The remaining questions in this workbook are devoted to a selection of specific crimes. Because there are so many crimes in South African law, it is not possible to cover all the crimes in the questions in this book. It is not even possible to cover all the common-law crimes.

As students must be able to give a definition of every crime, the questions in this section do not ask merely for the definitions of crimes, but test the students' wider knowledge of the particular crimes.

9. HIGH TREASON

R v Erasmus 1923 AD 73
S v Mayekiso 1988 (4) SA 738 (W)
S v Tsotsobe 1983 (1) SA 856 (A)

(7)

Question 102

Discuss the requirement for high treason that the perpetrator must owe allegiance to the Republic of South Africa.

Answer

Answer this question on your own.

Question 103

(a) Discuss the particular intention required for a conviction of high treason. (7)
(b) Indicate the difference between the intention required for high treason, the intention required for sedition and the intention required for public violence. (4)

Answers

(a) The intention that must accompany the act can be described as the definitive element of high treason. It is known as *animus hostilis* or hostile intent. No matter how innocent the act may be when viewed from the outside, it leads to a conviction of high treason if it is accompanied by hostile intent.

Hostile intent is present if it is X's intention to overthrow the state. For the purposes of high treason the government is completely identified with the state; therefore X acts with hostile intent if he or she intends unlawfully to overthrow the government.

In *Erasmus* the Appellate Division held that hostile intent is not confined to an intention to overthrow the state, but that it may also include the intention to achieve some lesser goal. In this case it was held that it may include an intention to force the government by violence to adopt a certain line of action. From the case law it is furthermore clear that hostile intent also includes an intention to impair the independence or safety of the state, or even an intention merely to endanger the

independence or safety of the state. It follows that hostile intent is not limited to an intention to assist a foreign enemy.

X's intention must not be confused with his motive. His motive may be to create a society or a constitution which in his opinion is more just than the existing one, but this will not avail him if in fact he harboured a hostile intent, as described above.

(b) Although there may be a measure of overlapping between the intention required for high treason and that required for sedition and public violence, the hostile intent required for treason is in essence directed at the *existence* of the state. The intention required for sedition is primarily aimed at the *authority* of the state, and that required for public violence at the *public peace and tranquillity*.

(5)

Question 104

Discuss the question whether a person may ever be convicted of attempt, conspiracy or incitement to commit high treason, or as an accomplice or an accessory after the fact to the crime.

Answer

Answer this question on your own.

10. COMMON-LAW PERJURY

Criminal Procedure Act 51 of 1977

R v Vallabh 1911 NPD 9

Question 105 (5)

Discuss the requirement for a conviction of common-law perjury that X must have made a false statement.

Answer

The false declaration may be either oral or written – that is, contained in an affidavit. According to Snyman, the declaration must be false. In English law only subjective, and not objective, falsity is required. This means that the crime can be committed by somebody who speaks the truth while under the impression that he or she is telling a lie. It has not yet been decided in South Africa whether objective or subjective falsity is required. If the witness tells the truth under oath while he actually intends to lie, he or she may be convicted of attempted perjury.

The falsehood can be made either expressly or tacitly. If it is made tacitly, the prosecution relies on an *innuendo*. In *Vallabh*, for example, it was decided that the words of a witness 'I have already stated what I heard' implied that the witness had heard nothing more.

In terms of a certain section in the Criminal Procedure Act it is not necessary for the state to aver and prove that the evidence is material.

Question 106 (8)

Discuss the requirement for a conviction of common-law perjury that the declaration must have been made in the course of a judicial proceeding.

Answer

Answer this question on your own.

Question 107 (5)

Discuss the requirement for a conviction of common-law perjury that the declaration must have been made under oath, or in a form allowed by law to be substituted for an oath.

Answer

Common-law perjury is committed only if the false declaration is made under oath, or in a form allowed by law to be substituted for an oath, namely an affirmation to tell the truth,

or an admonition to speak the truth in the case of certain classes of persons, such as young children. Perjury can therefore not be committed during a legal representative's address to the court. The official who administers the oath or its equivalent must be competent to do so. A witness who has taken the oath in the usual form without objection cannot afterwards, when charged with perjury, put up the defence that he or she did not regard the particular oath they took as binding on their conscience.

11. MURDER

Criminal Law Amendment Act 105 of 1997: s 51

The elements of the crime of murder are the following: murder is the (i) unlawful (ii) intentional (iii) causing of the death (iv) of another person. In this workbook there will be no questions on these elements, for the following reasons:

- the contents of the first three elements of (or prerequisites for) the crime have already been thoroughly investigated in the questions above dealing with the general principles of criminal law;
- the meaning of 'causing' or 'causation' (element (iii)) has been investigated in the questions above dealing with this topic (see 3.3 in ch 3);
- regarding the requirement of unlawfulness (element (i)), the grounds of justifications that may exclude the unlawfulness of the act, such as private defence, necessity and consent, have already been investigated in the questions dealing with unlawfulness (see ch 4);
- regarding the requirement of intention (element (ii)), the rules and principles relating to this requirement have been investigated in the questions above dealing with that form of culpability. In the questions dealing with intention above the emphasis was on the requirement of intention for murder (see 5.3 in ch 5);
- element (iv), namely the requirement that *another person* be killed, is largely self-explanatory. In order to avoid repetition, no questions will therefore be asked about the requirements for a conviction of murder.

The following questions relating to murder deal with a very important aspect of the crime which has thus far not been investigated, namely the punishment for this crime.

Question 108 (6)

Section 51 of the Criminal Law Amendment Act 105 of 1997 provides for certain minimum sentences to be imposed after a person has been convicted of murder. The section provides, inter alia, that a court must sentence a person convicted of murder to imprisonment for life if the evidence brings to light that the murder has been committed in certain situations. Name these situations.

Answer

(a) If the murder was premeditated;
(b) If Y (the murdered person) was a police officer who was murdered while performing his or her functions as a law enforcement officer;
(c) If Y was somebody who has given or was likely to give material evidence at a criminal proceeding involving the commission of a serious crime;
(d) If Y's death was caused by X in the course of committing rape;
(e) If Y's death was caused by X in the course of committing robbery with aggravating circumstances;
(f) If the murder was committed by a person or group of persons acting in the execution of a common purpose or conspiracy.

Question 109 (4)

If X has been convicted of murder and one of the circumstances set out immediately above in the answer to question 108 is not present, X does not qualify for the mandatory imprisonment for life. However, s 51 of the Criminal Law Amendment Act 105 of 1997 provides that in such a situation a court is nevertheless obliged to impose certain minimum periods of imprisonment. Set out these minimum periods of imprisonment.

Answer

(a) 15 years' imprisonment in respect of a first offender
(b) 20 years in respect of a second offender
(c) 25 years in respect of a third or subsequent offender.

12. ASSAULT

S v A 1993 (1) SA SACR 600 (A)
S v Marx 1962 (1) SA 848 (N)

Question 110 (4)

Distinguish between direct and indirect application of force when committing assault, and give an example of each. Also indicate whether, for the purposes of assault, it makes a difference whether the force has been applied directly or indirectly.

Answer

For the purposes of convicting somebody of assault, it makes no difference whether the force was applied directly or indirectly. In most cases the force is applied directly, for example by striking or kicking, but it can also be applied indirectly, for example by derailing a train, setting a vicious dog on somebody, or snatching away a chair from under a person about to sit on it, so that the person falls. In *Marx*, X gave glasses of wine to young children to drink. After drinking the wine the children became ill. X was convicted of assault.

Question 111 (9)

X tells Y, who is blind: 'I am going to stab you in your chest with this knife which I have in my hand!' As a result of this threat Y, who is slightly built, is terrified and starts to tremble. He only calms down after somebody else has given him a sedative. X in fact had nothing in his hand when he shouted at Y. Neither did he at any stage apply any real force to Y's body. X's conduct towards Y was unlawful and was not preceded by any provocation by Y. Discuss the question whether X can be convicted of assault upon Y.

Answer

Assault consists in any unlawful and intentional act or omission (i) which results in another person's bodily integrity being directly or indirectly impaired, or (ii) which inspires a belief in another person that such impairment of his or her bodily integrity is imminent.

There is no suggestion in the stated facts of any actual (direct or indirect) application of force. The question is whether, in terms of (ii) in the above definition, X has committed assault by means of a threat of violence. In order to be convicted of this form of assault, the threat must comply with certain requirements:

(a) The threat must be one of *personal* violence – in other words, a threat of violence to Y's body, and not, for example, to his or her property.
(b) The threat must be one of *immediate* violence, and not, for example, merely a threat to injure Y at some time in the future.
(c) Y must believe that X intends to carry out his or her threat and that he or she is capable of doing so. The crux of this form of assault is the intentional arousal of fear in Y. The test is subjective in the sense that one must enquire how Y envisaged the

situation. If Y did not fear the threat of violence, no assault was committed, even though X was in a position to carry out his threat, and even though X meant to do it. Whether X was actually capable of carrying out his threat is not relevant. Thus the fact that X in the present set of facts did not have a knife in his hand is no defence because actual fear was aroused in Y.

(d) In earlier definitions of the crime it was stated that mere verbal threats were insufficient to constitute the crime, and that there had to be at least 'an act or a gesture'. The weight of opinion today, however, is that it is possible to commit the crime by a mere verbal threat, as is the case in the present question.

(e) Y's fear need not be reasonable.

(f) In conclusion, X can be convicted of assault by means of a threat only if he *intended* to inculcate fear in Y's mind. In *the context* of the stated facts it implies that X must have known that Y was blind.

Only if all the abovementioned requirements are complied with can X in the stated set of facts be convicted of assault. However, in the stated set of facts it is not in every respect clear whether all these requirements have been complied with.

Question 112 (4)

Discuss the following statement critically: 'There is no such crime as attempted assault, because attempt to apply force to another's body is the same as threatening to apply force to such other person, and a threat of violence is in the eyes of the law the same as actual violence or actual assault'.

Answer

The statement is incorrect. The quoted statement is based on the fallacious idea that every threat of bodily harm necessarily gives rise to a corresponding fear of such harm on the part of the threatened person (Y). In certain situations, however, this does not happen; then, it is submitted, there is only attempted assault, for example where Y is unaware of the threats because he is asleep, intoxicated or drugged; or where Y is aware of the threats and comprehends them, but is completely unperturbed by them because he knows that, for example, it is only a toy pistol that is being pointed at him.

Question 113 (6)

Discuss the crime of assault with intent to do grievous bodily harm. Indicate whether it is required that grievous bodily harm should in fact have been inflicted.

Answer

Answer this question on your own.

Question 114 (4)

Discuss whether it is possible for a person to commit attempted assault.

Answer

Answer this question on your own.

13.

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13. SEXUAL CRIMES

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007: ss 1(1), 3, 5, 15(1) and 56
Criminal Law Amendment Act 105 of 1997: s 51

Question 115 (3)

Give the definition of the statutory crime of rape as set out in s 3 of the Sexual Offences Act of 2007.

Answer

Any person who unlawfully and intentionally commits an act of sexual penetration with another person without the latter's consent, is guilty of rape.

Question 116 (4)

The expression 'sexual penetration' as used in the Sexual Offences Act of 2007 is defined in s 1(1) of the Act. Set out this definition.

Answer

The expression 'sexual penetration' as defined in s 1(1) of the Sexual Offences Act of 2007 includes 'any act which causes penetration to any extent whatsoever by:

(a) the genital organs of one person into or beyond the genital organs, anus or mouth of another person;

(b) any other part of the body of one person, or any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or

(c) the genital organs of an animal, into or beyond the mouth of another person.'

Question 117 (6)

Briefly describe (in one sentence each) six of the possible types of acts by which a male person (X) can commit the crime of rape (as set out in the Sexual Offences Act of 2007) in respect of a female person (Y).

Answer

(a) X inserts his penis into Y's vagina;

(b) X inserts his penis into Y's anus;

(c) X inserts his penis into Y's mouth;

(d) X inserts any other part of his body into Y's vagina or anus;

(e) X inserts any object, such as a stick, into Y's vagina or anus;

(f) X inserts any part of the body of an animal into Y's vagina or anus.

Question 118

(3)

In order to be convicted of rape as set out in the Sexual Offences Act of 2007, X's sexual penetration of Y must take place without Y's consent. Give a brief description of the meaning of 'valid consent' as set out in the Act.

Answer

For consent to succeed as a defence, it must have been given consciously and voluntarily, either expressly or tacitly, by a person who has the mental ability to understand what he or she is consenting to, and the consent must be based on a true knowledge of the material facts relating to the intercourse.

Question 119

(5)

X may be convicted of rape as set out in the Sexual Offences Act of 2007 only if, inter alia, Y has not consented to the sexual penetration. One of the principles relating to the absence of consent is that consent given in circumstances in which Y had been forced, intimidated or threatened, is not regarded as valid consent. Discuss this principle.

Answer

Answer this question on your own.

Question 120

(6)

Discuss the rule applied by the courts in cases of rape where consent to sexual penetration that has been obtained by *fraud* is not regarded as valid consent.

Answer

Answer this question on your own.

Question 121

(8)

As a reaction to the high incidence of rape in South Africa, s 51 of the Criminal Law Amendment Act 105 of 1997 has been enacted. This section provides, inter alia, that a high court must sentence an accused convicted of rape to imprisonment for life in certain circumstances. Set out these circumstances.

Answer

(a) Where Y was raped more than once by X or by any co-perpetrator or accomplice;
(b) Where Y was raped by more than one person and such persons acted with a common purpose;
(c) Where X is convicted of two or more offences of rape but has not yet been sentenced;
(d) Where X knows that he has acquired the 'immune deficiency syndrome or the human immunodeficiency virus';
(e) Where Y is below the age of 16 years;
(f) Where Y is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable;
(g) Where Y is mentally ill;
(h) Where the rape involved the infliction of grievous bodily harm.

(4)

Question 122

If, after X had been convicted of rape, one of the circumstances set out in the answer to question 121 are not present, X does not qualify for the mandatory imprisonment for life. However, s 51 of the Criminal Law Amendment Act 105 of 1997 provides that in such a situation a high court or a regional court is nevertheless obliged to impose certain minimum periods of imprisonment. Set out these periods of imprisonment.

Answer

(a) 10 years in respect of a first offender;
(b) 15 years in respect of a second offender;
(c) 20 years in respect of a third or subsequent offender.

(3)

Question 123

Give the definition of the statutory crime of sexual assault as set out in s 5 of the Sexual Offences Act of 2007.

Answer

Section 5 defines the offence as follows:

'(1) A person ("A") who unlawfully and intentionally sexually violates a complainant ("B") without the consent of B, is guilty of the offence of sexual assault.

(2) A person ("A") who unlawfully and intentionally inspires the belief in a complainant ("B") that B will be sexually violated, is guilty of the offence of sexual assault.'

(6)

Question 124

Describe briefly the meaning of the expression 'sexual violation' as set out in s 1(1) of the Sexual Offences Act of 2007.

Answer

Answer this question on your own.

(6)

Question 125

Briefly describe (in one sentence each) six of the possible types of acts by which a person (X) can commit the crime of sexual assault (as set out in the Sexual Offences Act of 2007) in respect of another person (Y).

Answer

(a) X effects a contact between his or her genital organ and any part of the body of Y.
(b) X effects a contact between the genital organ of Y and any part of his or her own body.
(c) X effects a contact between his or her anus and any part of the body of Y.
(d) X effects a contact between the anus of Y and any part of his or her own body.
(e) Female X effects a contact between her breasts and any part of the body of Y, who may be either a male or a female.
(f) X causes or effects a physical contact between the genital organs or anus of Y and any part of the body of an animal.

Question 126 (3)

Give the definition of the statutory crime of consensual sexual penetration of a child as set out in s 15(1) of the Sexual Offences Act of 2007.

Answer

Section 15(1) defines the offence as follows:

'A person ("A") who commits an act of sexual penetration with a child ("B") is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child.'

The word 'child' in the definition is defined in s 1(1) as 'a person 12 years or older but under the age of 16 years'.

Question 127 (6)

Describe the two special defences, set out in s 56 of the Sexual Offences Act of 2007, on which a person who has been charged with the crime of having committed an act of consensual sexual penetration with a child may rely.

Answer

Answer this question on your own.

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14. CRIMEN INIURIA

S v A 1971 (2) SA 293 (T)
R v Olakawu 1958 (2) SA 357 (C)
R v Walton 1958 (3) SA 693 (R)

Question 128 (4)

Briefly distinguish *crimen iniuria* from criminal defamation. It must be clear from your answer what the protected interest is in each case.

Answer

Answer this question on your own.

Question 129 (4)

Discuss the meaning of the concept of *dignitas* as it appears in the definition of *crimen iniuria*.

Answer

Answer this question on your own.

Question 130 (6)

Before somebody can be convicted of *crimen iniuria* on the ground of having violated another's *dignitas*, the other person's dignity must in fact have been violated. Discuss whether an objective, a subjective, or perhaps both an objective and a subjective test is applied to determine whether X's words or conduct has violated Y's dignity.

Answer

Answer this question on your own.

Question 131 (6)

Discuss *crimen iniuria* committed by means of the violation of somebody else's privacy.

Answer

Answer this question on your own.

Question 132 (6)

In *Walton* the court stated: 'In the ordinary hurly-burly of everyday life a man must be expected to endure minor or trivial insults to his dignity.' In view of this statement, discuss the question whether the violation of dignity or privacy should be serious in order to

constitute *crimen iniuria* and, if so, what factors should be considered to determine whether the violation was serious.

Answer

Answer this question on your own.

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15. THEFT

R v Janoo 1959 (3) SA 107 (A)
S v Kinsella 1961 (3) SA 519 (C)
S v Kotze 1965 (1) SA 118 (A)
R v Laforte 1922 CPD 487
R v Makonie 1942 OPD 164
S v Ndebele 2012 (1) SACR 245 (GSJ)
S v Nkosi 2012 (1) SACR 87 (GNP)
R v Sibiya 1955 (4) SA 247 (A)
S v Van Coller 1970 (1) SA 417 (A)

Question 133 (7)

Theft can only be committed in respect of certain types of property. Discuss the types of property that are capable of being stolen.

Answer

Answer this question on your own.

Question 134

X stands next to Z's car and tells Y, who passes by: 'This car belongs to me. Don't you want to buy it from me?' Y tells X that he wishes to buy the car and pays X the purchase price there and then. X thereupon declares that he first has to get the key of the car from his wife, and they agree to meet each other again at the car an hour later. When Y returns an hour later, Z, the true owner, has already driven the car away, and there is no trace of X. Discuss the question whether, on these facts, X may be convicted of:

(a) theft of the car (in this question you must briefly consider the nature of the requirement of an act in theft); (8)

(b) theft by means of false pretences in respect of the money (purchase price) paid by Y to X; (5)

(c) fraud. (4)

Answers

(a) Theft consists in the unlawful, intentional appropriation of movable, corporeal property which (i) belongs to, and is in the possession of, another; (ii) belongs to another but is in the perpetrator's own possession; or (iii) belongs to the perpetrator but is in another's possession and that such other person has a right to posses 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 such property.

In Roman and Roman-Dutch law the act of theft was described as a *contrectatio*, which usually meant the handling of a thing by which it was physically touched.

South African courts today still use the term *contrectatio* to describe the act, but it is clear that our law has long since reached the stage where a thing can be stolen without it necessarily being physically handled. The courts nowadays prefer to describe the act of theft as the appropriation of particular property. 'Appropriation' of the property means the following: X (i) acts as if he or she is the owner of the thing and (ii) precludes the owner from exercising effective control over his or her thing.

In the stated set of facts it is clear that X acted as if he were the owner of the car. However, his act did not result in Z, the true owner of the car, losing or being effectively excluded from his property (the car). For this reason there was no act of appropriation by X, and he can therefore not be convicted of theft.

In *Makonie* the facts resembled those in the present question. X pointed out to Y a heifer which in reality belonged to Z, presented to Y that it belonged to him (X), and 'gave' it to Y in exchange for certain clothing. When Y later came to fetch the heifer he discovered that it in fact belonged to Z. The court held that X had not committed theft because he had not committed a *contrectatio* in respect of the heifer.

(b) A person commits theft by false pretences if he or she unlawfully and intentionally obtains movable, corporeal property belonging to another with the consent of the person from whom he or she obtains it, such consent being given as a result of a misrepresentation by the person committing the crime, and appropriates such property. The crime may be regarded as a form of fraud because Y is deceived by X, and the deception or misrepresentation is then followed by an appropriation of the thing. What in fact happens is that both fraud and theft are committed.

X clearly deceived Y by misrepresenting to him that he was the owner of the car and that he was selling it. As a result of this misrepresentation Y paid X the purchase price. X knew that Y had been deceived, and he therefore had the intention required for the crime. Y lost his money and X appropriated it for himself. This conclusion is based on the assumption (which is a reasonable assumption on the facts) that when X received the money from Y, he had no intention of giving Y the car. X is therefore guilty of theft by false pretences in respect of the money.

(c) Fraud is the unlawful, intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another. The cardinal requirements for the crime are (i) that there must be a misrepresentation, (ii) the misrepresentation must result in actual prejudice to Y or that there must be potential prejudice to him or her, and (iii) X must have the intention to defraud. It is clear that X deceived Y: first, he falsely presented to Y that he was the owner of a car which he wished to sell. Secondly, as a result of this misrepresentation Y parted with his money. He suffered actual prejudice. Thirdly, X acted with the intention to defraud: he knew that he was telling Y a falsehood and that Y would lose his money if he gave it to him (X). For these reasons there can be no doubt that X had committed fraud.

Questions relating to fraud are included in ch 17 below.

(7)

Question 135

X enters a self-service shop, removes a small bar of soap from a shelf and puts it in his trouser pocket. Before reaching the check out point, he is confronted by a security guard. The guard searches through X's clothing and finds the bar of soap in one of his pockets. X is charged with the theft of the soap. Discuss whether he ought to be convicted of theft for stealing the bar of soap.

Answer

(The answer ought to begin with a definition of theft. See the definition given above in part *(a)* of the answer to question 134.)

A bar of soap is a movable, corporeal thing *in commercio* (available in commerce) and therefore capable of being stolen.

X appropriates a thing if he acts as if he is the owner thereof and in so doing effectively precludes the actual owner from exercising control over it. It essentially amounts to X's exercising of control over the thing in the place of the person who has the right to it (Y). The precise moment at which the owner loses his or her control and the thief gains it is a question of fact. In order to decide whether, in the stated set of facts, X had committed an act of appropriation, one must determine whether X at the moment he was apprehended had already excluded Y (the shop owner) from his control over the bar of soap and had already obtained control over the soap himself.

There have been conflicting decisions regarding the question whether, in a set of facts such as the present, X had already obtained full control over the property. In some cases it was held that X's conduct constituted completed theft (which implies that he had already obtained effective control), whereas in other cases it was held that such conduct constituted only attempted theft (which implies that at that stage he had not yet obtained effective control). It is beyond doubt that, assuming that X had the intention to steal, he is at least guilty of attempted theft.

According to the latest trend in South African case law, X is guilty of completed theft if, with the intention to steal, he or she had in a self-service shop concealed articles in or under his or her clothing and was apprehended before reaching the check-out point. Although owners of self-service shops usually take steps to prevent customers from secretly removing articles from the shop without paying for them, it is practically impossible to keep an eye on all clients at all times. For this reason it cannot be alleged that, practically speaking, such shop owners exercise full and effective control over everything in their shops. One can therefore infer that, at the time he was apprehended, X had already obtained control over the article and had therefore appropriated it.

In order to be convicted of theft, X must have intended to steal the soap. If he had placed the soap in his trouser pocket in order to pay for it later, or if he was merely absent-minded, he would lack the intention to steal. The facts stated in this question are insufficient to justify a definite conclusion regarding X's intention.

(9)

Question 136

X takes Y's car without his consent, intending to use it for only about two to three hours to visit his girlfriend. He intends to return the car safely to Y's premises after his visit to his girlfriend. X visits his girlfriend, but on the way back to Y's house collides with a lamp post.

Having sustained only light injuries in the collision, he walks away from the damaged car and intentionally refrains from notifying Y of what has happened to the car. The place where the collision took place is situated about 20 km from Y's house. The next day Y notifies the police that his car has been stolen. Ten days later the police inform him that they have found the car in a damaged condition. Discuss the question whether X can be convicted of theft of the car. Briefly refer to the nature of the intention required for theft.

Answer

(The answer ought to start with a definition of theft. See the definition given in part *(a)* of the answer to question 134.)

A car is capable of being stolen because it is a movable, corporeal thing which is *in commercio*. X's conduct, especially his act of abandoning the car after the collision, constitutes an act of appropriation because he acted as if he were the owner of the car and in so doing excluded Y from exercising his rights to the car.

The most important question, however, is whether X had intended to steal the car. The intention required for theft comprises, first of all, a knowledge by X that the object he is dealing with is a movable, corporeal thing which is *in commercio* and which belongs to another. Secondly, he must know that Y has not consented to the taking of the article. Thirdly, X must have the intention to appropriate the article. This means that he must intend to deprive Y of his control over the article and to exercise such control himself in Y's stead.

The intention to deprive Y of his property is further qualified by the important rule that X must intend *permanently* to deprive Y of his property. Where he intends only temporarily to deprive Y of his property, he respects and recognises Y's right to the property throughout. This is contrary to the essence of appropriation. Already during the previous century the courts required for theft an intention permanently to deprive Y of his property, mainly because of a similar rule in English law. The Appellate Division recognised and applied this rule in *Sibiya*, amongst others. As was held in *Kinsella*, the common-law rule that X must have the intention of deriving a benefit from his handling of the thing no longer forms part of our law.

If one applies the above principles relating to the requirement of intention to the present set of facts, the position is as follows: the fact that X removed the car without Y's consent with the intention of returning it to Y after two or three hours does not mean that he had intended to steal it, because the intention to steal comprises an intention *permanently* to deprive Y of his property. However, the whole picture changed when X walked away after the collision without notifying Y of what had happened. The courts have held in a number of cases, such as *Laforte*, that if X uses Y's thing temporarily but thereafter abandons it, not caring whether Y will ever get it back, he acts with an intention to steal and is guilty of theft. In such a case the intention permanently to deprive Y of his property is present in the form of *dolus eventualis*: X foresees the possibility that Y may not recover his property and acts recklessly in respect of this possibility. For this reason X, in the given set of facts, is guilty of theft.

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Question 137 (9)

Briefly explain the meaning of:

(a) embezzlement;

(b) the unlawful arrogation of possession (*furtum possessionis*); and

(c) the unlawful use of a thing (*furtum usus*).

Indicate whether each of these acts is still punishable as a form of theft.

Answer

Answer this question on your own.

Question 138 (8)

X is a trustee who must administer Y's financial affairs for him. It is X's duty to receive cheques in respect of funds due to Y as well as other amounts of money acquired by Y and then to deposit the money or the funds which the cheques represent to Y's benefit in banking or savings accounts. However, instead of doing this, he deposits the cheques and other money into his own private bank account. From time to time he withdraws almost all the money from his own account and spends it on liquor and vacations. Discuss the question whether X has committed theft in respect of the money due to Y.

Answer

Answer this question on your own.

In your answer you should draw attention to the special rules relating to the theft of money by somebody in a trust or fiduciary relationship. You should mention that the bank is the owner of the money in the account, that the trustee (X) only has a claim against the bank, that X's act of paying the money into his own private account technically amounts to no more than a breach of contract, but that the courts, for example in *Kotze,* nevertheless equate this conduct to theft. You should also draw attention to the fact that what X steals is in reality not a specific corporeal object, but mere 'credit', that is, an abstract sum of money, but that not even this consideration deters the courts from regarding X's conduct as theft.

Question 139

Briefly discuss the question whether in each of the following instances X has committed theft:

(a) X's neighbour, Y, owes X R2 000 but fails for more than two years to pay back the money. One day X goes to Y's house, takes Y's television set and puts it into his (X's) storeroom. He tells Y that he will get his television back only after he has paid him (X) the R2 000 he owes him. X does not use the television set, but merely keeps it in order to induce Y to pay his debt. (3)

(b) X takes his car to a garage for repairs. He signs an agreement with the garage in terms of which the garage has a right to keep the car until X has paid the full amount for the repairs. When X later returns to the garage to fetch his car, he discovers that the amount to be paid for the repairs is much more than he had anticipated, and that he

does not have enough money to pay for it. The garage accordingly refuses to let him have the car back. The same night X sneaks into the garage in the dark, takes his car and drives it away. (3)

(c) X intentionally removes a large quantity of food and clothing from a millionaire's house without his consent. He does not use any of the booty himself, but distributes it among the poor. (3)

(d) A stray horse comes walking onto land belonging to X, a farmer. X does not know who the owner of the horse is, and allows it to graze on his property. Three months later he ascertains that it belongs to Y. A month thereafter X, who is in financial difficulty, sells the horse and uses the money to pay his debts. (3)

Answer

(a) X did not commit theft by taking Y's television set and keeping it at his own house without Y's consent because he did not intend to deprive Y of all the benefits of his ownership. X intended throughout to give the television set back to Y as soon as Y had paid back the debt. He intended to deprive Y only temporarily or partially of his property. This cannot be equated to an intention to appropriate the property because the latter intention presupposes an intention permanently and fully to exclude Y of his property. Clear authority for this conclusion may be found in the judgment in *Van Coller*, in which the facts were analogous.

(b) X is guilty of theft. This is a case *of furtum possessionis* or the 'unlawful arrogation of possession'. The garage had a particular right or, as the courts state, 'a special property or interest', in the car. X committed theft despite the fact that it was his own property which he took from the lawful possessor. Clear authority for the rule that such conduct constitutes theft is to be found in the decision of *Janoo*.

(c) X committed theft of the food and clothing, despite the fact that he did not consume or use the food or clothing himself, but distributed it among the poor. He intended to appropriate the articles unlawfully, that is, to dispose thereof as if he were the owner and in so doing to exclude the owner from exercising his rights to the articles. The fact that he did not intend to enrich himself in any way is no defence, since our law no longer applies the old common-law rule that the thief must intend to obtain an advantage from the handling of the property. This is clear from, inter alia, the decision in *Kinsella*. X's decision to distribute the articles among the poor refers to his motive only, but his motive should not be confused with his intention. X's benevolent motive may at most result in a more lenient sentence after his conviction.

(d) X committed theft, more particularly theft in the form of embezzlement. The mere fact that he allowed the stray horse to graze on his property does not mean that he had committed theft. It is also doubtful whether he committed theft by allowing the horse to remain on his property after having discovered who the owner was. Only if there is clear evidence of an act of appropriation (such as branding a horse with one's own mark) can one assume that X had appropriated the horse. The fact that X subsequently sold the horse is clear evidence that he had appropriated the horse.

16. ROBBERY

Ex parte Minister van Justisie: In re R v Gesa, R v De Jongh 1959 (1) SA 234 (A)
Ex parte Minister van Justisie: In re S v Seekoei 1984 (4) SA 690 (A)
S v Sithole 1981 (1) SA 1186 (N)

Question 140 (4)

Discuss the requirement for robbery that the property must be obtained by violence or threats of violence.

Answer

Answer this question on your own.

Question 141 (4)

Discuss the requirement for robbery that there must be a causal connection between the application of violence and the acquisition of the property.

Answer

Answer this question on your own.

Question 142

Briefly discuss the question whether in each of the following instances X has committed robbery:

(a) Intending to assault Y, X hits him over the head with a blunt object. Y falls to the ground, unconscious. While Y is lying on the ground, X notices for the first time that he (Y) is wearing a valuable watch. X snatches the watch from Y's arm and runs away with it. X's decision to take the watch was taken only after he had assaulted Y. (2)

(b) X breaks into Y's house during the night and threatens to injure Y seriously if he fails to hand him the keys to his shop and the safe in the shop. Y refuses to hand X the keys. X assaults him, takes the keys from him by force and ties him to a chair so that he cannot move. An hour later, X unlocks Y's shop and the safe inside with the keys and removes all the money from the safe. The shop is 3 km from Y's house. (2)

(c) Y walks on the pavement, clutching her handbag tightly under her arm. X approaches her from behind and with a quick, unexpected movement, snatches the handbag and runs away with it. The handbag did not have straps that Y could sling over her shoulder. Y did not sustain any injury when X snatched the handbag from behind her. (3)

Answers

(a) X is not guilty of robbery. A person can only be guilty of robbery if there is a causal link between the violence and the taking of the article. In the stated set of facts there is no such causal link. X first committed assault and thereafter theft, that is, two separate crimes, and can be convicted of these two crimes.

(b) X has committed robbery. He used violence against Y in order to gain access to the safe, and removed the money from the safe after using the keys. There is a causal link between the application of violence and obtaining the money. It is not required for robbery that the property be stolen from Y personally or in his presence. The time lapse between the violence and the taking of the property, as well as the distance between the place of assault and the place where the property was taken, are merely of evidential significance in order to determine whether the assault and the taking of the property formed one continuous transaction, and to determine whether there was a causal connection between the assault and the taking of the property. This is evident from the decision in *Seekoei*'s case.

(c) X has committed robbery. Previously the courts held that if X snatches Y's handbag from her hands in a sudden and unexpected movement without Y offering any resistance (because it happened unexpectedly), X is not guilty of robbery but of theft only. However, in a series of decisions, such as *Sithole*, the courts held that in such a case X is guilty of robbery on the ground that he intentionally used force in order to forestall Y offering the resistance which she would normally have offered, had she known beforehand what X had in mind.

17. FRAUD

S v Gardiner 2011 (1) SACR 570 (SCA)
R v Heyne 1956 (3) SA 604 (A)
S v Huijzers 1988 (2) SA 503 (A)
S v Myeza 1985 (4) SA 30 (T)

(8)

Question 143

Discuss the requirement for fraud that there must be a misrepresentation.

Answer

Answer this question on your own.

(8)

Question 144

Discuss the requirement for fraud that there must be prejudice or potential prejudice to somebody.

Answer

Answer this question on your own.

(7)

Question 145

Discuss the nature of the intention required for a conviction of fraud. In your answer you must distinguish between an intention to deceive and an intention to defraud.

Answer

Answer this question on your own.

(4)

Question 146

Discuss the question whether there is such a crime as attempted fraud in South African law.

Answer

Answer this question on your own.

(6)

Question 147

Write a brief comment on each of the following statements, pointing out whether each statement is, in your opinion, correct or incorrect.

(a) In the crime of fraud the misrepresentation must refer to a present situation or to a past event.

(b) If X, who wishes to borrow money from Y, misrepresents to Y the reason for borrowing the money, and Y lends him money as a result of this misrepresentation, X commits fraud.

(c) It is not required for fraud that there should be a causal link between the misrepresentation and the prejudice.

Answer

Answer this question on your own.

In commenting on statement *(b)* the judgment of the Appellate Division in *Huijzers* must be taken into account. In this judgment the Appellate Division held that X's conduct constituted fraud, because Y had suffered prejudice. As far as statement *(c)* is concerned, it is usually accepted that there need not be a causal link between the misrepresentation and the prejudice, because of the wide meaning of the term 'prejudice'. A person can commit fraud even though there is no such causal link, provided the misrepresentation is potentially prejudicial. It is, after all, not required for fraud that the misrepresentation should be successful.

SCHEDULE A: CONSTRUCTION OF CRIMINAL LIABILITY

NOTE:

(a) The diagram on the next page represents a standard crime. There are exceptions to this standard model. Strict liability crimes, for example, dispense with the requirement of culpability.

(b) 'Compliance with principle of legality' is indicated with a dotted line because, if a person's liability for a well-known crime such as murder, theft or rape has to be determined, it is so obvious that such a crime is recognised in South African law that it would be a waste of time to enquire whether there has been compliance with the requirement of legality.

(c) The heading 'Compliance with definitional elements' is further subdivided with a dotted line because crimes may, according to their definitional elements, be classified or subdivided in different ways. The purpose is merely to incorporate into the diagram the subdivision into formally and materially defined crimes. The subdivision shows the place of the requirement of causation in the general system of criminal liability.

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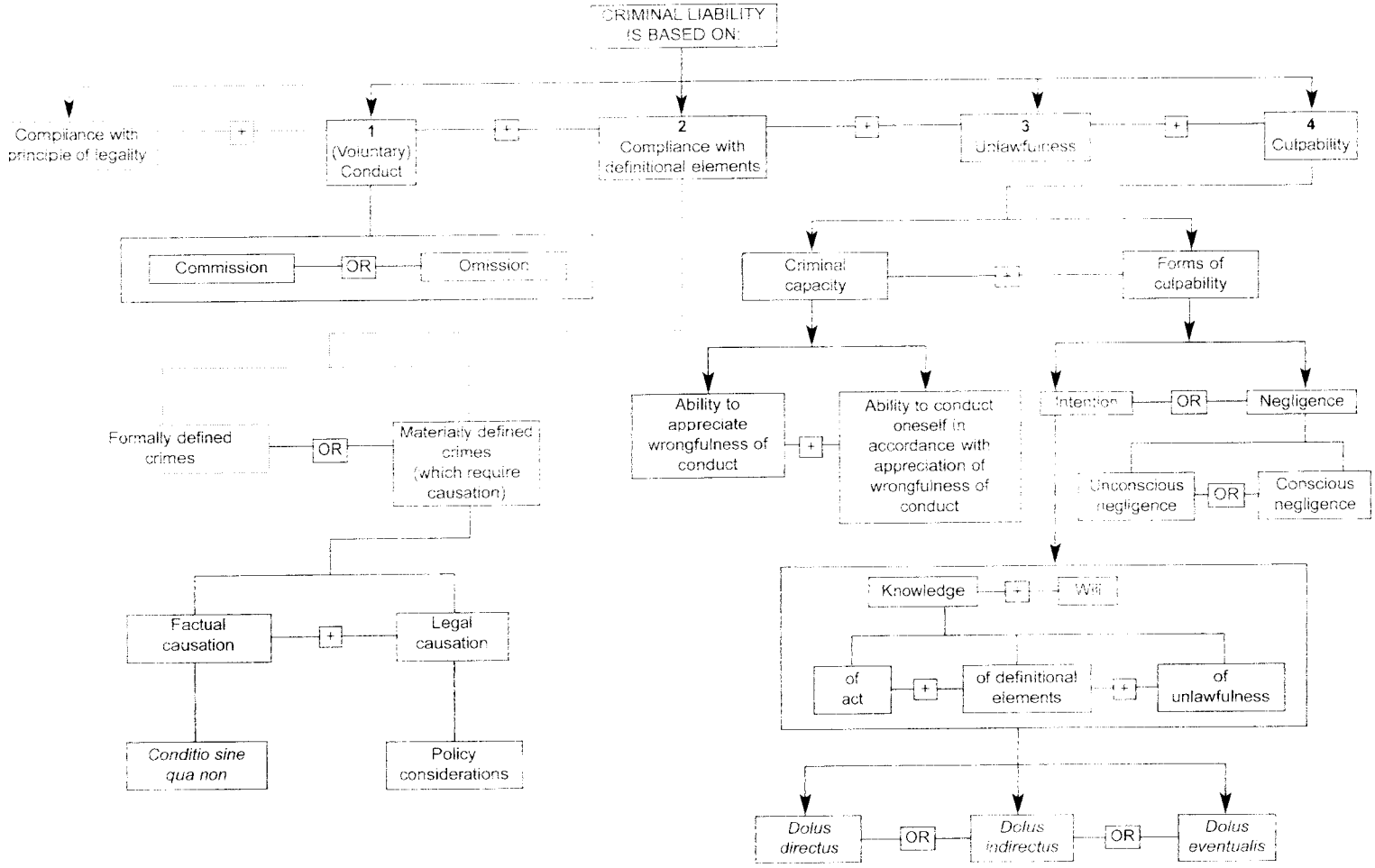
Figure 6: Construction of criminal liability



SCHEDULE B: DEFENCES AND THEIR EFFECTS

NOTE:

This table does not contain a complete list of every conceivable defence which an accused can raise when charged with an offence. Every crime has different definitional elements, and it is impossible here to set out every possible defence based on the absence of a particular definitional element of a particular crime (eg 'premises' in housebreaking, 'property' in theft).

The only defences included in this table are those based on or related to the absence of a general prerequisite for liability in terms of the general principles of criminal law. The purpose is to point out the relationship between a particular defence and the corresponding general prerequisites for liability.

For obvious reasons, we have left out defences of a procedural nature, defences related to the law of evidence and the general defence known as an alibi.

If there is an asterisk after the verdict 'Not guilty' in the third column, it means that a court would only in exceptional circumstances find an accused not guilty.

Table 2: Defences and their effects

Defence	General prerequisite for liability placed in issue	Verdict if defence is successful
Automatism due to involuntary conduct not attributable to mental illness	Conduct	Not guilty*
Impossibility	Voluntary conduct in form of omission	Not guilty
Act does not comply with definitional elements	Requirement that conduct should comply with definitional elements	Not guilty
Act not a *sine qua non* for result, or not an adequate cause of resultant condition, or *novus actus interveniens*	Requirement of causation	Not guilty (but possibly guilty of a less serious formally defined crime, such as assault)
Grounds of justification, such as private defence, consent, necessity	Unlawfulness	Not guilty
Youth	Criminal capacity	Not guilty
Mental abnormality, including automatism due to mental illness	Criminal capacity	Not guilty, but X usually ordered to be detained in psychiatric hospital or prison
Intoxication	Conduct	Not guilty* of crime charged, but guilty of contravening s 1 of Act 1 of 1988
	Criminal capacity	Not guilty* of crime charged, but guilty of contravening s 1 of Act 1 of 1988
	Intent required for crime charged	Not guilty, but usually guilty of less serious crime which is a competent verdict on main charge
Provocation	Intent required for crime charged	Guilty, but measure of provocation may serve as ground for mitigation of punishment
If charged with crime requiring intent: result or circumstances not *foreseen*	Intention	Not guilty (at least on main charge – possibly guilty of less serious crime which is a competent verdict on main charge)
If charged with crime requiring intent: *mistake*, either of fact or of law	Intention	Not guilty (at least on main charge – possibly guilty of less serious crime)
If charged with crime requiring negligence: conduct was reasonable, ie did not deviate from conduct to be expected of reasonable person in the circumstances; OR unlawful result or circumstances not foreseeable	Negligence	Not guilty

*A court would only in exceptional circumstances find an accused not guilty.

GLOSSARY OF LATIN TERMS

Latin term	Explanation
aberratio ictus	the going astray of the blow
actio libera in causa	literally 'free action in the cause'; real meaning: voluntarily becoming intoxicated in order to gain enough courage to commit a crime
actus reus	the forbidden act
animus hostilis	hostile intent
boni mores	the good morals (of society)
commissio	commission
conditio sine qua non	condition without which not
contrectatio	the requirement of an act in theft
crimen iniuria	the crime of injuring (another's dignity or privacy)
culpa	negligence
delirium tremens	literally 'trembling delirium' – a medical term for a certain psychiatric illness
dolus directus	direct intent
dolus eventualis	'legal intent', ie appreciation of possibility plus recklessness
dolus indirectus	indirect intent
error in negotio	mistake relating to the nature of the act (or transaction)
error in objecto	mistake relating to the object (of the act)
error in persona	mistake relating to the identity of a person
error iuris	mistake relating to the law
ignoratio iuris	ignorance of the law
lex non cogit ad impossibilia	the law does not apply to impossible things
lucidum intervallum	lucid interval
luxuria	conscious negligence
mens rea	literally 'guilty mind'; real meaning culpability or fault
novus actus interveniens	new intervening act
omissio	omission
socius criminia	partner in a crime
versari in re illicita	to be engaged in something unlawful
vis absoluta	absolute force
vis compulsive	force by means of compulsion
vis relative	relative force