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CRIMINAL LAW 1

REVISION PACK



[1ST SEMESTER 2016]

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Question 1

Name the four general requirements of criminal liability (4)

Act or conduct

Compliance with the definitional elements of a crime

Unlawfulness

Culpability

Define the principle of legality.

An accused may (1) not be convicted of a crime – (a) unless the type of conduct with which she is charged has been recognised by the law as a crime (b) in clear terms (c) before the conduct took place (d) without it being necessary to interpret the words in the definition of the crime broadly in order to cover the accused's conduct; and (2) if convicted, not be sentenced unless the sentence also complies with the four requirements set out above

(a) X, a fifteen-year-old girl is a party-animal. She is also an alcoholic and is placed into a rehabilitation centre by her parents for a month. Two weeks after being placed in rehabilitation, X escapes from the centre. Is X guilty of a crime? Discuss the *ius acceptum* principle with reference to applicable case law. (7)

Ius acceptum implies that a court can only find an accused guilty of a crime if the kind of act performed by the accused is recognised by the law as a crime. This explicitly shows that a court cannot create crime in accordance to the *ius acceptum* rule. The word *ius* means law and *acceptum* means which has been received. *Ius acceptum* refers to common law and statutory law. In M it was held by Kotze J that the court do not possess the



power to create crimes upon the ground that in our view the conduct is clearly contrary to good morals and our courts are not guardians of morals. This shows that if there is no provision of the common law declaring that certain conduct constitutes an offence whence no crime have been committed and the courts have held that there can be no crime.

In the set of facts, the fifteen year old girl who was detained to a rehabilitation centre and escaped, by escaping (conduct) the girl's conduct does not constitute a crime in the sense that this kind of conduct is not recognised by the law as a crime its contrary to the morals of the society. In *M* the court stated that if there is a need to make which is immoral to society punishable, it is the duty of the legislature to declare such conduct punishable. In a nutshell, the girl's conduct is not declared by the legislation as a crime so she did not commit any crime.

c) In June 2015, X is charged with drunken driving, a crime which he had allegedly committed in September 2014. Assume that, at that time (in 2014), legislation provided that a first offender could not be sent to prison for a conviction of drunken driving. However, in February 2015 the legislature amended the legislation, giving the courts discretion to send a first offender convicted of drunken driving to prison for a period not exceeding six months. X, a first offender, is convicted of the crime of drunken driving. The court, relying on the new legislation, sentences him to a period of three months' imprisonment. Discuss whether the punishment imposed by the court may be challenged on the ground that it violates the principle of legality.

The punishment of imprisonment imposed on X may be challenged on the grounds that it violates the *ius praevium* rule. In the context of punishment, this principle means that a more severe punishment may not be imposed on a person than the



punishment that could be imposed at the time of the commission of the offence.

In terms of section 35(3)(n) of the Constitution, punishment which is increased after the commission of a crime, may not be imposed to the detriment of an accused.

Consequently, the sentence imposed by the court violates the *ius praevium* rule thus X cannot be sentenced to three months imprisonment.

(b) Briefly explain what is meant by the term “automatism” and give two examples. (4)

Automatism is where a person behaves in a mechanical fashion that's is the person muscular movements are reminiscent of the mechanical behaviour of an automaton which amount to involuntary movement /conduct. Examples are an epileptic fit and somnambulism.

Discuss the defence of automatism. Your answer must include

(i) examples from the case law of cases in which this defence succeeded;

Answer

(a) AUTOMATISM -

A person acts in a state of automatism if he acts in a mechanical fashion. Examples of such instances are reflex movements such as heart palpitations or a sneezing fit and A person who acts in a state of automatism does not act voluntarily. (i) Dlamini's case - X killed Y while under influence of the nightmare. Mkize's case - X killed Y while he was having an epileptic fit. Du Plessis's case - an experienced driver had a mental “blackout”.



(ii) an explanation of the points of difference between so-called “sane” and “insane” automatism;

(i) sane automatism	insane automatism
onus on state to prove the act was voluntary	onus is on X to prove that he suffered from mental illness
if X's defence is successful, he leaves the court a freeman	if defence is successful, X is dealt with in term of section 78(1) of cpa

(iii) an explanation of what is meant by “antecedent liability”. (8)

Antecedent liability: X knows that he suffers from epileptic fits or that, because of some illness or infirmity he may suffer a "black out", but nevertheless proceeds to drive a motor-car, hoping that these conditions will not occur while he is sitting behind the steering wheel, but they nevertheless do occur. He can then not rely on the defence of automatism. He can be held liable for certain crimes requiring negligence, for example culpable homicide. His voluntary act is then performed when he proceeds to drive the car while still conscious.

In Victor 1943 TPD 77, for example, X was convicted of negligent driving despite the fact that the accident he had caused had been due to an epileptic fit: evidence revealed that he had already been suffering epileptic fits for the previous thirteen years, and that he had had insufficient reason to believe that he would not again suffer such a fit on that particular day.

Name, without discussing, three factors exclude the voluntary nature of the act. (3)

- (i) vis absoluta- absolute force
- (ii) natural forces
- (iii) automatism

(i) Name five specific instances where it is generally recognised that there is a legal duty on a person to act positively. (5)

A legal duty may arise by virtue of the provisions of the common law

The duty may arise from an agreement



Where a person accepts responsibility for the control of a dangerous or potentially dangerous object.

A duty may arise where a person stand in a protective relationship to somebody else

A duty may arise from a previous act

A duty may arise by the virtue of the fact that a person is the incumbent of a certain office.

N.B ALSO BE ABLE TO DISCUSS WITH REFERING TO CASE LAW !!!

(ii) Discuss briefly with reference to case law whether there rests a duty on the state to protect citizens from violent crime. (4)

The courts have ruled that there is a duty on the state to acting through the police the police to protect citizens against violent crime. *In Carmichele v Minister of Safety and Security* the court recognised the existence of such a duty on the police in accordance to the courts power to develop the common law according to the norms, values and rights enshrined in the Constitution where C was assaulted by the man who had previous conviction of violence and was out on bail awaiting trial for charges of rape and attempted murder. C claim damages from the state in the sense that the police and the prosecution had negligently failed to protect her.

Question 2

X, while travelling on the highway miscalculates the distance between himself and the car in front of him, driven by Y. When Y suddenly slows down, X bumps into the back of Y's car, causing Y's car to skid off the road and come to a halt just partly over the solid middle-line. X stops and gets out of his car to enquire whether Y had incurred any injuries. Y says that he is fine. X apologises and requests Y to move over to the left hand side of the road so that he (X) can give him (Y) his



insurance details. At that moment, a truck (driven by Z) arrives at a very high speed from the front and collides with Y's exposed vehicle. Y is killed instantly.

- (a) Name the three tests or theories to determine legal causation.**
(3)

Novus actus interveineins

Adequate causation

Individualisation

NB: KNOW THE DEFINITION OF THE THEORIES AND APPLICABLE CASE LAW.

- (i) Discuss whether X's conduct can be viewed as the cause of Y's death. In your answer you must discuss the various theories of causation and refer to relevant case law.**

In order to find that there is causal link between X's act and the prohibited condition that is Y's death, X's act must be both factual cause and legal cause of Y's death. X's act is the factual cause of Y's death if it is *a conditio sine qua non* for Y's death. An act is *a conditio sine qua non* for a situation if the act cannot be thought away without the situation disappearing at the same time. In the given sets of facts, it is explicitly that if X had not bump into the back of the Y's car, Z would not have collided with Y's car which caused him(Y) to die instantaneously therefore X's act is regarded as condition sine qua non for Y's death in the sense that in Daniels it was held that factual causation is determined on the basis of the condition sine qua non theory.

The mere fact that an act is regarded as *conditio sine qua non* and the factual cause of a certain result is not sufficient. The act must also be a legal cause of the certain result. There are three theories



to determine causation namely individualisation theory, the theory of adequate causation and *novus actus intervenien* theory.

According to the individualisation theory one must look, among all the factors that qualify as factual cause of the prohibited situation (Y's death), for that one which is the most operative and regard it as the legal cause. In *Daniels*, the court rejected to accept that an act can be the legal cause of a situation only if it can be described as a proximate.

The theory of adequate causation provides that an act is the legal cause of a situation, if to human experience, in the normal course of events the act has the tendency to bring about that kind of situation. *Novus actus interveniens* is used to indicate between X's act and the ultimate death of Y, it happens that another event which is unexpected breaks the chain of causation takes place, X's act cannot be regarded as the cause of Y's death. According to this approach, X's act is regarded as the cause of Y's death if it is the factual cause of the death and there is no *novus actus interveniens* between X's act and Y's death.

In *Mokgethi*, the court started that it is wrong to regard one theory as the correct theory when dealing with legal causation, the courts should have to policy consideration of what is reasonable and fair.

According to the given set of facts, X's act is regarded as the factual cause of Y's death but no there is no legal causation in the sense that of an unexpected event that is Z colliding with Y's car causing his death(Y).The theory of *novus actus interveniens* applies to the set of facts hence it breaks the chain of causation between X's act and Y' death.

Conclusively, X act did not cause the death of Y but may be convicted of reckless driving. It the Z's act which caused the death of Y.

b) X shoots Y twice in the chest and the abdomen with the intention to kill him. Y is admitted to a state hospital, where he receives inadequate and negligent care. He dies two weeks later



as a result of septicaemia, caused by the gunshot wounds. X is charged with murder. X's lawyer argues that the negligence and inadequate care in the hospital constituted a *novus actus interveniens* which broke the chain of causation between X's original act and the ultimate result.

You are the state prosecutor. Discuss the arguments that you will present to prove that X's act was the cause of Y's death.

The state will have to prove that X's act was the factual, as well as the legal, cause of Y's death. Factual causation is easy to prove: had X not shot Y in the chest and stomach, he would not have been admitted to hospital and would not have contracted septicaemia. Therefore, X's act is a *conditio sine qua non* of Y's death. X's act can also be viewed as the legal cause of Y's death.

The relevant authority is *S v Tembani* 2. In this case, the Supreme Court of Appeal held that the deliberate infliction of an intrinsically dangerous wound from which the victim is likely to die without medical intervention must generally lead to liability for an ensuing death, even if the medical treatment given later is substandard or negligent. However, the negligent medical treatment may be viewed as a *novus actus interveniens* if, at the time of the treatment, the victim had recovered to such an extent that the original injury no longer posed a danger to his life. In terms of the stated facts, this is not the position. Therefore, X's act can be viewed as the factual, as well as the legal, cause of Y's death.



- (c) X is suffering from severe clinical depression and has no hope for the future. He decides to take his own life. Because he does not want his family to suffer as a result of his death he reasons that it would be better to kill them as well. Despite the depression, X has the ability to understand that what he plans to do is unlawful. However, his condition has deteriorated to such an extent that he has become emotionally unstable. X kills all the members of his family and tries also to take his own life but he is saved in time. He is charged with murder. You are his legal representative and rely on the defence that, at the time of the killing, X had lacked criminal capacity as a result of mental illness
- (i) State the provisions of this defence as set out in section 78(1) of the Criminal Procedure Act 51 of 1977. (6)
- (ii) Who bears the onus of proof in such cases? (1)
- (iii) Explain the difference between the cognitive and the conative legs of the test for criminal capacity and indicate which one of these two capacities X had lacked. (4)

ANSWER

i) 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 ill nor 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 h act or omissions, shall not be criminally responsible for such act or omission

ii) In terms of section 78(1B) of the Criminal Procedure, the burden of proving insanity rests on the party raising the issue. This explicitly means that if the accused raises the defence of mental illness the burden of proving that she suffered from mental illness at the time of the commission of the unlawful act rests upon her. If the state (prosecution) raises the defence, the burden of proof rests on the state.

iii) Cognitive leg refers to where a person can appreciate the wrongfulness
_____ of



his/ her act whereas conative leg is where a person acts in accordance with the appreciation of wrongfulness. In the set of fact X lacked the conative leg of capacity.

Explain the meaning of the “principle of contemporaneity” in culpability. Refer also to case law.

In order for a crime to be committed, there must have been culpability on the part of X at the very moment when the unlawful act was committed. There is no crime if culpability only existed prior to the commission of the unlawful act, but not at the moment the act was committed, or it came into being only after the commission of the unlawful act.

S v Masilela

Principles dealt with:

Principle of contemporaneity Facts

:

X and another strangled Y and, believing him dead, set his house on fire. Turns out that Y was not dead and that the fire killed him. X and another were then convicted of murder. They appealed on the basis that they lacked culpability: the act of burning down the house killed Y, but they had no intention of killing Y with this act.

Outcome:

Judge turned down appeal: found that strangling and burning were part of the same act.

(d) Name the requirements of the act of defence in private defence. (4)

(1) Requirements of attack The attack must be unlawful must be against interests which ought to be protected must be threatening but not yet completed



(2) Requirements of defence The defensive action must be directed against the attacker must be necessary must stand in a reasonable relationship to the attack must be taken while the defender is aware that he is acting in private defence

(c) NOTE THE CHOICE THAT YOU HAVE IN THIS QUESTION

In *Goliath* 1972 (3) SA 1 (A) the court held that necessity can be raised as a defence on a charge of murdering an innocent person in a case of extreme compulsion. Discuss the question whether a person may kill another person in a situation of necessity?

In the case of *Goliath* the court held that necessity may be raised as a defence against a charge of murdering an innocent person in a case of extreme compulsion. The facts of this case were the following, X was ordered by Z to hold onto Y so that Z might stab and kill Y. X was unwilling but Z threatened to kill him if he refused to help him. X then helped Z to kill Y. X was subsequently charged with murder. The court found that it had been impossible for X to run away from Z since Z would then have killed him. The only way that he could save his life was to do what he was asked. X was acquitted of murder on the basis that he had acted in a situation of necessity. However, the court held that such a finding would not be made easily and would require the closest scrutiny of the facts. Rumpff JA made the following important points:

One should never demand of an accused more than is reasonable and that considering everyone's inclination to self-preservation, an ordinary person regards his life as being more important than that of another, to demand of a person that he should sacrifice himself



therefore amounts to demanding of him than is demanded of the average person.

OR

Y is an air hostess who does not fasten her safety belt when the plane lands. X threatens to have her fired unless she consents in writing that he may punish her. Y is scared that she will lose her job and consents in writing to X punishing her. X smacks her three times on her hands with a stick and is then charged with assault. Discuss whether X has a defence with reference to the requirements for a valid plea of consent.

The requirements for a valid plea of consent are , the consent must be given voluntarily ,given by a person who has certain minimum mental abilities, based upon knowledge of the true and materials facts , given either expressly or tacitly, given before the commission of the act and given by the complainant herself.

The relevant case is **McCoy's** case which the facts are the same as those in the scenario in question. In this case, the court rejected that the air hostess had consented to chastisement on the following grounds that the consent was not voluntary in the sense that she consent out fear and in order to avoid being dismissed. **See McCoy case**

In the set of facts, the consent was not given voluntarily, without any coercion. The consent was obtained as a result of fear/intimidation in the sense that she was afraid to be dismissed if she was not chastised.

Conclusively, X defence will not be successful because all the requirements of a valid plea of consent have not be complied with.



Upon experiencing pain in her womb, Y goes to a gynaecologist for a check-up. Z, her male gynaecologist, decides that Y should undergo an operation. Y agrees to this procedure. She is taken to the operating room and is administered a strong sedative as a preliminary procedure before receiving anaesthetics. Z leaves the operating room to address another emergency. Moments later, X, a male nurse, enters the operating room. He inserts his finger into Y's vagina with the intention to derive sexual gratification. Y, believing that this conduct amounts merely to a preparatory medical procedure, does not object. X is caught by another nurse and is later dismissed from his employment. A horrified Y lays a rape charge against X.

In his defence, X argues that there was consent because Y did not object. Consider only the merits of this defence. (It is not in dispute that the act performed by X amounts to an “act of sexual penetration” as required by the new statutory crime of rape). (8)

For a valid consent which X relies on must comply with the following requirements. It must be

- (1) given voluntarily
- (2) given by a person who has certain minimum mental abilities
- (3) based upon knowledge of the true and material facts
- (4) given either expressly or tacitly
- (5) given before the commission of the act
- (6) given by the complainant herself

The requirement, that consent must be based upon knowledge of true and material facts is the contentious point on the facts of this case.

- For X to be successful in his defence, it must be shown that the act to which Y gave her consent is “sexual penetration”.

On the facts given, Y consented to an operation, and not to sexual penetration.

- In *Flattery* , a woman thought that X, a quack surgeon, was operating on her to cure her of her fits, whereas he was in fact having sexual intercourse with her.



In *Williams* a woman thought that X, her singing teacher, was performing a surgical operation on her to improve her breathing ability when singing, whereas he in fact had sexual intercourse with her. In both these cases X was convicted of rape, the court refusing to recognise the existence of any "consent" to intercourse.

- Therefore, on these facts, we are dealing with a mistake relating to the nature of the act (an error in negotio).
- Its effect is that the consent on which X relies is invalid because Y was not aware of the true and material facts, in particular of the nature of the act performed on her.
- Therefore, X's reliance on Y's consent will be unsuccessful because Y did not consent to sexual penetration but to an operation.

(d) Define criminal capacity.

(2)

A person is endowed with criminal capacity if he has the mental ability to appreciate the wrongfulness of his act or omission and act in accordance with such an appreciation of the wrongfulness of his act or omission.

KNOW DEFENCES EXCLUDING CRIMINAL CAPACITY

Mental illness, youth and non – pathological criminal incapacity

Question 3

- (a) For each of the following factual situations below, indicate whether a defence of mistake can be successfully raised which nullifies X's intention. Give a reason for your answer in not more than two sentences and refer to case law where applicable.**



(i) X is charged with malicious injury to property where he thinks that he is fixing his friend Y's car engine, but is actually damaging it.

Yes

(1)

(ii) X shoots at a figure which she thinks is her neighbour's annoying cat. The figure turns out to be the neighbour's dog. X is charged with malicious injury to property.

This is a case of error in objecto with affords X no defence in the sense that the type of object X had in mind still falls within the description of the object as in the definitional elements (somebody else's property)

(2)

(B) NOTE THE CHOICE YOU HAVE IN THIS QUESTION

Define the test for negligence.

A person conduct is negligent if a reasonable person in the same circumstances would have foreseen the possibility that the particular circumstance might exist or that his conduct might bring about a particular result and a reasonable person would have taken steps to guard against such a possibility and the conduct of the person differed from the conduct expected of a reasonable person.

OR

Define the test for the defence of mental illness.

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

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from mental illness or mental defect which makes him or her incapable of appreciating the wrongfulness of his or her act or omission **or** of acting in accordance with an appreciation of the wrongful of his act or omission, shall not be criminally responsible for such act or omission.

(5)

Define the following forms of intention

i) *Dolus eventualis* ii) Indirect Intention (*dolus indirectus*) iii) Direct intention (*dolus directus*)

know the definition for intention.

i) A person acts with *dolus eventualis* if the causing of the forbidden result is not main aim but (1) he subjectively foresees the possibility that, in striving towards his main aim, his conduct may cause the forbidden results (2) he reconciles himself with the possibility.

ii) A person acts with indirect intention if the causing of the forbidden result is not his main aim or goal but he realises that, in achieving his main aim, his conduct will necessarily cause the result in question.

iii) A person acts with *dolus directus* if the causing of the forbidden result is his aim or goal.

(c) X leaves a party in a very drunken state. He gets into his car and drives home. On his way he is stopped by the police who requests him to get out of his car. X knows that he is very drunk and is afraid that he will be arrested and charged with drunken driving. He drives away as fast as he can. The police officer pursues him in the van but because X has a fast car, he manages to get away from the police officer. In his rush to get away he suddenly turns left into an alley and collides into a



pedestrian who was crossing the street. The pedestrian is injured and X is charged with attempted murder. In his defence, X argues that although he still had criminal capacity , he was so drunk that he had lacked the intention to kill. Consider these facts and answer the following questions.

- (i) If the court accepts X' defence and he is acquitted of attempted murder, can he nevertheless be convicted of the lesser crime of assault? In your answer you must discuss the relevant case law.**

In *Chretien* the court was faced with the similar facts that is X coming from a party and under the influence of alcohol had driven into a group of people. One person died and five were injured. X was charged with murder and attempted murder. In regard to the charge of murder X was acquitted and convicted of culpable homicide. His defence that he lacked intent because he expected the people to move out of the way was accepted.

The court held that X could also not be found guilty of attempted murder in respect of the people injured in the sense that he lacked the intention to kill. The question was whether he could be convicted of the lesser crime of assault in respect of the people injured. The trial court and the Appeal Court held that X could not be convicted of assault .The reason for the ruling was that the court rejected the “specific intent” theory applied in English law. In terms of this theory a person who as a result of intoxication did not foresee a consequence , cannot be convicted of a crime requiring specific intent but may be convicted of a lesser offence requiring ordinary intent. For instance , a person who did not have the intent to kill can nevertheless be convicted of the lesser offence of assault ,because this theory was rejected in *Chretien* , X in the given



set of facts , can also not be convicted of the lesser offence of assault on the charge of attempted murder.

- (ii) Can X be convicted of contravention of section 1 of the 1988 if the court finds that he had criminal capacity but lacked only intention. In your answer you must discuss the relevant case law.**

No in the sense that , according to the given facts , X had criminal capacity at the of his act and the provision only relates to situations where X, as a result of intoxication lacked criminal capacity.

The elements of the section 1 crime are the following :

The consumption of any substance which impaired his faculties to such an extent that he lacked criminal capacity, while knowing beforehand that the substance has such an effect and

X committed an act prohibited under penalty (a crime) while he lacked criminal capacity and was found to be not criminally liable for the crime charged on this basis. He can then be found guilty of section 1.

X and Z visit a bar and indulge in a number of drinks. Upon leaving the bar, pedestrian Y accidentally bumps against X, who at that stage was swaying on the sidewalk. A fight ensues. X holds onto Y from behind, and Z kills Y by stabbing her with a knife. X and Z are charged with the murder of the court finds that X and Z have caused Y's death unlawfully, but that X was so intoxicated during the fight, that she was unable to distinguish between right and wrong. The court further finds that at the time of the assault upon Y, Z was able to act and that she had criminal capacity, but that she was so intoxicated that she lacked the intention to murder Y.



X and Z rely on the defence of intoxication. Discuss whether X and Z ought to succeed with this defence.

The rules presently applicable to the defence of voluntary intoxication are those enunciated in Chretien as well as the provisions of section 1 of Act 1 of 1988. The facts in Chretien's case were briefly as follows: In this case X, who was intoxicated, drove his motor vehicle into a group of people standing in the street. As a result, one person died and five people were injured. He was charged with murder in respect of the person who died and attempted murder in respect of the five persons injured. The court found that owing to his consumption of alcohol, X expected the people in the street to see his car approaching and move out of the way, and that therefore he had no intent to drive into them. On the charge of murder he was convicted of culpable homicide, because the intention to kill had been lacking. X could not be found guilty on any of the charges of attempted murder owing to the finding that he did not have any intent to kill. The question arose, however, whether X should not have been found guilty of common assault on the charges of attempted murder. The trial court acquitted him on these charges. The state appealed to the Appellate Division on the ground that the trial court had interpreted the law incorrectly and that it should have found the accused guilty of assault. The Appeal Court found that the trial court's decision was correct.

The four basic principles enunciated by the Appellate Division are: (1) If a person is so drunk that her muscular movements are involuntary, there can be no question of an act, and although the state in which she finds herself can be attributed to an excessive intake of alcohol, she cannot be found guilty of a crime as a result of such muscular movements.

(2) In exceptional cases a person can, as a result of the excessive intake of alcohol, completely lack criminal capacity and as a result not be criminally liable at all. This will be the case if she is "so intoxicated that she is not aware that what she is doing is unlawful, or that her inhibitions have substantially fallen apart".



(3) The "specific intent theory" in connection with intoxication is unacceptable and must be rejected. It is precisely because of the rejection of this theory that in this case X could not even be convicted of common assault. The intoxication can therefore even exclude X's intention to commit the less serious crime, namely assault.

(4) The Chief Justice went out of his way to emphasise that a court must not lightly infer that owing to intoxication, X acted involuntarily or lacked criminal capacity or the required intention since this would discredit the administration of justice.

The conclusion reached in Chretien was criticised, because the effect of the decision was that a person who was responsible for her own intoxication is treated more leniently than a sober person who had committed the same act. As a result of this criticism section 1 of Act 1 of 1988 was enacted.

This section provides briefly as follows:

If X commits an act which would otherwise have amounted to the commission of a crime (ie which, "viewed from the outside", without taking into account X's subjective mental predisposition, would have amounted to the commission of a crime) but the evidence brings to light that at the time of the performance of the act she was in fact so intoxicated that she lacked criminal capacity, the court would, in terms of the Chretien judgment, first have to find her not guilty of the crime with which she has been charged (ie the crime she would have committed had she not been drunk), but must then nevertheless convict her of the statutory crime created in section 1(1), that is the crime known as "contravention of section 1(1) of Act 1 of 1988". She is in other words convicted of a crime, albeit not the same one as the one she had been initially charged with.

The section further provides that when the court has to decide what punishment to impose for the statutory crime of which she had been convicted, the court is empowered to impose the same punishment it would have imposed had she been convicted of the crime she was originally charged with. In this way she is prevented from "walking out of court" unpunished.



The application of the rules laid down in Chretien as well as in the Act on the present set of facts is as follows: The fact that X was not able to distinguish between right and wrong means that she did not have criminal capacity as a result of the intoxication. In terms of Chretien criminal incapacity, even if it was the result of intoxication, constitutes a defence. However, the effect of the provisions of section 1 of Act 1 of 1988 is that X will be convicted of the crime created by this section. Z acted with criminal capacity but did not have the intention to murder. Z accordingly cannot be convicted of murder or of a contravention of section 1 of Act 1 of 1988. She can, however, be convicted of culpable homicide, as she caused Y's death negligently. The test for negligence is objective, that is: How the effect of intoxication on liability would the reasonable person in Z's position have acted? Such a person would have foreseen that her act would result in death. Although it was not mentioned specifically in the question that X and Z started to drink voluntarily, and although it is not mentioned expressly that they had not started drinking with the exclusive aim of gaining courage, it can nevertheless be assumed that they started drinking voluntarily and that this was not a case of *actio libera in causa*. These two situations are so extraordinary that, unless specifically mentioned in the question, it can be assumed that the intoxication referred to in the question does not refer to these situations

QUESTION 4

a) Discuss one of the following cases in detail

- i) Tembani 2007 (1) SACR 355 (SCA) ii)
Eadie 2002 (1) SACR 663 (SCA)**

TEMBANI CASE

FACTS

X shot Y with the intention to kill. Y was admitted to the hospital and the medical personnel cleaned the wounds and gave her antibiotics

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but the following day X, had abdominal pains and she was insufficiently attended to in the ward and died 14 days later of septicaemia, resulting from the gunshot wound to the chest and the abdomen. X was convicted of murder and appealed against his conviction.

THE LEGAL QUESTION: Can negligent medical care be regarded as a new intervening cause that exempts the original assailant from liability? If so in which circumstances?

THE JUDGEMENT AND REASONS FOR FINDING:

The deliberate infliction by X of an intrinsically dangerous wound from which the victim was likely to die without medical intervention must generally lead to liability by X for the ensuing death of Y.

It is irrelevant whether the wound was readily treatable and even whether the medical treatment given later was substandard or negligent. X would still be liable for Y's death. The only exception would be if Y had recovered to such an extent at the time of the negligent treatment that the original injury no longer posed danger to his life. This approach is justified on the following two policy considerations:

- (i) An assailant who deliberately inflicted such a fatal wound consciously embraced the risk that death might ensue and is morally blameworthy for the consequences while the wound remains fatal.
- (ii) In a country where medical resources are sparse and badly distributed it would be wrong to suppose reliable and effective medical attention and to impose liability on this supposition. In South Africa improper medical treatment is not abnormal or extraordinary

Therefore, negligent medical treatment is not regarded as a *novus actus interveniens* where the wound inflicted was still intrinsically fatal.



EADIE CASE**FACTS**

LEGAL QUESTION: Is there a defence in our law of non-pathological criminal capacity caused by provocation and stress?

REASONS FOR JUDGMENT:

There is no difference between non-pathological criminal capacity owing to provocation and emotional stress and sane automatism. More specifically there is no difference between the conative leg for the test for criminal capacity in such cases (i.e. the ability to act in accordance with an appreciation of the wrongfulness of conduct) and the requirement that applies to the conduct element of liability, namely that X,s bodily movement must be voluntary. If X alleges that, as a result of provocation, his psyche had disintergrated to such an extent that he could no longer control himself, it amounts to an allegation that he could no longer control his bodily movements and that the therefore acted involuntarily. It is therefore the same as the defence of sane automatism. The court did not explicitly say that the defence of non-pathological criminal capacity does not exist anymore but declared that if, as a result of provocation an accused person relies on this defence, his defence should be treated as one of sane automatism. The court emphasised that the defence of sane automatism does not succeed easily.

QUESTION 5

X a widow lives all on her own on a farm. A number of farmers in the vicinity have been victims of burglaries and even serious crimes of violence such as assault and murder. X locks herself in her bedroom every night and keeps a pistol under footsteps in her house. She hears somebody walking down the passage. The next person then tries to break down the door with the some

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instrument. X is petrified and before calling the police fires a number of shots through the door. One of these shots hits the intruder Y and died instantly. It turns out that Y was a well-known convicted criminal who had escaped from a nearby prison. X is charged with murder .In her defence she argues that she was acting in a situation of private defence in order to protect her life and physical integrity.

- i) Suppose X is acquitted of murder on the grounds that she had acted in a situation of private defence. Can she still be convicted of culpable homicide? Give a reason for your answer .**

No in the sense that private defence is a complete defence which means that X cannot be convicted of any crime since her conduct was not unlawful.

- ii) If there was no intruder and that the person who had tried to enter X's bedroom was her son Z who was worried about his old mother and tried to break down the door because he under the impression that she had died in her bed. If charged with murder, is there any defence that X can rely upon? Name this defence and refer to relevant case law in which such defence was raised.**

The defence that X can rely upon is known as putative private defence. This clearly means that X was under the impression that her act was lawful, that she had made a mistake regarding the unlawfulness of her act and subjectively thought that she was acting in private defence. In *S v De Oliveira* putative private defence was raised. X had a noise at the gate and fired six shots in that direction. One person was killed and one injured. These were friends of his employee who tried to enter the premises. His defence was that he believed that his life and property were in danger. There, X relied on the defence of



putative private defence but was convicted of murder. The trial court found that X had intention on his part in form of *dolus eventualis* .

On appeal the court pointed out that the unlawfulness of his conduct was not at issue, only whether he had the intention to kill. The conviction was upheld on appeal. The court reasoned that because the accused did not testify, it had to focus on such other evidence as reflected on his state of mind and inferential reasoning. Although the reasonable man would have known that the area was dangerous and that robberies occurred, there was no indication that any attack had commenced or was imminent. In these circumstances, the court inferred that it was inconceivable that a reasonable person could have believed that he was entitled to fire at or in the direction of persons outside in defence of his life or property **(and that without even a warning shot)**.

In the absence of the accused's oral testimony, the court found that the only reasonable inference to be drawn from the *prima facie* evidence of the particular circumstances was that he could not have entertained an honest belief that he was entitled to act in private defence, but that he by necessary inference did foresee the possibility of death ensuing to the persons outside and reconciled himself to that possibility.

QUESTION 6

X and Z are both taxi drivers. They work in the same areas, and use the same route. X knows that Z's taxi is always filled to capacity. X feels that he has the sole right to that particular route, and decides to shoot and kill Z. One day, having stopped next to each other at a red traffic light, X is overcome with anger. The windows of Z's taxi are tinted, so that it is impossible to see whether there are any passengers inside. X fires a shot in the direction of the driver's seat of Z's taxi, hoping to kill Z. The bullet misses Z, but hits Y, who is sitting next to Z. Y is very badly



wounded, but miraculously survives. Discuss X's criminal liability.

This is a situation of *aberratio ictus*. *Aberratio ictus* is not a form of mistake as X aims correctly at his target, but misses due to a lack of skill. X can be convicted of malicious injury to property because he shattered the taxi window. He had intention in the form of *dolus indirectus* (indirect intention) in respect of the window.

X can be convicted of the attempted murder of Z, since he had *dolus directus* (direct intention) to kill Z, even though he did not kill him. X can also be convicted of attempted murder in respect of Y. X knew that Z's taxi is always filled to capacity. The court will in all probability come to the conclusion that X had foreseen the possibility that he could miss Z and kill a passenger sitting next to the driver, and that he had reconciled himself to such a possibility. Such a conclusion would be fair, since X had fired a shot at the driver's seat despite the tinted windows, knowing full well that Z's taxi was usually filled to capacity. Note that if Y had died, X would be guilty of murder if the court found that he had foreseen the possibility that he could hit Y and that Y could die as a result of it, and had reconciled himself to such a possibility. Since X had *dolus eventualis* in respect of Y's death and since Y did not die, he can be convicted of attempted murder only in respect of Y.

QUESTION 7

X, P and Q decide to rob money from Y, a shopkeeper. X tells P and Q that he knows that Y does not possess a firearm. He also tells them that, although none of them has a firearm, he (X) has a toy pistol with which he plans to threaten Y. They then decide that the three of them will go to the shop and that X will point the toy pistol at Y and threaten to shoot him if he does not hand over the money in the cash register. Before going to the shop, P sees X concealing a sharp knife under his clothes. He foresees



that X may use the knife in the shop and that somebody may get killed as a result. However, he does not say anything to X about the knife and voluntarily goes with the others to the shop. Q does not know that X has a knife concealed under his clothes. X, P and Q go into the shop. X points the toy pistol at Y and threatens to shoot him if he refuses to hand over the money. A scuffle ensues, and during the commotion P and Q remove the money from the cash register. In the course of the scuffle between X and Y, X draws the knife from under his clothes and stabs Y in the chest while P shouts: "Kill him!" X, P and Q run away with the money. Y dies as a result of the stab wound. Discuss the question whether X, P and Q may all be convicted of murder in terms of the doctrine of common purpose.

NB KNOW THE DEFINITION OF THE DOCTRINE OF COMMON PURPOSE AND APPLY IT TO THE SET OF FACTS.

X complies with all the requirements for murder. His act was the direct cause of Y's death. X's act was unlawful. He cannot rely on any ground of justification. Because X stabbed Y in the chest, the reasonable inference can be drawn that X had intention to kill Y.

P and Q can only be found guilty of murder if the state can prove that they shared a common purpose with X to kill Y. **The mere fact that they all had the intention to rob Y is not necessarily sufficient to warrant the inference that all of them also had the common purpose to kill.** A common purpose is established by proving a previous agreement to kill or active association with the execution of the common purpose (*Safatsa; Mgedezi*). **In terms of the doctrine of common purpose X's act of killing Y is then imputed to the other accused.** The intention or purpose which triggers the operation of common purpose is not confined to *dolus directus*, but includes *dolus eventualis*. It may be argued that P had performed an act of association with the execution of the common purpose by shouting "Kill him!" and he had intention to kill in the form *dolus eventualis*. He knew that X had a knife with him and foresaw the possibility that



X might use the knife in the shop and that somebody might get killed as a result and reconciled himself with this possibility (*Mambo*).

P and X had a common purpose and in terms of the operation of the doctrine of common purpose X's act of killing Y is **imputed** to P. P can be found guilty of murder in terms of the doctrine of common purpose.

Q was unaware that X had a knife with him. Neither can the inference be drawn that he foresaw that their conduct in the shop might result in Y's death and that he reconciled himself to this possibility. Although he took part in the robbery, the inference cannot be drawn that he had the intention to kill Y and he cannot, together with X, be held responsible for Y's death by virtue of the doctrine of common purpose (*Mambo*)





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