

Common Law Offences – Definitions

Crimes Against the State

1. High Treason

It consists of any conduct unlawfully committed by a person owing allegiance to a state with the intention of:

- Overthrowing the government of the Republic
- Coercing the government by violence into any action or inaction
- Violating, threatening or endangering the existence, independence or security of the Republic;
- Changing the constitutional structure of the Republic.

2. Sedition

It consists of unlawfully and intentionally -

- taking part in a concourse of people violently or by threats of violence challenging, defying or resisting the authority of the State; or
- causing such a concourse.

3. Public violence

It consists of the unlawful and intentional commission, together with a number of people, of an act/s which assume serious dimensions and which are intended forcibly to disturb public peace and tranquillity or to invade the rights of others.

Violence or threat of violence by a group of people with serious proportions and with intention to cause disturbance in public peace and order or to infringe on the rights of others.

This crime is committed even if there is no actual disturbance of the public peace and order, or no actual infringement on the rights of others.

Crimes Against the Administration of Justice

4. Perjury

Perjury consists in the unlawful and intentional making of a false statement in the course of a judicial proceeding by a person who has taken the oath or made an affirmation before, or who has been admonished by somebody competent to administer or accept the oath, affirmation or admonition.

Common-law perjury - It is the intentional making of false statement during judicial proceeding either orally or in writing under oath or affirmation or after being warned to speak the truth by a judicial officer who has authority to administer the oath.

A legal practitioner who makes false statement during the course of argument commits no crime.

5. Defeating or obstructing the course of justice

The crime of defeating or obstructing the course of justice consists of unlawfully and intentionally engaging in conduct which defeats or obstructs the course or administration of justice.

Obstructing the course of justice is less serious than defeating the course of justice. A case need not be pending but there must be a possibility of a court case ensuing in future.

6. Contempt of court

Contempt of court consists in unlawfully and intentionally -

- violating the dignity, repute or authority of a judicial body or a judicial officer in his/her judicial capacity; or
- publishing information or comment concerning a pending judicial proceeding which has the tendency to influence the outcome of the proceeding or to interfere with the administration of justice in that proceeding.

Contempt of court is punished to protect the administration of justice.

In the case of publishing the information that is still *sub iudice* by media, contempt of court is only applicable if the editor or proprietor of the newspaper and is not applicable when journalists are concerned. Intention is not a requirement but mere negligence is enough for an editor/proprietor to be charged for contempt.

Contempt of court could be done *in facie curiae* or *ex facie curiae*
in facie curiae occurs through actions or remarks made in the presence of judicial officer during session of the court. The court may summarily convict and sentence the wrongdoer without infringing on the rights of the wrongdoer.

ex facie curiae occurs through the actions or remarks made out of court

Crimes Against the Community

7. Extortion

It consists of taking from another some patrimonial or non-patrimonial advantage by intentionally and unlawfully subjecting that person to pressure which induces him or her to submit to the taking. **(Unlawful and intentional acquisition of a benefit from another person after subjecting him under undue pressure to submit and let go of his thing)**

8. Rape of Sexual Offenses and other Related Matters

Rape is an intentional and unlawful act of sexual penetration of another person without his/her consent. **s 3**

Compelled rape is the unlawful and intentional compelling a third person C without his consent to sexually penetrate person Y without Y's consent. **s 4**

Sexual assault is the unlawful and intentional sexually violating of B without his consent or inspiring belief that sexual violation will happen to B. **(s 5)**

Compelled sexual assault is the unlawful and intentionally compelling person B to sexually violate another person C. **S 6**

Compelled self-sexual assault is the unlawful and intentional compelling of complainant B without his consent to engage in masturbation, any form of arousal or sexual stimulation of breast, lewd acts with himself/herself.

9. Incest

Incest is unlawful and intentional sexual penetration between persons who are prohibited from marrying each other because they are related within the prohibited degrees of consanguinity, affinity or adoptive relationship despite their mutual consent to engage in such act.

10. Bestiality

Bestiality is an unlawful and intentional sexual act which result in penetration by the genital organs beyond a mouth, genital organ or anus between a human being and an animal or masturbation of an animal unless such act is committed for scientific reasons or breeding purposes.

In M, the court held that the existence of this crime is not unconstitutional and is not contrary to section 9(3) of the Constitution or section 14. The court emphasised that this kind of act, society regards it as unnatural and contrary to good morals.

11. Murder

Murder is an unlawful and intentional causing of death of another living human being.

In S v Mshupha, the court held that it cannot convict a suspect for murder of an unborn child since the common law does not recognise an unborn child as a living human being until it is born alive. However, the accused was convicted of attempted murder of A and B.

A person may be convicted as an accomplice to murder if his actions and intentions were for the victim to be murdered even though he was not a perpetrator but someone who was an active participant in the murder. However, Snyman disagrees with the decision of the court that an accomplice may be convicted of murder. Williams 1980.

12. Culpable Homicide

Culpable homicide is an unlawful and negligent causing of the death of another living human being.

To prove culpable homicide, the state must prove that a reasonable person in the same circumstances as the accused would have foreseen the possibility that his conduct might bring about the death of another person, and that a reasonable person would have taken steps to guard against such a possibility and that the accused's conduct differed from that of a reasonable person.

13. Assault

Assault is an unlawfully and intentionally applying of force directly or indirectly to another person or inspiring a belief in another person that force is immediately to be applied to him or her.

Direct application of force occurs when X Punches Y with a fist, kicks her or slaps her in the face. Y do not have to feel any physical pain. Spitting on Y or tripping her qualifies as direct assault.

Indirect force happens when X commits some acts which results in Y's physical integrity being infringed. Setting a vicious dog on Y, snatching a chair

under Y when he was about to sit on it resulting in Y falling to the ground, derailing a train in which Y is travelling in or frightening a horse in which Y is riding.

Giving children drinks not suitable to their age or forcing anyone to drink urine constitute assault even though no external harm could be noticed.

Inspiring fear or belief that immediate force is to be applied to Y constitutes an act of assault. The threat must be of violence to the person of Y, and it must be of immediate violence, it must be unlawful and Y must subjectively believe that X intends to carry the threat and that he is able to do so.

Assault with intent to do grievous bodily harm

It is a form of assault committed with the intention to cause serious bodily injury to the other person. Whether grievous bodily harm is in fact inflicted on Y is immaterial but is of great importance in determining the sentence.

Important factors that indicate intention to cause grievous bodily harm are nature of weapon or instrument used, the way it was used, degree of violence, part of body aimed at, persistence of the attack and nature of injuries if any.

14. Crimen Iniuria

Crimen iniuria is an unlawful and intentional and serious infringement of the dignity or privacy of another person. Violation of person's dignity and privacy. It involves only two parties, the wrong doer and the complainant.

The crime protects the person's dignity which is expressed as mental tranquillity, self-respect or feeling of chastity. It again protects the person's privacy. A complainant of these crimes may institute civil claim and also lay a charge of crimen iniuria against the alleged wrong doer.

This crime may be committed by word or deed and is not confined to insults of sexual impropriety and could be committed by males to females and vice versa.

Subjective elements are, Y must be aware of X's offending behaviour and must feel degraded or humiliated by it. Only proof needed that Y was degraded is by assumption that the conduct offends the sensibilities of a reasonable person but if Y was not offended, the courts will not convict X for the crime.

Infringement of privacy, Y need not be aware of X's offensive conduct.

Objective element is that X's conduct must be of such a nature that it would offend at least the feelings of a reasonable person.

15. Public Indecency

This crime consists of unlawfully, intentionally and publicly engaging in conduct which tends to deprive the morals of others, or which outrages the public's sense of decency.

16. Criminal defamation

Defamation consists of the unlawful and intentional publication of matter that impairs another person's good name or reputation. Violation of person's good name and reputation. Reputation involves three parties, person making defamatory statement, the complainant and a third party

Publication of defamatory matter unlawfully and intentionally.

17. Abduction

Abduction consists in unlawfully removing an unmarried minor out of the control of his or her parents or guardian without their consent with the intention that he or of enabling someone to marry or have sexual intercourse with that minor.

This crime protects the interests of parents or guardian(s) of a minor. The minor's consent to the removal is not a defence. Interests protected are the parents control over the minor and their right to give consent to her removal. It is still a crime even if the removal was not a forced one or if X was not present at the time of removal. If X and Y agree to meet somewhere it is sufficient to qualify as abduction.

If the intention of X was to remove Y permanently or for substantial period in order to marry or have sexual intercourse after the removal of Y from the control of her parents or guardian without their consent, abduction is committed.

Abduction is not committed if X removes Y from her parents' place in order to have sexual intercourse with her and later return her to her parents' place.

18. Kidnapping

This crime consists of unlawfully and intentionally depriving a person of his or her freedom of movement or parental control if such person is a child.

A parent cannot commit a crime in respect of her own child.

Forcible removal is not a requirement

Length of time the person is deprived of his freedom is immaterial

Motive is immaterial for purposes of liability

Unlawfulness may be excluded if X acted in official capacity or Y consented to removal but if he is 18 years or older

Intention requires that X had knowledge of unlawfulness.

Crimes Against Property

19. Theft

It consists of the unlawful and intentional appropriation of moveable corporeal property which belongs to another, which belongs to the other but the perpetrator is in possession of the property or belongs to the perpetrator but is in possession of the other and such person has a right to possess it which legally prevails over the perpetrator's own possession.

Removal of property, X removes property that belongs to the other from that person's possession and appropriates it.

Embezzlement (theft by conversion) is appropriating someone's property already in the possession or control of the perpetrator. Embezzlement is not a separate crime in South African law but another type of theft.

Examples of embezzlement

- X consumes property
- X sells the property
- X donates the property
- X exchanges property for something else

- X uses property to pay for his debts

De minimis non curat lex is a maxim used to demonstrate that no one may be charged or convicted for appropriating small articles lost by someone.

Arrogation of property (*furtum possessionis*) is the removal of owner's property from the person who had the right to possess or control over it and appropriate it.

Basic Requirements of Crime of Theft

Act of appropriation

X commits crime of theft if he removes a thing that belongs to the other and deprives the owner the possession of his thing or if X exercises the right of an owner with respect to the thing.

There are two components in the act of appropriation, **negative component**, which is the exclusion of Y from his property.

Positive component, happens when X's actual exercise of the rights of the owner in respect of the property in place of Y.

Appropriation is not completed if only a positive component is fulfilled. If X points a cow to Z and tells Z that it belongs to him and X is about to sell the cow to Z but Y intervenes, only the positive component was fulfilled and not the negative component because Y was not excluded from the control of his property. Appropriation was not completed and X cannot be convicted of theft but can be convicted of attempted theft.

If X is apprehended before he can complete the removal of property that belongs to Y, he was exercising the rights of the owner over the property and thus a positive component is present but Y was not excluded from his property.

A certain type of property or thing

The property must be movable and it must be a corporeal (something that can be seen or touched) thing.

Exceptions

- Arrogation of possession, what is infringed is the possessor's right of retention (incorporeal).
- Manipulation of cheques, banking accounts, funds or false entries is stealing of credit or abstract sum of money which is incorporeal.

S v Ndebele and Others 2012 (1) SACR 245

Three accused were charged for theft after they obtained a vending machine in which they were able to sell electricity. The judgement deals with whether electricity is a thing capable of being stolen.

- The property must be available in commerce

Properties not capable of forming part of commercial dealings and not susceptible to theft are:

- a) *Res communes* – property that belongs to everybody, air, water in the ocean or in streams.
- b) *Res derelictae* – abandoned property by the owner with intention of ridding themselves of it. Lost property belong to the owner.

- c) *Res nullius* – property that belongs to no one, although it can be subject of private ownership.
- The property must belong to someone else

Unlawfulness

Invito domino – without the owner's consent.

If the owner of property did not consent to the removal of his thing, theft was committed.

With intention to appropriate

Culpability required for theft is intention. Theft can never be committed negligently. X must be aware that the thing she is taking is a movable corporeal property which is available in commerce and which belongs to someone/herself.

If X believes her action is directed at a *res nullius* or *res delicta*, whereas it is not, X lacks intention to steal and cannot be convicted of theft.

X must be aware that he is acting unlawful and that the owner had not agreed to the removal or handling of property.

Both the negative and positive component of intention to appropriate must be fulfilled.

If the intention of X is to permanently deprive Y of his property, it must be qualified. If X wishes to deprive Y of his property only temporarily, it does not qualify as appropriation and no theft was committed.

In **Sibiya 1955**, the court held that ***furtum usus*** is no longer a form of theft in our law and that for X to be convicted of theft, he must have had an intention to permanently deprive Y of her property.

Exceptions to the rule that temporary use is no theft:

- a) If X removes Y's car intending to return it but had an accident before he returns it and subsequently abandons it, he may be charged of theft.
- b) If X takes property that belongs to Y as security for debt which Y owes X, she lacks intention to appropriate and cannot be guilty of theft.

Intention to acquire some form of gain or advantage from the acquisition or handling of the property is no longer requirement for theft.

Certain Aspects of the Theft of Money

Theft of money do not have to be in a form of coins or notes, money can be stolen in a form of credit or an abstract sum of money. If a client entrusts Y to keep money for him in a trust but X deposited the money in his own account, X could be charged for theft. Here the theft is not of corporeal thing but incorporeal and X cannot raise defence that the stolen thing is incorporeal.

Theft is a ***delictum continuum*** or a continuing crime meaning commission of crime continues as long as the stolen property remains in the possession of the thief. If Y assist X to hide or sell the property, Y is also guilty not only as an accessory after the fact but of theft as co-perpetrator because his assistance was before the theft was completed.

Robbery

It consists of the theft of property by intentionally using violence or threats of violence to induce submission to the taking of it from another.

Robbery is committed in two ways, either by the application of violence or by threats of violence and violence must be aimed at a particular person. Violence could be slight, and Y need not to be injured. Y need not be physically incapacitated and the threat may be expressed or implied.

In **Sithole**, the court held that the handbag snatcher commits robbery and not merely theft when he snatches a handbag from Y and ran away without Y offering any resistance. It is robbery because X intentionally used force in order to overcome the hold which Y has on the bag, even if X intentionally uses force to prevent such resistance as offered by Y to the taking of the bag if Y was aware of X's intentions.

In ex parte Minister of Justice: in re S v Seekoei, the Appellate court held that it is not a requirement that the property be in the person of Y for robbery to be committed. This decision was after the court aquo held that X did not commit robbery after he violently attacked Y and demanded keys to his shop, left him tied to a pole with barbed wire and proceed to remove property from the shop.

20. Receiving stolen property

The crime of receiving stolen property consists of unlawfully and intentionally receiving possession of stolen property knowing it to have been stolen.

21. Fraud

It is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.

Misrepresentation is a requirement for this crime to be committed. Misrepresentation is deception by means of falsehood. It could take a form of writing or speech or any other conduct like nodding of head. It may also be expressed or implied. It could also be made by either commissio (positive act) or an ommissio (omission).

Misrepresentation must refer to an existing state of affairs or past event but never on future events. Misrepresentation could also be made in respect of a computer. Using Y's pin number to transfer credit from her account, X may be convicted of fraud because she falsely presents that it is Y who is transferring the money

The misrepresentation must cause the actual prejudice or be potentially prejudicial. Mere lying is not enough but the lie must cause some sort of harm to another.

Prejudice may either be actual or potential, therefore, X may still be convicted even if no prejudice occurred and potential prejudice is enough.

Meaning of Potential Prejudice

- **It means prejudice looked at objectively involved some risk or likely to prejudice.**
- **Only possibility of prejudice is sufficient, if it can cause prejudice = fraud**
- **Possibility of prejudice should not be too remote or fanciful**
- **Prejudice need not be suffered by representee, but to 3rd parties, state or community**
- **It is not relevant that Y was not misled**

- **It is unnecessary to require a causal connection between representation and prejudice**

Prejudice may either be proprietary or non-proprietary in nature

It is proprietary if it has to do with a person's property or material possessions, i.e. if it consists of money or something that can be converted into money.

Non -proprietary prejudice includes the following:

- Writing examination for another
- Submitting a forged driver's licence to a prosecutor during a trial for a traffic offence
- Making false entries in a register reflecting the sale of liquor
- Laying a false charge with or making false statement to the police
- Failing to disclose in parliament, in breach of parliamentary code of conduct, a benefit negotiated for oneself.
- Failure to disclose in a tender application a family connection to a person employed by the state.

Intent

Intent relating to misrepresentation means X must know or at least foresee the possibility that the representation she is making to Y is untrue.

Intent relating to prejudice means that X must know, or at least foresee the possibility that Y or some other party may suffer actual or potential prejudice as a result of her misrepresentation.

In **Gardener** 2011, two CEOs of company A failed to disclose their interests in company B to the board of company A. company A had bought shares from company B and as a result, the two secured substantial profits. They were charged with fraud and convicted. The court found that the conduct of x and Y was potential prejudicial to company A. Non-disclosure of interests is a potential prejudicial act to the representee.

22. Forgery and uttering

Forgery consists of unlawfully and intentionally making a false document to the actual or potential prejudice of another.

Uttering consists of unlawfully and intentionally passing off a false document (forged) to the actual or potential prejudice of another.

23. Malicious injury to property

It consists of unlawfully and intentionally damaging the property belonging to the other, or damaging one's own insured property with the intention of claiming the value of the property from the insurer. The property must be corporeal and may either be movable or immovable.

One cannot commit the crime in respect of one's own property.

Damage of property includes total or partial destruction of the property. Tempering with the property is enough for one to be charged with the crime.

Unlawfulness

Unlawful injury to property may be justified by:

- Statutory provision giving X the right to destroy, wound or catch trespassing animals
- Defending oneself against aggressive animal
- Official capacity – Police breaks open a door or window to gain access to a house in which a criminal is hiding
- Consent by the owner of the house

This crime can only be committed intentionally.

24. Arson

Arson is the unlawful and intentional setting fire to an immovable property belonging to another.

25. Housebreaking with intent to commit a crime

Housebreaking with intent to commit a crime consists of unlawfully and intentionally breaking into and entering a building or structure with the intention of committing some crime in it.

Damage to the property is not a requirement for this crime, and all that is required is the removal or displacement of an obstacle which bars entry to the building and which forms part of the building.

Therefore, walking through an open door into a building, climbing through an open window into the building or stretching one's arm through an open hole in a wall of a building does not amount to a breaking in.

Pushing open a closed even not locked door or window or partially closed door or window amounts to breaking in. The obstacle must be part of the building that X wants to enter to qualify as breaking in. importantly, it must be breaking into the building and therefore breaking out of the building while inside cannot lead to conviction.

Mere breaking without entering is not sufficient to constitute a crime but qualifies for attempt to commit the crime. Entry is completed the moment any part of the body is inserted, or any instrument X is using for that purpose into the opening, with intention to exercise control over some of the contents of the building or structure.

The building, structure or premises can be any structure which is or might ordinarily be used for human habitation, for storage or housing of property.

If the structure or premises is used for the storage of goods, it must be immovable. If it is used for human habitation, it does not matter if it is movable or immovable.

The courts accept the caravan as a structure that breaking in could occur even if no one was living in it at the time. If the caravan is merely used for storing goods it does not qualify for breaking in.

Intention

- X must have the intention of unlawfully breaking into and entering the house or structure
- X must have the intention to commit some other crime inside.