

Tutorial Letter 102/2/2016

Criminal Law: General Principles

CRW2601

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 November 2016. 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 November 2015 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 2016 examination paper

The format of the examination paper for the October/November 2016 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 at "Previous exam papers" under the course code CRW2601 at the link *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.

CRW2601

(480516) October/November 2015

GENERAL PRINCIPLES OF CRIMINAL LAW

Duration : 2 Hours

100 Marks

EXAMINERS :

FIRST :

PROF L JORDAAN
PROF C VAN DER BIJL
DR N MOLLEMA

MR RD RAMOSA

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 eight (8) pages plus the instruction for the 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 PART A AND PART B. PART A CONSISTS OF TEN (10) MULTIPLE CHOICE QUESTIONS. YOU MUST FILL IN THE ANSWERS TO THESE QUESTIONS ON THE MARK-READING SHEET. THE CORRECT ANSWER FOR EACH OF THESE QUESTIONS 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. 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 (3) statements (marked (a)–(c)). Some of the statements are correct and some are incorrect. You must decide which statement/s is/are correct. The three (3) statements are followed by five (5) allegations (marked (1)–(5)). Each of them alleges that a certain statement or combination of statements is correct or not correct. You must decide which allegation correctly reflects the conclusions to which you have come.

Question 1

- (a) The four requirements of criminal liability are the following: conduct (act or omission); compliance with the definitional elements of the offence; unlawfulness and culpability.
 - (b) In terms of the *ius acceptum* principle a court may only find a person guilty of an offence if the kind of act performed is recognized by the law as a crime.
 - (c) The *ius praeivium* principle requires that a court may only find a person guilty of an offence if the kind of act performed was recognized as a crime at the time of its commission.
- (1) All the statements are correct.
 - (2) Only statement (a) is correct.
 - (3) Only statements (a) and (c) are correct.
 - (4) Only statement (c) is correct.
 - (5) Only statement (b) is correct.

Question 2

- (a) A South African court is allowed to create new crimes if the court is of the opinion that the particular conduct is against the good morals of society.
 - (b) A provision which reads as follows: "Nobody may criticise the government and anybody who contravenes this provision is guilty of a crime" complies with the *ius certum* rule of the principle of legality.
 - (c) In *Masiya v Director of Public Prosecutions 2007 (2) SACR 435 (CC)* the Constitutional Court extended the definition of the crime of rape in order to give effect to the rights of women to dignity, privacy and sexual autonomy.
- (1) Only statement (b) is correct.
 - (2) Only statements (b) and (c) are correct.
 - (3) All these statements are correct.
 - (4) Only statement (a) is correct.
 - (5) Only statement (c) is correct.

Question 3

- (a) The rules of the principle of legality need not be complied with in the context of punishment.
 - (b) X performs a voluntary act if he can subject his bodily movements to his will or intellect.
 - (c) If a person acted negligently, it means that he did not perform a voluntary act.
- (1) None of the statements is correct.
 - (2) Only statements (a) and (b) are correct.
 - (3) Only statement (a) is correct.
 - (4) Only statements (a) and (c) are correct.
 - (5) Only statement (b) is correct.

Question 4

- (a) If Y tells X that he will kill him unless he (X) kills Z and as a result of this threat X kills Z, then he (X) acts in a situation of absolute force.
 - (b) Sane automatism means that a person did not act voluntarily as a result of mental illness.
 - (c) In *Henry* 1999 (1) SACR 13 (SCA) the accused, who had shot his wife in a fit of rage relied upon the defence of insane automatism.
- (1) Only statement (b) is correct.
 - (2) Only statements (b) and (c) are correct.
 - (3) Only statements (a) and (b) are correct.
 - (4) None of the statements is correct.
 - (5) Only statement (a) is correct.

Question 5

- (a) An omission is punishable only if there is a legal duty upon X to act positively.
 - (b) The defence of impossibility may be raised if it is objectively impossible for X to comply with a criminal norm which places a positive duty upon him to act.
 - (c) Causation is a requirement in all materially-defined crimes.
- (1) Only statement (b) is correct.
 - (2) Only statements (b) and (c) are correct.
 - (3) Only statements (a) and (b) are correct.
 - (4) All the statements are correct.
 - (5) Only statement (c) is correct.

Question 6

- (a) Teachers may not impose corporal punishment on children.
 - (b) If X sees that Y is attacked by Z and helps to defend Y, he (X) cannot rely on private defence since he does not defend his own life or property.
 - (c) Killing an innocent person in a situation of necessity can never be a defence but only a mitigating circumstance.
- (1) Only statement (a) is correct.
 - (2) Only statement (b) is correct.
 - (3) None of the statements is correct.
 - (4) Only statements (b) and (c) are correct.
 - (5) Only statements (a) and (b) are correct.

Question 7

- (a) In a crime requiring intention, the intention requirement is satisfied irrespective of whether X had intention in the form of direct intention, indirect intention or *dolus eventualis*.
 - (b) If X wants to kill his enemy Z, but realizes that in order to kill Z, he will necessarily have to break into his (Z's) house, he has indirect intention with regard to the crime of housebreaking with the intent to commit a crime.
 - (c) In order to have intention, X's knowledge must refer to all the elements of the offence, excluding the element of culpability.
- (1) None of the statements is correct.
 - (2) Only statements (b) and (c) are correct.
 - (3) Only statement (c) is correct.
 - (4) Only statements (a) and (c) are correct.
 - (5) All these statements are correct.

Question 8

- (a) If X fires a shot at an object believing it to be an animal and it turns out to be a human being, X can, on a charge of murder, rely on the defence of mistake.
 - (b) Whether X had intention to commit an offence necessarily involves an investigation into his motive for committing the offence.
 - (c) *Aberratio ictus* is a form of mistake which affords X a defence provided it was a material mistake.
- (1) All the statements are correct.
 - (2) Only statements (a) and (b) are correct.
 - (3) Only statement (a) is correct.
 - (4) Only statement (b) is correct.
 - (5) Only statements (a) and (c) are correct.

Question 9

- (a) If X fires a shot at his enemy, Y, and the bullet hits a wall, ricochets and fatally injures Z who suddenly appears behind Y, the transferred-culpability approach requires that X be convicted of murder in respect of Z.
 - (b) An accessory after the fact is regarded as a participant in a crime.
 - (c) A "joiner in" is a person who joins in an attack at a stage when the victim had already died as a result of the wounds inflicted by other persons who acted in a common purpose.
- (1) All the statements are correct.
 - (2) Only statements (a) and (b) are correct.
 - (3) Only statement (a) is correct.
 - (4) Only statements (a) and (c) are correct.
 - (5) Only statement (b) is correct.

Question 10

- (a) An interrupted attempt at a crime can still amount to a punishable attempt provided X's actions qualify as acts of execution.
 - (b) If X thinks that it is a crime to commit adultery and then commits adultery, he may be convicted of an attempt to commit the impossible.
 - (c) If X fires a shot at Y while he (Y) is driving a vehicle with bullet-proof windows and Y is not injured, X may be convicted of attempted murder provided the state can prove that X had the intention to kill Y.
- (1) None of these statements is correct.
 - (2) Only statements (a) and (c) are correct.
 - (3) Only statement (c) is correct.
 - (4) Only statements (b) and (c) are correct.
 - (5) Only statement (b) is correct.

Sub-total: [30]

PART B

THIS PART CONSISTS OF THREE (3) QUESTIONS, NUMBERED 1, 2 AND 3. YOU MUST ANSWER ALL THREE (3) QUESTIONS (WITH THEIR SUBDIVISIONS). NOTE THAT SOME OF THE QUESTIONS CONTAIN A CHOICE. SUBSTANTIATE YOUR ANSWERS AND REFER TO DECIDED CASES WHERE RELEVANT. IN DETERMINING THE LENGTH OF YOUR ANSWERS YOU SHOULD BE GUIDED BY THE MARKS ALLOCATED TO EACH QUESTION.

Question 1

- (a) Y, a 22-year-old woman is obese and very keen to lose weight. She has tried all kinds of diets but in vain. She sees an advertisement placed in a magazine by a hypnotist, X, who claims that his clients lose weight as a result of his hypnosis. Y makes an appointment with X and agrees to hypnosis. While Y is under hypnosis, X has sex with Y. Y lays a charge of rape against X. X relies on the defence of consent. He argues that since Y consented to treatment through hypnosis to lose weight, she implicitly consented to *any* treatment that would cure her of obesity, including sexual intercourse.
 - (i) Name the requirements for successful reliance on the defence of consent. (6)
 - (ii) Indicate by a "yes" or "no" whether X can succeed with the defence and give reasons for your answer. (2)
- (b) NOTE THE CHOICE THAT YOU HAVE IN THIS QUESTION.

For successful reliance on the ground of justification known as private defence, it is required, amongst other things that the defensive action must stand in a reasonable relationship to the attack.

- (i) The Supreme Court of Appeal in *Steyn* 2010 1 SACR 411 (SCA) 417 identified certain factors as relevant in determining whether this requirement is complied with. However, the court also stated that the list is not exhaustive and that each case should be determined in the light of its own circumstances. Name four of the factors identified by the court. (4)
- (ii) Discuss the decision in *Steyn* 2010 1 SACR 411 (SCA) with reference to the facts; the finding of the court and the reasons for the finding. (6)

OR

Discuss the ground of justification known as “obedience to orders”. (10)

- (c) Merely name seven (7) specific instances in which a legal duty to act positively has been recognised by our courts. (7)
[25]

Question 2

- (a) X is a drug dealer and supplies drugs to Y. Y does not pay him and X decides to take revenge. He approaches Z, who is known as a so-called “contract killer” and makes a deal with him (Z) to kill Y. The exact execution of the killing is not discussed. Z agrees, and fires a shot at Y while he (Y) is driving his car. Y, who is shot in the neck, loses control over the car and collides into an oncoming car, killing the driver of that car, A, instantly. Y is taken to hospital by ambulance and treated for his injury. He is dismissed from hospital after two months, having recovered from the injury. However, he is paralysed and unable to return to work. His doctor tells him (Y) that there is a possibility that he may develop bed sores if he does not change his position every four hours. He is also advised to visit the doctor immediately if he should develop bed sores. Y does not listen to his doctor and develops bed sores from which he eventually dies. Both X and Z are charged with murder in respect of A and Y.
- (i) Indicate whether both X and Z can be classified as direct perpetrators in relation to Y’s death. Give a reason for your answer. (2)
- (ii) Can the conduct of both X and Z be regarded as the cause of Y’s death? Discuss with reference to the tests for factual and legal causation. Refer also to relevant case law. (8)
- (iii) Assume that the court finds that Z’s conduct of firing a shot at Y while he was driving a car was also the cause of A’s death. Can it be argued that Z should be convicted of murder in respect of A because he had intention in the form of *dolus eventualis*? In your answer you must give a definition of *dolus eventualis*. (4)
- (b) Explain briefly with reference to an example, what you understand by a mistake with regard to the presence of a ground of justification. Also state in one sentence which requirement of criminal liability is excluded if the defence is raised successfully. (3)
- (c) X1, X2 and X3 are members of a criminal gang. Their main activity is to manufacture drugs in the house of X1. Y, the girlfriend of X3, knows about this. One day while having a fight with X3 she (Y) threatens X3 to report their criminal activities to the police. X3 tells X1 and X2 about Y’s threat. They all decide to kill her. Their plan is that X3 will take Y for a late-evening walk in a deserted street; that X1 and X2 will wait for them there and then attack and kill Y by stabbing her with knives. Everything goes according to plan and Y is killed by X1 and X2. Answer the following questions.
- (i) Define the doctrine of common purpose. (2)
- (ii) Discuss whether X1, X2 and X3 may all be convicted of murder in terms of this doctrine. (6)
[25]

Question 3

(a) X is a taxi-driver. He drives too fast in an urban area, loses control over his taxi and kills a pedestrian, Y, who was crossing the road. Y is killed on impact. X is charged with culpable homicide. Consider whether X may be convicted of this offence. In your answer you must define the test for negligence. (6)

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

Discuss ONE of the following cases:

- (i) *Eadie* 2002 1 SACR 663 (SCA)
- (ii) *Thebus* 2003 2 SACR 319 (CC) (6)

(c) Fill in the missing words or phrases next to the corresponding question in your answer book.

- (i) If X is charged with murder and the court find that X lacked criminal capacity as a result of intoxication at the time of the commission of the act which caused Y's death, X cannot be convicted of murder or culpable homicide but may be convicted of (1)
- (ii) If X is charged of murder and the court finds that although he was intoxicated at the time of causing Y's death, X had criminal capacity but lacked intention, he may nevertheless be convicted of (1)
- (iii) An accomplice is a person who the commission of a crime committed by someone else. (1)
- (iv) The concept of criminal capacity comprises two psychological components: firstly, X's ability to of his act or omission, and secondly, his ability to of his act or omission. (2)
- (v) Intention, in whatever form, consists of two elements, namely a cognitive and a conative element. The cognitive element refers to X's, while the conative element refers to his (2)
- (vi) Whether *error in objecto* excludes intention and is, therefore, a defence depends upon the of the particular crime. (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

PART A (MULTIPLE CHOICE QUESTIONS)

QUESTION 1

- (a) This statement is correct. See SG 1.5.2 and 1.5.3.
- (b) This statement is correct. See SG 2.4.
- (c) This statement is correct. See SG 2.5.

Therefore, option 1 is correct because all these statements are correct.

QUESTION 2

- (a) This statement is incorrect. See SG 2.4.1 and the case of *M 1915 CPD 334* in which it was decided that our courts are not the guardians of good morals.
- (b) This statement is incorrect. The statement is much too vague and therefore does not comply with the *ius certum* rule of the principle of legality. See SG 2.6.
- (c) This statement is correct. See SG 2.7 and *Case Book 3-15*.

Therefore, option 5 is correct because only statement (c) is correct.

QUESTION 3

- (a) This statement is incorrect. See SG 2.8.
- (b) This statement is correct. See SG 3.3.4.
- (c) This statement is incorrect. Negligence only comes into the picture once the state has proved that a person had performed a voluntary act unlawfully. Negligence is one of the forms of culpability required for a few crimes for example, culpable homicide. As indicated in statement (b), a voluntary act means that X was capable of subjecting his bodily movements to his will. A negligent act means that X, who had performed a voluntary act unlawfully, is blamed for his conduct because a reasonable person in the same position would have acted differently than X. See SG 3.3.4 and 11.3.

Therefore, option 5 is correct because only statement (b) is correct.

QUESTION 4

- (a) This statement is incorrect. In such circumstances X acted in a state of relative force and not absolute force. In situations of absolute force X cannot subject his bodily movements to his will. X therefore acts involuntarily. However, in a situation of relative force, X still performs a voluntary act but, for example, chooses to obey an instruction in order to avoid another negative consequence for instance, his own death (see *Goliath* 1972 (3) SA 1 (A) discussed in 6.2.5). See also SG 3.3.4.2 and the examples provided there to illustrate the difference between the defences of absolute force on the one hand (involuntary conduct) and relative force on the other hand.
- (b) This statement is incorrect. **Insane automatism** means that a person acted involuntarily as a result of mental illness. See SG 3.3.4.2 ii.
- (c) This statement is incorrect. The accused relied on the defence of sane automatism. See *Case Book* 24-28.

Therefore, option 4 is correct because none of these statements is correct.

QUESTION 5

- (a) This statement is correct. See SG 3.4.2.
- (b) This statement is correct. See SG 3.4.2.
- (c) This statement is correct. See SG 4.3.1.

Therefore, option 4 is correct because all these statements are correct.

QUESTION 6

- (a) This statement is correct. See SG 6.5.2.
- (b) This statement is incorrect. In *Patel* 1959 (3) SA 121 (A) the court held that X may also act in private defence to protect a third person (Z). See SG 5.3.2 and *Case Book* 65-68.
- (c) This statement is incorrect. In exceptional circumstances killing an innocent person in a situation of necessity may be a defence. See *Goliath* 1972 (3) SA 1 (A) as discussed in SG 6.2.5 and *Case Book* 90-98.

Therefore, option 1 is correct because only statement (a) is correct.

QUESTION 7

- (a) This statement is correct. See SG 9.4.
- (b) This statement is correct. See SG 9.4.2.
- (c) This statement is correct. See SG 9.7.

Therefore, option 5 is correct because all these statements are correct.

QUESTION 8

- (a) This statement is correct. X had made a material mistake since his mistake related to an element of the offence. He did not intend to kill **another human being** which is a requirement for the crime of murder. See SG 10.3.
- (b) This statement is incorrect. The motive of a person is irrelevant in determining whether he had intention. See SG 9.10 for an explanation of the difference between motive and intention.
- (c) This statement is incorrect. *Aberratio ictus* means the going astray or missing of the blow. It is not a form of mistake since X had pictured in his mind what the target is, but as a result of some other factor the target was missed and the blow or shot hit something or someone else. See SG 10.5.1.

Therefore, option **3** is correct because only statement (a) is correct.

QUESTION 9

- (a) This statement is correct. See SG 10.5.2.
- (b) This statement is incorrect. An accessory after the fact only comes into the picture after the crime has already been completed. Because an accessory after the fact does not further the commission of the crime but is nevertheless involved in the crime, he is classified as a non-participant. See SG 14.2.
- (c) This statement is incorrect. A “joiner in” is a person who joins in an attack at a stage when the victim has already been mortally wounded but is **still alive**. See SG 4.3.5.

Therefore, option **3** is correct because only statement (a) is correct.

QUESTION 10

- (a) This statement is correct. See SG 16.2.5.
- (b) This statement is incorrect. See *Davies* 1956 (3) SA 52 (A) in SG 16.2.6.2 and 16.2.6.3 and *Case Book* 229-233 where it is stated that an attempt to commit a putative or non-existing crime is not punishable.
- (c) This statement is correct. See *Ngcamu* 2011 SACR 1 (SCA) as discussed in SG 16.2.6.2.

Therefore, option **2** is correct because only statements (a) and (c) are correct.

PART B**QUESTION 1**

- (a)(i) See SG 6.3.4.
The requirements for valid consent are the following:
- Consent must be given **voluntarily**
 - by a person with certain **mental abilities**
 - **based upon knowledge of the true and material facts**
 - given either **expressly or tacitly**
 - **before** the commission of the act
 - **given by the complainant her- or himself**
- (ii) X **cannot** succeed with the defence because she did not give consent **based upon knowledge of the true and material facts tacitly or expressly**.

(b) **Option 1**
(i) SG 5.3.3

The factors, of which only four have to be provided, are the following:

- **the relationship** between the parties
- **the gender or sex** of the parties, their respective **physical strengths and ages**
- **the location** of the incident
- **the nature of the weapon** used in the attack
- **the nature, seriousness and perseverance of the attack**
- **the nature and severity of any injury** likely to be sustained in the attack
- **the nature of the means used to offer defence**
- **the nature and extent of harm that could be caused by the defensive act.**

(ii) SG 5.3.3

First the **facts** have to be set out briefly (see page 75 of SG).

Legal question: Was there a reasonable relationship between the defensive act and the attack so that the appellant can rely on private defence?

Finding: The defence of private defence was upheld because the court found that the appellant had acted **reasonably** in the circumstances.

Reasons for finding:

- There must be a **reasonable relationship between the attack and the defensive action** but strict proportionality is **not** required – the question is whether the appellant had acted **reasonably**.
- The appellant had acted **reasonably** in view of the particular circumstances.
- The court **could not expect of her to have turned her back on the assailant and to gamble with her own life.**
- The appellant was entitled, **in her own house**, to leave her bedroom and to go to the kitchen to get something to eat.
- Her **life was in danger** and she was entitled to use deadly force in order to protect herself.

Option 2

See *Criminal Law* 134-136. (Note that this topic is discussed only in the textbook).

There are three approaches with regard to the question whether obedience to orders is a defence. The first is that the subordinate has a duty of blind obedience to the superior's order which means that he or she will always be able to rely on such a ground of justification. This approach is not followed in SA law.

The second approach is that obedience to an unlawful order can never be viewed as a ground of justification. This approach is also not followed in SA law.

The third approach is that one should adopt a middle course between the other two extreme approaches in order to satisfy the demands of morality while at the same time acknowledging the need for discipline in the various armed forces.

This middle course was first adopted in the case of **Smith** where the court held that a soldier is compelled to obey an order unless the order is **manifestly unlawful**. This third approach was adopted in the Constitution of the Republic of South Africa, 1996 (s199(6)) which now provides that "**no member of any security service may obey a manifestly illegal order**".

The leading case in this regard is *Mostert* 2006 (1) SACR 560 (N) (see *Case Book* 102-109). The facts of this case were the following: A traffic officer charged with assault relied on the defence. The court held that an act performed by a subordinate on the instruction of a superior is a recognized defence. This defence is not limited to soldiers but may also be raised by traffic officers.

The general requirements for the defence are the following:

- The order must emanate from a person **lawfully placed** in authority over X.
- X must have been under a **duty** to obey the order.
- The order must not be **manifestly unlawful**.
- X must have done **no more harm than is necessary** to carry out the order.

(c) SG 3.4.1.2.

A legal duty may arise from any of the following instances:

- a statute
- the common law
- an agreement
- acceptance of responsibility for the control of a dangerous or potentially-dangerous object
- where a person stands in a protective relationship towards another
- from a previous positive act
- if a person is an incumbent of a certain office, or
- an order of court.

QUESTION 2

(a)(i) SG 14.3.2.

No, Z is a direct perpetrator and X is an indirect perpetrator. The reason is that a direct perpetrator is somebody who commits the crime with his or her own hands whereas an indirect perpetrator commits a crime through the instrumentality of someone else.

(ii) SG 4.3.3.

X and Z's acts are both the **factual causes** of Y's death. The acts of both are each *conditiones sine qua non* of the result. If X did not hire Z to kill Y, Y would not have died; and if Z did not fire a shot at Y he would also not have died.

But the state must also prove **legal causation**. Legal causation is determined by considering **policy considerations**: would it be **fair and reasonable** to regard both X's and Z's acts as the cause of Y's death? In order to determine this, the courts make use of certain tests:

- The **individualisation test** which focuses on the most **operative or proximate** cause. In the set of facts Y's act of not moving sufficiently in order to prevent bedsores was the **most proximate cause** of his death but the test was rejected in *Daniels* as an exclusive criterion to determine legal causation. So, other tests should also be considered.
- The test of **adequate causation**. In terms of this test the question is whether according to human experience the acts of both X and Z, in the normal course of events, have the tendency to bring about the death of another person. The answer to this question is **yes**. The acts of both X and Z comply with this test – judging by human experience hiring somebody to kill another person, and firing a shot at another person, does have the tendency in the normal course of events to lead to the death of another person.

- The test of ***novus actus interveniens***. In terms of this test the question is whether there was an **abnormal, independent act** that broke the chain of causation. Z's act does not constitute such abnormal, independent act since he was used by X to commit the crime. Also Y's own failure to move his body in order to prevent bed sores from developing does not qualify as a true *novus actus interveniens* since it is not an **independent occurrence**; it followed from the acts of X and Z.
- But, it could nevertheless be argued in terms of ***Mokgethi*** that it would **not be fair and reasonable** to regard the acts of both X and Z as the legal cause of Y's death since the result (death of Y) is **too remote** from their acts. In other words, that there is **not a sufficiently close link** between their acts and the resultant death of Y. Y's own negligence was the cause of his death. If this reasoning is accepted, X and Z can only be convicted of attempted murder. However students could also have argued differently and marks were awarded depending on the merits of the argument.

(iii) SG 9.4.3 and SG 9.6

Dolus eventualis means that Z had **subjectively foreseen the possibility** that his conduct may cause the forbidden result and that he had **reconciled** himself to such possibility. It can be argued that Z did foresee the possibility that by firing a shot at Y and hitting him, Y will lose control over the vehicle which may result in the death of another person. In the absence of direct evidence, such an inference can be drawn from the circumstances. However, the court may not apply an objective test by considering what the reasonable person would have foreseen in the circumstances, but try to place itself in the position of the accused at the time in order to ascertain what his real state of his mind was. See SG 9.6.

(b) SG 10.6

This is a situation where X **thinks** that his act is justified in terms of a ground of justification, but in actual fact, he is making a mistake for example, where X thinks that a burglar enters his house and then fires a shot at the burglar – thinking he is acting in self-defence whereas, in reality, the “burglar” was his wife entering the house. The requirement of liability that is excluded is **culpability in the form of intention**.

(c) SG 14.3.4

If two or more people having a common purpose to commit a crime, act together in order to achieve that purpose, the acts of each of them in the execution of such a purpose are imputed to the others.

The requirements are the following:

A **prior conspiracy to murder** or **active association** with the execution of the common purpose.

It could be argued that X1, X2 and X3 all had a prior agreement (conspiracy) to kill Y, because they agreed to the execution of a prior plan to do so. The acts of X1 and X2 will be imputed upon X3 to satisfy the requirements of unlawful conduct. Furthermore, they each had direct intention (*dolus directus*) in relation to the murder of Y.

Alternatively, in terms the requirement of active association, it could be argued that

- They were all **present** at the scene of the crime.
- They were each **aware of the assault on Y**.
- **Each of them intended to make common cause with the others**.
- Each of them performed an **act of association with the conduct of the others**.
- Each of them intended to kill the victim.

Cases: *Mgedezi*; *Safatsa*

X1, X2 and X3 may all be convicted of murder on the basis of a prior agreement or active association with the execution of the common purpose.

QUESTION 3

(a) SG 11.3

A person's conduct is negligent if:

- (1) a **reasonable person** in the same circumstances would have **foreseen the possibility that**
 - (a) the **particular circumstance** might exist or
 - (b) his conduct might bring about the **particular result** ;
- (2) a reasonable person would have **taken steps to guard against such possibility**, and
- (3) the conduct of the person whose negligence has to be determined **differed from the conduct expected of the reasonable person**.

X may be convicted of culpable homicide. He performed an act **negligently** which caused Y's death.

(b)(i) *Eadie* SG 7.4.3 and *Case Book* 122.

Students first had to give a brief summary of the **facts**.

Legal question: Is there an independent defence of non-pathological criminal incapacity caused by provocation and/or stress in our law?

Finding: X could not rely on such defence.

Reasons for judgment:

- There is no difference in such instances between non-pathological criminal incapacity in such instances and sane automatism
- There is no difference between the **conative** leg for the test for criminal capacity in such cases (the ability to act in accordance with appreciation of wrongfulness of conduct) and the requirement of the conduct element that bodily movements must be voluntary.
- If X alleges that as a result of provocation, his psyche had disintegrated to such an extent that he could no longer control himself, it amounts to an allegation that he could no longer control his bodily movements and that he therefore acted involuntarily.
- It is therefore the same as the defence of sane automatism.
- **Important:** Court did not explicitly say that the defence of NPCI 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**.
- Court emphasized that this defence does not succeed easily.

(ii) *Thebus* SG 14.3.4.6 and *Case Book* 200.

Facts: The accused were protesting drug dealers. A shoot-out occurred between them and the drug dealers and in the cross-fire, a young child was killed and two other wounded. The state could not prove who had fired the shot that killed the child and injured the others but the court held that the accused were part of the group that fired shots and they were convicted of murder and attempted murder on the basis of the doctrine of common purpose. Liability on the basis of active association in a common purpose was challenged in the Constitutional Court on the grounds that it infringed the rights to dignity; freedom and security; and the rights of an accused person to a fair trial.

Finding: The court rejected this argument and declared liability on this basis justifiable and therefore constitutional.

Reasons:

- The doctrine serves a vital purpose in our society because the object of the doctrine is to **control crime committed in the course of joint enterprises**.
- In murder, it is **difficult to prove causation** and insisting on a causal relationship would make prosecution of collective criminal enterprises ineffectual.
- **Effective prosecution is a pressing social need**.
- The doctrine sets a standard of criminal liability and defines minimum elements necessary for a conviction. Therefore, the **culpability norm passes constitutional muster** and the **deprivation of freedom** is permissible.
- The doctrine does not amount to **arbitrary deprivation of freedom**. Group organised misdeeds strike more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals.
- If the doctrine was not applied, actual perpetrators of a crime and their accomplices will be **beyond the reach of our criminal justice system**.
- The doctrine does **not infringe the presumption of innocence since there is no reverse onus on the accused and therefore does allow for the presumption of guilt**.

(c) The following words or phrases had to be filled in:

- (i) Section 1 of the Criminal Law Amendment Act 1 of 1988
- (ii) culpable homicide
- (iii) furthers
- (iv) appreciate the wrongfulness of his conduct and act in accordance with an appreciation of the wrongfulness of his conduct .
- (v) knowledge and will
- (vi) definitional elements

4 New development in criminal law

In the Study Guide, under 6.3.2(2) it is stated that “there are crimes in respect of which consent by the injured party is never recognised as a defence. The best-known example is murder”. In the pre-constitutional era, voluntary active euthanasia (or assisted suicide) has been regarded as unlawful conduct. See *S v Hartmann* 1975 (3) SA 532 (C) and *Ex parte Minister van Justisie: In re S v Grotjohn* 1970 (2) SA 355 (A). In line with these decisions Snyman *Criminal Law 6ed* (2014) at 124 also states: “There are crimes in respect of which consent by the injured party is never recognised as a defence. The best-known example is murder. Mercy killing (euthanasia) at the request of the suffering party is unlawful”.

We alert you to a new judgment on this topic: *Stransham-Ford v Minister of Justice and Correctional Services; The Minister of Health; The Health Professional Council of South Africa and The National Director of Public Prosecutions* (North Gauteng High Court) Case Number 27401/15.

In this case, a terminally-ill person with lung cancer applied to the court that he be assisted by a medical doctor to end his life in a dignified manner. The court granted his application and also held that the **absolute prohibition on voluntary active euthanasia or assisted suicide violates fundamental constitutional rights of the person, amongst others, the right to dignity. The court accordingly developed the common law in this regard to bring it in line with constitutional values. The respondents in the Stransham-Ford case have appealed to the Supreme Court of Appeal against the decision and until the SCA has deliberated on the issue, there is uncertainty in our law in this regard. We will keep you updated in a further tutorial letter on the decision of the SCA.**

5 Amendments to the Study Guide

Kindly note that in Study Unit 12.9 of your Study Guide on the section dealing with provocation where it states that you must study the effects of provocation – the page numbers in the textbook need to be corrected. The effects of provocation are found on pp 230-235 of Snyman’s textbook.

You may also delete the entire sentence of the third bullet point in your Study Guide on p. 185 that starts: “It may reduce murder to culpable homicide on the basis that, as a result of intoxication, X lacked the intention to kill, but was nevertheless negligent.”

6 Group discussions

Please take note that NO group discussion classes will be offered in 2016.

7 Number of tutorial letters

You will receive a total of **FOUR** (4) tutorial letters this semester. You received the first tutorial 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 will only receive an additional tutorial letter in the event that there are significant developments in the law relating to this module.

Please note that you can also access these tutorial letters electronically on *myUNISA* (<http://my.unisa.ac.za>) under the course code, **CRW2601** at the link "Official Study Material".

We wish you success with your studies!

Regards

Prof N Mollema
Prof L Jordaan
Mr RD Ramosa
Prof C van der Bijl

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