

Tutorial Letter 102/1/2014

Criminal Law: Specific Offences

CRW2602

Semester 1

Department of Criminal and Procedural Law

This tutorial letter contains important information about your module.

Bar code

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Dear Student

We hope that you have already familiarised yourself with the first tutorial letter, as well as with the study guide and prescribed texts. Please remember that all these tutorial letters are very important and should be read.

In this tutorial letter, we will be discussing the format of the examinations which you will be writing in May. In order to assist you to prepare for these exams, we have supplied you with the exam written last year in November.

The model answers to these questions follow the exam paper, so that you will be able to check your own answers when you prepare for the exam. The commentary also serves as an example of what we expect students to answer if similar types of questions were to be asked.

There are, furthermore, some important amendments to your study guide. Please change where necessary as instructed.

Lastly, we will supply you with information regarding your tutorial letters.

1 Format of the examination paper for May/June 2014 Examinations

The format of the examination paper for the May/June 2014 examinations will in essence be the same as that of the October/November 2013 paper.

2 OCTOBER/NOVEMBER 2013 EXAMINATION PAPER

Below we provide you with the October/November 2013 examination paper. The correct answers to the questions in this paper follow in the next section.

If you have enrolled for this module for the first time, you will only fully understand the answers and the commentary on the examination paper once you have studied the different topics dealt with in the examination paper. We recommend that you do not read the commentary until you have studied the relevant topics. However, if you took this course last semester, you will find the commentary valuable, since you will have dealt with most of the work already. If you wrote this paper in November 2013, but failed and are now repeating the module, you should read both the answers and the commentary carefully to see where you went wrong in the examination.

CRIMINAL LAW SECOND MODULE

UNIVERSITY EXAMINATIONS

UNIVERSITEITSEKSAMENS



CRW2602

(470956)

October/November 2013

CRIMINAL LAW: SPECIFIC CRIMES

Duration : 2 Hours

100 Marks

EXAMINERS :

FIRST :

DR N MOLLEMA

MR RD RAMOSA

SECOND :

PROF C VAN DER BIJL

Closed book examination.

This examination question paper remains the property of the University of South Africa and may not be removed from the examination venue.

THIS PAPER CONSISTS OF SEVEN (7) PAGES PLUS INSTRUCTIONS FOR COMPLETION OF A MARK READING SHEET.

THE QUESTIONS IN THIS PAPER COUNT HUNDRED (100) MARKS. THE PAPER CONSISTS OF TWO PARTS, MARKED A AND B. YOU MUST ANSWER BOTH PARTS A AND B. PART A CONSISTS OF TEN (10) MULTIPLE CHOICE QUESTIONS. EACH QUESTION COUNTS THREE (3) MARKS, WHICH MEANS THAT THE QUESTIONS IN PART A COUNT A TOTAL OF THIRTY (30) MARKS. IN PART B, THE ANSWERS TO THE QUESTIONS MUST BE WRITTEN IN THE EXAMINATION ANSWER BOOK ITSELF. THE QUESTIONS IN PART B COUNT SEVENTY (70) MARKS.

PART A (MULTIPLE CHOICE QUESTIONS)

IMPORTANT NOTICE. THE QUESTIONS IN THIS PART HAVE TO BE ANSWERED ON THE MARK READING SHEET, WHICH WILL BE ISSUED WITH YOUR EXAMINATION ANSWER BOOK. YOU HAVE TO READ THE INSTRUCTIONS IN CONNECTION WITH THE USE OF THE MARK READING SHEET CAREFULLY. FAILURE TO DO SO MAY MEAN THAT YOUR ANSWERS CANNOT BE MARKED BY THE COMPUTER.

Ten questions (marked 1 - 10) follow. Each question contains three statements (marked (a)-(c)). Some of the statements are correct and some are incorrect. You must decide which of these statements is/are correct. The three statements are followed by five allegations (marked (1)-(5)). Each of them alleges that a certain statement or combination of statements is correct. You must decide which allegation accurately reflects the conclusions to which you have come.

Question 1

- (a) A **conviction** may be imputed to an accomplice by virtue of the principles relating to the doctrine of common purpose.
- (b) The liability of an accessory after the fact and an accomplice is accessory in character.
- (c) It was held in *Williams* 1980 (1) SA 60 (A) that a passive spectator to a deed of murder may be held liable as a co-perpetrator.
- (1) None of these statements is correct.
- (2) Only statement (a) is correct.
- (3) Only statement (b) is correct.
- (4) Only statement (c) is correct.
- (5) Only statements (b) and (c) are correct.

Question 2

- (a) In *Thebus* 2003 (2) SACR 319 (CC), it was held that where no prior agreement to commit an offence is proved, common-purpose liability may arise from an active association and participation in a common criminal design.
- (b) In *Molimi* 2006 (2) SACR 8 (SCA), the Supreme Court of Appeal held that conduct by a member of a group of persons which differs from the original mandate **may not** be **imputed** to the other members unless each member had intention in respect of the prohibited result caused by the act.
- (c) Disassociation or withdrawal from the common purpose will be a defence if it takes place before the events have reached the commencement of the execution stage.
- (1) Only statements (a) and (b) are correct.
- (2) Only statements (b) and (c) are correct.
- (3) Only statements (a) and (c) are correct.
- (4) Only statement (a) is correct.
- (5) All the statements are correct.

Question 3

- (a) According to *Motaung* 1990 (4) SA 485 (A) a joiner-in is a person who associates himself with the common purpose at a stage when the victim has already sustained the mortal injury, but is still alive and whose assault upon the victim does not precipitate the victim's death.
 - (b) An attempt to commit the impossible may qualify as a putative crime.
 - (c) A charge of conspiracy is utilized only if there is no proof that the envisaged crime was committed.
- (1) Only statements (a) and (b) are correct.
 - (2) Only statements (a) and (c) are correct.
 - (3) Only statements (b) and (c) are correct.
 - (4) Only statement (a) is correct.
 - (5) All these statements are correct.

Question 4

- (a) The mere fact that X and Y have the same intention, means that there is a conspiracy between them.
 - (b) If an incitement does not come to Y's knowledge as in the case of an inflammatory letter to Y which is written by X but which never reaches Y, X may only be found guilty of attempted incitement.
 - (c) In common-law perjury the falsehood may be committed by innuendo.
- (1) Only statement (a) is correct.
 - (2) Only statement (b) is correct.
 - (3) Only statements (a) and (c) are correct.
 - (4) Only statements (b) and (c) are correct.
 - (5) All the statements are correct.

Question 5

- (a) Commentary on pending cases constitutes contempt of court if it is calculated to influence the outcome of the case.
 - (b) Contempt of court *in facie curiae* may be committed if one grabs and tears a court document to pieces during court proceedings.
 - (c) A newspaper journalist may be convicted of the crime of contempt of court irrespective of whether he acted intentionally or negligently.
- (1) Only statements (a) and (c) are correct.
 - (2) Only statements (a) and (b) are correct.
 - (3) Only statements (b) and (c) are correct.
 - (4) Only statement (b) is correct.
 - (5) Only statement (c) is correct.

Question 6

- (a) In the crime of corruption it is required that a party suffers actual prejudice as a result of X's conduct.
 - (b) The 'giving of gratification' in the crime of corruption includes an **offer** to give gratification.
 - (c) In terms of the Prevention and Combating of Corrupt Activities Act 12 of 2004, a person who accepts money in order to undermine the integrity of a sporting event may be found guilty of corruption.
- (1) All these statements are correct.
 - (2) Only statements (a) and (b) are correct.
 - (3) Only statements (b) and (c) are correct.
 - (4) Only statements (a) and (c) are correct.
 - (5) Only statement (a) is correct.

Question 7

- (a) X may be found guilty of the crime of the use or possession of drugs if he merely keeps drugs for somebody else.
 - (b) If X is unaware that he has drugs in his possession, X may still be found guilty of the crime of the use or possession of drugs as negligence is a sufficient form of culpability.
 - (c) A person may be found guilty of dealing in drugs if he engages in activities whereby he **only acquires** drugs.
- (1) Only statement (a) is correct.
 - (2) Only statement (b) is correct.
 - (3) Only statements (a) and (c) are correct.
 - (4) Only statements (b) and (c) are correct.
 - (5) All these statements are correct.

Question 8

- (a) X may be found guilty of a crime if she engages the sexual services of an 18-year-old male prostitute, Y, for financial or other reward, even if Y consents to the act.
 - (b) Culpability in sexual offences against children may be in the form of either intention or negligence.
 - (c) A passive spectator who witnesses a sexual offence against an 18-year-old female and who fails to report the crime, may be found guilty of an offence in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
- (1) Only statement (a) is correct.
 - (2) Only statement (b) is correct.
 - (3) Only statements (a) and (c) are correct.
 - (4) Only statements (b) and (c) are correct.
 - (5) Only statements (a) and (b) are correct.

Question 9

- (a) Where X forces Y to drink his own urine, X may be found guilty of the crimes of assault and *crimen iniuria*.
- (b) In order to be convicted of assault with the intent to cause grievous bodily harm, actual serious bodily harm must be caused to the victim.
- (c) Criminal defamation is committed if X publishes defamatory comments about Y in a letter, personally hands it to Y and only Y opens the letter and reads it.
- (1) Only statement (a) is correct.
 (2) Only statement (b) is correct.
 (3) Only statement (c) is correct.
 (4) Only statements (a) and (b) are correct.
 (5) Only statements (b) and (c) are correct.

Question 10

- (a) Robbery is committed where X steals a cellphone from Y's desk and then uses force to retain the property.
- (b) In *Ex parte Minister of Justice: In re R v Gesa, R v De Jongh* 1959 (1) SA 234 (A), it was held that acquisition of property by means of a threat of violence is sufficient for a conviction of robbery.
- (c) X can be found guilty of housebreaking if he breaks into a caravan which is used to store goods.
- (1) Only statement (a) is correct.
 (2) Only statement (b) is correct.
 (3) Only statements (a) and (b) are correct.
 (4) Only statement (c) is correct.
 (5) All these statements are correct.

SUB-TOTAL: [30]**PART B**

THIS PART CONSISTS OF THREE QUESTIONS, NUMBERED, 1, 2 AND 3. YOU MUST ANSWER ALL THREE QUESTIONS (WITH THEIR SUB-QUESTIONS). NOTE THAT YOU HAVE A CHOICE IN CERTAIN OF THE SUB-QUESTIONS. SUBSTANTIATE YOUR ANSWERS AND REFER TO DECIDED CASES WHERE NECESSARY. IN DECIDING UPON THE LENGTH OF YOUR ANSWERS YOU SHOULD BE GUIDED BY THE MARKS ALLOCATED TO EACH QUESTION.

Question 1

- (a) Define the doctrine of common purpose and discuss its application in the case of *Safatsa* 1988 (1) SA 868 (A). (8)
- (b) Define the crime of murder and explain whether it is possible to be an accomplice to murder with reference to case law. (5)
- (c) There is a boundary that must be crossed in order for an act to qualify as a punishable attempt. Name and discuss the two stages that are used to differentiate cases of this nature with reference to the case of *Schoombie* 1945 AD 541. (7)
- (d) X, an outspoken political activist, makes a statement in public that a certain judge has been bribed

by a certain accused in a criminal matter to decide the case in his favour. X is charged with contempt of court. Name the form of contempt of court which is relevant in this instance and briefly discuss the requirements for liability in terms of this offence.

(5)
[25]

Question 2

- (a) Y, a 40-year old man is the boss of a large designer-clothing company. X, an 18-year-old girl, is a secretary at the company and is also studying for her LLB degree. X plans on being promoted and decides to have sexual relations with Y. She has a hole in her office wall and secretly spies on him waiting for her opportunity. One night when he is intoxicated, she goes to Y's office, plants a small video camera on his desk and has sexual relations with Y. He passes out drunk. The next day X threatens Y that she will send the video to his wife if he does not promote her.

Discuss whether X may be convicted of the following offences:

- (i) Rape in terms of section 3 of the *Criminal Law (Sexual offences and Related Matters) Amendment Act 32 of 2007*. (6)
- (ii) Extortion. (4)
- (iii) If X lays a false charge of rape against Y at the police station, identify and discuss the crime with which X may be charged. (4)

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

Discuss the case of either:

R v Sibiyi 1955 (4) SA 247 (A)

OR

S v Jonathan 1987 (A) SA 633 (A) (7)

- (c) Section 90 of the Firearms Control Act 60 of 2000 provides for four (4) exceptions to the provision that no person may possess ammunition. Name them. (4)

[25]

Question 3

- (a) Y is pregnant. X, her husband, is the father. One evening they have an argument and Y goes to the garage to get into her car and drive away. She locks the door between the garage and the house. Before she can get into the car, X fires random shots through the door and hits Y in the forehead and stomach. Y survives but the foetus is killed. Answer the following questions:

- (i) Critically discuss whether X may be found guilty of the murder of the foetus with reference to case law. (4)
- (ii) Explain whether X may be found guilty of malicious damage to property. (3)
- (iii) If X had missed and Y was not hit by any bullets, could X be able to be found guilty of assault with the intent to cause grievous bodily harm? Discuss. (3)

- (b) Discuss the meaning of 'potential prejudice' in the crime of fraud. (5)

(c) X, an attorney, undertakes to administer the financial matters of Y, a 10-year-old orphan who cannot look after herself. He acts as a trustee of her money and is under the obligation to receive all income due to her and to invest such income in a specific investment account. X, who experiences financial difficulties, decides to take some of this money to pay his own debtors. X draws the money from Y's investment account and pays his debtors. X's financial position is so bad that he realises that he will never be in a position to replace the money in Y's bank account. X is charged with theft. Discuss the following questions:

- (i) Name the **form of theft** that is relevant to this set of facts. (1)
 (ii) Discuss the **intention** required for the crime of theft and consider whether X's conduct complies with this requirement. (4)

[20]

SUB-TOTAL: [70]

TOTAL: 100

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3 Commentary on October/November 2013 examination paper

Below follows the commentary to the exam supplied above. We find that most students provide extremely superficial answers in the examination. Therefore, we advise that you actually complete the given examination paper on your own as a form of self-assessment. Test whether you are able to identify the relevant sections of the work. Plan and structure your answers. Look especially at the length of each answer, and how much time you need to allot to each answer. Then compare your answers to those in this commentary. This exercise will tell you exactly what is expected of you in the examination.

The following abbreviations are used:

SG – Study Guide for CRW2602

***Criminal Law* – CR Snyman *Criminal Law* 5th ed 2008 (the prescribed book)**

***Case Book* – CR Snyman *Criminal Law Case Book* 5th ed 2013**

PART A (MULTIPLE-CHOICE QUESTIONS)

Question 1

- (a) This statement is incorrect. An accomplice is someone whose conduct furthers the commission of a crime by someone else but who does not comply with the requirements of liability set out in the definition of a crime and whose conduct is not imputed to him in terms of the doctrine of common purpose. See SG 1.2.2.
- (b) This statement is correct. The liability of an accessory after the fact, and an accomplice, is accessory in character. See SG 2.3.3 (6)
- (c) This statement is incorrect. See SG 1.3.3.

You should, therefore, have chosen option (3) since only statement (b) is correct.

Question 2

- (a) This statement is correct. See SG 1.3.4.2.
- (b) This statement is correct. See SG 1.3.4.7.
- (c) This statement is correct. See SG 1.3.4.8.

You should, therefore, have chosen option **(5)** since all the statements are correct.

Question 3

- (a) This statement is correct. See SG 1.3.4.5. and Snyman *Casebook* commentary on 224.
- (b) This statement is incorrect. See SG 3.2.6.
- (c) This statement is correct. See SG 3.3.

You should, therefore, have chosen option **(2)** since only statements (a) and (c) are correct.

Question 4

- (a) This statement is incorrect. See SG 3.3. (9).
- (b) This statement is correct. See SG 3.4.(9).
- (c) This statement is correct. See SG 5.1.3.

You should, therefore, have chosen option **(4)** since only statements (b) and (c) are correct.

Question 5

- (a) This statement is correct. See SG page 61 Summary (15).
- (b) This statement is correct. See SG 5.4.9.1.
- (c) This statement is incorrect. Intention must be present. See SG 5.4.9.2. b.

You should, therefore, have chosen option **(2)** since only statements (a) and (b) are correct.

Question 6

- (a) This statement is incorrect. See SG 6.2.6.2 (4)
- (b) This statement is correct. See SG 6.2.7.3.
- (c) This statement is correct. See SG 6.2.8 (8).

You should, therefore, have chosen option **(3)** since only statements (b) and (c) are correct.

Question 7

- (a) This statement is correct. See SG 6.4.2.3.
- (b) This statement is incorrect. See SG 6.4.2.6.
- (c) This statement is incorrect. See SG 6.4.3.3.

You should, therefore, have chosen option (1) since only statement (a) is correct.

Question 8

- (a) This statement is correct. See SG 7.4. 1 (iv).
- (b) This statement is correct. See SG 7.7.2.4
- (c) This statement is incorrect. The crime can only be committed against a child (a person under the age of 18). See SG 7.9.

You should, therefore, have chosen option (5) since only statements (a) and (b) are correct.

Question 9

- (a) This statement is correct. See SG 10.1.6.
- (b) This statement is incorrect. Mere intention is sufficient. See SG 10.1.11.
- (c) This statement is incorrect. See SG 11.2.

You should, therefore, have chosen option (1) since only statement (a) is correct.

Question 10

- (a) This statement is incorrect. See SG 13.1.6. This act will amount to theft and assault.
- (b) This statement is correct. See SG 13.1.5.
- (c) This statement is incorrect. See SG 16.4.

You should, therefore, have chosen option (2) since only statement (b) is correct.

PART B

Question 1:

- (a) If **two or more people**, having a common purpose to commit a crime, **act together** in order to achieve that purpose, **the acts of each of them** in execution of such a purpose are **imputed** to the others. In *Safatsa* a crowd of 100 people attacked Y with stones and poured petrol over him and set him alight. The appellants were found guilty of murder based on their common purpose to kill Y. They argued that they could only be liable if a **causal connection** was proved between each person's individual conduct and the act but this was held not to be the case and no causal connection is required. It was held that common purpose may be proved and the **act will be imputed** to all the persons who had the same purpose where there was a **prior agreement or active association** and participation in the common design.

SG 1.3.4.1 and 1.3.4.4 and *Casebook* 187.

- (b) Murder is the unlawful and intentional **causing of the death of another person**. In *Williams* 1980 (1) SA 60 (A) it was held that a person **can be an accomplice** to murder. In this case the accused persons were travelling on a train and the one accused held the victim and the other charged the victim with a broken bottle while the one accused held the victim. Snyman criticises this decision as he says the conduct of the accused who held the victim **contributed causally** to the death and should be convicted as a **co-perpetrator** as his conduct complied with the definition of murder. To be an accomplice one would have to **further the death without causing it or contribute causally** to it which is not possible.

SG 2.2.5 and *Casebook* 207-212.

- (c) In the first stage X's conduct amounts to no more than **acts of preparation** and he will **not be convicted of any crime**. In the second stage his acts qualify as **acts of execution or consummation** and he will be guilty of **attempted murder**. In the third stage the **act has been completed and the requirements for liability have been met** and **X will be guilty of the completed crime** such as murder.

In *Schoombie* X went to a shop and placed petrol around it with a tin of inflammable material. He was stopped by a policeman. He was convicted of **attempted arson**. The court held that one needs to distinguish between **acts of preparation** and **acts of consummation** using an **objective criterion**.

See SG 3.2.5.1 – 3.2.5.3. and *Casebook* 227.

- (d) This is an example of contempt **ex facie curiae**. It relates to **scandalising the court**. The crime is not to protect the dignity of an **individual judicial officer** but to **protect the administration of justice**. The publication of allegations imputing dishonest motives can be **oral or in writing**. The words should have the tendency or **likelihood to harm**. As far as unlawfulness is concerned, **fair comment** on the administration of justice is not contempt but they must be **reasonable and bona fide**. There must be **intention** present and the offensive action must be directed at a judicial officer in his judicial capacity. In *Moila* 2005 (2) SACR 517 (T) it was held that the accused acted with malice and intentionally abused his right to freedom of expression to damage the character and dignity of the judges acting in their capacity as judges.

Contempt of court consists in the **unlawful and intentional violation of the dignity, repute or authority of a judicial body or a judicial officer in his judicial capacity or the publication of information/ comment concerning a pending judicial proceeding which may influence the outcome of the proceeding or the administration of justice**.

Question 2

- (a)(i) **Yes she may possibly be found guilty of rape.** Rape is any person who unlawfully and intentionally commits an act of **sexual penetration** with a complainant without his or her **consent** is guilty of rape. Consent means **voluntary or uncoerced agreement**. It must be given **consciously** and the person must understand what they are consenting to. There is **no valid consent if X is in an altered state of consciousness** and under the influence of alcohol (intoxicated) and is **unable to appreciate** the nature of the sexual act.

See SG 7.2.

- (ii) **Yes she may be found guilty of attempted extortion.** Extortion is the unlawful and intentional **acquisition of a benefit** from some other person by **applying pressure** to that person which **induced him or her to part with the benefit**. In this set of facts there is no indication that the benefit was handed over to X. The pressure can take the form of intimidation or **threats**. The benefit can be **any advantage** which is **patrimonial or non-patrimonial**. See the case of **S v J** 1980 (4) SA 113 (E) or **Ex Parte Minister van Justisie: In re S v J en S v Von Mollendorff**.

See SG 6.3

- (iii) X may be found guilty of the crime of **defeating or obstructing the course of justice** or an **attempt to commit this crime**. This crime is defined as consisting in unlawfully and intentionally engages in conduct which defeats or obstructs the course of justice. It is **not a requirement that a case must be pending**. It is sufficient if Y **subjectively foresees** that her conduct may lead to the case being **prosecuted or investigated**.

See Snyman *Criminal Law* self-study 338ff and SG 5.3

- (b) Discuss the case of either:

R v Sibiyi 1955 (4) SA 247 (A) OR

In this case the complainant took his car for repairs. The appellant took the car for a joyride and it ended up in a donga. They were charged with the theft of the car. They were convicted of theft and took the case on appeal. It was held that they had not **intended to permanently deprive** the owner or person entitled to the possession of the car but to use it temporarily and bring it back. The court upheld the appeal and confirmed that **furtum usus or the temporary use of another's thing without the intention of permanently depriving** the owner is no longer the crime of theft. In order to be convicted of theft there must be an **intention to appropriate** and permanently deprive an owner of his property. They were therefore **not guilty of the crime of theft**. The Legislation enacted Section 1(1) of the **General Law Amendment Act 50 of 1956** to make this type of temporary use a crime.

See *Casebook* 244.

OR

S v Jonathan 1987 (A) SA 633

Any 7 marks can be awarded.

In this case the three accused were charged with murdering a co-prisoner who was in the same cell as them. The court could not decide if they were **guilty of murder or had acted with a common purpose**. They found them **guilty as accessories after the fact**. The court referred to

the **Gani** case and confirmed it. They considered this case as an exception to the general rule that **one cannot be an accessory after the fact to a crime committed by himself**. The logic was if all three committed the murder then all three are accessories after the fact as they all disposed of the corpse. This *Gani* decision has been criticised because it did not consider that there was **no perpetrator** to whom one's act could be an accessory after the fact. The decision was based on **legal policy** that it would not be fair to acquit all three of the accused in the *Jonathan* case.

See Snyman *Casebook* 215ff.

(ii) They may possess ammunition however:

- If they hold a **licence**
- If they hold a **permit**
- If they hold a **dealer's licence**
- If **otherwise authorised** to do so

See SG 6.5.3.

Question 3

(a)(i) **No, X may not be found guilty of murder of the foetus**. Murder is the unlawful and intentional causing of the death of a human being. In the *Mshumpa* 2008 (1) SACR 126 (E) case it was held that this means the person must be **born alive**. The Constitution does not confer the right to life on an unborn child and the common law may be developed but incrementally and in accordance with the Constitution but **may not be applied retrospectively** as it will offend the principle of legality.

See *Mshumpa* case in casebook 264.

(ii) **No he may not be found guilty of damaging** the door if he is the owner or co-owner unless it is **only X's property then he may be found guilty**. Malicious injury to property is the unlawful and intentional **damaging of property belonging to another person** or **damaging one's own insured property** with the intention of claiming the value of the property from the insurer.

See SG 15.2.

(iii) **Yes** he could be found guilty. Assault may be caused by **applying force directly or indirectly to another person** or **inspiring a belief** that force will be immediately applied. It is not a requirement for this crime for Y to **suffer serious bodily harm**. Only X's **intention** to impose serious bodily harm is required.

See SG 10.1.11.

(b)

- It means there must be the **risk of prejudice** or **likelihood** of prejudice
- Likelihood means the **possibility of prejudice** and not that it can or will be caused
- It should **not be too remote or fanciful**
- The prejudice **need not necessarily be suffered by the representee**
- It is irrelevant whether the victim (Y) was **not misled** by the prejudice
- Since potential prejudice is sufficient it is **unnecessary to require a causal connection** between the misrepresentation and the prejudice

See SG 14.1.4.

(c)(i) Embezzlement (appropriation of property belonging to another in the perpetrator's own possession).

- There must be **intention in respect of the property** ie X must know that he is taking property which belongs to somebody else and which is not *res nullius* or *res derelictae*
- There must be **intention in respect of the unlawfulness**
- There must be **intention in respect of the act** (intention to **appropriate**) and this means X must have the intention to **exercise the rights of an owner** in respect of the property as well as an intention to exclude the owner from exercising her rights over her property (**permanently deprive the owner of her property**)

X is guilty as he is paying his debts and there is an intention to permanently deprive Y of her property and he exercised the right of an owner of the property (incorporeal property exception ie theft of an abstract sum of money).

See SG 12.6.4 and 12.7

SUB-TOTAL: [70]
TOTAL: 100

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4 Amendment to Study Guide

Please make the followings amendments to your CRW2602 Study Guide:

- **On page 45, under 4.2.1, replace the following sentence:**

'There are also various statutory crimes against the state, most of them created by the Internal Security Act 1982. Examples are terrorism and sabotage.'

with

'There is also a statutory crime against the state, namely terrorism, in terms of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004.'

- **Under 7.2.3.1 replace the words "Section 3" with "Section 4".**

Under 7.7.2.1 insert the following at the end of the last paragraph:

In *The Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development ZACC/2013* (decided on 3 October 2013) the Constitutional Court considered the constitutionality of the criminalisation of consensual sexual conduct of children between the ages of 12 and 16 years. The relevant provisions of the Sexual Offences Act are sections 15 and 16. As already pointed out, **section 15(1) makes it an offence for a person (A) to commit an act of sexual penetration with a child (a person between the ages of 12 and 15).** The court explained that the crime may be committed firstly if an adult (a person 18 years or older) or a child (a person younger than 18 years) engages in consensual sexual penetration with an adolescent (a person between the ages of 12 and 15). **Secondly, the crime may be committed when adolescents engage in consensual sexual penetration with each other.** The judgment focused on the constitutionality of the **second way** in which the crime may be committed. In such instances, **the Act provides that both parties may be found guilty of the crime.** This follows from **section 15(2), which states that if both A and B were children at the time of the commission of the offence, the Director of Public Prosecutions must give authorisation for the institution of a prosecution and if this occurs, then both the parties (A and B) must be prosecuted.** As we have pointed out, "sexual penetration" is broadly defined in section 1 as including vaginal, anal and oral sexual intercourse

as well as some forms of masturbation by another person.

Section 16 of the Act contains the same provisions as s 15 except that it criminalises “sexual violation”, which is broadly defined as “direct or indirect contact” and includes some forms of masturbation by another person, petting and even kissing. The provisions are otherwise similar to those of section 15(2). **The provisions of section 16 are discussed hereunder in 7.7.3.**

A “close-in-age” defence is available to a child who has been charged with sexual assault, which means that the accused child may rely on the defence that both of the accused were children and that the age difference between them was no more than two years (section 56 of the Act discussed hereunder). As pointed out by the court (at para 24), if a 12-year-old person and a 15-year old person engage in kissing they are both committing an offence in terms of section 16. If the 15-year-old is prosecuted, the 12-year-old must also be prosecuted and neither may rely on the close-in-age defence.

The North Gauteng High Court had ruled that these provisions unjustifiably infringe children’s constitutional rights to dignity, privacy and bodily and psychological integrity as well as their rights in terms of s 28(2) of the Constitution. The Constitutional Court was asked to confirm the ruling of the High Court. It was contended by the applicants that the provisions were so broad that, instead of protecting children, they in fact harmed children because they would be exposed to the criminal justice system as a result of the prohibited conduct. Such exposure, it was argued in expert evidence before the court, would harm the child’s development of a “proper understanding of, and healthy attitudes to, sexual behaviour” (at para 28). Because of these adverse consequences their rights to human dignity, privacy, physical and psychological integrity as well as the “best-interest-of the child” principle were infringed.

The Constitutional Court considered the impact of the provisions on each of these rights. First, it was pointed out that children enjoy each of the fundamental rights in the Constitution that are granted to “everyone” (at para 38). The expert evidence before the court indicated that data have revealed that the majority of South African children between the ages of 12 and 16 begin to explore their sexuality and that this is part of the child’s development. Adolescents charged under the impugned provisions might be shamed and embarrassed by criminal prosecutions which might have a negative impact on their natural development. **Another adverse consequence was that the child might be discouraged from seeking help for issues about sex from his or her parents or other people. Thus, instead of achieving positive outcomes, the provisions were more likely to heighten the risk of adolescents having negative experiences** (at para 47). Dealing first with the right to dignity, the court agreed that the **criminalisation of consensual sexual conduct is a “form of stigmatisation which is degrading and invasive”** (at para 55). The infringement of the s 10 right to dignity was therefore apparent since, as the court noted, **“[a]n individual’s human dignity comprises not only how he or she values himself or herself, but also includes how others value him or her”** (at para 56). A negative evaluation by others would invariably be a consequence of a criminal trial and conviction of such an adolescent (at para 56). As regards the right to privacy, **the court indicated that the provisions invaded “the most intimate spheres of personal relationships”** (at para 60). Moreover, evidence to the effect that exposure of children to the criminal justice system for engaging in consensual sexual behaviour **would have a negative impact on them generally, and would likewise be contrary to the best interests of the child in terms of s 28(2) of the Constitution.**

- Turning to the limitation analysis, the court rejected the respondents’ contention that implementation of the provisions would require prosecutorial discretion at the highest level and that **there are other diversionary measures available to avoid a criminal trial and conviction. The court pointed out that adolescents would inevitably be exposed to being arrested and questioned by the**

police (at para 83). There was no evidence before the court that the purpose of the provisions, namely to protect adolescents from risks associated with sexual acts and consequently to deter them from engaging in such conduct, could reasonably be expected. But there was evidence before the court that it would have the opposite effect by “cultivating a society in which adolescents are precluded from having open and frank discussions about sexual conduct with their parents and caregivers” (at para 89). The court found that there was no rational link between the provisions and their stated purpose (at para 94). It also considered the possibility that less restrictive means could be used to educate children about the risks of matters like child pregnancy. The provisions were declared inconsistent with the Constitution and invalid to the extent that they impose criminal liability on children under the age of 16 years. Because of the complexity of the matter (for example, the need to impose criminal liability on an adult for engaging in sexual conduct with a consenting adolescent the declaration of invalidity was suspended for a period of 18 months to allow parliament to amend the provisions.

- Scrap the first paragraph under 7.7.2.2

5 New edition of Case Book

In tutorial letter 101, under paragraph 5.3 we indicate that CR Snyman’s *Criminal Law Casebook* 4th ed 2008 is prescribed. Since then, a new edition of the Case Book has been prepared, the 5th ed 2013. It is anticipated that the new edition will be available soon. You can use either the 2008 or the 2013 edition, depending on which edition is available. However, please note that there is one prescribed case in the Study Guide which is **not** in the new edition. This case is:

Heyne 1956 (3) SA 604 (A)

Because this case is not included in the new edition, you are **no longer required to read it**.

6 Group Discussion Classes

Kindly note that there will be no group discussion classes offered in 2014. Please consult myUNISA under “Additional Resources” where additional assistance is offered.

7 Number of tutorial letters

You will receive a total of **FOUR** (4) tutorial letters this semester. You received the first letter (101) on registration. In addition to this tutorial letter (102), you will also receive a third tutorial letter (201) which will provide the answers to the first compulsory assignment. The final tutorial letter (202) will provide commentary on the second compulsory assignment.

Please note that you can also access these tutorial letters electronically on myUNISA (<http://my.unisa.ac.za>) under the course code **CRW2602-14-S1** at the link “Official Study Material”.

We wish you success with your studies.

Regards

Prof L Jordaan
 Prof C van der Bijl
 Dr N Mollema
 Mrs P Museka