

NOTES:

examination should use study guide as primary source - except in respect of topics which are not discussed in the study guide & only in prescribed work

Concentrate on remembering names of most important leading cases - Underline names of cases when referring to them in examinations

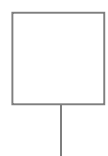
If fail to remember name of important case in examination - can simply state: "It has been decided"/"According to a decision"

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

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

The only difference between these two crimes is that - intention is required for one***negligence is required for the other.

Supra means "above" and *infra* means "below".



STUDY UNIT 1 Crimes against the state

Crimes divided into broad categories according to the object which is protected by the legal norm reflected in the definition of the crime.

Specific crimes four broad categories - crimes against the state and the administration of justice, crimes against the community, crimes against the person and crimes against property

1.1 CRIMES AGAINST THE STATE

- NB common law crimes - high treason and sedition (troublemaking)
- NB statutory - terrorism in terms of the *Protection of Constitutional Democracy Against Terrorist and Related Activities Act* 33 of 2004 – into operation 2005
- Terrorism & public violence - two offences occurring fairly regularly in practice

1.2 TERRORISM

Definition

- The Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 - broad definition of “terrorist activities”
- Main “terrorist activities” prohibited in section 1:
 - (a) **Any act** committed in/outside the Republic which
 - (i) **involves the use of violence** by any means/method
 - (ii) **involves the release into the environment of/distributing/exposing public to any dangerous/harmful substance/organism**; any toxic chemical/microbial/other biological agent/toxin;
 - (iii) **endangers the life/violates the physical integrity of any person/causes serious bodily injury/the death of any person/a number of persons**;
 - (iv) **causes serious risk to the health/safety of the public/any segment of the public**;
 - (v) **causes the destruction/substantial damage to any property**, natural resource/the environmental heritage whether private/public
 - (vi) **is designed/calculated to cause serious interference with/serious disruption of an essential service**, facility/system, including an electronic system; telecommunication system; banking/financial service/financial system; an essential infrastructure facility/any essential emergency services, such as police, medical/civil defence services;
 - (vii) **causes any major economic loss/extensive destabilisation of an economic system of a country**;
 - or**
 - (viii) **creates a serious public emergency situation/a general insurrection** in the Republic.
- Provided that the **harm** contemplated in (i) to (vii) above suffered **in/outside the Republic & “activity”** referred to in par (ii)–(viii) can be committed by **any means or method**
- Above acts performed with **defined culpability**
- Culpability accompanying any abovementioned acts is:
 - (a) An act which is **intended/by its nature & context, can reasonably be regarded as being intended, directly or indirectly, to**
 - (i) **threaten unity and territorial integrity** of Republic;
 - (ii) **intimidate/cause feelings of insecurity** within public/segment of public with regard to security, incl. economic security/**to cause feelings of terror, fear/panic in a civilian population**; or
 - (iii) **unduly compel, intimidate, force, coerce, induce /cause a person, a government, public/segment of public/domestic/international organization/intergovernmental organisation to do/to abstain/refrain from doing any act/to adopt/abandon a particular standpoint/to act in accordance with certain principles.**
 - Irrelevant whether public/person, government, body/organization/institution in (ii) & (iii) – inside/outside the Republic
 - **Further required:**

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



Note: Not memorise above definition - read carefully & able to identify set of facts in assignment/examination amounting to act of terrorism

1.2.3 ELEMENTS OF THE OFFENCE

- (1) An act
- (2) Unlawfulness
- (3) A **specific intention**

1.2.4 OBJECT/INTEREST PROTECTED

- Interests protected - safety & security of Republic, its institutions & people.

1.2.5 THE ACT

Conduct prohibited comprises:

- use of violence;
- release of toxic/harmful substances;
- conduct that endangers life/physical integrity of any person;
- causing serious risk to health & safety of public;
- causing damage to property;
- an act *calculated to cause* serious interference with services;
- causing destabilisation of economy & creation of public emergency/insurgency(riot)

1.2.6 UNLAWFULNESS

- Act performed under **compulsion** - justify performance.
- Provided in Act - act part of protest, dissent (rebellion)/industrial action - not intend harm contemplated in par (a)(i)–(iv) of definition - excluded from prohibition.
- In accordance with right to freedom of speech & right to strike (ss 10 and 23(2)(c) of Constitution).

1.2.7 INTENTION

- Specific intention required for the crime
- The intention has **two** components.
- Required that the act performed with intention or
- Act by nature & context reasonably regarded as being intended - directly/indirectly to –

FIRST COMPONENT

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

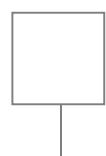
SECOND COMPONENT

Act be committed – directly/indirectly, in whole/in part, for the **purpose of the advancement of an individual/collective political, religious, ideological/philosophical motive, objective, cause/undertaking.**

Dolus eventualis - sufficient form of intention

“can reasonably be regarded as being intended” - import objective test - determine intention submitted these words refer to recognised practice of courts drawing inference of subjective intention from perpetrator’s outward conduct at time of commission of act & circumstances surrounding it - cases where no direct evidence of intention.

Other offences created in the Act:



- **Harbouring & concealment** of person committing acts of terrorism (s 11)
- **Failure to report** presence of persons suspected of intending to commit/having committed an offence (s 12)
- Offences relating to “**hoaxes**”(jokes/pranks) (s 13)

1.3 PUBLIC VIOLENCE

1.3.1 DEFINITION

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

1.3.2 ELEMENTS OF THE CRIME

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

1.3.3 THE OBJECT/INTEREST PROTECTED

- The interest protected in case of public violence - **public peace and order** (*Salie* 1938).
- Measure of overlapping may occur between this interest & interests protected by other crimes against the state
- separation not always possible:
- crime committed by number of people also impair/challenges auth of state – treason committed if
- acts accompanied by hostile intent as in high treason – high treason committed
- Section 17 of Constitution: everyone “ has the right, peacefully & unarmed, to assemble, demonstrate, picket & present petitions” – demonstration not peacefully as in S17 – guilty of public violence
- Public violence overlap with assault, malicious injury to property, arson & robbery – atleast 1 of these committed in commission of public violence – due to dangerous dimensions X charged not with 1 of these crimes but public violence

1.3.4 JOINT ACTION

- Not committed by individual acting alone - public peace & order disturbed by **number of persons** acting in concert.
- Impossible to specify number of persons required - depend on circumstances of the case, taking into account factors such as seriousness of threat to peace and order.
- *Terblanche* 1938 - 5 persons considered sufficient
- Other cases - was not serious as a result of limited scope & duration - 6, 8 and 10 persons considered insufficient for the commission of the crime (*Mcunu*, *Salie supra*, *Nxumalo* respectively).
- Participants in disturbance of peace **must act in concert - with a common purpose** (*Wilkins; Ndaba; Kashion; S v Whitehead*).
- Established X knowingly participated - prosecution need not prove precisely what acts were committed by which of the participants – application of doctrine of common purpose applies (*Wilkins supra; Lekoatla; Mashotonga*).
- *S v Le Roux* - Supreme Court of Appeal - in absence of proof of prior agreement/plan to commit transgressions - state must prove **active association with the acts of public violence of each individual accused** - proof of presence at scene of the crime not sufficient.
- Committed in **public place & on private property** (*Cele; Segopotsi*).
- Participants need not be armed.

- **Act accompanied by violence/threat of violence** (*Wilkens supra; Cele supra*).
- Committed even if no actual disturbance of public peace & order/no actual infringement of rights of another.
- Sufficient if action **aimed** at disturbance of peace/infringement of the rights of another (*Mvelase; Segopotsi supra*).
- No premeditation/ preconceived plan required
- Common purpose evolve spontaneously/tacitly (wordlessly)

1.3.5 EXAMPLES OF CONDUCT (Behaviour amounting to public violence)

- faction fights (*Ngubane*); *Xybele*)
- joint resistance to police action by a group of persons – if police acting lawfully (*Samaai; Segopotsi supra*)
- rioting (*Dingiswayo*)
- violent coercion of other workers by a group of strikers (*Cele supra*)
- disrupting & taking over meeting by a gang (*Claassens*)

1.3.6 SERIOUS PROPORTIONS

- Only committed if (in addition to the other requirements) the action of the group assumes **serious proportions**. Reasons for the existence - safety of persons not involved in disturbance is threatened - only be case if disturbance serious (*Tshayitsheni*) - requirement vague - essential to distinguish public violence from rowdy behaviour & family feuds (no threat to public peace & order)
- Whether/not classified as serious depend on various factors/combination of them:

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

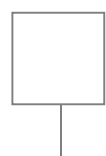
- Decided in **Mei** 1982 - mere placing of stones in a road at a spot where a group of people assemble - not amount to violence - therefore not public violence - fact that individual threw a stone at a police vehicle - not sufficient to convict of public violence.

1.3.7 UNLAWFULNESS

- Both actions of group of persons/crowd & actions of individual accused must be unlawful
- Participation of individual may be justified on ground of compulsion (*Samuel*) - while behaviour of group may be justified by private defence (*Mathlala*).

1.3.8 INTENT

- Intent is form of culpability required.
- Individual accused must been aware of nature & purpose of actions of the group - participation in activities of the group must have been intentional (*Aaron*).
- Common purpose of disturbing public peace & order must exist between members of group



STUDY UNIT 2

Crimes against the administration of justice

2.1 PERJURY AT COMMON LAW

2.1.1 DEFINITION

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

2.1.2 ELEMENTS OF THE CRIME

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

2.1.3 FALSE DECLARATION

Requirement:

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

2.1.4 UNDER OATH/IN FORM SUBSTITUTED FOR OATH

- Must be **under oath/in** one of the forms allowed to be substituted for an oath - **affirmation to tell the truth/ warning** by presiding official to witness to tell the truth.
- Three ways in which, before commencing his evidence, a witness can undertake to speak the truth:
 - (1) most common taking an **oath** (swearing) - will speak the truth (s162 of the Criminal Procedure Act).
 - (2) may declare that he **solemnly confirms** his evidence will be the truth (s163 of the Criminal Procedure Act) - intended witness objects to taking the oath (religious grounds)/indicates he does not regard the oath as binding on his conscience.
 - (3) Young children merely **warned** ("friendly little sermon" by magistrate/judge) to speak the truth (s164 of the Criminal Procedure Act).
Witness who intentionally makes a false statement commits perjury even if his statement not under oath - merely made after an affirmation (s163) - to speak the truth/after being warned (s164) to speak the truth.
only a declaration under oath/its equivalent can form the basis of perjury - crime not committed in course of argument to the court by a legal representative
Person who administers the oath/equivalent (eg magistrate) must have the authority to do so (*McKay; Hossain*)

2.1.5 IN COURSE OF LEGAL PROCEEDING

- crime only committed if false declaration is made in the course of a legal proceeding - Extrajudicial, false sworn statements - also punishable - not as common law perjury (punishable in terms of s 9 of Act 16 of 1963).
- (extrajudicial statement - statement made outside the court concerning a matter has nothing to do with the dispute decided in court.)
- legal proceeding can be a criminal/civil case.
- False sworn statements made before administrative tribunal - not crime - such a declaration at a meeting of creditors in terms of the Insolvency Act cannot amount to perjury (*Carse*).
- **Beukman** - decided perjury can be committed by making a declaration outside the court/before a case has begun, provided that:
 - declaration permissible as evidence at the subsequent trial
 - maker of declaration foresees possibility that it may be used subsequently in a trial
 - According to this test - perjury can be committed by making a false affidavit for purposes of a civil motion proceeding (mostly in writing) (*Du Toit*) - but not by making declaration in which a false criminal charge is lodged/making extrajudicial sworn statements to police in the course of their investigation into a crime (*Beukman supra*).
 - *Beukman* case - decided - extrajudicial statements made to police official not normally used in subsequent trial as evidence & consequently not declarations made in the course of legal proceeding.
 - fact that false declaration is made in the course of a case - judgment later set aside on appeal - no defence.
 - position same warrant for the arrest of the accused was invalid (*Vallabh*).

2.1.6 UNLAWFULNESS

- shortly after making false statement (in cross-examination) - witness acknowledges statement was false & then tells the truth - no excuse (*Baxter*).
- fact that false declaration was made by X in vain attempt to raise a defence - no excuse - happens daily in our courts - practical reasons - not every accused whose evidence is rejected as false is charged with perjury (*Malianga*).

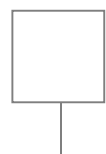
2.1.7 INTENT

X must know/at least foresee possibility that his declaration is false – negligence/carelessness not sufficient (*Mokwena* 1984).

2.2 STATUTORY PERJURY

Crime set out in section 319(3) of Act 56 of 1955.

- **the contents of this section:**
 - To overcome this & other difficulties (proving statement was made in course of legal proceedings) a new statutory offence was created – often referred to as “statutory perjury”
 - Originally contained in section 131(3) of Act 31 of 1917 (old Criminal Procedure Act) – re-enacted in section 319(3) of the Criminal Procedure Act 56 of 1955
 - 1977 act was replaced new Criminal Procedure Act 51 of 1977 – section 319(3) not revoked & replaced in new Act – therefore still applies
 - Section 319(3): “If a person has made any statement on oath whether orally/in writing & he therefore on another oath makes another statement as aforesaid, which is in conflict with such first-mentioned statement, he shall be guilty of an offence & may, on a charge alleging that he made the two conflicting statements, and upon proof of those two statements and without proof as to which of the said statements is false, be convicted of such offence & punished with the penalties prescribed by law for the crime of perjury, unless it is proved that when he made each statement he believed it to be true”



- **reasons why the legislature created this crime**

- Often difficult to prove that a person had committed common-law perjury.
- Result - many who ought to be punished for making false declarations under oath escaped convictions of perjury
- Fact that someone made 2 conflicting statements under 2 diff oaths did not mean that he had committed perjury
- Could only be convicted if state proved one of statements was false & that he knew it was false (that he intended to lie) – difficult to prove
- X might have changed his mind/could alledge as a defence
- When investigating commission of a crime police take affidavit from those who can throw light on the alleged commission of the crime
- Embarrassing to prosecutor if person who made such affidavit subsequently gives evidence in court & in course of evidence makes statement that are in conflict with the contents of his previous affidavit to police

- **what the State has to prove when prosecuting a person for contravention of this subsection**

State need only proof

(a) X on 2 diff occasions made 2 statements under oath &

(b) that the statements conflict with each other

Regarding (a) :

Immaterial whether 1/both are in writing/oral

Does not matter whether either was made in course of legal proceedings

- Section also contravened if 1/both of statements made after affirmation/declaration to speak the truth
- Section 2 of Interpretation Act 33 of 1957 provides – where word “oath” occurs in statute – includes an affirmation/ declaration to speak the truth
- 2 statements contained in 2 diff oaths – conflicting statements under same oath – not constitute the crime
- Example: After adjournment witness resumes evidence he started to give before adjournment & warned by judicial officer still under oath – not under another/different oath as contemplated by the section
- To prove witness made an extra-judicial statement under oath – state must prove the oath was administered & the statement made in accordance with the provision of Justices of the Peace and Commissioners of Oath Act 16 of 1963 and the regulations regarding the form of oath & way in which it was administered, which are promulgated from time to time in terms of section 10(b) of this Act
- Person administering the oath must have necessary auth to do so

Regarding (b):

State need not prove which statement is false

Whether/not statements do conflict – most part q of fact

Ramdas – Appellate Division held – 2 statements must not be capable of reconciliation & they must be mutually destructive

If 2nd statement consists in only a denial that first was made – not 2 conflicting statements

- **difference between common-law perjury and this crime**

(a) common-law perjury only 1 statement

- statutory perjury there are 2 statements

(b) common-law perjury can be committed in course of legal proceedings only

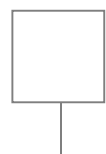
– statutory perjury neither of the statements need to be made in course of judicial proceedings (normally atleast 1 of them are)

2.3 DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

NB crime often committed in South Africa - must study discussion on own.

ELEMENTS

- (1) any **act** which
 - (2) **defeats/obstructs the course of justice**
 - (3) **in an unlawful** and
 - (4) **intentional** manner
- **the different names given to this crime**
 - Developed from Roman *lex Cornelia de falsis* – today cover wider field than original *lex*
 - Designation not always consistent in practice and described as:
 - “defeating” the course of justice
 - “obstructing” the course of justice
 - “defeating AND obstructing” the course of justice
 - “defeating OR obstructing” the course of justice
 - Depends on nature of conduct of X is alleged to have committed
 - Afrikaans expression – “dwarsboming van die geregt” sometimes used as description same meaning as “defeating the course of justice”
 - Expression “stremming van die geregtspieg” same meaning as “obstructing the course of justice”
 - Reference to *ends* of justice in description of crime to be avoided – unduly restricts the scope of the crime – crime can be committed even though justice does triumph in the end
 - **the difference between “defeating” and “obstructing” (the course of justice)**
 - “defeating” and “obstructing” – latter means something less than former
 - X found guilty on charge of defeating the ends of justice only if proved that justice has in fact been defeated
 - Case when innocent person convicted/a guilty person discharged/civil case order been made which would not have been made if wrongful conduct had not taken place
 - Difficult to prove course of justice been defeated – customary to charge conduct falling within ambit of this crime as defeating/obstructing the course of justice (attempting to do so)
 - Charges of “defeating or obstructing the course of justice” / “attempting to defeat or obstruct the course of justice” – not necessary that ultimate verdict should be one of defeating only/obstructing only/attempting only – one of a single offence – not one involving two distinct alternative offences
 - Course of justice obstructed many ways – trial delayed/postponed OR police/prosecution aut made to waste time & energy investigating wrong charge/wrong person
 - **the various and interesting ways in which this crime can be committed**
 - unlawfully inducing (attempt to induce) witness to give false evidence in court
 - to refuse to give evidence
 - give false information to police
 - abscond (as to not give evidence in court)
 - soliciting a complainant by unlawful means to withdraw a charge
 - soliciting prosecutor by unlawful means not to prosecute
 - improperly influencing party to civil case
 - improperly seeking to influence judiciary by exhorting them not to give credence to certain type of evidence contrary to their duties & unlawfully releasing a prisoner
 - also committed – prospective witness demands money as *quid pro quo* for absconding (not absconding)/giving false/true evidence
 - person tampers with documents/exhibits in a case to prevent true evidence placed before court
 - misleads police to prevent detection of crime that might otherwise be revealed



- fabrication of false evidence
 - Committed by positive act/omission
 - False denial of liability by suspect when questioned by police – not attempting to defeat/obstruct the course of justice
 - *Naidoo* – flashing lights to warn motorist of presence of speed trap – interferes with due administration of justice – commits & attempt to defeat course of justice HOWEVER
 - In *Perera* – facts materially same – person committing this act – guilty only if has reason to believe vehicle approaching him is exceeding the speed limit/driver of vehicle has intention to exceed speed limit
 - Latter should be followed – in effect nothing more than warning to others to obey the law
 - Laying false criminal charge against another – constitute the crime
 - Lying to police may amount to obstruction of administrative justice – not committed by mere refusal to answer questions put by police/refuse to co-operate with police obtaining evidence against oneself/another – most cases no legal duty on individual to assist police
- **the rule that the crime may be committed even though there is no pending case**
 - Not requirement for the crime that conduct allegedly constituting it should have been committed in relation to a specific pending case.
 - Not even necessary that court case be envisaged by the police/private litigant at time X's conduct
 - Sufficient that X subjectively foresees possibility that his conduct may in ordinary course of events lead to the case being prosecuted/at least being investigated by police
 - Must be possibility of real court case – civil/criminal ensuing – crime is not committed if X merely plays fool with police by telling them crime has been committed
 - Whereas X knows that no crime has been committed
 - Driver of vehicle involved in collision goes to police shortly after accident & falsely informs then car has been stolen to allay suspicion of himself – commits crime of attempting to defeat/obstruct the course of justice
 - must be **possibility** of real court case ensuing – example - X makes a false complaint at a police station accusing Y of having committed an offence - possibility that Y may be charged with the alleged offence and X has therefore committed the crime.
- **The meaning of the concept “course or administration of justice”.**
 - *Bazzard* – held that course/administration of justice which must be obstructed in order to constitute the crime refers to a process which is destined to eventuate in a court case between parties/between the state & its subjects
 - The mere wasting of time & energy of certain officials i.e. police/personnel of Director of Public Prosecutions' office – not constitute obstructing the course of justice
 - In *Bazzard* – X phoned police & told – kidnapped a girl & was planning to kill unless ransom paid to him. As result – police launched search & traced X – admitted he had not kidnapped anyone – had not falsely accused anybody of having committed a crime & had not put in motion any legal process – tried only to play the fool with police by reporting a non-existing/fictitious crime – court found not committed the crime – X in this case committed of fraud
 - *Bazzard* case must be distinguished from factual situation – X involved in crash with his car caused by own negligence (collided into stationary car – no passengers) – in attempt to escape consequences of deed – went to police & falsely claims car stolen (such false allegations implies another person caused accident) – such situation actual crash with damage caused – inevitable come to notice of police & real court case between two parties/between state & possible accuse destined to ensue – conduct does amount to commission of the crime (*Bazzard* – no real court case involving charge of kidnapping destined to ensue – no actual kidnapping in fact taken place)
 - Interest protected is due administration of justice by superior/inferior courts in civil/criminal judicial proceedings
 - Crime cannot be committed in respect of administrative proceedings

- requirement refers to **a process which is destined to end in a court case between parties/between the state and its subjects.**
 - Make sure that you know the facts and the judgment in ***Bazzard 1992 (1) SACR 303 (NC)***,
 - The court held that X's conduct in making a false report to the police to the effect that he had kidnapped another person was not punishable as obstruction of justice because it amounted to mere wasting of the time of police officers and therefore did not interfere with the "course or administration of justice". The facts in *Bazzard* must be distinguished from a factual situation such as the following: X, who was intoxicated while driving a motor car, collided with a child who was playing in the street. He drove away without having reported the incident to the police. Instead, he went to the police station and reported that his car had been stolen. The police investigated the matter and found out the truth. X can be convicted of the crime of obstruction of justice because the hit-and-run incident could have led to an actual court case (X could be charged with an offence for failing to report the accident).
- **the intention requirement**
 - X must subjectively foreseen possibility conduct might defeat/obstruct administrative justice
 - Aware of fact that might thwart/interfere with judicial proceedings were to take place in future/hamper/forestall investigation of an offence
 - X's conduct consists in interfering with witnesses – must be aware of fact – person approaching & influencing is in fact prospective witness
 - Conduct consist of fabricating evidence, laying false charge/telling falsehoods to witnesses with view to influence them – must know (foresee possibility) that allegations he is propounding are in fact false
 - person can be charged with attempt to commit this crime - charges of attempt are in fact more common than charges of having committed the completed crime

2.4 CONTEMPT OF COURT

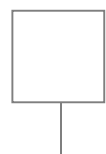
2.4.1 DEFINITION

Contempt of court consists in the unlawful and intentional

- (a) violation of the dignity, repute or authority of a judicial body or a judicial officer in his judicial capacity, or
- (b) 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

Contempt of court

- One of unusual characteristics of this crime - can be subdivided into several "subcrimes", each with requirements of its own.
- Distinction drawn between contempt *in facie curiae* (committed in court) & contempt *ex facie curiae* (committed outside court).
- One of many ways which contempt of court committed is by scandalising the court.
- Remarks amounting to fair comment on administration of justice/outcome of a case - not unlawful & not constitute contempt of court.
- Contempt of court *in facie curiae* - X behaves in such a way in court as to violate the dignity/authority of the judge/magistrate - example singing loudly in court – judge/magistrate summarily convict and punish X.
- Commentary on pending cases constitutes contempt of court - if calculated to influence outcome of case.
- General rule - culpability in form of intention required for conviction of contempt of court - following exception to this rule: newspaper editor charged with contempt of court in that his newspaper published commentary/information relating to case which is pending - not necessary to prove intention on his part; culpability in the form of negligence



2.4.2 ELEMENTS OF THE CRIME

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

2.4.3 UNUSUAL CHARACTERISTICS

Manifests the following unusual characteristics:

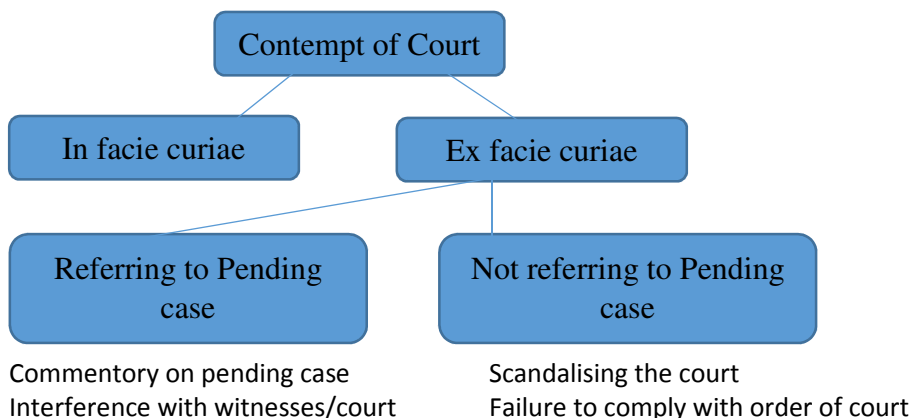
- (1) Acts by which crime is committed divided into various groups - some have very distinctive requirements
 - eg requirement that case must be *sub iudice* (ie, the legal process has not yet been completed) in the case of the publication of information - potentially prejudicial to the just trial of a case). crime therefore be subdivided to a certain extent into a no. of “subcrimes” - each has certain distinctive requirements
- (2) As rule some cases of contempt of court - not treated as criminal cases but civil cases in the civil courts. Cases where non-compliance with court order in civil cases & litigant in whose favour court has made order seeks to implement it by requesting the court to punish defaulting party for contempt of court if order not complied with
Been settled – so called cases of “civil-contemp” also constitutes as crime of contempt of court
Therefore has been held that these cases can also come before the courts as criminal cases at the same time if Director of Public Prosecutions chooses to bring case before a criminal court.
- (3) Some cases of contempt of court heard according to an unusually drastic procedure which judge/magistrate may convict & punish somebody for contempt of court committed inside the court in the presence of the judge/magistrate (contempt *in facie curiae*)

2.4.4 REASONS FOR EXISTENCE OF THE CRIME

- Difference between attack on dignity of judicial officer person capacity & attack on judicial officer on his dignity/reputation in official capacity
- Latter conduct public injury & not just private injury can amount to contempt of court
- Contempt of court - punished not to protect dignity of individual judicial officer but to protect administration of justice.
- Violation of dignity and repute of judicial officer undermines respect of the public for the court & the administration of justice – consequently - whole legal order suffer (*Tromp; Van Niekerk*).
- Court must come to proper decision without improper/extraneous influences
- Case of contempt committed by publication of information/comments on pending case reason for crime is - court should come to decision only on grounds of permissible evidence before it & ought not be influenced by disclosure of facts/comments from outside such as in press.

2.4.5 ACTS

A distinction between contempt *in facie curiae* and contempt *ex facie curiae*.



Failing to appear in court

Obstructing court officials

Simulating court processes

In facie curiae literally “in the face of the court” - contempt in this form - contempt in presence of judicial officer during a session of court.

Ex facie curiae occurs through actions/remarks out of court - take variety forms - scandalising the court by publication of allegations - objectively speaking - likely to bring judges/magistrates/administration of justice through the courts generally into contempt/unjustly to cast suspicion on administration of justice (*S v Mamabolo*)

- person falsely pretends to be officer of court - advocate, attorney/deputy sheriff (*Incorporated Law Society v Wessels*)
- someone intentionally obstructs officer of court - a messenger of court in execution of his duties (*Phelan 1877 Kotze 5*)
- someone bribes/attempts to bribe, a judicial officer, legal representative/witness (*Attorney-General v Crockett*)
- witness been summoned & deliberately fails to appear at trial (*Keyser*)

Constitutionality of punishing contempt in facie curiae:

Lavhengwa – define need in both Supreme & Magistrate Courts for power to punish contemptuous conduct summarily – prevent flow of court proceedings to be undermined

Where magistrate is both witness, prosecutor & judge – court held that magistrates power to act summarily against illegal offender in facie curiae does violate X’s right to equal protection & benefit of the law but that this violation is reasonable & justifiable in an open & democratic society in terms of limitation clause of Constitution

Court also held summary procedure – not violation of X’s right to be informed of the charge with sufficient detail to answer it – in practice X usually knows what his alleged misconduct is & because of limitation clause may be applicable in this respect

Summary procedure not infringe X’s right – presumed innocent & remain silent – no onus placed on X & limitation clause apply to any possible infringement

Summary procedure not necessarily violates X’s right to service of legal practitioner – depends on circumstances of each case whether practical & affordable for state to afford X service of such practitioner
Lavhengwa case followed in later cases

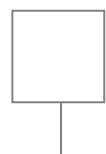
Publication of information regarding pending case

Ex facie curiae

Divided into 2 groups: acts which refer to pending cases & those who do not refer to pending cases

NB way contempt of court ex facie curiae referring to pending cases is committed by publication of information /comment about pending cases:

- committed if person publishes by writing/spoken word, information/comment about case still pending (sub iudice) – test applied previously was wide – test whether words published tended to prejudice outcome of case. Immaterial if statement complained of had reached ears of tribunal & if tribunal had in fact believed/been influenced by it
- Criticised & *Midi Television Ltd v Director of Public Prosecutions* – Supreme Court of Appeal – wide test to determine prejudice to the judiciary was unconstitutional – especially incompatible with constitutional right to free speech
Court accordingly introduced new, narrower test to determine prejudice – according to court words of commentary amount to contempt only of demonstrable relationship between publication of words & prejudice for administration of justice – must be real risk of substantial prejudice if publication takes place - narrower test welcomed more fair than previous wide test



- Existence of form of contempt of court not incompatible with provision of section 16(1) of Constitution – right to freedom of expression, including freedom of the press & other media, right to receive/impart information
Although rule infringe on right created in S16(1) – infringement reasonable & justifiable in open & democratic society as provided in limitation clause S36(1) of Constitution
“Fair trial” presuppose trial in which court decides on issues before it on basis of evidence placed before it & not on basis of statements/opinions in media
Before case has finally disposed of by courts the media ought not have right to publish information on the case which would have real influence on outcome but not produced as evidence to court hearing the case
“Trial by newspaper” is & remain real danger to fair & impartial disposal of an issue in judicial process
Present type of conduct not punishable – newspaper free to “convict” accused where court may find him not guilty
Perception raised that court’s findings wrong whereas in reality correct
- If assumes judge/magistrate capable of leaving out of consideration info published in press & in fact does so – still consideration that “justice must not only be done, but must manifestly be seen to be done”
Parties to case & outsiders – be satisfied court’s conclusions based on info laid before court in admissible way only & not upon info/comments concerning merits of issue published in media
Once media allowed to publish info & comment on pending case – will always remain suspicion in mind of public & party to case that court in coming to conclusion influenced by outside factors

Interference with witnesses/presiding officers

- X commits contempt of court if improperly influences/ attempts to influence a judge, magistrate, assessor, party to case, complainant/ accused, witness, interpreter/ legal representative in a case in decision he has to make in case, the evidence has to give/ generally way has to conduct himself during trial
- Act may take form of intimidating person concerned, bribing/ attempt to bribe, privately communicating / attempting to communicate with a judge/ magistrate with intention of influencing him to act in certain way/come to certain conclusion
- Peacefully demonstrating outside courtroom in support of certain conclusion in court case being concluded inside court – nowadays in terms of constitution 1994 not contempt of court – legitimate expression of freedom of speech

Failure to appear in Court

- Common law – commits contempt of court if summoned to attend trial as witness/accused intentionally fails to appear
- More customary to punish such conduct as contraventions of specific statutory provisions

Obstructing court officials

- Person who intentionally interfere with/hinder court officials – sheriffs/messengers of court in execution of duties – commit contempt of court – such act violate dignity & authority of the court
- Customary to punish conduct as contravention of specific statutory provisions

Simulating court processes

- Contempt of court to send letter to debtor, for purpose of obtaining payment of debt, document which is not a legal document emanating from a court of law but which is calculated to mislead the debtor into thinking it is
- Similarly contempt person to hold himself to be officer of court – attorney, advocate/sheriff – not in fact such officer

2.4.6 UNLAWFULNESS

- (1) Statements by members of certain bodies - Legislative Assembly, when present in the Assembly - **privileged** & cannot amount to contempt
- (2) NB rule that **fair comment** on outcome of case/administration of justice - not constitute contempt of court. Public debate on the administration of justice - not only permissible but also desirable in Community such as ours - to ensure that the law & administration of justice enjoy the respect of the population.

The famous words of Lord Atkin in *Armstrong v A-G of Trinidad* quoted with approval by our own courts (*Van Niekerk*): "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

Example - nothing wrong with newspaper complaining that certain sentences too light/heavy, provided that comments are made *bona fide*, in reasonable terms & in the interests of the proper administration of justice.

2.4.7 INTENT

- General - **intention** - essential element of the crime (*Van Niekerk supra*),
- Except cases - editor of newspaper charged with this crime on ground of publication in his newspaper of information concerning pending case - tends to influence outcome of case - Culpability in form of **negligence** - sufficient to establish contempt of court in such circumstances
- Remarks in newspaper article - be read in context to establish presence of intent (*Metcalf*).
- To request judicial officer, *bona fide* & in courteous language to withdraw from case - on account of personal knowledge of the event (*Luyt*) – does not constitute contempt. X's apparently offensive action attributable to forgetfulness, ignorance, absent-mindedness/negligence, intent is lacking (*De Bruyn; Nene*).

2.4.8 ADMINISTRATION OF JUSTICE BY COURTS - AOJ

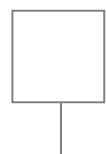
- The language complained of - directed at judicial officer in his judicial capacity/**administration of justice by the courts**.
- Criticism of performance of administrative function - actions of the police/criticism of alleged unreasonableness in Acts of parliament - not contempt of court (*Sacks; Dhlamini*).
- In *Nyikala* - X said to a magistrate: "Because I am a native, I am always considered guilty." - closer investigation his words referred to the methods of the police - found not guilty of contempt.
- Encouraging public to sign a petition for reprieve of person already been sentenced - not contempt (*Van Staden*). In *Tromp*, Court declared mere criticism of prosecution in criminal case - not contempt of court either.
- Contempt of court only committed only if conduct/words infringe upon AOJ *in or by the courts*
- Not committed if conduct/words aimed at executive branch of government/its servants unless criticism at same time imports disrespect of the courts
- Not contempt to criticize person/body for performance of purely administrative function – X's scornful words found to be in fact aimed at the police

2.4.9 SOME FORMS OF THE CRIME

1. CONTEMPT in facie curiae - "in the open court"
2. COMMENTARY ON PENDING CASES
3. SCANDALISING THE COURT
4. FAILURE TO COMPLY WITH COURT ORDER

2.4.9.1 CONTEMPT in facie curiae - "in the open court"

- shouting at witnesses during cross-examination (*Benson*)
- legal representative's conducting a case under influence of alcohol (*Duffey v Munnik*)
- continual changing of one's seat & talking loudly in court (*Lekwati*)



- grabbing & tearing court document to pieces (*Mongwe*)
 - Other hand - in *Nyalanbisa* - Court held merely falling asleep in court not necessarily amount to contempt *in facie curiae* - amounts to “a trivial breach of court etiquette”.
 - Must be intent to violate dignity of the court (*Zungu*).
 - *Khupelo* – example - X loudly sang religious song while she was leaving courtroom after conclusion of her trial - conviction for contempt of court - set aside on review - appeared she behaved in such a way merely out of joy - been acquitted not to insult the magistrate/court.
 - Cases of contempt *in facie curiae* - court has power to convict wrongdoer summarily & sentence him.
 - This power is undoubtedly necessary to place court in position to maintain its dignity - our courts frequently stressed that this drastic procedure must be applied with great circumspection (*Ashworth; Ngcemu*).
 - Judicial officer in these cases is complainant, witness & judge at same time - accused normally undefended & trial usually takes place in emotionally charged atmosphere.
 - Contempt of lesser nature best be ignored (*Mngomezulu*) - request to wrongdoer to offer apologies to the court followed by such an apology - often maintain the dignity of the court without person being sentenced for contempt (*Tobias*).
 - *Lavhenga* - Court held punishing accused for contempt of court *in facie curiae* not unconstitutional - the rules relating to form of the crime infringe upon certain rights of accused (right to a fair trial & right to legal representation) such infringement according to the Court is justified.

2.4.9.2 COMMENTARY ON PENDING CASES

a) Discussion of this form of the crime

- Committed by publishing information/commentary calculated to influence outcome of a case still *sub iudice* (the matter is still under consideration by the court).
- Press fully entitled to publish evidence delivered in course of trial (or portions thereof) - may not, while case still in progress publish information relating to the merits of case which did not form part of evidence in court.
- Journalist may not publish information/opinions concerning the case he heard outside the court during adjournment of court for tea.
- Neither may he give own opinion regarding the guilt nor otherwise of accused/draw own inferences from evidence before case concluded.
- Underlying reason for prohibiting the publication of such information - avoid so-called “trial by newspaper”.
- The judge, assessors/magistrate not be influenced by information/commentary emanating from sources outside court.
- Case is *sub iudice* from moment it commences (issue of summons/an arrest) until reached final conclusion in judicial process & includes last possible appeal.
- Test for ascertaining whether publication calculated to influence outcome of a case is extremely wide.
- Does not matter whether/not publication has ever reached ears of the court /if indeed it has – whether/not the court believes facts contained in publication/allowed itself to be influenced by them.
- Does not have to be probable that the words may influence the court (*In re Norrie v Consanie, Van Niekerk*)

b Liability of a newspaper editor

- AOJ may not be prejudiced/interfered with/else the crime of contempt of court (COC) is committed.
- Publication unlawful if real risk that prejudice will occur if publication takes place & substantial prejudice caused.
- Mere speculation is insufficient - *Midi Television (Pty) Ltd t/a E-Tv v Director of Public Prosecutions (Western Cape)* - held “the exercise of press freedom has potential to cause prejudice to AOJ in various ways”

- Prejudice caused through conducting of trials through media, prejudging issues/application of pressure on judicial officers/witnesses.
- To be determined whether risk of prejudice is such that will interfere with AOJ
- Court would have to evaluate & be satisfied that by limiting publication of information the advantage would outweigh the disadvantage
- “Extent of the limitation” imposed on right and the “purpose, importance and effect of the intrusion” need to be weighed.
- Some time - been uncertainty in our law whether intention required for a conviction where an editor of newspaper been charged with COC on ground of having published information in his newspaper concerning pending case - tends to influence the outcome of the case.
- *Harber* - Appellate Division removed uncertainty by holding - not necessary to prove intention in these cases – since - culpability may consist of either intention/negligence.
- **Editor negligent if reasonable person in his position could foresee the information which he publishes might deal with a pending case/might scandalise the court.**
- Rule that negligence may be sufficient form of culpability based on consideration - press influences public opinion to such an extent, it correspondingly shoulders a heavier responsibility than ordinary individual to control correctness of what it publishes.
- **Rule that proof of intention dispensed with & proof of negligence is sufficient - applies only if editor/proprietor of a newspaper/magazine/company which owns it - charged with the crime.**
- **Rule not apply where individual reporter charged in private capacity.**
- Culpable homicide & this form of COC - the only two exceptions to the rule that form of culpability required for all common law crimes = intention - In the case of two exceptions - negligence is required

2.4.9.3 SCANDALISING THE COURT

Note: form of contempt can be committed **without there being any pending case.**

- Crime committed by publication – writing/orally - of allegations which **objectively speaking are likely** to bring judges, magistrates/AOJ through the courts generally into contempt/unjustly cast suspicion on the AOJ
- Whether AOJ was in actual fact brought into disrepute - irrelevant.
- All required – words/conduct have **the tendency/likelihood to harm**

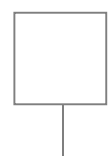
Examples of this form of the crime are:

- imputing of corrupt/dishonest motives/conduct to a judge in execution of his judicial duties
- improper arousing of suspicion regarding integrity of such AOJ

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

Scandalising the Court – WITHOUT pending cases

- Committed by publication in writing/verbally of allegations objectively speaking likely to bring judges, magistrates/administration of justice through courts generally into contempt/unjustly cast suspicion on administration of justice (AOJ)
- Whether AOJ in actual fact brought into disrepute irrelevant – all required – words/conduct have tendency/ likelihood to harm
- Does not matter if attack directed at particular judicial officer/AOJ through the courts generally into contempt/unjustly to cast suspicion on AOJ



- Whether AOJ in actual fact brought into disrepute irrelevant
- All required that the words/conduct should have tendency/likelihood to harm
- Does not matter whether attack directed at particular judicial officer/AOJ through courts generally
- To constitute contempt attack on individual judge need not be made in public
- Also committed if judge slandered in judicial capacity in private communication to him (letter) – even no 3rd party aware of communication
- Anything spoken/written imputing corruption/dishonest motives/conduct to judge in discharge of official duty/reflecting in improper/scandalous manner on AOJ falls within ambit of this form of contempt
- Been held - type of contempt also committed by exhorting judiciary to embark on a course of action is in clear conflict with his duties - asking judiciary to refuse to give credit to certain class of evidence irrespective of its intrinsic merits
- Courts emphasise – every citizen & news medium (newspaper) – at liberty to discuss proceedings in court/ general AOJ by courts freely & openly
- Such discussions/debates – safeguards public's respect for & confidence in courts
- Criticism/ debate – must be conducted in fair & moderate manner & right to free discussion not be abused – unbridled vituperative utterances vilifying judiciary/ridiculing tem
- Honest & temperate expression of dissenting opinion regarding perennial topic of inequality of sentences – not constitute contempt of court

Punishing scandalizing the court is constitutional – judgement in Mamabolo

- In *Mamabolo* Constitutional Court held – punishment of scandalizing the court as form of contempt is constitutional
- Judgement in *Mamabolo* – judiciary has to have trust of public – cannot function properly
- Therefore special safeguard to protect judiciary against vilification
- What are protected – not private interest of members of court such as indiv feelings, self-esteem, reputation/status – but public interest, public confidence in AOJ
- Freedom to debate merits of judgements/affairs of judiciary in general – not mean attacks (however scurrilous) can with impunity made on the judiciary
- Clear line drawn between acceptable criticism of judiciary as institution & of its indiv members – statements that are downright harmful to public interest by undermining legitimacy of judicial process
- Ultimate object of punishing form of contempt – courts must be able to attend to proper AOJ while having confidence of public
- In SA – right to freedom of expression – according to court – not unqualified right & 1 ranking above others
- Relying on S1 of Constitution – Court stated – right to freedom of expression cannot be said automatically to trump right to human dignity
- To decide if X in particular case committed the crime – question whether words/conduct (objectively) likely to result in AOJ being brought into disrepute
- Court added rider to finding – scandalizing court is constitutional – court should not be quick to infer X's words/conduct amounted to commission of the crime
- Scope of conviction very narrow
- Must be “clear case of impeachment of judicial integrity”; conduct must “really likely to damage AOJ”

Criticism of judgement in Mamabolo

- Main criticism – standing of & respect for judiciary should be based upon inherent merits of performance of judiciary itself
- Ordinary reasonable people not even deign to take seriously criticism that might be levelled at judiciary

- American Court – Bridges v California – “enforced silence however limited, solely in name of preserving dignity of the Bench, would probably engender resentment, suspicion & contempt more than it would enhance respect”
- Definition of this crime vague & accordingly difficult to reconcile with *ius certum* provision of principle of legality – “scurrilous abuse” & “scandalous” – emotionally charged
- Contentious rule endorsed by court – for conviction not necessary to establish that AOJ was actually brought into disrepute – all that is required – words/conduct objectively have tendency to bring AOJ into disrepute
- Disconcertingly wide & vague test open to misuse
- Subjective opinion of people - certain words have tendency vary widely

2.4.9.4 FAILURE TO COMPLY WITH COURT ORDER

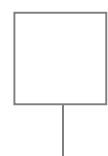
- Party to civil case against whom court has issued an order & deliberately fails to obey the court order commits Contempt of Court
- As a rule party not criminally prosecuted for contempt - left to his successful opponent - if chooses to apply to the court to sentence party who fails to carry out the court order for contempt.
- Application usually only a method of enforcing the court order - if request successful - sentence - as a rule suspended on condition that the court order is carried out (*Knott v Tuck*; *Tromp v Tromp*)
- Known as “civil contempt”
- In practice procedure regularly followed by person who has been divorced & wants to force other party to the divorce to comply with the order of court relating to payment of maintenance.
- In *Beyers* - Appellate Division decided in such cases - nothing preventing the attorney general himself from charging & prosecuting the party who fails to carry out a court order - Court decided - in “civil contempt” - still crime that is committed even though the case is heard by a civil court - a **sentence** is always imposed & no sentence can be imposed if no crime is committed.
- If attorney general had not had power to interfere - meant that most far-reaching contempt of court would remain unpunished if successful litigant decided for some reason/other not to request enforcement of order.
- Party to civil case against whom court has given an order & intentionally refuses to comply – commits contempt – hardly ever charged as criminal offence by the state – left to party whose favour order has been given to apply to court (if wishes) to convict defaulting party
- Application merely way of enforcing court order – application successful - sentence (imprisonment) – almost always suspended on condition that defaulting party comply with order in manner prescribed by court
- Usually referred to as “civil contempt” – usually dealt with by civil law only – nothing preventing Director of Public Prosecutions from indicting for criminal contempt of court in such case if he thinks circumstances merit public prosecution

GLOSSARY

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

SUMMARY

- (1) In common law perjury - must be a false declaration - declaration must be objectively false - declaration oral/in writing.
- (2) In common law perjury, the declaration must be under oath, after an affirmation to tell the truth, or (in the case of children) after a warning to tell the truth



- (3) In common law perjury, the declaration must be made in the course of a legal proceeding
- (4) Defeating or obstructing the course of justice
- (5) Difference between defeating & obstructing the course of justice - last-mentioned is something less than the first-mentioned.
- (6) Acts constitute ways in which course of justice may be defeated/obstructed: persuading a witness not to give evidence in a trial; misleading the police in order to prevent them from catching a criminal; and laying a false criminal charge against someone.
- (7) Requirement for crime that case must be pending - there must be the **possibility** of a real court case ensuing, for example, where X makes a false complaint to the police to the effect that Y has committed rape, there is the possibility that Y may be charged with rape and X has therefore committed the crime of attempt to obstruct the course of justice.
- (8) *Bazzard* 1992 court held that the mere wasting of the time of police officials does not amount to the crime.
- (9) Charges of attempt to defeat/obstruct the course of justice - more common than charges of actual defeat or obstruction.

STUDY UNIT 3 CRIME AGAINST PUBLIC WELFARE

CORRUPTION

(Criminal Law 401–417)

3.2.1 General

- Corruption erodes moral values, trust in the authorities & authoritative organs.
- Leads to malfunctioning of public & private sectors of the community & provides breeding ground for organised crime.
- Corruption - previously common law offence known as “bribery”
- From 1992 - corruption punished in terms of the provisions of the *Corruption Act* 94 of 1992
- In 2004 Act replaced by the *Prevention and Combating of Corrupt Activities Act* 12 of 2004.

3.2.2 General and specific crimes of corruption

- The current 2004 Act creates:
- “general, broad & all-encompassing offence of corruption”
- various crimes in which “specific corrupt activities” are criminalised
- In writing this Act - legislature followed a style according to which large parts of the formulation of the general offence have been repeated in the formulation of specific offences.
- To make easier to apply relevant section to specific class of persons/specific issue - legislature added certain provisions - great deal of repetition in Act

3.2.3 The general crime of corruption: definition in the Act – NOT TO MEMORIZE

S3 of the Act contains the formulation of the general offence of corruption.

The section provides as follows:

“Any person who directly or indirectly –

- (a) Accepts/agrees/offers to accept any gratification from any other person, whether for the benefit of himself/herself/for the benefit of another person; or
- (b) Gives/agrees/offers to give to any other person any gratification, whether for the benefit of that other person/for the benefit of another person, in order to act, personally/by influencing another person so to act, in a manner
 - (i) that amounts to the –
 - (aa) illegal, dishonest, unauthorised, incomplete/biased; or
 - (bb) misuse/selling of information/material acquired in the course of the exercise, carrying out/performance of any powers, duties/functions arising out of a constitutional, statutory, contractual/any other legal obligation;
 - (ii) that amounts to –
 - (aa) the abuse of a position of authority;
 - (bb) the breach of trust; or
 - (cc) the violation of a legal duty/a set of rules;
 - (iii) designed to achieve an unjustified result; or
 - (iv) that amounts to any other unauthorized/improper inducement to do/not to do anything, is guilty of the offence of corruption.”

3.2.4 Shortened definition of the general crime of corruption MUST KNOW THIS VERSION!!

Definition:

Anyone that

(a) accepts any gratification from any other person, or (recipient)

(b) gives any gratification to any other person, (giver)

in order to act in a manner that amounts to the illegal exercise of any duties, is guilty of the offence of corruption.

3.2.5 Corruption by giver and corruption by recipient

- 2 main categories are corruption committed by the giver and corruption committed by the recipient.
- Corruption committed if 1 party gives gratification to another party & the other party accepts it as inducement to act in a certain way.
- Both parties – the giver and the recipient – commit corruption.
- **“corruption by a giver” = conduct of the giver & “corruption committed by a recipient” = conduct of the party who accepted it.**
- “give” includes: the **agreement** by X to give gratification to Y/the **offering** by X to give gratification to Y
- “accept” includes: the **agreement** by Y to accept gratification/the **offering** by Y to accept it.
- S3 general crime is defined
- Principle - corruption committed by giver - mirror image of corruption committed by the recipient

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

3.2.6.1 Elements of the crime

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

3.2.6.2 The acceptance (element of an act)

“accept” - legislature employs two ways to broaden the meaning of “accept”:

Act provides in s 3(a) for certain conduct by Y which precedes the acceptance, namely

- to **agree** to accept a gratification or
 - to **offer** to receive satisfies the element of an act.
- Follows from provision - in this crime no distinction made between the stem crime (main crime) & conspiracy/incitement to commit the main crime
- S 2(3)(a) – words/expressions “accept”, “agree to accept” & “offer to accept” as used in Act - following broader meanings:
 - (1) to demand, **ask for, seek, request, solicit, receive/obtain** gratification
 - (2) to agree to perform the acts named under (1)
 - (3) to offer to perform the acts named under (1)

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

- (1) Y not accept gratification “directly” but only “indirectly” (s 3) - not have to accept gratification personally; fact made use of a middleman to accept gratification affords no defence.
- (2) **Y did not in actual fact later perform the act which X had induced him to perform** (s 25(c)) - accepted gratification but entire evil scheme been exposed & Y had been arrested by police before he could fulfil his part of agreement with X, Y nevertheless guilty of the crime.
Crime has been completed even if Y has not yet done what he undertook to do, expressly/implicitly.
- (3) Corrupt activity between X & Y **was unsuccessful** - consideration affords neither X/Y a defence.
- (4) Purpose of liability - irrelevant that state/private enterprise concerned with transaction - not **suffer prejudice** as a result of X's/Y's conduct.
- (5) Y accepted gratification - did **not have the power/right** to do what X wished him to do affords neither X/Y a defence (s 25(a)).
If X gives gratification to Y in the belief that Y will give him a driver's licence - not entitled to do -Z rather than Y empowered to make such decision - afford neither X/Y a defence.

3.2.6.3 The gratification

Definitions in section 1 - long definition for word "gratification" – NOT have to quote this long section. BUT KNOW THE FOLLOWING!!! highlighted words/expressions - according to legislature also mean "gratification":

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

Evident "gratification" has broad meaning in terms of the Act - clear "gratification" **not limited to tangible/patrimonial benefits** - wide enough to include information & even sexual favours (eg traffic officer, Y, who has caught a woman, X, for traffic offence, agrees/offers not to prosecute X for offence if he and X can engage in sexual intercourse with each other (W))

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

a General

Y must accept gratification to act in certain manner - must accept gratification as an inducement to act in a certain manner - must have a certain aim/motive in mind with the acceptance.

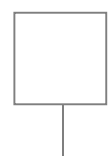
b The aims **KNOW FOR EXAMS**

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

c General principles of the aims

- (1) Each instance expression "to act" appears - legislature provides explicitly that an "act" also **includes an omission** (s 2(4)).
- (2) Irrelevant whether Y plans to achieve aim personally/whether plans to achieve aim by influencing another person to act in such a manner (see s 3 between (b) and (i)) - Y may make use of **a middleman** to achieve aim.
- (3) Aims apply in the **alternative** - sufficient for state to prove Y had only one of aims in mind when he accepted gratification.
- (4) Irrelevant Y accepted gratification **for his own benefit/for the benefit of someone else** (s 3(a) and (b)). Fact Y receives money from X in a corrupt way with aim of using the money to provide for his sick child affords him no defence.
- (5) Fact **Y did not in actual fact have the power to act** in the manner in which he was induced to act affords Y no defence (s 25(a)).

If Y receives money from X as inducement to give X particular licence, but appears that a person in a higher position in the relevant state department/enterprise is actually empowered to decide who should be issued with licences -Y still guilty of the crime.



3.2.6.5 Unlawfulness

- Element of unlawfulness - not expressly provided for in definition of crime
- Unlawfulness/requirement that act should be “unjustified” = requirement/element of all crimes.
- General meaning - “unlawful” is “against the good morals/the legal convictions of society” - implies Y’s conduct not covered by ground of justification
- Examples of conduct which, ostensibly, fall within ambit of definitional elements of corruption - but nevertheless not unlawful:
 - (1) Act which otherwise amount to corruption would not be unlawful if Y acted **under compulsion**.
 - (2) **A person used as a police trap** - not act unlawfully if agrees to receive gratification from another person to trap person into committing corruption (*Ernst; Ganie*)
 - (3) Suggested - certain officials/employees – porters/waiters - not acting unlawfully when receive small amounts of money from public as “**tips**” for services they performed satisfactorily - conduct is socially adequate - not against good morals/legal convictions of the community.
 - (4) Same applies - receiving of **gifts** of reasonable proportion by employees - **marriage/retirement**/completion of a “round number” (eg 20 years) of work. (“golden handshake” may involve substantial amount of money depending on circumstances be different case.)

3.2.6.6 Intention

- Cannot be said that legislature intended to create strict liability
- Form of culpability required for this crime - clear **intention & not negligence** required
- Words/expressions used - requirement of intention: “accept”, “agree”, “offer”, “inducement”, “in order to ...” and “designed”.
- General principles - intention always includes certain knowledge -knowledge of nature of the act, presence of definitional elements & unlawfulness.
- Has knowledge of fact not only if convinced of existence - also foresees possibility of existence of the fact - but is reckless towards it (not deterred by possibility of existence of the fact & goes ahead with forbidden conduct regardless)
- Intention present in form of **dolus eventualis**.
- Act contains provision - expressly applies principle (*dolus eventualis*) to this crime:

S2(1) - for purposes of Act - person has knowledge of fact not just if has actual knowledge of a fact but also if court satisfied the person believes there is reasonable possibility of existence of that fact & person has failed to obtain information to confirm existence of that fact - provision is application of general rule - intention in respect of a circumstance (opposed to consequence) also exist in form of *dolus eventualis*; that “wilful blindness” amounts to knowledge of a fact & accordingly intention.
- These principles previously accepted in our case law. (*Meyers, Bougarde*)
- Fact Y accepted gratification **without intending to perform the act which he was induced to perform, affords Y no defence** (s 25(b)) – Y somebody who can decide to whom a tender should be awarded, receives money from X as inducement to award the tender to X, the fact that Y received the money without having intention to actually use his influence in X’s favour & accepted the money only to enrich himself affords him no defence.

3.2.7 General crime of corruption: corruption by the giver

3.2.7.1 General

Corruption by recipient deals with **acceptance** by Y of gratification given by X

Corruption committed by giver deals with **giving** by X of gratification to Y

Corruption committed by giver only a mirror image of corruption committed by recipient

“accept” (describes Y’s conduct in corruption as recipient) & “give” (describes X’s conduct in corruption by the giver) should be used.

Because corruption committed by giver is a mirror image of corruption committed by recipient - all principles applicable to corruption committed by the recipient are, *mutatis mutandis* (by replacing word “accept” with word “give” in each instance) applicable also to corruption committed by giver

3.2.7.2 Elements of the crime

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

3.2.7.3 The giving of gratification

The act consists of X **giving** gratification to Y.

“gives” - legislature uses two ways to broaden meaning of “give”:

- (1) Act provides in s 3(b) - certain conduct by X preceding giving of gratification - merely agree to give gratification/to **offer** to give it - satisfies requirement of an act.
- (2) Act provides in s 3(b)- words “give/agree/offer to give gratification” - have following broader meanings:
 - to promise, lend, grant, confer/procure gratification
 - to offer to lend, grant, confer/procure gratificationNot requirement for offence committed by giver that X have succeeded with plan of action - considerations such as the following afford X no defence:
 - Y may given impression he would accept offer - actual fact **had no intention** of doing what X had asked him to do (s 25(b))
 - **Y did not do what X requested him to do** (s 25(c))
 - **Y did not have the power** to do what he was requested to do (s 25(a))
 - **Y rejected X's offer**
 - **Y agreed, but subsequently changed his mind**
 - **Y found it impossible** to do what he had undertaken to do

3.2.7.4 The gratification

- (11) money
- (12) a gift
- (13) a loan
- (14) property
- (15) the avoidance of a loss
- (16) the avoidance of a penalty (fine)
- (17) employment, a contract of employment/services
- (18) any forbearance to demand any money
- (19) any “favour/advantage of any description”
- (20) any right/privilege

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

SAME AS corruption committed by the recipient.

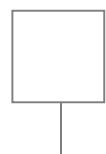
Wording of section dealing with element of corruption committed by giver - not very lucid - nevertheless clear legislature intended to say: “anyone who ... gives any gratification ... in order to *induce the recipient to act* ... in a manner that ...” (words in italics express meaning of provision clearly do not appear in the text of the section, but are implied)

Shaik - accused convicted of corruption in terms of predecessor of section 3 of Act 12 of 2004 (s1 of Corruption Act 94 of 1992)

No substantial difference between wording of previous section & that of current section 3 of Act 12 of 2004.

Elements of previous offence (s 1(1)(a)(i))- relevant were:

- (i) the giving (**offer to give & agree to give**)
- (ii) of a benefit not legally due
- (iii) to a person who is vested with carrying out of any duty, by virtue of holding of an office, etc



- (iv) with the aim of influencing that person to do an act/or omit to do some act in the performance of that duty
- (v) unlawfulness
- (vi) intention

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

No dispute about actual payments made by X to Y. Only issue that arose was whether/not payments were made by X **with the intention of influencing Y** to use the weight of his political office (was MEC for Economic Affairs in KZN & deputy president of ANC) to protect/further X's business interests. Court found on facts there were several instances in which Y intervened to protect, assist/further interests of X's business enterprises & concluded these showed a (1) readiness on X's part to turn to Y for help in his business affairs (2) Y's willingness to give it. Court concluded payments were made by X with intention of influencing Y to act in X's interests. Were made at time when X's businesses could not afford to issue such payments owing to financial position. Since Y could not repay the money - could only satisfy sense of obligation placed upon him by payments by using his name & political office. X blatantly advertised association with Y to his business partners, confident of political support he would gain from the latter. Payments could not be regarded as loans - arrangements surrounding them too flexible & made no business sense from the point of view of a lender. Court found the arrangement was *prima facie* contrary to good morals/legal convictions of society & there was no justification (ie requirement of unlawfulness was satisfied). X foreseen possibility that Y would feel obligated, through these payments, to help him in his businesses & continued to make these payments, aware that Y would respond this way - therefore was found to have had intention in form of *dolus eventualis*.

X convicted on both counts of corruption (& 1 of fraud) & appealed to Supreme Court of Appeal (SCA) - dismissed appeals on all counts & confirmed conviction.

3.2.7.6 Unlawfulness

SAME AS corruption committed by the recipient

3.2.7.7 Intention

SAME AS corruption committed by the recipient

3.2.8 Corruption relating to specific persons

S4 (onwards) "corrupt activities **relating to specific persons**" are criminalized

Brief overview of some of these specific offences.

- (1) **Corruption relating to public officials.** S4 creates offence limited to corruption of public officials
"Public officials" defined exhaustively in s1 -typical eg - state official such as police officer.

S v Selebi former National Commissioner of Police & former Head of Interpol - convicted for corruption in contravention of section 4(1)(a) of the Prevention and Combating of Corrupt Activities Act 12 of 2004. Provisions of section 4(1)(a) - same as general offence of corruption (in s 3(1)(a)) except for use of words at beginning of the section - "Any public officer ..." instead of "Any person ..."

Issue in appeal – 2 matters: Selebi had received payment from a person (Agliotti) & whether he had provided Agliotti with any *quid pro quo* (a favour given in return for another) as result of such payment as required in terms of section 4 of the Act. Court explained - question whether Selebi received payments and/or other benefits "requires a consideration of whether he received such gratification with a corrupt intention". Indictment alleged that at the relevant time **a corrupt relationship existed between Selebi & Agliotti & that Selebi had received sums of money & clothing from Agliotti.** Alleged Selebi received payment **in order to act in a manner as set out** in s4(1)(a)(i)–(iv) of the Act & that Selebi did act by way of *quid pro quo*.

Details in indictment - Selebi had, *inter alia*, shared secret information with Agliotti with regard to investigations conducted against him (Agliotti) in the United Kingdom & in SA & protected him from criminal investigation.

In judgment Mthiyane DP pointed out - facts pertain to general crime of corruption committed by a recipient & essential elements of this offence as set out in s4(1)(a) of the PCCA Act are:

- (1) the acceptance of
- (2) gratification
- (3) in order to act in a certain way (the inducement)
- (4) unlawfully and
- (5) intentionally

The element of "inducement" **depends on whether the receipt of the gratification is directed at procuring the recipient to act in one/more of the ways** set out in s4(1)(a)(i)–(iv) - include **the abuse of a position of authority** (s 4(1)(ii)(aa)). The elements of unlawfulness & intention not expressly set out in the specific provision - court held it should be construed as requiring these elements.

Court considered the question whether the State succeeded in proving beyond reasonable doubt payments were received from Agliotti & any *quid pro quo* given by Selebi with requisite *mens rea*. Mthiyane DP reiterated - intention not specifically referred to but the words "in order to act ..." in s 4(1)(a)(i) of PCCA Act "import some 'intention' element".

He also pointed out s24 of the Act makes it easier for the State to prove the element of intention. The section provides - once prosecution able to show despite having taken reasonable steps - could not link acceptance of gratification to lawful authority/excuse on the part of the person charged & in absence of evidence to the contrary which raises reasonable doubt - sufficient evidence that person accepted gratification "in order to act" in a manner envisaged.

Supreme Court of Appeal did not find it necessary to invoke the presumption.

Concluded - once been proved Selebi received payments from Agliotti "the inference was irresistible that it was for an illegal purpose & with knowledge of that illegal purpose"

Court concluded - trial court was justified in convicting appellant of corruption as charged - had succeeded in establishing that payments been accepted by Selebi with **requisite corrupt intention**.

Judgment of Mthiyane DP did not address issue whether a *quid pro quo* is in fact required for the crime of corruption to have been committed in terms of s4(1)(a) of the Act.

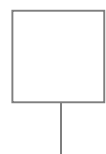
Separate judgment Snyders JA (Leach JA concurring) focused specifically on this issue.

She pointed out that factual findings & conviction of the trial court consisted of acceptance of a gratification on the one hand & giving of *quid pro quo* by appellant on the other hand on basis of inferred agreement between Selebi & Agliotti.

In her view - does not mean that s4 of the Act requires an agreement between the corruptor & the corruptee/that it requires a *quid pro quo* from the corruptee.

Snyders JA emphasised at para 97: "It must be plainly understood that the conviction, in this case on the evidence that established an agreement & giving of a *quid pro quo*, is not the lowwater mark of the section." - Pointed out - s25 supports her wide interpretation of s4. S25 of PCCA provides that whenever an accused is charged with offence (including a contravention of s4) - not valid defence for accused to contend that he did not have the power/did not intend/failed to perform the act in relation to which the gratification was given, accepted/offered (s 25(a)–(c)) - We submit that judgment of Snyders JA on this point is correct.

- (2) **Corruption in relation to agents.** S6 creates an offence limited to corruption of agents. Corruption committed by businesspeople in private sector - criminalised in this section.
- (3) **Corruption in relation to members of the legislative authority.** See S7.
- (4) **Corruption in relation to judicial officers.** S8 creates crime limited to corruption of judicial officers. Expression "judicial officer" defined in s1 & includes judges & magistrates. Conduct which judicial officer induced to perform - further defined in s8(2). Typical example - someone gives a judge money/offers him money in order to persuade him to give a judgment in favour of a certain party – conduct on part of judge that amounts to him not giving a judgment according to objective evaluation the merits of the facts before the court. If someone corrupts a judicial officer - conduct also be punished as contempt of court.



- (5) **Corruption relating to members of the prosecuting authority.** S9 creates offence limited to corruption of the members of the prosecuting authority.
Act Y induced to perform is further defined - example of a case resorting under this heading is when X gives Y, the prosecutor in criminal case money to persuade Y to destroy/hide the docket in which the particulars of the prosecution's case are contained - be reported missing & prosecution will consequently not be successful.
Type of conduct criminalised under this heading can overlap with common law offence of defeating/obstructing the course of justice.
- (6) **Receiving or offering of unauthorised gratification by a party to an employment relationship.** S10 creates offence - limited to corruption committed in an employment relationship.
If employer accepts gratification as inducement to promote one of employees - can be charged with contravention of this section.
- (7) **Corruption relating to procuring of tenders.** S13 creates offence limited to corruption committed in order to procure a tender - example is where X gives an amount of money to Y, whose task it is to decide to whom a tender should be awarded, in order to persuade Y to accept X's tender.
- (8) **Corruption relating to sporting events.** S15 creates offence limited to corruption committed in context of sporting events.
Someone accepts/gives money to undermine integrity of any sporting event contravenes this section.
Word "sporting event" further defined in s1 - example is when X who bets money on outcome of sporting events, gives money to Y, who is a sportsman/sportswoman/referee, in order to persuade Y to manipulate the game in a way that the match has a certain outcome.

3.2.9 Failure to report corrupt acts

S34 creates important crime - consists of failure **by a person in a position of authority** who knows/ought reasonably to have known that certain crimes named in the Act have been committed to report an offence created in the Act to a police officer.

Subsection (4) - long list of persons regarded as people who hold a position of authority - includes any partner in a partnership & any person responsible for overall management & control of the business of an employer.

Form of culpability required – intention/negligence (result of use of the words "who knows/ought reasonably to have known").

The word "knows" - expanded meaning given to word "knowledge" in s2 - apart from actual knowledge also includes the case where person believed a fact existed but failed to obtain information to confirm existence of that fact ("wilful blindness").

3.3 EXTORTION

(Criminal Law 417–419)

3.3.1 Definition

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

3.3.2 Elements of the crime

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

3.3.3 The perpetrator

Roman & Roman-Dutch law - crime known as *concoction* & according to some of our old authorities - only be committed by public official.

G - Appellate Division held - the crime could be committed **by any person & not only an official**; X need not even represent herself as an official (*Richardson*)

3.3.4 Exertion of pressure

X acquire benefit by bringing pressure to bear on Y - Y must give way under stress of pressure.

Pressure take form of threats, the inspiring of fear/intimidation.

Threat of physical injury to Y himself, extortion & robbery overlap (*Ex Parte Minister of Justice: In re R v Gesa, R v De Jongh*)

Y also threatened with defamation (*Ngqandu*);

Dismissal from employment (*Farndon*); or

Arrest & prosecution (*Lepheana*).

Even threat couched in negative terms sufficient - example where X threatens not to return something he borrowed (*Mntonintshi; Ngqandu supra*).

Threat also take form of harm to third person - *Lepheana supra* - threat was prosecution of Y's wife.

Threat be explicit/implicit.

3.3.5 The benefit

Before 1989 - conflicting decisions on question whether/not benefit in extortion be limited to patrimonial benefit - "Patrimonial" in this connection - "which can be converted into/expressed in terms of money/economic value".

Ex parte Minister van Justisie: S v J en S v Von Molendorff - Appellate Division thoroughly analysed question & after extensive investigation of common law authorities held - benefit in this crime must be limited to a patrimonial one.

The state not satisfied with - shortly afterwards legislature enacted following provision in s1 of the General Law Amendment Act 139 of 1992:

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

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

Example - not of a patrimonial nature but can lead to conviction of extortion - "benefit" which figured in J - Y threatened by X - unless she had sexual intercourse with him he would show photographs of her in the nude to her parents - Court found X guilty of attempted extortion - was of opinion that the benefit in extortion need not be of patrimonial/financial nature - "benefit" X sought to obtain was sexual satisfaction

Crime not been completed until the benefit has been handed to X (*Mtirara*).

3.3.6 Causation

As in case of robbery a causal connection between violence and acquisition of the thing must exist so too in the case of extortion - must be causal connection between application of pressure and acquisition of the thing (*Mahomed*)

Benefit handed over not because of pressure exerted by X but because a trap has been set for X & Y wishes her to be apprehended - crime merely attempted extortion (*Lazarus*)

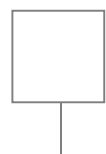
3.3.7 Unlawfulness

Pressure/intimidation been exerted unlawfully

Does not imply that if Y threatened with something which X is entitled/empowered to do that the threat can never be sufficient for extortion

Correct approach advocated by courts - note the way in which X exercised pressure & what he intended thereby

Although in order for police official to inform accused he intends prosecuting him is both irregular & unlawful for the police official to state that he will prosecute the accused **unless** he pays him a sum of money (*Lutge supra, Lepheana supra*).



3.3.8 Intention

Intent is required - X must intend his words as a threat/intend they should give rise to fear - must have intention of acquiring the benefit while realising he is not entitled to it - motive is irrelevant

3.4 DRUG OFFENCES

3.4.1 General

NB offences relating to drugs - found in the *Drugs and Drug Trafficking Act* 140 of 1992 (hereinafter called "the Act")

(1) **use/possession** of drugs

(2) **dealing** in drugs

Act divides drugs into 3 categories

(1) dependence-producing substances

(2) dangerous dependence-producing substances

(3) undesirable dependence-producing substances

drugs/substances falling under each category listed in great detail in schedule 2 of the Act

punishment prescribed for possession of, use of/dealing in substances under (2) & (3) - more severe than punishment prescribed for possession of, use of/for dealing in the substances under (1).

Substances listed under (2) are coca leaf, morphine and opium.

substances listed under (3) are cannabis (dagga), heroin and mandrax.

Dealing in drugs - more serious offence than possessing/using drugs

NB to note "possession" & "use" not treated in the Act as 2 separate offences but as 1 single offence.

3.4.2 The use or possession of drugs

3.4.2.1 Definition

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

3.4.2.2 Elements of the offence

(1) the **act**, that is possession/use of

(2) a **drug** as described in the Act

(3) **unlawfulness**

(4) **intention**

3.4.2.3 The act – possession or use

a Use

word "use" - self-explanatory - the smoking, inhalation, injection/ingestion of drugs

not clear why legislature prescribed not only possession but also the use of drugs - any instance of **use** of a drug also involves its possession and amounts to an offence under the Act - this reason that in practice seldom happens X is accused only of using a drug.

b Possession

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

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

- a **physical/corporeal element** (*corpus/detentio*)
- a **mental element** - X's intention (the *animus*)

The **physical element**: appropriate degree of physical **control** over the thing

Precise degree of control required depends upon nature of the article & way in which control is ordinarily exercised over such a type of article

Control may be actual/constructive.

Constructive control - control through somebody else – representative/servant (*Singiswa*)

The **mental element** (*animus*) of possession - the intention with which somebody exercises control over an article.

More than one possibility:

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

(ii) **Meaning of “possession” in the Act**

In various Acts legislature created crimes penalising possession of certain types of articles - drugs, unlicensed firearms, stolen goods, dangerous weapons/housebreaking implements.

Meaning of word “possession” - vary between different Acts depending upon intention of the legislature. S1 of the Act - word “possess” as used in Act **includes**

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

Although not expressly stated in the section - provision wide enough to cover situations in which person has custody over article not in order to use self, but **on behalf of somebody else** - looks after it for somebody else - meaning of this NB provision: use of word “includes” in s1 means the meaning ascribed to “possession” in this section (keeping, storing) - **not the only meaning** the word can have in the Act.

Other meaning *possessio naturalis*

Follows - if state charges X with having possessed a drug - **two ways** state may prove the element of possession.

- **First** - proving X exercised control over the drug as **an owner** - for himself - opposed to exercising control over the drug on behalf of somebody else - (possession as an owner) is *possessio civilis*.
- **Second** - proving possession - proving although X did not exercise control over it as an owner (to use for self) - nevertheless kept it for **on behalf of somebody else** - *possessio naturalis* – extended/broad meaning

3.4.2.4 The drug

Offence committed if what is possessed/used is a dependence-producing substance, dangerous dependence-producing substance/undesirable dependence-producing substance.

3.4.2.5 Unlawfulness

Unlawfulness excluded by necessity.

Apart from grounds of justification flowing from general principles s4 of the Act explicitly mentions number of grounds of justification for purposes of this offence

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

3.4.2.6 Intention

Culpability in form of intention required

Person unaware dagga in their possession cannot be found guilty of the offence.

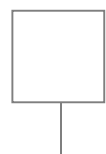
3.4.3 Dealing in drugs

3.4.3.1 Definition

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

3.4.3.2 Elements of the offence

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



(4) intention

3.4.3.3 The act – dealing in

Creating offence of dealing in drugs - legislature not concerned with punishing those who use drugs as punishing those who make drugs available to users.

To suppress supply of drugs to user's legislature has prohibited - sale of drugs, all aspects of production, manufacture, distribution & provision of drugs.

S1 of the Act - to "deal in" drugs defined as including performance of any act in connection with the

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

Solomon - Appellate Division held - not legislature's intention that person who purchases drugs **for his own use** performs an act in respect of the "sale"/"supply" of drugs within extended meaning of the definition of "dealing". Court explained - legislature by creating different offences of "dealing" & "possession/use" - intended to draw distinction between

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

Court found legislature intended to punish **activities in furnishing drugs** as "dealing in" drugs & not intend **activities in acquiring drugs** to be regarded as "dealing in" drugs - only being in **possession** of the drugs. Court held - if X commits an act which consists merely in him obtaining the drug for own personal use - only be convicted of possession/use of the drug and not of dealing in the drug.

Means - (X) person who acts as agent for (Z) somebody else & purchases drugs for Z's own use - performs an act with the acquisition of drugs & not an act relating to supply/furnishing of drugs - If X found in possession - only be convicted of offence of "possession/use" (as opposed to "dealing in drugs") (*Solomon supra*; *Jackson*)

Person who purchases drugs for **the purpose of selling them** - held to be dealing in the drugs - will possess drugs "for purposes of sale".

Previously - third way in "dealing" could be proved - relying on number of presumptions created in the Act - Act provided that anyone found in possession of prohibited/dangerous drugs/dagga exceeding 115 grams - presumed to have dealt in the drug/dagga - onus on accused to prove he had not dealt in the drug.

These & other provisions which created presumptions - declared unconstitutional on ground they inconsistent with accused's constitutional right to be presumed innocent until proven guilty (*Bhulwana*; *Gwadiso*; *Julies*; *Ntsele* & *Mjezu*)

Fact that statutory presumptions have fallen away - not mean basic legal principles & common-sense approach to proving guilt have also been abandoned - courts have held where a person found in possession of large quantities of dagga & been unable to furnish a reasonably acceptable explanation for such possession - might nevertheless be sufficient circumstantial evidence to make inference that he has been dealing in the drugs (*Bhulwana*; *S v Gwadiso supra*; & *Sixaxeni*)

Mathe - police found X alone in vehicle which contained +- 131 kg dagga - failed to give explanation for possession of the dagga & raised a "spurious" defence in the trial court - conviction of possession replaced on appeal by conviction of dealing in dagga.

3.4.3.4 The drug

As in possession - offence committed if a dependence-producing substance/dangerous/undesirable dependence-producing substance as defined in the Act.

3.4.3.5 Unlawfulness

Unlawfulness excluded by necessity in form of coercion.

Apart from grounds of justification flowing from general principles - s5 of the Act mentions number of grounds of justification relating to this offence

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

3.4.3.6 Intention

Culpability in form of **intention** required

X must know the substance is a substance described in the Act - his conduct amounts to dealing & it is unlawful.

3.5 UNLAWFUL POSSESSION OF FIREARMS OR AMMUNITION

3.5.1 General

The *Firearms Control Act* 60 of 2000 regulates control of firearms & ammunition & creates a number of offences relating to unlawful possession of firearms & ammunition.

Act draws distinction between “**firearm**” & “**prohibited firearm**”.

Firearm = lethal weapon

Arms & devices under heading “prohibited firearm” - more ominous & destructive - amounting weapons of war - cannon & rocket launcher

Firearm can be licensed - prohibited firearm cannot (few exceptions) be licensed.

Heavier sentence (max 25 yrs’ imprisonment) prescribed for offence of possessing prohibited firearm - possession of firearm not prohibited firearm (max 15 yrs’ imprisonment.)

3.5.2 Unlawful possession of a firearm

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

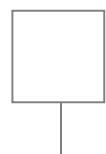
The elements of this offence are as follows:

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

3.5.2.1 Possession

“possess” not defined in the Act - In previous Act word “possession” defined as **including custody** under previous Act - “possession” referred to physical control over the arm with intention of possessing it

- either as if the possessor were the owner (*possessio civilis*) or
- to keep/guard it on behalf of/for the benefit of, somebody else (*possessio naturalis*)
submitted that considering purpose of the Act set out in the preamble - meaning the term had in previous Act still applies to the term used in present Act
means possession by person who keeps/guards firearm temporarily for/on behalf of somebody else (*possessio naturalis*) is punishable.



3.5.2.2 Firearm

S1 - very long, technical definition of word "firearm" - not necessary to know this definition - sufficient to know the gist of the definition - **"any device manufactured/designed to propel a bullet/projectile through a barrel/cylinder by means of burning propellant"** - keep in mind definition **includes the barrel/frame of the device.**

3.5.2.3 Unlawfulness

possession must be unlawful - not covered by ground of justification such as necessity

s3 - crime not committed by somebody who holds a licence, permit/authorisation issued in terms of the Act for the firearm

Official institutions - South African National Defence Force, South African Police Service & Department of Correctional Services - exempt from prohibition of possession of firearms.

3.5.2.4 Culpability

- legislature does not specify whether intention/negligence required for liability
- X had **intention** - would be guilty
- *Majikazana* court pointed out - if state avers the accused intentionally possessed firearm without licence - state must also prove the accused had knowledge of unlawfulness - if there is a reasonable possibility the accused believed she was holding weapon innocently - should receive benefit of the doubt. Case dealt with provisions of the previous Act (Arms and Ammunition Act 75 of 1969) - ruling also valid with regard to new Act.
- *Kwanda* X a driver of a vehicle conveying him & two others to rob a bank. man carrying AK47 rifle & ammunition seated next to him. were arrested before robbery could be carried out. question before the court - whether X could be convicted of unlawful possession of firearm in terms of provisions of the Arms and Ammunition Act 75 of 1969. was insufficient evidence before the court to indicate X aware of firearm in companion's possession. court ruled - even if accepted X had conspired with companions to commit robbery - **and he was aware that some of his co-accused possessed firearms for the purpose of committing the robbery** - knowledge on his part **not sufficient** to support inference he had **the intention of jointly possessing the firearm**. court explained - such inference only drawn if the state has established facts from which it can properly be inferred by a court that **the group had the intention of exercising possession of the guns through the actual detentor(s) and the actual detentors had the intention of holding the guns on behalf of the group.**
- ruling also valid in respect of interpretation of the provisions of the new Act
- question arises whether person can be convicted if form of culpability proved against him is not intention but **negligence**.
- Under previous Act which dealt with this matter - proof of negligence sufficient for conviction - submitted same should apply under present Act.
- well known unlawful possession of firearms one of greatest evils besetting SA society & the legislature's intention clearly to spread net against unlawful possession of firearms as widely as possible.

3.5.3 Unlawful possession of ammunition

S90 provides - **no person may possess any ammunition unless she**

- (1) holds a **licence** in respect of a firearm capable of discharging that ammunition
- (2) holds a **permit** to possess ammunition
- (3) holds a **dealer's licence**, manufacturer's licence, gunsmith's licence, import, export/in-transit permit/ transporter's permit issued in terms of this Act, or
- (4) is **otherwise authorised** to do so.
 - S91(1) provides - holder of licence to possess firearm - not possess more than **200 cartridges** for each firearm of which she holds a licence.
 - terms of subsection (2) - limitation does not apply to:
 1. **dedicated hunter/dedicated sports-person** who holds a licence, or

2. holder of a licence to possess firearm in respect of ammunition bought & discharged at **accredited shooting range**

- above provisions not apply to official institutions such as South African National Defence Force, South African Police Service & Department of Correctional Services.

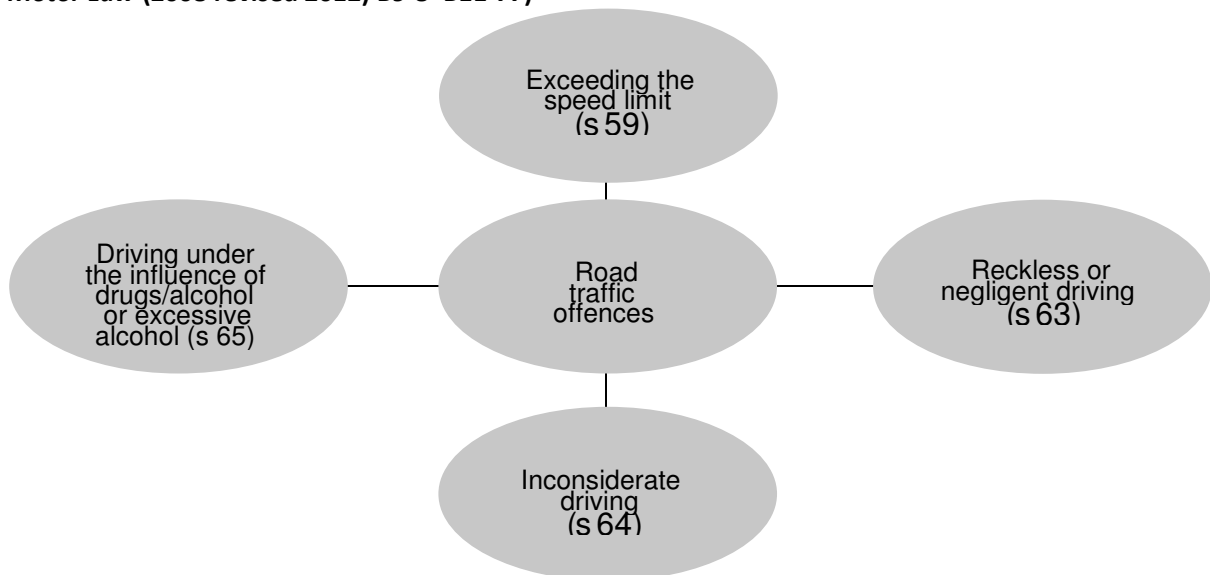
3.5.4 Certain other offences created in the Act

Other offences relating to firearms & ammunition (briefly defined) created in the Act:

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

3.6 ROAD TRAFFIC OFFENCES

(Burchell *Principles of Criminal Law* (2013) 786–796; Hootor *Coopers Motor Law* (2008 revised 2012) B9-8–B11-77)



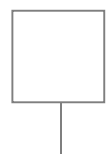
3.6.1 Introduction

Various offences relating to regulation of road traffic created in terms of the Road Traffic Act 93 of 1996. Road traffic offences fall under crimes against public welfare - most NB source of road-traffic legislation - **National Road Traffic Act 93 of 1996** ("the NRTA")

Act - **offence for any person to exceed the speed limit, engage in reckless, negligent/inconsiderate driving/drive while under the influence of alcohol/drugs/while having excess of alcohol in one's blood/on ones' breath.**

NOTE:

number of definitions in the Act - should know to understand the application of these offences – NOT REQUIRED to memorise all definitions - able to recognise factual situation which involves any of these definitions - also required to know the cases in which definitions applied & interpreted.



3.6.2 Driving in excess of speed limit

3.6.2.1 Definition

S59 of the NRTA provides that:

The general speed limit in respect of –
every public road/section thereof, other than a freeway, situated within an urban area;
every public road/section thereof, other than a freeway, situated outside an urban area;
and every freeway, shall be as prescribed.

An appropriate road traffic sign may be displayed on any public road in accordance with s57, indicating a speed limit other than the general speed limit which applies in respect of that road in terms of subsection (1): Provided that such other speed limit shall not be higher than the speed limit prescribed in terms of subsection (1)(c).

The Minister may, after a decision has been taken in the Shareholders Committee, in respect of any particular class of vehicle prescribe a speed limit which is lower/higher than the general speed limit prescribed in terms of subsection (1)(b)/(c): Provided that the speed limit so prescribed shall not replace a lower speed limit indicated in terms of subsection (2) by an appropriate road traffic sign.

No person shall drive a vehicle on a public road at a speed in excess of –
the general speed limit which in terms of subsection (1) applies in respect of that road;
the speed limit indicated in terms of subsection (2) by an appropriate road traffic sign in respect of that road; or
the speed limit prescribed by the Minister under subsection (3) in respect of the class of vehicle concerned.

3.6.2.2 Elements of the offence MUST KNOW

- (1) Driving
- (2) Vehicle
- (3) Public road
- (4) In excess of speed limit
- (5) Unlawfulness
- (6) Culpability

3.6.2.3 Act

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

a Driving

driving must constitute voluntary act - means offence would not be committed if a person acts involuntarily from an act of automatism/from epileptic fit.

Intoxication may cause involuntary conduct although *actio libera in causa* - not apply to drunken driving.

Rooyen - word “drive” examined - X who was under influence of alcohol pushed his vehicle by exercising control over the steering wheel & handbrake from outside the vehicle. Court held that accused had driven the vehicle as he had **control of the movements** of the vehicle. Whether vehicle moves forward by force of gravity/as result of being pushed by a person - irrelevant.

Ekstraal - was held that if **someone sits behind the steering wheel of a vehicle**/controls the movements of the steering wheel of a vehicle being towed by another vehicle - situation **also qualifies as driving**.

Contrasting case of *Makhubela* - accused drove without valid driver’s licence - held that word “drive” considered in context of licensed drivers. **“To drive” means to have control of a vehicle which is propelled by its own mechanical power.** Charge - attempting to drive impossible as evident from the definition - “driver” includes persons who attempt to drive a vehicle.

b Vehicle

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

Definition broad & may also cover a pedal cycle (*Gertse; Van Wyk*) - further clear that device that travels on rails will be excluded from definition & a train is therefore not a vehicle in terms of this Act.

NOTE: NOT KNOW DEFINITIONS ABOVE BY HEART - BE ABLE TO IDENTIFY A SITUATION WHICH INVOLVES A "VEHICLE" AS DEFINED IN THE ACT/"DRIVING" AS INDICATED IN THE ACT.

c Public road – **MUST KNOW!!**

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

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

2 Requirements for road, street/throughfare to qualify as public road:

- (1) must be commonly used by public/section of public; **OR**
- (2) public/section of public must have right of access to it (*Kriel; Dillon*)

Example – *Coetzee* - held parking lot that was reserved for roadhouse customers - not qualify as a public road

Drifters Adventure Tours CC v Hircock 2007 - courts held word "driving" not include terrain driven over such as "unmade roads, slippery/steep terrain" & the implication therefore that such a path does not qualify as a public road.

3.6.2.4 Speed limit

Three general speed limits set out in s59(1) of the NRTA which apply & which may be exceeded in terms of s89(1) & s89(3) of the NRTA - these speed limits apply on following roads:

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

Act - not stipulate what type of evidence necessary to prove that speed limit been exceeded.

general principle - **onus rests on the state** to prove the vehicle exceeded the speed limit & that the

timing device used to measure speed was **accurate** (*Meaker; Margolis; Makoera*)

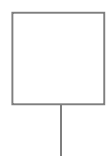
interest protected by prosecution of this crime - physical safety of general public.

S v Joseph - accused exceeded speed limit of 60 km p/hr by driving at speed of 102 km p/hr - received suspended sentence but had to attend Nicro Adult Life Skills programme.

3.6.2.5 Unlawfulness

Despite restrictions imposed by speed limit - needs to take cognisance of fact that there are certain drivers who are permitted to exceed general speed limit in terms of s60 of the Act

exceptions are drivers of ambulance, fire-fighting vehicle/response vehicle, a rescue vehicle, an emergency medical response vehicle carrying out duties/traffic officer/SAPS member/any other authorised persons who drive a vehicle in execution of their duties subject to proviso that they should drive such vehicle with **due regard** to safety of other road users & that certain vehicles are equipped with a lamp/sound device that must be operated when general speed limit is exceeded.



S v Groep - appellant a police officer convicted of negligent driving of a police vehicle - was responding to an emergency & drove through a traffic-light-controlled intersection while traffic lights were against her - was held - she had not driven with "due regard" for safety of other road users.

Fourie - regional magistrate raised defence of official capacity as ground of justification when charged with exceeding the speed limit - averred he was acting in interests of administration of justice - he would have been late for court proceedings - court held respondent's actions were unlawful & that he should have considered alternative measures to ensure speed limit not be exceeded

Necessity may be raised as defence (*Myute*)

3.6.2.6 Culpability

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

3.6.3 Reckless/negligent driving

3.6.3.1 Definition **MUST KNOW!!**

S63 of the NRTA reads as follows:

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

3.6.3.2 Reckless driving (Burchell 792)

S63(1) provides that it is an offence for any person to drive a vehicle recklessly upon a public road.

a The elements of the offence

elements of reckless driving divided into:

- (1) Driving
- (2) Vehicle
- (3) Public road
- (4) Recklessly
- (5) Unlawfulness
- (6) Culpability

b The act

Act consists in driving a vehicle recklessly on a public road.

person deemed to have driven recklessly if person drives "**in wilful & wanton disregard for the safety of persons/property**"

Reckless driving includes **inconsiderate driving** - might give rise to **risk of harm** to others

If person drives inconsiderately - driving considered to be reckless as there is a disregard for safety of other road users (*Van Zy; Sweigers*).

Recklessness & negligence distinct concepts & treated separately in sentencing phase

Intention in form of *dolus eventualis* also present in acts of recklessness where there is an appreciation/acceptance of risk (*Van Zyl*).

determining whether a person has driven recklessly/negligently, the manner in & speed at which vehicle was driven will be considered, together with amount of traffic on the road.

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

c Unlawfulness

element of unlawfulness excluded by grounds of justification such as necessity & official capacity - depending on objective circumstances

d Culpability

element of culpability consist in intention (*dolus eventualis*) & gross negligence.

3.6.3.3 Negligent driving (Burchell 790ff)

S63(1) of the NRTA also provides that it is an offence for any person to drive negligently upon a public road.

a The elements of the offence

elements of negligent driving divided into:

- (1) Driving
- (2) Vehicle
- (3) Public road
- (4) Negligently
- (5) Unlawfulness
- (6) Culpability

b The act

act consists in driving vehicle negligently on a public road

interest protected by crime of negligent driving is safety of **public** using the roads

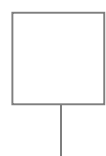
Negligence present where **reasonable person in the same circumstances would have foreseen that the driving could create a risk of harm to other persons and should have guarded against such risk & failed to do so** (*Kruger v Coetzee*)

Such risk should not be remote - **person drives negligently** if he does **not drive with the degree of care and skill a reasonable man would exercise in the same circumstances** (*Wells; Mathlane; Naik*)

Burchell says (790–791) - reasonable person would not drive like racing driver/with excessive caution & timidity

our law not recognise degrees of negligence - slightest deviation from reasonable-person standard - regarded as negligent driving.

Erwin - while accused was overtaking another vehicle - bee flew into car & stung him on the cheek - instinctively pulled his head away & bumped his glasses against the window & one of the lenses broke - released the steering wheel to protect his eyes from splinters & vehicle collided with car he was overtaking. court set high standard for test of reasonable man & held that he made an error of judgment during an emergency but that a reasonable driver would not have made this error & that a reasonable driver must be able to cope with unexpected situations - was accordingly convicted of negligent driving. Automatism raised as defence to conduct requirement where motorist claims to have had a mental blackout/epileptic attack.



R v Victor

X charged with reckless/negligent driving as he had a collision with another vehicle & a pedestrian as a result of an epileptic fit. He had had prior seizures & had insufficient reason to assume he would not have another seizure on that day. It was foreseeable that a seizure could have happened & he knew what the consequences could be. Found guilty of negligent driving. Also known as **antecedent** liability - where X performs a voluntary act knowing that he may suffer from an epileptic fit but hopes it will not occur & proceeds to drive the car while conscious. In such instances a person will be held liable.

c Unlawfulness

requirement of unlawfulness must be complied with - means no ground of justification be present such as necessity/official capacity

defences that may be raised - mechanical failure, skidding/sudden emergency.

d Culpability

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

Humphreys - accused 55 years old was driver of mini-bus which collided with a train - 10 of 14 children being transported were killed & he was charged & convicted of 10 counts of murder & 4 counts of attempted murder – on appeal - ten convictions of murder set aside - Supreme Court of Appeal held - accused not have intention in form of *dolus eventualis* - was found guilty of culpable homicide on basis that he was negligent - attempted murder charges set aside.

S v Qeque - accused was trying to evade the police in a stolen vehicle & drove onto sidewalk killing 3 pedestrians who were children - accused charged with theft, reckless & negligent driving & murder - pleaded guilty to first 2 charges, also found guilty of 3 counts of murder - was held that he had intention in the form of *dolus eventualis*.

3.6.4 Inconsiderate driving

3.6.4.1 Definition

S64 of the NRTA provides that:

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

3.6.4.2 Elements of the offence

- (1) Driving
- (2) Vehicle
- (3) Public road
- (4) Without reasonable consideration
- (5) Culpability

3.6.4.3 Act

- consists in driving a vehicle on a public road without reasonable consideration of other road users
- offence only be committed if other road-users present on road at the time (*Van Rooyen*)
- *Killian* - was held “without reasonable consideration” - without consideration that “**a reasonable man would have shown in the situation & circumstances prevailing at the time.**”
- offence applicable where driving is calculated to embarrass/inconvenience other road users (*Killian*)
- does not include situations of negligent driving & other road users must be present for this offence to be committed.

3.6.4.4 Unlawfulness

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

3.6.4.5 Culpability

can be committed with intention/negligence.

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

3.6.5.1 Definition

S65(1) of the NRTA provides that:

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

3.6.5.2 Elements of the offence

- (1) Driving
- (2) Vehicle
- (3) Public road
- (4) Under the influence of intoxicating alcohol/drugs with a narcotic effect
- (5) Culpability

3.6.5.3 Act

act consists in driving a vehicle on a public road while under influence of intoxicating alcohol/drugs with narcotic effect

two offences created by this section - aimed at protection of public:

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

Person sitting behind steering wheel of stationary vehicle which has its engine running - cannot be said to be "driving" the vehicle in terms of the offence in (1) - may found guilty of contravention of the offence in (2)

must be proved that driver affected by intoxicating liquor/drug to such a degree that **skill & judgment normally required of a driver was diminished/impaired as a result** (*Lloyd*).

"Skill" refers to **driver's physical powers &** is diminished/impaired when driver's vision, judgment/muscular coordination is affected (*Donian*)

"Judgment" refers to the **driver's mental powers** - deemed to be impaired/diminished if intoxicating liquor/drug causes him to be euphoric /over-optimistic

driver must have been **under the influence at the time** of driving the vehicle (*Lombard*)

Alcohol refers to ethyl alcohol & drug referred to should have a **narcotic effect & need not be a narcotic drug per se** (*Whitehead*)

Any substance/remedy which has effect resembling that of narcotic drug included & not merely pharmaceutical narcotics.

3.6.5.4 Unlawfulness

requirement of unlawfulness complied with - no ground of justification should be present.

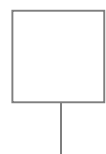
3.6.5.5 Culpability

offence can be committed with intention/negligently (*Fouche*)

Culpability be present where accused foresees/ought to have foreseen that he would drive a vehicle while under the influence

Voluntary intoxication therefore not a defence - this section provides for antecedent liability - accused did not know that he was under influence of alcohol - example - where drug/alcohol administered without accused's knowledge ("spikes his drink") - would lack culpability

Another defence could be raised - accused ignorant of combined effects of intoxicating liquor & narcotic drugs.



3.6.6 Driving with excessive alcohol in the blood

3.6.6.1 Definition

S65(2) of the NRTA provides that:

No person shall on a public road –

A) drive a vehicle; or

B) occupy the driver's seat of a motor vehicle the engine of which is running, while the concentration of alcohol in any specimen of blood taken from any part of his/her body is not less than 0,05 gram per 100 millilitres/in the case of a professional driver referred to in s32, not less than 0,02 gram per 100 millilitres.

3.6.6.2 Elements of the offence

- (1) Driving
- (2) Vehicle
- (3) Public road
- (4) Blood alcohol
- (5) Culpability

3.6.6.3 Blood alcohol

act consists of driving vehicle on public road while having consumed excessive amounts of alcohol present in the blood

Two offences created by this section (1) driving of a vehicle (2) occupying driver's seat while engine of motor vehicle is running where alcohol in any specimen of blood taken is not less than 0,05 gram per 100 millilitres/in case of professional driver the amount is not less than 0,02 gram per 100 millilitres.

Where blood alcohol level concerned - in terms of s65(9) - may not refuse to provide specimen of one's breath/blood

state must prove using expert evidence - district surgeon, registered medical practitioner, medical officer of a prison/registered nurse - concentration of alcohol exceeded 0.049 grams **at the time accused was driving** the vehicle by means of **chemical analysis** & that the blood sample is blood of accused (*Ross*)

blood alcohol specimen must not be contaminated (*Ngcobo*)

limits strictly applied & even minor transgressions are punishable (*Director of Public Prosecutions v Klue*)
presumption - if blood sample taken **within two hours** after alleged offence & if not less than 0.05 grams per 100 millilitres - alcohol content exceeded prescribed limit **at the time of the offence**.

3.6.6.4 Unlawfulness

requirement of unlawfulness must be complied with - means no ground of justification be present.

3.6.6.5 Culpability

offence committed with intention/negligently

Kelder - held if accused while driving is under influence of alcohol to such degree that he is not criminally responsible he will still have necessary *mens rea* - while sober he should have foreseen that he might need to drive in his drunken state

Automatism caused by voluntary intoxication - not constitute valid defence on charge of drunken driving should accused comply with requirement of negligence.

3.6.7 Additional offences relating to driving

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

- S65(5) provides for offence where (1) person drives a vehicle or (2) occupies the driver's seat if the level exhaled by breath is not less than 0.24 milligrams per 1 000 millilitres
- onus rests on state to prove analyst's findings are reliable (*Price v Mutual and Federal Insurance Co Ltd; Bester; Nkhalele*)
- committed with intention/negligently.

3.6.7.2 Duty to report an accident

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

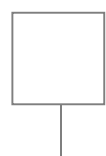
The driver of a vehicle at the time when such vehicle is involved in/contributes to any accident in which any person is killed/injured/suffers damage in respect of any property, including a vehicle/animal shall –

- immediately stop the vehicle & report the accident on the prescribed form & in the prescribed manner, the officer concerned shall deal with the report in the prescribed manner & the chief executive officer must ensure that the accident is recorded in the register of accidents in the prescribed manner & within the prescribed period;
- ascertain the nature & extent of any injury sustained by any person;
- if a person is injured, render such assistance to the injured person as he/she may be capable of rendering;
- ascertain the nature & extent of any damage sustained;
- if required to do so by any person having reasonable grounds for so requiring, give his/her name & address, the name & address of the owner of the vehicle driven by him/her &, in the case of a motor vehicle, the licence number thereof.

clear - s61(1) of NRTA requires driver of vehicle **involved in/contributes to an accident where another person is injured/killed/suffers damage** - stop his vehicle immediately to provide assistance & assess damage (*Mutobvu*) - also required to report accident to police within reasonable time.

GLOSSARY

<i>animus</i>	the mental element of possession, ie, the intention with which somebody exercises control over an article
<i>corpus</i>	the physical element of possession, ie, physical control over something
<i>detentio</i>	the physical element of possession, ie, physical control over something
<i>possessio civilis</i>	possession as if one is an owner, ie, possession for oneself
<i>possessio naturalis</i>	possession not for oneself, but on behalf of somebody else



STUDY UNIT 4 Sexual crimes

4.1 INTRODUCTION

- The *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* - introduced due to prevalence of sexual offences in Republic of SA
- felt SA common law & statutory law - not deal adequately & effectively in non discriminatory manner with many aspects relating to commission of sexual offences
- children not adequately protected against sexual exploitation & common law crime of rape was gender-specific.
- Act amends aspects of laws relating to sexual offences & deals with legal aspects relating to sexual offences in single statute by, *inter alia*,
 - repealing common law offence of **rape** replacing it with new, expanded statutory offence of rape applicable to all forms of sexual penetration without consent, **irrespective of gender**, “sexual penetration” widely defined include acts of a sexual nature previously not criminalised
 - repealing common law offence **indecent assault** replacing with new statutory offence of sexual assault, applicable to all forms of sexual violation without consent
 - creating new statutory offences relating to **compelled acts of penetration/violation**
 - **creating new statutory offences for adults** - criminalising compelling/causing witnessing of certain sexual conduct & certain parts of human anatomy, exposure/display of child pornography & engaging of sexual services of an adult
 - repealing common law offences **incest, bestiality & violation of a corpse** - **such violation is of sexual nature** - enacting corresponding new statutory offences
 - creating new, comprehensive sexual offences against **children** & persons **mentally disabled**, incl. offences relating to **sexual exploitation/grooming, exposure to/display of pornography & creation of child pornography**
 - Act eliminates differentiation between age of consent for different consensual sexual acts & provides special provisions relating to **prosecution of consensual sexual acts between children older than 12 yrs, but younger than 16 yrs.**
 - Act creates duty to report sexual offences committed with/against children/persons - mentally disabled. Failure to report knowledge of commission of sexual offences = an offence.

4.2 RAPE

4.2.1 General

- *Sexual Offences Act 2007* repeals common law offence rape
- common law offence rape - unlawful, intentional sexual intercourse by male with female without consent
- offence committed by male & unlawful & intentional sexual penetration of female genital organ (vagina) by male genital organ (penis) without female's consent was required for conviction of the offence
- Other forms of sexual penetration without consent - not rape
- Chapter 2 - *Sexual Offences Act 2007* expanded definition of rape - creating **two** new statutory offences of rape
- object of provisions to punish **all** forms of **sexual penetration** without consent, **irrespective of gender**
- means male also commit offence in respect of another male & female commit offence in respect of male/female.
- Act distinguishes between 2 specific offences of rape - **rape & compelled rape**
- crime of rape “**act of sexual penetration**” required by X before he convicted of offence
- crime of compelled rape X need not perform “act of sexual penetration” - to be convicted as **perpetrator** of offence sufficient if X **compelled another person** unlawfully & intentionally to commit “an act of sexual penetration” - provided the person compelled & complainant did **not** consent
- no age prescription for the crime of rape - crime committed by person of any age in respect of person of any age.

4.2.2 Rape

4.2.2.1 Definition

S3 of Act provides that:

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

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

4.2.2.2 The act

a The prohibited act consists in the act of **sexual penetration** by any person with another person without his/her consent.

“Sexual penetration” defined:

Including any act which causes penetration to any extent whatsoever by

- (i) **the genital organs** of one person into/beyond **genital organs, anus/mouth** of another person
- (ii) **any other part of the body** of one person into/beyond genital organs/anus of another person; or
- (iii) **any object** (incl. any part of body of animal) into/beyond **genital organs/anus** of another person; or
- (iv) **genital organs of an animal** into/beyond the mouth of another person.

“Genital organs” defined including whole/part of male/female genital organs as well as surgically constructed/reconstructed genital organs.

Examples - prohibited conduct in terms of (i)–(iv) above:

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

b The use of words “including any act which **causes** penetration” in first line of definition means - crime of rape created in Act no longer (as in common law formally defined crime - crime consisting merely commission of certain type of act) - now **materially defined crime** - crime consisting **causing of a certain situation** - sexual penetration.

Use of word “causes” - an act of “sexual penetration” performed also where X causes **another person/object** to perform the act of penetration. (“causes” should be read with word “includes” in beginning of definition) - word “causes” - clear sexual penetration includes **all** situations in which X performs penetration of Y himself/herself - with his/her own body/causes another person/some object to perform penetration.

c The act must be performed **without the consent** of Y (complainant)

Absence of consent - definitional element of the offence.

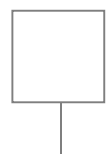
Consent - **voluntary/uncoerced agreement** - s 1(2)

S1(3) - provision dealing with interpretation of words “voluntary/uncoerced”

Circumstances in which Y does not voluntarily/without coercion agree to an act of sexual penetration include - not limited to:

Y submits/subjected to sexual act as a result of

- (1) **use of force/intimidation** by X against Y/Z (3rd person)/W (another person)/**against property** of Y, Z/W/**threat of harm** by X against Y, Z/W/**against property** of Y, Z/W - s1(3)(a);
- (2) **an abuse of power/authority** by X to the extent that Y inhibited from indicating his/her unwillingness/resistance to sexual act/unwillingness to participate sexual act - s1(3)(b)
- (3) sexual act committed **under false pretences/by fraudulent means including** - Y led to believe by X



- (i) Y is committing a sexual act with a **particular person** who is in fact a different person; or
- (ii) sexual act is **something other than that act** - s 1(3)(c) or
- (4) Y incapable in law of appreciating nature of sexual act **including** - Y @ time of commission of sexual act
 - (i) asleep;
 - (ii) unconscious;
 - (iii) altered state of consciousness - influence of medicine, drug, alcohol/other substance to extent that Y's consciousness/judgment is adversely affected;
 - (iv) child under age of 12 yrs; or
 - (v) person who is mentally disabled s1(3)(d)

Provisions relating to consent in s1(2) & (3) summarised as follows:

For consent to succeed as defence - given **consciously & voluntarily** – expressly/tacitly by person who has the mental ability to understand what he/she is consenting to & consent must be based on **true knowledge of the material facts** relating to the act.

Various factors law not deeming consent valid despite fact that at first glance one may perhaps think there had indeed been consent - set out in s1(3)

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

- 1st factor - leads law not to recognise ostensible (alleged) consent by Y as valid consent for purposes of rape in existence of **force, intimidation/threats of harm** emanating (coming) from X in respect of Y - if Y ostensibly "consents" to sexual penetration but "consent" in fact result of force, intimidation/threats of harm emanating from X in respect of Y - law not regard consent as valid consent
- Provisions of s1(3)(a) stipulates - even force, intimidation/threats of harm not against Y but against **third party** may render ostensible consent invalid
- Matters not whether 3rd - close family member of Y such as his/her child/spouse/close friend
- subsection so widely worded - even include threats against somebody whom Y has never met
- subsection make clear – force/threat of harm not against some person, but **against property** belonging to a person may result in ostensible consent being invalid
- matters not whether property belongs to Y personally, family member/friend of his/hers/some other person whom Y has never met
- "harm" in s1(3)(a) not qualified & accordingly not restricted to physical harm/harm to physical objects - wide enough to cover **monetary loss of whatever nature/even harm to reputation/dignity**.
- X tells Y an earlier act of infidelity against her husband will be revealed to her husband if she does not submit to an act of sexual penetration with him (X), and Y, not wanting her husband to know about infidelity submits- submission not construed (seen) as valid consent - case of intimidation of Y by X.

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

- S1(3)(b) speaks of cases "where there is an abuse of power/authority by (X) to extent that (Y) is inhibited (repressed) from indicating his/her unwillingness/resistance to sexual act ..."
- provision refers to cases where Y not threatened by physical violence but X expressly/tacitly uses position of power he/she exercises over Y to influence Y to consent
- been held - X a policeman - threatens to lay charge against Y for having committed a crime if does not consent to intercourse & as result of threat Y then does "consent" - consent invalid (*Volschenck;Botha*)
- S - held that X a policeman committed rape - had intercourse with Y in circumstances which he had not threatened Y with form of harm - but **Y believed that X had the power to harm her & X had been aware of this fear** - therefore clear - if X somebody like a policeman in a position of power over Y, Y's "consent" not regarded as valid if evidence reveals that she apprehended some form of harm other than physical assault

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

- S1(3)(c) "consent" obtained by **fraud**
- In common law crime rape - X was always a male & Y always a female - fraud which vitiated consent - fraud in respect of identity of man (*error personae*) as woman led to believe man was her husband/fraud

in respect of nature of act she “agreed” (*error in negotio*) as she was persuaded that act not act of sexual penetration but medical operation

- principles still apply under new Act but X & Y may now be either male/female
- Misrepresentation of circumstance other than mentioned above - X’s wealth, age/Y is a prostitute - X’s ability to pay for Y’s “services” - not vitiate consent
- X falsely represents to Y he/she is multimillionaire & Y believes X’s story & on strength of such misrepresentation he/she agrees to sexual penetration by X, his/her consent is **valid** & rape not committed
- consent deemed valid where person misled **not about the nature of the act of sexual intercourse but about the results which will follow on such intercourse.** (K - X represented to Y - intercourse with him would cure her infertility)
- position if X is HIV-infected but Y is not & would never give consent to intercourse with man who is - yet X acquires Y’s consent by misrepresenting that he is not HIVinfected - submitted that - in light of severe consequences of such misrepresentation Y’s consent **not** regarded as valid - even if relates to results of act - cannot consent to one’s own death – it is *contra bonos mores*.

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

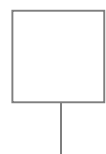
- S1(3)(d) - Y “incapable in law of appreciating the nature of the sexual act”
- no valid consent if X performs act of sexual penetration in respect of Y if Y is **asleep** unless Y previously whilst awake given consent (C) - same applies to situation where Y **unconscious**
- Paragraph (iii) subsection (3)(d) provides - consent not valid if Y “in an altered state of consciousness, incl. under influence of medicine, drug, alcohol/substance to extent that Y’s consciousness/judgement is adversely affected”
- Paragraph (iv) subsection (3)(d) contains provision NB in practice: If at time of commission of sexual penetration **Y is a child under age of 12 yrs** - ostensible “consent” by him/her in law invalid - child **irrebuttably presumed** incapable of consenting to act of sexual penetration
- Paragraph (v) subsection (3)(d) provides - consent not valid if Y “a person who is mentally disabled” – **d Marital relationship no defence**
- S56(1) provides - accused person charged with rape - “it is not a valid defence for that accused person to contend that a marital/other relationship exists/existed between him/her & complainant” – therefore possible for husband to rape own wife

4.2.2.3 Unlawfulness

- Absence of consent by Y not ground of justification but **definitional element of the crime**
- If it were ground of justification - definitional elements of crime would have consisted in sexual penetration between two persons - not recognisable as a crime
- does not mean unlawfulness not element of the crime
- Unlawfulness excluded if X acted under **compulsion**
- Z forces X to rape Y/threatens X with harm if he/she does not rape Y & X in actual fact rapes Y, X may rely on ground of justification of necessity.

4.2.2.4 Intention

- Intention specifically mentioned in definition of the crime in s3 as requirement for conviction
- X must know Y not consented to sexual penetration
- *Dolus eventualis* suffices - sufficient to prove X foresaw possibility Y’s free & conscious consent might be lacking but nevertheless continued with act of sexual penetration
- proof of absence of consent - reliance placed on fact that girl is under 12 yrs at time of commission of act - X must be aware girl is not yet 12 yrs/at least foresee possibility
- Similarly - in order to establish absence of consent - reliance placed upon woman’s intoxication/mental defect/was sleeping/defrauded - must established X aware of such factor vitiating consent.



4.2.3 Compelled rape

4.2.3.1 Definition

S4 of the Act provides that

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

Elements of this crime:

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

4.2.3.2 The act

- act consists in **compelling of a 3rd person without his/her consent** to commit act of sexual penetration with Y (complainant) **without Y's consent**
- X may be convicted as perpetrator of the crime even if he himself/she herself did **not** perform any actual act of sexual penetration with complainant - X unlawfully & intentionally compels Z to put his penis in Y's anus without Y (complainant) & Z's consent - X commits crime of compelled rape
- new offence of compelled rape changed common law - rape was regarded as crime which could only be committed by X personally (own body)
- common law - X compelled Z to rape Y, X only liable as accomplice to the crime of rape - even possible X be acquitted as accomplice if Z (perpetrator) could not be held liable for lack of criminal capacity/*mens rea*.
- enacting crime of "compelled rape" - unacceptable position has been addressed
- doubtful whether necessary to create this crime - provisions coincide with wide formulation of the crime rape in s3 - particular words "**any act which causes** penetration" in the definition of "sexual penetration" in s1(1) wide enough to include conduct by X whereby he/she compels third party to perform sexual penetration.
- Presumably s3 inserted by legislature to make sure compelled sexual penetration indeed criminalized
- not a defence on charge of compelled rape – marital/other relationship between parties - s56(1)

4.2.3.3 Unlawfulness

- unlawfulness of act conceivably (possibly) excluded if X is himself/herself compelled to compel Z to perform the act upon Y.

4.2.3.4 Intention

- X must have intention that Z performs act of sexual penetration with Y knowing/foreseeing consent of Z & Y absent - *dolus eventualis* sufficient form of intention for the crime
- X genuinely believed Y (complainant) consented - lacks intention

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

4.3.1 General

- Apart from two specific offences of rape - Act repeals common law crime **indecent assault** & replaces with new statutory offences of **sexual assault, compelled sexual assault & compelled self-sexual assault**
- various offences relate to non consensual sexual violation of another person by perpetrator himself/herself/another person who is compelled by perpetrator to perform the prohibited act
- compelled person may also be complainant himself/herself.

4.3.2 Sexual assault

4.3.2.1 Definition

S5(1) of Act provides that

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

S5(2) furthermore provides that

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

Elements of the crime:

- (a) an act of “**sexual violation**” of another person;
- (b) **without the consent** of the latter person;
- (c) **unlawfulness**; and
- (d) **intention**; OR
- (a) the **inspiring of a belief** in another person that he/she **will be sexually violated**;
- (b) **unlawfully**; and
- (c) **intentionally**.

4.3.2.2 The act

(a) Definition of “sexual violation” - NOT required to memorise definition - must be able to identify act which complies with definition

purpose of crime - criminalise sexual acts which fall short of actual penetration of Y

If actual penetration (as word defined in Act) - crime of rape committed.

“Sexual violation” - broadly defined in s1:

including any act which causes –

(a) direct/indirect contact between the

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

BUT does not include act of sexual penetration & “**sexually violates**” has a corresponding meaning.

word in definition “includes” = important - implication of word - punishable acts included in this crime - not limited to those expressly mentioned in definition but is possible that other acts not expressly mentioned in definition - also amount to commission of the crime

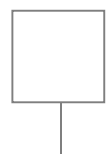
in light of extensive enumeration (list) of acts in definition - unlikely a court will decide other acts not mentioned in definition - amount to commission of the crime.

(b) Discussion of definition of “sexual violation”

- (i) “... any act which causes ...”

As in statutory crime rape - present crime defined widely to include not only actual act of X hereby he or/she makes contact with body of another but also any act whereby he/she **causes** such contact.

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



expression "sexual penetration" - describes act in crime of rape is defined as "any act which causes penetration ..." & expression "sexual violation" describes act in crime of sexual assault is defined in terms of "any act which causes ... contact between ..."

Sexual assault does not deal with penetration but with "contact" between two persons.

(iii) Direct/indirect contact

definition - "any act which causes ... direct/indirect contact between ..."

"Contact" - the physical touching of two parts of the different bodies/body & an object

"Indirect contact" - contact through agency of another person/use of instrument i.e. stick

Examples of conduct may amount to offence of "sexual violation" - **not learn examples for exam - may be required to identify acts which comply with provisions of the section.**

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

second way which crime of sexual assault committed - X inspiring a belief in Y that Y will be sexually violated - s 5(2)

"sexual assault" - may deduce that legislature intended crime to be species of common law crime assault Assault can be committed in two ways:

- (i) by act which infringes Y's bodily integrity – takes form of actual application of force to Y; and
 - (ii) by inspiring of belief in Y that Y's bodily integrity is immediately to be infringed.
- Legislature wanted similar principle to apply to crime of sexual assault - submitted that same principles applying to form of assault known as inspiring of a belief that Y's bodily security is about to be infringed also apply to this way in which sexual assault may be committed
 - X either male/female - same applies to Y
 - act of sexual violation - **place without consent of complainant**
 - S56(1) provides - when accused person charged with sexual assault - "it is not a valid defence for that accused person to contend that a marital/other relationship exist/existed between him/her & the complainant"
 - possible for husband to commit sexual assault in respect of own wife

4.3.2.3 Unlawfulness

X may rely on compulsion as ground of justification excluding unlawfulness

4.3.2.4 Intention

- Intention specifically mentioned in definition of crime in s3 as requirement for conviction
- X must know Y had not consented to sexual violation
- Same principles as those in corresponding element in crime of rape also apply to element of intention in this crime.

4.3.3 Compelled sexual assault

4.3.3.1 Definition

S6 of Act provides that:

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

Elements of the crime:

- (a) **compelling a 3rd person;**
- (b) to commit act of **sexual violation with another person** (complainant);
- (c) **without the consent of such 3rd person;** and
- (d) **without the consent of the complainant;**
- (e) **unlawfulness;** and
- (f) **intention.**

4.3.3.2 The act

- typical example of commission of crime - X tells Z he will kill him if he does not commit some act of sexual violation in respect of Y - impossible for Z to escape his dilemma & Z ends up yielding to pressure & performs the deed
- S56(1) provides - accused person charged with this crime - "it is not a valid defence for that accused person to contend that a marital/other relationship exists/existed between him/her & the complainant".
- See corresponding element in crime of rape

4.3.3.3 Unlawfulness

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

4.3.3.4 Intention

See corresponding element in the crime of rape

4.3.4 Compelled self-sexual assault

4.3.4.1 Definition – NOT required to memorise definition - must know elements of offence & able to identify an act of compelled self-sexual assault.

S7 of Act provides that:

A person (X) who unlawfully & intentionally compels a complainant (Y) without Y's consent to –
engage in
masturbation;
any form of arousal/stimulation of a sexual nature of the female breasts; or
sexually suggestive/lewd (lustful/vulgar) acts with Y himself/herself;
engage in any act which has/may have the effect of sexually arousing/degrading Y; or
cause Y to penetrate in any manner whatsoever her own genital organs/his/her anus,
is guilty of the offence of compelled self-sexual assault.

Elements of crime are:

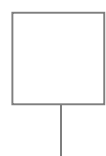
- (a) the compelling of somebody else;
- (b) to engage in the conduct set out in the definition;
- (c) without consent of the other person;
- (d) unlawfulness; and
- (e) intention

crime created in s7 deals with situations in which there are only two persons – the **perpetrator (X)** & the **victim (Y)**

X compels Y to perform the "indecent" act upon Y himself/herself.

4.3.4.2 The act

- example of conduct punishable under this section - X tells Y that he will kill him/her - if he/she does not self-masturbate - impossible for Y to escape his/her dilemma & where Y yields to the pressure & performs the act.
- act in paragraph (c) refers to - Y forced to penetrate himself/herself - insert his/her finger into his/her own anus/her vagina.
- requirement of "absence of consent" - same as for crime of rape - corresponding element
- S56(1) provides - accused charged with this crime - "it is not a valid defence for that accused person to contend that a marital/other relationship exists/existed between him/her & the complainant".



4.3.4.3 Unlawfulness

unlawfulness conceivably excluded if X himself/herself compelled to compel Y to perform the act.

4.3.4.4 Intention

Same as crime of rape - corresponding element in the crime of rape.

4.4 SEXUAL OFFENCES AGAINST PERSONS 18 YEARS/OLDER

4.4.1 General

Act creates various offences which may be committed in respect of **persons 18 yrs/older**

Brief summary of punishable acts: **NOT required to memorise various ways crimes committed against persons 18 yrs & older - must identify act which amounts to offence in given set of facts.**

- (i) unlawful & intentional **compelling** of person 18 yrs/older **without his/her consent** to **witness sexual offences, sexual acts with another/self-masturbation** - s8(1)–(3)
irrelevant whether act performed for sexual gratification of perpetrator (X)/for third person (Z)
word “sexual act” defined as either sexual penetration/sexual violation - s 1(1)
S v Pretorius:
- accused performed act of self-masturbation in lounge of his house in front of domestic servant
 - then asked if she would like to help him masturbate & she replied she would not
 - continued to masturbate in front of her finally moving to the bathroom but leaving the door open in full view of complainant
 - charged with contravention of s 8(3) - he had unlawfully & intentionally compelled/caused complainant to witness act of self-masturbation
 - accused argued - domestic servant had opportunity not to witness - she must have effectively consented thereto
 - was convicted of offence & appealed against conviction
 - court of appeal confirmed conviction on basis that accused had **caused** her to witness the act - pointed out that ordinary meaning of word “cause” = “bring about”
 - further found - conduct of accused unlawful because complainant had **not consented** to witnessing the act
 - court found the appellant **abused his position of power/authority** in self-masturbating in complainant’s presence & attempting to induce complainant to participate in his act of self-masturbation
 - Because complainant dependent on income from the job to support children did not expressly indicate objection to appellant’s conduct
 - court rejected argument that her failure to expressly object/indicate unwillingness/resistance amounted to voluntary/uncoerced consent.
- (ii) unlawful & intentional **exposure/display** (or causing exposure/display) **of the genital organs, anus/female breasts of X/Z** to Y - person 18 yrs/older **without Y’s consent** (s 9)
irrelevant whether act performed for sexual gratification of perpetrator (X)/third person (Z)
offence generally referred - “**flashing**”.
- (iii) unlawful & intentional **exposure/display** (or causing exposure/display) of persons 18 yrs/older to **child pornography**.
irrelevant whether act performed for sexual gratification of perpetrator (X)/third person (Z)
NB - crime committed even if Y consented to exposure of display of child pornography to himself/herself (s 10).
- (iv) **engagement** of persons 18 yrs /older in **sexual services** for financial/other reward, favour/compensation to Y/third person (Z) (s 11)
X to be convicted of offence act must be performed:
(a) **for purpose of engaging in a sexual act with Y** (if sexual act in actual fact committed/not) (s 11(a)); or
(b) **by committing a sexual act with Y** (s 11(b)).

➤ **conduct of X punishable even if Y consented to the act**

- Therefore person who engages services of prostitute (18 yrs/older- male/female) may be convicted of this offence
- section not expressly criminalise activity of Y (prostitute) - clear Y's conduct furthers/promotes criminal activity of X - Y convicted of being **an accomplice** to the crime committed by X

4.5 INCEST

4.5.1 Definition

S12(1) provides:

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

"consanguinity", "affinity" & "adoptive relationship" - circumscribed in subsection (2)

Elements of crime are:

- (a) act of **sexual penetration**;
- (b) **between 2 people** who may **not lawfully marry each other** on account of **consanguinity, affinity/an adoptive relationship**;
- (c) **unlawfulness**; and
- (d) **intention**.

4.5.2 The act

crime committed if **sexual penetration takes places between people who may not lawfully marry each other on account of consanguinity, affinity/an adoptive relationship**.

S12(2) reads as follows: **Not required to memorise - must be able to identify factual situation involving people who may not lawfully marry each other on account of consanguinity, affinity/an adoptive relationship.**

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

4.5.3 Unlawfulness

sexual penetration must be unlawful – i.e. not committed under duress

Consent by other party no defence - both parties consented - both parties guilty of the crime

4.5.4 Intention

Intention element of the crime

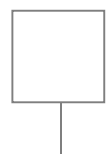
parties not only intend to have sexual intercourse with each other - also be aware of fact are related to each other within prohibited degrees of consanguinity, affinity/adoptive relationship.

4.6 BESTIALITY

4.6.1 Definition - NOT required to know definition in detail - be able to identify act prohibited in terms of provision

A person who unlawfully & intentionally commits an act

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



court in *M* held - existence of such crime = not unconstitutional pg 391 in case book – MUST STUDY FOR EXAMS

4.7 SEXUAL OFFENCES AGAINST CHILDREN

4.7.1 General

Chapter 3 of Act comprising of s15 to 22 - sexual offences against children

most NB of these crimes 1st one - **sexual penetration of children below the age of 16 yrs even with their consent**

4.7.2 Consensual sexual penetration of children

4.7.2.1 Definition

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

NOTE: For purpose of s15 & 16 - "child" defined in s1(1) - "a person 12 yrs/older but under the age of 16 yrs"

Elements are:

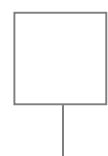
- (a) **commission of an act of sexual penetration**
- (b) **with a person 12 yrs/older but under the age of 16 yrs**
- (c) **unlawfulness** and
- (d) **intention**

- referred to as "**statutory rape**"
- X commits act of sexual penetration with child below age 12 – he/she guilty of this crime – any ostensible "consent" young child regarded by law invalid
- Sexual penetration of child between ages 12 & 16 = criminalized - child not yet mature enough to properly appreciate implications & consequences of sexual acts - especially sexual penetration of female by male
- therefore specially protected
- **Consent by the child to the commission of the act is no defence**
- act takes place without consent by child - X commits more serious crime of rape
- ***The Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development*** (decided 3 Oct 13) - Constitutional Court considered constitutionality of criminalisation of consensual sexual conduct of children **12 yrs/older but under age of 16 yrs**
- provisions of Sexual Offences Act = s15 & 16
- court explained - crime committed in following circumstances:
 - Firstly - **adult (18 yrs/older)/minor (16 yrs but under age of 18)** engages in **consensual sexual penetration with adolescent (12 yrs/older but under age of 16 yrs)**.
 - Secondly - crime committed when **adolescents (12 yrs/older but under age of 16 yrs) engage in consensual sexual penetration with each other**.
- S16 of Act contains same provisions as s15 except it criminalises "sexual violation" - broadly defined as "direct/indirect contact" & includes some forms of masturbation by another person, petting & kissing
- provisions similar in other respects to s15(2)
- "close-in-age" defence available to child charged with sexual assault - accused child may rely on defence that both of accused children & age difference between them **no more than two yrs** – s56
- pointed out by court - 12-yr-old & 15-yr-old engage in kissing - both committing offence in terms of s16
- If 15-yr-old prosecuted 12-yr-old must also be prosecuted - neither may rely on close-in-age defence
- North Gauteng High Court ruled provisions unjustifiably infringe children's constitutional rights to dignity, privacy & bodily & psychological integrity as well as rights in terms of s28(2) of the Constitution
- Constitutional Court asked to confirm ruling of High Court

- contended by applicants that provisions so broad - instead of protecting children - harmed children - would be exposed to criminal justice system as result of prohibited conduct
- Such exposure (argued in expert evidence before court) would harm child's development of *proper understanding of & healthy attitudes to sexual behaviour*
- Due to adverse consequences rights to human dignity, privacy, physical & psychological integrity as well as "best interests of the child" principle infringed
- Constitutional Court considered impact of provisions on each rights:
 - pointed out - children enjoy each of fundamental rights in Constitution granted to "everyone"
 - expert evidence before court indicated data revealed that majority of SA children 12 yrs/older but under 16 yrs begin explore sexuality & is part of child's development
 - Adolescents charged under impugned provisions might be shamed & embarrassed by criminal prosecutions which might have negative impact on natural development
 - Another adverse consequence - child might be discouraged from seeking help for issues relating to sex from parents/other people
 - instead of achieving positive outcomes - provisions more likely to heighten risk of adolescents having negative experiences
 - dealing 1st with right to dignity - court agreed that criminalisation of consensual sexual conduct - "form of stigmatisation which is degrading & invasive"
 - infringement of s10 - right to dignity therefore apparent since as court noted "an individual's human dignity comprises not only how he/she values himself/herself but also includes how others value him/her"
 - negative evaluation by others would be a consequence of criminal trial & conviction of such adolescent
 - right to privacy - court indicated that provisions invaded "the most intimate spheres of personal relationships"
 - evidence was led to the effect that exposure of children to criminal justice system for engaging in consensual sexual behaviour would have negative impact on them generally & would likewise be contrary to best interests of the child in terms of s28(2) of Constitution
 - Turning to limitation analysis - court rejected respondents' contention (argument) that implementation of provisions would require prosecutorial discretion at highest level & that there are other diversionary measures available to avoid criminal trial & conviction
 - court pointed out - adolescents would inevitably be exposed to being arrested & questioned by police
 - no evidence before court that purpose of provisions - protect adolescents from risks associated with sexual acts & consequently deter them from engaging in such conduct - could reasonably be expected to be achieved
 - was evidence before court - have opposite effect - "cultivating a society in which adolescents are precluded from having open & frank discussions about sexual conduct with their parents and caregivers"
 - court found - no rational link between provisions & stated purpose
 - also considered possibility - less restrictive means used to educate children about risks of matters like child pregnancy
 - provisions - declared **inconsistent with Constitution & invalid to extent that they impose criminal liability on children under age of 16 yrs**
 - **Because of complexity of matter (example - need to impose criminal liability on adult for engaging in sexual conduct with consenting adolescent) - declaration of invalidity suspended for 18 months - allow parliament to amend provisions**
 - **provisions have not yet been amended by parliament**

4.7.2.2 The act

- provision which was conditionally declared unconstitutional in *Teddy Bear* case provides a child must be **12 yrs/older but under age of 16 yrs** at time of commission of act
- definition of crime in subsection (1) - not require X to be above certain age



- subsection (2) provides – X also a child (person 12 yrs/older but under age of 16 yrs) - institution of prosecution be authorised in writing by national director of public prosecutions
Two defences X may rely on when charged with this crime (s 56(2)).
- **First defence: Y deceived X about his/her age**
 - s56(2)(a) - valid defence for somebody charged with this crime to contend the child (Y) deceived X into believing he/she 16 yrs/older at time of alleged commission of crime & X reasonably believed that Y was 16 yrs/older
 - provision not apply if X related to Y within prohibited degrees of blood, affinity/an adoptive relationship as set out in definition of incest
 - submitted that prosecution bears onus of proving X not deceived into believing Y was 16 yrs/older - is evidential onus on X to raise defence & lay factual foundation for existence of belief
- **Second defence: X & Y both children**
 - s56(2)(b) - valid defence for somebody charged with this crime to contend that both X & Y “children” (betw ages 12 & 16 yrs) **and** age difference betw them not more than two years at time of alleged commission of crime
 - **if X 15 yrs old at time of act he/she - have valid defence if Y 13 yrs at that time - not if Y 12 yrs at that time**

entire s15 declared unconstitutional - declaration of unconstitutionality been suspended for 18 months to give parliament opportunity to amend provisions

4.7.2.3 Unlawfulness

Act must be unlawful

Compulsion conceivably exclude unlawfulness

Unlawfulness be excluded by official capacity - medical doctor examines child - places his/her finger in child's vagina/anus/mouth

4.7.2.4 Negligence sufficient form of culpability

Intention specifically mentioned as requirement for conviction in most crimes created in the Act - not mentioned as requirement for conviction of the present crime

Happens that X bona fide believes female Y at least 16 yrs of age - in fact just below age of 16 at time of commission of act

S56(2)(a) - X not rely on defence he made mistake regarding Y's age

Section provides - X's belief that Y already 16 yrs must be **reasonable**

Word “reasonable” - **objective element** into inquiry - X held liable if reasonable person would have realised Y not yet 16 yrs - X found guilty of the crime if state proves only **negligence**

4.7.3 Consensual sexual violation of children

NOT required to know exact provisions of s16

Only difference between this crime & consensual sexual penetration of children in contravention of s15 - the latter crime relates to situations where child betw ages of 12 & 16 yrs sexually penetrated - in present crime such child **is not sexually penetrated but only sexually violated**.

2 special defences created in s56 also apply to this crime

Same remarks apply to elements of unlawfulness & intention & to the consent of national director of public prosecutions which must be obtained if X below age of 16 yrs

As in other crime X may be male/female & same applies to Y.

4.7.4 Sexual exploitation of children under the age of 18 years

4.7.4.1 Definition

S17 creates number of crimes relating to **sexual exploitation** of children

Summary of s17's provisions

WORD “CHILD” USED IN SECTION - PERSON UNDER AGE OF 18 YRS OLD

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

s17(1) provides - any person engages services of a child (**with/without his/her consent**) for sexual favours, any type of reward - irrespective of whether sexual act committed/not - guilty of the crime of sexual exploitation of a child

example - X commits the crime if obtains services of Y for sex for reward even if Y is consenting 17-yr-old person

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

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

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

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

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

Subsection (4) - person who intentionally receives financial/other reward from commission of sexual act with child complainant by 3rd party - guilty of benefiting from sexual exploitation of a child

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

subsection (5) - person who intentionally lives wholly/in part on rewards/compensation for commission of sexual act with a child (Y) by 3rd person (Z) - guilty of living from earnings of sexual exploitation of a child.

(f) **Promoting child sex tours**

Subsection (6) - a person who organises any travel arrangements for 3rd person (Z) with intention of facilitating commission of sexual act with a child (Y)/prints/publishes information intended to promote such conduct - guilty of promoting child sex tours.

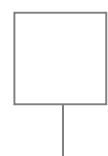
4.7.5 Sexual grooming of children under age of 18 yrs

NOT expected to memorise all ways which offence committed - must be able to identify act of sexual grooming of child in a given set of facts

- S18 criminalises long list of acts which amount to requesting, influencing, inviting, persuading, encouraging/enticing child (Y) - **person under age of 18 yrs** - to indulge in sexual act/diminishing his/her resistance to performance of such acts - **irrelevant whether child consented to the act**
- S18(2) - person commits crime of **sexual grooming of child** if he/she among other things performs any of the following acts:
 - display **an article to Y intended to be used in performance of sexual act**/display of pornography/publication/film which is intended to encourage child to commit sexual act
 - commission of any act with/in presence of Y with intention **to encourage child** to commit sexual act with him/her/3rd person/**to reduce unwillingness on the part of Y to perform such act**
- Further acts which amount to the offence - specifically aimed at prevention of grooming of child **over internet**. Punishable acts are:
 - arrange meeting with child (any part of world) to commit sexual act with child
 - invite child to travel to meet X to commit sexual act with child

4.7.6 Displaying of pornography to children, use of children for child pornography & benefiting from child pornography

- S19 prohibits person from unlawfully & intentionally exposing/displaying child pornography to persons younger than 18yrs
- S20 creates crime of using child for/benefiting from child pornography - targets different roleplayers actively involved in obtaining children & using them to create child pornography
- **does not matter whether Y consents to the act/not/receives any benefit/reward from such proposed conduct**



- Subsection (2) - aimed at punishing all roleplayers who benefit in any manner from involvement in child pornography

NOT expected to memorise above definition of the crime - must be able to identify prohibited act in terms of this offence

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

S21 creates offence similar to offence in s8 ("Sexual offences against person 18 yrs/older") - offence however applies to children under age of 18 yrs

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

offence same as offence in respect of adults (s9) - except one important difference : adults act must be performed **without** consent of victim & children offence committed **even if the child consented** (offence committed **with/ without consent of child**)

4.8 SEXUAL OFFENCES AGAINST MENTALLY DISABLED PERSONS

4.8.1 General

Mentally disabled persons constitute group of persons particularly vulnerable to sexual exploitation - Consequently mentally disabled people need particular protection by the law

4.8.2 Definition

Chapter 4 of the Act, comprising s23 & 26, deals with sexual offences against persons who are mentally disabled.

expression "**person who is mentally disabled**" defined as follows in s1(1):

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

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

offences created in respect of mentally disabled persons - similar to offences created in respect of children - Section 17 – 20 applicable!!!

4.9 FAILURE TO REPORT SEXUAL OFFENCES AGAINST CHILDREN & MENTALLY DISABLED PERSONS

S54(1) provides **any person** who has **knowledge** that a sexual offence has been committed against a child must report such knowledge immediately to a police official

S54(2) provides - person who fails to report such knowledge is guilty of an offence

S54(2) places similar obligation on any person to report **knowledge, reasonable belief/suspicion** that sexual offence has been committed against a person who is mentally disabled

Failure to comply with these obligations amounts to an offence

4.10 TRAFFICKING IN PERSONS FOR SEXUAL PURPOSES

Act provides that a person who traffics in any person (Y) for sexual purposes without person's consent - guilty of the offence of trafficking in persons for sexual purposes - s71(1)

Encouraging, incitement, instigation & other preparatory actions amount to offence of involvement in trafficking in persons for sexual purposes - s71(2)

4.11 ATTEMPT, CONSPIRACY AND INCITEMENT

S55 provides - any person involved in commission of sexual offence by way of attempt, conspiracy, aiding/abetting, inducement, incitement, instigation, instruction, commanding, counselling/procurement - guilty of an offence

STUDY UNIT 5 - CRIMES AGAINST LIFE AND POTENTIAL LIFE

5.2 MURDER

5.2.1 General

NOT required to study prescribed punishment for murder in any detail for examination

Definition:

Murder is the unlawful & intentional causing of the death of another human being

Elements of crime:

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

General:

Many different ways person can cause death of another

Crime of murder in SA law covers wide field

Moral reprehensibility of the intentional causing of another's death vary from case to case

1 extreme – case where X kills Y cold-bloodedly with premeditation & out of hatred

Other extreme – X & Y drink liquor together, Y acts provocatively towards X, quarrel ensues, Y slaps X across the face whereupon enraged X kills Y

Also situation – X gives Y, who suffers from cancer & endures excruciating pain, lethal injection to release him from his suffering; X at Y's request assists him to commit suicide & even where X stumbles upon Y in the act of committing adultery with X's wife & an enraged X then kills Y

According to SA law – all these situations X liable to be convicted of murder

USA – well known “murder in the 1st degree” & “murder in the 2nd degree”

English likewise distinguishes between murder & voluntary manslaughter

German law – between *mord* & *totschlag*

Dutch law – between *moord* & *doodslag*

Similar/analogous differences between different crimes reflecting different types of intentional causing of death found in most other legal systems

Present definition of murder in SA law is an oversimplification of something which is more complex than 1 might initially tend to think

If like other legal systems (above) our law had recognized 2 different crimes by which the unlawful, intentional killing of someone else were punished, our courts would not have experienced so many problems deciding what effect of provocation on liability was

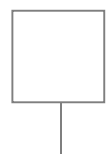
Provoked homicide could in principle have been treated as falling under the less serious form of intentional homicide

Causing the death

Act consists in voluntary act/omission which causes the death of another human being

Brief summary of these rules:

- x must either commit a voluntary positive act (*commission*)/there must be a voluntary omission (*omission*) on his part in circumstances in which there is a legal duty on him to act positively
- Act/omission is voluntary if X capable of subjecting his bodily movement to his will/intellect
- Act/omission qualifies as the cause of Y's death if it is both the factual cause & legal cause of the death
- Factual cause of death if it is a *condition sine qua non* – indispensable condition of the death – X's conduct cannot be thought away without Y's death disappearing at the same time
- Legal cause of Y's death if a court is of the view that there are policy considerations for regarding it as the cause of Y's death
- 1/more of number of theories of legal causation used – individualization theory (proximate cause), theory of adequate causation/the *novus actus interveniens* theory



Another human being

- Neither suicide nor attempted suicide is a crime
- Does not mean to instigate, assist/put another in a position to commit suicide can never be criminal
- Certain circumstances such conduct amount to murder/culpable homicide – since instigator's conduct may be causally related to the death/amount to attempted murder
- Human being killed must be a live human being
- To "kill" unborn foetus & separate it from mother's body – treated in our law as abortion – not murder
- Various tests used to ascertain whether child was born alive – breathed, had independent blood circulation/completely expelled from mother's body
- S239(1) of Criminal Procedure Act 51 of 1977 – child deemed to have been born alive if it is proved that it breathed whether it had independent blood circulation/not & not necessary to prove child was at time of death entirely separated from mother's body – presumption of live birth if child breathed
- Presumption rebuttable not yet decided – been submitted it's not
- Section merely procedural importance – does not lay down substantive law
- Facilitates task of prosecution in case child has breathed – ordinary not difficult to prove
- Hydrostatic test – lungs placed in water to determine whether they float employed
- Section not state when child born alive but how it may be proved
- Remains possible for X to prove that even if it breathed child was dead before completely expelled from mother's body
- Wording of section ambiguous: irrebuttable presumption of live birth not only inference to be drawn – fact that wording ambiguous – more reason for interpreting in X's favour

Unlawfulness

Killing must be unlawful

Certain grounds of justification – private defence (including self-defence), necessity, official capacity/obedience to orders – may justify otherwise unlawful killing

Consent to killing by deceased not exclude unlawfulness

Euthanasia not grounds of justification

Intention

Form of culpability required = intention

(Unlawful) negligent causing of another's death = culpable homicide

Rules relating to element of intention summary:

- Intention requirement satisfied not only if X has direct intention (*dolus directus*) to kill Y but also if he foresees possibility of Y being killed & reconciles himself with the possibility (*dolus eventualis*)
- Test for intention = subjective
- Subjective mental state inferred from objective facts proved by state
- Awareness of unlawfulness is integral part of intention
- Mistake concerning material element of crime (requirement that it is a *human being* that must be killed) excludes intention
- X's motive irrelevant

Punishment

(a) General

- Death sentence used to be competent sentence for murder – 1995 *Makwanyane* - Constitutional Court held – form of punishment unconstitutional – amounts to unjustifiable violation of the right to life, right to dignity & right not to be subjected to cruel, inhuman/degrading punishment
- Before 1997 court had free discretion as to period of imprisonment imposed on conviction of murder
- Incidence of murder increased alarmingly since 1990 (moratorium 1st placed on execution of death sentences)
- Reaction to high crime level S51 of Criminal Law Amendment Act 105 of 1997 enacted
- Makes provision for min sentences imposed for certain crimes – murder in certain circumstances

- Subsection (6) of S51 provides – min sentences not applicable in respect of a child who was under age 16 at time of commission of the crime

(b) Imprisonment for life must sometimes be imposed

- S51(1) – Regional Court/High Court must sentence person convicted of murder to imprisonment for life in following circumstances:

- (1) murder planned/premeditated
- (2) Y was law enforcement officer (police) who has been murdered while performing his functions as a law enforcement officer, irrespective of on duty/not
- (3) Y somebody who has given/was likely to give material evidence at a criminal proceeding with reference to any crime referred to in Schedule 1 (list of crimes described as serious) of Criminal Procedure Act 51 of 1997
- (4) Y's death caused by X committing/attempting to commit (after having committed/attempted to commit) rape/compelled rape
- (5) Y's death caused by X committing/attempting to commit (after having committed/attempted to commit) robbery with aggravating circumstances
- (6) murder committed by person, group of persons/syndicate acting in execution/furtherance of common purpose/conspiracy
- (7) Y killed to unlawfully remove any part of his body
- (8) Y's death resulted from certain crimes mentioned in Witchcraft Suppression Act 3 of 1957

Existence of punishment as imprisonment for life (replaced death sentence as max sentence imposed on conviction of murder) must be taken with pinch of salt, person who received such punishment may be released on parole

(c) Other min periods of imprisonment must sometimes be imposed

If 1 of circumstances not present – X not qualify for mandatory imprisonment for life

S51(2) – in such situations high/regional court – nevertheless obliged to impose following min period of imprisonment

- (1) 15 yrs – 1st offence
- (2) 20 yrs – 2nd offence
- (3) 25 yrs – 3rd/subsequent offender

(d) Avoidance of min sentences

Always cases court of opinion imposition above min periods imprisonment – considering circumstances of case – harsh/unjust

Subsection (3)(a) of S51 – legislature created mechanism whereby court freed from obligation of imposing 1 of min sentences above

According to subsection – court not bound to impose imprisonment for life/for min periods of imprisonment above – if *substantial & compelling circumstances* which justify imposition of lesser sentence than prescribed

Such circumstances exist – court may impose period of imprisonment less than period prescribed by legislature

Crucial words in Act relating to avoidance of mandatory min sentences – “substantial & compelling circumstances”

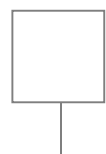
Court initially came to conclusions not always harmonious

Malgas – Supreme Court of Appeal considered interpretation of these words & formulated long list of rules to be kept in mind by courts when interpreting the words

Without setting out these rules – may be stated – most NB – provides that if court satisfied the circumstances of the case render prescribed sentence unjust in that it would be disproportionate to the crime, the criminal & needs of society – so that justice would be done by imposing that sentence – it is entitled to impose a lesser sentence

Dodo – Constitutional Court held – introduction by legislature of min sentences in S51 not unconstitutional

Pay particular attention - requirement that “another person” must be killed and more particularly that the object of this crime must be a **living** human being



Read Case **Mshumpa – IRMA to PLEASE SUMMARIZE??**

(case deals with requirement that victim of crime of murder must be **living human being**, also application of principles of participation in crimes of attempted murder, robbery & assault, crimes that featured in judgment - incitement to commit attempted murder & crime of defeating/obstructing course of justice)

5.3 CULPABLE HOMICIDE

Elements of crime:

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

Definition

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

Difference between culpable homicide & murder

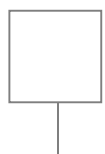
- Form of culpability required is negligence
 - Test for negligence in principle objective
 - Court must ask itself
 - (a) reasonable person in same circumstances would have foreseen the possibility that Y's death may result from X's conduct
 - (b) whether reasonable person would have taken steps to guard against such a possibility
 - (c) whether X's conduct deviated from what reasonable person would have done in the circumstances
 - Been proved X (charged with murder) killed the deceased unlawfully – because of factors such as intoxication/provocation lacked intention – crime not automatically reduced from murder to culpable homicide
 - Court must be satisfied X negligent in causing Y's death
 - Easy to draw conclusion in cases of assault resulting in death – no general presumption – that in every case of assault which results in death X ought to have foreseen that death might result & that he was therefore negligent
 - Type of case in which court even though X at first glance would seem to have had an intention to kill Y, convict X of culpable homicide
 - Cases where X in killing, exceeds bounds of ground of justification such as private defence (self-defence)
 - X is then convicted not of murder but culpable homicide
 - Previously cases referred to as the “particular excuse cases” – said reason X convicted of culpable homicide (not murder) in such cases although there was intention to kill – intention “not entirely but to some extent excusable”
 - Closer examination of these cases reveals that in these cases intention to kill is absent – X lacked awareness of unlawfulness
 - Awareness of unlawfulness indispensable component of concept of intention as employed in criminal law
 - X directs his will to kill Y (factors such as – excitement, over-eagerness) he fails to appreciate acting unlawfully- real reason why *dolus*/intention to kill in its proper legal connotation is lacking
 - “partial excuse rule” according to which person may be guilty of culpable homicide even though he had an “intention to kill” is irreconcilable with the clear view of Appellate Division especially in later judgement such as *Ntuli* that the form of culpability in culpable homicide is not intention but negligence
 - Number of cases – question arose – X could be convicted of culpable homicide if charged with this crime – evidence revealed that he in fact had intention to kill
 - Different divisions of supreme court came to different conclusions – *Ngubane* – Appellate Division resolved differences by holding – wrong to assume that if X acted intentionally – impossible to find he was also negligent – means in this type of case X may be found guilty of culpable homicide despite fact he killed Y intentionally
- ONLY** difference between murder & culpable homicide lies in the form of culpability required for each Case of murder, intention is required - case of culpable homicide X must have acted negligently in causing the death of the deceased

No attempt

Person cannot intent to be negligent & intention is required in an attempt to commit a crime – no crime as attempted culpable homicide

SUMMARY

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



STUDY UNIT 6 CRIME AGAINST BODILY INTEGRITY

6.1 ASSAULT

(Criminal Law 447–454; Case Book 238–244)

6.1.1 Definition

A person commits assault if she unlawfully & intentionally
(1) applies force, directly/indirectly, to the person of another, or
(2) inspires a belief in another person that force is immediately to be applied to her.

6.1.2 Elements of the crime

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

6.1.3 Historical overview

In common law assault in sense of an attack/threat of attack to the person of another was not known as independent crime - was comprehensive crime – *iniuria* -included all kinds of violations of the rights of personality

Under influence of English law - assault in our law developed into independent crime

An *iniuria* committed against another's dignity (*dignitas*) punished in our law as *crimen iniuria*;

an *iniuria* against another's good name (*fama*) punished criminal defamation

Assault is nothing other than iniuria against the physical integrity (*corpus*) of another.

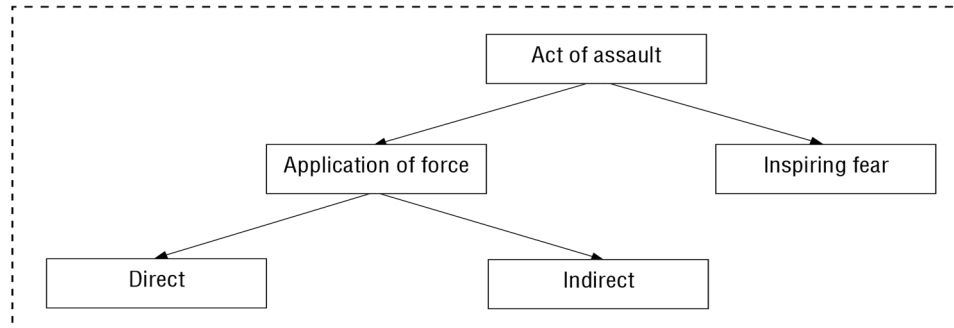
6.1.4 Ways in which the crime can be committed

Assault may take different forms

1st ly - application of force to the person (body) of another

2nd ly - inspiring fear in Y - a belief in Y that force is immediately to be applied to her

LEARN DIAGRAM



6.1.5 Application of force – direct

first way crime can be committed - application of force

distinguish between direct & indirect application of force

direct application of force most common way in which crime committed

form of crime corresponds most closely to ordinary lay-person's idea of assault

example:

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

fact Y does not feel much/any physical pain – irrelevant

X commit the crime even if only spits in Y's face/trips her so that she stumbles.

6.1.6 Application of force – indirect

application of force may be indirect

X commits act - results in Y's physical integrity being infringed

examples:

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

two examples from case law of convictions of assault where application of force indirect:

- (1) **Marx** - X gave 3 glasses of wine to drink to each of 2 children (5&7)
children drank the wine & became sick as result
younger child could not walk at all & was in semiconscious condition
X convicted of assault
fact that harm/discomfort internal rather than external - irrelevant.
- (2) **A** - X a policeman forced Y who he just arrested & taken to police station to drink his own urine
X convicted of assault
Court rejected proposition - urine not poisonous/dangerous - forced drinking of it - not constitute assault
- holding that forced drinking of **any** substance constitutes assault.

6.1.7 Inspiring fear of immediate force

Inspiring fear/a **belief** in Y that force is immediately to be applied to her - constitutes act of assault

no physical contact with/impact on, Y's body

unusual way of committing the crime - departs from layperson's conception of what constitutes assault

rules setting out preconditions for holding somebody liable for assault - be convicted of assault:

- (1) threat - 1 of violence to the **person** of Y - threat by X to damage Y's property is not sufficient
- (2) threat 1 of **immediate** violence - threat by X to cause Y physical harm in future (next day) - not qualify as assault
- (3) threat 1 of **unlawful violence** - If X entitled by law to threaten Y with violence should Y not behave in certain manner (leave X's house/premises) - does not commit assault if she threatens Y
X may always threaten Y to use force to defend herself/property.
- (4) Y (complainant) must **subjectively believe** X intends to carry out threat & is able to do so
essence of type of assault is intentional inculcation of fear upon Y
If Y not fear threat no assault committed
- (5) general consensus of opinion - modern writers - X commits this form of assault **even though she does not perform any act/gesture but merely threatens Y verbally** - if Y turns corner to be confronted by motionless X who (gun in hand) commands "Hands up!" - X commits assault

6.1.8 Unlawfulness

use of force/inspiring of fear must be unlawful - must be no ground of justification for X's act

examples of instances - X's act would be justified (not unlawful)

- (1) **Private defence**: Y threatens to kill/assault X - to defend herself, X uses force against Y.
- (2) **Official capacity**: X a police official uses force to arrest Y, who committed a crime in her presence.
- (3) **Parental authority**: X gives her naughty 7yr daughter a moderate hiding to discipline her
- (4) **Consent**
 - (a) X a surgeon cuts open Y's body in course of performance of operation upon Y to which Y has consented
 - (b) Y a sportswoman (netball/hockey player) injured by X in course of sporting contest in respect of which Y has voluntarily consented to take part.

6.1.9 Intention

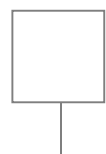
X must have intention to apply force to body of another/inspire in her fear of application of force

Implies following:

- (1) intention may take form of direct intention, indirect intention/*dolus eventualis*.

Example of assault in which X has intention in form of *dolus eventualis* is: X throws stones at birds -

children around playing - foresees possibility that if she throws stone at bird stone may miss bird & strike one of the children - hopes this will not happen & nevertheless decides to go ahead - unperturbed



(unworried) by possibility of injuring a child - throws a stone which misses bird she aimed at & strikes child.

(2) cases of assault which take place by means of inspiring fear (opposed to application of force), X **must know her conduct will inspire fear in Y** - means X must believe her threats will inspire fear in Y.

(3) ordinary principles relating to intention - X's intention must **incorporate knowledge of unlawfulness** - means X must know her conduct not covered by ground of justification - if X believes is entitled to act in private defence because she fears imminent unlawful attack by Y upon herself - where in fact not entitled to private defence because Y does not intend to attack her - lacks necessary intention to assault.

(4) *Chretien* - **intoxication** may lead to X lacking intention to assault - X must be found not guilty

(5) doubtful whether our courts prepared to recognise **provocation** as ground for excluding intention required for ordinary assault. (They recognise provocation exclude "special intention" required for qualified assaults - assault with intent to do grievous bodily harm.)

6.1.10 Attempt

- Previously - assumed attempted assault impossible - reason: Every time X attempts to assault Y, but her blow misses Y, X nevertheless inspired belief in Y that force is immediately to be applied to her & therefore X guilty of completed assault even in these cases which at first glance appear to constitute attempted assault only
- now recognised that above argument is fallacious & there may indeed be cases in which only attempted assault committed
- granted that where X has indeed inspired fear in Y - commits completed assault - must be remembered in exceptional cases possible X's blow at Y which misses her may not arouse any fear in Y - such cases only attempted assault committed
- Y may be unaware of X's words/conduct in instances where she is blind/deaf/unconscious/under influence of liquor/she does not understand X's threatening words - Even where she is aware & understands the threat she may be completely unperturbed - knows it is only a toy revolver X is pointing at her

6.1.11 Assault with intent to do grievous bodily harm

- under influence of English law – number of qualified forms of assault (qualified by intention to achieve certain goal) have developed in our law
- each qualified form is a separate, substantive crime – not merely aggravated form of assault to distinguish assault from qualified forms of assault – assault which is not qualified referred to as "common assault"/"ordinary assault"
- most NB of these crimes one known as assault with intent to do grievous bodily harm
- all requirements for assault apply to this crime – addition there must be intent to do grievous bodily harm
- whether grievous bodily harm is in fact inflicted on Y immaterial in determining liability (great importance for purpose of sentence)
- whether X had intent to do grievous bodily harm is factual question
- NB factors which may indicate X had such intention:
 - nature of weapon/instrument used,
 - way it was used
 - degree of violence
 - part of body aimed at
 - persistence of attack
 - nature of injuries inflicted if any
- Crime may be committed even though physical injuries slight
- *Joseph* – X drove truck & deliberately swerved toward Y – did not actually hit him – X nevertheless convicted of assault with intent to do grievous bodily harm – conversely crime committed may be common assault even though bodily harm of serious nature has in fact been inflicted – *dolus eventualis* sufficient
- Need not necessarily be of permanent/dangerous nature – twisting of arm/attacking with fists – even if blow aimed at head – not necessarily indicative of intention to do grievous bodily harm
- Such intention can be inferred if
 - X kicks Y in face with heavy boot while Y is lying prostrate

X administers electrical shocks to body of Y
X lets loose vicious dog on Y & dog bites Y
X throws acid in Y's face

- X found guilty of assault with intent to do grievous bodily harm even though did not use any instrument such as knife when attacked Y, but used her hands/fists only
- X may be convicted of assault with intent to do grievous bodily harm on ground of not only actually inflicting violence on Y's body, but also on ground of a threat to inflict grievous bodily harm on Y
- Rule which applies – same as in common(ordinary) assault

6.1.12 Assault with intent to commit another crime

- Various other forms of assault - each consisting of separate offence- consisting of assault with intent to commit some other crime
- Example: assault with intent to commit rape, robbery/murder
- All requirements for ordinary assault applicable – in addition there must be intent to commit the further crime
- 1 of few instances where assault with intent to murder does not overlap with attempted murder – X means to murder Y by poisoning her but events not reached stage where Y has swallowed the poison – will be attempted murder not assault with intent to murder

POINTING OF A FIREARM

6.2.1 Definition

S120(6) of the Firearms Control Act 60 of 2000 provides that it is an offence to point:
(a) any firearm, an antique firearm/an airgun, whether/not it is loaded/capable of being discharged, at any other person, without good reason to do so; or
(b) anything which is likely to lead a person to believe that it is a firearm, an antique firearm/an airgun at any other person, without good reason to do so.

subsection creates two different offences - offences so closely related - convenient to discuss them as a single offence.

6.2.2 Elements of the offence

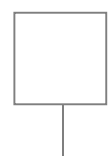
- (1) the **pointing** of
- (2) a **firearm**/other article
- (3) at **any person**
- (4) **unlawfully** and
- (5) **intentionally**

offence created in this subsection may overlap with crime of assault in form of inspiring fear of immediate personal violence

6.2.3 The act: "To point ... at"

proscribed act consists simply in pointing firearm/article described in subsection at somebody else - to secure a conviction - state need not prove any of the following:

- (1) X fired a shot
- (2) Firearm/article was loaded
- (3) Firearm/article was of such nature that it could be discharged - was capable of firing a shot
expression "point at" - interpreted in more than one way:
 - First - interpreted **narrowly** - meaning the pointing of firearm at Y in such a way that if discharged the bullet would **hit** Y (interpretation adopted in *Van Zyl*)
 - Secondly - interpreted **broadly** - meaning the directing of firearm towards Y in such a way that if it were discharged the bullet would **either strike Y/pass in her immediate vicinity** (interpretation adopted *Hans*)
support for both interpretations found in case law - submitted latter (broader interpretation) is correct 1 reasons for following broader interpretation:



- (1) can assume **intention of the legislature** - to combat evils surrounding handling of firearms on as broad a front as possible.
- (2) narrow construction of expression would make **unduly difficult for the state to prove** commission of offence - would be extraordinarily difficult to prove beyond reasonable doubt that if bullet had been fired it would actually have hit Y & not merely have missed her by millimetres.
- (3) **harm sought to be combated by the legislature** - arousal of fear in mind of Y of being struck by the bullet - exist irrespective of proof that bullet would have actually struck her/just missed her.

6.2.4 A firearm, et cetera

What must be pointed is firearm, antique firearm/airgun/anything likely to lead a person to believe that it is a firearm/antique firearm/airgun.

Definition same as unlawfully possessing firearm

Effect of paragraph (b) subsection (6) – X may commit the offence even if she points a toy pistol @Y – provided toy pistol likely to lead person to believe it is a real pistol

6.2.5 “Any other person”

Firearm/article described in Act must be pointed at a **person** - to point at **animal** - **not** lead to conviction.

6.2.6 Unlawfulness

requirement of unlawfulness not mentioned in definition of offence

words “without good reason to do so” in definition wide enough to incorporate grounds of justification
clear X not guilty of the crime if example points firearm at another while acting in private defence/X is police officer lawfully effecting an arrest.

6.2.7 Intention

Intention not expressly required in definition of offence in subsection (6)

highly unlikely that legislature intended to create strict liability offence

also unlikely it intended mere negligence to be sufficient form of culpability - words “point at” *prima facie* denote intentional behavior

corresponding offence in previous legislation - replaced by present Act required the firearm be “wilfully” pointed - submitted - form of culpability required for conviction under the subsection is intention.

means X must know that

- (1) **what she is handling is an object described in the Act**, namely a firearm, antique firearm, airgun/anything likely to lead person to believe that it is such an article
- (2) she is pointing weapon **at another person** – if she thinks she is pointing it at an animal/inanimate (lifeless/dead/non-living) object -lacks intention
- (3) **no “good reason”** for her conduct & that it is unlawful - not covered by a ground of justification
Hodgkinson - X pressed water pistol against body of 1 of his employees - was charged & convicted of contravening s120(6) of Firearms Control Act 60 of 2000 by unlawfully pointing firearm/something likely to be believed to be a firearm “without good reason to do so” – appeal: court held - culpability to be proved was intention & it was not a strict liability offence. words “without good reasons to do so” made it clear that conscious decision to point object resembling firearm under circumstances that would constitute a threat was envisaged (seen) by legislature. verb “to point” describes conscious, deliberate action. was evidence before trial court that water pistol was lying openly in the office & X & employees, including appellant would often make practical jokes & spray water on one another with water pistol. court of appeal set aside conviction on ground X had lacked intention to commit the offence.

SUMMARY

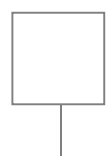
Assault

- (1) act of assault may consist either application of force to body of another person/inspiring of fear/belief in Y that force is immediately to be applied to her. The application of force may be direct/indirect.
- (2) Grounds of justification possibly be raised on a charge of assault - private defence, official capacity, parental authority & consent.

- (3) Intention is required form of culpability for the crime of assault. Negligence not sufficient form of culpability for this crime.
- (4) possible to commit attempted assault.

Assault with the intention to do grievous bodily harm

- (5) requirements for ordinary assault apply to this crime in addition there must be intent to do grievous bodily harm.
- (6) Whether grievous bodily harm is in fact inflicted on victim is immaterial in determining liability. is only the intention to do such harm that is in question.
- (7) NB factors which may indicate that person had such an intention are the nature of the weapon/instrument, way in which it was used, degree of violence used & part of body aimed at. Assault with intent to commit another crime
- (8) requirements for ordinary assault also applicable to these offences. In addition there must be intention to commit the further crime for example rape, robbery/murder. Pointing of a firearm
- (9) expression "point at" interpreted as directing firearm towards Y in such a way that if it were discharged bullet would either strike Y/ pass in her immediate vicinity.
- (10) The gist of the definition of a firearm is any device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of a burning propellant.
- (11) Intention is the required form of culpability for the offence.



STUDY UNIT 7 Crimes against dignity, reputation and freedom of movement

7.1 BACKGROUND

crimes against dignity & reputation, abduction & kidnapping - 2 crimes related to protection of family life & freedom of movement

7.2 CRIMEN INIURIA

7.2.1 Definition

Crimen iniuria is the unlawful, intentional & serious infringement of the dignity/privacy of another.

7.2.2 Elements of the crime

- (1) the **infringement**
- (2) of another's **dignity/privacy**
- (3) which is **serious**
- (4) **unlawfulness**
- (5) **intentional**

7.2.3 Introduction

person values not only his physical integrity (freedom from physical attacks by others) but also his

personality rights - include right to dignity & privacy

well known that insults to person's dignity regarded by him in just as serious light as insults to his physical integrity

criminal law punishes not only violations of person's physical integrity ("assault") but also violations of certain rights to personality - last-mentioned violations punished under headings of "*crimen iniuria*" & "criminal defamation".

7.2.4 Distinction between *crimen iniuria* and criminal defamation

- ***crimen iniuria*** - violations of a person's **dignity & privacy** are made punishable.
- **criminal defamation** - violations of a person's **good name/reputation** are made punishable.
person's **reputation** refers to what others think of him - violation of reputation always involves three parties:
 - **person who makes the defamatory statement**
 - **complainant** (Y) - person about whom defamatory statement is made
 - so-called **third party** (one/more other people) to whose knowledge defamatory statement must come
crimen iniuria only **two parties** involved:
 - **wrongdoer** (X) – says/does something which violates dignity/privacy of
 - **complainant** (Y),
where X insults/degrades Y over telephone (remarks nobody other than Y hear)/watches Y undressing.

7.2.5 The interests protected by the crime

interest protected by the crime - a person's *dignitas* (dignity) & privacy

7.2.5.1 Dignity

- crime first protects person's dignity/*dignitas*.
- *dignitas* mean:
 - Melius de Villiers (*The Roman and Roman-Dutch Law of Injuries*) classical description of concept which our courts have followed:
That valued & serene condition in his social/individual life which is violated when a person is, either publicly/private subjected by another to offensive & degrading treatment/when exposed to ill-will, ridicule, disesteem/contempt.
(quoted with approval in *Umfaan* 1908; *Jana* 1981)
- Other expressions used by courts include "mental tranquillity" (*Holliday*) & "his proper pride in himself" (*Tanteli*)

Gist of concept of dignity usually expressed “**mental tranquillity**”, “**self-respect**”/“**feeling of chastity**”.

7.2.5.2 Privacy

- *Crimen iniuria* protects not only person’s dignity but also privacy
- courts regard privacy as something which is included in concept of dignity - but number of commentators have observed properly viewed privacy cannot be accommodated under concept of dignity
- reasons for view:
- right to privacy infringed **without Y being aware of the infringement** (X watches Y undressing) (*Holliday supra*)
- On other hand - infringement of Y’s dignity/right to self-respect is only conceivable if Y aware of X’s insulting words/conduct (*Van Tonder*)
- This is reason why both terms “dignity” & “privacy” been designated as protected interests in definition of the crime above.

Bill of Rights in SA Constitution recognises person’s right to dignity & right to privacy in different sections. S10 recognises person’s right to dignity & s14 his right to privacy.

7.2.6 Infringement of legal interest may lead to both civil claim and criminal prosecution

If X’s dignity/privacy unlawfully & intentionally violated by Y’s conduct - X may institute **civil claim** against Y - claims an amount of money for damages/compensation from Y for unlawful infringement of his interests.

same applies if X’s good name/reputation which has been violated by Y

In latter case a claim for defamation which X institutes against Y

civil claims entirely different from criminal prosecution for *crimen iniuria*/defamation

nothing unusual to find person whose dignity/good name has been infringed

- not only institutes civil claim against alleged infringer, but also
- lays charge of *crimen iniuria*/criminal defamation against alleged wrongdoer with police, resulting in criminal prosecution for one of these crimes.

7.2.7 Infringement of interests protected

7.2.7.1 General

- (1) can be committed either by **word/deed**.
- (2) Many/perhaps most cases of *crimen iniuria* involve some taint of **sexual impropriety** - crime is **not confined to insults of such a nature**.
- (3) many instances of *crimen iniuria* involve conduct by male towards female, **X may be either male/female, & same applies to Y**.

7.2.7.2 Subjective and objective aspects of infringement

infringement of interests protected contains **both subjective & objective element**.

subjective element is:

infringement of dignity (opposed to infringement of privacy) - Y must

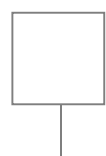
- be aware of X’s offending behaviour and
- feel degraded/humiliated by it.

Is following **exception to this rule**: Y a **young child/mentally defective** person - not be able to understand nature of X’s conduct & consequently not able to feel degraded by it

This does not afford X a defence - for this reason the crime can be committed even in respect of young child/mentally defective person (*Payne*)

proof of fact that Y felt degraded - usually assumed that conduct which offends sensibilities of reasonable person would also have offended Y’s sensibilities

If comes to light Y did not take any offence at (did not in any way feel aggrieved/humiliated by) X’s behavior - court will not convict X of the crime.



infringement of privacy (opposed to dignity) - different rule applies:

need not be established that Y was aware of X's offensive conduct

if X watches Y undressing - X have infringed Y's privacy irrespective of whether Y aware of being watched/not (*Daniels*)

objective element is:

feelings as "mental tranquillity" & "self-esteem" (describe dignitas) highly subjective & emotional concepts - existence & intensity may vary - person to person

certain person be hypersensitive & easily take affront - another more robust/broadminded & not feel degraded if same conduct directed at

reason law must of necessity apply following objective standard:

X's conduct be of such nature that **it would offend at least the feelings of a reasonable person**

so timid/hypersensitive takes affront at conduct that would not affront a reasonable person - law does not assume crime has been committed

7.2.7.3 Examples of infringement of dignity (conduct constituting infringement of Y's dignity):

- (1) **Indecent exposure** -X exposes private parts to Y (without Y's consent) (A) - does not matter whether takes place in public/private. (conduct arguably also categorised as instance of invasion of privacy.)
- (2) Communicating to Y (usually a woman) a **message containing** explicit/implicit **invitation to/suggestion of sexual immorality**
(*Olakawu*) - X unsolicited sends indecent photographs to Y.
- (3) Address another in **language which humiliates/disparages** him such as calling him "pikkenien" – *Mostert*
- (4) **Acts which constitute assault** may also constitute *crimen iniuria* - X spits in Y's face (*Ndlangisa*)
- (5) uttering words constituting **vulgar abuse**/gross impertinence (cheek) may constitute the crime provided the circumstances sufficiently serious

Examples cases - X convicted of *crimen iniuria*:

- *Walton* –Y a mother asked X to stop making a noise with his motorcycle so that child could sleep - X shouted at Y, "Come here lady and I will give you another."
- *Momberg* - X swore at traffic officer who issued him a ticket for traffic offence shouting at him, "Jou lae donnerse bliksem!" ("You low-down damn scoundrel!").

7.2.7.4 Examples of infringement of privacy

examples of infringement of privacy:

- (1) person's privacy infringed by "**Peeping Tom**" - someone who peeps through window/other aperture at somebody else (usually a woman) undressing/taking a bath
Cases - "Peeping Toms" - most common instances of criminal invasion of privacy which come before courts (*Schoonberg*; *Holliday supra*)
fact that Y at time being watched by X had not yet undressed offers X no defence - mere unwanted intrusion by X into Y's private sphere enough to constitute infringement of interests protected by the crime
- (2) person's privacy infringed by "**bugging**" - someone planting listening device in Y's house, room/office & listening to private conversations (A)
fact that contents of conversation overheard did not reveal anything shameful/scandalous - not afford X a defence - mere unlawful intrusion by X into Y's private sphere enough to constitute infringement of the interests protected by the crime.
- (3) person's privacy conceivably be infringed in variety of other ways - **opening & reading of a confidential postal communication** (including e-mail) addressed to him/prying into private life in unwarranted manner by means of apparatus such as cameras, telescopes & other "bugging devices".

7.2.8 Violation of dignity/privacy must be serious

- to constitute *crimen iniuria* - violations of dignity/privacy **must be serious**/same requirement is sometimes expressed may **not be of a trifling (trivial/small/unimportant) nature** (*Seweya*)
- requirement vague - nevertheless necessary

- everyday life - common that people argue with each other & in course of argument - 1 person may say something to other - technically amounts to infringement of other's dignity (X swears at Y)
 - ill-mannered drivers may snarl at other road users/make uncouth (rude/vulgar) gestures
 - law cannot possibly regard all relatively small & unfortunate episodes that occur everyday as crimes
 - If every swearword/scornful remark resulted in criminal prosecution - courts inundated with unnecessary trials - as said in *Walton* "in the ordinary hurly-burly of everyday life a man must be expected to endure minor/trivial insults to his dignity" - Whether words/behavior serious enough to qualify depends on circumstances of each case - Factors may play role in deciding whether behaviour was serious (list not exhaustive):
- (1) **ages of the parties** - Certain conduct towards young persons sometimes viewed in more serious light than directed at mature people.
 - (2) **gender of the parties** - *Van Meer* - Court stated "the law would naturally be always more studious to protect girls & women against insults from men than in insults offered by one man to another" - no rule stipulating that the crime can only be committed by a man towards a woman - also man towards a man, a woman towards woman/woman towards man.
 - (3) **nature of the act** - Certain types of conduct by nature notoriously (very) serious - indecent exposure/activities of "Peeping Toms".
 - (4) **relationship between the parties** - violation of X's dignity more serious if she insulted by stranger than when insulted by husband/boyfriend in course of i.e. domestic argument.
 - (5) **persistence of the conduct** - persistent repetition of conduct may push over borderline between nonpunishable conduct & *crimen iniuria* - to stare at woman scarcely injurious - to follow her & rudely stare persistently may be (*Van Meer supra*).
 - (6) **publicity** with which conduct accompanied - degree of impairment of dignity greater where X's words heard not only by Y(to whom addressed) others as well/otherwise made known to larger audience.
 - (7) **Sexual impropriety** - X makes unwanted overtures towards Y containing element of sexual impropriety - conduct viewed in more serious light than when overtures not contain such element - crime can be committed even if there no suggestion of sexual impropriety in X's advances towards Y.
 - (8) **Y's public standing** - dignity of all people protected by the crime - attacks upon dignity of person occupying public office & related to such person's performance of duties be viewed in more serious light compared with same behaviour directed at person in private capacity - to swear at police/traffic officer for performing duties more serious than swearing at private person in private capacity (*Momberg supra*) - reason - offensive words directed at person occupying public office viewed as expression of contempt not only to individual person who words directed but also to institutions such persons represent - institutions are necessary to maintain law & order & secure public peace & security.

7.2.9 Unlawfulness

Conduct otherwise amount to violation of dignity/privacy - justified by grounds of justification as

- **Necessity** - although X appeared naked in Y's presence it appeared a fire broke out in X's house while having a bath & for this reason he had to flee for his life while naked
- **consent** - Y gives X permission to look at her while undressing
- **official capacity** - X a policeman who in course of performance of duties as detective enters Y's house without Y's permission & searches the house in effort to find evidence of commission of a crime he is investigating

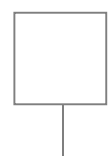
7.2.10 Intention

crime only committed intentionally - Negligence insufficient ground to base conviction - X must know his words/conduct violate Y's dignity/privacy & must know there no ground of justification for his conduct.

7.3 CRIMINAL DEFAMATION

Definition:

Criminal defamation consists in the unlawful & intentional publication of matter concerning another which tends to injure his reputation



Elements of this crime:

- (1) the **publication**
- (2) of **defamatory matter**
- (3) which takes place **unlawfully** and
- (4) **intentionally**

Existence of crime confirmed

Before 2009:

- uncertain whether crime existed in our law
- writers argue the crime no longer existed/it ought no longer exist
- prosecutions rare despite fact - defamation of other people occurs daily
- since 1953 no reported judgement in which person convicted
- people defamed may claim damages from alleged defamer in civil courts
- impression 1 gets – prosecution authorities charge people with criminal defamation only if defamed person a prominent person in society – politician/judge
- hard to justify tendency towards “selective prosecution”

IN 2009:

- question whether crime still exists & whether existence compatible with provision of Constitution came before Supreme Court of Appeal in *Hoho*
- unanimous judgement – court held crime not ceased to exist because of disuse – no good reasons why it should not still exist & its existence not incompatible with provision of Constitution
- Problem with decision – not removed criticism in everyday legal practice that criminal law does not protect every person right to good reputation on equal basis
- SA prosecuting authorities – already hard pressed to prosecute everybody with committing the many serious crimes committed in this country will hardly waste time to prosecute people who have defamed others who do not hold a prominent position in society
- If Supreme Court of Appeal held that the crime should be restricted to cases in which a person seriously defames another perhaps still been rational ground for restriction of prosecution to really serious instances of violation of another's reputation as where prominent people in society are defamed
- Court in *Hoho* expressly held – violations of other people's reputations are criminal even if degree of violation not serious
- Court held – to prevent non-serious cases coming before court – court apply *de minimis rule*
- Difficult to understand how serious defamation committed against ordinary person (not prominent position in society) not be prosecuted by applying the *de minimis rule*
- Certain that prosecutions for this crime will in practice be restricted to cases of defamation of serious nature
- Difficult to agree with court's decision – non-serious instances of defamation still falls within ambit (field) of the crime

Publication of defamatory matter

- Person's good name/reputation (*fama*) harmed only if conduct/words complained of come to notice of someone other than Y – if publication takes place
- If conduct comes to notice of Y only – at most amount to *crime iniuria* if Y's *dignitas* been impaired
- Words defamatory – expose person to hatred, contempt/ridicule/tend to diminish esteem of person to whom they refer is held by others
- “vulgar abuse” not likely to lower reputation of person it is addressed & therefore ordinarily not amount to defamation

- Requirement of publication is concerned:
 - term “publication” used does not necessarily mean the allegations should be made public in printed form - means the allegations must come to attention of people other than Y
 - publication can therefore take place orally/in writing
 - come to attention of Y only can at most constitute *crimen iniuria* if of such nature that Y’s dignity is injured
- **Hoho** - X convicted of 22 charges of criminal defamation stemming from having published various leaflets defaming certain political office bearers & officials in Eastern Cape
- On appeal - Supreme Court of Appeal - following matters considered: whether crime been abrogated (nullified) by disuse - whether degree of seriousness of conduct was element of offence & whether offence was constitutional
- Court held crime still existed & no proof that it had been repealed through disuse by silent consent of the whole community/by a paucity(lack) of prosecutions
- Court held practice of confining criminal proceedings for defamation to serious cases - not a legal rule - If prosecution instituted for nonserious defamation - lack of seriousness would be reflected in the sentence.
- could be concluded - crime of defamation consisted only in unlawful & intentional publication of matter concerning another which tended to injure his reputation
- Court held - crime was constitutional, arguing as follows:
 - Although freedom of expression fundamental to democratic society - not of paramount value & had to be considered in context of other values such as human dignity
 - law of defamation - civil & criminal - designed to protect reputation of people
 - Although criminal remedy much more drastic than civil remedy - requirements for succeeding in criminal proceedings much more onerous(heavy/difficult) than in civil proceedings
 - state had to prove all elements of the crime beyond reasonable doubt
 - To expose person to criminal conviction if proved beyond reasonable doubt that he acted unlawfully & knew he acted unlawfully - reasonable limitation on the right to freedom of expression
 - no reason why state should prosecute in case of complaint in respect of injury to person’s physical integrity (assault) but not in case of complaint in respect of injury to reputation

Unlawfulness

Publication of defamatory matter which is otherwise *prima facie* unlawful justified on grounds

- (a) it is the truth & for public benefit that it be made known
- (b) it amounts to fair comment
- (c) communication is privileged

Grounds of justification do not differ from well-known defences available to defendant in civil defamation action

Intention

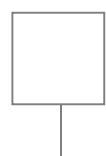
X must intent to harm Y’s reputation by unlawful publication of defamatory matter concerning him aware of the fact – what he says/writes tend to injure Y’s reputation

Implies – X must intent communication to come to notice of somebody other than person it is addressed & intent allegation to refer to Y(not someone else)

Thinks words covered by defence of truth & public interest, fair comment/privilege – lacks necessary intention

7.4 ABDUCTION

In our law abduction is regulated only by common law.



7.4.1 Definition

A person commits abduction if he/she unlawfully & intentionally removes an unmarried minor from the control of his/ her parents/ guardian, without their consent, intending that he/she/somebody else, may marry/have sexual intercourse with the minor.

7.4.2 Origin and character of the crime

- abduction dates from period in history when women (especially minors) played a subordinate role in society
- parents/guardians exercised considerable authority over them
- had little freedom of movement & often regarded as economic assets of their parents
- purpose of the crime - prevent outsiders from removing minor from authority of parents & depriving parents of their rights (economic & otherwise) over minor
- particular - crime protected parents' right to consent to daughter's marriage
- scope of crime - later extended to protect parents' rights in respect of their sons as well.
- Nowadays - minors are more independent of parental authority
- Nevertheless - crime still exists & protects rights of parents to consent to marriage of minor children, exercise control over where they stay
- Although importance of crime diminished - still serves purpose - it punishes unscrupulous (dishonest) persons who entice minors to leave parental homes to make them available for purposes of engaging in indiscriminate sex (often with minor's consent & for remuneration).

7.4.3 Legal interest protected by the crime

those of parents/guardian of the minor - minor's consent to removal not defence
interests protected = twofold: factual exercise of control over minor & parents'/guardian's right to consent to minor's marriage.

7.4.4 Elements of the crime

- (1) the **removal**
- (2) of an **unmarried minor**
- (3) **from the control of his/her parents/guardian**
- (4) with the **intention to marry/have sexual intercourse with the minor**
- (5) **without the consent of the parents or guardian**
- (6) **unlawfulness**
- (7) **intention**

7.4.5 Removal

- perpetrator (X) must remove minor (Y) from 1 place to another
- X be either male/female
- In vast majority of reported cases - X male & Y (minor) female
- removal need not be forcible – almost all cases of abduction Y consents to removal
- not required X should himself effect removal/be present at time of removal
- sufficient if X & Y arrange to meet - place away from house of parents (*Nel; Jorgenson*)

7.4.6 Person removed must be an unmarried minor

- person removed (Y) must be unmarried & minor & be either male/female (In practice Y usually female)
- **person a minor - below age of 18 yrs (s17 of Children's Act 38 of 2005)**

7.4.7 There must be a removal from the control of the parents or guardian

- Y must be removed from control of his/her parents/guardian
- Abduction committed against parents/guardian & not against minor - Y's consent to removal does not afford X a defence
- possible parents have completely relinquished control over minor - Y left parental home to go & live & work elsewhere & parents no longer know where Y finds herself & no longer care what she does

- If this the case - X does not commit abduction if takes Y from where she stays to another place – *Bezuidenhout*

7.4.8 Intention to marry/have sexual intercourse with minor

- crime only committed if X removes Y with a certain aim in mind
- aim - that somebody (X himself) either marries Y/has sexual intercourse with her
- crime to be complete - not required that marriage/sexual intercourse actually have taken place - All required is an intention on part of X to achieve one of these aims
- temporary removal of girl from home to have sexual intercourse - not yet abduction
- X must intend to remove Y from home either permanently/a substantial period
- man wishes to have sexual intercourse with girl - impractical for him to at her parents' home (she lives) & couple drive to another place for purpose of sexual intercourse - whereafter he immediately brings her back home - not committed abduction
- conduct may amount to seduction - seduction not same as abduction (Seduction not constitute a crime)
- to distinguish between seduction & abduction - law requires X should have had intention of removing Y for substantial period (*Killian*)
- intention to marry Y/have sexual intercourse with her must exist at time of removal
- If removal for innocent purpose & X decides after to have sexual intercourse - crime not committed – *Sashi*
- NB - crime is committed if X's intention that **someone other** than himself/herself should marry Y/have sexual intercourse with him/her (*Adams*)
- draws attention to important aspect of the crime - situation where unscrupulous persons entice minors to leave their homes to engage in indiscriminate sex with strangers (often - remuneration to minor)

7.4.9 Without the consent of the parents/guardian

- removal must take place without consent of parents/guardian
- Whether/not Y consented to removal = immaterial
- In practice - Y would usually consent to removal/sometimes request X to take her away
- not a defence unless **both the parents/guardian** consented
- Y not consent - apart from abduction, X also guilty of more serious crime of kidnapping – crime which (in cases victim is no longer child) only committed if victim does not consent to his/her removal
- What must be lacking is consent of parents/guardian to both removal & purpose of the removal

7.4.10 Unlawfulness

must be no ground of justification for X's conduct
removal justified by necessity - X acts under compulsion

7.4.11 Intention

form of culpability = intention
general principles relating to intention - X's intention must relate to all the elements of the crime
X must know Y an unmarried minor (*Churchill*) & Y's parents have not consented to removal (*Sita*)

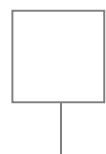
7.5 KIDNAPPING

Definition:

Kidnapping consists in unlawfully & intentionally depriving a person of his/her freedom of movement and/or if such person is under the age of 18 yrs the custodians of their control over the child

Elements of crime:

- (1) the **deprivation**
- (2) of **freedom of movement** (or **parental control**)
- (3) which takes place **unlawfully**, and
- (4) **intentionally**



Is a crime against a person's **freedom of movement/against a parent's/a custodian's control over a child.**

NB features of the crime:

- parent cannot commit the crime in respect of her own child
- Forcible removal not requirement
- length of time for which person deprived of freedom of movement = immaterial
- Motive (demanding ransom) = immaterial for purposes of liability - may be a factor that is taken into consideration for sentencing
- Unlawfulness may be excluded if X acted in official capacity (police officer effecting a lawful arrest)/where person aged 18/above consented to be removed.
- Intention always requires X had knowledge of unlawfulness - means X must know Y did not consent to removal/Y is minor – parents/custodian did not consent

Appellation

- Crime derived from *lex Fabia de plagariis* – Roman law & known in common law as *plagium*
- In SA – past – given many names –
“manstealing”/“womanstealing”/“childstealing”/“*plagium*”/“kidnapping” & in Afr.
“menseroof”/“kinderroof”/“ontvoering”/“vryheidsberowing” & “kinderdiefstal”
- Submitted – most satisfactory description – “kidnapping” – conveys to layman the character & most NB essentials of the crime
- Human being cannot be object of theft & therefore crime not form of theft – descriptions as “manstealing” etc be avoided
- Submitted – best Afr. Equivalent of “kidnapping” = “menseroof”
- Crime committed in respect of woman/man/child

Relation to other crimes

- Established – “childstealing” not separate crime but species of kidnapping
- Result of inclusion of childstealing in crime kidnapping – kidnapping now a dual character: infringe either of 2 interests (1) person's freedom of movement/(2) parent's/custodian's control over a child
- child removed without her own/parents consent – both these interests infringed
- kidnapping not confused with abduction
- Abduction committed against parental authority over minor AND Kidnapping in principle committed against person's freedom/freedom of movement
- Abduction minor removed in order to enable someone to marry/have sexual intercourse
- Kidnapping – X's motive for removing Y is immaterial – crime committed – sufficient if X intends to deprive Y of her freedom of movement/Y's parents/guardian of their control
- X's motive in depriving Y of her freedom is to demand ransom for her release – existence of such “ulterior purpose” not requirement for liability although almost invariably ground for imposing more severe sentence
- X demands ransom – also guilty of extortion

Interest protected

- Usually described as “the liberty of another” – clear by term “liberty” – meant liberty in sense of freedom of movement only
- Law undoubtedly recognizes the crim can also in certain circumstances be committed against person who consents to own removal – child who already had ability to form independent judgement of own consents to own removal from parents/custodians control
- *Lentit* was assumed that Y 17yr old girl – removed willingly but X's conviction of kidnapping nevertheless upheld on appeal
- although term “child” invariably employed in cases of “childstealing” – clear that “child” in respect always means minor
- where child has herself consented to removal would be inexact to describe legal interest violated by crime as freedom of movement

- what is violated in such cases is the control exercised over a child by her parents/custodians

Meaning of word “child”/“minor”

- word “child” always used in so-called childstealing – word always meant “minor”
- before 2005 – no doubt word child denoted someone who was a minor in terms of common law – person below 21 yrs
- S17 of Childrens Act 38 of 2005 – child, male/female is major upon reaching age of 18yrs
- Effect of provision on definition kidnapping – word minor as used in former/traditional definition now means somebody under age of 18yrs

Parents cannot commit crime in respect of own child

- If father & natural guardian of child (divorced his wife) removes child from her care to keep in his own care – does not commit the crime
- True even if court awards custody & control of child to mother
- Does not mean divorce father can with impunity (freedom/immunity/exemption) remove child from care of mother to whom court has awarded custody & control – by doing so – infringes a court order & may be guilty of contempt of court

Deprivation of freedom of movement

- Removal usually effected by force – forcible removal not a requirement
- Removal may be effected by cunning/craft – *Long, X* pretended to be photographer’s assistant who had to fetch a little girl from her school to photograph her – this way obtained possession of the girl
- Crime also be committed even though no physical removal – Y concealed/imprisoned where she happens to be

Duration of deprivation usually irrelevant

- Still not perfectly clear whether deprivation of freedom/control must last for specific period of time &/so how long period must be
- Duration of deprivation been regarded as material element of the crime in some cases & rejected in others
- Weight of authority favour view “time factor” immaterial – submitted correct view
- Only relevance time factor may have (affecting sentence) is distinguishing kidnapping from cases of assault involving a “transient & incidental seizure” of person for short period
- Deprivation for short period - some hrs – sufficient
- X has kidnapped Y with object of demanding ransom – illogical to require Y’s captivity last for more than short period
- X’s purpose is to obtain ransom money asap & then release Y asap
- Time element may sometimes be of importance in providing evidence of X’s intention

Unlawfulness

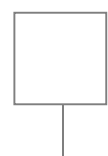
Otherwise unlawful deprivation of freedom may be justified by official capacity (police lawfully arrests someone)/by consent of person removed unless is a child

Intention

- X must know Y has not consented to removal/Y a child that parents/gustodians have not consented
- X need not intent to deprive Y permanently of her freedom of movement – sufficient if intends to release Y upon payment of ransom even if takes place after few hrs
- X’s motive in depriving Y of freedom of movement/parents or custodians of their control immaterial for purpose of liability although may affect degree of punishment

GLOSSARY

dignitas dignity



SUMMARY

Crimen iniuria

- The crime of *crimen iniuria* protects both a person's dignity and privacy.
- The gist of concept of dignity (*dignitas*) - usually expressed as "mental tranquillity", "self-respect"/"feeling of chastity".
- Although many/perhaps most cases of *crimen iniuria* involve some measure of sexual impropriety - crime is not confined to insults of such nature.
- In instances of infringement of dignity (opposed to infringement of privacy) - Y be aware of X's offending behaviour & feel degraded/humiliated by it.
- Examples: conduct infringes Y's dignity - indecent exposure, communicating to Y (practice, usually woman) message containing invitation to/suggestion of, sexual immorality & vulgar abuse.
- Examples: conduct infringes Y's privacy - activities of "Peeping Toms", planting a listening-in device in Y's house, room/office & opening & reading confidential postal communication addressed to Y without his consent.
- to qualify as *crimen iniuria* - infringement of dignity/privacy must be serious.
- required form of culpability for this crime - intention
- Criminal defamation**
- crime protects the reputation of a person.
- person's good name/reputation can be harmed only if conduct/words complained of come to notice of someone other than Y - if publication takes place. If conduct comes to notice of Y only - can at most amount to *crimen iniuria*.
- Grounds of justification - same as defences available to defendant in civil defamation action - truth & public benefit, fair comment & privilege.
- X must intend to harm Y's reputation by unlawful publication of defamatory matter concerning him - X must know words not covered by any ground of justification - X must have necessary knowledge of unlawfulness
- Abduction**
- 7 different elements identified in crime of abduction
- Kidnapping**
- interest protected in principle - freedom of movement of a person - person is a child - interest which is infringed is the control of a parent/guardian over the child.
- X's motive in depriving Y of his/her freedom of movement need not be to demand ransom for his/her release - if ransom demanded - X punished for extortion also
- Childstealing form of kidnapping.
- Forcible removal not requirement for the crime - removal also effected by cunning(sneaky/sly)/craft.
- not required that person be removed from 1 place to another - also committed even though no physical removal - Y concealed/imprisoned where he happens to be.
- no such requirement for kidnapping that perpetrator must intend to deprive Y permanently of his freedom of movement

CRIMES AGAINST PROPERTY

STUDY UNIT 8 – THEFT

8.1 Definition

Theft is the unlawful, intentional appropriation of movable, corporeal property which

- (a) belongs to & is in the possession of, another
- (b) belongs to another but is in the perpetrator's own possession or
- (c) belongs to the perpetrator but is in another's possession & 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.

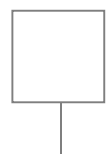
GENERAL CHARACTERISTICS OF THE CRIME

Case Book 244–256

- absence of legislation defining the crime rely on provisions of Roman-Dutch law to define its contents
- RomanDutch law - crime comprised an exceptionally large number of acts
- covered the appropriation not merely of another's property in possession of such other person - also of another's property already in perpetrator's own possession
 - Example of the lastmentioned form of theft: Fearing her house may be burgled while away on holiday my neighbour requests me to keep a bottle of precious wine belonging to her in my house & to look after it while she is away. I agree to do so - receive the bottle of wine & put it away in my house - before my neighbour returns from holiday, I drink all the wine myself.
- type of conduct - consists in appropriating someone else's property already in perpetrator's possession/control = known as **embezzlement**.
- our law unlike other legal systems - embezzlement not separate crime - form of theft
- above definition of theft - embezzlement covered by words in subparagraph (2) - "belongs to another but is in the perpetrator's own possession"
- acts of embezzlement amount to theft - cannot define theft in our law in terms of **removal** of another's property
- above example - I drank my neighbour's wine - I did not first **remove** the wine from her possession – I already possessed it myself
- Another unusual characteristic of the crime in our law - can be committed even if X takes back her own property which is temporarily in another's lawful possession - X has pledged her watch to Y & then, before paying her debt to Y withdraws it from Y's possession without Y's consent. above definition of the crime – type of conduct covered by words in subparagraph (3) - form of theft described as unlawful **arrogation of the possession of a thing** - such conduct also amounts to theft - incorrect to describe theft in our law exclusively in terms of the appropriation of **somebody else's** property.

8.3 LATIN TERMINOLOGY

- Since most important concepts relating to theft derived from Roman law - some original Latin terminology still used today
- The Latin word for theft is *furtum*
- act of theft described by Romans as *contrectatio*
- Generally speaking - *contrectatio* meant a physical handling of the property - almost always involved touching property
- Today - clear - commit theft without necessarily touching the stolen property - drive somebody else's sheep from her land onto my own land
- present law - act by which theft committed much broader than that conveyed by meaning of word *contrectatio* - word preferably be avoided describing the act of stealing
- courts sometimes still use word *contrectatio* - then term nothing more than an "eruditesounding" synonym for "the act of stealing"
- prefer to describe act as an **appropriation of the property**: word not only "appropriation" understandable to layperson - also flexible enough to encompass wide variety of acts amounting to theft



- object of the crime – property/thing stolen - described in Latin as *res*
- *Animus furandi* means “intention to steal”
- can express the crux of intention required for theft better by describing it as an “**intention to appropriate**”
- expression *invito domino* means “without the owner’s consent” - refers to the unlawfulness requirement

8.4 DIFFERENT FORMS OF THEFT

Depending upon way committed - speak of & distinguish between following different forms of theft in our law:

- (1) **The removal of property.** X removes property belonging to somebody else from that person’s possession & appropriates it - most common form of theft.
- (2) **Embezzlement.** X appropriates another’s property already has in her possession.
- (3) **Arrogation of possession.** X removes own property which is in the lawful possession of another (pledgee) & appropriates it.

also possible to distinguish further forms of theft

- certain instances of theft of money in form of credit - governed by certain rules applicable only to such cases.

four basic requirements of the crime which (in principle) must always be complied with – no matter what form of theft one is dealing with

8.5 FOUR BASIC REQUIREMENTS

Four basic requirements must be complied with before a person can be convicted of theft in any of its forms.

- (1) an **act of appropriation**
- (2) in respect of a **certain type of property** (/thing)
- (3) which takes place **unlawfully** and
- (4) **intentionally** (more particularly with intention to appropriate)

8.6 THEFT IN THE FORM OF THE REMOVAL OF PROPERTY

form of theft - X removes Y’s property from Y’s/somebody else’s possession & appropriates it - most common form of theft. The four basic requirements for liability for this form of theft are the following:

8.6.1 Act of appropriation

A person commits an act of appropriation if she commits an act whereby

- (1) she deprives the lawful owner/possessor of her property, and
- (2) she herself exercises the rights of an owner in respect of the property.

(*Tau*)

thus behaves as if she is the owner/person entitled to the property - she is not - and in so doing exercises control over the property.

8.6.1.1 Act of appropriation consists of two components

Consists of following two components:

- a **negative** component - exclusion of Y from the property
- a **positive** component - X’s actual exercise of the rights of an owner in respect of the property in the place of Y

If only second component been complied with & not first - no completed act of appropriation explains why X does not commit theft in the following two types of situation:

- (1) **The “pointing out” situation.** X points out certain property (cow) to Z & tells Z the property belongs to her (X). property in fact belongs not to X but to Y. X “sells” the property to Z - before Z can remove it Y the true owner intervenes & X’s fraudulent conduct is revealed. (*Makonie & Strydom* - examples of situation of this kind.) set of facts such as this - could argue - has been compliance with positive component (X professed to exercise the rights of an owner). it is clear that negative component not been complied with

- real owner Y has not yet been excluded from control over her property. therefore no completed act of appropriation & X cannot be convicted of theft. (may be convicted of attempted theft.)

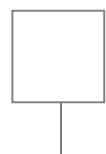
- (2) **The situation where X is apprehended before she can complete the taking of the property.** X exercises the rights of an owner over the property but is caught before she can succeed in getting the property under her control. Example - X sets out to steal a motor car - gets into Y's car & starts tampering with the electrical wiring below the steering column of the car - before she can succeed in starting the car - caught by a police officer. the positive component of appropriation is present (X acted as if she were the owner) but negative component absent (Y the real owner was not excluded from her property) - there has not been a completed appropriation of the property - X at most - convicted of attempted theft.

8.6.1.2 Border between attempted and completed theft

- X carries away Y's thing - apprehended shortly thereafter - before succeeded in removing property to exact locality has in mind - whether should be convicted of completed theft/attempted theft only
- **test employed to distinguish between attempted & completed theft = same as employed to distinguish between uncompleted & completed act of appropriation: crucial question – whether at stage when X was apprehended Y had lost control of her property & X had gained control of the property in Y's place**
- answer to question depends upon particular circumstances of each case
 - character of property taken
 - way in which person would normally exercise control over property of such nature, and
 - distance between place from which property was removed & place where X was apprehended with it
- Since the thief & owner have opposing claims to the property - cannot simultaneously exercise control over it
- precise moment which owner loses control & thief gains it is a question of fact
- *Tarusika* and N 51 - was held X had already gained control of property & had consequently committed completed theft when he removed a blanket from a washing line, placed it under his arm & had been caught in possession of it 20 metres from the line.

8.6.1.3 Stealing from a self-service shop

- X intending to steal - conceals in her clothing article offered for sale in self-service shop & is apprehended with article before leaving shop - courts decided - some cases - convicted of completed theft (*M; Dlamini*)
- be inclined to think owner of shop exercises control over all articles as long as they are still in the shop & X guilty of completed theft only if caught after having moved past the checkout point/perhaps after having left the shop itself
- fact courts accept X convicted of completed theft in such circumstances be explained as follows: public invited to help themselves in shop & even security personnel who have to try to trace thieves in the shop find it impossible to keep all clients continually under surveillance while in the shop - cannot be said that the owner of selfservice shop exercises effective control over all articles while the shop is open
- *Nkozi* - court observed "one should be cautious not to lavishly apply the shoplifting principle to all other cases where a determination has to be made between completed and attempted theft"
- court's view - theft out of self-service shops constitutes "a special form of theft" - is always risk that person who contemplates theft & hides article under clothes may get away with his act (*Tau*)
- whether completed/only attempted theft committed in context of self-service shop depends on facts of each particular case
- *Mekula* - good illustration of application of the principles
 - X took bottle of whiskey from shelf of liquor store & concealed it under his clothes
 - spotted by security guard
 - attempted to put bottle back but bottle broke
 - convicted of theft
 - on review conviction set aside on ground that owner had not yet been excluded from his property
 - court found the owner still exercised effective control over bottle through security guard
 - security guard had noticed intended offence & X had recognised that it would not be possible for him to leave the premises with the liquor
 - conviction for completed theft therefore incorrect & replaced by conviction for attempted theft



illustrate - each instance - determine whether shop owner still had effective control over property

8.6.2 The property

- In principle - theft committed only in respect of certain type of property (thing)
 - there are specific exceptions to this rule
 - qualify as property capable of being stolen - property must comply with following requirements:
- (1) property must be **movable** - example of immovable property = farm - cannot steal part of farm by moving its beacons/fences - If part of immovable property is separated from the whole - qualifies as something that can be stolen; examples - mealie cobs separated from mealie plants (*Skenke*) & trees cut down to be used as firewood (*Williams*)
- (2) property must be **corporeal** - must be independent part of corporeal nature. In principle - must be able to see/touch it - cannot steal a mere idea (*Cheeseborough*)/a tune (last-mentioned case X might be liable for damages in terms of legal provisions relating to copyright). rule that only corporeal property capable of being stolen should be viewed circumspectly (warily). requirement watered down in our law
- two exceptions to the rule:
- Firstly** - from Roman times - law recognised that owner may steal own property from somebody else who is in lawful possession of property (pledgee) - form of theft known as "the arrogation of possession". in reality - not the property that is stolen - act directed at corporeal thing - infringed is possessor's **right of retention** - a right & therefore something incorporeal.
- A **second** exception to the rule: certain types of conduct recognised by courts as theft - theft of money through "manipulation" of cheques, banking accounts, funds, false entries, et cetera - object stolen - not corporeal thing in form of individual coins/money notes - but incorporeal - "credit"/"abstract sum of money"
- *Mintoor* - court held - electricity cannot be stolen since not a particular material but a movement of molecules; a form of energy
 - *Ndebele* - court regarded approach - out of step with modern developments in law of theft. Lamont J argued - courts moved away from "physical handling of the property" requirement to broader & more abstract requirement of "appropriation."
 - development occurred to make provision for more complicated financial transactions that take place in modern times - theft through manipulation of credit
 - such instances taking not consist in physical removal of a thing but the "appropriation of a characteristic which attaches to a thing & by depriving the owner of that characteristic"
 - court explained energy created by electricity - not exist as abstract concept - exists in reality in form of energised electrons
 - characteristic which attaches to electron is energy by which it moves & it is that characteristic that is consumed when the electricity passes through a load in the customer's residence through the customer's circuit
 - characteristic of electricity & extent to which it has been used is measurable
 - is produced & sold to customers by Eskom & is susceptible to theft

Read judgment in *Ndebele*

- (3) property must be **available in** (or capable of forming part of) **commerce**. (Latin phraseology - *in commercio*.)
- Property available in commerce - capable of being sold, exchanged/pledged/generally of being privately owned.
- following types of property - **not** capable of forming part of commercial dealings - not susceptible to theft:
- (a) *Res communes*- property belonging to everybody- air, water in ocean/water in a public stream (*Laubscher*).
- Mostert* - accused, 2 sugar cane farmers charged - various offences under the National Water Act 1998, as well as common law offence of theft – Allegedly - pumped more water from river than legally permitted as riparian owners.

Supreme Court of Appeal held - water flowing in a river/stream (water resource as envisaged in legislation) - incapable of being stolen - accused convicted of statutory offences not of common law offence of theft.

(b) *Res derelictae* - property abandoned by owners with intention of ridding themselves of it.

Property which person merely lost such - money which has fallen out of person's pocket - not a *res derelict* - person did not have the intention to get rid of it.

accepted - articles thrown out by householders in garbage containers/dumped onto rubbish heaps are *res derelictae*.

(c) *Res nullius* - property belonging to nobody - can be subject of private ownership - wild animals/birds (*Mafohla* (wild kudu); *Mnomiya* (honey of wild bees)).

such animals/birds - reduced to private possession by capture - example birds in cage/animals in zoo - can be stolen (*Sefula*).

(4) property must **belong to somebody else** - cannot steal one's own property.

exception to this rule - the unlawful arrogation of the possession of a thing (*furtum possessionis*)

8.6.3 Unlawfulness

- most NB ground of justification excluding unlawfulness of the act - consent by owner to removal/handling of the property
- requirement - owner should not have consented to taking - often expressed in legal literature by statement - X should have acted *invito domino* - Latin expression means "without the owner's consent".
- Presumed consent ("spontaneous agency") - also constitute ground of justification - example: While my neighbour Y is away on holiday, her house is threatened by flood waters; I remove her furniture to my own house in order to protect it. I am then not guilty of theft.

8.6.4 Intention

- form of culpability required for theft = intention
- never committed negligently
- general principles relating to intention - intention (and X's knowledge) must refer to all the requirements/elements of the crime

8.6.4.1 The intention in respect of the property

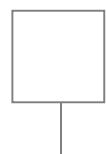
- This aspect of the requirement of intention - X must know what she is taking/that at which her conduct is directed - movable corporeal property - available in commerce & belongs to somebody else/(cases of theft in form of arrogation of possession) which belongs to herself - respect of which somebody else has a right of possession which prevails against her (X's) right of possession.
- X believes her action directed at a *res nullius/res derelict* - particular piece of property in fact not a *res nullius/res derelict* - lacks intention to steal & cannot be convicted of theft.
- *Rantsane* - X removed dirty mattress cover from garbage container in military camp - was under impression the owner (defence force authorities at camp) had thrown it away - was a *res derelicta*. It appeared the quartermaster at camp had not discarded it - 1 of the conscripts (rookies/recruits) had possibly dumped it in garbage container - regarded it as too dirty to sleep on - X found not guilty of theft - had acted mistakenly & therefore lacked intention to steal
- X believes property she is taking belongs not to another but to herself - lacks intention to steal.

8.6.4.2 The intention in respect of the unlawfulness

X aware of fact that she is acting unlawfully - that Y had not agreed to removal/handling of the property. *Slabbert* - Y invited X for drink at Christmas - arriving at his host's home - found no-one there & helped himself to drinks - found not guilty on charge of stealing some of Y's drinks - lacked awareness of unlawfulness: thought Y would not object if he helped himself to drinks.

8.6.4.3 The intention in respect of the act (ie intention to appropriate)

the act of stealing consists in an appropriation of the property - follows that intention in respect of the act consists in the intention to appropriate the property.



a Meaning of intention to appropriate

concept "appropriation" comprises two components - positive & negative

positive component consists in X exercising the rights of an owner over the property - negative in X excluding the owner from her property

intention to appropriate is a mirror image of the act of appropriation - must reflect both components of the concept "appropriation" - result, X must have

- (1) **an intention to exercise the rights of an owner in respect of the property, as well as**
- (2) **an intention to exclude the owner from exercising her rights over her property /to deprive her of her property**

b Intention permanently to deprive

- intention to deprive owner (Y) of her property - be qualified in a very important respect:
 - X's intention must be to deprive Y **permanently** of her property.
 - X wishes to deprive Y only temporarily - she still respects & recognises Y's right to her property throughout
 - contrary to essence of appropriation
 - I take my friend's car without her consent not intending to deprive her of it permanently but intending merely to take a joyride in it & return it to her
 - If this my intention when I take & use the car - not commit theft - lack intention to appropriate the property
- Past - not always clear whether intention permanently to deprive Y of her property was required for a conviction of theft
- particular intention not required in Roman & Roman-Dutch law (our common law)
- Instead of this requirement - common law required an intention to act *lucri faciendi gratia* – with an intention to derive benefit from handling of the property. ("benefit" - widely interpreted in our common law.)
- common law did not require intention permanently to deprive Y of her property - X convicted of theft - even intended to use property without Y's consent only **temporarily** before returning it to Y
- form of theft in common law - known as *furtum usus* – theft of the **use** (of property)
- legal literature - type of conduct sometimes referred to as "unlawful borrowing"/"arrogation of the use of a thing"
- Before 1955 - uncertainty in our law whether *furtum usus* (temporary use of property without owner's consent) - still theft
- In 1955 - Appellate Division – **Sibiya** - removed uncertainty - holding that *furtum usus* no longer form of theft in our law & X to be convicted of theft - intention permanently to deprive Y of her property is therefore required
- In this case - X removed Y's car without his consent & took a joyride in it - intending to return it to Y - car overturned & landed in a donga - police arrived at the scene, X (who was apparently unscathed (unharmful/safe/untouched)) - still standing near the car - Appellate Division held - he had not committed theft.

Read Sibiya

c Intention to appropriate includes intention permanently to deprive

- **Sibiya** & other later judgments emphasised intention permanently to deprive Y of property - better to describe intention in respect of the act as intention to appropriate the property
- intention to appropriate not in conflict with intention permanently to deprive
- intention to appropriate wide enough to encompass intention permanently to deprive
- all emphasis on intention permanently to deprive Y of her property & neglects intention to appropriate (more particularly - intention directed at positive component of concept of appropriation) - is a danger - X may be convicted of theft where facts reveal she actually committed only malicious injury to property
- example - X chases Y's cattle over precipice (cliff, height, rock face) to their death without performing any further acts in respect of the cattle/X merely sets Y's furniture alight - X has intention permanently to deprive Y of her property - questionable whether she has intention to appropriate the property

- clear from judgment - *Sibiya* - mere temporary use of another's property not constitute theft
- does not mean such conduct not punishable
- After judgment in *Sibiya* - legislature passed legislation aimed at preventing X from escaping criminal liability in such a situation
- s1 of Act 50 of 1956m - legislature created offence penalising unlawful removal of another's property for temporary use in certain circumstances
- amounts to statutory form of unlawful borrowing

d Exceptions to the rule that temporary use is not theft

following important qualification to the rule that mere temporary use of another's property is not theft:

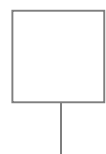
- (1) X removes Y's car intending to use only temporarily - before she returns the car - breaks down/possibly collides with some object & X simply abandons it without notifying Y of situation - guilty of theft. abandoning car without caring whether Y will ever find it again - X adopts intention opposite of an intention of returning the car to Y: foresees possibility that Y may lose her car & behaves recklessly towards this possibility. state of mind amounts to intention in form of *dolus eventualis* to deprive Y permanently of her car. facts in *Laforte* similar; in this case, X was convicted of theft.
- (2) X takes Y's property without Y's consent - not to take & use it unreservedly for own benefit but to retain it as a pledge/security for a debt which Y owes her - lacks intention to appropriate & not guilty of theft. intention to appropriate = absent - X not wish to deprive Y of full benefit of her ownership: prepared to return the property to Y as soon as Y has repaid the debt. *Van Coller* - X "flying doctor" in Botswana took possession of 4 microscopes belonging to Botswana government without its consent. intended returning microscopes provided certain criminal charges against him were withdrawn by Botswana authorities, as they had undertaken to do. court held - his intent could not be reconciled with intent to deprive owner of the full benefit of his ownership - court held - X had not committed theft.

e Intention to acquire benefit not required

- Unlike common law - our law - intention to acquire some form of gain/advantage from acquisition/handling of property no longer a requirement for theft.
- *Kinsella* - illustrates this principle - X a major in the Defence Force - removed property belonging to the Defence Force without its permission & sold it - not with intention of converting the proceeds of the sale for his own personal benefit - use proceeds to acquire certain facilities for residents of the military camp of which he was in charge. His defence - never intended to acquire any personal advantage from transaction was rejected. Court stated - been guilty of theft even if he had intended to donate the proceeds of the sale to a charitable organization
- It follows - in order to be convicted of theft- not required X should intend to "keep the property for herself"
- X were to remove Y's property without consent & minutes later give it to Z as a present - still guilty of theft

8.7 EMBEZZLEMENT

- theft committed in variety of ways
- X commits theft in form of embezzlement - also called "theft by conversion" - appropriates another's (Y's) property already in her (X's) possession
- only difference between this form of theft & theft in form of removal of property - found in way in which act of appropriation takes place: unlike theft in form of removal of property - embezzlement: X need not first remove property from Y's possession before appropriating it; she only commits an act of appropriation in respect of property already in her possession
- other requirements for the crime apart from the act - the property, the unlawfulness & the intent requirements - same as in case of theft in form of removal of property
- In embezzlement - way X comes into possession of the property is immaterial
- Example - immaterial whether animal that X appropriates accidentally walked onto X's land/whether its owner had entrusted it to her.
- examples of acts amounting to X's appropriation of Y's property - already in X's possession:
 - where X **consumes** the property (eats Y's food/burns Y's firewood)



- where she **sells** it (*Attia; Markins Motors (Pty) Ltd*)
- where she **donates** it
- where she **exchanges** it for something else (*Van Heerden*)
- where she uses it to **pay her debts**
- conduct of somebody who **finds/picks up** an article - somebody else has lost & keeps it for herself/example uses, consumes/sells it - in certain circumstances amount to theft
- if finder knows who owner of article is/how to trace her but fails to inform owner & example consumes it herself - conduct would amount to appropriation of the article (*Spies and Windt ; Luther*)- (person who picks up a single coin/other article of small value & appropriates it would normally not be charged with/convicted of theft - operation of maxim *de minimis non curat lex.*)
- failure/procrastination by X to return property to Y/false denial of possession - cannot without more adobe construed as an appropriation of property (*Kumbe*)
- have to investigate all circumstances of case before assuming X's mere failure amounts to appropriation
- not inconceivable X's mere passivity/*omissio* may amount to an appropriation – example - happen if X simply refuses to return Y's mantelpiece clock which she had to look after - which now in her lounge where she can regularly consult it to ascertain the time - X's decision not to return the property – not constitute its appropriation – thoughts/resolve - not punishable

8.8 ARROGATION OF POSSESSION (*FURTUM POSSESSIONIS*)

- today - *furtum usus* - no longer regarded as a crime in our law - *furtum possessionis* is
- owner steals her own thing by removing it from possession of a person who has a right to possess it which legally prevails over owner's own right of possession
- pledgee & somebody who has a right of retention - examples of persons who enjoy such preferential (special/favored) right of possession
- following example:
 - X wishes to borrow money from Y - Y only prepared to lend X money if X gives her (Y) her (X's) watch as security for repayment of the debt. X gives Y her watch & Y lends X the money. In terms of the agreement, X will get her watch back only after she has repaid Y the amount of money owing. Before she has paid Y the money, X takes the watch into her own possession without Y's consent = theft in form of arrogation of possession.
 - form of theft is peculiar - what X steals is in fact own property
 - *Roberts* - X took his car to a garage for repairs - garage had lien ("right to retain") over car until account for repairs had been paid - X removed his car from garage without permission - convicted of theft
 - *Janoo* – X owner of carton of soft goods (ordered by post) removed carton from station without permission of railway authorities - entitled to receive goods only against signature of receipt & certificate of indemnification - intention in removing goods - to claim loss from railway - was found guilty of theft

8.9 CERTAIN ASPECTS OF THE THEFT OF MONEY

- modern business community cash seldom used
- Money changes hands by means of cheques, negotiable instruments, credit/debit entries in books/registration in electronic "memory" of computer
- X an attorney undertakes to administer financial affairs of Y - aged widow growing senile
- As trustee of Y's money - X has obligation to receive all cheques made out to Y/representing funds which she is entitled & deposit them into her banking account/invest them for her at favourable rate of interest
- X receives the cheques - contrary to her (X's) duties deposits them into her own (X's) banking account - enable her (X) to pay her own private debts
- such set of facts - X does not handle tangible coins/notes - corporeal things
- dealing with & converting to her own use is something incorporeal - "credit"/"abstract sum of money"
- convicted of theft - would mean - convicted of theft of incorporeal property
- according to our courts - consideration affords her no defence on a charge of theft: conduct described above constitutes theft (*Kotze 1965; Verwey*)
- courts emphasise - what is important – not the particular mechanisms employed by X to acquire money but the economic effect of her actions - reduction of credit in Y's banking account (*Scoulides*)

- position same if (above example) - X had undertaken to write out cheques on behalf of Y in order to pay her creditors - contrary to her undertaking - X wrote out cheques enabling her to withdraw money from Y's banking account & channel money into own banking account to pay her (X's) own private debts
- X guilty of theft of the money
- fact that as trustee has the right to write out cheques on Y's behalf - not afford X a defence - according to the courts - Y has so-called "special interest/property" in the money/funds in her account - writing out cheques contrary to her duties - X infringes Y's "special interest/property" (*Manuel*)

8.10 THEFT A CONTINUING CRIME

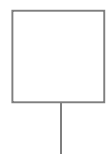
- Theft = *delictum continuum*/continuing crime
- means commission of the crime continues for as long as stolen property remains in possession of thief
- result of this rule - generally our law draws no distinction between perpetrators & accessories after the fact in respect of theft
- If X has stolen property & thereafter Y assists X - still in possession of the property- to hide/sell It - Y guilty not merely of being accessory after the fact to the theft but also of theft as co-perpetrator - at time assisted X - theft not yet completed but still in process of taking place
- *Von Elling* - X convicted of theft (co-perpetrator) - at request of Z who had stolen a motorcar - drove car from one garage to another with intention of concealing it from the owner

GLOSSARY

<i>animus furandi</i>	the intention to steal
<i>contrectatio</i>	the act of stealing (handling or touching of the property)
<i>delictum continuum</i>	a continuing crime
<i>furtum</i>	Theft
<i>furtum possessionis</i>	theft of the possession of the property (arrogation of possession)
<i>furtum usus</i>	theft of the use of the property (no longer a form of theft in our law)
<i>invito domino</i>	without the consent of the owner
<i>lucri faciendi gratia</i>	the intention of gaining some gain or advantage
<i>res</i>	the thing or property
<i>res communes</i>	things belonging to everybody
<i>res derelictae</i>	abandoned things
<i>res in commercio</i>	things that are capable of forming part of commerce
<i>res nullius</i>	things belonging to nobody

SUMMARY

- (1) The act of stealing consists in the appropriation of the property.
- (2) The act of appropriation consists in any act whereby X
 - (a) deprives the lawful owner/possessor of her property, and
 - (b) exercises the rights of an owner herself in respect of the property
- (3) person commit theft of another's property either in circumstances in which the property is in owner's possession/circumstances in which it is in perpetrator's own possession. The former form of theft is known as **removal of property** & latter as **embezzlement**.



- (4) It is possible for the perpetrator (X) to commit theft even in respect of property belonging to herself - happens if removes own property from possession of person (as pledgee) who has a right to possess it which legally prevails over the owner's own right of possession. This form of theft is known as the **arrogation of possession**.
- (5) For property to be capable of being stolen, it must
- (a) be **movable**
 - (b) be **corporeal**
 - (c) be **capable of forming part of commerce** (which means that it should not fall into one of the following categories:
 - (i) *res communes* – things belonging to **everybody**
 - (ii) *res derelictae* – **abandoned** property
 - (iii) *res nullius* – things belonging to **nobody**)
 - (d) **belong to somebody else** (except in cases of the arrogation of possession)
- (7) In order to be unlawful, the act of stealing must take place, *inter alia*, **without the permission** of the person who has a right to possess it.
- (8) In order to have the intention required for theft, X's intention (which includes her knowledge) must
- (a) relate to the **act**
 - (b) relate to the **nature of property**
 - (c) relate to the **unlawfulness**, and,
 - (d) furthermore - must have intention **permanently** (and not temporarily) to deprive person entitled to possession of the property, of such property. intention relating to **act** means X must intend to appropriate the property. intention relating to nature of property (ie, the **property requirement**) means she must know that the thing she is appropriating is a movable, corporeal thing belonging (in principle) to another. intention in respect of **unlawfulness** requirement comprises - knowledge on the part of X that person who is entitled to possession of property has not consented to the taking of the property.
- (9) The intention permanently to deprive person entitled to possession of such property - X does not commit theft if she takes property with intention merely of using it temporarily & then of returning it to the person entitled to its possession.
- (10) In theft in the form of embezzlement, X appropriates another's property which already happens to be in her (X's) possession. Here it is not necessary for X first to remove the property from another's possession, since she is already in possession of it.
- (11) In theft in the form of the arrogation of possession, the owner steals by removing her own property from the possession of the person who has a right to possess it and whose right legally prevails over the owner's own right of possession.

STUDY UNIT 9 Robbery & receiving of stolen property

9.1 ROBBERY

Case Book 257–260

9.1.1 Definition

Robbery consists in theft of property by unlawfully and intentionally using
(1) violence to take the property from another or
(2) threats of violence to induce the other person to submit to the taking of the property.

customary to describe robbery as “theft by violence” - though incomplete - description reflect the essence of the crime.

9.1.2 Elements of the crime

- (1) the **theft of the property**
- (2) **the use of either actual violence or threats of violence**
- (3) a **causal connection** between the violence (or threats thereof) and the acquisition of the property
- (4) **unlawfulness**
- (5) **intention**

9.1.3 General character of the crime

All requirements for theft apply to robbery

Just as in theft - only movable, corporeal property available in commerce can form the object of robbery
possessor/person - entitled to the property must not have consented to the taking & X must have known that consent was lacking.

9.1.4 Application of force

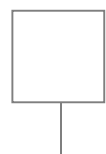
As appears from the definition of the crime, robbery can be committed in two ways, namely either by the application of actual violence or by threats of violence. (The crime of assault, likewise, can be committed in these two ways.) As far as the actual application of violence is concerned, the violence must be aimed at Y's person, that is his bodily integrity (*Pachai* 1962 (4) SA 246 (T) 249). The violence may be slight, and Y need not necessarily be injured. Robbery is likewise committed if X injures Y and thereupon takes the property from him while he (Y) is physically incapacitated, provided that X already at the time of the assault intended to take it (*Mokoena* 1975 (4) SA 295 (O); *L* 1982 (2) SA 768 (ZH)).

9.1.5 Threats of violence

- Robbery committed even if no actual violence against Y: threat of physical violence against Y if he does not hand over the property is sufficient (***Ex parte Minister of Justice: In re R v Gesa, R v De Jongh; Benjamin***)
- Y simply submits through fear to the taking of the property
- Y need not be physically incapacitated
- threats of violence – express/implied.

9.1.6 Causal link between violence (threats thereof) & the acquisition of the property

- must be causal link between the violence/threats of violence on one hand & acquisition of the property on the other
- If X acquires the property not as result of violence (threats) but as result of some other consideration/event - not commit robbery
- judgment in *Pachai* illustrates this rule - X made telephone calls to Y in course of which he threatened Y - Y reported telephone calls to police - set a trap for X in Y's shop - X entered the shop demanded money & cigarettes from Y & aimed a pistol at Y - Y handed over the money & cigarettes to X - that stage police were hiding in the shop & immediately after the handing over of the property arrested X - Court held - Y did not hand over the property to X **as a result of X's threats** - but in course of a prearranged plan



together with the police which was aimed at securing X's arrest – Consequently - X not found guilty of robbery - found guilty of attempted robbery

- X steals something from Y & uses violence to retain the property (prevent Y from regaining property)/avoid being caught by the police (someone else) - does not commit robbery - may be convicted of the 2 separate offences of theft & assault (*John; Ngoyo*)
- converse also true: X only wanted to assault Y & after having knocked him unconscious for first time discovers his (Y's) watch lying in the road & then only hits on idea of taking it & in fact does so - does not commit robbery but the 2 separate offences of assault & theft (*Malinga; Marais*)
- violence/threats of violence precede acquisition (gaining) of the property
- **Yolelo** - Appellate Division held
 - no absolute rule that requires violence to precede the acquisition: **If such close connection between the theft & the violence that these can be seen as connecting components of one & the same course of action robbery may according to this decision be committed even though the violence does not precede the taking of the property**
 - X in process of stealing certain articles from Y's house
 - Y caught him red-handed in the house
 - X assaulted Y & incapacitated her by gagging her with napkin tying her arms & locking her up in the bathroom
 - X continued to search house for money & arms
 - If considers facts of case - difficult to assume the assault on Y took place after X had already completed the theft.

9.1.7 The “bag- and cellphone-snatching cases”

- **Sithole** - Natal Court held - handbagsnatcher commits robbery & not theft
- Y carrying her handbag clutched under her armpit - X behind her & suddenly grabbed it & ran off - Court expressed view - for handbag-snatching to amount to robbery - **sufficient if X intentionally uses force in order to overcome the hold which Y has on the bag for the purpose of carrying it/if X intentionally uses force to prevent/forestall such resistance as Y would ordinarily offer to the taking of the bag, if she were aware of X's intentions** - judge emphasised - not necessary for Y to offer resistance/to try to retain possession of the bag
- *Mofokeng & Witbooi* - judgment in *Sithole* followed by other divisions of the Supreme Court
- **Salmons** - question before Court - whether grabbing of a cellphone out of complainant's hand constituted robbery/merely theft - Upon extensive review of case law & academic opinion - Court concluded - **any force applied to the person of a victim (however slight)** - sufficient to constitute robbery - Court argued that physical grabbing of a handbag/cellphone out of complainant's hand is a physical intervention necessary for dispossession - To “grab” - in Court's words “to seize suddenly & roughly” - does not matter whether act is labelled “force”/“violence” - is a physical act against the person of another- complies with definition of robbery & does not amount to theft
- decision in *Salmons* cited with approval in *Mambo*
- If Y offer resistance - clings on to her handbag/cellphone while X pulls it away from her/draws her -self-evident there is actual violence & consequently X's conduct amounts to robbery (*Hlatwayo*)

9.1.8 Property need not be on the victim's person or in his presence

- **Ex parte Minister van Justisie: In re S v Seekoei** - violently attacked Y & forced her to hand him the keys to her shop(2km away) - tied her to a pole using barbed wire & drove her car to shop - he stole money & other property - trial judge refused to convict X of robbery - was of opinion it was a requirement for robbery that property should be on the victim's person/in his presence at time of theft
- Appellate Division held - trial judge erred in this regard - for robbery no such requirement existed & X should have been convicted of robbery

9.2 RECEIVING STOLEN PROPERTY

Definition

A person commits the crime of receiving stolen property knowing it to be stolen if he unlawfully & intentionally receives into his possession property knowing, at the time that he does so, that it has been stolen

9.2.1 Elements of the crime

- (1) **receiving**
- (2) **stolen goods**
- (3) **unlawfully** and
- (4) **intentionally** (includes knowledge of fact the goods are stolen)

Appellation, origin & overlapping with theft

- Roman law – receivers of stolen property generally regarded as thieves themselves & Roman-Dutch law as thieves/"helers"(receptors/receptators)
- "Heling" no longer charged – been superseded by "receiving"
- "Receiving" shorter version of "receiving stolen property knowing it is stolen"
- "Receiving" unknown in common law & developed by Cape courts in 19th century under influence of English law
- Peculiarity of this crime – coincides with theft
- Person who commits this crime = simultaneously accessory after the fact to theft – in our law treated as thieves(perpetrators) – because of the rule that theft is a continuing crime
- All "receivers" may be charged with theft – general practice – charge them with more specific crime of receiving
- Charge better acquaints X with allegations against him than charge of theft only
- Criminal Procedure Act – theft a competent verdict on charge of receiving & receiving competent verdict on charge of theft

Stolen Property

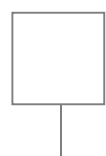
- Property received must be stolen
- Stolen if obtained by theft, robbery, housebreaking with intent to steal & theft/theft by false pretences
- Obvious – crime committed only in respect of property capable of being stolen – movable corporeal property *in commercio*
- Punishable – receiving *stolen property*
- If person receives *the proceeds of the sale* of stolen property – not commit the crime

Unlawfulness

- Receiving must be unlawful
- Receiver receives property with consent of owner/with intention of returning it to the owner/handing it over to police – does not commit the crime
- *Sawitz* – police recover stolen property & handed it to the thief with request he give it to - police can trap X in act "receiving" – was done & X convicted of receiving – defence that police consented to the receiving was rejected

Receiving the property

- Crime not consist being in possession of stolen goods – receiving such goods
- Concept "receiving" – taking into possession
- Receiving take place in any of recognized ways in which movable property can be delivered incl. constructive modes of delivery
- Negotiation between thief & X incl. physical inspection of goods by X – not sufficient to render X guilty of receiving
- Possession gained by receiver need not amount to juridical possession in sense that he intends to keep the property as own(*possession civilis*) – crime committed if keeps property temporarily for another (*possession naturalis*)



Culpability

- Firstly – knowledge by X – receiving the goods into his possession – awareness on his part that he has custody & control over property
- Secondly – appreciation of fact that goods are stolen
- *Dolus eventualis* suffices – sufficient X aware of possibility property might be stolen & despite this decided to receive it
- Submitted that its this principle which courts apply in stating that mental element is satisfied where X has strong suspicion the goods are stolen but willingly refrains from making inquiries to avoid confirmation of suspicions
- At moment received goods – receiver must know they are stolen – if discovers subsequently & then appropriates the goods (selling/consuming) – guilty of independent theft
- Not yet decided by courts – submitted that receiver like thief – must have intention to deprive owner of benefits of ownership permanently – crime of receiving equated by courts with theft

SUMMARY

Robbery

- (1) Robbery can be defined as theft by violence - violence may be actual/in form of a threat of violence.
- (2) must be causal connection between violence & obtaining of the property - X merely wishes to assault Y, & in fact does so. After the assault, Y lies unconscious on the ground. At that stage, X discovers for first time that Y is wearing a valuable watch. X takes the watch for himself. X not guilty of robbery but of assault & theft.
- (3) X snatches Y's handbag (clasping under her arm) away from her & runs away with it - does not according to courts commit only theft but robbery - intentionally forestalls any possibility of Y offering any resistance.
- (4) not required for robbery that property should be on the person of the victim/in his presence when the violence takes place.

Receiving stolen property

- (5) correct, complete name of this crime "receiving stolen property, knowing it to have been stolen".
- (6) person who commits this crime renders himself (same time) guilty of being an accessory after the fact to theft - persons who are accessories after the fact to theft - usually regarded as thieves (perpetrators of theft) - crime of receiving overlaps crime of theft.
- (7) can be committed only in respect of property that is capable of being stolen.
- (8) X need not touch the property when he receives it - Neither necessary for him to receive the property with intention of keeping it for himself - also commits the crime if receives it with intention of keeping it temporarily for somebody else.
- (9) X must know the property is stolen/must foresee possibility it may be stolen & reconcile himself to such possibility.

STUDY UNIT 10 FRAUD & RELATED CRIMES

10.1 FRAUD

Case Book 260–263

10.1.1 Definition

Fraud is the unlawful & intentional making of a misrepresentation which causes actual prejudice/which is potentially prejudicial.

10.1.2 Elements of the crime

- (1) **misrepresentation**
- (2) which causes/may **cause prejudice** & which is
- (3) **unlawful** and
- (4) **intentional**

10.1.3 The misrepresentation

1st requirement for fraud - must be a misrepresentation - conduct requirement of the crime

misrepresentation = **a deception by means of a falsehood** - X represent to Y that a fact/set of facts exists which in truth does not exist.

- (1) **Form that the misrepresentation may take:** will generally take form of writing/speech - conduct other than writing/speech sometimes sufficient - a nod of the head signifying consent (*Larkins*)
- (2) misrepresentation be **either express/implied**
rule relating to implicit misrepresentation:
 - general course of events somebody who buys goods not by paying cash but on credit implicitly represents that at time of purchase - willing to pay for them/intends to pay for them in future & she believes will be able to do so
 - If at time of purchase in fact has no such intention/belief - misrepresents state of her mind (*Persotam*)

Mdantile

- X bribed security official to gain entrance to station platform & hence onto train
 - was charged & convicted of fraud
 - court held - fact there not sufficient evidence of oral statement whereby misrepresentation was made expressly - not stand in way of conviction for the crime
 - Through his conduct - X represented to world he had a valid ticket knowing that such representation was false
 - court found his conduct intended to induce Transnet to convey him at its expense & its detriment
 - misrepresentation as well as real prejudice had been established.
- (3) misrepresentation made **either a commissio (positive act)/an omissio (omission)**
 - most cases - misrepresentation made by means of a *commissio*.
 - omission by X to disclose a fact - in eyes of law amount to making of a misrepresentation - if legal duty on X to disclose the fact
 - legal duty may arise:
 - (a) specifically by **statute**
 - s137(a) of the *Insolvency Act 24 of 1936*
 - insolvent person obliged to disclose is insolvent to any person from whom receives credit for more than a certain amount during sequestration of estate
 - (b) from considerations **other than the terms of a statute**
 - such as where court is of opinion X should have acted positively to remove a misconception which would (natural course of events) have existed in Y's mind
 - example - *Larkins supra* - X informed Y on 24 August his salary for the month would be deposited in his banking account on 30 August
 - On the strength of this Y lent him money
 - X failed to mention - prior to 24 Aug he had ceded his entire salary for the month to some other person
 - was convicted of fraud on the strength of his omission

- *Yengeni* – X member of parliament failed (breach of a parliamentary code of conduct) to disclose to parliament a benefit negotiated for himself
- Court held - although the breach of the parliamentary code of conduct in itself did not amount to fraud - X nevertheless be convicted of fraud - was under a legal obligation to speak & had by his deliberate failure to disclose benefit intended to mislead parliament.

(4) sometimes been stated (*Larkins supra* 92) - a **mere false promise as to the future cannot be equated to a misrepresentation**.

- misrepresentation must refer to an existing state of affairs/some past event - not to some future event (*Feinberg*)
- contention = misleading - person who promises to do something at some future stage implies when making the promise that intends fulfilling it
- If is not her intention - guilty of a falsehood regarding an existing state of affairs - implies that she has a certain belief/intention which she in fact does not have (*Persotam supra*).
- NB consequence of above - rule which has developed - person writing out a cheque & handing it to another - generally deemed to have implied that at that stage she believes there are sufficient funds in her banking account to cover payment of the cheque when it is presented to the bank (*Deetlefs*)

(5) misrepresentation also made in respect of **computer**

- example -X uses Y's pin number without Y's consent to transfer credit from Y's account to her own
- she (X) may be convicted of fraud - falsely presents that it is Y who is transferring the money/that Y has consented to the transfer

10.1.4 The prejudice

10.1.4.1 General

- 2nd element of the crime - requirement that the misrepresentation must **cause actual prejudice/be potentially prejudicial**
- lying not punishable as fraud
- crime only committed if the lie brings about some sort of harm to another - purposes of this crime- harm referred to as "prejudice".
- many instances of fraud - person to whom false representation is made is in fact prejudiced
- example - X falsely represents to Y that painting she is selling to Y - an original painting by famous artist & therefore worth great amount of money - in fact a copy of original & worth very little (if any) money
- Actual prejudice - not required; potential prejudice sufficient to warrant a conviction
- Nor required that prejudice be of a patrimonial nature

10.1.4.2 Prejudice may be either actual or potential

- if prosecution has not proved misrepresentation resulted in actual prejudice - X may still be convicted - if proved her misrepresentation was potentially prejudicial.
- Assume X insured with insurance company all articles belonging to her against theft
- subsequently claims an amount of money from insurance company on ground that certain articles belonging to her have been stolen
- Her allegation that articles have been stolen = false
- If insurance company paid her the money she claimed - company would have suffered actual prejudice. Assume after she has put in her claim - company discovers articles concerned not stolen & X's claim was therefore false
- It accordingly refuses to pay X the amount of her claim
- X nevertheless convicted of fraud? - "Yes" - although company not suffered any actual prejudice - X's misrepresentation resulted in **potential** prejudice

Potential Prejudice:

- (1) means - misrepresentation looked at objectively involved some **risk** of prejudice/it was **likely** to prejudice
 - *Mngqibisa* - X falsely represented to Y (acted on behalf of insurance company) that at time of collision he had been the driver of his motor vehicle - in fact his wife (Z) had been the driver - At time of collision Z still a learner driver
 - In terms of insurance policy - additional excess payable in event of claim where driver was only in possession of learner driver's licence
 - After misrepresentation to Y, X told A, the claims assessor the truth - that his wife (Z) actually driver of vehicle at time of collision
 - claim was never paid out
 - X charged with fraud - caused potential prejudice to insurance company
 - argued by state that insurance company was potentially prejudiced - might have been induced to pay out under policy on basis that statement was true
 - Supreme Court of Appeal confirmed - only potential prejudice required for the crime of fraud & this approach has consistently been followed through the years
 - fact X had subsequently told truth to A (claims assessor) - not regarded as factor exonerating him
 - was convicted of fraud on basis that potential prejudice occasioned **at the time of making the false representation**
- (2) "Likely to prejudice" - not mean there should be probability of prejudice but that there should be a **possibility** of prejudice (*Heyne*) - what is required is that prejudice **can be not will be** caused
- (3) possibility of prejudice should **not be too remote/fanciful** (farfetched/unlikely)(*Kruger*)
- (4) prejudice need **not necessarily be suffered by the representee** (party to whom misrepresentation is directed); prejudice to 3rd party/the state/community in general = sufficient (*Myeza*)
- (5) **It is not relevant that Y, the victim, was not misled by the misrepresentation**; the representation's potential which is the crucial issue
Dyonta - X attempted to sell glass as diamonds to Y
X & Y knew the articles were glass & not diamonds
X nevertheless convicted - "representation that the stones were diamonds was capable in the ordinary course of events of deceiving a person with no knowledge of diamonds & that being so, the misrepresentation was calculated to prejudice" - follows - makes no difference whether/not Y reacts to the misrepresentation/whether X's fraudulent scheme successful/not (*Isaacs*)
- (6) Since potential prejudice sufficient - **unnecessary to require a causal connection** between misrepresentation & the prejudice- Even where no causal connection - may still be fraud - provided one can say that misrepresentation holds potential for prejudice - successful misrepresentation is not required for fraud

10.1.4.3 Prejudice may be either proprietary or non-proprietary in nature

- prejudice may be proprietary/non-proprietary in nature
 - Prejudice described as proprietary if it has to do with person's property/material possessions - if it consists in money/something which can be converted into money
 - other instances of prejudice - prejudice is non-proprietary in nature
 - in most cases - prejudice/potential prejudice is of proprietary nature - need not necessarily be the case
 - examples of fraud involving non-proprietary prejudice:
- (1) writing examination for another - at very least - constitutes potential prejudice to education authorities (*Thabetha*)
 - (2) submitting forged driver's licence to prosecutor during trial for a traffic offence (*Jass*)
 - (3) making false entries in a register reflecting sale of liquor - prejudices the state in its control of sale of liquor (*Heyne supra*)
 - (4) laying a false charge with/making a false statement to the police (*Van Biljon*)
 - (5) Failing to disclose to parliament (breach of a parliamentary code of conduct) - benefit negotiated for oneself (*Yengeni supra*) - prejudice/potential prejudice suffered - parliament & individual members cannot function properly without correct information & accurate knowledge of particular matter before it which has to be considered.



- (6) Failure to disclose (in tender application for school textbooks) - family connection to person employed by state in Department of Education
Tshopo - court held - such omission amounts to misrepresentation - prejudicial to other tenderers & community at large & renders state incapable of administering public funds fairly.

10.1.5 Unlawfulness

Compulsion/obedience to orders - conceivably operate as grounds of justification

fact that Y aware of falsehood - no defence

any fraudulent misrepresentation = obviously unlawful - unlawfulness not play important role in this crime.

10.1.6 Intent

- general principles relating to intent - X's intent must relate to all requirements of the crime other than the intent requirement - means - apart from intention relating to unlawfulness (awareness of unlawfulness) - X's intent must cover the following:
 - intent relating to requirement of **misrepresentation** - X must know/at least foresee possibility that the representation making to Y is untrue
 - intent relating to requirement of **prejudice** - X must know/at least foresee possibility that Y/some other party may suffer actual/potential prejudice as result of her misrepresentation (*Bougarde*)
 - distinction between an **intention to deceive** & an **intention to defraud**:
 - former means an intention to make somebody believe that something which is in fact false is true
 - **latter means the intention to induce somebody to embark – as a result of the misrepresentation – on a course of action prejudicial to herself** (*Isaacs supra*)
 - former is the intention relating to the misrepresentation & the latter is the intention relating to both the misrepresentation & the prejudice
 - Is latter intention which must be established in order to convict somebody of fraud - **means that the mere telling of lies which the teller thereof does not believe will cause the person to whom they are told to act upon them to his prejudice, is not fraud** (*Harvey*)
- **Gardener**
 - X & Y (2 chief executive officers of company A)
 - failed to disclose their interests in company B to board of company A
 - Company A bought shares in company B & as result of this transaction X & Y secured substantial profits
 - charged with fraud & duly convicted
 - appeal - questions before court were whether they had intention of defrauding company A & whether their failure to disclose resulted in actual/potential prejudice to the company
 - court summarised following requirements for this type of fraud (*Burstein*):
 - (1) a duty to disclose the particular fact
 - (2) a wilful breach of this duty
 - (3) an intention to defraud which involves
 - (i) knowledge of the particular fact
 - (ii) awareness and appreciation of the existence of the duty to disclose
 - (iii) deliberate refraining from disclosure in order to deceive and induce the representee to act to its prejudice or potential prejudice
 - (4) actual/potential prejudice of the representee
 - court found that conduct of X & Y was potentially prejudicial to company A
 - precluded company A from considering the advantages & disadvantages of the sale & induced company A to raise the finance & pay X & Y for their interest in company B
 - 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**
 - considering the **intention to cause prejudice, the court deemed it unnecessary to be more specific as to the nature of that prejudice**

- court stated that when company directors directly withhold information material to affairs of their company from the board of directors - in the absence of an explanation for such conduct which may reasonably be true - case of fraudulent non-disclosure - because the company can only make decisions through a board that is properly informed
- such circumstances - both prejudice & intention to prejudice have been proved
- X & Y - deliberately withheld knowledge of their interest in company B from board of company A - intention can therefore only have been that they feared steps which board if properly informed would take & intended to preclude such action
- board was therefore deprived of opportunity to exercise its judgment in interests of the company & was a fact that both X & Y aware of
- court upheld conviction for fraud for these reasons.

Read *S v Gardener*

10.1.7 Attempt

potential prejudice sufficient to constitute fraud - view has long been held - there can be no such crime as attempted fraud - even if misrepresentation is not believed/even if Y does not act on strength of the representation - potential prejudice is present & consequently fraud is committed (*Nay; Smith*)

Heyne - Appellate Division held - attempted fraud indeed possible - will arise in case where misrepresentation has been made - not yet come to Y's attention – example: letter containing misrepresentation is lost in the post/intercepted

10.2 FORGERY & UTTERING

Definition of forgery

Forgery consists in unlawfully & intentionally making a false document to the actual/potential prejudice of another

Elements of the Crime

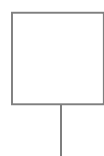
- (1) making a document
- (2) which is false
- (3) prejudice
- (4) unlawfulness and
- (5) intention (incl. intention to defraud)

Character

- Forgery = species of fraud
- In forgery misrepresentation takes place by way of falsification of a document
- Apart from this – all requirements for crime of fraud must be present – intention to defraud & actual/potential prejudice
- small point of difference between fraud & forgery:
 - fraud completed only when misrepresentation has come to the notice of the representee
 - forgery completed moment document is falsified – document then brought to attention of others – separate crime committed – uttering the document
- Person who falsifies document in most cases also person who offers it to another – customary to charge that person with forgery & uttering – which are 2 distinct crimes

The Document

- Never yet been necessary for the court to define meaning of “document” for purpose of crime of forgery
- *De Wet & Swanepoel* – contended – proper interpretation of common law forgery can be committed only in respect of limited class of documents: documents embodying legal transaction/which afford evidence of such transaction/officially drawn-up documents
- Our courts influenced by English law & broader definition of “document” – S219 of Native Territories Penal Code – interpret term “document” more broadly for purpose of the crime



- Example – held – forgery can be committed in respect of following type of document: testimonial, written request to military authorities for a pass, certificate of competence to repair watches
- Other examples – cheques, receipts, promissory notes, bonds, general dealers' licences & documents setting out educational qualifications

Falsification

- Document not forged/falsified because it contains untrue statements
- Document false when purport to be something other than it is
- If it is spurious imitation of another document/its falsely purporting to have been drawn up by somebody other than its author/contains information (figures/dates) which it did not originally contain & which is of material interest for purpose of the transaction forming background of the charge
- Falsification achieved in many ways – alteration, erasure, substitution/addition of particulars on the document/endorsement BUT NOT by the destruction of the whole document
- Document falsely purporting to be copy of non-existent document = forged document incl. signed in the name of fictitious person

Prejudice

- Requirement same as fraud except the existence of potential prejudice in case of forgery can be inferred at an early stage than in case in fraud – as soon as forgery of the document has been completed
- As in fraud – prejudice need not be actual/patrimonial
- Mere forgery of document does not automatically imply prejudice
- Fact that forgery = clumsy/ineffectual – not mean cannot be potential prejudice

Intent

- Requirement that X must have intention to defraud (not merely to deceive) = identical with corresponding element in crime of fraud
- Intention to defraud – knowledge on part of X that she is falsifying a document

Definition of Uttering

Uttering consists in unlawfully & intentionally passing of a false document to the actual/potential prejudice of another

- Most cases person who utters the document = one who forged it & will be charged with 2 offences – forgery & uttering
- Person who utters document = not person who forged it – will be charged with uttering only
- Uttering like forgery = species of fraud & elements of prejudice & intention to defraud similar to corresponding elements of crime of fraud
- Requirement of false document = same as in crime of forgery
- Only element in definition of this crime which does not also form part of the definition of forgery is “passing off” of the document – means document is communicated to another person by an offer, delivery/attempt to make use of it in some/other way
- Person who utters document must represent it as genuine – therefore mere handing over of false document by forger to accomplice (aware is forged document) & who has not yet uttered the document herself – not constitute an uttering of the document
- If document does not reach person to whom addressed (lost in post) – only attempted uttering
- Passing off of document can take place through instrumentality of some other person/agent
- Immaterial whether person to whom document is uttered is in fact misled thereby

10.3 THEFT BY FALSE PRETENCES

10.3.1 Definition

A person commits theft by false pretences if she unlawfully & intentionally obtains movable, corporeal property belonging to another, with the consent of the person from whom she obtains it, such consent

being given as a result of a misrepresentation by the person committing the offence & she appropriates it.

10.3.2 Elements of the crime

- (1) a **misrepresentation** by X to Y
- (2) **actual prejudice** (harm/loss) suffered by Y - parts with her property by allowing X to take possession of it
- (3) a **causal connection** between the misrepresentation & the prejudice
- (4) an **appropriation** of the property by X
- (5) **unlawfulness**
- (6) **intention**

10.3.3 General character of crime

- regarded both as form of theft & a form of fraud
- when X commits this crime:
 - 1st - commits fraud by making a misrepresentation to Y
 - 2nd ly - Y as result of misrepresentation "voluntarily" hands over movable, corporeal property to X;
 - 3rd ly - X appropriates this property
 - In short - fraud followed by a theft
 - Example - X goes to Y's house & falsely represents to Y (housewife) that she (X) repairs & services television sets & that her (Y's) husband has requested her (X) to fetch their television set for servicing. On the strength of this misrepresentation, Y allows X to remove the set from their home. X disappears with it & appropriates it to herself. X thus makes use of a misrepresentation to obtain Y's consent to her removal of the property, thereby excluding any resistance by Y to the removal
- Cases such as these are treated as theft - assumed that although Y seemingly consented to part with property & to allow X to take it Y's "consent" not regarded by law as valid consent: consent induced by fraud/misrepresentation = not regarded as valid consent
- crime of theft by false pretences = strictly speaking unnecessary - every case in which X is convicted of this crime - could equally be convicted of fraud
- therefore completely overlaps with fraud
- if crime were to disappear - would always still be possible to charge X with & convict of fraud
- Although every case of theft by false pretences also involves fraud - opposite = not the case: every case of fraud not involve theft by false pretences - X can commit fraud without obtaining/appropriating movable, corporeal property (writes an examination in Y's place)

SUMMARY

Fraud

- (1) misrepresentation in fraud is presentation of a fact which does not exist, and
 - (a) may be made in speech, writing/in conduct
 - (b) may be made expressly/tacitly
 - (c) may consist in either a *commission*/an *omissio*
 - (d) is not made through a mere false promise as to the future
- (2) misrepresentation in fraud must cause actual prejudice/be potentially prejudicial to another.
- (3) The prejudice required for fraud may be
 - (a) either actual/potential, and
 - (b) either proprietary/non-proprietary in nature
- (4) Because of wide interpretation of prejudice - need not be actual causal connection between misrepresentation & prejudice required.
- (5) Fraud - X's intent must relate to both misrepresentation & the requirement of prejudice.
- (6) *Heyne* - Appellate Division decided - attempted fraud can be committed if misrepresentation has not yet come to the complainant's attention.



Forgery and uttering

- (7) Forgery a form of fraud in which misrepresentation takes place by means of forgery.
 - (8) crime of uttering takes place when forgery brought to attention of someone else.
 - (9) crimes of forgery and uttering - courts give wide interpretation to concept "document".
 - (10) Forgery - document regarded as false if it purports to be something other than it is.
- Theft by false pretences
- (11) Theft by false pretences always involves fraud - then followed by theft of property concerned.
 - (12) theft by false pretences - Y consents to part with property in favour of X - consent not regarded by the law as valid consent.

STUDY UNIT 11 CRIMES RELATING TO DAMAGE TO PROPERTY

BACKGROUND

Criminal law protects interests in property by punishing those who damage property

general crime used for this purpose = malicious injury to property

Malicious injury to property overlaps with crime of arson - merely a particular form of malicious injury to property (*Motau*)

MALICIOUS INJURY TO PROPERTY

11.2.1 Definition

Malicious injury to property consists in unlawfully and intentionally

(1) damaging property belonging to another person or

(2) damaging one's own insured property with the intention of claiming the value of the property from the insurer.

11.2.2 Elements of the crime

- (1) **damaging**
- (2) **property**
- (3) **unlawfully** and
- (4) **intentionally**

11.2.3 The property

- The property must be corporeal & **may be either movable/immovable.**
- In principle - cannot commit the crime in respect of one's own property - stands to reason that owner of property = free to do with his property what he likes
- Example: I no longer like my old rickety table - commit no crime if chop it to pieces & use as firewood - for this reason - required that the property should belong to another
- courts have held - X also commits the crime if sets fire to his own insured property to claim its value from insurer of the property (*Gervais; Mavros; Van Zyl*)

11.2.4 Damage

- Damage = difficult to define in abstract terms - includes total/partial destruction of property - animal is killed/wounded (*Laubscher*)/loss of property/substance (draining of petrol from container) & causing of any injury (permanent/temporary) to property
- can be damage even where original structure of property not changed – example: statue painted (*Bowden*)
- will usually be assumed there is damage if property has been tampered with in such way - will cost the owner money/at least some measure of effort/labour to restore to its original form (*Bowden supra*)

11.2.5 Unlawfulness

unlawful injury to property justified by

- (1) statutory provisions giving X the right to destroy, wound/catch trespassing animals (*Oosthuizen*)
- (2) necessity - X defends himself against an aggressive animal (*Jaffet*)
- (3) official capacity – example: policeman breaks open door to gain access to house - a criminal is hiding
- (4) consent by the owner of the property

11.2.6 Intention

The crime can only be committed intentionally

In practice - crime described as “malicious” injury to property – However - use of word “malicious” may be misleading - creates impression X has to act with evil/malicious motive

X's motive in fact not relevant consideration (*Mnyanda*)



ARSON

Definition

A person commits arson if he unlawfully & intentionally sets fire to:

- (a) immovable property belonging to another; or
- (b) his own immovable property, in order to claim the value of the property from the insurer

Elements of crime

- (a) setting fire to
- (b) immovable property
- (c) unlawfully and
- (d) intentionally

Requirements for crime

- Is only a particular form of the crime of malicious injury to property
- Can only be committed in respect of immovable property
- Movable property set on fire – crime of malicious injury to property committed provided other requirements for this crime complied with
- Crime completed ONLY @ moment property has been set on fire
- X caught at stage before property set on fire – guilty of attempted arson only – provided conduct according to general rules governing liability for attempt – proceeded beyond mere act of preparation
- As in malicious injury to property – cannot in principle commit arson of 1's own property
- Courts incl. Appellate Division- *Mavros* – held – X commits arson if sets fire to own insured property to claim its value from insurer
- Better to punish this type of conduct as fraud instead of arson – courts will in all probability not depart from appeal court's view – facts amount to arson & this is reason crime defined above in terms including this type of situation
- Intention & more particularly intention to damage property by setting fire to it (causing harm to somebody) required
- *Dolus eventualis* = sufficient

SUMMARY

Malicious injury to property

- (1) The property must be corporeal & may be movable/immovable.
- (2) usually be assumed - is damage if property has been tampered with in such way - will cost owner money/at least some measure of effort/labour to restore to its original form.
- (3) Intention is a requirement for the offence - perpetrator's conduct need not be accompanied by evil/malicious motive.

Arson

- (4) Arson - only be committed in respect of immovable property - movable thing is set on fire - amounts to malicious injury to property.
- (5) Intention & more particularly intention to damage property by setting fire to it - causing patrimonial harm to somebody is required.

STUDY UNIT 12 Housebreaking with the intent to commit a crime

DEFINITION

Housebreaking with intent to commit a crime consists in unlawfully & intentionally breaking into & entering a building/structure, with the intention of committing some crime in it.

ELEMENTS OF THE CRIME

- (1) **breaking and entering**
- (2) **a building or structure**
- (3) **unlawfully** and
- (4) **intentionally**

BREAKING AND ENTERING

requirement of an act in this crime - two components:

- (1) **breaking into** the structure
- (2) **entering it**

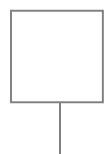
12.3.1 Breaking

- When uses word “breaking” - inclined to think of an act which causes damage to building/structure
- most cases this crime is committed - some degree of damage to building caused by X - **it is not a requirement for liability for this crime that actual damage be inflicted to the building or structure.**

All that is required for an act to amount to a breaking is the removal/displacement of an obstacle which bars entry to the building & which forms part of the building itself.

(Meyeza; Ngobeza)

- word “breaking” - therefore so-called “term of art” - an artificial concept
- If applies above criterion to concrete facts - finds acts such as following do **not amount to a “breaking in”** (no displacement of obstacle forming part of the building):
 - walking through an **open door** into a building
 - climbing through an **open window** into a building
 - stretching one’s arm through an **open hole** in a wall of a building
(Makoelman; Rudman)
- most obvious **act which does qualify as a breaking in** - physically **breaking a door, window, wall/roof** of a building (to gain entry)
- acts which are on the face of it more innocuous than those described **qualify as a breaking**
- Examples:
 - merely pushing open a **closed (even though not locked) door/window**
(Faison)
 - merely pushing open a **partially closed door/window** (Moroe)
(reason why last-mentioned acts qualify - X displaces an obstacle which bars entry into building & which forms part of the building itself.)
- in effort to gain entry into house through open window - X shifts a flower pot placed on the windowsill to one side - act not qualify as a breaking in - flower pot not form part of building/structure
- if pushes a blind in front of open window to one side to gain entry - act qualify as a breaking in - blind is attached to the window & therefore forms part of building (Lekute)
- been held - curtain at a window = not an “obstruction” & X therefore does not “break into” a house if she pushes a curtain at an open window to one side to gain entry (Hlongwane)
- conclusion - must be stressed - the breaking in must be **into** the building - To break **out** of building after having entered it without a breaking in cannot lead to conviction of housebreaking (Tusi) - X walks through open door into building & while inside wind blows door shut & X has to open the door (or break it down) to get out of the building - no “breaking into” for purposes of this crime.



12.3.2 Entering

- “breaking” without “entering” = not sufficient to constitute the crime (*Maruma*) - may amount to attempt to commit the crime
- Like “building” & “breaking”, “entering” also has technical meaning - entry complete moment X has **inserted any part of her body/any instrument she is using for that purpose, into the opening** - with intention of thereby exercising control over some of the contents of the building/structure (*Melville*)
- *Mavela* - X broken a window & was about to enter with his body - was seen by someone & desisted - not clear had already inserted a part of his body/his hand into premises - convicted only of attempted housebreaking with intent to steal.

BUILDING/STRUCTURE

- house, structure/premises in respect of which crime is committed - **any structure which is/might ordinarily be used for human habitation/for the storage/housing of property.**
- difficult to deduce (from cases) a general principle that can be applied to decide whether particular premise/structure qualifies as a premise/structure in respect of which the crime can be committed
- submit following principle - advocated in De Wet & Swanepoel - should be followed in this respect:
 - If structure/premises = used for storage of goods - must be immovable BUT if used for human habitation - does not matter whether movable/immovable
 - explains why structures such as the following (immovable) always qualify as structures in respect of which the crime can be committed:
 - a house
 - a storeroom
 - a factory
 - business premises
 - also explains why structures such as the following (movable/not - used for human habitation) do not qualify as structures in respect of which the crime can be committed:
 - a motor car
 - a tent which is used only for the storage of goods (*Abrahams*)
 - a railway truck used for conveying goods (*Johannes*)
 - a fowl run made of tubes and wire netting (*Charlie*)
 - an enclosed backyard (*Makoelman*)
- caravan = “house on wheels” - movable thing - used for human habitation/storage of goods/both - accordingly a structure which does not readily fit into classification set out in principle advanced & applied above
- position in our law - whether caravan can be broken into - summarised as follows: Generally speaking, the courts accept that a caravan does qualify as a structure, even if the breaking in takes place at a time when nobody is living in it (*Madyo; Temmers*) - it does not qualify if (although it can be moved) used for the purpose of storing goods (*Jecha*)
- *Temmers supra* - Court rejected criterion which we advanced above - submit the alternative, very vague criterion applied by Court in this case - not be followed
 - *Mavungu* - X broken into brand-new caravan which was property of caravan business - did not steal anything - intended to sleep there - Court held - caravan was a “house” for purpose of housebreaking & also a “building” for purposes of trespassing - X convicted of housebreaking with intent to commit statutory crime of trespassing (s 1(1)(b) of the Trespass Act 6 of 1959).

UNLAWFULNESS

breaking into & entering of building/structure must be unlawful

the crime not committed if one breaks into & enters own house/room which you share with someone else/if one has permission to enter (servant) (*Faison supra; Mashinga*)

INTENTION

intention required for this crime - two completely distinct components:

- (1) **X must have the intention of unlawfully breaking into & entering the house/structure**
Such intention absent if she believes that she is breaking into her own house/is committing the act of housebreaking with the consent of the owner of the house.
- (2) **X must have the intention of committing some other crime inside**
housebreaking without such intention - not amount to the crime
housebreaking without such an intention may depending on circumstances - punishable as malicious injury to property
further crime which X intends to commit must be different from the housebreaking itself (*Melville supra*).
In practice - housebreaking - mostly committed with intention to steal - in principle charges of housebreaking with intent to commit any crime are competent
legislature has sanctioned charges of housebreaking with intention of committing a crime unknown to the prosecutor
READ s95(12) with ss262 & 263 of the *Criminal Procedure Act* 51 of 1977

SUMMARY

- (1) act consists in (a) housebreaking & (b) entering of a building/structure.
- (2) "breaking" consists in removal/displacement of any obstacle which bars entry to the structure & which forms part of the structure itself.
- (3) entering = complete moment X inserted any part of her body/any instrument using for that purpose into the opening with intention of exercising control over some of the contents of the building/structure.
- (4) Building/structure may be any movable/immovable structure which is/might ordinarily be used for human habitation/any immovable structure which is/might be used for storage/housing of property.
- (5) intention required for housebreaking comprises following two distinct components – both must be present:
 - (a) X must have the intention of unlawfully breaking into & entering the building/structure.
 - (b) X must have the intention of committing some other crime inside of the building/structure.

