that capital punishment and corporal punishment may no longer be imposed. This principle also applies to robbery. Since a fine is not a suitable form of punishment for so serious a crime as robbery, the only type of punishment that comes into the picture for this crime is imprisonment.

(*b*) *Prescribed minimum periods of imprisonment* As far as the period of imprisonment which must be imposed upon a conviction of robbery is concerned, before 1997 the courts used to have a free discretion. However, section 51 of the Criminal Law Amendment Act 105 of 1997 now provides for certain minimum periods of imprisonment to be imposed by a court upon convicting X of certain types of robbery.

---

163 *Sithole supra* 1190B–C.

164 *Hunt-Milton* 656; *Mohamed supra* 290*f–g*.

165 *Salmans* 2006 1 SACR 333 (C) 340*b–c*. For an analysis of the case law regarding these "bag-snatching cases", see Hoctor 2012 *SACJ* 361. Hoctor argues (correctly, it is submitted) that this development of the law concerning robbery is not unconstitutional and that it is consistent with the structure and function of the crime.

166 *Mogala* 1978 2 SA 412 (A); *Hlatswayo* 1980 3 SA 425 (O).

167 *Sithole* 1981 1 SA 1186 (N) 1190C; *Mohamed supra* 290*j*.

168 *Gqalowe* 1992 2 SACR 172 (E) 174; *M* 1996 2 SACR 132 (T) (X grabbed a cell phone attached to Y's belt with a plastic clip and ran away with it). In these two cases the stolen article was not in Y's grip. In *Mati* 2002 1 SACR 323 (C) the court likewise convicted X only of theft after he had just grabbed Y's cell phone out of her hand. The court in this case expressed its doubts as to the correctness of the decisions in *Sithole supra* and *Witbooi supra*.

169 *Supra* XI B 9.

170 *Supra* XIV A 8.

Section 51 provides that if a person has been convicted of robbery (*a*) when there are aggravating circumstances or (*b*) involving the taking of a motor vehicle ("motor hijacking") a court must impose the following minimum sentences:

(1) fifteen years in respect of a first offender;

(2) twenty years in respect of a second offender;

(3) twenty five years in respect of a third or subsequent offender.

(*c*) *Avoidance of minimum sentences* There are always cases where a court is of the opinion that the imposition of one of the above minimum periods of imprisonment would, considering the specific circumstances of the case, be very harsh and unjust. In subsection (3)(*a*) of section 51 the legislature has created a mechanism whereby a court may be freed from the obligation of imposing a minimum sentence.

According to subsection (3)(*a*) of section 51 a court is not bound to impose one of the minimum periods of imprisonment set out above, if there are *substantial and compelling circumstances* which justify the imposition of a lesser sentence than the prescribed one. If such circumstances exist, a court may then impose a period of imprisonment which is less than the period prescribed by the legislature. The crucial words in the Act relating to the avoidance of mandatory minimum sentences are the words "substantial and compelling circumstances". In *Malgas*[171] the Supreme Court of Appeal considered the interpretation of these words and formulated a relatively long list of rules to be kept in mind by courts when interpreting the words. Without setting out all these rules, it may be stated that perhaps the most important of them provides that if a court is satisfied that the circumstances of the case render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

In *Dodo*[172] the Constitutional Court held that the introduction by the legislature of minimum sentences in section 51 is not unconstitutional.

D RECEIVING STOLEN PROPERTY

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.

2 Elements of crime The elements of the crime are the following: (*a*) *receiving* (*b*) *stolen property*, which takes place (*c*) *unlawfully* and (*d*) *intentionally* (which includes knowledge of the fact that the goods are stolen property).

3 Appellation, origin and overlapping with theft The crime discussed here is known as "receiving stolen property knowing it to be stolen". Because of its

171 2001 1 SACR 469 (SCA) 481*f*–482*g* (par 25).
172 2001 1 SACR 594 (CC).

long name it will, for the sake of convenience, be referred to below simply as "receiving".

In Roman law receivers of stolen property were generally regarded as thieves themselves[173] and in Roman-Dutch law either as thieves[174] or as "helers" (*receptores* or *receptatores*).[175] "Heling" was a common-law crime closely resembling what is now known as "receiving". "Heling" is, however, no longer charged, having been superseded by "receiving". The crime of "receiving", as we know it today, was unknown in common law (although it closely resembles "heling"), and was developed by the Cape courts in the nineteenth century under the influence of English law.[176]

A peculiarity of this crime is that it coincides with theft. A person who commits this crime is simultaneously an accessory after the fact to theft.[177] As emerged from the discussion above of theft,[178] accessories after the fact to theft are normally treated in our law as thieves (ie, perpetrators), particularly because of the rule that theft is a continuing crime. Thus, although all "receivers" may be charged with theft the general practice is to charge them with the more specific crime of receiving. Such a charge better acquaints X with the allegations against him than a charge of theft only. According to the Criminal Procedure Act theft is a competent verdict on a charge of receiving, and receiving is a competent verdict on a charge of theft.[179]

4 Stolen property The property received must be stolen property. It is stolen if it is obtained by theft, robbery, housebreaking with intent to steal and theft or theft by false pretences.[180] It is obvious that the crime can be committed only in respect of property capable of being stolen, that is, movable corporeal property *in commercio*.[181] What is punishable under this crime is receiving *stolen property*. If a person merely receives *the proceeds of the sale* of stolen property, he does not commit the crime.[182]

5 Unlawfulness The receiving must be unlawful. If the receiver receives the property with the consent of the owner or with the intention of returning it to the owner or handing it over to the police, he does not commit the crime.[183] In *Sawitz*[184] the police recovered the stolen property and handed it to the thief with the request that he give it to X, so that the police could trap X in the act of

---

173 Inst 4 1 4 *in fine*; D 47 2 37; D 47 2 48 1.
174 Van Leeuwen *RHR* 4 38 12; Huber *HR* 6 5 19 34; Voet 47 16 2–4; Damhouder 107.
175 Moorman 3 4; Matthaeus 47 10 1.
176 *Ex parte Minister of Justice: in re R v Maserow* 1942 AD 164 169, 170; *Karolia* 1956 3 SA 569 (T) 571G–H; *Arbee* 1956 4 SA 438 (A) 441.
177 *Ex parte Minister of Justice: in re R v Maserow supra*; *Joffe* 1925 TPD 86; *Arbee supra* 441, 445; *Correia* 1958 1 SA 533 (A) 544A; *Naran* 1963 1 SA 652 (A) 656H; *Bolus* 1966 4 SA 575 (A) 580A; *Sepiri* 1979 2 SA 1168 (NC).
178 *Supra* XVIII A 16.
179 S 265, 264(1).
180 *Vilakazi* 1959 4 SA 700 (N) 701–702 (as to theft by false pretences).
181 *Supra* XVIII A 8.
182 *Augustine* 1986 3 SA 294 (C).
183 *Ex parte Minister of Justice: in re R v Maserow supra* 170.
184 1962 3 SA 687 (T). Cf also *Maserow supra* 173.

"receiving". This was done, and X was convicted of receiving. His defence that the police consented to the receiving was rejected.

6 Receiving the property The crime does not consist in being in possession of stolen goods but in receiving such goods.[185] The concept of "receiving" presupposes an act of taking into possession. Receiving can take place in any of the recognised ways in which movable property can be delivered, including constructive modes of delivery.[186] Mere negotiation between the thief and X, even including a physical inspection of the goods by X, is not sufficient to render the latter guilty of receiving.[187] The possession gained by the receiver need not necessarily amount to juridical possession in the sense that he intends to keep the property as his own (*possessio civilis*); the crime is committed even where he keeps the property only temporarily for another (*possessio naturalis*).[188]

7 Culpability The culpability requirement of the crime comprises, *firstly*, knowledge by X that he is receiving the goods into his possession; this implies an awareness on his part that he has the custody and control over the property,[189] and, *secondly*, an appreciation of the fact that the goods are stolen.[190] *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.[191] It is submitted that it is this principle which the courts apply in stating that the mental element is satisfied where X has a strong suspicion that the goods are stolen, but he wilfully refrains from making inquiries in order to avoid confirmation of his suspicions.[192]

At the moment when he receives the goods the receiver must know that they are stolen.[193] If he discovers this only subsequently and then appropriates the goods (eg by selling or consuming them) he will be guilty of an independent theft.[194] Although the point has not yet been decided by the courts, it is submitted that the receiver, like the thief, must have the intention to deprive the owner of the benefits of his ownership permanently, more particularly because the crime of receiving is equated by the courts with that of theft.[195]

---

185 *Retief* 1904 TS 63 64; *Chicani* 1921 EDL 123.
186 *Saffy* 1944 AD 391 420; *Jeremiah* 1965 4 SA 205 (R) 206–207.
187 *Croucamp* 1949 1 SA 377 (A). Cf also *Singh* 1960 3 SA 489 (E).
188 *Von Elling* 1945 AD 234 251.
189 *Van der Bank* 1941 TPD 307 309–310.
190 Matthaeus 47 10 1; Voet 47 16 3; Huber *HR* 6 5 19; *Patz* 1946 AD 845 856.
191 *Sipendu* 1932 EDL 312 319; *Patz supra* 857.
192 *Patz supra* 858; *Markins Motors (Pty) Ltd* 1959 3 SA 508 (A) 516. On the other hand, if he had no suspicion or did not foresee the possibility of the goods being stolen, even though a reasonable person would have, the requirement of intention is not satisfied. Negligence cannot replace the intention required. See *Nossel* 1937 AD 1 8–9; *Patz supra* 856–857.
193 *Van der Bank supra* 309; *Patz supra* 856.
194 *Naidoo* 1949 4 SA 858 (A) 862; *Bolus* 1966 4 SA 575 (A) 578G.
195 In *Nkwana* 1953 2 SA 190 (T) it was held that *animus furandi* (the intention to steal) is necessarily implied in an allegation of "receiving".

E INABILITY TO GIVE ACCOUNT OF POSSESSION OF GOODS SUSPECTED OF BEING STOLEN (CONTRAVENTION OF SECTION 36 OF ACT 62 OF 1955)

1 Definition Section 36 of the General Law Amendment Act 62 of 1955 provides as follows:

"**Failure to give a satisfactory account of possession of goods**—Any person who is found in possession of any goods, other than stock or produce as defined in section *thirteen* of the Stock Theft Act, 1923 (Act No. 26 of 1923), in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft."

2 Reason for crime's existence In practice it is often very difficult for the prosecution to prove all the requirements for the common-law crime of receiving stolen property, knowing it to be stolen. *Firstly*, it is often very difficult to prove that a person in whose possession stolen property was found knew that it was stolen. *Secondly*, the identification of the owner or person entitled to the property is one of the most important prerequisites for a successful prosecution for theft. If the state cannot identify the person from whom the property was stolen, it is impossible to prove that the property was taken from the owner or possessor without his consent. In order to further combat theft, the legislature created two crimes in sections 36 and 37 of the General Law Amendment Act 62 of 1955 which punish the possession and receiving, respectively, of stolen goods or goods suspected to be stolen. The crime created in section 36 is first considered.[196]

Section 36 applies if it is not possible for the prosecution to prove that the goods are stolen.[197] If it is possible for the prosecution to prove this, X ought to be charged with the common-law crime of receiving stolen property, or with the statutory crime created in section 37 of Act 62 of 1955, which will be discussed below. Because of the difficulties the state may have in proving the commission of the common-law crime of receiving stolen property, convictions for contravening section 36 are in practice more common than convictions for committing the common-law crime.

3 Elements of the crime If one ignores the reference in section 36 to the Stock Theft Act, the elements of the crime created in the section can be described as follows: (*a*) the "*goods*"; (*b*) X must be *found in possession*; (*c*) there must be a *reasonable suspicion that the goods have been stolen*, and (*d*) *X must be unable to give a satisfactory explanation of the possession*.

---

196 The section is identical with s 2 of the Stock Theft Act 57 of 1959 (previously Act 26 of 1923), except that the Stock Theft Act applies only to stock or produce as defined in that Act, whereas s 36 applies to other goods. The interpretation by the courts of the corresponding provision in the Stock Theft Act may also be applied to the interpretation of s 36, since according to the Appeal Court in *Ismail* 1958 1 SA 206 (A) 211 the legislature intended that s 36 be interpreted in the same way as the corresponding provision in the Stock Theft Act.

197 Cf *Sepiri* 1979 2 SA 1168 (NC) 1173D–E.

4 Definition of crime constitutional In *Osman v Attorney-General, Transvaal*[198] the Constitutional Court held that the provisions of section 36 are not incompatible with the Constitution. The court held that the section does not violate any of the following rights: the right to remain silent, the right not to be compelled to make any confession or admission, and the right to be presumed innocent.

The court held that section 36 neither compelled X to do anything, nor constituted pressure being applied on him to make a statement. He had a choice whether or not to provide an explanation for the possession of the goods. X retained the right to furnish an explanation at the trial if no explanation had previously been given. It is the inability and not the failure or unwillingness to give a satisfactory account of possession that constituted the offence created in the section. The inability to give a satisfactory account of possession is an element of the offence, and the burden of proving this element rests on the State.

The consequences of a failure by X to give evidence depended on the strength of the state case. If the prosecution failed to discharge its onus, X was entitled to be acquitted. If the case was strong enough to warrant a conviction in the absence of any countervailing evidence by or on behalf of X, X could not be heard to say that a conviction in such circumstances infringes upon his right to silence.

5 The "goods" The crime can be committed only in respect of property capable of being stolen.[199] Although this is not expressly stated in the Act, it is clear from the fact that the whole purpose of section 36 is to combat theft. However, the courts have held[200] that it could never have been the intention of the legislature that the section should apply to unidentifiable money in cash. Otherwise sellers of goods and commercial banks would carry far too heavy a burden and the flow of money would be seriously hampered. It is, of course, an entirely different matter if the money is identifiable, as where a money note is marked, or where, as in *Mohapie*,[201] X was found in possession of a (stolen) American hundred dollar note.

6 X must be found in possession The crime is not committed if goods suspected of having been stolen are possessed. It is committed if a person is found in possession of such goods. Section 36 is a criminal provision, and therefore words or expressions in it that may have more than one meaning must be interpreted restrictively; in other words, that interpretation which favours the accused should be adopted.[202] This is the case when the words "who is found in possession" are interpreted: X must have personal and direct control over he goods.[203] It is not sufficient that he exercises control through an agent or a subordinate: it will then be the latter person who "is found in possession".[204]

---

198 1998 2 SACR 493 (CC).
199 *Monyane* 1960 3 SA 20 (T) 23A.
200 *Monyane supra* 23; *Boshoff* 1962 3 SA 175 (N); *Mohapie* 1969 4 SA 447 (C).
201 *Supra*.
202 *Ismail* 1958 1 SA 206 (A) 211; *Boshoff supra* 177.
203 *Nader* 1963 1 SA 843 (O) 845; *Essack* 1963 1 SA 922 (T) 924.
204 *Tsotitsie* 1953 1 SA 239 (T) 240D–E; *Langa* 1998 1 SACR 21 (T) 26*a–d.*

X must furthermore be in possession *at the moment* that the goods are found by the police. It is not sufficient that he possessed them previously, or that he merely falsely alleged that he possessed them.[205]

On the other hand it is not necessary to prove that X possessed the goods *animo domini* (with the intention to possess them as an owner, that is, to keep and use them for himself). It is sufficient that X possessed the goods on behalf of or in the interest of somebody else, as where, although he had direct physical control over the goods, he merely looked after them on behalf of somebody else. What is required is *possessio naturalis*, not *possessio civilis*.[206] A person cannot possess something if he is unaware *that* he possesses it (that means, if he is unaware that he is exercising control over it). Neither, it is submitted, can one possess something without one knowing *what* it is that one possesses (or *what* it is over which one is exercising control).[207]

7 Reasonable suspicion that the goods have been stolen There must be a reasonable suspicion that the goods have been stolen. The reasonable suspicion must arise at virtually the same moment that the goods are found in X's possession.[208] If the suspicion existed before the goods were found, it must still exist at the moment that the goods are found.[209]

The suspicion must be a reasonable one. The test used to determine whether it is reasonable is objective: would a reasonable person in the position of the policeman at the moment the goods were found also have suspected that they were stolen?[210] It is not enough that a policeman simply states in court that he had a suspicion (or even a "reasonable suspicion") that the goods were stolen. He must also set out the grounds on which he based the suspicion, and the court must determine independently whether the suspicion was reasonable.[211]

The grounds or facts on which the suspicion rests must be true and correct. If it appears that they are wrong, the suspicion cannot be correct or reasonable.[212] The fact that X, when asked where he obtained the property or who the owner thereof was, gave a spurious explanation for his possession of the goods may well be relevant in deciding whether there was a reasonable suspicion.[213]

---

205 *Hassen* 1956 4 SA 41 (N) 43.

206 *Tsotitsie supra* 240.

207 Cf the similar interpretation by the Appellate Division in *Jacobs* 1989 1 SA 652 (A) 659D–H of the words "found in possession" in s 10(1)(*a*) of Act 41 of 1971 (which dealt with the crime of dealing in drugs).

208 *Reddy* 1962 2 SA 343 (N); *Khumalo* 1964 1 SA 498 (N) 499; *Zuma* 1992 2 SACR 488 (N) 491*e*; *Mbebe* 2004 2 SACR 537 (Ck) 541*a–b*.

209 *Naidoo* 1970 1 SA 358 (A).

210 *Hunt* 1957 2 SA 465 (N) 470; *Khumalo supra* 500A; *Mohapie supra* 447–448.

211 *Essack supra* 924; *Khumalo supra* 500; *Makhati* 1997 2 SACR 524 (O) 528*f–g*. However, the failure of the policeman or finder to state that he had a suspicion that the goods were stolen, does not necessarily mean that X cannot be convicted: his suspicion can be inferred from the circumstances – *Zuma* 1992 2 SACR 488 (N).

212 *Hunt supra* 470.

213 *Shakane* 1998 2 SACR 218 (SCA). This decision may be irreconcilable with that in *Du Preez* 1998 2 SACR 133 (C) (as well as other decisions relied on by the court in the latter case), in which it was decided that X's subsequent explanation or reaction is not relevant in determining whether there was a reasonable suspicion, for the merits of the explanation become relevant only after it has been established that there was a reasonable

[*continued*]

The grounds for the suspicion must also exist at the moment that the goods are found.[214] Whether the suspicion that the goods have been stolen is reasonable depends upon the facts of each case. Factors which may be of particular importance in this respect include the nature and quantity of the goods, the place where they were found, whether they were still new, X's status and financial standing, and X's reaction when the goods were found in his possession. Each case must be judged on its own merits.[215]

8 Inability to give satisfactory account Only if the previous requirements have been complied with is it necessary to examine whether X was unable to give a satisfactory account of his possession.[216] Whereas the reasonable suspicion that the goods have been stolen must exist at virtually the same moment that the goods are found, it is not required that X's inability to give a satisfactory account should be restricted to the time when the goods were found.[217] As far as this requirement is concerned the courts follow a generous interpretation of the section by allowing X to give an account of his possession at any time up to and including his trial.[218] It follows that the crime is completed only at the moment the trial court finds that he was unable to give a satisfactory account of his possession.

X's account or explanation is "satisfactory" if (*a*) it is reasonably possible and (*b*) shows that he *bona fide* believed that his possession was innocent with reference to the purposes of the act, namely the prevention of theft.[219] This means that X must state where he obtained the goods, and it must be clear from his statement that his possession was innocent in the sense that either the goods had not been stolen or that X honestly believed that it was not stolen or that he was entitled to possess it.

It has sometimes been said that the account must not only be *bona fide* (in other words honest), but that it must also be reasonable; this would mean that a reasonable person in X's position should also have believed that his possession was *bona fide* and innocent.[220] It is submitted that this is wrong. The contrary view, held to be correct in *Bloem*[221] and *Aube*[222] is to be preferred, namely that

---

suspicion. Perhaps *Shakane* and *Du Preez* are not irreconcilable if one considers the different circumstances and types of articles involved in each case, namely expensive electronic equipment possessed in highly suspicious circumstances (in *Shakane*) and an old window frame carried by X in not such suspicious circumstances (in *Du Preez*).

214 *Khumalo* 499–500, 505H. There is, however, a qualification to this rule, *viz* "that he [the policeman] may form the suspicion, perhaps not reasonably, but be confirmed in it by the facts he ascertains thereafter; those facts are to be taken into consideration in judging the reasonableness of the suspicion provided the person accused was still in possession" – *Khumalo supra* 505H. A similar view was held in *Kane* 1963 3 SA 404 (T) 406.

215 *Rubinstein* 1964 3 SA 480 (A).

216 *Khumalo* 1964 1 SA 498 (N) 505F.

217 *Ismail* 1958 1 SA 206 (A) 212D–E.

218 *Armugan* 1956 4 SA 43 (N); *Osman v Attorney-General of Transvaal* 1998 1 SACR 28 (T) 30*e–f*.

219 *Nader* 1963 1 SA 843 (O) 848; *Mojaki* 1993 1 SACR 491 (O); *Aube* 2007 1 SACR 655 (W) 657–658.

220 *Nader supra* 849C.

221 1993 PH H16 (NC).

222 2007 1 SACR 655 (W) 657–658.

the test to be applied to determine whether X has given a satisfactory explanation is subjective. In other words, it does not matter whether X's belief is unreasonable. Such a view accords with not only the restrictive interpretation of the section which the courts say is required but also with the subjective test for awareness of unlawfulness, which is a cornerstone of the general principles of criminal law. There is nothing in the wording of the section which suggests that the legislature did not want the courts to apply this subjective test. The crime created in the section is one of dishonesty and not one of negligence.[223]

If the state has proved the other requirements for the crime but X *refuses* to give an account of his possession, it would be reasonable to infer that he is unable to give such account, and he can then be convicted.[224] If, at the time that the goods are found X gives an account of his possession which is materially at variance with the account given by him in court, a court may infer that he has not given a satisfactory account of his possession.[225]

In highly exceptional cases a court may accept that even though X gave no account this does not mean that he is unable to give a satisfactory account: this is where the court is convinced that because of personal defects such as dullness, stupidity, feeble-mindedness or low intelligence X did not know what was expected of him while there may be a reasonable possibility that his possession was in fact innocent.[226] It is unlikely that a court will accept an account offered by somebody other than X as satisfactory,[227] unless it appears from the circumstances of the case that the other person's account is in fact that of X, which he confirms.

F RECEIVING STOLEN PROPERTY WITHOUT REASONABLE CAUSE (CONTRAVENTION OF SECTION 37 OF ACT 62 OF 1955)

1 Definition Section 37(1) of the General Law Amendment Act 62 of 1955 provides as follows:

"(*a*) Any person who in any manner, otherwise than at a public sale, acquires or receives into his or her possession from any other person stolen goods, other than stock or produce as defined in section 13 of the Stock Theft Act, 1959, without having reasonable cause for believing at the time of such acquisition or receipt that such goods are the property of the person from whom he or she receives them or that such person has been duly authorized by the owner thereof to deal with or to dispose of them, shall be guilty of an offence and liable on conviction to the penalties which may be

continued

223 *Aube* 2007 1 SACR 655 (W) 657*h–i*.
224 *Zulu* 1951 3 SA 44 (N) 47F; *Khumalo supra* 505G–H.
225 *Khumalo supra* 501F.
226 *Khumalo supra* 501E; *Osman v Attorney-General of Transvaal* 1998 1 SACR 28 (T) 31*h–j*.
227 See, however, *Balitane* 1956 3 SA 634 (E), a case under the Stock Theft Act, in which it was accepted that the account may come from someone other than X.

imposed on a conviction of receiving stolen property knowing it to have been stolen except in so far as the imposition of any such penalty may be compulsory.

(*b*) In the absence of evidence to the contrary which raises a reasonable doubt, proof of such possession shall be sufficient evidence of the absence of reasonable cause."

2 Constitutionality of section 37(1) The provisions of section 37(1) as set out above reflect the slight but significant change in the wording of the subsection brought about by the amendment of the section in 2000.[228] This amendment in turn flows directly from the judgment of the Constitutional Court in *Manamela*.[229] In this case the Constitutional Court considered the constitutionality of the original wording of the section. The court held, *firstly*, that the subsection infringed upon the right to remain silent enshrined in the Constitution, but that this infringement was justifiable in terms of the limitation clause in the Constitution. The reason why it was justifiable is that in most cases the state has no information on the circumstances in which X acquired the stolen goods The court held, *secondly*, that the creation of a reverse onus in the original wording of the section (which provided that the onus was on X to prove that he had reasonable cause for believing that the goods were not stolen) infringed upon the right to remain silent, and that this infringement could not be justified by the limitation clause.

However, the majority decision did not go so far as to declare the whole section 37(1) unconstitutional. The state and society had a vital interest in combatting the evil of the unlawful receipt of stolen property. The court made use of its powers to read words into the legislation so as to replace the invalid reverse onus. The words deleted from the subsection and the new words inserted into it were shortly afterward followed by legislation which precisely endorsed the changes proposed by the Constitutional Court.

3 Evidential presumption The effect of the abovementioned "reading in" of words into the subsection is that the Constitutional Court has created an evidential presumption. A burden is placed upon possessors of stolen property to create a reasonable doubt in the mind of the court as to whether they had reasonable cause to believe that the person who disposed of the property was entitled to do so. If X does not create such a reasonable doubt, the court will assume that he did not have reasonable cause. X is therefore required to furnish evidence as to the reasonableness of his belief.

4 Discussion of subsection The word "possession" in the section must not be interpreted narrowly and must therefore not be limited to *possessio civilis* – that is, possession in order to keep the property for oneself. It bears the wide meaning of *possessio naturalis*, which means that its meaning is wide enough to incorporate possession on behalf of somebody else.[230] Thus, somebody who

228 By s 2 of the Judicial Matters Amendment Act 62 of 2000.

229 2000 1 SACR 414 (CC).

230 *Moller* 1990 3 SA 876 (A). On the concept of possession in criminal law generally, see *supra* II C.

receives property in order merely to look after it on behalf of somebody else, contravenes the section.

The person who acquired or received the goods must have reasonable grounds for believing what is set out in the section. It is not sufficient for him merely to have an honest *bona fide* belief that he acquired the goods lawfully, for the test is not subjective but objective: this means that a reasonable person in the same circumstances must also have believed that the goods were obtained lawfully as set out in the section.[231] It is a pity that the legislature prescribed an objective rather than a subjective test. The objective test does not accord with current views relating to intention and mistake in criminal law. A person can accordingly be convicted under the section even though he would not be guilty if he were charged with common-law receiving, since in the latter crime the test for determining the presence or absence of intention is subjective.

The reasonable cause for the belief mentioned in the section must be present at the time when X acquires or receives the goods into his possession. If, at that stage he has reasonable grounds for believing that the goods belong to the person from whom he receives them, he does not contravene the section even though he later becomes suspicious or comes to know of circumstances suggesting that the goods have been stolen.[232]

---

231 *Kaplin* 1964 4 SA 355 (T) 358; *Ghoor* 1969 2 SA 555 (A); *Mkhize* 1980 4 SA 36 (N).
232 *Mkhize* 1980 4 SA 36 (N).

CHAPTER

XIX

FRAUD AND RELATED CRIMES

A FRAUD

1 Definition Fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.[1]

2 Elements of the crime The elements of the crime are the following: (*a*) a *misrepresentation*; (*b*) *prejudice or potential prejudice*; (*c*) *unlawfulness* and (*d*) *intention*.

3 Origin and character To understand why fraud covers such a wide field in our law it is necessary to refer briefly to its origin in our common law.[2] The crime of fraud, as we know it today, is derived from two different Roman law crimes, namely (*a*) *stellionatus* and (*b*) the *crimina falsi*. *Stellionatus* was the criminal-law equivalent of the delict *dolus*, and developed from the *actio de dolo* in private law.[3] It involved an intentional misrepresentation resulting in harm, or prejudice, to others. *Crimina falsi* was the collective term for a number of crimes relating to falsification, almost all of which were derived from the *lex Cornelia de Falsis*. These different forms of falsification were, however, never unified into one generic crime. Examples of the *crimina falsi* are the falsification of a will,[4] of weights and measures[5] and of evidence.[6] In the *crimina falsi* it was not required that somebody should necessarily have been prejudiced by X's conduct.[7]

---

1 A substantially similar definition of the crime was given or quoted with apparent approval in *Myeza* 1985 4 SA 30 (T) 31–32; *Ex parte Lebowa Development Corporation Ltd* 1989 3 SA 71 (T) 101; *Gardener* 2011 1 SACR 570 (SCA) par 29.

2 On the position in Roman and Roman-Dutch law, see *De Wet and Swanepoel* 384 ff; *VerLoren van Themaat* 148 ff; *Frankfort Motors (Pty) Ltd* 1946 OPD 255.

3 D 47 20 3 1; C 9 34.

4 D 48 10 2.

5 D 48 19 32 1.

6 D 22 5 16; D 48 10 1, 2. On the falsification of coins, see D 48 10 8 and 9.

7 *De Wet and Swanepoel* 385.

Our Roman-Dutch writers did not differentiate clearly between *stellionatus* and the *crimina falsi*.[8] Since the beginning of this century the distinction between these two crimes has become blurred; the courts have combined them to form a new crime known as fraud.[9] In fact, fraud has sometimes even been referred to as *falsitas* or "falsiteit". The most important result of this merging has been that fraud may now be committed even where there is no actual proprietary prejudice: even non-proprietary or potential prejudice may be sufficient to result in a conviction.

4 Misrepresentation The very first requirement for fraud is that there must be a misrepresentation or, as it is sometimes expressed, "a perversion or distortion of the truth". 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.

(*a*) *Form that misrepresentation may take* Although the misrepresentation will generally take the form of spoken or written words, conduct other than writing or speech may also sometimes be sufficient, such as a nod of the head signifying consent.[10]

(*b*) *Express or implied* The misrepresentation may be either express or implicit. If X unlawfully comes into possession of Y's credit card and uses the card to buy herself articles in a shop by falsely writing Y's signature on the pay slip, she commits fraud.[11] She misrepresents to the shop or shop assistant that she is the owner of the credit card, whereas she in fact is not.

In the ordinary course of events somebody who buys goods 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.[12] It is submitted that the position ought to be the same if X books in at an hotel and later disappears without paying her account: in the normal course of events somebody in X's position represents that she can pay and intends to pay.[13]

Every student who, when writing an examination, unlawfully uses notes concealed in her clothing or scribbled on her body, misrepresents to the examination

---

8 It seems that Matthaeus 48 7 1, 7; Voet 48 10 4, and Van der Linden 2 6 4 did require actual prejudice and in this way differentiated between fraud and the *crimina falsi*, but writers such as Damhouder 109 ff, Carpzovius 2 93 and Perezius 9 22 2 virtually equated the two crimes.

9 The most important of the many decisions in this respect are *Moolchund* (1902) 23 NLR 76; *Jolosa* 1903 TS 694; *Dyonta* 1935 AD 52; *Kruse* 1946 AD 524 and *Heyne* 1956 3 SA 604 (A).

10 *Brande* 1979 3 SA 371 (D); *MacDonald* 1982 3 SA 220 (A) 239H; *Mdantile* 2011 2 SACR 142 (FB) par 29.

11 *Salcedo* 2003 1 SACR 324 (SCA).

12 *Deetlefs* 1953 1 SA 418 (A); *Heyne supra* 619C; *Latib* 1973 3 SA 982 (A) 984–985; *Moodie* 1983 1 SA 1161 (C).

13 *Coertzen* 1929 SWA 20 21, but contrast *Hochfelder* 1947 3 SA 580 (C); *Hattingh* 1959 2 PH H355 (O) and *Hutson* 1964 1 PH H16 (O). It is submitted that the last three decisions were incorrectly decided.

authorities that what she is writing is knowledge she has acquired by studying, whereas it is in fact not such knowledge.

(*c*) *Commissio or omissio* The misrepresentation may be made by either a *commissio* (positive act) or an omission. A mere omission by X to disclose a fact may, in the eyes of the law, amount to the making of a misrepresentation if there is a legal duty on X to disclose the fact.[14]

A legal duty may, *firstly*, be created by legislation. An omission to comply with the provisions of certain legislation may amount to a misrepresentation and fraud.[15] Failure to comply with the provisions of certain legislation, for example, to disclose certain facts, may amount to a misrepresentation even though the legislation concerned does not stipulate that non-compliance with it amounts to a crime.[16]

A legal duty may, *secondly*, arise from considerations other than the terms of a statute, such as where a court is of the opinion that X should have acted positively to remove a misconception which would, in the natural course of events, have existed in Y's mind. The following is an example of such a case: In *Larkins*[17] X informed Y on the 24th of the month that his (X's) salary for the month would be deposited in his banking account on the 30th. On the strength of this, Y lent X money. However, X failed to disclose to Y that prior to the 24th, he had ceded his entire salary for the month to somebody else. Because of this omission he was convicted of fraud.

In *Harper*[18] X was convicted of fraud in the following circumstances: in order to induce Y to lend him money for a year, he expressed to Y his honest belief that he had adequate security for a loan. Y accordingly lent X the money. Subsequently X discovered that his security was no longer safe. Y still thought that it was, and X knew that Y was under this impression. X nevertheless allowed a year to pass without informing Y of the changed circumstances. At the end of the year he went insolvent and Y could not recover his money. The court stated that X was under a legal duty to inform Y of the changed circumstances relating to the security. His intentional omission to do this constituted a misrepresentation.

---

14 *Mbokazi* 1998 1 SACR 438 (N) 445*f–g*.

15 *Heller (2)* 1964 1 SA 524 (W) 537–538: *Shaban* 1965 4 SA 646 (W) 649. In *Heller* Trollip J said at 537 that before a non-disclosure of an existing fact could amount to fraud "the breach of duty to disclose that fact must have been wilfully committed by the accused (*a*) in such circumstances as to equate the non-disclosure with a representation of the non-existence of that fact . . . (*b*) with knowledge of its falsity . . . (*c*) with intent to deceive, and (*d*) resulting in actual or potential prejudice to the representee". As far as point (*c*) is concerned, it would perhaps have been better to require "an intent to defraud" (cf *infra* par 10). The *dictum* of Trollip J was followed in *Harper* 1981 2 SA 638 (D) 677–678; *African Bank of SA Ltd* 1990 2 SACR 585 (W) 646–647; *Gardener* 2011 1 SACR 570 (SCA) par 30; *Malan* 2013 2 SACR 655 (WCC) 659-660. See also *Western Areas Ltd* 2004 1 SACR 429 (W), in which it was held that an omission to reveal facts on the grounds of the provisions of the Companies Act as well as the "listing requirements" of the Johannesburg Stock Exchange may in certain circumstances amount to a misrepresentation and fraud.

16 *Western Areas Ltd* 2004 1 SACR 429 (W) 438; *Yengeni* 2006 1 SACR 405 (T) 421–222.

17 1934 AD 91. See also *Judin* 1969 4 SA 425 (A) 441–442.

18 1981 2 SA 638 (D).

(*d*) *False promise about the future* It has sometimes been said that a misrepresentation must refer to a present situation or to a past event, and that one relating to the future, being the equivalent of a promise, is insufficient because making a false promise cannot constitute fraud.[19] This statement is, however, misleading. If X makes a promise to do something in the future, she represents, at the time of making it, that she intends to keep it. If, at the time of making the promise she has no intention of keeping it, she misrepresents an existing state of affairs, namely the state of her mind, in that she represents to the outside world that she has a certain belief or intention which she in fact does not have.[20] An important illustration of this rule in practice is the case of a person who gives somebody a cheque when, at the time of delivery, she is not sure or does not believe that she has or will have enough funds in her account to meet the amount shown on the cheque, and she keeps quiet about her lack of funds in the account. Such a person normally implicitly represents that she believes or is sure that the cheque will be met on the due date, and, if the cheque is not met she may be convicted of fraud.[21]

(*e*) *Misrepresentation to a computer or machine* It is possible for X to make a misrepresentation leading to liability for fraud even if the misrepresentation is not made to another person, but to a computer or a machine (such as a parking metre).[22] If X discovers Y's "PIN" number and unlawfully utilises this knowledge to transfer credit which is recorded to Y's advantage in a bank to her (X's) own advantage, or if she succeeds in instructing or manipulating a computer by some underhand method to transfer credit which is not due to her, to her own account, she commits a misrepresentation. She falsely and impliedly

---

19 *Larkins supra* 92; *Deetlefs* 1953 1 SA 418 (A) 421; *Feinberg* 1956 1 SA 734 (O) 736B.

20 *Myers* 1948 1 SA 375 (A) 382; *Deetlefs supra* 421; *Isaacs* 1968 2 SA 187 (D) 191 (in which the following statement from an English case was quoted with approval: "There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion"); *Latib supra* 984–985.

21 *Strydom* 1962 3 SA 982 (N); *Burger* 1969 4 SA 292 (SWA) 296; *MacDonald* 1982 3 SA 220 (A) 240A–C. For a case where X *did* have an honest belief that there would be enough money in his account to meet the cheques, see *Van Niekerk* 1981 3 SA 787 (T) 793. In *Rautenbach* 1990 2 SACR 195 (N), however, it was held that it was not possible to construe a tacit misrepresentation by the person who issued a cheque that he believed that the cheque would be paid by the bank (although at the time of issuing the cheque he knew that there were no funds in the cheque account), since the bank guaranteed payment of cheques to an amount of R200, and the amount of the cheque did not exceed R200. The court held that the person to whom the cheque had been presented could possibly have relied on the advertised guarantee and not on any representation by X. This argument cannot be supported. X had impliedly represented that he had authority from the bank and that he was entitled to write out the cheque, or at least that he believed that he was entitled to write out the cheque, whereas he well knew that he was not entitled to do so. In this case the bank suffered the real or potential prejudice. Furthermore, it is, it is submitted, irrelevant whether Y accepted the cheque as a result of X's misrepresentation or whether he did so as a result of the bank guarantee, since a causal connection between the misrepresentation and the prejudice is not required in the case of fraud (*infra* par 8). It is sufficient that the misrepresentation be potentially prejudicial – which, it is submitted, was indeed the case here.

22 As in *Myeza* 1985 4 SA 30 (T). On fraud committed by the use of credit cards or computers, see Carstens and Trigardt 1987 SACC 132; Botha 1988 *SACJ* 377; 1990 *SACJ* 231; Ebersöhn 2004 *THRHR* 193.

represents to the bank's electronic system that it is Y who is withdrawing the money or who has at least consented to the withdrawal of the money, whereas she (X) knows that it is actually she (X) who is withdrawing the money and that Y has in fact not given her any permission to withdraw the money.[23] (X may also be charged with theft of the money if there is clear evidence that she had committed an act of appropriation by excluding Y from the control of her funds and by herself obtaining the control of the funds with the intention of appropriating it.)[24]

If X steals Y's credit card and then buys goods with the stolen card, she firstly commits theft of the credit card, and secondly she commits fraud every time she uses the card to buy goods, because she then on each occasion makes a misrepresentation that it is her card while knowing that it is in fact somebody else's card.[25]

5 Prejudice – general The following general requirement for fraud, namely the requirement that there must be real or potential prejudice, is next considered. The mere telling of a lie is not punishable as fraud. The crime is committed only if the telling of the lie brings about some form 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 painter 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. These last two prepositions, which incorporate important principles, will now be examined in more detail.

6 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, in other words that the misrepresentation involved some risk of prejudice.

Assume X has insured with an insurance company all articles belonging to her, against theft. She subsequently claims an amount of money from the insurance company on the ground that certain articles belonging to her have been stolen. Her allegation that the articles have been stolen, is, however, false. If the insurance company pays her the money she claims, the company would have suffered actual prejudice. Assume, however, that after she put in her claim, the company discovers that the articles concerned were in fact not stolen and that

---

23 *Mbokazi* 1998 2 All SA 78 (N).

24 Cf the discussion of theft *supra* XVIII A 15 (*b*). Ebersöhn 2004 *THRHR* 198 states: "[W]hen a hacker transfers money from A's account to his account or to someone else's account, he can be charged with fraud (in that he makes a misrepresentation to the bank's system administrator with the intent to defraud the bank) or with theft (in that he stole A's 'money' or more correctly stated: He diminished A's personal rights against the bank)."

25 *Nonkonyana* 2008 2 SACR 271 (E).

X's claim was therefore false. It accordingly refuses to pay X the amount of her claim. Can X still be convicted of fraud? The answer is "yes", because although the company has not suffered any actual prejudice, X's misrepresentation resulted in *potential* prejudice.

What is the meaning of "potential prejudice"?

(1) Potential prejudice means that the misrepresentation, looked at objectively, involved some risk of prejudice, or that it was likely to prejudice.[26]

(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. This means that what is required is that prejudice *can* be, not *will* be, caused.[27]

(3) The possibility of prejudice must be a *reasonable* possibility. This means that remote or fanciful possibilities should not be considered.[28] The test is objective in the sense that it must be determined whether a reasonable person could, in the normal course of events, have suffered prejudice.[29] If the misrepresentation is so far-fetched that no reasonable person would believe it, there is no potential prejudice.

(4) The prejudice need not necessarily be suffered by the representee (Y). Prejudice to a third party, or even to the state or the community in general, is sufficient.[30]

---

26 *Dyonta* 1935 AD 52 55; *Heyne* 1956 3 SA 604 (A) 622; *Kruger* 1961 4 SA 816 (A) 827–828.

27 *Seabe* 1927 AD 28 32, 35; *Heyne supra*; This was also the test posited in *Bester* 1961 2 SA 52 (F) 54 and *Kruger* 1961 4 SA 816 (A) 828–829, 832–833. See also *Chetty* 1972 4 SA 324 (N) 328; *Harper* 1981 2 SA 638 (D) 654H.

28 *Seabe supra* 32, 34; *Heyne supra* 622; *Kruger supra* 832. For cases in which there might have been some discomfort for Y which nevertheless did not amount to prejudice, and where the courts accordingly refused to convict for fraud, see *Ellis* 1969 2 SA 622 (N); *Chetty* 1972 4 SA 324 (N); *Francis* 1981 1 SA 230 (ZA). The courts have held that the issuing of a worthless cheque in payment of an existing debt does not amount to fraud, since there is no prejudice. See *Ellis supra*; *Van Aswegen* 1992 1 SACR 487 (O) 490*b–c*; *Calitz* 1992 2 SACR 66 (O); *Labuschagne* 1997 2 SACR 6 (NC). It is submitted that this view of the law is incorrect, since in this type of case there is at least potential prejudice. The person to whom the cheque is given (Y) may, on the strength of X's conduct, make use of her overdraft facilities at her bank; her computation of the amount of credit she has in the bank may be wrong; or she may have to go to the bank unnecessarily to deposit the cheque or try to cash the worthless cheque. What is more, this view of the law by the courts is irreconcilable with the rule the courts themselves apply that the mere creation of an objective risk of prejudice already constitutes a form of prejudice (*Kruger supra* 827–828). Alternatively, this type of conduct could at least be punishable as attempted fraud. Cf *Ostilly (1)* 1977 4 SA 699 (D) 714–716; *Rosenthal* 1980 1 SA 65 (A) 87. For criticism of this view of the courts, see *Hunt-Milton* 721–722; Snyman 1997 *THRHR* 691.

29 *Seabe supra* 32–34; *Heyne supra* 622; *Kruger supra* 828–829.

30 *Frankfort Motors (Pty) Ltd* 1946 OPD 255 259–260; *Heyne supra* 622; *Minnaar* 1981 3 SA 767 (D) 778–779; *Myeza* 1985 4 SA 30 (T) 32C. In *Tshoba* 1989 3 SA 393 (A) X was arrested on a suspicion of being a terrorist. Shortly after his arrest, when asked by the police to identify himself, he presented a false passport. The Appellate Division held that this conduct did not amount to fraud, since there was no need to amplify the concept of "potential prejudice to the police" to cover a case such as this one. It is difficult to reconcile this decision with the one in *Heyne*, in which the same court held that if a liquor licence holder supplies false information about the sale of liquor he commits fraud, since there is potential prejudice for the state which has the responsibility to enforce legislation

[*continued*]

(5) The fact that the party to whom the misrepresentation has been made (Y) was not in fact misled by the misrepresentation is irrelevant. It is sufficient for a conviction that the misrepresentation had the potential of leading to prejudice.[31] X therefore commits fraud even if she makes the misrepresentation to a police trap who knows very well that X's statement is false.[32] The crime is committed the moment the misrepresentation is made. It follows that it does not matter whether or not Y reacts to the misrepresentation, how Y reacted to the misrepresentation, or whether X's fraudulent scheme is successful or not.[33]

(6) Whether there is potential prejudice must be determined according to the facts which exist at the time the misrepresentation is made. Whether the defrauded party would ultimately have suffered the prejudice anyway is irrelevant.[34]

(7) If X obtains a loan from Y by misrepresenting to her the purpose for which the loan is required, she commits fraud: as a result of the misrepresentation Y is induced to exchange her existing right of ownership in her money for a mere right to reclaim the money from X. Since a mere personal right to claim as a creditor is a weaker right than the real right to property which Y would have had as a possessor, she suffers prejudice and X therefore commits fraud.[35]

In *Myeza*[36] X was held to have committed fraud when he put an object other than a coin into a parking meter, thus activating it. In this case X put the ring of a beer-can lid into the parking meter. By so activating the meter he created the false impression that he had put in a coin as required. In this way he intentionally distorted the truth, so that the persons responsible for enforcing the municipality's by-laws were brought under the false impression that he had paid for the parking in the prescribed manner. This resulted in at least potential prejudice to the municipality. It was held that X had committed fraud.

7 Non-proprietary prejudice sufficient Although in most cases of fraud there is financial or proprietary prejudice (real or potential), the prejudice need not necessarily be proprietary in character. Instances of conduct leading to such non-proprietary prejudice are the following: (*a*) a liquor licensee's making false entries in sales registers regarding the sale of liquor – such conduct is prejudicial

---

about the control of liquor sales. The court's attempt in *Tshoba* to distinguish *Heyne*'s case is, with respect, not convincing. To show a false passport to the police or any other government body is at least potentially prejudicial to the state. It is difficult to see how the state's interests in exercising control over who is inside the country's borders or who is entering the country, could in any way be less important than the state's interest in keeping control over the sale of liquor – an interest which was held by the same court in *Heine supra* to be sufficiently important to be protected by the crime of fraud.

31 *Dyonta* 1935 AD 52; *African Bank of SA Ltd* 1990 2 SACR 585 (W) 647*f–g*; *Campbell* 1991 1 SACR 503 (Nm) 507; *Mdantile* 2011 2 SACR 142 (FB).

32 *Swarts* 1961 4 SA 589 (G).

33 *Dyonta supra* 55–56; *Persotam* 1938 AD 92 95; *Kruger supra* 828, 832–833; *Isaacs* 1968 2 SA 187 (D) 191.

34 *Kruger* 1961 4 SA 816 (A) 828, 832; *Henkes* 1941 AD 143 167.

35 *Huijzers* 1988 2 SA 503 (A), discussed by Botha 1989 *SACJ* 89.

36 1985 4 SA 30 (T) 32C, discussed by Botha 1986 *SACC* 72.

to the state because the misrepresentations are calculated to weaken the state's control over the sale of liquor;[37] (*b*) producing a forged driver's licence to a prosecutor when charged with a traffic offence;[38] (*c*) writing an examination on behalf of another person, thereby misrepresenting to the examiners the examination candidate's identity;[39] (*d*) obtaining a privilege, exemption or permit to which the person requesting it is not entitled but endeavours to obtain by way of fraudulent misrepresentation;[40] (*e*) impairing the dignity or reputation of another by making false allegations against her (if sufficiently serious);[41] (*f*) creating the risk of having to vindicate one's rights by means of civil proceedings or of incurring a criminal prosecution;[42] (*g*) even entering into an agreement which Y would not have entered into if there had been no fraudulent misrepresentation.[43]

8 Requirement of causation superfluous A causal link between misrepresentation and prejudice has sometimes been required,[44] but because "prejudice" is interpreted so widely this requirement of causation has become meaningless. Fraud may be committed even though there is no causal link, provided there is potential prejudice. As was pointed out above, X may be guilty of fraud even though her misrepresentation was unsuccessful.

How irrelevant the requirement of causation is, is apparent from *Kruse*.[45] In this case X obtained two rings from Y on approval. As security he gave Y a cheque which the bank refused to meet. It appeared, however, that Y would have given X the rings even if no cheque had been given as security. The Appeal Court held that the latter consideration afforded X no defence, because "if the false representation is of such a nature as in the ordinary course of things, to be likely to prejudice the complainant, the accused cannot successfully contend that the crime of fraud is not established because the Crown has failed to prove that the false representation induced the complainant to part with his property". The result is that fraud may be committed even where there is actual prejudice, though it cannot be proved that this was caused by the misrepresentation; it is sufficient if the misrepresentation is of such a nature that it is potentially prejudicial.[46]

9 Unlawfulness Compulsion or obeying of orders may possibly be grounds of justification.[47] As was pointed out above,[48] the fact that Y knew that the representation was false is no defence.

---

37 *Heyne* 1956 3 SA 604 (A) 623–625.
38 *Jass* 1965 3 SA 248 (E) 250; *Pelser* 1967 1 PH H102 (O).
39 *John* 1931 *SALJ* 83; *Thabeta* 1948 3 SA 218 (T) 222.
40 *Macatlane* 1927 TPD 708; *Jolosa* 1903 TS 694.
41 *Heine supra* 624; *Kruger supra* 814D–E; *Ressel* 1968 4 SA 224 (A) 232F.
42 *Armstrong* 1917 TPD 145 150; *Gweshe* 1964 1 SA 294 (R) 297.
43 *Deale* 1960 3 SA 846 (T). Cf also *Moodie* 1983 1 SA 1161 (C) 1163D–E.
44 *Van Wyk* 1969 1 SA 615 (C) 623B–C; *Rautenbach* 1990 2 SACR 195 (N).
45 1946 AD 524 533–534, followed in *Judin* 1969 4 SA 425 (A) 435.
46 *Kruger supra* 828, 830; *Gweshe supra* 297.
47 In *Shepard* 1967 4 SA 170 (W) 177–178 the court refused to regard the fact that X acted unlawfully on the instructions of his employer as a defence on a charge of fraud.
48 *Supra* par 6.

10 Intention X must, firstly, be aware of the fact that the representation is false.[49] X can be said to be aware that her representation is false not only if she knows that it is false but also if she has no honest belief in its truth, or if she acts recklessly, careless as to whether it is true or false.[50] She can even be said to know that her representation is false if, although suspicious of their correctness, she intentionally abstains from checking on sources of information with the express purpose of avoiding any doubts about the facts which form the subject-matter of the representation.[51] All these rules applied in practice, it is submitted, are merely applications of the rule that *dolus eventualis* suffices, in other words that it is sufficient if X foresees the possibility that her representation may be false but nevertheless decides to make it.[52]

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 on a course of action prejudicial to herself as a result of the misrepresentation.[53] The former is the intention relating to the misrepresentation, and the latter is the intention relating to both the misrepresentation and the prejudice.[54] It is this latter intention which must be established in order to convict somebody of fraud. The mere telling of lies which the teller thereof does not believe the person to whom they are told will act upon is not fraud.[55] The intention to defraud includes the intention to deceive, but the latter does not include the former.[56]

If the intention to defraud is present, X's motive is immaterial.[57] No intention to acquire some advantage is required.[58]

11 Attempt Because potential prejudice is sufficient to constitute fraud the view was long held that there can be no such thing as attempted fraud, since even if a representation is not believed or acted upon potential prejudice is

---

49 *Hepker* 1973 1 SA 472 (W) 477E–F. *Ex parte Lebowa Development Corporation Ltd* 1989 3 SA 71 (T) 101–104. Cf also *MacDonald* 1982 3 SA 220 (A) 240.

50 *Myers* 1948 1 SA 375 (A) 382; *Bougarde* 1954 2 SA 5 (C) 7–9; *Hepker* 1973 1 SA 472 (W) 477E–F; *Ex parte Lebowa Development Corporation Ltd* 1989 3 SA 71 (T) 101–102.

51 *Myers supra* 382; *Bougarde supra* 7–8.

52 For a case expressly recognising *dolus eventualis* to be sufficient for a conviction of fraud, as well as an analysis of this form of intention in cases of fraud, see *Ex parte Lebowa Development Corporation Ltd* 1989 3 SA 71 (T) 101–104. See also the recognition of *dolus eventualis* as a sufficient form of intention for the purposes of fraud in *African Bank of SA Ltd* 1990 2 SACR 585 (W) 646.

53 "To deceive is to induce a man to believe that a thing is true which is false . . . To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put that to deceive is by falsehood to induce a state of mind, and to defraud is by deceit to induce a course of action" – *Re London and Globe Finance Corp Ltd* (1903) 1 Ch 728 733, approved in *Isaacs* 1968 2 SA 187 (D) 191. See also *Gardener* 2011 1 SACR 570 (SCA) par 35.

54 *Gardener* 2011 1 SACR 570 (SCA) par 31-35.

55 *Harvey* 1956 1 SA 461 (T) 464G.

56 *Isaacs supra* 192; *Bell* 1963 2 SA 335 (N) 337.

57 *Van Biljon* 1965 3 SA 314 (T) 318.

58 *Shepard* 1967 4 SA 170 (W) 179D.

nevertheless present and the fraud is therefore complete.[59] Since the decision of the Appeal Court in *Heyne*,[60] however, it has been acknowledged that an attempt to commit fraud is possible in cases where a misrepresentation is made but not communicated to the representee, for example, because the letter in which it is made is lost or intercepted in the post.[61]

Francis[62] is an example of one of the rare cases in which X was convicted of attempted fraud. He buried some pieces of jewellery in a garden, then took out an insurance policy to cover the jewellery against theft. Within minutes he returned to the insurers, informing them that the jewellery had been stolen out of his car. The insurers told him that he must first report the case to the police and then fill in the prescribed claim form. Using a screwdriver he then forcibly lifted the lock out of the door of his car to simulate a forced entry. Before he could return to the offices of the insurance company the police discovered that he had faked the loss of the jewellery. The court held that his report to the insurance company could not have caused even potential prejudice to the company. His conduct nevertheless went beyond the stage of a mere preparation and constituted an attempt to commit fraud.

12 Aspects of definition may be wide, but not unconstitutional The rule that the prejudice need be neither actual nor patrimonial has been criticised as rendering the meaning of the requirement of prejudice too vague.[63] In *Friedman (1)*[64] the defence invited the court to find that this rule is, because of its vagueness, unconstitutional. However, the court rejected this argument, stating that "[t]he present definition of fraud is wide, but that does not make it difficult, much less impossible, to ascertain the type of conduct which falls within it".[65]

B FORGERY AND UTTERING

1 Definition of forgery Forgery consists in unlawfully and intentionally making a false document to the actual or potential prejudice of another.[66]

2 Elements of the crime The elements of the crime are the following: (*a*) *making a document* (*b*) which is *false* (*c*) *prejudice* (*d*) *unlawfulness* and (*e*) *intention*, which includes the *intention to defraud*.

3 Character Forgery is merely a species of fraud.[67] In forgery the misrepresentation takes place by way of the falsification of a document. Apart from this, all the requirements for the crime of fraud must be present, such as the intent to defraud and actual or potential prejudice.

---

59 *Dyonta* 1935 AD 52 57; *Moshesh* 1948 1 SA 681 (O) 684, 692.
60 1956 3 SA 604 (A) 622.
61 *Isaacs* 1968 2 SA 187 (D) 188–191.
62 1981 1 SA 230 (ZA). For a similar case, see *Chaitezvi* 1992 2 SACR 456 (ZS).
63 *De Wet and Swanepoel* 388 ff.
64 1996 1 SACR 181 (W).
65 At 194*b*.
66 *Muller* 1953 2 SA 146 (T) 148A.
67 *Hymans* 1927 AD 35 37, 38; *Dormehl* 1966 1 PH H223 (A).

There is, however, one small point of difference between fraud and forgery: whereas fraud is completed only when the misrepresentation has come to the notice of the representee, forgery is completed the moment the document is falsified.[68] If the document is then brought to the attention of others a separate crime is committed, namely uttering the document. Because the person who falsifies the document is in most cases also the one who offers it to another, it has become customary to charge that person with both forgery and uttering, which are, nevertheless, two distinct crimes.[69]

4 The document It has never yet been necessary for the courts to define the meaning of "document" for the purposes of the crime of forgery. In *De Wet and Swanepoel* [70] it is contended that upon a proper interpretation of the common law forgery can be committed only in respect of a limited class of documents, namely documents embodying a legal transaction or which afford evidence of such a transaction, or officially drawn-up documents. However, our courts, influenced by English law and by the broader definition of "document" in section 219 of the Native Territories Penal Code,[71] interpret the term "document" more broadly for the purposes of the crime.[72] They have, for example, held that forgery can be committed in respect of the following types of documents: a testimonial,[73] a written request to the military authorities for a pass,[74] and a certificate of competence to repair watches.[75] Other examples of "documents" for the purposes of this crime are: cheques,[76] receipts,[77] promissory notes,[78] bonds,[79] general dealers' licences,[80] and documents setting out educational qualifications.[81]

---

68 *Hymans supra* 38.
69 *Joubert* 1961 4 SA 196 (O) 199–200; *Van Niekerk* 1980 1 SA 594 (O).
70 At 425.
71 Act 24 of 1886 (Cape). The s defines "document" for the purposes of forgery as "any substance on which is impressed and described by means of letters, figures, or marks, any matter which is intended to be or may be used in a court of justice, or otherwise, as evidence of such matter".
72 As far as is known, the narrow definition of "document" found in *De Wet and Swanepoel* has never been adopted by the courts, and was only once referred to *obiter* in *Banur Investments (Pty) Ltd supra* 770–771. *Hunt-Milton* 745 rejects it. In *Joffe* 1934 SWA 108 109 Van den Heever J referred to the accelerated development of the *crimina falsi* towards the end of the Roman Republic, to "curb the machinations of individuals who fraudulently tampered with, destroyed or perverted the authority of the written word". Damhouder 110 regards the falsification *inter alia* of "handschriften" and "brieven" as a particular form of *falsitas*. These terms are wide enough to include more documents than those mentioned in *De Wet and Swanepoel*.
73 *Dhlamini* 1943 TPD 20; *Leballo* 1954 2 SA 657 (O).
74 *Slater* (1901) 18 SC 253.
75 *Motete* 1943 OPD 55.
76 *Joffe* 1934 SWA 108; *Timol* 1959 1 PH H47 (N).
77 *Vilakazi* 1933 TPD 198; *De Beer* 1940 TPD 268.
78 *Sedat* 1916 TPD 431.
79 *Pepler* 1927 OPD 197.
80 *Kolia* 1937 TPD 105.
81 *Macatlane* 1927 TPD 708.

5 Falsification A document is not forged or falsified merely because it contains untrue statements.[82] A lie does not become a forgery merely because it is reduced to writing.[83] A document is false when it purports to be something other than it is. This is the case if it is a spurious imitation of another document,[84] or if it falsely purports to have been drawn up by somebody other than its author,[85] or to contain information (such as figures or dates) which it did not originally contain and which is of material interest for the purposes of the transaction forming the background of the charge.[86]

The falsification can be achieved in many ways, for example, by the alteration,[87] erasure, substitution[88] or addition[89] of particulars on the document, or by endorsement,[90] but not, it is submitted, by the destruction of the whole document. A document falsely purporting to be a copy of a non-existent document is a forged document,[91] as is one signed in the name of a fictitious person.[92]

6 Prejudice The requirement of prejudice is the same as in fraud,[93] except that the existence of potential prejudice in the case of forgery can be inferred at an earlier stage than is the case in fraud, namely as soon as the forgery of the document has been completed.[94] As in fraud, the prejudice need not be actual or patrimonial.[95] On the other hand, the mere forgery of a document does not automatically imply prejudice.[96] The fact that the forgery is clumsy or ineffectual does not mean that there cannot be potential prejudice.[97]

7 Intent The requirement that X must have the intention to defraud (and not merely to deceive)[98] is identical with the corresponding element in the crime of fraud.[99] The intention to defraud obviously entails knowledge on the part of X that she is falsifying a document.

---

82 *Dreyer* 1967 4 SA 614 (E) 618C; *Banur Investments (Pty) Ltd supra* 772E–G.
83 *Banur Investments (Pty) Ltd* 1970 3 SA 767 (A).
84 *Dreyer supra* 618B–C; *Banur Investments (Pty) Ltd supra* 772D.
85 As in *Qumbu* 1952 3 SA 390 (O); *Leballo supra*.
86 The falsification of information which is not of material interest for the purposes of the transaction forming the background of the charge does not amount to forgery – *Redelinghuys* 1990 1 SACR 443 (W). If the falsified information is not material, it will in any event not result in any prejudice.
87 *De Beer* 1940 TPD 268; *Kruger* 1950 1 SA 591 (O).
88 *Leibrandt* 1939 WLD 377.
89 *Muller* 1953 2 SA 146 (T).
90 *Joffe* 1934 SWA 108.
91 *Motete* 1943 OPD 55; *Leballo* 1954 2 SA 657 (O).
92 *Sedat* 1916 TPD 431; *Mashiya* 1955 2 SA 417 (E).
93 *McLean* 1918 TPD 94; *Letsoela* 1942 OPD 99.
94 *Hymans* 1927 AD 35 38.
95 *Macatlane* 1927 TPD 708 (in this case the potential prejudice was of a non-proprietary nature, *viz* injury to Y's honour or reputation); *Kruger supra* 596; *Muller supra* 148; *Keppler* 1970 4 SA 673 (T) 677.
96 *Steyn* 1927 OPD 172; *Letsoela* 1942 OPD 99 101; *Muller supra* 150C.
97 *Crowe* 1904 TS 581 582; *Dormehl* 1966 1 PH H223 (A). If X puts Y's signature to a document with Y's consent there is no falsification of the document and therefore no prejudice. See *Potgieter* 1979 4 SA 64 (ZRA).
98 *Bell* 1963 2 SA 335 (N) 337. *Contra Keppler* 1970 4 SA 673 (T) 667–678, in which it was held (incorrectly, it is submitted) that a mere intention to deceive is sufficient.
99 *Sedat supra* 438; *Letsoela* 1942 OPD 99; *Bell supra* 337.

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

In most cases the person who utters the document is the one who forged it, and she will be charged with two offences, namely forgery and uttering.[100] If the person who utters the document is not the person who forged it, she will be charged with uttering only.[101] Uttering, like forgery, is merely a species of fraud, and the elements of prejudice and intention to defraud are similar to the corresponding elements in the crime of fraud.[102] The requirement of a false document is the same as in the crime of forgery.

The only element in the definition of this crime which does not also form part of the definition of forgery is the "passing off" of the document. This phrase means that the document is communicated to another person by, for example, an offer, delivery or attempt to make use of it in some or other way. The person who utters the document must represent it as genuine,[103] and therefore the mere handing over of a false document by a forger to an accomplice, who is aware of the fact that it is a forged document and who has not yet uttered the document herself, does not constitute an uttering of the document.[104] If the document does not reach the person to whom it is addressed (eg where a letter is lost in the post), there is only attempted uttering.

The passing off of the document can take place through the instrumentality of some other person or agent.[105] It is immaterial whether the person to whom the document is uttered is in fact misled thereby.[106]

C THEFT BY FALSE PRETENCES

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 crime, and appropriates it.

2 Elements of crime The elements of the crime are the following: (*a*) a *misrepresentation* (*b*) *actual prejudice* (*c*) a *causal link* between the misrepresentation and the prejudice (*d*) an *appropriation* of the property (*e*) *unlawfulness* and (*f*) *intention*.

---

100 *Hymans supra* 38.
101 *Ibid* 38, 40. Forgery and uttering are two separate crimes – *Joubert* 1961 4 SA 196 (O) 199–200; *Van Niekerk* 1980 1 SA 594 (O).
102 *Kruger* 1950 1 SA 591 (O) 594.
103 *Kolia* 1937 TPD 105 108–109.
104 *Ibid*; *Latib* 1968 1 SA 177 (T).
105 *Joffe* 1934 SWA 108 109.
106 *Latib supra* 178H. Cf *Seabe* 1927 AD 28 32; *Dyonta* 1935 AD 52 57.

3 Character This crime is regarded by the courts as a form of theft.[107] It comprises those cases of theft where Y is induced to part with her property in favour of X as a result of X's fraudulent misrepresentation.[108] For example, X falsely represents to housewife Y that she (X) repairs and services television sets, and that Y's husband has requested her to fetch their television set for servicing. On the strength of this misrepresentation Y allows X to remove the set from the home. X disappears with it and appropriates it for herself. These cases are treated as theft because it is assumed that there was no valid consent by Y to X's taking of the thing: consent induced by fraud or misrepresentation is not regarded as valid consent.[109] Whether it is legally tenable to speak of theft where Y has consented to the handing over of her property to X, although the consent was "tainted", has been questioned,[110] but the courts have for more than a century consistently dealt with these cases as theft under the special heading of "theft by false pretences".

4 Relation to fraud All cases of theft by false pretences are at the same time also fraud.[111] The converse, however, is not the case. The crime of fraud is completed the moment the misrepresentation has come to the notice of the representee. For theft by false pretences to be completed, however, it is further required that the misrepresentation be followed by the handing over of the property to X and her appropriation of it.[112] In cases of theft by false pretences, therefore, two crimes are actually committed: first, fraud and then theft.

5 Doubtful whether crime necessary The question arises whether the crime is at all necessary in our law. Criminal law would be none the poorer if this crime were discarded. Nobody who would otherwise be guilty of theft by false pretences would escape the sanctions of criminal law if the crime were dispensed with. The person who commits the act complained of would invariably be guilty of either fraud or (according to the courts) theft. In some cases[113] the crime has indeed been described as superfluous.

It is nevertheless submitted that it would not be satisfactory to treat all cases of theft by false pretences simply as cases of fraud. A conviction of fraud only does not fully reflect all the blameworthy elements of X's conduct. After all, she causes not only proprietary prejudice by her fraudulent behaviour but goes

---

107 *Teichert* 1958 3 SA 747 (N) 753G; *Ex parte Minister of Justice: in re R v Gesa; R v De Jongh* 1959 1 SA 234 (A) 239D; *Vilakazi* 1959 4 SA 700 (N) 701H; *Anderson* 1962 2 SA 286 (O) 287; *Government of the Republic of SA v Pentz* 1982 1 SA 553 (T) 560–561; *Mia* 2009 1 SACR 330 (SCA) par 16.

108 *Maklakla* 1919 TPD 336 340; *Salemane* 1967 3 SA 691 (O) 692G.

109 *Ex parte Minister of Justice: in re R v Gesa; R v De Jongh supra* 240D.

110 Especially by Van den Heever J in *Mofoking* 1939 OPD 117 118; *Coovadia* 1957 3 SA 611 (N) 612F; *Teichert supra* 753; *De Wet and Swanepoel* 325 ff; 407–417.

111 *Davies* 1928 AD 165 170; *Ex parte Minister of Justice: in re R v Gesa; R v De Jongh supra* 240; *Nkomo* 1975 3 SA 598 (N) 602C. Contrast, however, *Mia* 2009 1 SACR 330 (SCA)

112 *Davies supra* 170.

113 *Stevenson* 1976 1 SA 636 (T) 637. In this case Hiemstra J said that the Attorney-General of the Transvaal had assured him that he never allowed anybody to be charged with this crime. See also *Mphatswanyane* 1980 4 SA 253 (B). See further the severe criticism in *De Wet and Swanepoel* 416–417.

further and turns this prejudice to her advantage by appropriating the property. It is submitted that the best way of treating such cases is to charge X with ordinary theft, but to include a specific allegation in the charge sheet to the effect that X obtained the property as a result of false pretences.[114]

114 *Levitan* 1958 1 SA 639 (T) 644; *Teichert supra* 753–754; *Knox* 1963 3 SA 431 (N); *Salemane* 1967 3 SA 691 (O) The judgment of the Supreme Court of Appeal in *Mia* 2009 1 SACR 330 (SCA) may serve as authority for the usefulness of this crime. In his discussion of this case in 2009 *Annual Survey of SA Law* 316, Hoctor expresses the view that the crime "has a useful role to play in South African criminal law".

CHAPTER

XX

CRIMES RELATING TO DAMAGE TO PROPERTY

A MALICIOUS INJURY TO PROPERTY

1 Definition A person commits malicious injury to property if he unlawfully and intentionally damages:

(*a*) property belonging to another; or

(*b*) his own insured property, intending to claim the value of the property from the insurer.[1]

2 Elements of the crime The elements of the crime are the following: (*a*) *damaging* (*b*) *property* (*c*) *unlawfully* and (*d*) *intentionally*.

3 Origin, overlapping and appellation The crime as it is known today was not known in Roman or Roman-Dutch law.[2] It was evolved by the Cape courts during the last century, being modelled partly on English law and partly on analogous provisions to be found in the common law.[3]

It overlaps with the crime of arson, which is simply a particular form of malicious injury to property.[4] It also overlaps with certain instances of theft, namely where X destroys Y's property with the intention of permanently depriving Y of his property.[5] If X's conduct amounts to an appropriation of the property X may

---

1 *Mashanga* 1924 AD 11 12; *Bowden* 1957 3 SA 148 (T) 150B; *Kgware* 1977 2 SA 454 (O) 455. In *Mnyandu* 1973 4 SA 603 (N) 606A it was said that the crime is the unlawful and intentional damaging of property belonging to another person or in which another person has a substantial interest. The reason for the (*b*) section of the definition is to be found in *Gervais* 1913 EDL 167 and *Mavros* 1921 AD 19, discussed *infra* par 4.

2 In Roman law only certain forms of what is today known as malicious injury to property were punished: see D 47 8 2 1; D 47 9 1 1; D 47 9 4; D 47 7 2, and D 48 6. For a discussion of the position in Roman-Dutch law generally, see *Solomon* 1973 4 SA 644 (C) 647H, 648B–C.

3 See generally the discussion in *Solomon supra* 647H.

4 *Motau* 1963 2 SA 521 (T) 523D–E.

5 As in *Maruba* 1941 2 PH H249 (O); *Kama* 1949 1 PH H66 (O); *Kula* 1955 1 PH H66 (O); *Dlomo* 1957 2 PH H184 (E); *Ndukiso* 1945 EDL 119 and *Mohale* 1955 3 SA 563 (O). In

[*continued*]

be charged with either malicious injury to property or theft. It may also overlap with housebreaking with intent to commit a crime, for instance, where X breaks a window in order to gain access to a house.

The use of the word "malicious" in the description of the crime is unnecessary, for it wrongly creates the impression that X must act with an evil motive or "malice". X's motive is in fact irrelevant. All that is required is that X damages the property intentionally.

4 The property The property must be corporeal, and may be either movable or immovable.[6] The crime cannot be committed in respect of property which belongs to nobody (*res nullius*).[7] In principle one cannot commit the crime in respect of one's own property, for it stands to reason that the owner is free to do with his property what he likes. For example, if I no longer like my rickety old table, I commit no crime if I chop it to pieces and use it as firewood.

However, an early Eastern Cape case, *Gervais*,[8] held that X commits malicious injury to property if he sets fire to his *own* insured property in order to claim its value from the insurance company. This decision can be criticised: if X falsely represents to the insurance company that somebody else has destroyed his property, he commits fraud. It is unnecessary to broaden the ambit of the crime of malicious injury to property so as to include this type of situation. Nevertheless in *Mavros*[9] the Appellate Division held that conduct similar to that in *Gervais* does amount to arson (which is but a species of malicious injury to property). *Mavros* is an appeal court decision and it is unlikely that the courts will depart from it. If one assumes that arson is but a species of malicious injury to property, one must accept that our courts will also, as far as malicious injury to property is concerned, feel bound to follow *Mavros*, and will, thus, hold that X commits malicious injury to property if he damages or destroys his own insured property in order to claim its value from the insurer.

5 Damage Damage, as understood in the definition of this crime, is difficult to define in abstract terms. It includes the total or partial destruction of property, as where an animal is killed[10] or wounded;[11] the loss of the property or substance, for example, the draining of petrol from a container, and the causing of any injury (either permanent or temporary) to property. Where the injury is trifling it will be disregarded by the law because of the maxim *de minimis non curat lex* (as where X, without the consent of his neighbour Y, trims Y's overgrown hedge with a pair of garden shears).[12] There can be damage even where

---

the first four cases X was convicted of malicious injury to property and in the last two of theft, although the facts in all six of these cases were materially similar (the killing of another's animal).

6 In *Bowden supra* the property damaged was an immovable statue.

7 *Malamu Nkatlapaan* 1918 TPD 424 428; *Mandetela* 1948 4 SA 985 (E) 990.

8 1913 EDL 167. This case was referred to with apparent approval in *Mtetwa* 1963 3 SA 445 (N) 449.

9 1921 AD 19.

10 *Maritz* 1956 3 SA 147 (G); *Moller* 1971 4 SA 327 (T); *Oosthuizen* 1974 1 SA 435 (C).

11 *Laubscher* 1913 CPD 123; *Mashanga* 1924 AD 11 (ears of an ox were cut).

12 This is what happened in *Dane* 1957 2 SA 472 (N).

the original structure of the property is not changed as, for example, where a statue is painted.[13] It will usually be assumed that there is damage if the property has been tampered with in such a way that it would cost the owner money or at least some measure of effort or labour to restore it to its original form.[14] If X writes or paints graffiti on a wall or structure, he commits the distinct crime of contravention of section 44 of the General Law Further Amendment Act 93 of 1962.[15]

6 Unlawfulness Otherwise unlawful injury to property may be justified by (*a*) statutory provisions giving X the right to destroy, wound or catch trespassing animals;[16] (*b*) necessity, as where X defends himself against an aggressive animal[17] or defends his property against an attack by an animal;[18] (*c*) official capacity, as where a policeman breaks open a door to gain access to a house in which a criminal is hiding; (*d*) consent by the owner of the property, and (*e*) obedience to orders.[19]

7 Intention The form of culpability required for the crime is intention. The terms "malice" or "malicious", which are often employed to describe X's state of mind, derive from English law[20] and may create the impression that the crime can be committed only if X acts with some improper or ulterior motive, such as personal ill-will or spite. This is not the case.[21] The ordinary principles of criminal law relating to intention apply. X's motive is irrelevant. Damaging the property need not be X's principal aim: it is sufficient if he foresees the possibility that the damage may be caused and nevertheless proceeds with his actions.[22]

X need not intend to harm any particular person;[23] in fact, in many instances the true owner or person entitled to the use or possession of the property is unknown to him. The intention may be present even if it forms part of a larger design to commit some other crime, such as escaping from custody.[24] If X *bona fide* believes that he is entitled to damage the property whereas in fact he has no such authority, he lacks the intention necessary to constitute the crime.[25]

---

13 This is what happened in *Bowden* 1957 3 SA 148 (T).
14 *Bowden supra* 150G.
15 For a discussion of this provision, see Van Rooyen 2001 *SACJ* 238.
16 See the defence raised in *Oosthuizen* 1974 1 SA 435 (C); *Van der Westhuizen* 1976 2 PH H194 (C).
17 *Laubscher* 1913 CPD 123 126 (defending oneself against an attack by an ostrich); *Jaffet* 1962 2 PH H220 (R) (police dog wounded in "self-defence").
18 *Dittmer* 1971 3 SA 296 (SWA) 298; *Moller* 1971 4 SA 327 (T) 329.
19 Cf *Stewart* 1903 TS 456 and *Maritz supra*.
20 As emphasised in *Ncetendaba* 1952 2 SA 647 (R) 650H.
21 *Shelembe* 1955 4 SA 410 (N) 411D; *Mnyandu* 1973 4 SA 603 (N) 605H.
22 *Ncube* 1968 2 SA 18 (R) 19; *Kgware* 1977 2 SA 454 (O) 455.
23 *Malamu Nkatlapaan supra* 428; *Mtetwa* 1963 3 SA 445 (N) 449D–E.
24 *Shelembe* 1955 4 SA 410 (N) 411.
25 *Shahmohamed v Hendriks* 1920 AD 151 158; *Barber* 1937 EDL 79.

B ARSON

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.[26]

2 Elements of crime The elements of the crime are the following: (*a*) *setting fire to* (*b*) *immovable property* (*c*) *unlawfully* and (*d*) *intentionally*.

3 Requirements for crime Arson is only a particular form of the crime of malicious injury to property.[27] The crime can be committed only in respect of immovable property.[28] If movable property is set on fire the crime of malicious injury to property may be committed, provided the other requirements for this crime are complied with. The crime is completed only at the moment that the property has been set on fire.[29] 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, according to the general rules governing liability for attempt, proceeded beyond mere acts of preparation.[30]

As in malicious injury to property one cannot in principle commit arson in respect of one's own property. Yet the courts, including the Appellate Division in *Mavros*,[31] have held that X commits arson if he sets fire to his own insured property in order to claim its value from the insurer.[32] It would have been better to punish this type of conduct as fraud instead of arson, but the courts will in all probability not depart from the appeal court's view that such facts amount to arson and this is the reason the crime was defined above in terms including this type of situation.

Intention, and more particularly an intention to damage property by setting fire to it, thereby causing patrimonial harm to somebody, is required.[33] *Dolus eventualis* is sufficient.[34]

---

26 In *Soqokomashe* 1956 2 SA 142 (E) 142E arson is defined as "the intentional setting on fire of any immovable property with intention to injure someone". Since arson is merely a form of malicious injury to property the definition of this crime is dependent on that of malicious injury to property. See *supra* XX A 1.

27 *Motau* 1963 2 SA 521 (T) 523D–E.

28 *Mavros* 1921 AD 19 ("buildings and other immovable property"); *Mabula* 1927 AD 159 161, 162; *Mataung* 1953 4 SA 35 (O) 36A–B; *Motau supra* 522.

29 *Viljoen* 1941 AD 366 367; *Soqokomashe supra* 143E.

30 *Schoombie* 1945 AD 541.

31 1921 AD 19.

32 Apart from *Mavros*, see also *Van Zyl* 1987 1 SA 497 (O).

33 *Mavros supra* 22; *Kewelram* 1922 AD 213 216; *Shein* 1925 AD 6 12.

34 Cf *Kewelram supra* and *Shein supra*.

C HOUSEBREAKING WITH INTENT TO COMMIT A CRIME

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.[35]

2 Elements of crime The elements of the crime are the following: (*a*) *breaking* and (*b*) *entering* (*c*) *a building or structure* (*d*) *unlawfully* and (*e*) *intentionally*.

3 Character of crime The crime was unknown in Roman-Dutch law.[36] The crime as we know it today was developed under the strong influence of English law during the nineteenth century. Whether the end result of the development of this crime in our law is satisfactory in all respects is very doubtful. The most fundamental criticism against the crime as it is known today is that the law places all the emphasis on the housebreaking and the intent, instead of on the unlawful entry, which is the gravamen of the offence.[37] What is actually protected, namely the right of a householder to undisturbed habitation of his house or storage of his property,[38] seems to be forgotten while emphasis is laid on artificial rules governing "breaking", "entering", "premises" and "intention to commit a crime".[39] The latter intention is threatening to become a mere fiction since a person can be charged with and convicted of a crime called "housebreaking with intent to commit a crime unknown to the prosecutor".[40]

4 Housebreaking alone not a crime Housebreaking *per se* is not a crime[41] (although the act of housebreaking as such may, depending upon the circumstances, amount to the crime of malicious injury to property). To constitute the crime the housebreaking must be accompanied by the intention of committing some other crime. In practice housebreaking is mostly committed with the intention to steal, and charged as such, but in principle charges of housebreaking with intent to commit any crime are competent.[42] The legislature has even sanctioned

---

35 The definition put forward in *Hunt* 707 and *Burchell and Milton* 857 reads: "Housebreaking with intent to commit a crime consists in unlawfully breaking and entering premises with intent to commit that crime." Cf also the brief definition in *Badenhorst* 1960 3 SA 563 (A) 566B.

36 *Badenhorst supra* 566B–C.

37 *Faison* 1952 2 SA 671 (R) 673A–B.

38 *Slabb* 2007 1 SACR 77 (C) 81*a–b*. Hoctor 1998 *Obiter* 96 examines different possible rationales for the crime and argues that an overarching rationale can be found in the protection of the owner or occupant against the psychological trauma and sense of violation invariably accompanying a housebreaking.

39 See the criticism of this crime in *Ngobeza* 1992 1 SACR 610 (T) 614*e–h*; *Abrahams* 1998 2 SACR 655 (C) 656; *Woodrow* 1999 2 SACR 109 (C) 111*h*–112*c*; *De Wet and Swanepoel* 360 ff, especially 365–372; *Hoctor* 289–298 and Snyman 1977 *SACC* 11 28–30; 1993 *SACJ* 38.

40 *Infra* par 11.

41 *Hlongwane* 1992 2 SACR 484 (N) 485; *Maseko* 2004 1 SACR 22 (T) 23.

42 *Schonken* 1929 AD 36 46; *M* 1989 4 SA 718 (T).

charges of housebreaking with the intention of committing a crime unknown to the prosecutor.[43]

As "housebreaking with intent to steal" is a crime in its own right, X is charged with two crimes if he is charged with "housebreaking with intent to steal and theft".[44] However, it is still uncertain whether a conviction of "housebreaking with intent to steal and theft" is a conviction of a single crime or of two crimes.[45] In practice this is unimportant, for even if one holds that two crimes have been committed they are treated as one crime for the purposes of punishment. It is submitted that the better view is that two crimes have been committed.

5 Building or structure Generally, 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.[46] It is most often a house (irrespective of whether it has one or many rooms), store-room, business premises, an outbuilding or a factory. It has been held that the crime can also be committed in respect of a tent wagon used as a residence[47] and a cabin on a ship,[48] but not in respect of the following: a railway truck used for conveying goods;[49] a fowl-run made of tubes and wire netting,[50] and an enclosed backyard.[51] Neither can the crime be committed by breaking into a motor car.

In *Abrahams*[52] the court held that the crime cannot be committed in respect of a tent standing next to a caravan in which there was *inter alia* a fridge, from which X stole food. It is submitted that this decision is wrong. The tent was probably attached to the caravan and was used for human habitation or the storage of goods. The fact that the "walls" of this structure were of canvas and not of brick or some more solid material, is immaterial.

It is difficult to deduce from the cases a general principle that can be applied in order to decide whether a particular premises or structure qualifies as one in respect of which the crime can be committed. *De Wet and Swanepoel*[53] concluded that if the structure is used for human habitation it does not matter whether the structure is movable or immovable, but, if it is used for the storage of goods, it must be immovable.

---

43 S 95(12), read with ss 262 and 263 of the Criminal Procedure Act 51 of 1977, and see *infra* par 11.

44 *Zamisa* 1990 1 SACR 22 (W) 23*d–e*; *Cetwayo* 2002 2 SACR 319 (E) 321.

45 Housebreaking with intent to steal and theft were regarded as a single crime in *Impey* 1960 4 SA 556 (E) 566G, but regarded as comprising two separate crimes in *Mkize* 1961 4 SA 77 (N) 77H; *Buthelezi* 1961 4 SA 376 (N); *Chinyerere* 1980 2 SA 576 (RA) 580; *Zamisa* 1990 1 SACR 22 (N).

46 *Lawrence* 1954 2 SA 408 (C) 409; *Meyeza* 1962 3 SA 386 (N); *Ndhlovu* 1963 1 SA 926 (T) 927; *Ngobeza* 1992 1 SACR 610 (T) 613*h*.

47 *M'Tech* 1912 TPD 1132.

48 *Lawrence supra* 409.

49 *Johannes* 1918 CPD 488.

50 *Charlie* 1916 TPD 367.

51 *Makoelman* 1932 EDL 194; *Ngobeza* 1992 1 SACR 610 (T) 613*j*, 614*b*.

52 1998 2 SACR 655 (C) 656.

53 At 351. In *Ngobeza supra* 613*i* the court seemed to agree with this view of the law.

Although this conclusion seems to tally in broad outline with the case law, it was explicitly rejected as a criterion by the Cape court in *Temmers*.[54] In this case the court held that the criterion to be used should rather be the following: one must distinguish between

- *Firstly*, a structure "in which goods are kept or stored to safeguard them from the elements or misappropriation, or placed for functional reasons". The crime can, according to the court, be committed in respect of this type of structure.
- *Secondly*, a structure "(like packing cases or containers) in which goods are placed for ease of storage or conveyance". The crime can, according to the court, not be committed in respect of this category.[55]

Thus, X does not commit the crime if he "breaks into" a suitcase or even "a modern steel container lying on the wharf-side prior to being loaded onto a vessel for conveyance".[56] On the other hand, it would seem that, according to the criterion in *Temmers*, the crime can be committed in respect of virtually any structure used for human habitation, no matter how flimsy its construction.

Whether the criterion laid down in *Temmers* will be followed in other divisions, remains to be seen.[57] This criterion may be criticised for its vagueness. Goods may, after all, be placed in a container or structure both in order "to safeguard them from the elements or misappropriation" and "for ease of storage", in which case the structure would fall into both categories and it would seem impossible to distinguish between the two categories. The phrase "or placed for functional reasons" in the formulation of the criterion also seems to be too vague to be workable.[58]

Whatever criterion one adopts, it should be noted that if the structure is used for the storage of goods (and therefore qualifies as a structure for the purposes of this crime) it need not necessarily be so large that a person of average height can enter it. Thus, there have been convictions of this crime where an immovable display cabinet separate from but forming an integral part of a shop has been broken into,[59] and where a mine magazine made of concrete and used for the storage of dynamite, but too small for a person to enter, has been broken into.[60] The material of which it is made is of little importance. It may vary from a canvas tent[61] to a structure built of thick concrete.[62]

---

54 1994 1 SACR 357 (C).
55 See 361*b–c*.
56 See 361*c*.
57 In *Mavungu* 2009 1 SACR 425 (T) the court based its decision that the crime can be committed in respect of a caravan on both the criteria laid down in *De Wet and Swanepoel* and that recommended by the court in *Temmers*. Since the court relied on both criteria, its judgment cannot be construed as an unqualified support for one criterion at the expense of the other.
58 Hoctor 2008 *SACJ* 315 and 1998 *Obiter* 127 is of the opinion that the criterion laid down in *Temmers* is acceptable.
59 *Ndhlovu* 1963 1 SA 926 (T).
60 *Botha* 1960 2 SA 147 (T).
61 *Thompson* 1905 ORC 127. *Contra Abrahams* 1998 2 SACR 655 (C) 656. It is submitted that this decision is wrong.
62 *Botha supra*.

A person who has a right of entry to a house or building may still commit housebreaking in respect of a separate room in that building.[63]

6 Is housebreaking in respect of a caravan possible? Given the vagueness of the criterion (or lack thereof) to decide whether a structure qualifies as one in respect of which this crime can be committed, it comes as no surprise to find that the courts experience considerable difficulties in deciding whether a caravan (which by definition is "a house on wheels") qualifies. Before the *Temmers* case was decided, it seems as if the courts had nevertheless decided that a caravan did qualify, even if the breaking-in took place at a time when nobody was living in it,[64] but that it did not qualify if, although it could not be moved, it was used merely for the purpose of storing goods.[65]

This construction is perfectly explicable in terms of the criterion laid down by *De Wet and Swanepoel*, according to which a structure used merely for the storing of goods had to be immovable in order to qualify. However, in terms of the criterion formulated in *Temmers*,[66] a caravan used merely for the storage of goods may qualify, and in this case the court in fact held that a caravan used as a shop and which was not moved around but was positioned in one particular place "with a relative degree of permanency", did indeed qualify.[67] The structure in question in *Temmers* was for all practical purposes an immovable structure. It would therefore have qualified as one in respect of which the crime can be committed even in terms of the criterion of *De Wet and Swanepoel*. In *Mavungu*[68] the court held that housebreaking can be committed in respect of an empty caravan that was displayed for sale.

It is submitted that, as far as the question whether housebreaking can be committed in respect of a caravan is concerned, one must simply follow the following common-sense approach:[69] the normal purpose of a caravan is to serve as a place in which to stay, although people seldom stay permanently in a caravan. Since the normal use of a caravan is human habitation, it does qualify as a structure in respect of which housebreaking can be committed. Only in exceptional cases, namely when the caravan has been converted into a place for storing goods on a reasonably permanent basis, does it not qualify as such a structure, as where the wheels have been removed and the caravan placed on bricks or other blocks to serve as a dovecot.

It is submitted that the criterion suggested by *De Wet and Swanepoel*, according to which a structure used for the storage of goods or property must be immovable in order to qualify, is more workable, less vague, and therefore to be preferred to the criterion suggested in *Temmers*.

A trailer that is hooked onto the back of a motor car and which is meant only for the transportation of goods, ought according to the criterion advanced above,

---

63 *Coetzee* 1958 2 SA 8 (T); *Myeza* 1962 3 SA 386 (N).
64 *Madyo* 1990 1 SACR 292 (E).
65 *Jecha* 1984 1 SA 215 (Z).
66 1994 1 SACR 357 (C) 361*b–c*.
67 See 361*e*.
68 2009 1 SACR 425 (T), discussed by Snyman 2010 *THRHR* 158.
69 In *Madyo supra* 294*d-e* Kannemeyer JP advocated such an approach to this issue.

ought not to qualify as a structure in respect of which the crime can be committed, because it is movable and not intended for human habitation.[70]

7 Breaking The act can be subdivided into two separate components, namely (*a*) breaking into the structure and (*b*) entering it. The first component will first be considered.[71]

For breaking to take place no actual damage to the structure need be inflicted,[72] although it usually is in practice. The "breaking" consists of the removal or displacement of any obstacle which bars entry to the structure and which forms part of the structure itself.[73] Thus, to push open a closed (though not locked) door or window[74] or even to push open a partially closed door or window[75] will amount to breaking, but there is no breaking if one merely walks through an open door,[76] climbs through an open window[77] or stretches one's arm through an open hole.[78]

The obstacle which is removed in order to break in need not be a permanent attachment to the building. However, it must form part of its structure. Therefore the mere shifting of blinds in front of an open window in order to gain access to the house will qualify as a "breaking in",[79] but not the mere shifting of a pot plant on a window-sill. Neither will the mere moving of a curtain amount to "entering", since a curtain cannot be regarded as an "obstruction".[80] If X arranges with an associate Z that Z, who normally has a right to be in the house during the day, will conceal himself in it after he has finished his work and will open the door from the inside to let X in, X is considered to have "broken into" the house.[81] (X merely used Z as a "tool" to gain entry into the house.) The position is the same if X, unable to climb through an opening in a building, gets a child to climb through it and to open the door from the inside.[82]

Finally, the breaking must be *into* the building. To break *out* of a building or structure after having entered it without a breaking-in cannot entail liability for housebreaking.[83]

8 Entering A mere "breaking" without "entering" is not sufficient to constitute the crime,[84] although it may amount to an attempt to commit the crime.[85]

---

70 Snyman 2010 *THRHR* 157 163.
71 For a detailed discussion of this requirement, see Hoctor 1998 *Obiter* 201.
72 *Mososa* 1931 CPD 348 352; *Faison* 1952 2 SA 671 (R) 673.
73 *Lekute* 1991 2 SACR 221 (C); *Ngobeza* 1992 1 SACR 610 (T) 614*c*.
74 *Faison supra* 673B–C; *Maelangwe* 1999 1 SACR 133 (NC) 146.
75 *Mososa* 1931 CPD 348 351–352; *Moroe* 1981 4 SA 897 (O) 899.
76 *Moyana* 1921 EDC 139 140; *Makoelman* 1932 EDL 194.
77 *Rudman* 1989 3 SA 368 (E) 385.
78 *Chalala* 1947 3 SA 62 (O); *Dyenti* 1973 1 PH H4 (C).
79 *Lekute* 1991 2 SACR 221 (C).
80 *Hlongwane* 1992 2 SACR 484 (N) 486*h–i* ; *Small* 2005 2 SACR 300 (C) 302–303.
81 *Tusi* 1957 4 SA 553 (N) 556; *Maelangwe* 1999 1 SACR 133 (NC) 146*i*.
82 *Maelangwe* 1999 1 SACR 133 (NC) 147*a–b*.
83 *Maunatlala* 1982 1 SA 877 (T); *Ngobeza supra* 614*c–d*.
84 *Maruma* 1955 3 SA 561 (O); *Melville* 1959 3 SA 544 (E) 545E.
85 *Ncanca* 1954 4 SA 272 (E). For cases of attempted housebreaking with intent to commit a crime where actual breaking has not taken place, see *Mtetwa* 1930 NPD 285; *Ndhlovu* 1963 1 SA 926 (T). On the entry requirement in this crime generally, see Hoctor in Hoctor and Schwikkard (ed) *The Exemplary Scholar: Essays in Honour of John Milton* 45.

Like the concepts "building" and "breaking", "entering" also has a very technical meaning. The entry is complete the moment X has inserted any part of his body, or any instrument he is using for that purpose, into the opening with the intention of thereby exercising control over some contents of the building or structure.[86] Entry obtained by fraud is not sufficient to constitute housebreaking, but entry obtained by threats (as where X threatens to kill a gatekeeper if he does not open the gate for him) does constitute illegal "breaking" and "entry" for the purposes of this crime.[87]

9 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,[88] or if one has permission to enter (eg as a servant).[89] But the permission given to, for example, a servant to enter a building may be qualified: he may, for example, be allowed to enter only certain parts of the building or at certain times of the day only. Therefore a servant who, for example, breaks into a built-in safe in an office which he is cleaning may commit the crime.[90]

Where Y requests X, a locksmith, to open the door of his house because he, Y, has lost his key, X's breaking into and entering the house take place with Y's consent and are therefore not unlawful. The unlawfulness may conceivably also be excluded on grounds of justification such as necessity, presumed consent, superior orders and official capacity (as where a policeman breaks open a door in order to arrest a criminal).

If X, who is walking in a street, is surprised by an unexpected, heavy thunderstorm which makes him fear for his life, and runs to a house, opens the door uninvited and enters the house in order to take shelter against the elements, he commits no crime, first, because his "breaking into the house" is justified by necessity and, secondly, because he lacks the intention of committing any crime inside.

10 Intention X must, *firstly*, have the intention of unlawfully breaking into and entering the house or structure. Such intention will be absent if, for example, he believes that he is breaking into his own house, or that he is committing the act of housebreaking with the approval of the owner of the house.

Secondly, he must at the time of the housebreaking have the intention of committing some other crime inside, for mere housebreaking on its own is not a crime. This further crime which he intends to commit must be a different one from the housebreaking itself.[91] Housebreaking with intent to commit malicious injury to property cannot therefore be committed where such malicious injury to property is the same act as the housebreaking itself. The position is different

---

86 *Melville* 1959 3 SA 544 (E) 545E–F.

87 *Mososa* 1931 CPD 348; *Maisa* 1968 1 SA 271 (T) and especially *Cupido* 1975 1 SA 537 (C) 538. On entry by means of threats, duress or intimidation, as well as the "doctrine of constructive breaking", see Bhamjee and Hoctor 2005 *Obiter* 726.

88 *Faison* 1952 2 SA 671 (R) 673.

89 *Mashigo* 1976 6 PH H210 (A).

90 *Coetzee* 1958 2 SA 8 (T) 10.

91 *Melville* 1959 3 SA 544 (E).

if the housebreaker intends to commit malicious injury to property within the building once he has gained entry.[92] This further intended crime is usually theft but may be any other crime known either in common or statutory law,[93] such as murder,[94] rape,[95] assault,[96] robbery[97] or malicious injury to property.[98]

If it is difficult to ascertain which crime the housebreaker intended to commit, there are two possibilities: *firstly*, he may be charged with housebreaking with the intention of contravening some trespass ordinance or statute[99] and, *secondly*, in terms of section 95(12) of the Criminal Procedure Act, he may be charged with housebreaking with the intention of committing "a crime unknown to the prosecutor".

The intention to commit a crime must be present at the moment of breaking and entering. If X forms this intention only after he has entered the building, the crime of housebreaking with intent is not committed.[100] It is submitted that X may then be charged with malicious injury to property or, depending upon the circumstances, with housebreaking with intent to commit a crime unknown to the prosecutor.

11 Housebreaking with intent to commit a crime unknown to the prosecutor

The legislature has made it possible to charge[101] and convict[102] a person of "housebreaking with intent to commit an offence unknown to the prosecutor".

There is much to be said for the view that this crime (namely "housebreaking with intent to commit an offence unknown to the prosecutor") has no right of existence. Housebreaking on its own is not a crime. What in effect happens here is that a person is charged with having committed something which is not a crime (namely housebreaking) with the allegation that the act was accompanied by an intention to commit another, unknown, crime. The mere intention to commit even a known crime is not punishable. After all, the law does not punish mere thoughts. To charge somebody with such a crime is therefore to charge him with something which conceptually cannot constitute a crime.

What is more, a charge or conviction of housebreaking with intent to commit an unknown crime contains a contradiction: how can a court find as a fact that X intended to commit *a* crime if it is impossible for that court to determine *what* this intended crime was?[103] It is submitted that a court may largely evade

---

92 *Badenhorst* 1960 3 SA 563 (A) 566–567.
93 *Schonken* 1929 AD 36 46.
94 *Cumoya* 1905 TS 402 405.
95 *Cumoya supra* 405; *Williams* 1956 2 PH H192 (G).
96 *Grobler* 1918 EDL 124 127.
97 *Cupido* 1975 1 SA 537 (C).
98 *Badenhorst* 1960 3 SA 563 (A) 566.
99 *Badenhorst supra*; *Konyana* 1992 1 SACR 451 (O).
100 *Andries* 1958 2 SA 669 (E).
101 S 95(12) of the Criminal Procedure Act 51 of 1977.
102 Ss 262 and 263 of the Criminal Procedure Act 51 of 1977.
103 The inherent injustice of charging a person with housebreaking with intent to commit an unknown offence was pointed out by Innes CJ in *Cumoya supra* 404–405. Hugo 1969 *SALJ* 22 23 argues that "(i)f at the end of the case the court is still in doubt as to which offence the accused intended to commit, the doubt must surely extend to the possibility that he intended to commit no offence at all, in which case he must be acquitted". *Hunt-*

[*continued*]

this criticism by endeavouring to ascertain *what* crime X intended to commit and convicting him of housebreaking with intent to commit that particular crime, rather than of housebreaking with intent to commit a crime unknown to the prosecutor. When a court looks for the particular crime intended by X it very often finds the crime to be trespassing; this so-called "intention to trespass" is seized upon by the courts as a sort of *deus ex machina* to cover those cases where it is impossible for the court to determine what X's real intention was when he committed the housebreaking. This makeshift solution, just like the whole idea of "an intention to commit an unknown crime", only serves to indicate the artificiality of this crime.[104]

The question may arise whether a charge of housebreaking with intent to commit a crime unknown to the prosecutor is not perhaps unconstitutional, on the ground that it violates an accused's right "to be informed of the charge with sufficient detail to answer it".[105]

D POSSESSION OF HOUSEBREAKING IMPLEMENTS[106]

1 Definition Section 82 of the Third General Law Amendment Act 129 of 1993 provides that any person who possesses any implement or object in respect of which there is a reasonable suspicion that it was used or is intended to be used to commit housebreaking, or to break open a motor vehicle or to gain unlawful entry into a motor vehicle, and who is unable to give a satisfactory account of such possession, is guilty of an offence and liable on conviction to a fine,[107] or to imprisonment for a period not exceeding three years.

2 General The abovementioned section creates a crime which is closely linked to the common-law crime of housebreaking with intent to commit a crime. The section renders conduct which precedes the actual commission of housebreaking punishable.

The structure of the crime created in section 82 strongly resembles that of the well-known crime created in section 36 of the General Law Amendment Act 62 of 1955, according to which it is a crime to be found in possession of goods in

---

Milton 807 is similarly critical of charges alleging an unknown intent, describing it as potentially prejudicial to the accused and smacking of a fishing expedition. See also the criticism in *Woodrow* 1999 2 SACR 109 (C) 111–113, by *De Wet and Swanepoel* 369–370 and Snyman 1977 *SACC* 11 29–30, as well as the remarks in *Kesolofetse* 2004 2 SACR 166 (NC).

104 In *Woodrow* 1999 2 SACR 109 (C) 112–113 the court was acutely aware of this illogical aspect of the crime of "housebreaking with intent to commit a crime unknown to the prosecutor". Contrast, however, the view adopted in *Slabb* 2007 1 SACR 77 (C) 81.

105 S 35(3)(*a*) of the Constitution.

106 On this crime generally, see Hoctor 1999 *Obiter* 225.

107 If the provisions of the Adjustment of Fines Act 101 of 1991 are taken into account, the maximum fine that may be imposed is R120 000 × 3 = R360 000 in the case of a Magistrate's Court which is not a Regional Court, and in the case of a Regional Court R600 000 × 3 = R1.8 million. If the provisions of s 1(*b*) of the 1991 Act are taken into account, a fine as well as imprisonment may be imposed.

regard to which there is a reasonable suspicion that they have been stolen, in circumstances where the person in whose possession the goods are found is unable to give a satisfactory account of such possession.[108] Decisions dealing with the interpretation of section 36 can therefore also be material to the interpretation of section 82.[109] The provisions of section 82 are not incompatible with the Bill of Rights in the Constitution.[110]

2 Deficiency in wording of section 82 The section speaks only of implements that can be used to break open a motor vehicle or to gain unlawful entry into a motor vehicle. It does not speak of implements or objects that may be used to steal a motor vehicle. Therefore, if, as happened in *Mailula*,[111] X is caught in suspicious circumstances while he is in possession of an object (a motor vehicle fuse) that is used or may be used to activate the ignition mechanism of a motor vehicle, the section does not apply. It would seem that, as far as this aspect of the crime is concerned, there is a deficiency in the definition of the crime, because the legislature in all probability intended to render punishable not only the possession of housebreaking implements, but also implements that may be used to steal motor vehicles, thereby creating a measure to combat the theft of motor vehicles – a crime which is endemic in South Africa. However, the limited wording of the section does not lend itself to such a wide interpretation, as was indeed held in *Mailula*.[112]

E TRESPASS

1 Definition Section 1(1) of the Trespass Act 6 of 1959 provides that any person who without the permission –

(*a*) of the lawful occupier of any land or any building or part of a building; or

(*b*) of the owner or person in charge of any land or any building or part of a building that is not lawfully occupied by any person,

enters or is upon such land or enters or is in such building or part of a building, shall be guilty of an offence unless he has lawful reason to enter or be upon such land or enter or be in such building or part of a building.

2 Elements of the crime The elements of the crime are the following: (*a*) *damaging* (*b*) *property* (*c*) *unlawfully* and (*d*) *intentionally*.

3 General The crime of trespassing is derived from English law[113] and serves to complement the crime of housebreaking in protecting owners or lawful occupiers of immovable property from incursions by the lawless.

4 The conduct – entering or being upon The punishable conduct consists in either entering the land or building (or part of the building) or being upon the

---

108 See the discussion of this crime *supra* XVIII E.
109 *Mosoinyane* 1998 1 SACR 583 (T).
110 *Zondo* 1999 1 SACR 54 (N).
111 1998 1 SACR 649 (T).
112 *Supra*.
113 See the discussion in *Milton and Cowling* J1–1.

land or building (or part of the building). Entering (the land or building) refers to the situation where X physically crosses the boundary of the land or building and enters it. Being (upon the land or building) refers to the following type of situation: X has already entered the property lawfully, since he entered with the permission referred to in the statute or had a lawful reason for entering. However, the permission has ceased to be effective (eg because the owner or occupier has withdrawn the permission or had given permission for only a certain period, which has elapsed) or the lawful reason no longer exists (eg because X had completed what he was supposed to do on the property) with the result that his presence on the property has become unlawful. In such an event X must leave the property. If he fails to do so, he commits a trespass because he "is upon" the property without permission or without lawful reason – in other words, he is unlawfully upon the property.

If the permission to be on the property is withdrawn, common sense dictates that X must be afforded a reasonable opportunity of vacating the property, since he cannot be expected immediately to "disappear into thin air". It is essential for the prosecution to allege and prove either the entry or the remaining (or, if applicable, both), for strictly speaking section 1(1) creates two separate crimes, namely entering the property and being upon it.[114]

As far as the meaning of "entry" is concerned, it would seem that the word denotes some form of physical passing of the boundaries of the property by X personally, for neither inciting a dog to enter the land nor the mere placing of some object on or over the property is sufficient to qualify as an "entry". X must therefore be personally present on the property.[115] Theoretically the mere placing by X of his foot on the land or building may constitute an "entry", but in practice such cases will be – or ought to be – disregarded due to the operation of the principle of *de minimis non curat lex* (the law does not concern itself with trifles).

5 The land or building or part of the building This requirement of the crime is largely self-explanatory. A caravan also qualifies as a "building" for the purposes of this crime.[116]

It is noticeable that every time the word "building" appears in the section the words "or part of a building" are added. There is a specific reason for this. A building may consist of different parts or entities, and X may have obtained permission or have a lawful reason to enter a certain part of the building only. X may, for example, have permission to enter only a certain flat in a block of flats, and not the other flats in the same building.

6 Unlawfulness The entry or remaining upon the property must be unlawful. The conduct concerned will be lawful if: (*i*) permission has been granted to enter or to be on the property; (*ii*) X has a lawful reason for entering or being on the property; or (*iii*) there is another ground of justification, such as necessity, for his conduct. Each of these possibilities will briefly be considered.

---

114 *Badenhorst* 1960 3 SA 563 (A) 566H–567A; *Brown* 1978 1 SA 305 (NC) 308C.
115 *Brown supra* 308.
116 *Mavungu* 2009 1 SACR 425 (T) 434c–e.

(*a*) *Consent (permission)* It is important to identify the person whose permission for the conduct must be absent in order to secure a conviction. The section draws a distinction between a land or building that is lawfully occupied and a land or building that is not lawfully occupied. This is in fact another way in which the crime created in the section can be divided into two distinct crimes.[117] In the case of the former, the person whose consent must be absent is the lawful occupier of the property concerned. In other words, in this type of case the permission of the owner of the property is not sufficient,[118] unless the owner and the occupier happen to be the same person. In the latter type of case, the person whose consent must be absent is the owner or person in charge of the land or building or part of the building. It is essential for the prosecution to allege and prove that X did not have the permission of the particular class of persons mentioned above.[119]

The courts regard the lawful occupier of land as somebody "who, though not the owner, has the same rights of residence on and control over the property as the owner would have".[120] A tenant is a good example of a lawful occupier of property. The owner may, of course, himself be the lawful occupier of the property. Subsection (2) of section 1 specifically provides that for the purposes of subsection (1) the expression "lawful occupier" in relation to a building or part of a building does not include a servant of the lawful occupier of the land on which the building is situated.

Consent once given may always be withdrawn, in which case X must leave the property. Consent may also be given tacitly:[121] if the occupier or owner is aware of the fact that X for some period regularly enters the property but fails to object to his presence, such failure may, depending upon the circumstances, be interpreted as tacit consent for X to enter or be on the property.

(*b*) "*Lawful reason*" X does not commit the crime if he has lawful reason to enter or be on the land or building or part of the building. Section 1(1A) of the Act provides that a person who is entitled to be on land in terms of the Extension of Security of Tenure Act 62 of 1997, shall be deemed to have lawful reason to enter and be upon such land.

There are also other situations not mentioned in the Act in which a person has a "lawful reason" to enter or be upon land or a building or part thereof. In everyday life there are a number of instances in which an entry upon another's property is not regarded as unlawful. Thus, X may have a right by virtue of some statute, by-law or regulation to enter property, as where X is a police official who enters property in order to arrest somebody, to search the property in terms of a search warrant lawfully issued, or to otherwise investigate a crime; where X is a sheriff who enters property in order to serve a summons or other legal document; or where he is a municipal official who enters property in order to read an electricity or water meter. X may also have a right of entry if he is a person who delivers some article at the request of somebody on the property. X

---

117 *Molele* 1960 1 PH K61 (O).
118 *Mdunge* 1962 2 SA 500 (N).
119 *Molele* 1960 1 PH K61 (O); *Mdunge supra* 502D; *Brown* 1978 1 SA 305 (NC) 308A.
120 *Lombard* 1948 2 SA 31 (T); *Davids* 1966 1 PH H26 (N).
121 *Molelekeng* 1992 1 SA 604 (T) 606*h*.

may have a right of entry by virtue of a contract between himself and the owner or occupier of the property, as where he is a servant of the occupier. An entry onto premises made with the very purpose of obtaining permission to be upon the property is deemed to be an entry with a lawful reason.[122]

(*c*) *Further possible grounds of justification* X may conceivably rely on necessity, as where he flees into a building without the permission of the owner or occupier because he is being attacked by other people or by an animal; or on presumed consent (*negotiorum gestio*), as where he enters premises without permission in order to perform some task for the benefit of an absent owner or occupier, such as extinguishing a fire or fixing a leaking tap; or even on private defence, as where X is a passer-by who witnesses an unlawful attack by Z upon Y on the premises and rushes into the premises to render assistance to X.

7 Intention The form of culpability required for this crime is intention.[123] X must know or foresee that he is entering property belonging to somebody else; that he has no permission from the occupier or owner of the property, as the case may be, to enter or remain on the property; that if permission has been granted, that the person who granted it is lawfully empowered to do so; and that he has no lawful reason for entering or remaining on the property. If X honestly thinks that the owner or occupier would not object to his entering or remaining on the premises, he lacks the necessary awareness of unlawfulness and therefore intention.[124]

8 Punishment The punishment for the crime is a fine or imprisonment for a period not exceeding two years or both such fine and such imprisonment.[125] If the provisions of the Adjustment of Fines Act 101 of 1991 are taken into account, the maximum fine that may be imposed is R120 000 × 2 = R240 000 in the case of a Magistrate's Court which is not a Regional Court, and in the case of a Regional Court R600 000 × 2 = R1.2 million.

---

122 *Davids* 1966 1 PH H26 (N) 52. The courts have on more than one occasion held that if X believes (or, what is substantially the same, if he has good reason for believing) that the owner or occupier will not object to his entering or remaining on the property, he has a lawful reason as envisaged in the section. See *Jakwane* 1944 OPD 139 142–143; *Ramakau* 1959 4 SA 642 (O) 644. It is submitted that this view of the law is incorrect. In these cases the courts confuse the element of "lawful reason", which forms part of the definition of the proscription, with the quite distinct requirement of intention, which includes awareness of unlawfulness. X's subjective belief has nothing to do with the objective requirement of lawful reason.

123 *Venter* 1961 1 SA 363 (T); *Ziki* 1965 4 SA 14 (E) 15G–H.

124 *Davids* 1966 1 PH H26 (N) 52.

125 S 2 of the Act.

SCHEDULES

SCHEDULE A

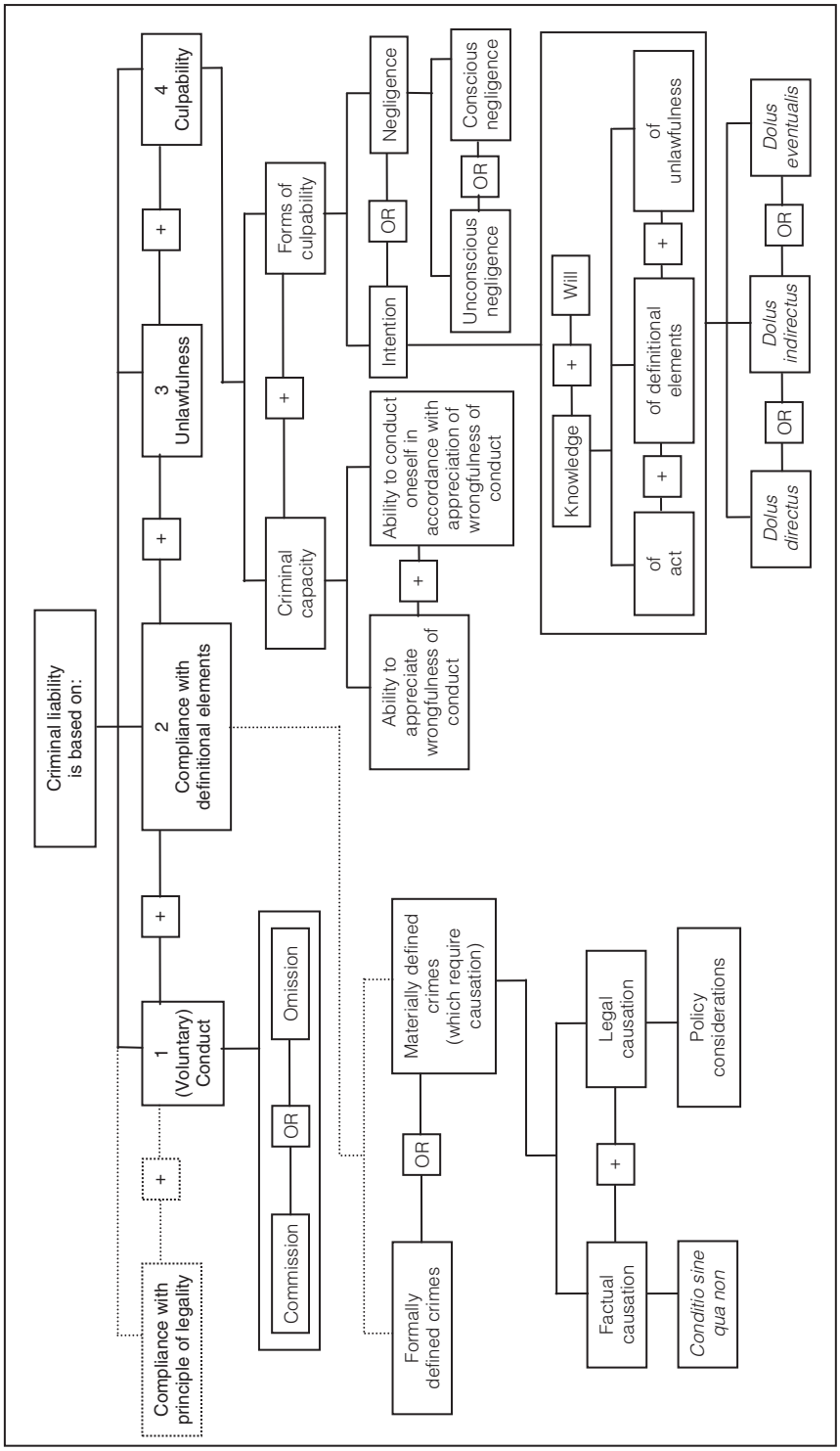
CONSTRUCTION OF CRIMINAL LIABILITY

Note:

(1) The diagram below represents a standard crime. There are exceptions to this standard model. Strict liability crimes, for example, dispense with the requirement of culpability.

(2) The reason why compliance with the principle of legality is indicated with a dotted line is the following: if a person's liability for a well-known crime such as murder, theft or rape has to be determined, it is so obvious that such a crime is recognised in our law that it is usually a waste of time to enquire whether there has been compliance with the requirement of legality.

(3) The reason why the box containing the words "Compliance with definitional elements" is further subdivided with a dotted line is the following: crimes may according to their definitional elements be classified or subdivided in different ways (*supra* III A 9). The purpose is merely to incorporate into the diagram the subdivision into formally and materially defined crimes, since this subdivision shows the place within the general system of criminal liability of the *requirement of causation*.


Criminal liability is based on:
1 (Voluntary) Conduct
Omission
OR
Commission
+
Compliance with principle of legality
2 Compliance with definitional elements
Materially defined crimes (which require causation)
OR
Formally defined crimes
Legal causation
+
Factual causation
Conditio sine qua non
Policy considerations
3 Unlawfulness
+
Criminal capacity
Ability to conduct oneself in accordance with appreciation of wrongfulness of conduct
+
Ability to appreciate wrongfulness of conduct
4 Culpability
+
Forms of culpability
+
Negligence
OR
Intention
Conscious negligence
OR
Unconscious negligence
Will
+
Knowledge
of act
+
of definitional elements
+
of unlawfulness
Dolus directus
OR
Dolus indirectus
OR
Dolus eventualis

SCHEDULE B

TABLE OF DEFENCES AND THEIR EFFECT

Note: This table does not contain a complete list of every conceivable defence which an accused can raise when charged with a crime. Every crime has different definitional elements, and it is impossible here to set out every possible defence based upon the absence of a particular definitional element (eg "premises" in housebreaking, "property" in theft, or "judicial proceedings" in perjury). The only defences included in this table are those based upon or related to the absence of a general prerequisite for liability in terms of the general principles of criminal law. The purpose is to point out the relationship between a particular defence and the corresponding general prerequisite for liability. Defences of a procedural nature, or related to the law of evidence, as well as the general defence known as an alibi, have been left out for obvious reasons. If in the third column there is an asterisk after the verdict "not guilty" it means that a court would not readily find an accused not guilty, but only if the circumstances were fairly exceptional.

Defence	General prerequisite for liability placed in issue	Verdict if defence is successful
Automatism due to involuntary conduct not attributable to mental illness	Conduct	Not guilty*
Impossibility	Voluntary conduct in form of omission	Not guilty
Act does not comply with definitional elements	Requirement that conduct should comply with definitional elements	Not guilty
Act not a *sine qua non* for result, or not an adequate cause of resultant condition, or *novus actus interveniens*	Requirement of causation	Not guilty (but possibly guilty of a less serious formally defined crime, such as assault)
Grounds of justification, such as private defence, consent, necessity	Unlawfulness	Not guilty
Youth	Criminal capacity	Not guilty
Mental abnormality, including automatism due to mental illness	Criminal capacity	Not guilty, but X usually ordered to be detained in psychiatric hospital or prison

continued

Defence	General prerequisite for liability placed in issue	Verdict if defence is successful
Intoxication	Conduct	Not guilty* of crime charged, but guilty of contravening s 1 of Act 1 of 1988
	Criminal capacity	Not guilty* of crime charged, but guilty of contravening s 1 of Act 1 of 1988
	Intent required for crime charged	Not guilty, but usually guilty of less serious crime which is a competent verdict on main charge
Provocation	Intent required for crime charged	Guilty, but measure of provocation may serve as ground for mitigation of punishment
If charged with crime requiring intent: result or circumstances not *foreseen*	Intention	Not guilty (at least on main charge – possibly guilty of less serious crime which is a competent verdict on main charge)
If charged with crime requiring intent: *mistake*, either of fact or of law	Intention	Not guilty (at least on main charge – possibly guilty of less serious crime)
If charged with crime requiring negligence: conduct was reasonable, ie, did not deviate from conduct to be expected of reasonable person in the circumstances; OR unlawful result or circumstances not foreseeable	Negligence	Not guilty

BIBLIOGRAPHY

Mode of citation: In the references to books in the footnotes only the name of the author(s) is given, followed by the page number of the book. Particulars regarding the title, edition, etc of the book may then be obtained in the bibliography below. Where more than one book by the same author was used, the method of referring to the different books is set out below under the name of the author concerned.

ALLEN MJ, Textbook on Criminal Law, 5th ed, 1999.

ARCHBOLD: See RICHARDSON PJ.

ASHWORTH A, Principles of Criminal Law, 5th ed, 2006.

AUSTRALIAN MODEL CRIMINAL CODE: See CRIMINAL LAW OFFICERS COMMITTEE OF THE STANDING COMMITTEE OF ATTORNEYS-GENERAL.

BADENHORST CHJ, Die Inhoud van die Misdaadbegrip in die Suid-Afrikaanse Reg, doctoral thesis, RAU, 1982.

BAUMANN J and WEBER U, Strafrecht. Allgemeiner Teil, 9th ed, 1985.

BERGENTHUIN JG, Provokasie as Verweer in die Suid-Afrikaanse Strafreg, doctoral thesis, UP, 1985.

BILL OF RIGHTS COMPENDIUM, looseleaf publication, 1997.

BOEHMER JSF, Meditationes in Constitutionem Criminalem Carolinam, 1744.

BORT P, Tractaet van Crimineele Saeken, 1688.

BOTHA CR, Bedrog in die Suid-Afrikaanse Strafreg, doctoral thesis, UNISA, 1988.

BURCHELL EM and HUNT PMA, South African Criminal Law and Procedure, Vol 1, General Principles of Criminal law, 3rd ed, by BURCHELL JM, 1997.

BURCHELL J and MILTON J, Principles of Criminal Law, 3rd ed, 2005.

CARPZOVIUS B, Verhandeling der Lijfstraffelijke Misdaden en haare Berechtinge, 1772.

CODE PENAL: See MAYAUD.

CORPUS IURIS CIVILIS, Vol 1 Institutiones (ed Krüger P); Digesta (ed Mommsen T, Krüger P) 1954; Vol II Codex Iustinianus (ed Krüger P) 1954; Vol III Novellae (ed Schöll, Kroll) 1954.

CORPUS IURIS SECUNDUM: See CULLIGAN LJ.

CRANKSHAW'S CRIMINAL CODE OF CANADA (general editor Gary P Rodrigues) 1993.

CRIMINAL LAW OFFICERS COMMITTEE OF THE STANDING COMMITTEE OF ATTORNEYS-GENERAL, Model Criminal Code Chapter 2 General Principles of Criminal Responsibility (Australia), 1992.

CULLIGAN LJ (editor-in-chief), Corpus Iuris Secundum. A Contemporary Statement of Americal Law as derived from Reported Cases and Legislation, Vol 22, 1989.

DAMHOUDER J DE, Practycke in Criminele Saken, 1660.

DAVELAAR VAN TONGEREN: See STRAFRECHT IN PERSPEKTIEF.

DECKER: See VAN LEEUWEN S, Het Roomsch Hollandsch Recht with notes by Decker CW, 1780.

DECOCQ A, Droit Pénal Général, 1971.

DE GROOT: See GROTIUS.

DE VILLIERS, MELIUS, The Roman and Roman-Dutch Law of Injuries, 1899.

DE WET and SWANEPOEL, Strafreg, 4th ed, 1985, by De Wet JC.

DRESSLER J, Understanding Criminal Law, 3rd ed, 2001.

DU TOIT E, DE JAGER FJ, PAIZES A, SKEEN A ST Q and VAN DER MERWE S, Commentary on the Criminal Procedure Act, 2nd ed, 1997.

ESER A and FLETCHER GP (eds), Justification and Excuse. Comparative Perspectives, 1987.

FIAT IUSTITIA: See KAHN.

FLETCHER GEORGE P, Rethinking Criminal Law, 1978.

FOREGGER E and SERINI E, Strafgesetzbuch, 1990.

GANE: See HUBER and VOET.

GARDINER FG and LANSDOWN CWH, South African Criminal Law and Procedure, 6th ed, 1957.

GELDENHUYS T, Die Regsbeskerming van Inligting, doctoral thesis, UNISA, 1993.

GELDENHUYS T, Inleiding tot die Sekuriteitsreg, 1992.

GLAZEBROOK PR (ed), Reshaping the Criminal Law. Essays in honour of Glanville Williams, 1978.

GORDON GH, The Criminal Law of Scotland, 3rd ed, vol 1 (2000) and vol 2 (2001) by Christie MGA.

GROENEWEGEN S VAN G VAN DER M, Tractatus de Legibus Abrogatis et Inusitatis in Hollandia vicinisque regionibus, 1669.

GROOT PLACAET-BOEK, 1658.

GROTIUS H, De Iure Belli ac Pacis, 1752.

GROTIUS H, Inleiding tot de Hollandsche Rechtsgeleerdheid, 1767.

HALL J, General Principles of Criminal Law, 2nd ed, 1960.

HART HLA, Punishment and Responsibility. Essays in the Philosophy of Law, 1968.

HART HLA and HONORÉ AM, Causation in the Law, 2nd ed, 1985.

HAZEWINKEL-SURINGA'S Inleiding tot de Studie van het Nederlandse Strafrecht, 14th ed, 1995, by Remmelink J.

HIEMSTRA *See* KRUGER

HOCTOR and SCHWIKKARD (ed) The Exemplary Scholar: Essays in Honour of John Milton, 2008.

HOCTOR SH, The crime of housebreaking in South African Law – a Comparative Approach, 1997.

HOMMES: See VAN EIKEMA HOMMES.

HUBER: A reference to Huber *HR* is a reference to Huber U, Heedendaegse Rechtsgeleertheyt, 1742. (This work was translated into English in 1939 by Gane P under the title A Jurisprudence of my Time.) A reference to Huber *Praelectiones* is a reference to Huber U, Praelectionum Juris Civilis, 1735.

HULDIGINGSBUNDEL AANGEBIED AAN PROFESSOR DANIEL PONT, 1970.

HUNT-MILTON: South African Criminal Law and Procedure, Vol II, Common-Law Crimes, 3rd ed by Milton JRL, 1996.

HUSAK, DN, Philosophy of Criminal Law, 1987

ISS: See Institute for Security Studies.

INSTITUTE FOR SECURITY STUDIES, Nedcor ISS Crime Index, different dates.

JAKOBS G, Strafrecht. Allgemeiner Teil. Die Grundlagen und die Zurechnungslehre. Lehrbuch, 2nd ed, 1993.

JESCHECK H-H and WEIGEND T, Lehrbuch des Strafrechts, Allgemeiner Teil, 5th ed, 1996.

JOUBERT JJ, Huldigingsbundel vir SA Strauss, 1995.

JOUBERT WA, Grondslae van die Persoonlikheidsreg, 1953.

JOUBERT WA (ed), The Law of South Africa (LAWSA), vol 6, 2nd ed, 2004.

KAHN E (ed), Fiat Iustitia. Essays in Memory of Oliver Deneys Schreiner, 1983.

KERSTEMAN FL, Hollandsch Rechtsgeleert Woorden-boek, 1768.

KRUGER A Hiemstra Suid-Afrikaanse Strafproses, 7 ed, 2010

KÜHL K, Strafrecht. Allgemeiner Teil, 2nd ed, 2003.

LA FAVE WR, Criminal Law, 4th ed, 2003.

LA FAVE WR and SCOTT AW, Substantive Criminal Law, Vol 2 (containing text of Model Penal Code), 1986.

LAW COMMISSION, A Criminal Code for England and Wales, Law Com No 177, 1989.

LAWSA: See JOUBERT.

LEYSER A, Meditationes ad Pandectas, 1761.

LOUBSER MM, The Theft of Money in South African Law, Annals of the University of Stellenbosch, New Series B Vol 1 no 1, 1978.

MARÉ MC, Die Onskuldige Medewerker in die SA Strafreg, doctoral thesis, UNISA, 1988.

MATTHAEUS A, De Criminibus. Ad Lib XLVII et XLVIII Dig Commentarius, 1672.

MAURACH R, GÖSSEL KH and ZIPF H, Strafrecht. Allgemeiner Teil. Teilband 2. Erscheinungsformen des Verbrechens und Rechtsfolgen der Tat. Ein Lehrbuch, 6th ed, 1984.

MAURACH R and ZIPF H, Strafrecht. Allgemeiner Teil. Teilband 1. Grundlehren des Strafrechts und Aufbau der Straftat. Ein Lehrbuch, 8th ed, 1992.

MAYAUD Y, Code Pénal, 98th ed, 2001.

MERLE R and VITU A, Traité de Droit Criminel, 1967.

MERULA PGFPN, Manier van Procederen, 1750.

MILTON JRL and COWLING MG, South African Criminal Law and Procedure, Vol III, Statutory Offences, 2nd ed, looseleaf publication revised to 2005.

MODEL PENAL CODE: See LA FAVE WR and SCOTT AW.

MOMMSEN T, Römisches Strafrecht, 1899.

MOORE MS, Placing Blame, 1997.

MOORMAN J, Verhandelinge over de Misdaden en der Selver Straffen, voorts vervolgt en ten einde gebracht door JJ van Hasselt, 1764.

MORRIS H, On Guilt and Innocence, 1976.

NAUDÉ BC, Lokvalbetrapping in die Suid-Afrikaanse Reg, doctoral thesis, UNISA, 1999.

NEDCOR ISS CRIME INDEX: Nedcor ISS (Institute for Security Studies), editions of different years.

NEDCOR PROJECT ON CRIME, VIOLENCE AND INVESTMENT, 1996.

NEETHLING J, POTGIETER JM and VISSER PJ, Law of Delict, 5th ed, translated and edited by Knobel, JC, 2006.

NEW DRAFT CANADIAN PENAL CODE: See LAW REFORM COMMISSION OF CANADA.

NOLL P, Schweizerisches Strafrecht. Allgemeiner Teil 1, 1981

NOYON TJ and LANGEMEIER GE, Het Wetboek van Strafrecht, 7th ed, by Remmelink J, 1982.

PEREZIUS A, Praelectiones Codicis Justiniani Imperialis, 1653.

PERKINS RM, Criminal Law, 2nd ed, 1969.

PETERS AAG, Opzet en Schuld in het Strafrecht, 1966.

POLITOFF SI and KOOPMANS FAJ, Schuld, 1988.

PUFENDORF SF VON, De Iure Naturae et Gentium, 1744.

RABIE MA, STRAUSS SA and MARÉ MC, Punishment: an Introduction to Principles, 5th ed, 1994.

REIN W, Das Kriminalrecht von Romulus bis auf Justinian, 1844, reprint 1962.

REPORT OF THE COMMISSION OF INQUIRY INTO THE PENAL SYSTEM OF THE REPUBLIC OF SOUTH AFRICA RP 78/1976 (The Viljoen Report)

REPORT OF THE COMMISSION OF INQUIRY INTO THE RESPONSIBILITY OF MENTALLY DERANGED PERSONS AND RELATED MATTERS RP 69/1967 (The Rumpff Report).

REPORT ON THE INVESTIGATION INTO OFFENCES COMMITTED UNDER THE INFLUENCE OF LIQUOR AND DRUGS, PROJECT 49 OF THE SA LAW COMMISSION 1986 (Researcher: Ellis P).

RICHARDSON PJ (ed), Archbold Criminal Pleading, Evidence and Practice, 2012.

ROBINSON: If the name of the author (Robinson) is immediately followed by a page number, the reference is to Robinson PH, Criminal Law Defences, 1984. If the name of the author is followed by the word Fundamentals, it is a reference to Robinson, PH, Fundamentals of Criminal Law, 1988.

ROXIN C, Strafrecht. Allgemeiner Teil, 4th ed, 2006.

RUMPFF REPORT: See under REPORT.

SAIRR SURVEY: See SOUTH AFRICAN INSTITUTE OF RACE RELATIONS.

SCHMIDHÄUSER E, Strafrecht. Allgemeiner Teil. Lehrbuch, 2nd ed, 1975.

SCHOEMAN (ed), Responsibility, Character and the Emotions, 1987.

SCHÖNKE A and SCHRÖDER H, Strafgesetzbuch. Kommentar, 27th ed, 2006.

SMITH JC and HOGAN B, Criminal Law, 10th ed, by Smith J, 2002.

SMYTHE D, PITHEY B and ARTZ L, Sexual Offences Commentary Act 32 of 2007, 2011.

SNYMAN CR, A draft Criminal Code for South Africa, 1995.

SOUTH AFRICA SURVEY: See SOUTH AFRICAN INSTITUTE OF RACE RELATIONS

SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, South Africa Survey, Editions of various Years

SOUTH AFRICAN LAW COMMISSION, REPORT ON BRIBERY, Project 74, 1991.

SOUTH AFRICAN LAW COMMISSION, The Application of the Trapping System, Working Paper 51, Project 84, 1994.

SOUTH AFRICAN LAW COMMISSION, Draft Discussion Paper on Sexual Offences: The Substantive Law (Project 107), July 1999.

STRAFRECHT IN PERSPEKTIEF. EEN BUNDEL BIJDRAGEN. Editor VAN TONGEREN VH, 1981.

STRAUSS SA, Doctor Patient and the Law. A Selection of Practical Issues, 3rd ed, 1991.

STUART: A reference to Stuart Canadian Criminal Law is a reference to Stuart D, Canadian Criminal Law. A Treatise, 1982. A reference to Stuart Charter Justice is a reference to Stuart D, Charter Justice in Canadian Criminal Law, 1991.

SWANEPOEL HL, Die Leer van *Versari in re Illicita*. Annals of the University of Stellenbosch, Series B Vol XXII no 1, 1945.

TERBLANCHE SS, The Guide to Sentencing in South Africa, 2nd ed, 2007.

TRECHSEL S, Schweizerisches Strafrecht Teil I, 1998.

TRIFFTERER O, Österreichisches Strafrecht. Allgemeiner Teil, 2nd ed, 1994.

VAN BEMMELEN JM, Ons Strafrecht. Deel 1. Het Materiële Strafrecht. Algemeen Deel, 9th ed, 1986.

VAN DEN WYNGAERT C, Strafrecht en Strafprocesrecht in hoofdlijnen, 2nd ed, 1994.

VAN DER KEESSEL DG, Praelectiones ad Ius Criminale, also known as Praelectiones in libros XLVII et XLVIII Digestorum, translated into English by Beinart B and Van Warmelo P, in 5 volumes, 1969–1978.

VAN DER LINDEN J, Regtsgeleerd, Practicaal en Koopmans Handboek, 1806, translated into English under the title *Institutes of the Laws of Holland*, by Juta H, 1828.

VAN DER MERWE DP, Computers and the Law, 2nd ed, 2000.

VAN DER WALT and MIDGLEY JR, Delict. Principles and Cases, 2nd ed, 1997.

VAN DER WESTHUIZEN J (ed), Crimes of Violence in South Africa, 1982.

VAN DER WESTHUIZEN JV, Noodtoestand as Regverdigingsgrond in die Strafreg, doctoral thesis, UP, 1979.

VAN ECK (initials unknown), Principia Iuris Civilis Secundum Ordinem Digestorum, 1756.

VAN EIKEMA HOMMES HJ, De Elementaire Grondbegrippen der Rechtswetenschap, 2nd ed, 1983.

VAN HOUDT CJ and CALEWAERT W, Belgisch Strafrecht, 1968.

VAN LEEUWEN: A reference to Van Leeuwen *Cens For* is a reference to Van Leeuwen S, Censura Forensis, 1741. A reference to Van Leeuwen *RHR* is a reference to Van Leeuwen S, Het Roomsch Hollandsch Recht 1780 (of which an English translation by Kotzé JG appeared in 1881 under the title *Commentaries on Roman-Dutch Law*).

VAN OOSTEN FFW, Oorsaaklikheid by Moord en Strafbare manslag, doctoral thesis, UP, 1981.

VAN RENSBURG ADJ, Juridiese Kousaliteit en Aspekte van Aanspreeklikheidsbepaling by die Onregmatige Daad, doctoral thesis, UNISA, 1970.

VERLOREN VAN THEMAAT JP, Diefstal en, in verband daarmee, Bedrog in die Romeins-Hollandse Reg, 1949.

VINNIUS A, Institutionum Imperialium Commentarius, 1726.

VISSER PJ, VORSTER JP and MARÉ MC, General Principles of Criminal Law through the Cases, 3rd ed, 1990.

VISSER PJ and VAN DER WESTHUIZEN JFG, Die Reg insake Wapens en Ammunisie, 1979.

VOET J, Commentarius ad Pandectas, 1698, as well as the translation by Gane P, 1955–1957.

WALKER N, Sentencing. Theory, Law and Practice, 1985.

WASSENAAR G VAN, Praxis Iudiciaria, 1708.

WELZEL H, Das Deutsche Strafrecht, 11th ed, 1969.

WESENBECIUS M, Commentarii in Pandectas Juris Civilis et Codicem Justinianeum, 1649.

WESSELS J AND BEULKE W, Strafrecht. Allgemeiner Teil, 34th ed, 2004.

WESTENBURG JO, Principia Iuris, Secundum Ordinem Institutionem Imperialis Justiniani, 1793.

WILLIAMS: A reference to Williams *CL* is a reference to Williams, Glanville, Criminal Law. The General Part, 2nd ed, 1961. A reference to Williams *Textbook* is a reference to Williams, Glanville, Textbook of Criminal Law, 1978.

WISSENBACH JJ, Exercitationum Pandectarum, 1673.

ZIMMERMANN R, The Law of Obligations: Roman Foundations of the Civilian Tradition, 1990.

ZOESIUS H, Commentarius ad Digestorum seu Pandectarum, 4th ed, 1718.

LEGAL PERIODICALS

The following abbreviations refer to the following legal periodicals. Periodicals not contained in this list are referred to by their full titles in the footnotes.

CILSA — Comparative and International Law Journal of South Africa.
JJS — Journal for Juridical Science.
SACC — South African Journal of Criminal Law and Criminology.
SACJ — South African Journal of Criminal Justice.
SALJ — South African Law Journal.
THRHR — Tydskrif vir Hedendaagse Romeins-Hollandse Reg.
TSAR — Tydskrif vir die Suid-Afrikaanse Reg.

MOST IMPORTANT LEGISLATION DISCUSSED

Note: Only legislation discussed in some detail is listed hereunder

Year	*Act No*	*Section*	*Title*	*Page*
1935	46	113	General Law Amendment Act	432–433
1955	56	319(3)	Criminal Procedure Act	336–338
1955	62	36	General Law Amendment Act	515–519
1955	62	37	General Law Amendment Act	519–521
1956	17	18	Riotous Assemblies Act	286, 289
1956	50	1	General Law Amendment Act	502–507
1959	6	1	Trespass Act	551–554
1963	16	9	Justices of the Peace and Commissioners of Oaths Act	338
1977	51	49	Criminal Procedure Act	129–134
1977	51	51	Criminal Procedure Act	339
1977	51	77–79	Criminal Procedure Act	164–172
1977	51	252A	Criminal Procedure Act	140–143
1977	51	332	Criminal Procedure Act	245–248
1982	74	1	Intimidation Act	455–458
1988	1	1	Criminal Law Amendment Act	224–229
1992	149		Drugs and Drugs Trafficking Act	420–426
1993	129	82	Third General Law Amendment Act	550–551
1996	108	35	Constitution of the Republic of South Africa	38–48

continued

Year	*Act No*	*Section*	*Title*	*Page*
1997	105	51	Criminal Law Amendment Act	356–358, 440–441, 511–512
1998	111	115, 117	Correctional Services Act	339–340
2000	60	3, 4(1), 90	Firearms Control Act	426–431
2000	60	120(6)	Firearms Control Act	458–460
2004	12		Corruption Act	401–417
2007	32		Criminal Law (Sexual Offences and Related Matters) Amendment Act	341–392
2008	75	7, 11	Child Justice Act	173–175

TABLE OF CASES

PAGE

A

A 1962 4 SA 679 (E) 379
A 1971 2 SA 293 (T) 465, 466, 467
A 1991 2 SACR 257 (N) 60, 464, 465
A 1993 1 SACR 600 (A) 257, 268, 366, 448, 449, 463, 465
Abrahams 1983 1 SA 137 (A) 210
Abrahams 1998 2 SACR 655 (C) 543, 544, 545
Adams (1903) 20 SC 556 ..... 444, 445
Adams 1911 CPD 863 ..... 396, 398
Adams 1959 1 SA 646 (Sp Ct) 289, 302, 306
Adams 1981 1 SA 187 (A) 115
Adams 1986 4 SA 882 (A) 68, 70, 208, 242, 248, 421
Adams 1993 1 SACR 330 (C) 214
Adcock 1948 2 SA 818 (C) 61
Adendorff (1884) 3 EDC 403 334
Affordable Medicines Trust v Minister of Health 2006 3 SA 247 (CC) 43
African Bank of SA Ltd 1990 2 SACR 585 (W) 525, 529, 531
Afrikaanse Pers-Publikasie (Edms) Bpk v Mbeki 1964 4 SA 618 (A) 328
Agliotti 2011 2 SACR 437 (GSJ) 87, 90, 124, 277, 287, 288, 289
Agmat 1965 2 SA 874 (C) 281
Ah Chee 1912 AD 231 333
Aitken 1988 4 SA 394 (C) 488
Aldridge 1991 1 SACR 611 (C) 142
Alexander 1965 2 SA 818 (C) 287
Alfeus 1979 3 SA 145 (A) 115, 118, 119
Allen (1872) LR 1 CC 367 394
Amalgamated Beverage Industries Natal (Pty) Ltd v City Council of Durban 1994 1 SACR 373 (A) 257, 259, 260, 262, 263
Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council 1992 2 SACR 181 (N) 257
Ambard v Attorney-General of Trinidad [1936] 1 All ER 704 (PC) 326
Amonda Ayar (1905) 26 NLR 332
Anderson 1962 2 SA 286 (O) 536
Andhee 1996 1 SACR 419 (A) 329
Andreas 1989 2 PH H35 (SWA) 137
Andries 1958 2 SA 669 (E) 549

PAGE
Appleton 1982 4 SA 829 (ZS) ... 212
April (1894) 4 EDC 177 ... 332
Arbee 1956 4 SA 438 (A) ... 513
Arends 1946 NPD 441 ... 434, 435
Arenstein 1964 1 SA 361 (A) ... 259, 260
Arenstein 1967 3 SA 366 (A) ... 259, 260
Argus Printing and Publishing Co Ltd v Esselen's Estate 1994 2 SA 1 (A) 29 ... 316, 323
Armstrong 1917 TPD 145 ... 530
Armugan 1956 4 SA 43 (N) ... 518
Attia 1937 TPD 102 ... 491, 500, 501
Attorney-General v Baker 1929 TPD 996 ... 316
Attorney-General v Crockett 1911 TPD 893 ... 316, 322
Attorney-General v Grieve 1934 TPD 187 ... 62
Aube 2007 1 SACR 655 (W) ... 518, 519
Augustine 1986 3 SA 294 (C) ... 44, 45, 513

B

B 1955 3 SA 494 (D) ... 434, 435
B 1956 3 SA 363 (E) ... 287
B 1958 1 SA 199 (A) ... 279, 280, 281, 284
B 1985 2 SA 120 (A) ... 19, 20
B 1994 2 SACR 237 (E) ... 60, 449
B and C 1949 1 PH H74 (T) ... 433
B and C 1949 2 SA 582 (T) ... 433, 434
Baartman 1983 4 SA 393 (NC) ... 235
Bacela 1988 2 SA 665 (E) ... 337
Badenhorst (1900) 21 NLR 227 ... 302, 303
Badenhorst 1960 3 SA 563 (A) ... 543, 549, 552
Bailey 1981 4 SA 187 (N) ... 210, 256
Bailey 1982 3 SA 772 (A) ... 116, 117, 151, 152, 153, 256
Balitane 1956 3 SA 634 (E) ... 519
Banda 1989 4 SA 519 (B) ... 301, 302
Banda 1990 3 SA 466 (B) ... 59, 136, 257, 300, 303, 304, 305, 306
Banur Investments (Pty) Ltd 1969 1 SA 231 (T) ... 246, 262
Banur Investments (Pty) Ltd 1970 3 SA 767 (A) ... 533, 534
Barber 1937 EDL 79 ... 541
Barketts Transport (Pty) Ltd 1986 1 SA 706 (C) ... 210
Barnard 1985 4 SA 431 (W) ... 153
Barnard v SANTAM Bpk 1999 1 SA 202 (SCA) ... 217
Barnes 1990 2 SACR 485 (N) ... 255, 259, 260, 271
Barney's Super Service Station (Pty) Ltd 1956 4 SA 107 (T) ... 246
Basson 2000 1 SACR 1 (T) ... 287, 290
Bates 1903 TS 513 ... 450
Baxter 1929 EDL 189 ... 334
Bazi 1943 EDL 222 ... 501
Bazzard 1992 1 SACR 302 (NC) ... 327, 328, 330, 331
Beahan 1992 1 SACR 307 (ZS) ... 263, 264, 286
Beja 1978 1 SA 395 (E) ... 424
Bekker 1956 2 SA 279 (A) ... 327, 331
Bell 1963 2 SA 335 (N) ... 531, 534
Benator 1984 3 SA 588 (Z) ... 325
Bengu 1965 1 SA 298 (N) ... 444
Benjamin 1980 1 SA 950 (A) ... 454, 508

PAGE
Bennet and Co (Pty) Ltd 1941 TPD 194 246
Benson 1914 AD 357 318
Bergh 1975 3 SA 359 (O) 481
Bergh 2006 2 SACR 225 (N) 453, 454
Berliner 1966 4 SA 535 (W) 493
Bernardus 1965 3 SA 287 (A) 150, 203, 225, 442
Bertinotti 1961 1 PH H79 (F) 489
Bester (1900) 21 NLR 237 304
Bester 1961 2 SA 52 (F) 528
Bester 1966 4 SA 432 (RA) 335
Bester 1971 4 SA 28 (T) 140, 448
Bethlehem Municipality 1941 OPD 230 40
Beukes 1988 1 SA 511 (A) 183, 189
Beukman 1950 4 SA 261 (O) 332, 333, 334
Beyers 1968 3 SA 70 (A) 325
Bezuidenhout 1971 4 SA 32 (T) 396, 397
Bezuidenhout 1979 3 SA 1325 (T) 210
Bhardu 1945 AD 813 500
Bhulwana 1995 2 SACR 108 (CC) 507
Bhulwana 1995 2 SACR 748 (CC) 337, 424, 456
Binns 1961 2 SA 104 (T) 67, 421
Binta 1993 2 SACR 553 (C) 329, 330
Bisset 1990 1 SACR 292 (ZS) 335
Blaauw 1934 SWA 3 379
Blaauw 1999 2 SACR 295 (W) 344
Blanche 1969 2 SA 359 (W) 471, 472, 474
Blank 1995 1 SACR 62 (A) 20
Blauw 1972 3 SA 83 (C) 65, 423
Bloem 1993 PH H16 (NC) 518
Blum 1960 2 SA 497 (E) 487
Bochris Investments (Pty) Ltd 1988 1 SA 861 (A) 224
Bodigelo 1982 3 SA 568 (NC) 424
Boers (1900) 21 NLR 116 303
Boesak 2000 1 SACR 633 (SCA) 484, 485
Bokane 1975 1 PH H101 (NC) 454
Bokane 1975 2 SA 186 (NC) 454
Bolus 1966 4 SA 575 (A) 513, 514
Booth Road Trading Co (Pty) Ltd 1947 1 SA 34 (N) 246
Booysen 1977 2 PH H148 (C) 138, 139
Boshoff 1962 3 SA 175 (N) 516
Botes 1945 NPD 43 ..... 379, 380, 381
Botes 1966 3 SA 606 (O) 105
Botes v Van Deventer 1966 3 SA 182 (A) 227
Botha 1953 4 SA 666 (C) 325
Botha 1959 1 SA 547 (O) 286
Botha 1960 2 SA 147 (T) 545
Botha 1982 2 PH H112 (E) 354
Botha 1990 SACJ 231 494
Bougarde 1954 2 SA 5 (C) 411, 531
Bourke 1916 TPD 303 235
Bowden 1957 3 SA 148 (T) 539, 540, 541
Bradbury 1967 1 SA 387 (A) 118, 119
Brand 1960 3 SA 637 (A) 500
Brande 1979 3 SA 371 (D) 524

PAGE
Brereton 1971 1 SA 489 (RA) 461, 465
Bresler 2002 2 SACR 18 (C) 315, 316, 320, 322
Brett and Levy 1915 TPD 53 500
Brick 1973 2 SA 571 (A) 65, 66, 70
Bridges v California (1941) 314 US 252 ..... 324, 325
Britz 1949 3 SA 293 (A) 135
Brown 1978 1 SA 305 (NC) 552, 553
Buda 2004 1 SACR 9 (T) 187, 253, 255
Bugwandeen 1987 1 SA 787 (N) 466, 467
Bull 2001 2 SACR 674 (SCA) 172
Buren Uitgewers (Edms) Bpk v Raad van Beheer oor Publikasies 1975 1 SA 379 (C) 434
Burger 1959 2 SA 110 (T) 84
Burger 1968 4 SA 877 (A) 224
Burger 1969 4 SA 292 (SWA) 526
Burger 1975 2 SA 601 (C) 45, 225, 327, 328, 329, 330, 331, 442
Burstein 1978 4 SA 699 (T) 491
Bushinelo 1982 3 SA 456 (T) 425
Bushula 1950 4 SA 108 (E) 335
Busuku 2006 1 SACR 96 (E) 339
Butelezi 1925 AD 160 253
Butelezi 1952 1 SA 511 (O) 337
Butelezi 1960 1 SA 284 (N) 318
Butelezi 1963 2 PH H238 (D) 195
Buthelezi 1961 4 SA 376 (N) 544

C

C 1952 4 SA 117 (O) 125, 126, 354, 355
Calitz 1990 1 SACR 119 (A) 155
Calitz 1992 2 SACR 66 (O) 528
Cameron 2005 2 SACR 279 (SCA) 1 69
Campbell 1991 1 SACR 503 (Nm) 529
Campher 1987 1 SA 940 (A) 155, 156, 158, 159, 164, 166, 208, 252
Campos 2002 1 SACR 233 (SCA) 189
Canca 2000 2 SACR 284 (E) 318
Canestra 1951 2 SA 317 (A) 61, 118
Cape Town and Districts Waterworks Co Ltd v Executors of Elders (1890) 8 SC 435
Cape Treason Trials reported in 1901 (vol 18) CLJ 164 303
Carmichele v Minister of Safety and Security 2002 1 SACR 79 (CC) 59
Carse 1967 2 SA 659 (C) 332, 333
Cassiem 2001 1 SACR 489 (SCA) 19, 500
Cassimjee 1989 3 SA 729 (N) 328, 329
Cele 1958 1 SA 144 (N) 312, 313
Cele 1993 2 SACR 52 (N) 483, 488, 491
Cele 2009 1 SACR 59 (N) 457
Cetwayo 2002 2 SACR 319 (E) 544
Chaitezvi 1992 2 SACR 456 (ZS) 532
Chalala 1947 3 SA 62 (O) 547
Charlie 1916 TPD 367 544
Chaulk (1991) ICRR (2d) 1 (SCC) 169
Cheeseborough 1948 3 SA 756 (T) 481
Chenjere 1960 1 SA 473 (FC) 60
Chetty 1972 4 SA 324 (N) 528

PAGE
Chicani 1921 EDL 123 514
Chimbamba 1977 4 SA 803 (RA) 258
Chinyerere 1980 2 SA 576 (RA) 264, 544
Chipangu 1939 AD 266 280
Chipo 1953 3 SA 602 (R) 461
Chipo 1953 4 SA 573 (A) 461
Chorle 1945 AD 401, 408
Chretien 1981 1 SA 1097 (A) 45, 164, 233, 235, 237, 238, 239, 242, 244, 246, 248, 453
Christian 1924 AD 101 ..... 301, 304
Christian Education South Africa v Minister of Education 2000 4 SA 757 (CC) 138
Church 1935 OPD 70 129
Churchill 1959 2 SA 575 (A) 191, 395, 397, 398, 399
Claasen 1979 4 SA 460 (ZS) 60, 268
Claassen 1997 1 SACR 675 (C) 44
Claassens 1959 3 SA 292 (T) 313
Claassens 1992 2 SACR 434 (T) 211, 214, 233, 260
Clark 1914 TPD 50 398
Clark 1958 3 SA 394 (A) 400 318
Clarke 1961 R and N 652 312
Clarke v Hurst 1992 4 SA 630 (D) 74, 97, 98
Cleminshaw 1981 3 SA 685 (C) 65, 67
Close Settlement Corporation 1922 AD 294 62
Coertzen 1929 SWA 20 524
Coetzee 1958 2 SA 8 (T) 546, 548
Coetzee 1974 3 SA 571 (T) 261
Coetzee 1993 2 SACR 191 (T) 436
Coetzee 1997 1 SACR 379 (CC) 214, 247, 248, 258, 337, 507
Cohn (1985) 15 CCC (3d) 150 320
Colgate-Palmolive Ltd 1971 2 SA 149 (T) 210
Collett 1978 3 SA 206 (RA) 124, 127, 139
Collett 1991 2 SA 854 (A) 208, 422, 423
Congo 1962 3 SA 988 (N) 424
Cooke 1939 TPD 69 434
Cooper 1976 2 SA 875 (T) 287, 288, 289
Coovadia 1957 3 SA 611 (N) 536
Cornick 1957 2 PH K140 (C) 397
Correia 1958 1 SA 533 (A) 544A 513
Counter 2000 2 SACR 241 (T) 85, 91
Counter 2003 1 SACR 143 (SCA) 87, 89
Couvaras 1946 OPD 392 ..... 247, 248
Cowan 1903 TS 798 329
Cronje 1955 3 SA 319 (SWA) 322
Crossberg 2008 2 SACR 317 (SCA) 442
Croucamp 1949 1 SA 377 (A) 280, 514
Crowe 1904 TS 581 534
Cumoya 1905 TS 402 549
Cunningham 1996 1 SACR 631 (A) 54, 56, 57, 168
Cupido 1939 1 PH H69 (C) 335
Cupido 1975 1 SA 537 (C) 548, 549
Curtis 1926 CPD 385 ..... 366, 463, 467

PAGE

D

D 1963 3 SA 263 (E) 123, 125
D 1966 4 SA 267 (D) 273
D 1969 2 SA 591 (RA) 126
D 1972 3 SA 202 (O) 379
D 1995 2 SACR 502 (C) 245
D 1998 1 SACR 33 (T) 125, 362, 368
Dalindyebo 1980 3 SA 1049 (Tk) 1054 233
Damascus 1965 4 SA 598 (R) 115, 119
Dames 1951 2 PH H140 (C) 444
Dane 1957 2 SA 472 (N) 140, 540
Daniels 1938 TPD 312 ..... 462, 464, 465, 466
Daniels 1963 4 SA 623 (E) 329
Daniëls 1983 3 SA 275 (A) 81, 83, 85, 87, 88, 89, 92, 195, 258
Danster 1976 3 SA 668 (SWA 140, 425
Davids 1966 1 PH H26 (N) 553, 554
Davies 1928 AD 165 536
Davies 1956 3 SA 52 (A) 77, 276, 281, 282, 283, 295, 510
Dawood 1972 3 SA 825 (N) 91
Dayizana 1989 1 SA 919 (E) 500
De Beer 1929 TPD 104 129
De Beer 1940 TPD 268 ..... 533, 534
De Blom 1977 3 SA 513 (A) 70, 134, 164, 208, 210, 211, 212, 214, 215, 233, 259
De Bruin 1975 3 SA 56 (T) 129
De Bruyn 1968 4 SA 498 (A) 188
De Bruyn 1992 2 SACR 574 (Nm) 145
De Jager 1917 CPD 558 61
De Jager 1965 2 SA 616 (A) 476
De Jager v Attorney-General of Natal (1907) 1904–1907 All ER 1008 (PC) 301
De Kock 1997 2 SACR 171 (T) 19
De Oliveira 1993 2 SACR 59 (A) 112, 113, 178, 188, 207, 208
De Reuck v DPP 2003 2 SACR 445 (CC) 62, 70
De Ruiter 1957 3 SA 361 (A) 488
De Swart 1948 1 PH H49 (C) 481
De Wet 1915 OPD 157 ..... 304, 305
Deale 1960 3 SA 846 (T) 530
Deetlefs 1953 1 SA 418 (A) 524, 526
Del Ré 1990 1 SACR 392 (W) 257
Dema 1947 1 SA 599 (E) 432
Desai 1997 1 SACR 38 (W) 142, 145
Dettbarn 1930 CPD 188 267
Dhlamini 1931 1 PH H57 (T) 450
Dhlamini 1943 TPD 20 533
Dhlamini 1955 1 SA 120 (T) 55
Dhlamini 1958 4 SA 211 (N) 325
Dhlamini 1975 2 SA 524 (D) 510
Dhlamini (unreported) 205
Di Stefano 1977 1 SA 770 (C) 257
Dibley v Furter 1951 4 SA 73 (C) 436
Dick 1969 3 SA 267 (R) 294, 295
Dikant 1948 1 SA 693 (O) 162, 175
Dimuri 1999 1 SACR 79 (ZH) 474
Dingiswayo 1985 3 SA 175 (Ck) 313
Director of Public Prosecutions, Transvaal v Venter 2009 1 SACR 165 (SCA) 171

PAGE

Director of Public Prosecutions, Western Cape v Prins
2012 2 SACR 183 (SCA) 41, 343
Dittmer 1971 3 SA 296 (SWA) 541
Dladla 1965 3 SA 146 (T) 421
Dladla 1980 1 SA 1 (A) 180, 181, 189
Dlamini 1984 3 SA 196 (N) 489, 490
Dlepu 1978 3 SA 106 (T) 427
Dlomo 1957 2 PH H184 (E) 487, 539
Dodo 2001 1 SACR 594 (CC) 17, 49, 358, 441, 512
Dohne (1901) 22 NLR 176 304
Dorfling 1954 2 SA 125 (E) 493
Dormehl 1966 1 PH H223 (A) 532, 534
Dougherty 2003 2 SACR 36 (W) 107, 113
Dreyer 1967 4 SA 614 (E) 487, 534
Du Plessis 1960 2 SA 642 (T) 91, 93
Du Plessis 1981 3 SA 382 (A) 279, 284, 286
Du Preez 1998 2 SACR 133 (C) 517, 518
Du Toit 1947 3 SA 141 (A) 231
Du Toit 1950 2 SA 469 (A) 333, 338
Du Toit 1974 4 SA 679 (T) 327, 329
Du Toit 1981 2 SA 33 (C) 210, 214, 233, 259, 260
Du Toit 2004 1 SACR 66 (T) 289
Duarte 1965 1 PH H83 (T) 508
Dube 1991 2 SACR 419 (ZS) 453, 454
Dube 1994 2 SACR 130 (N) 279, 282
Dube 2000 1 SACR 53 (N) 142
Dube 2010 1 SACR 65 (KZP) 187, 189, 261
Duffey v Munnik 1957 4 SA 390 (T) 319
Duma 1970 1 SA 70 (N) 221
Dunya 1961 3 SA 644 (O) 504
Dyenti 1973 1 PH H4 (C) 547
Dyk 1969 1 SA 601 (C) 162
Dyonta 1935 AD 52 ..... 524, 528, 529, 532, 535

E

E 1957 4 SA 61 (G) 291
Eadie 2002 1 SACR 663 (SCA) 158, 160, 161, 162, 252
Edward 1992 2 SACR 429 (ZH) 166
Elbrecht 1977 4 SA 165 (C) 509
Els 1972 4 SA 696 (T) 234
Els 1986 1 PH H73 (A) 471
Endemann 1915 TPD 142 ..... 304, 309, 310, 311
Eneldoe's Taxi Service (Pty) Ltd 1966 1 SA 329 (A) 43
Engelbrecht 1966 1 SA 210 (C) 485, 487, 493
Engelbrecht 2005 2 SACR 41 (W) 98, 102, 103, 104, 105, 106, 107, 110, 111, 112, 155, 157
Erasmus 1923 AD 73 ..... 304, 305
Erasmus 2005 2 SACR 658 (SCA) 452, 454
Ernst 1963 3 SA 666 (T) 410
Eshowe Local Board v Hall 1923 NPD 233 435
Essack 1963 1 SA 922 (T) 516, 517
Evans 1982 4 SA 346 (C) 233, 259
Evilio 2012 1 SACR 367 (SGHJ) 339

PAGE
Ex parte die Minister van Justisie: in re S v Van Wyk 1967 1 SA 488 (A) 105, 109
Ex parte Lebowa Development Corporation Ltd 1989 3 SA 71 (T) 411, 523, 531
Ex parte Minister of Justice: in re R v Bhyala 1943 AD 135 336
Ex parte Minister of Justice: in re R v Gesa; R v De Jongh
1959 1 SA 234 (A) 126, 418, 484, 508, 509, 536
Ex parte Minister of Justice: in re R v Maserow 1942 AD 164 ..... 484, 501, 513
Ex parte Minister of Justice: in re R v Nanabhai 1939 AD 427 ..... 262, 263
Ex parte Minister of Safety and Security: in re S v Walters
2002 2 SACR 105 (CC) 129, 131
Ex parte Minister van Justisie: in re S v J en S v Von Molendorff
1989 4 SA 1028 (A) 418
Ex parte Minister van Justisie: in re S v SAUK 1992 4 SA 804 (A) 75, 99, 154, 246
Ex parte Minister van Justisie: in re S v Seekoei 1984 4 SA 690 (A) 510
Ex parte Schwietering 1948 3 SA 378 (O) 302

F

F 1958 4 SA 300 (T) 291
F 1977 2 SA 1 (T) 433, 434
F 1982 2 SA 580 (T) 353
F 1983 1 SA 747 (O) 471, 474
F 1990 1 SACR 238 (A) 366
F v Minister of Safety and Security 2009 2 SACR 639 (C) 60
Faison 1952 2 SA 671 (R) 543, 547, 548
Farndon 1937 EDL 180 ..... 418, 419
Feelander 1926 TPD 157 397
Feinberg 1956 1 SA 734 (O) 526
Fernandez 1966 2 SA 259 (A) 53, 60, 225
Ferreira 2004 2 SACR 454 (SCA) 177
Fick 1945 GWL 11 450
Filani 2012 1 SACR 508 (ECG) 428
Fisher 1970 3 SA 446 (RA) 508
Flattery [1877] 2 QBD 410 ..... 126, 354
Folkus 1954 3 SA 442 (SWA) 103
Forlee 1917 TPD 52 ..... 40, 41
Fouché 1958 3 SA 767 (T) 498
Fouché 1973 3 SA 308 (NC) 261
Fouché 1974 1 SA 96 (A) 257, 260
Fourie 2001 2 SACR 674 (C) 74, 97, 98
Foye (1886) 2 BAC 121 327
Francis 1981 1 SA 230 (ZA) 528, 532
Francis 1994 1 SACR 350 (C) 41
Frankfort Motors (Pty) Ltd 1946 OPD 255 ..... 523, 528
Fraser 1928 AD 484 498
Fraser 2005 1 SACR 456 (SCA) 287, 473
Fredericks 1923 TPD 350 41
Friedman 1996 1 SACR 181 (W) 43, 532
Fuleza 1951 1 SA 519 (A) 468

G

G 1938 AD 246 417
Gaba 1981 3 SA 745 (O) 60, 329
Gaba 1985 4 SA 734 (A) 301
Gabriel (1908) 29 NLR 750 329

PAGE
Gani 1957 2 SA 212 (A) ... 273, 274, 328
Ganie 1967 4 SA 203 (N) ... 410
Gardener 2011 1 SACR 570 (SCA) ... 523, 525, 531
Gaseb 2001 1 SACR 438 (NmS) ... 254, 344
Gathercole 1964 1 SA 21 (A) ... 495, 498
Gcabashe 1997 2 SACR 106 (N) ... 278
Gebhard 1947 2 SA 1210 (G) ... 482
Gedezi 2010 2 SACR 363 (WCC) ... 199, 261
Geffen 1944 CPD 86 ... 419
Gentle 1983 3 SA 45 (N) ... 67, 423
Gervais 1913 EDL 167 ... 539, 540
Geyer (1900) 17 SC 501 ... 302
Ghoor 1969 2 SA 555 (A) ... 521
Gibson 1979 4 SA 115 (D) ... 325, 326, 469
Ginsberg 1934 CPD 166 ... 469
Gokool 1965 3 SA 461 (N) ... 268, 418, 419
Golding (1896) 13 SC 210 ... 497, 498
Goldman 1990 1 SACR 1 (A) ... 20
Goliath 1972 3 SA 1 (A) ... 54, 55, 99, 103, 104, 115, 116, 117, 118, 120, 121, 122, 152, 153, 154, 256
Gomas 1936 CPD 225 ... 304
Gondo 1970 2 SA 306 (R) ... 447
Goosen 1989 4 SA 1013 (A) ... 148, 195, 197, 199, 205, 225
Gordon 1962 4 SA 727 (N) ... 438
Gosain 1928 TPD 516 ... 448, 465
Gouws 1975 1 SA 1 (A) ... 401, 412
Gouws 2004 2 SACR 512 (W) ... 166
Govender 2004 2 SACR 389 (SCA) ... 60
Govender v Minister of Safety and Security 2001 2 SACR 197 (SCA) ... 131
Govender v Minister of Safety and Security 2009 2 SACR 87 (D&C) ... 105
Government of the Republic of SA v Pentz 1982 1 SA 553 (T) ... 536
Gqalowe 1992 2 SACR 172 (E) ... 511
Gqomana 2001 2 SACR 28 (C) ... 358
Graham 1975 3 SA 569 (A) ... 481, 482, 495, 496, 498, 499
Greenstein 1977 3 SA 220 (RA) ... 327, 328, 330, 331
Griessel 1993 1 SACR 178 (O) ... 248
Griffin 1962 4 SA 495 (E) ... 488
Grobler 1918 EDL 124 ... 549
Grobler 1972 4 SA 559 (O) ... 84, 85
Grobler 1974 2 SA 663 (T) ... 58, 84
Groenewald 1941 OPD 194 ... 491
Grotjohn 1970 2 SA 355 (A) ... 85, 87, 90, 93, 124, 438
Grove-Mitchell 1975 3 SA 417 (A) ... 254
Guess 1976 4 SA 715 (A) ... 425
Gumbi 1927 TPD 660 ... 67
Gweshe 1964 1 SA 294 (R) ... 530

H

Haarmeyer 1971 3 SA 43 (A) ... 83
Hammersma 1941 OPD 39 ... 247
Hammond 2008 1 SACR 476 (SCA) ... 142
Handcock 1925 OPD 147 ... 127
Hanekom 1979 2 SA 1130 (A) ... 70

PAGE
Hanna 1937 TPD 236 ..... 396, 398
Hans 1998 2 SACR 406 (E) 459
Harber 1988 3 SA 396 (A) 217, 321, 326, 327
Harber: in re S v Baleka 1986 4 SA 214 (T) 327
Hardy (1905) 26 NLR 433
Harlow 1955 3 SA 259 (T) 475
Harmse 1944 AD 295 500
Harper 1981 2 SA 638 (D) 477, 482, 488, 495, 498, 525, 528
Harris 1927 NPD 330 287
Harris 1965 2 SA 340 (A) 205
Hartmann 1975 3 SA 532 (C) 124, 189, 437, 439
Hartyani 1980 3 SA 613 (T) 234
Harvey 1956 1 SA 461 (T) 531
Hassa 1939 NPD 161 332
Hassen 1956 4 SA 41 (N) 517
Hassen 1997 1 SACR 247 (T) 142, 145
Hattingh 1959 2 PH H355 (O) 524
Hayes 1998 1 SACR 625 (O) 142, 145
Heller 1964 1 SA 524 (W) 525
Heller 1971 2 SA 29 (A) 488, 493, 495, 496
Hendricks 17 CTR 470 481
Hendricks 1938 CPD 456 487
Henkes 1941 AD 143 529
Henry 1999 1 SACR 13 (SCA) 54, 56, 57, 168, 168
Hepker 1973 1 SA 472 (W) 531
Herbert 10 CTR 424 448
Hercules 1954 3 SA 826 (A) 54, 443
Herholdt 1957 3 SA 236 (A) 488, 493, 499
Herschel v Mrupe 1954 3 SA 464 (A) 224, 225
Heyne 1956 3 SA 604 (A) 524, 528, 529, 530, 532
Heyneke 1959 2 PH H185 (O) 467
Hibbert 1979 4 SA 717 (D) 87, 93, 124, 189, 437
Hiltonian Society v Crofton 1952 3 SA 130 (A) 139
Hirschhorn 1934 TPD 178 331
Hlapo 1944 OPD 166 ..... 395, 396, 398
Hlatswayo 1980 3 SA 425 (O) 511
Hlatwayo 1933 TPD 441 284
Hlomza 1983 4 SA 142 (E) 210, 425
Hlomza 1987 1 SA 25 (A) 210
Hlongwana 1975 4 SA 567 (A) 242
Hlongwane 1992 2 SACR 484 (N) 280, 543, 547
Hochfelder 1947 3 SA 580 (C) 524
Hodgkinson 2010 2 SACR 511 (NG) 460
Hoffman 1983 4 SA 564 (T) 210, 473
Hogan 1983 2 SA 46 (W) 302
Hoho 2009 1 SACR 276 (SCA) 467, 468, 469
Hoko 1941 SR 211 62
Holbrook [1998] 3 All SA 597 (E) 42, 457
Holliday 1924 AD 250 ..... 166, 235
Holliday 1927 CPD 395 ..... 462, 463, 464, 465, 466
Holm 1948 1 SA 925 (A) 303
Hoosain 1990 2 SA 1 (A) 65
Hosiosky 1961 1 SA 84 (W) 227
Huebsch 1953 2 SA 561 (A) 286

PAGE
Huijzers 1988 2 SA 503 (A) 529
Humphreys 2013 2 SACR 1 (SCA) 55, 56, 57, 177, 178, 183, 185, 186, 187, 188, 189, 231
Humphries 1957 2 SA 233 (N) 459
Hunt 1957 2 SA 465 (N) 517
Hutchinson 1990 1 SACR 149 (C) 245, 248
Hutson 1964 1 PH H16 (O) 524
Huyser 1968 3 SA 490
Hymans 1927 AD 35 ..... 532, 534

I

I 1976 1 SA 781 (RA) 74, 97, 98, 100, 465
Impey 1960 4 SA 556 (E) 544
Incorporated Law Society v Sand 1910 TPD 1295 325
Incorporated Law Society v Visse 1958 4 SA 115 (T) 497
Incorporated Law Society v Wessels 1927 TPD 592 325
Ingham 1958 2 SA 37 (C) 268
Ingram 1999 2 SACR 127 (W) 247
Ireland [1998] AC 147 451
Isaacs 1968 2 SA 187 (D) 526, 529, 531, 532
Ismail 1943 CPD 418 397
Ismail 1958 1 SA 206 (A) 515, 516, 518
Ismail 1965 1 SA 452 (N) 247, 248
Ismail v Durban Corporation 1971 2 SA 606 (N) 257
Ivory 1916 WLD 17 166

J

J 1953 3 SA 494 (E) 464
J 1975 3 SA 146 (O) 171
J 1980 4 SA 113 (E) 417, 418, 419
J 1989 1 SA 525 (A) 356
Jabulani 1980 1 SA 331 (D) 509
Jack 1908 TS 131 ..... 444, 447, 461
Jackelson 1920 AD 486 ..... 267, 270
Jackson 1957 4 SA 636 (R) 471, 474
Jackson 1963 2 SA 626 (A) 110
Jackson 1990 2 SACR 505 (E) 424
Jacobs 1926 OPD 184 394
Jacobs 1955 2 PH H187 (W) 479
Jacobs 1989 1 SA 652 (A) 65, 68, 425, 517
Jacobs 1989 1 SA 882 (A) 78
Jaffet 1962 2 PH H220 (R) 541
Jakwane 1944 OPD 139 554
Jama 1989 3 SA 427 (A) 259
James 1960 R and N 159 464
Jana 1981 1 SA 671 (T) 461, 466
Janoo 1959 3 SA 107 (A) 492
Jansen 1959 1 SA 777 (C) 418
Jansen 1983 3 SA 534 (NC) 103
Jantjies 1991 1 SACR 74 (C) 85
Japel 1906 TS 111 468
Jara 2003 2 SACR 216 (Tk) 229
Jarrard 1939 EDL 102 332

PAGE
Jass 1965 3 SA 248 (E) ... 530
Jassane 1973 4 SA 658 (T) ... 193
Jecha 1984 1 SA 215 (Z) ... 546
Jeremiah 1965 4 SA 205 (R) ... 514
Jetha 1929 NPD 91 ... 61
Job 1976 1 SA 207 (NC) ... 68, 425
Joffe 1925 TPD 86 ... 513
Joffe 1934 SWA 108 ... 533, 534, 535
Johannes 1918 CPD 488 ... 544
John 1931 SALJ 83 ... 530
John 1969 2 SA 560 (RA) ... 88, 225
Johnson 1969 1 SA 201 (A) ... 55, 155, 234, 235, 242
Johnson 1977 4 SA 116 (RA) ... 508
Jolly 1923 AD 176 ... 205, 448, 449
Jolosa 1903 TS 694 ... 524, 530
Jona 1961 2 SA 301 (W) ... 476
Jonathan 1987 1 SA 633 (A) ... 272, 273, 274
Jongani 1937 AD 400 ... 272
Jordan (1956) 49 Cr App Rep 152 ... 91
Jordan 2002 2 SACR 499 (CC) ... 42, 375, 376, 377
Jorgenson 1935 EDL 219 ... 395, 397, 398, 399
Joseph 1964 4 SA 54 (RA) ... 453, 454
Joseph Mtshumayeli (Pvt) Ltd 1971 1 SA 33 (RA) ... 246
Josephus 1991 2 SACR 347 (C) ... 280
Joshua 2003 1 SACR 1 (SCA) ... 208
Josiya 1970 4 SA 549 (R) ... 479
Joubert 1961 4 SA 196 (O) ... 533, 535
Joyce v DPP [1946] 1 All ER 186 (HL) ... 302
Judin 1969 4 SA 425 (A) ... 525, 530
Julies 1996 2 SACR 108 (CC) ... 337, 424, 456, 507

K

K 1951 4 SA 49 (O) ... 126
K 1956 2 SA 217 (T) ... 418, 419
K 1956 3 SA 353 (A) ... 104, 107, 110, 156, 173, 174, 175
K 1958 3 SA 420 (A) ... 123, 126, 353, 355, 356
K 1966 1 SA 366 (RA) ... 126, 354
K 1975 3 SA 446 (N) ... 467
Kaba 1970 1 SA 439 (T) ... 210
Kadongoro 1980 2 SA 581 (R) ... 233
Kahn 1928 CPD 328 ... 395, 398
Kama 1949 1 PH H66 (O) ... 487, 539
Kamfer 1965 1 SA 521 (SWA) ... 263
Kamffer 1965 3 SA 96 (T) ... 105
Kaplin 1964 4 SA 355 (T) ... 521
Karolia 1956 3 SA 569 (T) ... 481, 513
Karvie 1945 TPD 159 ... 105
Kasamula 1945 TPD 252 ... 67
Kashion 1963 1 SA 723 (R) ... 312, 314
Kature 1967 1 PH H125 (RA) ... 335
Katz 1959 3 SA 408 (C) ... 276, 279, 280
Kaukakani 1947 2 SA 807 (A) ... 235
Kavin 1978 2 SA 731 (W) ... 167

PAGE
Kaye 1928 TPD 463 463
Kazi 1963 4 SA 742 (W) 191, 269
Kearny 1964 2 SA 495 (A) 498
Kelaman (1897) 14 SC 329 444
Kelder 1967 2 SA 644 (T) 242
Kellner 1963 2 SA 435 (A) 268
Kemp [1956] 3 All ER 249 166
Ken 1966 4 SA 514 (N) 454
Kennedy 1951 4 SA 431 (A) 171
Kensley 1995 1 SACR 646 (A) 159, 248, 252
Keppler 1970 4 SA 673 (T) 534
Kerkhoff v Minister of Justice and Constitutional Development
2011 2 SACR 109 (NGHP) 325
Kesolofetse 2004 2 SACR 166 (NC) 550
Kewelram 1922 AD 213 542
Keyser 1951 1 SA 512 (A) 322
Kganare 1955 1 PH H106 (O) 335
Kgogong 1980 3 SA 600 (A) 140
Kgoyane 1982 4 SA 133 (T) 509
Kgupane 1975 2 SA 73 (T) 425
Kgware 1977 2 SA 454 (O) 189, 539, 541
Khambule 2001 1 SACR 501 (SCA) 257, 258
Khan 1963 4 SA 897 (A) 337
Khotle 1981 3 SA 937 (C) 233
Khoza 1973 4 SA 23 (O) 287, 288, 290, 337
Khoza 1982 3 SA 1019 (A) 252, 258, 268, 269, 271
Khubeka 1980 4 SA 221 (O) 162, 175
Khumalo 1960 2 PH H245 (N) 255
Khumalo 1964 1 SA 498 (N) 517, 518, 519
Khumalo 1975 4 SA 345 (N) 489
Khumalo 1984 3 SA 327 (A) 19
Khumalo 1991 4 SA 310 (A) 313
Kibi 1978 4 SA 173 (E) 103, 115, 118, 119, 336
Killian 1977 2 SA 31 (C) 191, 397, 398, 399
Kimberley 2004 2 SACR 38 (E) 253, 254, 262, 270
Kimmich 1996 2 SACR 200 (C) 482, 495, 497
Kinqa 1962 2 SA 401 (E) 487
Kinsella 1961 3 SA 519 (C) 487
Kiti 1994 1 SACR 14 (E) 327, 330
Kleyn 1927 CPD 288 105
Klopper 1975 4 SA 773 (A) 40
Knox 1963 3 SA 431 (N) 537
Kock 1988 1 SA 37 (A) 270
Koekemoer 1959 1 PH H131 (O) 493
Kok 1998 1 SACR 532 (N) 54, 56
Kok 2001 2 SACR 106 (SCA) 56, 165, 168
Kokkinakis v Greece (1994) 16 EHRR 397 48
Kolia 1937 TPD 105 ..... 533, 535
Konyana 1992 1 SACR 451 (O) 549
Koopman 1958 3 SA 68 (G) 489
Kosztur 1988 3 SA 926 (A) 171
Kotze 1965 1 SA 118 (A) 45,475, 482, 494, 495, 496, 497
Kotze 2010 1 SACR 100 (SCA) 142
Koza 1949 4 SA 555 (A) 202

PAGE
Kruger 1950 1 SA 591 (O) 534, 535
Kruger 1961 4 SA 816 (A) 528, 529, 530
Kruger 1989 1 SA 785 (A) 500
Kruger v Coetzee 1966 2 SA 428 (A) 217
Kruse 1946 AD 524 ..... 524, 530
Kula 1955 1 PH H66 (O) 487, 539
Kumalo 1952 2 SA 389 (T) 489
Kumalo 1956 3 SA 238 (N) 168
Kumbe 1962 3 SA 197 (N) 491, 501
Kuzwayo 1949 3 SA 761 (A) 202
Kwadi 1989 3 SA 524 (NC) 262
Kwanda 2013 1 SACR 137 (SCA) 68, 427

L

L 1981 1 SA 499 (B) 397, 398
L 1982 2 SA 133 (T) 508
L 1982 2 SA 768 (ZH) 509
L 1991 2 SACR 329 (C) 434
La Grange 1991 1 SACR 276 (C) 40, 41
Labuschagne 1941 TPD 271 303
Labuschagne 1997 2 SACR 6 (NC) 528
Lachman 2010 2 SACR 52 (SCA) 145
Laforte 1922 CPD 487 ..... 487, 493
Lalbhai (1909) 19 CTR 751 334
Lambert 1927 SWA 32 272
Lamont 1977 2 SA 679 (RA) 255
Langa 1998 1 SACR 21 (T) 516
Lange 1989 1 SACR 199 (W) 245, 247
Langley 1931 CPD 31 41
Lark Clothing (Pty) Ltd 1973 1 SA 239 (C) 247
Larkins 1934 AD 91 ..... 525, 526
Latham 1980 1 SA 723 (ZRA) 488
Latib 1968 1 SA 177 (T) 535
Latib 1973 3 SA 982 (A) 524, 526
Laubscher 1913 CPD 123 ..... 540, 541
Laubscher 1948 2 PH H46 (C) 483
Laubscher 1988 1 SA 163 (A) 155, 157, 158, 163, 166
Laurence 1975 4 SA 825 (A) 278
Lavenstein 1919 TPD 348 405
Lavhengwa 1996 2 SACR 453 (W) 43, 318, 319, 320
Lawrence 1954 2 SA 408 (C) 544
Lawrence 1991 2 SACR 57 (A) 171
Lazarus 1922 CPD 293 419
Le Roux 1959 1 SA 808 (T) 498
Le Roux 2010 2 SACR 11 (SCA) 311, 312, 313
Leballo 1954 2 SA 657 (O) 533, 534
Lees 1927 EDL 314 395
Leeuw 1975 1 SA 439 (O) 61, 62
Leeuw 1980 3 SA 815 (A) 168
Lehnberg 1975 4 SA 553 (A) 171
Leibbrandt 1944 AD 253 ..... 303, 304, 305, 306
Leibrandt 1939 WLD 377 534
Lekgathe 1982 3 SA 104 (B) 138, 139, 215

PAGE
Lekoatha 1946 OPD 6 312
Lekute 1991 2 SACR 221 (C) 547
Lentit 1950 1 SA 16 (C) 471, 472, 473, 474
Lepheana 1956 1 SA 337 (A) 418, 419
Lesch 1983 1 SA 814 (O) 155, 157, 158, 254
Lesia 1978 3 SA 930 (B) 398
Lessing 1907 EDC 220 ..... 485, 487
Letoka 1947 3 SA 713 (O) 435, 436
Letsoela 1942 OPD 99 534
Levitan 1958 1 SA 639 (T) 537
Levy 1929 AD 312 248
Levy 1967 1 SA 351 (W) 472, 474
Lewis 1968 2 PH H367 (T) 464
Libazi 2010 2 SACR 233 (SCA) 287
Limbada 1958 2 SA 481 (A) 247
Linda 1966 1 SA 41 (O), ... 418
Lionda 1944 AD 348 ..... 278, 281
Lizzy 1995 2 SACR 739 (W) 319
Lombard 1948 2 SA 31 (T) 553
Lombard 1980 3 SA 948 (T) 423
Lombard 1981 3 SA 198 (A) 242
Long 1969 3 SA 713 (R) 472, 474
Long 1970 2 SA 153 (RA) 472, 473, 474
Longdistance (Natal) (Pty) Ltd 1990 2 SA 277 (N) 210, 214, 233
Longdistance (Pty) Ltd 1986 3 SA 437 (N) 210, 233
Loubser 1953 2 PH H190 (W) 85
Lubisi 1982 3 SA 113 (A) 304, 306
Lujaba 1987 1 SA 226 (A) 490
Lungile 1999 2 SACR 597 (SCA) 87, 93, 118, 119, 189, 199, 205, 263
Lushozi 1968 1 PH H 21 (T) 255
Lutge 1947 2 SA 490 (N) 419
Luther 1962 3 SA 506 (A) 491
Luyt 1927 AD 1 326
Lwane 1966 2 SA 433 (A) 208

M

M 1990 1 SACR 456 (N) 344, 361
M 1915 CPD 334 467
M 1947 4 SA 489 (N) 462
M 1953 4 SA 393 (A) 125, 127, 353
M 1961 2 SA 60 (O) 449
M 1968 2 SA 617 (T) 380
M 1978 3 SA 557 (Tk) 162, 173, 175
M 1979 2 SA 25 (A) 464, 467
M 1979 4 SA 564 ..... 173, 175
M 1982 1 SA 309 (O) 479, 489, 490
M 1985 1 SA 1 (A) 171
M 1989 4 SA 718 (T) 543
M 1997 2 SACR 340 (O) 387
M 1999 2 SACR 548 (SCA) 379
M 2004 1 SACR 228 (O) 381, 382
M'Tech 1912 TPD 1132 544
Mabaso 1990 1 SACR 675 (T) 318

PAGE
Mabona 1935 TPD 407 ... 469
Mabrida 1959 1 R and N 186 ... 471, 474
Mabula 1927 AD 159 ... 542
Macatlane 1927 TPD 708 ... 530, 533, 534
MacDonald 1953 1 SA 107 (T) ... 468
MacDonald 1980 2 SA 939 (A) ... 509
MacDonald 1982 3 SA 220 (A) ... 524, 526, 531
Macu v Du Toit 1983 4 SA 629 (A) ... 131
Madihlaba 1990 1 SA 76 (T) ... 215
Madikane 1990 1 SACR 377 (N) ... 83, 87, 454
Madikela 1994 1 SACR 37 (BA) ... 282
Madito 1970 2 SA 534 (C) ... 483
Madlala 1992 1 SACR 473 (N) ... 271
Madyo 1990 1 SACR 292 (E) ... 546
Maelangwe 1999 1 SACR 133 (NC) ... 253, 257, 258, 547
Mafadza 1987 2 SA 113 (V) ... 508
Mafora 2010 1 SACR 269 (NWM) ... 339
Mafu 1966 2 SA 240 (E) ... 61
Mafu 1992 2 SACR 494 (A) ... 11
Magagula 2001 2 SACR 123 (T) ... 258
Magerman 1960 1 SA 184 (O) ... 318
Magidson 1984 3 SA 825 (T) ... 140
Magmoed v Janse van Rensburg 1993 1 SACR 67 (A) ... 261
Maguire 1969 4 SA 191 (RA) ... 448
Magwaza 1985 3 SA 29 (A) ... 261
Magxwalisa 1984 2 SA 314 (N) ... 279, 280, 301
Mahlakwane 1968 2 PH H331 (O) ... 447
Mahlangu 1986 1 SA 135 (T) ... 43
Mahlangu 1995 2 SACR 425 (T) ... 59, 60, 268
Mahlinza 1967 1 SA 408 (A) ... 155, 156, 165, 166
Mahomed 1929 AD 58 ... 418, 419
Mahomed 1938 AD 30 ... 118
Mahomed 1951 1 SA 439 (T) ... 336, 337
Mahomed Hossain 1913 CPD 841 ... 333, 334
Mailula 1998 1 SACR 649 (T) ... 551
Maisa 1968 1 SA 271 (T) ... 548
Maisel v Van Naeren 1960 4 SA 836 (C) ... 469
Majikazana 2012 2 SACR 107 (SCA) ... 429
Majola 1975 2 SA 727 (A) ... 40, 423
Majola 2001 1 SACR 337 (N) ... 55
Major 1968 2 PH H186 (R) ... 379
Majosi 1991 2 SACR 532 (A) ... 178, 188
Makgatho 2013 2 SACR 13 (SCA) ... 178, 180, 187
Makhati 1997 2 SACR 524 (O) ... 517
Makhutla 1968 2 SA 768 (O) ... 500
Maki 1994 2 SACR 414 (E) ... 244, 249
Maklakla 1919 TPD 336 ... 536
Makoelman 1932 EDL 194 ... 544, 547
Makonie 1942 OPD 164 ... 479
Makwanyane 1995 2 SACR 1 (CC) ... 263, 356, 440
Makwanyane 1995 3 SA 391 (CC); 1995 2 SACR 1 (CC) ... 26
Makwasie 1970 2 SA 128 (T) ... 257
Malamu Nkatlapaan 1918 TPD 424 ... 540, 541
Malan 1915 TPD 180 ... 309, 311

PAGE
Malan 2013 2 SACR 655 (WCC) 525
Malatje 1981 4 SA 249 (B) 221
Maleka 1965 2 SA 774 (T) 432
Malgas 2001 1 SACR 469 (SCA) 19, 39, 49, 358, 512
Malianga 1962 3 SA 940 (R) 334
Malinga 1963 1 SA 692 (A) 258, 261
Mall 1959 4 SA 607 (N) 247
Mamabolo 2001 1 SACR 686 (CC) 316, 322, 323, 324, 326
Mambo 2006 2 SACR 563 (SCA) 258
Manamela 2000 1 SACR 414 (CC) 409, 520
Mandela 2001 1 SACR 156 (C) 117, 119, 122, 152, 153
Manderson 1909 TS 1140 ..... 434, 435
Mandetela 1948 4 SA 985 (E) 540
Mange 1980 4 SA 613 (A) 301, 304
Manngo 1980 3 SA 1041 (V) 432
Mans 1950 1 SA 602 (C) 322
Manuel 1953 4 SA 523 (A) 495, 496, 498
Mara 1966 1 SA 82 (SR) 221
Marais (1888) 6 SC 367 ..... 47, 433, 434
Marais 1969 4 SA 532 (NC) 509
Mardon 1947 2 SA 768 (Sp Ct) 302, 303
Maree 1964 4 SA 545 (O) 272, 331
Maritz 1956 3 SA 147 (G) 540, 541
Maritz 1996 1 SACR 405 (A) 178, 181, 183, 189
Markins Motors (Pty) Ltd 1958 4 SA 686 (N) 491
Markins Motors (Pty) Ltd 1959 3 SA 508 (A) 514
Marks 1965 3 SA 834 (W) 247
Martheza (1885) 3 HCG 456 334
Maruba 1941 2 PH H249 (O) 539
Maruba 1942 OPD 51 487
Maruma 1955 3 SA 561 (O) 547
Marx 1962 1 SA 848 (N) 444, 447, 448, 449
Marx 2009 2 SACR 562 (E) 254
Maseko 1950 1 SA 586 (A) 443, 444
Maseko 2004 1 SACR 22 (T) 543
Maserow 1942 AD 164 274
Mashanga 1924 AD 11 ..... 539, 540
Mashigo 1976 6 PH H210 (A) 548
Mashiya 1955 2 SA 417 (E) 534
Mashotonga 1962 2 SA 321 (R) 257
Masilela 1968 2 SA 558 (A) 93, 148, 149, 195
Masilo 1963 4 SA 918 (T) 65
Masiya 2006 2 SACR 357 (T) 46, 47, 48
Masiya v Director of Public Prosecutions 2007 2 SACR 435 (CC) 44, 45, 344, 345
Masondo 1989 3 SA 734 (N) 260
Matakane 1947 3 SA 717 (O) 334
Matakane 1948 3 SA 384 (A) 333
Mataung 1953 4 SA 35 (O) 542
Mathe 1998 2 SACR 225 (O) 424
Mathlala 1951 1 SA 49 (T) 314
Mathoho: in re da Silva Pessegueiro v Tshinanga 2006 1 SACR 388 (T) 318, 319
Mati 2002 1 SACR 323 (C) 510, 511
Matjeke 1980 4 SA 267 (B) 509
Matlare 1965 3 SA 326 (C) 482

PAGE
Matle 1984 3 SA 748 (NC) ... 202, 204
Matlou v Makhubedu 1978 1 SA 946 (A) ... 131
Matoma 1981 3 SA 838 (A) ... 20
Matsabu 2009 1 SACR 513 (SCA) ... 145
Matsemela 1988 2 SA 254 (T) ... 125
Matsepe 1931 AD 150 ... 150
Matthews 1943 CPD 8 ... 432
Matthews 1950 3 SA 671 (N) ... 443, 444
Matu 2012 1 SACR 68 (ECB) ... 172
Matyityi 2011 1 SACR 40 (SCA) ... 19
Maunatlala 1982 1 SA 877 (T) ... 547
Mavhungu 1981 1 SA 56 (A) ... 178, 202, 204
Mavros 1921 AD 19 ... 539, 540, 542
Mavungu 2009 1 SACR 425 (T) ... 545, 546, 552
Maxaba 1981 1 SA 1148 (A) ... 251, 253, 261, 266
Mayekiso 1988 4 SA 738 (W) ... 299, 300, 304, 305
Mayekiso 1990 2 SACR 38 (NC) ... 65
Mayers 1958 3 SA 793 (R) ... 136
Mayisela 2013 2 SACF 129 (NGP) ... 355
Mayo 1969 1 PH H26 (R) ... 364
Mazwai 1979 4 SA 484 (T) ... 337
Mbaba 2002 1 SACR 43 (E) ... 318
Mbande 1933 AD 382 ... 268
Mbanyaru 2009 1 SACR 631 (C) ... 259, 260, 265
Mbatha 1987 2 SA 272 (A) ... 261
Mbatha 1996 1 SACR 371 (CC) ... 337, 456, 507
Mbebe 2004 2 SACR 537 (Ck) ... 517
Mbele 1991 1 SA 307 (T) ... 245, 246, 248, 249
Mbokazi 1998 1 SACR 438 (N) ... 525
Mbokazi 1998 2 All SA 78 (N) ... 527
Mbombela 1933 AD 269 ... 220, 223
Mbulawa 1969 1 SA 532 (EC) ... 67
McCoy 1953 2 SA 4 (R) ... 126
McEvilly and Lee [1979] 60 Crim LR 150 ... 147
McIntosh (1910) 4 BAC 63 ... 332
McIver 1929 TPD 574 ... 468, 469
McKenna 1998 1 SACR 106 (C) ... 318
McLean 1918 TPD 94 ... 534
McLoughlin 1929 CPD 359 ... 326
McPherson 1972 2 SA 348 (E) ... 498
Mcunu 1938 NPD 229 ... 312
Mdakani 1964 3 SA 311 (T) ... 328, 329, 330
Mdantile 2011 2 SACR 142 (FB) ... 524, 529
Mdau 2001 1 SACR 625 (T) ... 453, 454
Mdukazi 1972 4 SA 256 (NC) ... 173
Mdunge 1962 2 SA 500 (N) ... 553
Mealy and Sheridan [1974] Crim App R 59 ... 147
Meer 1958 2 SA 175 (N) ... 246
Mei 1982 1 SA 299 (O) ... 312, 313
Meinert 1932 SWA 56 ... 434
Mekula 2012 2 SACR 521 (ECG) ... 480, 490
Meleka 1965 2 SA 774 (T) ... 445
Melk 1988 4 SA 561 (A) ... 260
Mello 1998 1 SACR 267 (T) ... 67, 421

PAGE
Mello 1999 2 SACR 255 (CC) 421
Mellors 1990 1 SACR 347 (W) 471, 473, 474
Melrose 1985 1 SA 720 (ZS) 453
Melville 1959 3 SA 544 (E) 547, 548
Memani 1990 2 SACR 4 (TkA) 260, 261
Mendez v Kitching 1995 2 SACR 634 (E) 145
Mene 1988 3 SA 641 (A) 329, 331
Metcalf 1944 CPD 266 325
Meyer Yates (1897) 4 OR 134 335
Meyers 1948 1 SA 375 (A) 411
Meyeza 1962 3 SA 386 (N) 544
Mgcineni 1993 1 SACR 746 (E) 454
Mgedezi 1989 1 SA 687 (A) 257, 259
Mgxwiti 1954 1 SA 370 (A) 258
Mhlongo 1942 NPD 134 397
Mhlongo 1960 4 SA 574 (A) 443
Mia 2009 1 SACR 330 (SCA) 536, 537
Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape) [2007] 3 All SA 318 (SCA) 315, 321
Milne and Erleigh 1951 1 SA 791 (A) 53, 290, 293, 294, 495, 496, 499
Minister of Law and Order v Kadir 1995 1 SA 303 (A) 59
Minister of Police v Skosana 1977 1 SA 31 (A) 83
Minister of Safety and Security v Howard 2009 2 SACR 536 (GSJ) 330
Minister of Safety and Security v Mohofe 2007 2 SACR 92 (SCA) 217
Minister van Polisie v Ewels 1975 3 SA 590 (A) 59, 60
Minister van Vervoer v Bekker 1975 3 SA 128 (O) 224
Minnaar 1981 3 SA 767 (D) 528
Mintoor 1996 1 SACR 514 (C) 44, 482, 483
Misnum 1906 TS 216 296
Mitchell 1992 1 SACR 17 (A) 257, 258
Miya 1966 4 SA 274 (N) 447, 450
Mjezu 1996 2 SACR 594 (NC) 424
Mkansi 2004 1 SACR 281 (T) 202
Mkhize 1980 4 SA 36 (N) 521
Mkhize 1999 2 SACR 632 (W) 261
Mkize 1951 3 SA 28 (A) 223
Mkize 1959 2 SA 260 (N) 155
Mkize 1961 4 SA 77 (N) 544
Mkize 1962 2 SA 457 (N) 318
Mkize 1975 1 SA 517 (A) 422
Mkwanazi 1967 2 SA 593 (N) 227
Mkwetshana 1965 2 SA 493 (N) 223
Mlambo 1986 4 SA 34 (E) 278, 279, 422
Mlooi 1925 AD 131 ..... 272, 500, 501
Mlotswha 1989 4 SA 787 (W) 311, 313
Mnanzana 1966 3 SA 38 (T) 45
Mncwango 1955 1 PH H2 (N) 471, 474
Mneke 1961 2 SA 240 (N) 122
Mngoma 2009 1 SACR 435 (EC) 13
Mngomezulu 1972 2 PH H96 (N) 447
Mnguni 1966 3 SA 776 (T) 107
Mnisi 1996 1 SACR 496 (T) 261, 428
Mnisi 2009 2 SACR 227 (SCA) 252, 254
Mntoninthsi 1970 2 SA 443 (E) 418

PAGE
Mnyanda 1976 2 SA 751 (A) ... 166, 171
Mnyandu 1973 4 SA 603 (N) ... 539, 541
Modus Publications (Private) Ltd 1998 2 SACR 465 (ZS) ... 468, 469
Moeng 1977 3 SA 986 (O) ... 62
Moerane 1962 4 SA 105 (T) ... 509
Mofokeng 1957 2 SA 162 (O) ... 337
Mofokeng 1973 1 SA 89 (O) ... 65
Mofokeng 1982 4 SA 147 (T) ... 510
Mofoking 1939 OPD 117 ... 536
Mogala 1978 2 SA 412 (A) ... 511
Mogohlwane 1982 2 SA 587 (T) ... 105, 109
Mohale 1955 3 SA 563 (O) ... 489, 539
Mohale 1999 2 SACR 1 (W) ... 135
Mohamed 1999 1 SACR 287 (O) ... 510, 511
Mohapi 1984 1 SA 270 (O) ... 458
Mohapie 1969 4 SA 447 (C) ... 516, 517
Moila 2005 2 SACR 517 (T) ... 315, 322, 323
Mojaki 1993 1 SACR 491 (O) ... 518
Mokgethi 1990 1 SA 32 (A) ... 81, 83, 84, 88, 90
Mokgiba 1999 1 SACR 534 (O) ... 105
Mokoena 1975 4 SA 295 (O) ... 508
Mokoena 1976 4 SA 162 (O) ... 104, 105, 110, 114
Mokonto 1971 2 SA 319 (A) ... 250, 253, 254
Mokwanazi 1959 3 SA 782 (W) ... 168
Mokwena 1948 4 SA 772 (T) ... 334, 335
Molapo 2004 2 SACR 417 (T). ... 319
Molefe 2012 2 SACR 574 (GNP) ... 432
Molele 1960 1 PH K61 (O) ... 553
Molelekeng 1992 1 SA 604 (T) ... 553
Molimi 2006 1 SACR 8 (SCA) ... 199, 261
Moller 1971 4 SA 327 (T) ... 540, 541
Moller 1990 3 SA 876 (A) ... 520
Moloto 1982 1 SA 844 (A) ... 509
Moloy 1953 3 SA 659 (T) ... 103
Molubi 1988 2 SA 576 (B) ... 214
Momberg 1970 2 SA 68 (C) ... 464, 466, 467
Mongalo 1978 1 SA 414 (O) ... 257
Mongwe 1974 3 SA 326 (T) ... 319
Monyane 1960 3 SA 20 (T) ... 516
Moodie 1983 1 SA 1161 (C) ... 524, 530
Moolchund (1902) 23 NLR ... 524
Morgan 1993 2 SACR 134 (A) ... 271
Morisette v United States (1952) 342 US 246 ... 258
Moroe 1981 4 SA 897 (O) 8 ... 547
Moshesh 1948 1 SA 681 (O) ... 532
Moshoeu 2007 1 SACR 38 (T) ... 318, 326
Mosoinyane 1998 1 SACR 583 (T) ... 421
Mosoinyane 1998 1 SACR 583 (T) ... 421, 551
Mososa 1931 CPD 348 ... 547, 548
Mostert 1915 CPD 266 ... 61
Mostert 2006 1 SACR 560 (N) ... 135, 136, 208, 461, 464
Mostert 2010 1 SACR 223 (SCA) ... 483
Motati (1896) 13 SC 173 ... 471, 472, 474
Motau 1963 2 SA 521 (T) ... 47, 539, 542

PAGE
Motau 1968 4 SA 670 (A) 217, 225
Motaung 1961 2 SA 209 (A) 258
Motaung 1990 4 SACR 485 (A) 260, 265
Motete 1943 OPD 55 ..... 491, 533, 534
Motiwane 1974 4 SA 683 (NC) 504
Motleleni 1976 1 SA 403 (A) 112
Motsema 2012 2 SACR 96 (SGJ) 68, 258, 427
Motseremedi 1965 2 SA 220 (O) 491
Motshari 2001 1 SACR 550 (NC) 42, 456, 457
Moumbaris 1974 1 SA 681 (T) 287
Moyage 1958 3 SA 400 (A) 65
Mphatswanyane 1980 4 SA 253 (B) 536
Mphungathe 1989 4 SA 139 (O) 248
Mpofana 1970 2 SA 72 (C) 338
Mpofu 1969 1 SA 334 (R) 221
Mquabuzana 1976 1 SA 212 (E) 489
Mshumpa 2008 1 SACR 126 (EC) 48, 329
Msomi 2010 2 SACR 173 (KZP) 266, 267
Msuida 1912 TPD 419 339
Mtetwa 1930 NPD 285 ..... 281, 547
Mtetwa 1963 3 SA 445 (N) 540, 541
Mtetwa 1966 1 PH H250 (T) 465
Mtimunye 1994 2 SACR 482 (T) 450, 452, 454
Mtirara 1962 2 SA 266 (E) 418, 419
Mtombeni 1993 1 SACR 591 (ZS) 148, 149
Mtshali 1960 4 SA 252 (N) 507
Mtshiza 1970 3 SA 747 (A) 202, 203, 204, 442
Mtshizana 1965 1 PH H80 (A) 335
Mucherechdzo 1982 1 SA 215 (ZS) 119
Mukwevho 2010 1 SACR 349 (SDT) 429
Mula 1975 3 SA 208 (A) 242
Mulder 1954 1 SA 228 (E) 379, 380
Mule 1990 1 SACR 517 (SWA) 137
Muller 1934 NPD 140 418
Muller 1948 4 SA 848 (O) 139
Muller 1953 2 SA 146 (T) 532, 534
Munonjo 1990 1 SACR 360 (A) 261, 273
Munyani 1972 1 SA 411 (RA) 418
Musingadi 2005 1 SACR 395 (SCA) 263, 264
Mutimba 1944 AD 23 419
Muvhaki 1985 4 SA 302 (Z) 462
Myers 1948 1 SA 375 (A) 526, 531
Myeza 1962 3 SA 386 (N) 546
Myeza 1985 4 SA 30 (T) 523, 526, 528, 529
Mzandi 2011 1 SACR 253 (WC) 480
Mzwempi 2011 2 SACR 237 (ECM) 256, 261

N

N 1955 2 SA 647 (T) 419
Nabo 1968 4 SA 699 (EC) 67
Nader 1963 1 SA 843 (O) 516, 518
Naidoo 1949 4 SA 858 (A) 514
Naidoo 1966 1 PH H210 (A) 273

PAGE
Naidoo 1970 1 SA 358 (A) ... 517
Naidoo 1971 3 SA 605 (N) ... 55
Naidoo 1974 3 SA 706 (A) ... 472, 473
Naidoo 1977 2 SA 123 (N) ... 281, 329
Naidoo 1997 1 SACR 62 (T) ... 113
Naidoo 2003 1 SACR 347 (SCA) ... 286, 443
Nair 1993 1 SACR 451 (A) ... 199
Naran 1963 1 SA 652 (A) ... 513
Naryan 1998 2 SACR 345 (W) ... 500
National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 2 SACR 102 (W) ... 43
National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 2 SACR 557 (CC) ... 350, 361, 375, 382
Ncanca 1954 4 SA 272 (E) ... 547
Ncedani 1908 EDC 243 ... 398
Ncetendaba 1952 2 SA 647 (R) ... 204, 541
Ncube 1960 2 SA 179 (R) ... 379
Ncube 1968 2 SA 18 (R) ... 541
Ncube 1984 1 SA 204 (ZS) ... 202
Ncube 1998 1 SACR 174 (T) ... 480
Ndaba 1942 OPD 149 ... 312
Ndalangisa 1969 4 SA 324 (E) ... 105
Nddlovu 1982 2 SA 202 (T) ... 64
Ndebele 2012 1 SACR 245 (GSJ) ... 44, 482, 483
Ndebu 1986 2 SA 133 (ZS) ... 263, 264
Ndhlela 1956 2 SA 4 (N) ... 488
Ndhlovu 1965 4 SA 692 (A) ... 235, 242
Ndhlovu 1945 AD 369 ... 437
Ndhlovu 1963 1 SA 926 (T) ... 544, 545, 547
Ndhlovu 1972 3 SA 42 (N) ... 242
Ndlangisa 1969 4 SA 324 (E). ... 465, 467
Ndlovu 1982 2 SA 202 (T) ... 279, 281, 422
Ndlovu 1984 3 SA 23 (A) ... 281
Ndukiso 1945 EDL 119 ... 539
Nduli 1993 2 SACR 501 (A) ... 264, 286
Ndwalane 1995 2 SACR 697 (A) ... 66, 67, 421, 427
Ndwardwa 1937 TPD 165 ... 313
Ndzima 2010 2 SACR 501 (ECG) ... 254
Nedzamba 1993 1 SACR 673 (V) ... 140
Neethling 1965 2 SA 165 (O) ... 329, 330, 331
Nel 1923 EDL 82 ... 395, 397
Nel 1980 4 SA 28 (E) ... 215
Nel 1987 4 SA 950 (T) ... 289
Nel 1991 1 SA 730 (A) ... 318, 319, 326
Nene 1963 3 SA 58 (N) ... 318
Nene 1982 2 SA 143 (N) ... 140
Neuboza 1970 3 SA 558 (O) ... 255
Neumann 1949 3 SA 1238 (Sp Ct) ... 301, 302, 304, 305
Newman 1998 1 SACR 94 (C) ... 280, 480
Ngcamu 2011 1 SACR 1 (SCA) ... 281
Ngema 1992 2 SACR 651 (D) ... 220, 223, 227, 231
Ngobese 2002 1 SACR 562 (W) ... 162, 174, 175
Ngobeza 1992 1 SACR 610 (T) ... 543, 544, 547
Ngomane 1979 3 SA 859 (A) ... 113

PAGE
Ngqandu 1939 EDL 213 ..... 418, 419
Ngubane 1947 3 SA 217 (N) 313
Ngubane 1985 3 SA 677 (A) 75, 178, 181, 183, 185, 186, 219, 225, 229, 231, 443
Ngubane v Chief Executive Director of Emergency Services,
Ethekwini Metropolitan Services 2013 1 SACR 48 (KZD) 105, 107
Ngubane v SA Transport Services 1991 1 SA 756 (A) 217
Ngwenya 1979 2 SA 96 (A) 425
Nhlapo 1958 3 SA 142 (T) 329, 331
Nhlapo 1981 2 SA 744 (A) 93, 199, 205
Njenje 1966 1 SA 369 (RA) 255
Nkabi 1918 SR 160 ..... 393, 394
Nkambula 1980 1 SA 189 (T) 492
Nkhumeleni 1986 3 SA 105 (V) 103
Nkombani 1963 4 SA 877 (A) 180, 181, 189, 195, 204
Nkomo 1966 1 SA 831 (A) 261
Nkomo 1975 3 SA 598 (N) 536
Nkosi 1991 2 SACR 194 (A) 271
Nkosi 1998 1 SACR 284 (W) 68, 258, 427
Nkosi 2012 1 SACR 87 (GNP) 479, 480
Nkosiyana 1966 4 SA 655 (A) 290, 291, 293, 295
Nkwana 1953 2 SA 190 (T) 514
Nkwanyana 2003 1 SACR 67 (W) 124, 439
Nkwenja 1985 2 SA 560 (A) 261
Nlhovo 1921 AD 485 ..... 276, 278, 296
Nomakhlala 1990 1 SACR 300 (A) 264, 286
Nonkonyana 2008 2 SACR 271 (E) 527
Nooroodien 1998 2 SACR 510 (NC) 254, 255, 259, 271, 288
Nortje 1955 2 PH H138 (O) 398
Nortje 1996 2 SACR 308 (C) 142, 145
Nossel 1937 AD 1 514
Nqula 2005 1 SACR 283 (E) 319
Ntanzi 1981 4 SA 477 (N) 233, 261, 286, 443
Nteco 2004 1 SACR 79 (NC) 510
Ntsane 1982 3 SA 467 (T) 319
Ntsele 1997 2 SACR 740 (CC) 337, 424, 456, 507
Ntshwence 2004 1 SACR 506 (Tk) 320
Ntsomi v Minister of Law and Order 1990 1 SA 512 (C) 106, 107, 110
Ntuli 1962 4 SA 238 (W) 93
Ntuli 1975 1 SA 429 (A) 112, 113, 114, 134, 208, 225, 437, 442, 443
Nxane 1975 4 SA 433 (O) 319
Nxumalo 1960 2 SA 442 (T) 312, 313
Nyalambisa 1993 1 SACR 172 (Tk) 319
Nyalungu 2013 2 SACR 99 (T) 279, 342
Nyokong 1975 3 SA 792 (O) 113
Nyongano 1975 1 PH H42 (R) 149
Nzo 1990 3 SA 1 (A) 260, 261, 263, 264, 286

O

O 1952 3 SA 185 (T) 290
O'Malley 1976 1 SA 469 (N) 43
Oberholzer 1941 OPD 48 ..... 45, 424
Oberholzer 1971 4 SA 602 (A) 259, 260
Odugo 2001 1 SACR 560 (W) 145

PAGE
Ohlenschlager 1992 1 SACR 695 (T) ... 260, 269
Olakawu 1958 2 SA 357 (C) ... 462, 463, 464, 466, 467
Oliphant 1950 1 SA 48 (O) ... 432, 433, 444, 445
Oliphant 1989 4 SA 169 (O) ... 249
Olivier 1964 3 SA 660 (N) ... 322
Oosthuizen 1974 1 SA 435 (C) ... 540, 541
Opperman 1969 2 SA 181 (T) ... 338
Osman v Attorney-General of Transvaal 1998 1 SACR 28 (T) ... 516, 518, 519
Osman v Attorney-General, Transvaal 1998 2 SACR 493 (CC) ... 516
Ostilly 1977 4 SA 699 (D) ... 528

P

Pachai 1962 4 SA 246 (T) ... 278, 508, 509, 510
Pakane 2008 1 SACR 518 (SCA) ... 272, 327
Palmos 1979 2 SA 82 (A) ... 281, 283
Parry 1924 AD 401 ... 254, 267
Pasfield 1974 2 PH H92 (A) ... 451, 454
Passtoors (unreported, WLD 15.05.1986) ... 301, 302, 304
Patel 1944 AD 511 ... 401, 405
Patel 1959 3 SA 121 (A) ... 104, 107, 112, 113
Paterson 1907 TS 619 ... 380
Pather 1927 TPD 800 ... 272
Patz 1946 AD 845 ... 514
Payne 1934 CPD 301 ... 463
Pearston 1940 OPD 153 ... 397
Peer 1968 4 SA 460 (N) ... 246
Peerkhan and Lalloo 1906 TS 798 ... 267
Pelser 1967 1 PH H102 (O) ... 530
Pepler 1927 OPD 197 ... 533
Peraic 1965 2 PH H201 (A) ... 257
Perera 1978 3 SA 523 (T) ... 281, 329
Perka v R [1985] 42 CR 3d 113 ... 122
Persotam 1938 AD 92 ... 529
Petersen 1989 3 SA 420 (A) ... 255, 260
Peterson 1980 1 SA 938 (A) ... 55, 120
Petzer 1992 1 SACR 633 (A) ... 454
Phakane 2008 1 SACR 518 (SCA) ... 271
Phallo 1999 2 SACR 558 (SCA) ... 271, 273
Phelan 1877 K 5 ... 325
Philips Dairy (Pty) Ltd 1955 4 SA 120 (T) ... 246
Phillips (1896) 3 OR 216 ... 304
Phillips 1985 2 SA 727 (N) ... 171, 261
Piccione 1967 2 SA 334 (N) ... 55
Pienaar 1990 2 SACR 18 (T) ... 245
Piet Arends (1891) 8 SC 176 ... 379
Pieterse 1923 EDL 232 ... 381
Pieterse 1982 3 SA 678 (A) ... 171
Pietersen 1983 4 SA 904 (E) ... 162, 173, 175
Pietersen 1994 2 SACR 434 (C) ... 244, 249, 259
Pillay 1990 2 SACR 410 (CkA) ... 318, 326
Pitje 1960 4 SA 709 (A) ... 318
Pitwood (1902) 19 TLR ... 60
Pokan 1945 CPD 169 ... 329, 331

PAGE
Port Shepstone Investments (Pty) Ltd 1950 2 SA 812 (N) 291, 296
Port Shepstone Investments (Pty) Ltd 1950 4 SA 629 (A) 328, 331
Poswa 1986 1 SA 215 (NC) 319
Potgieter 1977 3 SA 291 (O) 418
Potgieter 1979 4 SA 64 (ZRA) 534
Potgieter 1994 1 SACR 61 (A) 57
Pretoria Timber Co (Pty) Ltd 1950 3 SA 163 (A) 43
Pretorius 1975 2 SA 85 (SWA) 31, 96, 115, 118
Pretorius 2013 1 SACR 261 (WCC) 371
Prince v President of the Law Society of the Cape of Good Hope 2002 1 SACR 432 (CC) 421
Prozesky (1900) 21 NLR 216 302
Publications Control Board v William Heinemann Ltd 1965 4 SA 137 (A) 434
Pule 1960 2 SA 668 (T) 67
Pule 1996 2 SACR 604 (O) 142, 145

Q

Q v Most [1881] 7 QBD 244 293
Qeqe 2012 2 SACR 141 (ECG) 180, 185
Quinta 1974 1 SA 544 (T) 267, 269
Quinta 1984 3 SA 334 (C) 67, 68, 442
Qumbella 1966 4 SA 356 (A) 260, 261
Qumbella 1967 4 SA 577 (A) 260
Qumbu 1952 3 SA 390 (O) 534

R

R 1954 2 SA 134 (N) 465
R 1958 3 SA 145 (T) 291
R 1971 3 SA 798 (T) 64, 66, 67, 70, 421
R 1998 1 SACR 166 (T) 453, 454
R v Nguyen (1990) 59 CCC (3d) 161 258
R v Segale 1960 1 SA 721 (A) 292
Rabodila 1974 3 SA 324 (O) 115, 118, 119, 120
Raisa 1979 4 SA 541 (O) 202, 203, 204
Rajah 1955 3 SA 276 (A) 337
Ramagaga 1992 1 SACR 455 (B) 229, 261
Ramakau 1959 4 SA 642 (O) 554
Ramdas 1994 2 SACR 37 (A) 337
Ramosunya 2000 2 SACR 257 (T) 85, 91
Randelhoff (1907) 22 NLR 59 304
Randen 1981 2 SA 324 (ZA) 488
Rantsane 1973 4 SA 380 (O) 193, 483, 488
Rasool 1924 AD 44 267
Rautenbach 1990 2 SACR 195 (N) 526, 530
Re Layne and the Queen (1985) 14 CCC (3d) 149 320
Re London and Globe Finance Corp Ltd (1903) 1 Ch 728 531
Reabow 2007 2 SACR 292 (E) 193
Reddy 1962 2 SA 343 (N) 517
Reddy 1975 3 SA 757 (A) 20
Redelinghuys 1990 1 SACR 443 (W) 534
Reed 1972 2 SA 34 (R) 129
Reids Transport (Pty) Ltd 1982 4 SA 197 (E) 210
Renaud 1922 CPD 322 481

PAGE
Ressel 1968 4 SA 224 (A) 530
Retief 1904 TS 63 514
Revill 1970 3 SA 611 (C) 468, 469
Reynecke 1972 4 SA 366 (T) 495, 497, 498
Rheeder 2000 2 SACR 558 (SCA) 504, 505
Richardson 1913 CPD 207 417
Riddels 1991 2 SACR 529 (O) 249
Riekert 1977 3 SA 181 (T) 488
Roberts 1932 CPD 87 493
Roberts 1936 1 PH H2 (G) 492
Robinson [1938] 1 All ER 301 394
Robinson 1968 1 SA 666 (A) 124, 258, 439
Robson 1991 3 SA 322 (W) 98
Roets 1954 3 SA 512 (A) 411
Roopsingh 1956 4 SA 509 (A) 231
Rosenthal 1980 1 SA 65 (A) 528
Rubinstein 1964 3 SA 480 (A) 518
Rudman 1989 3 SA 368 (E) 547
Rudolph 1935 TPD 79 492
Rusike 1961 2 PH H254 (R) 493
Russell 1967 3 SA 739 (N) 60, 224
Ryan v Petrus 2010 1 SACR 274 (E) 464
Ryperd Boesman 1942 1 PH H63 (SWA) 355

S

S 1948 4 SA 419 (G) 462, 463
S 1955 3 SA 313 (SWA) 461, 462, 465, 466
S 1964 3 SA 319 (T) 463, 464, 466, 467
S 1971 1 SA 591 (A) 354
S v Peake 1962 4 SA 288 (C) 293
S 1951 3 SA 209 (C) 355
SA Metal and Machine Co (Pty) Ltd 2010 2 SACR 413 (SCA) 246
Saaiman 1967 4 SA 440 (A) 242
Sachs 1932 TPD 201 325
Sachs 1953 1 SA 392 (A) 44, 208, 210
Sackstein 1939 TPD 40 ..... 462, 463, 464
Safatsa 1988 1 SA 868 (A) 257, 258, 261, 262, 270
Saffier 2003 2 SACR 141 (SEC) 251, 254, 262, 267
Saffy 1944 AD 391 514
Sahd 1992 2 SACR 658 (E) 262
Salcedo 2003 1 SACR 324 (SCA) 524
Salemane 1967 3 SA 691 (O) 536, 537
Salie 1938 TPD 136 ..... 312, 313
Salmans 2006 1 SACR 333 (C) 510, 511
Salmonson 1960 4 SA 748 (T) 259
Sam 1980 4 SA 289 (T) 193, 208
Samaai 1986 4 SA 860 (C) 313
Samson v Winn 1977 1 SA 761 (C) 224
Sang [1979] 2 All ER 1222 (HL) 147
SANTAM v Nkosi 1978 2 SA 784 (A) 217, 223, 224, 226
SANTAM Versekeringsmaatskappy v Swart 1987 4 SA 816 (A) 217
Sashi 1976 2 SA 446 (N) 397, 398
Sataardien 1998 1 SACR 637 (C) 113, 188

PAGE
Satisky 1915 CPD 574 ... 498
Sauerman 1978 3 SA 761 (A) ... 329
Savage (1990) 91 Cr App R 317 (CA) ... 449
Sawitz 1962 3 SA 687 (T) ... 513
Sayed 1981 1 SA 982 (C) ... 233, 259, 261
Scheepers 1915 AD 337 ... 138
Schonken 1929 AD 36 ... 543, 549
Schoombie 1945 AD 541 ... 279, 280, 285, 286
Schoonberg 1926 OPD 247 ... 463
Schoonwinkel 1953 3 SA 136 (C) ... 55
Schwartz 1971 4 SA 30 (T) ... 448
Schwartz 1980 4 SA 588 (T) 592 ... 504, 506
Scott-Crosby 2008 1 SACR 223 (SCA) ... 271
Scoulides 1956 2 SA 388 (A) ... 495, 496, 497
Seabe 1927 AD 28 ... 528, 535
Sedat 1916 TPD 431 ... 533, 534
Seeiso 1958 2 SA 231 (GW) ... 504, 505
Segale 1960 1 SA 721 (A) ... 294
Segopotsi 1960 2 SA 430 (T) ... 313
Selebi 2012 1 SACR 209 (SCA) ... 404, 410, 411
Senyane 1993 1 SACR 643 (O) ... 319
Senyolo 2010 2 SACR 571 (GHJ) ... 49
Sephume 1948 3 SA 982 (T) ... 435
Sepiri 1979 2 SA 1168 (NC) ... 513, 515
September 1996 1 SACR 325 (A) ... 248
Seweya 2004 1 SACR 387 (T) ... 466
Sexaba 1957 4 SA 280 (E) ... 500
Seymour 1998 1 SACR 66 (N) ... 229
Shaban 1965 4 SA 646 (W) ... 525
Shahmohamed v Hendriks 1920 AD 151 ... 541
Shaik 1983 4 SA 57 (A) ... 180, 257, 258
Shaik 2007 1 SACR 142 (D) ... 408, 410
Shakane 1998 2 SACR 218 (SCA) ... 517, 518
Shandu 1927 TPD 786 ... 481
Shapiro 1987 2 SA 482 (B) ... 318
Sharp 2002 1 SACR 360 (Ck) ... 461, 464, 467
Sharpe 1903 TS 868 ... 280, 296
Shasha 1996 2 SACR 73 (Tk) ... 379, 380
Shaw (1884) 3 EDC 323 ... 468, 469
Shaw 1960 1 PH H184 (G) ... 493
Shaw v Hendry 1927 CPD 357 ... 64
Shein 1925 AD 6 ... 542
Shelembe 1955 4 SA 410 (N) ... 541
Shepard 1967 4 SA 170 (W) ... 137, 530, 531
Shephard [1919] 2 KB 125 ... 294
Sherman v United States (1958) 356 US 369 ... 147
Shevill 1964 4 SA 51 (RA) ... 58, 223
Shezi 1948 2 SA 119 (A) ... 258
Shikuri 1939 AD 225 ... 268
Shivute 1991 1 SACR 656 (Nm) ... 223
Shole 1960 4 SA 781 (A) ... 336, 337
Shongwe 1966 1 SA 390 (RA) ... 335
Shorty 1950 SR 280 ... 272
Sibanyone 1940 JS 40 (T) ... 447

PAGE
Sibiya 1955 4 SA 247 (A) 44, 475, 486, 488, 492, 493, 497, 502
Sibiya 1957 1 SA 247 (T) 291
Sibiya 1984 1 SA 91 (A) 171
Sibuyi 1993 1 SACR 235 (A) 287, 289
Sigwahla 1967 4 SA 566 (A) 180, 188, 437
Sikhakane 1985 2 SA 289 (N) 453
Sikunyana 1961 3 SA 549 (E) 124, 125
Sikweza 1974 4 SA 732 (A) 178, 180
Silber 1952 2 SA 475 (A) 319, 326
Sillas 1959 4 SA 305 (A) 49
Singh 1960 3 SA 489 (E) 514
Singiswa 1981 4 SA 403 (C) 64, 421
Singo 1993 2 SA 765 (A) 263, 264
Sinzani 1979 1 SA 935 (E) 452
Sipendu 1932 EDL 312 514
Sita 1954 4 SA 20 (E) 395, 399
Sithole 1981 1 SA 1186 (N) 510, 511
Sitole 1957 4 SA 691 (N) 508
Sixishe 1992 1 SACR 620 (CkA) 137
Skenke 1916 EDL 225 481
Skhosana 1973 1 SA 322 (O) 65
Slabb 2007 1 SACR 77 (C) 543, 550
Slater (1901) 18 SC 253 533
Small 2005 2 SACR 300 (C) 547
Smit 2007 2 SACR 335 (T) 40
Smith (1900) 17 SC 561 136
Smith 1918 CPD 260 432
Smith 1965 4 SA 166 (C) 68
Smith 1973 3 SA 945 (O) 45
Smith 1984 1 SA 583 (A) 290
Smith 2003 2 SACR 135 (T) 454
Snyders v Louw 2009 2 SACR 463 (C) 103, 106, 112, 113
Sokoyi 1984 3 SA 935 (NC) 319, 326
Solomon 1953 4 SA 518 (A) 497, 498
Solomon 1973 4 SA 644 (C) 39, 539
Solomon 1986 3 SA 705 (A) 424
Solomon v Law Society of the Cape of Good Hope 1934 AD 407 248
Solomon v Visser 1972 2 SA 327 (C) 64
Solomons 2004 1 SACR 137 (C) 319, 320
Sonpra 2004 1 SACR 278 (T) 319, 326
Soqokomashe 1956 2 SA 142 (E) 542
Sorrels v United States (1932) 287 US 435 147
Sotsu 2001 1 SACR 428 (Tk) 428
Southern 1965 1 SA 860 (N) 223, 224
Speedy 1985 2 SA 782 (A) 488
Stassen 1965 4 SA 131 (T) 44
State v Roy 233 NC 558 64 SE 2nd 840 (1951) 137
Stavast 1964 3 SA 617 (T) 88
Steenberg 1999 1 SACR 594 (N) 464
Steenkamp 1960 3 SA 680 (N) 452
Stellmacher 1983 2 SA 181 (SWA) 55, 166, 168
Stevenson 1976 1 SA 636 (T) 536
Stewart 1903 TS 456 541
Steyn 1927 OPD 172 534

PAGE
Steyn 1964 1 SA 845 (O) ... 263
Steyn 2010 1 SACR 411 (SCA) ... 102, 106, 107, 110, 113
Stojilkovic 1995 1 SACR 435 (T) ... 247
Strauss 1948 1 SA 934 (A) ... 303, 304
Strydom 1952 2 SA 397 (T) ... 479
Strydom 1962 3 SA 982 (N) ... 526
Swanepoel 1983 1 SA 434 (A) ... 178
Swanepoel 1985 1 SA 576 (A) ... 135
Swarts 1961 4 SA 589 (G) ... 529

T

T 1960 4 SA 685 (T) ... 387
T 1986 2 SA 112 (O) ... 110, 227
Talane 1986 3 SA 196 (A) ... 178, 258, 261
Tanoa 1955 2 SA 613 (O) ... 328, 329, 331
Tanteli 1975 2 SA 772 (T) ... 462, 463
Tarusika 1959 R and N 51 ... 489
Tau 1996 2 SACR 97 (T) ... 479, 480, 489, 490
Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development CCT 12/13 [2013] ZACC 35 ... 384, 386, 388
Teichert 1958 3 SA 747 (N) ... 536, 537
Tembani 1999 1 SACR 192 (W) ... 85, 87
Tembani 2007 1 SACR 355 (SCA) ... 81, 83, 87, 91, 92
Temmers 1994 1 SACR 357 (C) ... 545, 546
Terblanche 1933 OPD 65 ... 462
Terblanche 1938 EDL 112 ... 312
Terblanche 2007 1 SACR 545 (C) ... 507
Terblanche 2011 1 SACR 77 (EC) ... 271
Texeira 1980 3 SA 755 (A) ... 105, 106
Thabeta 1948 3 SA 218 (T) ... 279, 530
Thabo Meli [1954] 1 All ER 373 (PC) ... 93, 195
Thebe 1981 1 SA 504 (B) ... 488
Thebus 2003 2 SACR 319 (CC) ... 257, 258, 262
Theledi 1992 1 SACR 336 (T) ... 40, 41
Thenkwa 1970 3 SA 529 (A) ... 224
Theron 1936 OPD 166 ... 138
Theron 1968 4 SA 61 (T) ... 338
Thody 1971 2 SA 213 (N) ... 53
Thomas 1922 EDL 194 ... 492
Thomas 1925 EDL 248 ... 398
Thomas 1928 EDL 401 ... 105
Thomas 1954 1 SA 185 (SWA) ... 129
Thomo 1969 1 SA 385 (A) ... 254, 260
Thompson 1905 ORC 127 ... 545
Thompson 1968 3 SA 425 (E) ... 330, 331
Thooe 1973 1 SA 179 (O) ... 325
Timol 1959 1 PH H47 (N) ... 533
Timol 1974 3 SA 233 (N) ... 268
Tissen 1979 4 SA 293 (T) ... 202
Tobias 1966 1 SA 656 (N) ... 316, 318, 319, 322, 323
Tobie (1899) 16 CLJ 45 (O) ... 396
Torch Printing and Publishing Co (Pty) Ltd 1956 1 SA 815 (C) ... 323, 326
Trainor 2003 1 SACR 35 (SCA) ... 108, 110

PAGE
Trickett 1973 3 SA 526 (T) 55, 58, 168, 231
Tromp 1966 1 SA 646 (N) 316, 322, 325, 326
Tromp v Tromp 1956 3 SA 664 (N) 325
Troskie 1920 AD 466 379
Tshabalala 1921 AD 13 ..... 443, 444
Tshabalala 2002 1 SACR 605 (W) 140
Tshabalala v Jacobs 1942 TPD 310 139
Tshayitsheni 1918 TPD 23 312
Tshoba 1989 3 SA 393 (A) 528, 529
Tshwape 1964 4 SA 327 (C) 208, 269
Tsotitsie 1953 1 SA 239 (T) 516, 517
Tsotsi 2004 2 SACR 273 (NC) 456
Tsotsobe 1983 1 SA 856 (A) 301, 304
Tsotsotso 1976 1 SA 364 (O) 242
Tungata 2004 1 SACR 558 (Tk) 287
Tusi 1957 4 SA 553 (N) 547
Twala 1979 3 SA 864 (T) 289, 308, 309, 310, 311

U

Uirab 1970 2 PH H172 (SWA) 489
Umfaan 1908 TS 62 ..... 461, 462
United States v Balint (1922) 258 US 250 258
United States v Bevans 24 Fed Cases 1183 No 14, 589 (CC Mass 1816) 137
Usayi 1981 2 SA 630 (ZS) 313

V

V 1979 2 SA 656 (A) 242, 248
Valachia 1945 AD 826 437
Vallabh 1911 NPD 9 333
Van Aardt 2009 1 SACR 648 (SCA) 60, 178, 180, 187
Van Antwerpen 1976 3 SA 399 (T) 111, 112, 460
Van As 1967 4 SA 594 (A) 83, 89, 224, 227
Van As 1976 2 SA 921 (A) 150, 217, 220, 224, 225, 227, 442
Van Aswegen 1992 1 SACR 487 (O) 528
Van Biljon 1965 3 SA 314 (T) 189, 531
Van Coller 1970 1 SA 417 (A) 486
Van den Berg 1948 2 SA 836 (T) 88
Van den Berg 1979 3 SA 1027 (NC) 491, 493
Van der Bank 1941 TPD 307 514
Van der Berg 2009 1 SACR 661 (HHA) 145
Van der Merwe 1974 4 SA 310 (E) 140, 425
Van der Walt 1946 GWL 42 487
Van der Westhuizen 1951 2 SA 338 (C) 53
Van der Westhuizen 1965 1 SA 773 (T) 491
Van der Westhuizen 1974 4 SA 61 (C) 405
Van der Westhuizen 1976 2 PH H194 (C) 541
Van Heerden 1984 1 SA 667 (A) 491
Van Heerden 2010 1 SACR 529 (EC) 89
Van Meer 1923 OPD 77 ..... 465, 467
Van Niekerk 1918 GWL 89 ..... 471, 473, 474
Van Niekerk 1970 3 SA 655 (T) 316, 323, 326
Van Niekerk 1972 3 SA 711 (A) 316, 321, 323, 329
Van Niekerk 1980 1 SA 594 (O) 533, 535

PAGE
Van Niekerk 1981 3 SA 787 (T) ... 526
Van Rensburg 1987 3 SA 35 (T) ... 55, 58, 231
Van Rooyen 2002 1 SACR 661 (T) ... 40, 41
Van Schoor 1948 4 SA 349 (C) ... 224, 227
Van Staden 1973 1 SA 70 (SWA) ... 326, 327
Van Tonder 1932 TPD 90 ... 463
Van Vuuren 1961 3 SA 305 (E) ... 105
Van Vuuren 1983 1 SA 12 (A) ... 242, 254
Van Wyk 1931 TPD 41 ... 380
Van Wyk 1967 1 SA 488 (A) ... 105, 106, 108, 109, 110, 111
Van Wyk 1969 1 SA 615 (C) ... 530
Van Wyk 1974 1 SA 36 (A) ... 140
Van Wyk 1992 1 SACR 147 (Nm) ... 178, 180
Van Wyk 2000 2 SACR 693 (O) ... 318
Van Zyl [1996] 1 All SA 336 (W) ... 120, 208
Van Zyl 1942 TPD 291 ... 279, 280
Van Zyl 1944 SWA 1 ... 398
Van Zyl 1975 2 SA 489 (N) ... 140, 425
Van Zyl 1987 1 SA 497 (O) ... 542
Van Zyl 1993 1 SACR 338 (C) ... 459
Van Zyl 1996 2 SACR 22 (A) ... 248
Vanmali 1975 1 SA 17 (N) ... 267, 269
Velumurugen 1985 2 SA 437 (D) ... 271, 272
Venter 1961 1 SA 363 (T) ... 554
Vermaak (1900) 21 NLR 204 ... 304
Verwey 1968 4 SA 682 (A) ... 45, 495
Victor 1943 TPD 77 ... 55, 231
Vilakasi 1999 2 SACR 393 (N) ... 493
Vilakazi 1933 TPD 198 ... 533
Vilakazi 1959 4 SA 700 (N) ... 513, 536
Vilakazi 1967 2 PH H280 (N) ... 487
Vilinsky 1932 OPD 218 ... 281
Viljoen 1923 AD 90 ... 302, 304, 309, 311, 312
Viljoen 1939 OPD 52 ... 491
Viljoen 1941 AD 366 ... 542
Viljoen 1970 1 SA 14 (T) ... 331
Viljoen 1992 1 SACR 601 (T) ... 55
Visagie 1991 1 SA 177 (A) ... 476, 485, 495, 496, 497, 499
Visagie 2009 2 SACR 70 (W) ... 140
Vittee 1958 2 PH H348 (T) ... 329
Volschenck 1968 2 PH H283 (D) ... 126, 354
Von Elling 1945 AD 234 ... 274, 475, 500, 501, 514
Von Molendorff 1987 1 SA 135 (T) ... 44, 45, 418
Von Zell 1953 3 SA 303 (A) ... 166

W

W 1949 3 SA 772 (A) ... 268
W 1953 3 SA 52 (SWA) ... 434
W 1976 1 SA 1 (A) ... 281
W 1991 2 SACR 642 (T) ... 406
W 1994 2 SACR 777 (N) ... 493
W 1995 1 SACR 606 (A) ... 329
Waglines (Pty) Ltd 1986 4 SA 1135 (N) ... 210, 233

PAGE
Walker 1978 4 SA 588 (C) ... 424
Wallace 1927 TPD 557 ... 267
Wallace 1959 3 SA 828 (R) ... 333, 335
Wallendorf 1920 AD 383 ... 150
Walton 1958 3 SA 693 (R) ... 461, 464, 466, 469
Wannenburg 2007 1 SACR 27 (C) ... 266, 267
Watson 1961 2 SA 283 (R) ... 327
WC and MJ Botha (Edms) Bpk 1977 4 SA 38 (T) ... 259
Weinberg 1939 AD 71 ... 262
Weiss 1934 AD 41 ... 498
Wells 1949 3 SA 83 (A) ... 217
Wenzel 1940 WLD 269 ... 302, 305, 306
Werner 1947 2 SA 828 (A) ... 122, 208
Wessels 1933 TPD 313 ... 497
Western Areas Ltd 2004 1 SACR 429 (W) ... 36, 525
Whitehead 2008 1 SACR 431 (SCA) ... 262, 311
Wiese 1928 TPD 149 ... 267
Wiid 1990 1 SACR 561 (A) ... 157, 158, 159, 164, 199, 252
Wilkens 1941 TPD 276 ... 257, 312, 313
Williams [1923] 1 KB 340 ... 126, 354
Williams 1931 1 PH H38 (E) ... 126, 354
Williams 1956 2 PH H192 (G) ... 549
Williams 1970 2 SA 654 (A) ... 260
Williams 1980 1 SA 60 (A) ... 250, 251, 252, 253, 259, 266, 267, 268, 269, 270
Williams 1986 4 SA 1188 (A) ... 87, 91
Williams 1995 2 SACR 251 (CC) ... 356
Williams 1998 2 SACR 191 (SCA) ... 59, 271
Williams 7 HCG 247 ... 481
Williamson 1972 2 SA 140 (N) ... 257
Windvogel 1998 1 SACR 125 (C) ... 258
Witbooi 1984 1 SA 242 (C) ... 510, 511
Woodrow 1999 2 SACR 109 (C) ... 543, 550

X

X 1974 1 SA 344 (RA) ... 122, 270
Xabanisa 1946 EDL 167 ... 461
Xabendlini (case no 608/10 [2011] SASCA 86) ... 459
Ximba 1969 2 PH H223 (N) ... 450
Xinwa 1970 2 PH H171 (NC) ... 489
Xulu 1943 AD 616 ... 202
Xybele 1958 1 SA 157 (T) ... 313

Y

Yelani 1989 2 SA 43 (A) ... 260
Yengeni 2006 1 SACR 405 (T) ... 525
Yolelo 1981 1 SA 1002 (A) ... 510
Youngleson (1) 1948 1 SA 819 (W) ... 85

X

Z 1960 1 SA 739 (A) ... 123, 126, 191, 353, 355, 356
Zackon 1919 AD 175 ... 328, 330, 331, 335
Zamisa 1990 1 SACR 22 (W) ... 544

PAGE
Zeelie 1952 1 SA 400 (A) 290, 291, 296, 376
Zemura 1974 1 SA 584 (RA) 211
Zikalala 1953 2 SA 568 (A) 106, 107
Ziki 1965 4 SA 14 (E) 554
Zinn 1969 2 SA 537 (A) 19, 20
Zondo 1999 1 SACR 54 (N) 551
Zulu 1951 3 SA 44 (N) 519
Zuma 1992 2 SACR 488 (N) 517
Zuma 1995 1 SACR 568 (CC) 337
Zuma 1995 2 SA 642 (CC) 456
Zungo 1966 1 SA 268 (N) 318
Zurich 2010 1 SACR 171 (SCA) 145
Zwakala 1966 2 PH H378 (T) 419
Zwane 1987 4 SA 369 (W) 308, 310, 311
Zwane 1989 3 SA 253 (W) 287, 289, 302, 305, 306, 310, 334
Zwezwe 2006 2 SACR 599 (N) 453

INDEX

PAGE

A

abduction.....395–399
control of parents or guardian.....397
definition.....395
elements of crime.....395
intention.....399
legal interest protected.....396
origin and character.....395–396
person below 18 years.....395
purpose of removal.....397
removal of minor.....396
without consent of parents or guardian.....398–399
aberratio ictus.....193–196
concrete figure approach.....193–196
description of.....193
judging such situations.....196
transferred intention.....193
two opposing approaches.....193–194
abolition of death sentence, criticism of.....26–29
absolute force.....54–55
absolute liability – *see* strict liability
accessories – *see* accomplices
accessory after fact.....251, 271–274
accessory nature of.....272–274
assisting perpetrator to evade liability.....271–272
definition.....271
general.....271
intention.....272
punishment.....274
reason for existence questionable.....274
accomplices.....250–251, 265–270
accessory nature of.....266–267
act furthering commission of crime.....267–268

PAGE

accomplices – *continued*
definition of.....166
distinguished from perpetrator.....249–251, 265–266
intention.....269
meaning of.....266
murder, in.....269–270
punishment.....270
requirements for liability as.....266–269
act, requirement of.....1–58
absolute force.....54–55
antecedent liability.....57–58
automatism (and *see* automatism).....55–57
basis of liability.....52
definitional elements.....52
human.....53
intention not part of.....54
intoxication, exclusion of.....220, 227
involuntary.....54–57
muscular movement not an act.....53–54
omissions (and *see* omissions).....58–62
possession, in crimes of (and *see* possession).....62–70
thoughts not punishable.....53
vis absoluta.....54–55, 117
vis compulsiva.....54–55
voluntary.....54
actio libera in causa.....217–218
administering poison or other noxious substance.....443–444
affidavit, making false statement in.....338
age, youthful – *see* immature age
aider and abettor.....252
ammunition, possession of.....430–431
amnesia, effect of.....55–57
analogous interpretation of criminal provisions not allowed.....45–48

PAGE

anger – *see* non-pathological criminal incapacity, provocation
animus detentionis 65
animus domini 66, 69
animus ex re commodum acquirendi 66
animus furandi 477, 484
animus hostilis 304–306
animus possidendi 67
animus rem sibi habendi 66–67
animus tenendi 65–67
antecedent liability 57–58
arm pointing – *see* pointing a firearm
arrest, use of force or homicide during 129–134
  basic requirements for defence 130
  deadly force 131–132
  excessive force during arrest 131
  general 129
  ground of justification 133
  ignorance of law as defence 133
  imminent death or harm 132
  necessary conduct 131
  proof, onus of 134
  proportionality requirement 131
  proviso in s 49(2) 131–132
  s 2(*a*), wording of 132
  s 2(*b*), wording of 132–133
  s 49, wording of 130
arrogation of possession 492
arson 542
assault in course of arrest – *see* arrest, use of force or homicide during
association of persons, liability of – *see* corporate bodies, liability of
attempt 275–289
  assault, in
  commencement of consummation 280–281
  completed 278–279
  culpable homicide not possible 286
  execution, acts of 280–281
  factual situations 277
  fraud, in 543
  high treason, in 300
  impossible 281–282
  intention 286
  interrupted 279–281
  preparation, acts of 280
  prohibition of 276
  punishment 286
  putative crime 282–283
  rules relating to, summary of 277
  subjective and objective approaches 277–278

PAGE

attempt – *continued*
  summary of rules relating to 277
  voluntary withdrawal 284–286
autographic crimes 79, 262
automatism 55–57
awareness of unlawfulness 197–204
awareness of wrongfulness 197–204

B

bestiality 381–382
bigamy 393–395
  customary marriages 394
  definition 393
  elements of crime 393
  intention 394
  rationale 393
  second marriage ceremony 394
  valid marriage, subsistence of 393–394
Bill of Rights, effect of
  bestiality 381–382
  chastisement of children 137–138
  commentary on case which is *sub iudice* 321
  contempt of court *in facie curiae* 319–320
  corporate bodies, liability of director or servant 247
  courts may not create crimes 38–39
  crimes may not be created with retrospective effect 38, 41–42
  crimes must be clearly formulated 38, 42–43
  death sentence, plea for reintroduction 26–29
  definitions of crimes must be strictly interpreted 38, 43–48
  failure to give account of goods suspected of being stolen 516
  general description 9–10
  high treason, definition of 306–307
  killing another in necessity, role in 129
  killing in protection of property 109
  legality principle contained in 38
  public indecency 433–434
  receiving stolen goods without reasonable cause 520
  scandalising the court 323–324
  strict liability, constitutionality of 238
  surge of crime and 24–26
  unlawfulness, meaning of, role in 98
births, concealment of 432

PAGE

blameworthiness – *see* culpability
boni mores 98
bonus paterfamilias 210
bribery – *see* corruption

C

capacity – *see* criminal capacity
capital punishment abolished, criticism of 26–29
causa causans 84
causation 79–94
  abnormal physiological condition of victim 93
  adequate 85–86, 88–89
  causa causans 84
  common purpose, and 89
  conditio sine qua non 81–83
  direct cause 84
  effective cause 84
  factual 81–83
  foreseeablity theory 87–88
  formally and materially defined crimes 79, 80
  fraud, in 530
  immediate cause 84
  individualisation theories 84
  legal 83–89
  medical treatment, effect of 90–93
  mistake relating to chain of 189–194
  multiple causes of same condition 89
  novus actus interveniens 86–87, 89–94
  omission, by 89
  policy considerations 88
  precipitating death 80–91
  proximate cause 84
  subsequent conduct of accused 93
  subsequent conduct of third party 90–93
  subsequent conduct of victim 89–90
  substantial cause 84
  suicide, incitement to 90
  summary of rules 79
  theories of 81–88
chain of causation, mistake relating to 189–192
chastisement, disciplinary, as justification 137–138
  employer has no right to 138
  general 138
  moderation required 138
  parents' right to 138
  private schools, in 137

PAGE

chastisement, disciplinary, as justification – *continued*
  schools, in, not allowed 137
  spouse has no right to 138
  teachers have no right to 137
child pornography, displaying 373
children (and *see* immature age)
  chastisement of 137–138
  consent to sexual acts, by 125–126, 355
  criminal capacity of 173–175
  exploitation, sexual, of 338–389
  grooming, sexual, of 389
  negligence, test for 213
  offences against 383–390
  penetration of, consensual 383–387
  pornography displayed to 389–390
  pornography, using children for 389–390
  violation of, consensual 387–388
childstealing – *see* kidnapping
combination theory of punishment 19–20
common assault – *see* assault
common-law abduction – *see* abduction
common purpose, doctrine of 255–264
  active association 259–260
  autographic crimes, not applicable in 262
  causation, proof of unnecessary 258
  constitutionality of 262–263
  culpable homicide, role in 261
  definition 256
  dolus eventualis and 261
  general 257–258
  instrumentality of own body 262
  principles relating to, summary of 256–257
  Safatsa, judgment in 258–259
  withdrawal from 263–264
company, liability of – *see* corporate bodies, liability of
compelled rape 358–360
compelled self-sexual assault 369–371
compelled sexual assault 368–369
compelling someone to watch sexual acts 371–272
compulsion – *see* necessity
concealment of births 432–433
conditio sine qua non 81–83
conduct *see* act, requirement of, omission and possession
conflicting statements in different oaths 336–338
conscious negligence 183, 215

PAGE

consent 122–127, 351–454
abuse of authority 353–354
assault, in 124–125
awareness of true and material facts 126, 348
before commission of act 127
crimes in respect of which defence may apply 124–125
error in negotio 126, 348
error personae 126, 348
euthanasia 124, 435
expressly or tacitly 126
force, effect of 125, 346–347
fraud, effect of 354
general 122–123
intimidation, effect of 125, 352–353
medical treatment 125
mental abilities of person consenting 126, 354
murder, in 124, 441
party who may give 127
rape, in 351–354
requirements 123–127, 351–354
sexual assault, in 125, 367–368
sport, effect of participating in 125
submission not consent 126
theft, in 484
threats, effect of 125, 352–353
voluntarily given 125–126, 352–353
conspiracy 286–289
act 287–289
agreement 287–288
attempt, overlapping with 301–302
chain 288
express or tacit 288
high treason, in 312
intention 289
prohibition of 286
punishment 289
purpose of prohibition 286
successful 287
umbrella spoke 288
constitutionality of certain rules – *see* Bill of Rights, effect of
construction of criminal liability 29–35, 555–556
contemporaneity, principle of 148–149
contempt of court 315–327
administration of justice by courts 325
classification of ways of committing crime 317
constitutional dimensions 319–321, 324

PAGE

contempt of court – *continued*
contempt *in facie curiae* 317–319
definition 315
elements of crime 315
ex facie curiae 317
failure to appear in court 322
failure to appear with court order 325
in facie curiae 317–319
intention 326–327
interfering with presiding officer 322
interfering with witnesses 322
negligence may suffice 326–327
newspaper editor, liability of 326–327
obstructing court officials 325
pending case, commentary on 320–322
publication of matter which is *sub iudice* 320–322
rationale of crime 316
scandalising court 322–324
simulating court process 325
unlawfulness 326
unusual features 315–316
contrectatio 477
corporal punishment – *see* chastisement, disciplinary
corporate bodies, liability of 235–248
appearance at trial 247
association of persons 247–248
desirability of punishing 235–236
director or servant no longer liable 247
general 235
liability of corporate body for act of director or servant 246–247
plea 247
punishment 247
corpse, sexual act with 383
corpse, violation 436
corruption 401–417
acceptance by recipient 404–405
accessories after fact 412
accomplices 412
attempt 412
conspiracy 412
definition in Act 402
elements of crime by giver 413
elements of crime by recipient 404
failure to report corruption 417
general 401
giver and receiver 403
giver, crime committed by 413–415
giving of gratification 414

PAGE

corruption – *continued*
gratification 405–406
historical 401–402
incitement 412
inducement 412
intention of recipient 410–412
presumption of inducement 408–410
proof of inducement 408–410
punishment 412–413
recipient 404–413
specific categories of 415–417
unlawfulness 410
creation of crimes, courts may not 39
crime and offence 5
crime distinguished from delict 3–5
crime statistics 21–26
crimen expositionis infantis 444
crimen iniuria 461–467
definition 461
dignitas 462
elements of crime 461
intention 467
interests protected 462
objective dimension 463–464
origin 461
overlapping with other crimes 461–462
privacy, infringement of 465–466
serious infringement of interests 466–467
subjective dimension 463
unlawfulness 467
victim degraded by conduct 463
violation of dignity 464–465
criminal capacity 155–175
at time of conduct 157
cognitive function 157–158
conative function 157–158
culpability, relation to 156
definition 156
diagram of contents 157
diminished 170–171
general concept 155–156
grounds excluding (and *see* mental illness, immature age) 164–175
immature age 173–175
intention and 156
intoxication and (and *see* intoxication) 216–230
involuntary behaviour and 158
meaning of 155–156
mental illness (and *see* mental illness) 174–176
non-pathological 158–164

PAGE

criminal capacity – *continued*
provocation, and 159–164, 232
psychological requirements for 157
youth – *see* immature age
criminal defamation 467–469
definition 467
elements of crime 467
existence of crime confirmed 469–470
origin 567–568
publication of defamatory matter 469
unlawfulness 469
criminal law, place of in legal system 3
criminal liability
construction of 29–35, 555–556
summary of 29–35
crisis in criminal justice system 20–29
culpa (and *see* negligence) 205
culpability (and *see* criminal capacity, intention, intoxication, negligence, provocation, strict liability) 145–243
contemporaneity, principle of 148–149
criminal capacity (and *see* criminal capacity) definitional elements, relation to 155
forms of 148
freedom of will, and 147
general 145
intention (and *see* intention) 176–204
legal as opposed to moral 147–148
meaning of 145
mens rea 145, 146
moral as opposed to legal 147–148
necessity excluding 235–236
negligence (and *see* negligence) 204–216
normative character of 150–153
psychological theory of 153–156
statutory offences, in 236–241
strict liability 236–241
taint doctrine, rejection of 149–150
terminology 146–147
unlawfulness, relation to 100–101, 145–146
versari in re illicita 149–150
vicarious liability 242–243
culpable homicide 442–443
attempt not possible 443
definition 442
elements of crime 442
murder, relation to 442
negligence 442–443
custody, escaping from 338–340

PAGE

D

dagga – *see* drug offences
de minimis non curat lex 139–140
dealing in drugs 423–426
  dealing in, meaning of 423–425
  definition 423
  drug, description of 425
  elements of crime 423
  intention 425
  punishment 425–426
  unlawfulness 425
death sentence abolished, criticism of 26–29
defamation, criminal – *see* criminal defamation
defeating or obstructing course of justice 327–331
  administration of justice 330–331
  appellation 327–328
  attempt 331
  definition 327
  difference between obstructing and defeating 328
  elements of crime 327
  intention 331
  pending case not requires 330
  ways in which committed 328–330
defences and their effect 557–558
defences, table of 557–558
definitional elements 71–79
  act and 72
  arrangement of crimes according to 78–79
  contents of 72–73
  culpability and 74–76
  intention and 74–76
  meaning of term 71–72
  negligence and 206–209
delict distinguished from crime 3–5
delictum continuum 500–501
delirium tremens 166, 218
deterrent theory of punishment 15–17
  criticism of 17
  general deterrence 16–17
  individual deterrence 15–16
dignitas (and *see crimen iniuria*) 462
dignity, infringement of – *see crimen iniuria*
diligens paterfamilias 210
diminished criminal capacity 170–171
disciplinary chastisement – *see* chastisement, disciplinary
displaying child pornography 373
dolus – *see* intention

PAGE

dolus directus 177
dolus eventualis 178–186
  conscious negligence 183–184, 215
  definition 178
  foreseeing result 179–180
  proof of 184–186
  recklessness 181
  reconciling to result 181–183
dolus generalis 196–197
dolus indeterminatus 196–197
dolus indirectus 177
drug offences – *see* possession of drugs, dealing in drugs
drugs, effect of liability – *see* intoxication
duress – *see* necessity

E

embezzlement 490–492
emergency – *see* necessity
emotional stress – *see* non-pathological criminal incapacity
engaging in sexual services for reward – *see* prostitution
English law, influence of, on South African criminal law 7–8
entrapment 140–143
  exclusion of evidence relating to 140
  general principle relating to 142
  justification, no ground of 140
  meaning of term 140
  necessary in certain cases 141
  possible future developments 142
  provisions of s 252A of Criminal Procedure Act 141–142
epileptic fit, effect of 55–47
error – *see* mistake
error in negotio 126, 354
error in objecto 188–189
error iuris (mistake of law) (and *see* ignorance of law) 199–204
error personae 126, 354
escaping from custody 338–340
euthanasia 124, 441
ex post facto legislation 36, 41–42
exploitation, sexual, of children 388–389
exposing an infant 444–445
exposing genital organs, anus or breasts 372–373
extortion 417–419
  acquisition of advantage 419
  advantage 418–419
  causation 419
  definition 417
  elements of crime 417

PAGE

extortion – *continued*
intention 419
origin 417–418
pressure 418
unlawfulness 419

F

failure to give account of possession of goods suspected of being stolen – *see* inability to give account of possession of goods suspected of being stolen
false statement in affidavit, making....338
fama (and *see* criminal defamation) 467
fault – *see* blameworthiness
firearm, pointing a – *see* pointing a firearm
firearm, unlawful possession of....426–430
culpability 428–429
definition....426
elements of crime....427
firearm, meaning of....427–428
possession 427
prohibited firearm 429–431
punishment....429
unlawfulness 428
flashing 372–373
forgery....532–535
character and origin....532–533
definition....532
document....533
elements of crime....532
falsification 534
fraud, overlapping with....532
intent 534
prejudice....534
formally defined crimes....79, 80
fraud....523–523
attempt....531–532
causation not required....530
constitutional aspects 532
definition....523
elements of crime....523
forgery, overlapping with....532–533
implied misrepresentation....524–525
intention 531
misrepresentation 524–527
omission, misrepresentation by....525
origin and character....523
prejudice, general....527
prejudice, non-proprietary....529–530
prejudice, potential....527–529
promise about future 526
unlawfulness 530

PAGE

fundamental rights – *see* Bill of Rights, effect of
furtum possessionis....492
furtum usus 492–493

G

general theory of deterrence 16–17
genital organs, exposing 372–373
going astray of the blow – *see aberratio ictus*
goods suspected of being stolen, inability to give account of – *see* inability to give account of goods suspected of being stolen
grave, violation of....435–436
grievous bodily harm – *see* assault
grooming, sexual, of children....389
grounds of justification (and *see* private defence, necessity, consent, presumed consent, official capacity, obedience to order, disciplinary chastisement) 97, 103–143

H

high treason 299–308
acts of....302–304
allegiance 301–302
animus hostilis 304–306
attempt 306
conspiracy....306
constitutional dimensions 306–308
definition....299
elements of crime....300
historical 300
incitement 306
intention 304–306
majestas not required....301
omission, committing crime by 303
peacetime, in....304
perpetrator of 301–302
punishment....306
violence not required 304
war, in time of....303–304
homicide – *see* murder, culpable homicide
housebreaking implements, possession of....550
housebreaking with intent to commit a crime 543–550
breaking 547
building or structure....544–546
caravan, in respect of 546–547
definition....543
elements of crime....543

PAGE

housebreaking with intent to commit a crime – *continued*
entering 547–548
housebreaking alone not a crime 543–544
intention 548–549
origin and character 543
unlawfulness 548
with intent to commit crime unknown to prosecutor 549–550

I

ignorance of the law, effect of 199–204
criticism of *De Blom* 201–204
judgment in *De Blom* 199–200
'knowledge', meaning of 200
law before 1977 199
legal advice, effect of 200–201
present law, position in 199–200
suggested law reform 204
ignorantia iuris neminem excusat 199
immature age 173–175
age limits 174
cognitive leg of test 175
conative leg of test 175
criminal capacity, test for 174
summary of rules 173
impossibility, defence of 60–62
in facie curiae, contempt 317–319
inability to give account of goods suspected of being stolen 515–519
constitutionality of crime 516
definition 515
elements of crime 515–516
found in possession 516–517
goods 516
inability to give account 518–519
possession, meaning of 517
reason for crime's existence 515
reasonable suspicion 517
incest 378–381
adoptive relationship 380–381
affinity 379
consanguinity 379
definition 378
elements of crime 378
general 378
intention 381
people who may not marry 378–379
sexual penetration 378
inchoate crimes – *see* attempt, conspiracy, incitement
incitement 289–296
act of 290–293

PAGE

incitement – *continued*
attempt and 295-
chain incitement 295
concretisation requirement 291–293
conditional 294
conduct which is not 291
conspiracy and 296
impossible 294–295
inciting person lacking capacity 295
influencing another 290–291
intention 293–294
prohibition of 289–290
punishment 296
purpose of prohibition 290
successful 290
ways in which committed 291
indecency, public – *see* public indecency
indecent assault replaced by statutory crime 360–361
individual deterrence, theory of 15–16
infant, exposing an 444–445
injury to property – *see* malicious injury to property
insane automatism – *see* automatism
insanity – *see* mental illness
intention 176–204
aberration ictus 193–197
awareness of unlawfulness 197–204
causation, mistake relating to chain of 189–192
chain of causation, mistake relating to 189–192
circumstance, in respect of 186–187
cognitive element of 179–180
colourless 176
conative element of 181–183
conscious negligence and 183–184
constructive – *see dolus eventualis*
definition 176
definitional elements, relating to 186–192
description of 176
diagram of contents of 177
direct – *see dolus directus*
dolus directus 177
dolus eventualis (and *see dolus eventualis*) 178–184
dolus generalis 196–197
dolus indeterminatus 196–197
dolus indirectus 177
elements of 176–177
error, effect of (and *see* mistake) 187–204
error in objecto 188–189

PAGE

intention – *continued*
error iuris – *see* mistake of law
foreseeing result 179–180
forms of 177
going astray of the blow – *see aberratio ictus*
ignorance of law, and 199–204
indirect – *see dolus indirectus*
inferential reasoning, by 184–186
intoxication and 220–222, 226–227
knowledge of unlawfulness 197–204
legal – *see dolus eventualis*
material and immaterial mistakes ... 188
mistake, effect of 187–204
mistake of law, effect of 199–204
mistake relating to motive 189
mistake relating to chain of causation 189–192
motive, and 186, 189
negligence, and 205
proof of 184–186
recklessness, and 181
reconciling oneself to foreseen result 181–183
subjective test 184
test to determine 184–186
transferred 193–197
wild shootout situations 197
intimidation 455–458
crime created in s 1(1) 455–457
crime created in s 1A(1) 457–458
intoxication, effect of 216–230
actio libera in causa 217–218
approaches, two different, to 219
burden of proof in statutory crime 227–229
Chretien's case 219–222
criminal capacity excluded by 220–221
delirium tremens 218
desirability of statutory crime 224–225
drugs, resulting from use of 217
general 216–217
intention excluded by 220–221
involuntary 237
mental illness, and 218
mistake due to 223
negligence, in crimes of 222–223
punishment, effect of on 223
specific intent theory 220
statutory crime 224–229
summary of present rules 229–230
test to determine 223

PAGE

intoxication, effect of – *continued*
voluntary 217, 226
voluntary act excluded by 220–221
involuntary conduct – *see* automatism
ius acceptum 36, 39–41
ius certum 36, 42–43
ius praevium 41–42
ius strictum 36, 43–45

J

joiner-in 264–265
justification – *see* grounds of justification

K

kidnapping 471–474
appellation 471–472
child, meaning of 473
definition 471
deprivation of freedom 473
duration of deprivation 473–474
elements of crime 471
intention 474
interests protected 472–473
minor, meaning of 473
own child cannot be kidnapped 473
relation to other crimes 472
killing in course of arrest – *see* arrest, use of force or homicide during
knowledge of unlawfulness 201–202

L

legal duty to act 58–59
legal *persona* – *see* corporate bodies, liability of
legality, principle of 36–49
analogous interpretation to be avoided 45–48
clear formulation of crimes required 36, 42
common-law crimes, interpretation of 39–41
Constitution, recognition of in 37–39
courts may not create crimes 39
definition 36
fair trial, right to, and 38
ius acceptum 36, 39–41
ius certum 36, 42–43
ius praevium 41–42
ius strictum 36, 43–45
Masiya judgment, criticism of 45–48
nulla poena sine lege 36–37, 49
punishment, role is 36, 49
rationale of 36

PAGE

legality, principle of – *continued*
retrospective operation of crime, prohibition on....36, 41–42
right to fair trial, and....38
rules embodied in principle....36
strict interpretation of criminal provisions....36, 43–45
vague formulations of crimes unacceptable....36, 42–43
lex non cogit ad impossibilia – see impossibility
lex talionis....12
liability, criminal, construction of....29–35, 555–556
lucidum intervallum....166

M

making conflicting statements under different oaths....336–338
making false statement under oath....338
malicious injury to property....539–541
appellation....539–540
damage....540–541
definition....539
elements of crime....539
intention....541
malice not required....540
overlapping....539–540
property....540
unlawfulness....541
materially defined crimes....79, 80
medical treatment, effect of on causation....90–93
mens rea – see culpability
mental illness....164–173
act in accordance with appreciation of wrongfulness....167
analysis of s 78(1)....165
automatism, relation to....55–57, 167–168
delirium tremens....166
diagram setting out requirements of defence....165
diminished responsibility....170–171
lucidum intervallum....166
mental illness or defect....165–167
non-pathological incapacity, relation to....158–159
proof, burden of....169–170
psychological components of test....167
psychopaths....171–172
release of accused....170
test to determine....164
trial, incapacity to stand....172

PAGE

mental illness – *continued*
verdict....170
wrongfulness of conduct, capacity to appreciate....167
mentally disabled person, sexual crimes against....390–392
mercy killing – *see* euthanasia
mistake
aberratio ictus....193–197
chain or causation, relating to....189–192
definitional elements, relating to....188
error in negotio....126, 348
error in objecto....199–204
error iuris....199–204
error personae....126, 348
general....187
intoxication, effect of....219–221
law, of....199–204
material and immaterial forms of....188
motive, relating to....189
negligence, relation in respect of....215
reasonableness not required....188
unlawfulness, relating to....197–204
murder....437–441
causing death....438
definition....437
elements of....437
general....437–438
human being as victim....438–439
intention....439
punishment....440–441
unlawfulness....439

N

Native Territories' Penal Code....8
necessity....114–122
absolute and relative compulsion....116
accused must be aware of emergency....119
accused responsible for emergency....118–119
compulsion and inevitable evil....115–116
culpability, excluding....116–117, 235–236
definition....114
ground of justification, as....116–118
imminence of emergency....118
killing another in....120–122
legal interest threatened....118
necessary to avert danger....119
people legally compelled to endure danger....119

PAGE

necessity – *continued*
private defence, and 114–115
proportionality between harm and interests threatened 119–120
punishment, mitigation of 122
putative 120
necessity excluding culpability 235–236
negligence 204–216
abbreviated way of referring to 206
attempt not possible 216
bonus paterfamilias 210
children 213
circumstances, in respect of 209
conscious and unconscious 183, 215
crimes requiring 205
culpability, as a form of 206–207
culpable homicide, in 436–437
definitional elements, as part of 206–207
diligens paterfamilias 210
dual meaning of 206–209
experts 213
foreseeability of death 212
foreseeability, reasonable 211–212
general description 204–205
ignorance or incompetence 215
intention, and 205, 214–215
intoxication, effect of on 222–223
objective test 184–186, 206
reasonable person 209–211
foreseen result 212–213
strict liability crimes, in 240–241
subjective factors 213–214
superior knowledge 213–214
telescoped test 208–209
test to determine 205–206
unlawfulness, in respect of 215–216
negotiorum gestio – see presumed consent
non-pathological criminal incapacity 158–160
before *Eadie* judgment 159–160
criticism of *Eadie* 161–163
defence implicitly abolished ... 163–164
description of 158–160
Eadie, judgment in 160–161
general 158–159
normative theory of culpability ... 150–153
novus actus interveniens 86–87, 89–94
nulla poena sine lege 36–37, 49

O

oaths, making conflicting statements under different 336–338
obedience to orders as justification 134–136
obstructing course of justice – *see* defeating or obstructing course of justice
offence and crime 5
omissio per commissionem 60
omissions 58–62
causation by 89
generally 58–59
high treason, commission of by 303
impossibility, defence of 60–62
legal duty to act 58–59
omissio per commissionem 60
prohibitive and imperative norms 58
when punishable 59–60
orders, obedience to, as justification 134–136

P

parents' right to corporal punishment 138
participation in crime 249–274
accessory after fact (and *see* accessory after fact) 251, 271–274
accomplice (and *see* accomplice) 250–251, 265–270
aider and abettor 252
common purpose, doctrine of (and *see* common purpose, doctrine of) 255–264
diagram of categories 250
general overview 249–251
joiner-in 264–265
perpetrator (and *see* perpetrator) 249–250, 252–265
socius criminis 251–252
terminology 251–252
perduellio 301
perjury 332–335
court need not have jurisdiction 334
definition 332
elements of crime 332
false statement 332–333
intention 335
judicial proceeding, in the course of 333–334
material statement not required 333
oath, affirmation or admonition 334
origin 332
statutory perjury 336–338
subornation of 335
unlawfulness 334

PAGE

perpetrators 250, 252–265
accomplices distinguished from.....250–251
co-perpetrators 253
common purpose, doctrine of (and *see* common purpose, doctrine of).....255–264
direct 253–254
indirect 253–254
joining-in.....264–265
murder, in.....254–255
summary of rules relating to....252–253
plagium (and *see* kidnapping).....471
pointing a firearm 458–460
any other person.....459–560
definition.....458
elements of crime.....459
firearm.....459
intention 460
punishment.....460
unlawfulness 460
poison, administering.....443
pornography, child, displaying 373
pornography, using child for.....389–390
possessio civilis.....63–64, 66–67
possession 62–70
ammunition, of.....430–431
animus 65–70
animus detentionis 65
animus domini 66, 69
animus ex re commodum acquirendi 66
animus possidendi 67
animus rem sibi habendi 66–67
animus tenendi 65–67
control, exercising *see corpus corpus*.....63–65
culpability, relation to 68–69
drugs, of 420–423
elements of.....63
firearm, of 429–430
general.....62–63
goods suspected of being stolen, of.....514–519
housebreaking implements, of 550–551
immediate presence not required 64
joint 68
legal possession – *see possessio civilis*
mens rea, relation to.....68–69
natural possession *see possessio naturalis*
physical possession – *see corpus possessio civilis*.....63–64, 66–67

PAGE

possession – *continued*
possessio naturalis..... 63–64, 66–67
receiving stolen property 512–514
subjective components of 74–75
unlawfulness and 73–74
unwilling receiver of articles 69–70
wrongdoing and 74
possession of drugs..... 420–423
definition..... 420
drug, description of..... 422
elements of crime..... 421
intention 423
possession, meaning of..... 421–422
punishment..... 423
unlawfulness 422
use of..... 421
possession of housebreaking implements 550
presumed consent 127–128
preventive theory of punishment..... 15
principle of legality – *see* legality, principle of
privacy, infringement of (and *see crimen iniuria*)..... 465–466
private defence 102–114
attack must be imminent..... 105
attack must be unlawful..... 103–104
attack need not be directed at defender..... 104
defence must be directed at attacker 106
defence must be necessary..... 106–108
defender must be aware that he acts in private defence 111–112
defence of property, in..... 108–111
definition..... 102
exceeding limits of..... 113–114
general 102–103
interest against which attack must be directed..... 105
no duty to flee..... 106–108
putative 112–113, 197–198
relationship between attack and defence 108–111
test to determine..... 112–113
theories underlying 102
prostitution..... 373–377
constitutional dimensions 374–375
criticism of crime..... 377
definition..... 373
elements of crime..... 373
engaging, meaning of 376
gender-neutral definition 375–376
general remarks on..... 374

PAGE

prostitution – *continued*
intention 377
person older than 18 years 376
purpose of engaging 376–377
reward 377
services, meaning of 376
sexual act 376–377
provocation 230–235
assault, effect of on charges of 235
complete defence, provocation ought not to be 232
conduct, by 234–235
culpable homicide, effect on charge of 235
diminished responsibility 234
examples of situations 230–231
general 230
partial defence 233
present law 233–234
problems arising from the definition of murder 231–232
treatment of 232
psychogenic amnesia 56
psychogenic automatism 56
psychological theory of culpability 153–156
psychopaths 171–172
public indecency 433–435
conduct in public 434–435
constitutional dimensions 433–434
definition 433
elements of crime 433
indecent conduct 434
origin 433
public violence 311–314
acting together with others 312
conduct constituting crime 313
definition 311
elements of crime 311
intention 314
interests protected 311–312
number of participants 312
overlapping with other crimes 312
serious dimensions 313
publication of matter which is *sub iudice* 320–322
punishment
basic considerations 19
crime statistics 21–24
death sentence, feasibility of reintroducing 26–29
evaluation of rules relating to 20
murder, for 440–441
rape, for 356–358

PAGE

punishment – *continued*
robbery, for 511–512
theories of 10–20
purpose of punishment – *see* theories of punishment
putative crime (and *see* attempt) 282–283
putative private defence 113, 201–202

R

rape 343–358
absence of consent 351–355
abuse of authority 353–354
acts falling under 'sexual penetration' 347–351
acts of female in respect of another female 351
acts of female in respect of male 349–350
acts of male in respect of another male 350
acts of male in respect of female 347–348
appreciation of nature of act 355
authority, abuse of 353–354
common-law crime 343
compelled 358–360
complainant mentally defective 355
complainant younger than 12 355
consent, absence of 351–355
definition (statutory) 343
elements of crime 343
error in negotio 354
error in persona 354
force, consent as result of 352–353
fraud, consent induced by 354
general remarks on 344–346
genital organs, definition 346
HIV/AIDS, misrepresentation concerning 354
inability to appreciate nature of act 355
intention 356
intimidation, consent as result of 352–353
marital relationship no bar to conviction 355
misrepresentation, consent induced by 354
penetration, sexual 346–351
punishment 356–358
sentence 356–358
sexual penetration 346–351
statutory definition 346

PAGE

rape – *continued*
submission to penetration 352–353
threats, consent as result of.....352–353
unlawfulness 356
'voluntary and uncoerced', definition.....352
reasonable person – *see* negligence
receiving stolen property 512–514
definition.....512
elements of crime.....512
intention 514
origin.....512–513
overlapping with theft.....512–513
receiving.....514
stolen property 513
unlawfulness 513–514
receiving stolen property without reasonable cause 519–521
recklessness.....181
reformative theory of punishment ...17–18
rehabilitation theory of punishment.....17–18
removal of property for use 502–507
consent, absence of 506
control of another.....504–506
criticism of formulation 503–504
definition.....502–503
elements of crime.....503
extra-contractual borrowing....503–504
extra-contractual use 503–504
intention 506–507
property 504
reason for existence of crime 502
removal 504
somebody else's control.....504–505
reputation, protection of – *see* criminal defamation
requirements for liability, sequence of 34–35
retributive theory of punishment 11–15
condemnation of crime 13
culpability requirement and 13–14
description of 11–12
freedom of will and.....13–14
human dignity and.....14–15
proportionality in punishment.....13
punishment, degree of, and 13
rebirth of.....12
vengeance different from retribution.....12–13
retrospective operation of crime, prohibition on.....36, 41–42
rights, fundamental – *see* Bill of Rights, effect of

PAGE

robbery.....508–512
bag-snatching.....510–511
causal link 509–510
definition.....508
elements of crime.....508
immediate vicinity of property 510
origin.....508
punishment.....511–512
theft, and 508
threats of violence.....508–509
violence.....508

S

sane automatism 55–56
scandalising the court (and *see* contempt of court) 322–324
sedition 308–311
causing a concourse 310–311
challenging state authority.....310
definition.....308
elements of crime.....308
historical 308
intention 311
interests protected 309
number of persons taking part 309
relationship to other crimes against the state.....308–309
violence or threats of 309
self-defence – *see* private defence
self-sexual assault, compelled 369–371
sentence – *see* punishment
sexual act with corpse.....383
sexual assault.....360–368
acts punishable.....361–366
compelled.....368–369
consent, absence of.....367–368
definition.....360
direct contact.....362
elements of crime.....360
indecent assault, common-law crime.....360–361
indecent assault replaced by ...360–361
indirect contact 362
inspiring belief of violation 366–367
intention 368
purpose of crime 360
sexual violation.....361–366
sexual crimes against children.....383–390
act of sexual penetration 385
both parties are children 384–385
child between 12 and 16 384
child, meaning of 384
compelling children to witness sexual crimes 390

PAGE

sexual crimes against children – *continued*
consensual penetration of.....383–387
defences, special 385–386
failure to report sexual offences against children.....390
general.....383, 384
grooming, sexual, of children 389
intention 386–387
old legislation.....384
pornography
displaying to children.....389
using children for 389–390
sexual exploitation of children 388–389
sexual grooming of children 389
sexual penetration 385
sexual violation of children.....387–388
sexual crimes against mentally disabled persons.....390–392
sexual exploitation of children.....388–389
sexual services for reward, engaging in – *see* prostitution
sexual violation of children 387–388
socius criminis 251–252
sodomy no longer punishable 350
sources of criminal law.....5–10
Bill of Rights.....9–10
case law.....6
common law.....6–7
Constitution.....9–10
English law.....7–8
German criminal-law theory 8–9
legislation.....5–6
Native Territories' Penal Code 8
Strafrechtswissenschaft.....8–9
specific-intent theory – *see* intoxication
spontaneous agency – *see* presumed consent
statistics of crime in South Africa ...21–26
statutory intoxication, crime of (and *see* intoxication).....224–229
statutory perjury.....336–338
statutory rape *see* sexual offences against children
stolen property, receiving – *see* receiving stolen property
stolen property, receiving without reasonable cause 519–521
strict interpretation of criminal provisions.....36, 43–45
strict liability.....236–241
constitutionality of.....238
criticism of.....241
strict liability – *continued*
decrease in cases of strict liability.....237
description of 236–237

PAGE

intention or negligence, whether required.....240–241
negligence as middle course 240
principles for determining 238–240
subornation of perjury 335
suicide
inciting someone to.....90
not a crime 438–439
summary of criminal liability 29–35
suspectedly stolen goods, inability to give account of – *see* inability to give account of goods suspected of being stolen

T

table of defences and their effect.....557–558
taint doctrine, rejection of.....149–150
teachers, no right to inflict corporal punishment 137
theft.....475–502
accessories after fact not possible 500–501
accomplices not possible 501–502
act, requirement of.....478–481
animus furandi.....477, 484
appropriation, act of.....478–481
arrogation of possession 492
attempted and completed theft, border between 489
benefit, intention to acquire not required.....487–488
cheques, theft by means of 494–500
consent.....484
continuing crime 500–501
contrectatio.....477
corporeal, property must be 481
credit, theft of 493–500
debtor-creditor relation, defence of 497–498
definition.....475
delictum continuum.....500–501
dishonest accounting of trust funds 498–499
electricity, whether possible to steal.....482–483
elements of crime.....476
embezzlement 490–492
entrusted property, theft of 495–497

PAGE

theft – *continued*
failure to account for trust funds.....498
false pretences, by.....535–537
forms of theft.....477–478
fraudulosa.....477
furtum possessionis.....492
furtum usus.....492–493
goods suspected of being stolen, possession of.....515–519
in commercio, property must be.....483–484
injury to property, overlapping with.....486–487
instrumentality of another, through.....481
intent to benefit not required.....487–488
intention.....484–488
intention permanently to deprive.....486
intention to appropriate.....485–486
Latin expressions used.....477
liquid fund, defence of.....497
lucri faciendi gratia.....487–488
money, theft of.....494, 499–500
movable, property must be.....481
omissions, by.....491–492
overpayments, appropriation of.....499
possession, unlawful arrogation of.....492
property capable of being stolen.....481–484
receiving stolen property.....512–514, 519–521
removal of thing.....488–490
res communes cannot be stolen.....483
res derelictae cannot be stolen.....483–484
res fungibiles.....499
res nullius cannot be stolen.....484
res (property).....481–484
self-service shop, theft from.....489–490
stolen property, receiving.....512–514, 519–521
temporary use of a thing.....492–493
things capable of being stolen.....481–484
trust funds, appropriation of.....493–500
unlawfulness.....484
unusual aspects of crime.....476–477
use of thing not theft.....486
theft by false pretences.....535–537
theories of punishment.....10–20
absolute and relative.....11

PAGE

theories of punishment – *continued*
classification of.....10
combination theory of.....19–20
deterrent theories (and *see* deterrent theories of punishment).....15–17
evaluation of.....20
general deterrence.....16–17
individual deterrence.....15–16
preventive theory.....15
reformative theory.....17–20
relative and absolute.....11
retributive theory (and *see* retributive theory of punishment).....11–15
thoughts not punishable.....53
transferred malice – *see aberratio ictus*
trapping – *see* entrapment
treason – *see* high treason
trespass.....551–554
being upon.....551–552
definition.....551
elements of crime.....551
entering.....551–552
intention.....554
land or building.....552
lawful reason for being on ground.....553–554
punishment.....554
unlawfulness.....552–554
trifling nature of act.....139–140

U

unauthorised administration – *see* presumed consent
unlawfulness (and *see* grounds of justification).....95–148
awareness of.....201–202
boni mores.....98
culpability, and.....100–101
definitional elements and.....85–96
grounds of justification (and *see* grounds of justification).....97
knowledge of.....201–202
legal convictions of community.....97–99
material contents of.....97–99
subjective considerations.....99–100
wrongdoing and.....97
use, removal of property for – *see* removal of property for use
uttering.....535

PAGE

V

vague formulations of crimes unacceptable....36, 42–43
versari in re illicita, rejection of....149–150
vicarious liability....242–243
violation of corpse....436
violation of grave....435–436
vis absoluta....54–55, 117
vis compulsiva....54–55

PAGE

W

watching sexual acts, compelling someone to....371–372
wrongdoing....74

Y

young age – *see* immature age