

Tutorial Letter 102/2/2018

Criminal Law: Specific Offences

CRW2602

Semester 2

Department of Criminal and Procedural Law

This tutorial letter contains important information about your module.

Bar code

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Dear Student

We trust that you have already familiarised yourself with the first tutorial letter, as well as with the Study Guide and prescribed texts. Note that all tutorial letters are very important and should be read carefully.

In this tutorial letter, we discuss the format of the examination paper which you will be writing in October/November 2018. In order to assist you with preparation for these exams, we provide you with the exam paper written last year in November.

Feedback to the questions in the October/November 2017 paper is provided. The feedback also serves as an example of how we expect students to answer if similar types of questions were to be asked.

We also alert you to a new development in criminal law and provide you with information regarding your tutorial letters.

1 Format of the October/November 2018 Examination Paper

The format of the examination paper for the October/November 2018 examinations will in essence be the same as that of previous exam papers.

2 Example of a previous examination paper

Below we provide you with an example of a previous examination paper and feedback on the paper. Please take note that this exam paper as well as other past exam papers for this course are also available online for you to download from *myUNISA*.

If this is the first year that you have enrolled for this module you will find it difficult to understand the answers and the feedback on the examination paper. However, once you have studied all the different topics dealt with in the examination paper, the questions and the feedback will make sense. We therefore recommend that you do not read the feedback until you have studied the relevant topics. If you were registered for this course previously you will find the feedback valuable, since you have been exposed to the topics already. If you have previously failed this course, and you are now repeating the module, you should read both the answers and the feedback carefully, to enable you to see where you went wrong in the examination.

CRW2602

(477596)

October/November 2017

CRIMINAL LAW: SPECIFIC CRIMES

Duration : 2 Hours

100 Marks

EXAMINERS :

FIRST :

PROF L JORDAAN
PROF C VAN DER BIJL
MR RD RAMOSA

PROF N MOLLEMA

SECOND :

Closed book examination.

This examination question paper remains the property of the University of South Africa and may not be removed from the examination venue.

THIS PAPER CONSISTS OF SEVEN (7) PAGES PLUS INSTRUCTIONS FOR COMPLETION OF A MARK READING SHEET.

THE QUESTIONS IN THIS PAPER COUNT HUNDRED (100) MARKS. THE PAPER CONSISTS OF TWO PARTS, MARKED A AND B. YOU MUST ANSWER BOTH PARTS A AND B. PART A CONSISTS OF TEN (10) MULTIPLE CHOICE QUESTIONS. EACH QUESTION COUNTS THREE (3) MARKS, WHICH MEANS THAT THE QUESTIONS IN PART A COUNT A TOTAL OF THIRTY (30) MARKS. IN PART B, THE ANSWERS TO THE QUESTIONS MUST BE WRITTEN IN THE EXAMINATION ANSWER BOOK ITSELF. THE QUESTIONS IN PART B COUNT SEVENTY (70) MARKS.

PART A (MULTIPLE CHOICE QUESTIONS)

IMPORTANT NOTICE. THE QUESTIONS IN THIS PART HAVE TO BE ANSWERED ON THE MARK READING SHEET, WHICH WILL BE ISSUED WITH YOUR EXAMINATION ANSWER BOOK. YOU HAVE TO READ THE INSTRUCTIONS IN CONNECTION WITH THE USE OF THE MARK READING SHEET CAREFULLY. FAILURE TO DO SO MAY MEAN THAT YOUR ANSWERS CANNOT BE MARKED BY THE COMPUTER.

Ten questions (marked 1 - 10) follow. Each question contains three statements (marked (a)-(c)). Some of the statements are correct and some are incorrect. You must decide which of these statements is/are correct. The three statements are followed by five allegations (marked (1) - (5)). Each of them alleges that a certain statement or combination of statements is correct. You must decide which allegation accurately reflects the conclusions to which you have come.

QUESTION 1

- (a) "Terrorist activities" prohibited in section 1 of the *Protection of Constitutional Democracy against Terrorist and Related Activities Act* 33 of 2004 may consist of any act which causes serious risk to the health or safety of the public.
 - (b) "Terrorist activities" as in the above-mentioned Act must be performed with a defined culpability.
 - (c) The interests protected by the crime of terrorism are the safety and security of the Republic, its institutions and people.
- (1) Only statement (a) is correct.
 - (2) Only statement (b) is correct.
 - (3) Only statement (c) is correct.
 - (4) Only statements (a) and (c) are correct.
 - (5) All these statements are correct.

QUESTION 2

- (a) For the crime of statutory perjury, the statements must be made in writing in the course of legal proceedings.
 - (b) A legal representative, who, in the course of argument, makes a false declaration to the court, can be charged with common law perjury.
 - (c) If X persuades Y, a witness in a trial, to give false evidence in court, X may be convicted of the crime of defeating or obstructing the course of justice.
- (1) Only statement (a) is correct.
 - (2) Only statement (b) is correct.
 - (3) Only statement (c) is correct.
 - (4) Only statements (a) and (b) are correct.
 - (5) Only statements (b) and (c) are correct.

QUESTION 3

- (a) X can be convicted of the offence of corruption created in section 3 of the *Prevention and Combating of Corrupt Activities Act* 12 of 2004 if he had merely agreed to accept gratification unlawfully in the future.
 - (b) X can be convicted of corruption even if the person to whom he had offered the benefit was a police trap who had no intention of keeping the benefit for himself.
 - (c) The crime of corruption is completed only once the benefit is handed over.
- (1) Only statement (a) is correct.
 - (2) Only statement (b) is correct.
 - (3) Only statement (c) is correct.
 - (4) Only statements (a) and (b) are correct.
 - (5) Only statements (b) and (c) are correct.

QUESTION 4

- (a) If X exercises control over ecstasy tablets on behalf of Y but has no intention of using the drugs personally, X cannot be convicted of the crime known as “use or possession of drugs” in terms of section 4 of the *Drugs and Drugs Trafficking Act* 140 of 1992.
 - (b) The mental element of possession in the above-mentioned Act relates to the intention with which somebody exercises control over an article.
 - (c) If X buys dagga from Y with purpose of smoking it himself, he cannot be found guilty of the offence of dealing in drugs.
- (1) Only statement (a) is correct.
 - (2) Only statement (b) is correct.
 - (3) Only statement (c) is correct.
 - (4) Only statements (a) and (b) are correct.
 - (5) Only statements (b) and (c) are correct.

QUESTION 5

- (a) The *Firearms Control Act* 60 of 2000 makes it punishable to be aware that somebody else possesses a firearm unlawfully and then to fail to report this to the police.
 - (b) The crime of unlawfully possessing a firearm is defined in the *Firearms Control Act* 60 of 2000 in such a way that X commits the crime **only** if he exercises control over the weapon with the intention of possessing it as an owner for his own benefit.
 - (c) A person may lawfully possess ammunition even if he does not have a licence in respect of a firearm capable of discharging that ammunition.
- (1) Only statement (a) is correct.
 - (2) Only statement (b) is correct.
 - (3) Only statement (c) is correct.
 - (4) All these statements are correct.
 - (5) None of the statements is correct.

QUESTION 6

- (a) The *National Road Traffic Act* 93 of 1996 provides that no person shall drive a vehicle on a public road outside an urban area at a speed in excess of 80 km/h.
 - (b) The definition of “driver” in the above-mentioned Act does not include persons who rides or attempts to ride any pedal cycle.
 - (c) Only SAPS members are permitted to exceed the general speed limit in terms of section 60 of the Act.
- (1) Only statement (a) is correct.
 - (2) Only statement (b) is correct.
 - (3) Only statement (c) is correct.
 - (4) All these statements are correct.
 - (5) None of the statements is correct.

QUESTION 7

- (a) Reckless driving includes inconsiderate driving which might give rise to a risk of harm to others.
 - (b) The interest protected by the crime of negligent driving is the safety of the public using the roads.
 - (c) An intoxicated person sitting behind the steering wheel of a stationary vehicle which has its engine running may not be found guilty of a contravention of the offence driving under the influence of alcohol or drugs.
- (1) Only statement (a) is correct.
 - (2) Only statement (b) is correct.
 - (3) Only statement (c) is correct.
 - (4) Only statements (a) and (b) are correct.
 - (5) Only statements (b) and (c) are correct.

QUESTION 8

- (a) The offence of pointing of a firearm in the *Firearms Control Act* 60 of 2000 may overlap with the crime of assault in the form of inspiring fear of immediate personal violence.
 - (b) In order to secure a conviction for pointing of a firearm, the state needs to prove that the firearm was capable of firing a shot.
 - (c) If X presses a water pistol against the body of Y, and Y thinks it is a real gun, X may be charged with the unlawful pointing of a firearm.
- (1) Only statement (a) is correct.
 - (2) Only statement (b) is correct.
 - (3) Only statement (c) is correct.
 - (4) Only statements (a) and (b) are correct.
 - (5) Only statements (a) and (c) are correct.

QUESTION 9

- (a) It is not required for robbery that the property should necessarily be on the person of the victim or in his presence when the violence takes place.
 - (b) X assaults Y. His intention, at that moment, is merely to assault Y. After having knocked him unconscious, X sees Y's watch, decides to take the watch and in fact does so. X can be convicted of **robbery**.
 - (c) X cannot be convicted of the crime of receiving stolen property, knowing it to have been stolen, if she received the property with the intention of keeping it merely temporarily for somebody else.
- (1) Only statement (a) is correct.
 - (2) Only statement (b) is correct.
 - (3) Only statement (c) is correct.
 - (4) Only statements (a) and (b) are correct.
 - (5) Only statements (a) and (c) are correct.

QUESTION 10

- (a) Forgery is a form of fraud.
 - (b) The reason why the word “malicious” appears in the crime “malicious injury to property” is that this crime can be committed only if X had an evil motive when he damaged the property.
 - (c) Stretching one’s arm through an open hole in a wall of a building does not amount to “breaking in” in the crime of housebreaking with intent to commit a crime.
- (1) Only statement (a) is correct.
 - (2) Only statements (a) and (b) are correct.
 - (3) Only statements (a) and (c) are correct.
 - (4) Only statements (b) and (c) are correct.
 - (5) None of the statements is correct.

SUB-TOTAL [30]

PART B

THIS PART CONSISTS OF THREE QUESTIONS, NUMBERED, 1, 2 AND 3. YOU MUST ANSWER ALL THREE QUESTIONS (WITH THEIR SUB-QUESTIONS). NOTE THAT YOU HAVE A CHOICE IN CERTAIN OF THE SUB-QUESTIONS. SUBSTANTIATE YOUR ANSWERS AND REFER TO DECIDED CASES WHERE NECESSARY. IN DECIDING UPON THE LENGTH OF YOUR ANSWERS YOU SHOULD BE GUIDED BY THE MARKS ALLOCATED TO EACH QUESTION.

Question 1

- (a) Define the crime of public violence. (5)
- (b) X is in financial trouble and staying with his sister. He uses his sister’s car with her consent but tells everybody that it is his own car. X’s friend Y, who is under the impression that the car belongs to X, offers to buy the car from him in order to help him out of his financial crisis. X agrees, receives R80 000 from Y, and delivers the car to Y’s house, promising that he will ensure that the car is registered in Y’s name. Answer the following questions:
 - (i) Fully define the crime of theft. (5)
 - (ii) Name and explain briefly the form of theft which is present in the factual scenario sketched above. (1)
 - (iii) Did X perform an act of appropriation as required for the crime of theft? In your answer you must define an “act of appropriation”. (3)
 - (iv) Can X also be convicted of fraud? Briefly discuss by setting out the elements of the offence. (5)
- (c) Discuss **ONE** of the following cases:
 - (i) *S v Mshumpa* 2008 (1) SACR 126 (E)
 - (ii) *S v Gardener* 2011 (1) SACR 570 (SCA)
 - (iii) *S v Ndebele* 2012 (1) SACR 245 (GSJ) (6)

[25]

Question 2

- (a) X, a top government official, is convicted by a judge of corruption. She is very unsatisfied with the outcome of the case, and at a public meeting declares: "The whole bench in this country is corrupt".
- (i) With which crime may X be charged? Define this crime. (5)
 - (ii) Identify clearly the specific form of the crime which is identified here. (1)
 - (iii) What are the reasons for the existence of this crime? (4)
- (b) The application of force to the person of Y is the most common way in which the crime of assault is committed. Define assault and discuss in detail the requirement of "application of force" for this form of the crime of assault. (8)
- (c) X bears a grudge against a previous girlfriend who had left him for another man. The girlfriend, Y, has a 10-year-old child, Z. One morning, X picks up Z at his school. He tells Z that his mother is seriously ill, and that she had sent him to pick up Z and to take him home. However, X takes Z to his own house and keeps him captive in the cellar underneath his house. He does not tell anybody about this and also does not demand a ransom from Y. Discuss whether X may be found guilty of the crime of kidnapping. (7)

[25]**Question 3**

- (a) Name the six elements of the offence of extortion. (6)
- (b) X, a 26-year-old male and Y, a 20-year-old female, live in a one-roomed shack with their ten-year-old daughter, Z. X has sexual intercourse with Z with the assistance of Y. While X penetrates Z sexually, Y puts a piece of cloth in Z's mouth to prevent the neighbours from hearing her screams. Y tells nobody about what is going on since she is afraid that X will no longer support her financially if she reveals his criminal conduct. X also has sex with Y with her consent, and at the same time locks Z in the room with the intent to make her witness the act.
- (i) Merely name the offences in the *Criminal Law (Sexual Offences and Related Matters Amendment Act 32 of 2007)* of which X may be convicted. (3)
 - (ii) Merely name any TWO offences in terms of the abovementioned Act of which Y may be convicted. (2)
- (c) In terms of section 1(2) of the *Criminal Law (Sexual Offences and Related Matters Amendment Act 32 of 2007)* "consent" means "voluntary and uncoerced agreement". Set out the circumstances in which such consent is deemed to be absent in terms of the said Act. (6)
- (d) Name the reasons for the existence of the following offences:
- (i) *Crimen iniuria* (1)
 - (ii) Criminal defamation (1)
 - (iii) Abduction (1)

[20]**SUB-TOTAL: [70]****TOTAL: [100]**

3 Feedback and self assessment

Below follows the feedback on the previous exam paper provided above. We find that most students provide very superficial answers in the examination. Therefore, we advise that you actually complete the given examination paper on your own as a form of **self-assessment**. Test yourself whether you are able to identify the relevant sections of the work. Plan and structure your answers in accordance with the duration of time provided. Determine the length of your answer with reference to the marks allocated to each question. Then compare your answers with those provided in the feedback. This exercise will enable you to know exactly what is expected of you in the examination.

The following abbreviations are used:

SG - Study Guide

***Criminal Law* - CR Snyman *Criminal Law* 6th ed 2014 (the prescribed book)**

Case Book - CR Snyman *Criminal Law Case Book* 5th ed 2013

Reader – Case Law Reader for CRW2602

PART A (MULTIPLE-CHOICE QUESTIONS)

QUESTION 1

- (a) This statement is correct. See SG 1.2.2 (iv).
- (b) This statement is correct. See SG 1.2.2.
- (c) This statement is correct. See SG 1.2.4.

You should therefore have chosen option **(5)** since all the statements are correct.

QUESTION 2

- (a) This statement is incorrect. See *Criminal Law* 336. The declaration may be **oral or in writing** (in an affidavit).
- (b) This statement is incorrect. See SG 2.1.4. Because only a declaration under oath or its equivalent can form the basis of perjury, the crime cannot be committed, for example, in the course of argument to the court by a legal representative.
- (c) This statement is correct. See SG 2.3 and *Criminal Law* 328-329.

You should therefore have chosen option **(3)** since only statement (c) is correct.

QUESTION 3

- (a) This statement is correct. See *Criminal Law* 404, 408 and SG 3.2.6.2.
- (b) This statement is correct. See SG 3.2.6.5, 3.2.6.6 and 3.2.7.3.
- (c) This statement is incorrect. See SG 3.2.6.2. The crime of corruption has been completed even if Y has not yet done what he undertook to do. As such, the benefit need not be handed over for the completion of the crime; Y must have merely accepted the gratification.

You should therefore have chosen option **(4)** since only statements (a) and (b) are correct.

QUESTION 4

- (a) This statement is incorrect. See SG 3.4.2.3(b). X can be convicted of the crime known as “use or possession of drugs” in terms of section 4 of the *Drugs and Drugs Trafficking Act* 140 of 1992 as he kept drugs for or on behalf of somebody else (*possessio naturalis*).
- (b) This statement is correct. See SG 3.4.2.3(b)(i).
- (c) This statement is correct. See SG 3.4.3.3.

You should therefore have chosen option **(5)** since only statements (b) and (c) are correct.

QUESTION 5

- (a) This statement is correct. See SG 3.5.4 (1).
- (b) This statement is incorrect. See SG 3.5.2.1. X may commit the crime of unlawfully possessing a firearm if he exercises control over the weapon with the intention of possessing it as an owner for his own benefit (*possessio civilis*) or if he merely keeps or guards it on behalf of, or for the benefit of, somebody else (*possessio naturalis*).
- (c) This statement is incorrect. See SG 3.5.3(1). Section 90 provides that no person may possess any ammunition unless he holds a licence in respect of a firearm capable of discharging that ammunition.

You should therefore have chosen option **(1)** since only statement (a) is correct.

QUESTION 6

- (a) This statement is incorrect. See SG 3.6.2.4. The *National Road Traffic Act* 93 of 1996 provides that no person shall drive a vehicle on a public road outside an urban area at a speed in excess of **100 km/h**.
- (b) This statement is incorrect. See SG 3.6.2.3. The definition of “driver” in the above-mentioned Act does include persons who rides or attempts to ride any pedal cycle.
- (c) This statement is incorrect. See SG 3.6.2.5. Drivers of an ambulance, fire-fighting vehicle or response vehicle, a rescue vehicle, an emergency medical response vehicle who are carrying out their duties or a traffic officer or SAPS member or any other authorized persons who drive a vehicle in the execution of their duties may exceed the general speed limit in terms of section 60 of the Act.

You should therefore have chosen option **(5)** since none of the statements is correct.

QUESTION 7

- (a) This statement is correct. See SG 3.6.3.2(b).
- (b) This statement is correct. See SG 3.6.3.3(b).
- (c) This statement is incorrect. See SG 3.6.5.3. An intoxicated person sitting behind the steering wheel of a stationary vehicle which has its engine running may be found guilty of a contravention of the offence driving under the influence of alcohol or drugs.

You should therefore have chosen option **(4)** since only statements (a) and (b) are correct.

QUESTION 8

- (a) This statement is correct. See SG 6.2.3 and *Criminal Law* 459.
- (b) This statement is incorrect. See SG 6.2.3. The state need not prove that the firearm was capable of firing a shot in order to secure a conviction for pointing of a firearm.
- (c) This statement is correct. See SG 6.2.7.

You should therefore have chosen option **(5)** since only statements (a) and (c) are correct.

QUESTION 9

- (a) This statement is correct. See SG 9.1.8.
- (b) This statement is incorrect. See SG 9.1.6. X commits assault and theft, and not robbery. There must be a causal link between the violence on the one hand and the acquisition of the property on the other. If X acquires the property not as a result of the violence, but as a result of some other consideration or event, he does not commit robbery.
- (c) This statement is incorrect. See SG 9 Summary (10). X may be found guilty of the crime of receiving stolen property if he receives the property with the intention of keeping it temporarily for somebody.

You should therefore have chosen option **(1)** since only statement (a) is correct.

QUESTION 10

- (a) This statement is correct. See SG 10 Summary (8).
- (b) This statement is incorrect. See SG 11.2.6. X's motive is not a relevant consideration in order to be found guilty of the crime of malicious injury to property.
- (c) This statement is correct. See SG 12.3.1.

You should therefore have chosen option **(3)** since only statements (a) and (c) are correct.

SUB-TOTAL: [30]

PART B

Important advice for answering problem-type questions:

The purpose of asking problem-type questions in this module is to test your understanding of the various specific crimes. This requires knowledge and understanding of **the definitions** of these crimes.

The second step in answering a problem-type question is to **discuss the legal principles** that are relevant to providing the answer to the problem. Most of the legal principles discussed in this module come from **court decisions (case law)**. You must therefore make reference to a decided case(s) whenever a legal principle is stated. You are reminded that even if you fail to remember the name of a case, you can simply state: "It has been decided" or "According to a decision" when stating the principle. Please note, however, that the discussion of an incorrect principle will not be credited, irrespective of whether the case reference (name) is appropriate. In other words, referring to the correct case name will not award you a mark if it is done to support an inappropriate legal principle. Students who do this merely indicate to the lecturer that they do not understand what the cited case actually decided.

The third step in answering a problem-type question is to **apply the relevant legal principles to the facts** of the problem. Students often combine the second and third steps when answering problem-type questions. In other words, they would discuss the principle(s) while applying it to the facts. There is nothing inappropriate about doing this. However, the chances of omitting a relevant principle (if there is more than one) are greater when adopting this approach. To minimize this possibility, we would advise the separation of the second from the third step. Another advantage of discussing the legal principle(s) before applying them to the facts is that you can more easily identify the relevant facts at the stage of discussing the principle(s). This will enable you to address as many relevant facts as possible and prepare you for a more in-depth analysis at the stage of application.

The final step in answering a problem-type question is to **provide a conclusion** to the problem. Please ensure that you have addressed the question(s) that has (have) been asked. If, for example, the question requires you to determine the criminal liability of X on a charge of murder, then your conclusion should state either "X is criminally liable of murder", or "X is not criminally liable on a charge of murder". If the question requires you to determine whether X caused Y's death, then your conclusion should state either "X caused Y's death", or "X did not cause Y's death", et cetera. Please note also that in order for your conclusion to have any basis it must be a deduction of your reasoning.

QUESTION 1

- (a) Public violence is the unlawful and intentional performance of an act or acts by a number of persons which assumes serious proportions and is intended to disturb the public peace and order by violent means or to infringe the rights of another.
- (b)(i) Theft is the unlawful, intentional appropriation of movable, corporeal property which
- (1) belongs to, and is in the possession of, another
 - (2) belongs to another but is in the perpetrator's own possession, or
 - (3) belongs to the perpetrator but is in another's possession and such other person has a right to possess it which legally prevails against the perpetrator's own right of possession;
- provided that the intention to appropriate the property includes an intention permanently to deprive the person entitled to the possession of the property, of such property.
- (ii) Theft by means of embezzlement / removal of property.
- (iii) The answer is yes, because his act of removal complies with both components of the act required for theft. A person commits an act of appropriation if she commits an act whereby:
- (1) he deprives the lawful owner or possessor of his property, (negative component) and
 - (2) he himself exercises the rights of an owner in respect of the property (positive component).
- By removing the car and delivering it to his friend, X committed an act of appropriation.
- (iv) Yes, X can also be convicted of fraud because he complies with all the elements required for the offence. The elements of fraud are:

1. misrepresentation
2. which causes or may cause prejudice and which is
3. unlawful and
4. intentional.

(c) In this question, students had to choose one of three cases to discuss.

(i) **Option 1**

Reader 31–37 - *S v Mshumpa* 2008 (1) SACR 126 (E)

First the **facts** of the *Mshumpa* case have to be set out briefly (see p31–33 of the *Reader*). A young pregnant woman (S) was ‘hijacked’ together with the father of the child (B). She was shot in the stomach and the baby was stillborn. B was shot in the shoulder and valuables were taken. It transpired the father of the child (B) arranged for the incident. B and M (the ‘hijacker’) were both charged with various offences including: attempted murder; assault; robbery; attempting to defeat the course of justice and unlawful possession of firearms. M and B were found guilty of the attempted murder of S.

Legal question: Can they (B and M) be charged with murder of an unborn child/ foetus?

Finding: No, they cannot.

Reasons for finding: One cannot be found guilty of the murder of an unborn child since it is not included in definition of murder. It will violate the principle of legality. If the definition of murder is to be broadened, the legislature must effect such change. The Constitution does not afford a right to life to an unborn child. The development of common law (as allowed in *Masiya*-case) must be done incrementally and cautiously in accordance with dictates of the Constitution. There are practical difficulties with including the killing of an unborn child in the definition of murder (see para 59 of the judgment for the various difficulties).

(ii) **Option 2**

Reader 38–41 - *S v Gardener and Another* 2011 (1) SACR 570 (SCA)

First the **facts** of the *Gardener* case have to be set out briefly (see p38–39 of the *Reader*). Two chief executive officers of company A failed to disclose their interests in company B to the board of company A. Company A had bought shares in company B and as a result of this transaction X and Y secured substantial profits. They were charged with fraud and duly convicted, and appealed.

Legal question: Did they have the intention of defrauding company A and did their failure to disclose their interests result in actual or potential prejudice to the company?

Finding: The court upheld the conviction of fraud.

Reasons for finding: The court found that the conduct of X and Y was potentially prejudicial to company A since, *inter alia*, it precluded company A from considering the advantages and disadvantages of the sale and induced company A to raise the finance and pay X and Y for their interest in company B. Moreover, their conduct was **deliberate since it was done to avoid proper consideration of the transaction by the board in the self-interest of X and Y** (para 57). In considering the **intention to cause prejudice, the court deemed it unnecessary to be more specific as to the nature of that prejudice**. The court stated (at para 58) that when company directors directly withhold information material to the affairs of their company from the board of directors there is, in the absence of an explanation for such conduct which may reasonably be true, a case of fraudulent non-disclosure. That is because the company can only make decisions through a board that is properly informed.

(iii) **Option 3****Reader 24–27** - *S v Ndebele* 2012 (1) SACR 245 (GSJ)

First the **facts** of the *Ndebele* case have to be set out briefly (see p 24 of the *Reader*). The three accused were charged with theft for the unlawful use of electricity vending machines known as credit dispensing units that could be used to dispense pre-paid vouchers for electricity. They were alleged to have used the machines to steal electricity and electricity credits.

Legal question: Is electricity capable of being the object of common-law theft?

Finding: Yes, it can be stolen.

Reasons for finding: In *Ndebele* it was held that the courts have moved away from the physical handling of the property to a more abstract requirement of appropriation such as the manipulation of credit. There need not be physical removal but rather the deprivation of a characteristic and depriving the owner of a characteristic. Energy by electricity consists of electrons and the characteristic attached to electrons is energy which is consumed and is capable of theft. This case is contrary to the case of *S v Mintoor* which held that electricity is not capable of being stolen. [25]

QUESTION 2

- (a)(i) X may be charged with the crime of contempt of court. Contempt of court consists in the unlawful and intentional
- (1) violation of the dignity, repute or authority of a judicial body or a judicial officer in his judicial capacity, or
 - (2) the publication of information or comment concerning a pending judicial proceeding, which has the tendency to influence the outcome of the proceeding or to interfere with the administration of justice in that proceeding.
- (ii) Scandalising the court.
- (iii) Contempt of court is punished not to protect the dignity and repute of an individual judicial officer, but to protect the administration of justice. In the case of contempt committed by the publication of information or comments on a pending case, the reason for the crime is that the court should come to a decision only on the grounds of permissible evidence before it, and ought not to be influenced by the disclosure of facts or comments from outside, such as those in the press.
- (b) A person commits assault if she unlawfully and intentionally applies force, directly or indirectly, to the person of another, or inspires a belief in another person that force is immediately to be applied to her. Force can be applied directly and indirectly. The direct application of force is the most common way in which the crime can be committed; e.g. X punches Y with her fist, or kicks her, or slaps her in the face. The fact that Y does not feel much or any physical pain, is irrelevant. Thus X may commit the crime even if she only spits in Y's face or trips her so that she stumbles. In the indirect form of assault, X commits some act which results in Y's physical integrity being infringed, as in any given example: X sets a vicious dog on Y, X derails a train on which Y is travelling, or X frightens a horse on which Y is riding so that Y falls from the horse. Students could also provide case law for extra marks; e.g. the cases of *Marx* or *A* where a person is forced to consume a specific substance such as alcohol or urine.

- (c) Yes, X may be found guilty of kidnapping. 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. X's conduct complies with the elements of the crime. X knows that Y (Z's parent) did not consent to the removal of Z, a minor. As such, X had intention and knowledge of unlawfulness. Forcible removal is not a requirement for kidnapping. Motive (whether doing it out of spite or demanding a ransom) is immaterial for purposes of liability although it may be a factor that is taken into consideration for sentencing. X will only not be guilty of kidnapping if he is Y's father as a parent cannot commit the crime in respect of her own child. This is however not stated in the scenario. This scenario is not a case of abduction. [25]

QUESTION 3

- (a) The elements of the crime of extortion are:
- (1) the acquisition of
 - (2) a benefit
 - (3) by applying pressure
 - (4) a causal link (between the pressure and the acquisition of a benefit)
 - (5) unlawfulness
 - (6) intention
- (b)(i) X may be convicted of rape, incest, sexual assault, compelling children to witness sexual acts, and exposing genital organs to children (flashing).
- (ii) Y may be convicted of aiding or abetting another person to commit a sexual offence (an accomplice to rape or sexual assault); compelling children to witness sexual acts, failure to report sexual offences against children.
- (c) Circumstances in respect of which Y does not voluntarily or without coercion agree to an act of sexual penetration:
- (1) the use of force or intimidation by X against Y or Z (a third person) or against the property or a threat of harm or against property
 - (2) where there is an abuse of power or authority by X
 - (3) where sexual act is committed under false pretences or by fraudulent means
 - (4) where Y is incapable in law of appreciating the nature of the sexual act (including where Y is, at the time of the commission of such sexual act —
 - (i) asleep;
 - (ii) unconscious;
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that Y's consciousness or judgment is adversely affected;
 - (iv) a child under the age of 12 years; or
 - (v) a person who is mentally disabled.
- (d)(i) *Crimen iniuria* protects a person's **dignity** and **privacy**.
- (ii) Criminal defamation protects a person's **good name** or **reputation**.
- (iii) Abduction protects the factual **exercise of control over the minor** and the **parents' or guardian's right to consent to the minor's marriage**. [20]

SUB-TOTAL: [70]

4 New developments in criminal law: the 2015 *Amendment of the Sexual Offences Act*

PLEASE ADD THE FOLLOWING DISCUSSION AT THE END OF PAR 4.7.2.2 IN STUDY UNIT 4:

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

- **Section 1** of Act 5 of 2015 now provides that a “child” means a **person under the age of 18 years**.
- **Section 15(1)** which deals with **consensual sexual penetration of a child** now provides that:

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

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

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

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

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

- Because the position is now regulated in terms of the amended sections 15 and 16, **section 9 of Act 5 of 2015 provides for the deletion of the defence set out in section 56(2)(b).**

You are advised therefore, to **DELETE** the discussion of section 56(2)(b) under para 4.7.2.2 “Second Defence: X and Y are both children” and replace it with the information provided above.

- **Section 56(2)(a) is, however, still a valid defence.**

5 Amendments to Study Guide

- **In Study Unit 3 of your Study Guide under paragraph in 3.4.2.3, add the following:**

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

The applicants applied to the court that these sections be declared invalid on the grounds that the criminal prohibition on the use and possession of cannabis in their own homes and “properly designated places” was unconstitutional (para [11]). In particular, they contended that, pursuant to the impugned legislation, fundamental rights such as equality, dignity and freedom of religion and **most importantly, the right to privacy** were breached (para [11]).

After considering all the evidence, the court found that the respondents did not provide credible evidence about the uniquely harmful effects of dagga. The respondents did not prove that the criminalisation of cannabis served an important purpose and that there was no way to achieve this purpose other than to criminalise the use and possession of dagga. Davis J concluded that: “The evidence as set out in this judgment supports the argument that the legislative response to the personal consumption and use (of dagga) is disproportionate to the social problems caused as a result thereof” ([para 102]).

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

The declaration of invalidity was, however, suspended for a period of 24 months to allow Parliament to correct the defects in the legislation, as envisaged in this judgment. It was declared further that until Parliament has made the amendments contemplated by the court, or the period of suspension has expired, it would be deemed to be a defence to a charge under the relevant provisions that the possession, or cultivation of cannabis in a private dwelling is for the personal consumption of the adult accused.

- **In Study Unit 4 of your Study Guide in 4.2.1, add the following:**

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

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

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

- In **Study Unit 4 on p. 97 in 4.6 "Bestiality"**, the **page numbers** of the textbook need to be corrected. Please amend as follows in your Study Guide:

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

- In **4.7.2.1 in the first paragraph, (after the elements of the crime is set out) third line from the top, delete the words "of this crime" and replace it with the words "of rape"**.
- **At the end of that same paragraph, add the following example in the case law of this crime:**

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

- **At the end of Study Unit 6 on p. 132, delete question (17).**
- **In Study Unit 7, at the end of 7.2.7.3, add the following:**

(6) In *S v Van Leperen 2017 (1) SACR 226 (WCC)*, the common-law offence of *crimen iniuria* was considered in the context of **offensive behaviour of a sexual nature**. X, an attorney, was charged in the court *a quo* of sexual assault, a contravention of section 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. His conduct consisted in having slapped the buttocks and having made sexual remarks to the complainant, Y, a female manager of three legal aid offices.

X was acquitted by the court *a quo* of both sexual assault and common assault on the ground of having lacked intention, but found guilty nevertheless of *crimen iniuria*. He appealed against his conviction on the ground that his conduct did not constitute the elements of *crimen iniuria*. The court of appeal rejected his argument, and upheld the conviction. In the court's view, the court *a quo* found correctly that X had harmed the dignity of Y by telling her that he wanted to 'smack her bum'; that 'she wore sexy shoes' and that 'she needs a man' (at para [28]).

The court of appeal noted that *crimen iniuria* amounts to the unlawful, intentional and serious violation of the dignity or privacy of another, and that the crime protects all the rights of personality other than reputation and bodily integrity (at para [29]). The violation of dignity is determined by applying both an objective and subjective test, referring to *S v Jana* 1981 (1) SA 671 (T) at 675A-B, where the court explained that “the concepts of self-respect, mental tranquillity and privacy are judged both objectively and subjectively. Objectively in that the law accepts that each person is entitled to them. Subjectively in that it depends upon the particular person and the circumstances whether it can be said that his *dignitas* has been impaired.”

It is submitted that the description of the objective test in the *Jana* case as ‘that the law accepts that each person is entitled to [self-respect, mental tranquillity and privacy]’ is not entirely correct. The objective test requires of a court to make a value judgment of the conduct, by enquiring whether a reasonable person would also have been offended by the conduct. Again, the subjective test requires an investigation relating to the knowledge of the complainant (whether she was aware of the offending conduct) and whether she felt degraded or humiliated by it).

The court engaged in the subjective enquiry and found that the words uttered by the appellant were experienced by the complainant as shocking because she was a professional person who viewed herself as to be on an equal footing with the appellant and was perplexed why the appellant humiliated her and tried to diminish her standing (at para [33]). The court then objectively assessed the conduct and concluded (at para [34]) that the “offending words collectively, used in the context where both the appellant and the complainant are attorneys present in a courtroom where other colleagues and members of the public were present, had the effect of humiliating and belittling the complainant”. The fact that dignity is expressed in section 1 as a foundational value of our democratic state and guaranteed in section 10 of the Constitution of the Republic of South Africa, 1996, was emphasised (at para [31]) and attorneys and legal practitioners admonished to “develop a consciousness about constitutional rights and obligations which they ought to apply in the course of practising their profession” (at para [43]). The court indicated that sexually offensive misconduct rarely stems from flirtation but made rather with a view to treat a person “condescendingly and ‘patronisingly’” (at para [44]).

- **In Study Unit 7, at the end of the discussion of the *Hoho* case, insert the following:**

In *Motsepe* 2015 (2) SACR 125 (GP), X had written an article for a major newspaper dealing with two different sentences that were imposed by a white magistrate, the one on a black man and the other on a white woman. The article suggested that the magistrate was biased in favour of the white accused. X was convicted of criminal defamation in the trial court on the basis of having been reckless. X appealed against his conviction and the only issue on appeal was whether X had intention to defame the magistrate. The court held that from the evidence it appeared that X had honestly relied on the truth of the statement and deemed it in the public interest to publish the facts. Because he was under the impression that his published words were covered by one of the recognised defences for a claim for defamation, he had lacked intention and was accordingly acquitted since there is no crime such as negligent defamation.

- **In Study Unit 8, on page 166, at the end of the second paragraph (just before 8.8), add the following:**

In *Director of Public Prosecutions, Western Cape v Parker* 2015 (2) SACR 109 (SCA), the court held that a VAT (value-added tax) vendor who misappropriates an amount of VAT which is payable to the South African Revenue Service (SARS), cannot be charged of common-law theft. This is because the Value-Added Tax Act 89 of 1991 is a scheme with its own directives, processes and penalties and does not confer on the vendor the status of a trustee or tax-collecting agent of SARS. Instead, it creates a debtor-creditor relationship which means that SARS can sue the vendor for payment of the VAT and/or have such vendor charged with offences created in terms of the said Act.

- **In Study Unit 10, in 10.1.3 on page 183, after discussion of the *Yengeni* case under 3(b), insert the following:**

In *Tshopo* 2013 (1) SACR 127 (FB), X, Y and Z had secured a tender from the Provincial Department of Education to distribute books and other educational material to schools. X was employed by the traffic department and married to the MEC for Health (later Education). X completed the tender form on behalf of Y, who was his sister. They were charged with fraud and convicted on the basis of an omission namely, a failure to comply with a duty to make a 'declaration of interest' in the tender application revealing any affinity relationship between themselves and government officials.

The court also rejected the argument that the Department of Education did not suffer any prejudice or potential prejudice as it had paid moneys for services actually rendered. The prejudice required for the crime of fraud need not necessarily be of a proprietary nature. The court emphasized the importance that the state keeps strict control over state tenders that are being "unscrupulously used for self-enrichment by public servants" (at para 130a). The failure to reveal in a tender application the employment relationship with the state and with the MEC were prejudicial to other tenderers and the community at large which constituted the element of prejudice.

- **In 10.1.4.2 on page 185 at the end of para (5), add the following:**

In *Ndwambi* 2016 (2) SACR 195 (SCA), X was caught in a police trap operation, selling a fake rhinoceros horn for R350 000. He was convicted of fraud and appealed on the ground that the elements of fraud relating to the element of prejudice and the intent to defraud, and more particularly the intent to deceive component thereof, had not been established on the evidence.

With regard to the **requirement of prejudice**, it was argued on the behalf of X that since the state's evidence was to the effect that the police had no intention to pay for the rhino horn, there was no question of prejudice. The court dismissed this argument, pointing out (at paras [18]-[21]) that the important perspective was not that of the deceived, but rather the deceiver (citing in support of this long-standing rule the cases of *Dyontya* 1935 AD 52; *S v Mngqibisa* 2008 (1) SACR 92 (SCA); and *S v Brown* 2015 (1) SACR 211 (SCA)). In any event, objectively speaking, some risk of harm which did not have to be financial, proprietary or even to the person to whom the representation had been addressed might have been caused, given the contribution of such transactions to the illegal trade in rhinoceros horn in South Africa (paras [18]-[22]).

- In 10.1.6 on page 187, at the beginning of the second paragraph, add the following:

In *Ndwambi* (see the discussion of the case under 10.1.4) it was argued, *inter alia*, that X, by trying to sell a fake rhino horn to a police trap, did not have the intention required for fraud. The court rejected this argument, stating that X's conduct "was calculated to prejudice" and therefore sufficient to establish the intention required for fraud. (at par [22]).

6 Group Discussion Classes

The lecturers of the module will be conducting discussion classes at the Pretoria, Durban and Cape Town regional offices during this semester. Kindly take note of the following:

Date: Saturday 1 September 2018
 Time: 09:00 – 13:00
 Regional centre: Pretoria (Auditorium D, Theo Van Wijk Building, Miriam Makeba Hall, Main Campus)
 Lecturers: Prof N Mollema

Date: Saturday 8 September 2018
 Time: 09:00 – 13:00
 Regional centre: Durban (Room 2B4, Unisa Campus, Stalwart Simelane Street)
 Lecturer: Prof N Mollema

Date: Saturday 22 September 2018
 Time: 09:00 – 13:00
 Regional centre: Cape Town (Room A17 & A18, Unisa Parow Campus, 15 Jean Simons Street, Parow)
 Lecturer: Prof N Mollema

Please note that, for the benefit of all students, discussion class notes will be available on myUnisa after 22 September 2018.

7 Number of tutorial letters

You will receive a total of **FOUR** (4) tutorial letters this semester. You received the first letter (101) on registration. In addition to this tutorial letter (102), you will also receive a third tutorial letter (201) which will provide the answers to the first compulsory assignment. The final tutorial letter (202) will provide commentary on the second compulsory assignment.

Please note that you can also access these tutorial letters electronically on myUNISA (<http://my.unisa.ac.za>) under the course code **CRW2602-18-S2** at the link "Official Study Material".

We wish you success with your studies.

Regards,

Prof N Mollema