Theories of punishment

S v Masiya 2006 (2) SACR 357 (T).

The High Court (at par 61) explained that, in terms of the existing common law defi nition of the crime, the non-consensual anal penetration of a girl (or a boy) amounted only to the (lesser) common-law crime of indecent assault, and not rape, because only non-consensual vaginal sexual intercourse was regarded as rape.

The court questioned why the non-consensual sexual penetration of a girl (or a boy) *per anum* should be regarded as less injurious, less humiliating and less serious than the non-consensual sexual penetration of a girl *per vaginam*. The court (at par 71) was of the view that the common-law definition of rape was not only archaic, but also irrational, and amounted to arbitrary discrimination regarding which kind of sexual penetration was to be regarded as the most serious. The court was of the opinion that the conviction of rape did not amount to an unjustified violation of the accused's fair-trial rights (e.g. the principle of legality, which, in sections 35(3)(l) and 35(3)(n) of the Constitution, is guaranteed as one of the rights of the accused), because non-consensual anal

In *Director of Public Prosecutions, Western Cape v Prins* 2012 9 SACR 183

(SCA), it was contended that no crime is created in the absence of a penalty clause in the particular legislation (prescribed punishment). In other words, the contention was that a person accused of a statutory offence cannot be charged and found guilty of such an offence if there is not also a sentence or punishment prescribed for the offence in the particular legislation. The Supreme Court of Appeal rejected this contention. The court found that there was no support for this contention in the case law. Although the presence or absence of a penalty clause (prescribed punishment) is an important factor in determining whether a crime has, in fact, been created (at par 15), the court was of the view that it is not an essential factor, since it may otherwise be very clear from the particular legislation that a crime was actually created. Apart from focusing upon the language used in the Act, a court must consider, in particular, the **objectives** of the particular legislation. If it is clear from the objectives of the legislation (expressed in the title and preamble to the Act) and the entire context of the Act that the intention was to create a crime or crimes, then a person may be charged with such (a) crime(s) and be found guilty, even if no penalty is prescribed in the particular Act. **The imposition of punishment is then left to the discretion of the court, as has always been the position in the common law**

Mokgethi 1990 (1) SA 32 (A)

--- in Mokgethi Supra the Appellate Division Held that it is wrong for a court to regard only one specific theory (eg ``proximate cause'') as the correct one to be applied in every situation,

--- thereby Excluding from future consideration all the other specific theories of legal causation.

--- A Court may even base a finding of legal causation on considerations outside these specific theories.

Tembani 2007 (1) SACR 355 (SCA) (4)

--- In Tembani, X's Act can also be seen to be the legal cause of Y's death.

--- X Deliberately inflicted an intrinsically dangerous wound to Y, Which without medical intervention would probably cause to die. It Is irrelevant whether it would have been easy

--- to Treat the wound, and even whether the medical treatment given later was substandard or negligent.

--- X Would still be liable for Y's death.

--- The Only exception would be if at the time of the negligent treatment had recovered to such an extent that the original injury no longer posed a danger to her life

***Eadie* 2002 (1) SACR 663 (SCA)**

--- In Eadie 2002 (1) SACR 663 (SCA), the Supreme Court of Appeal delivered a judgment which raises doubts about whether there is Still such a defence in our law.

--- The court held that there is no distinction between non pathological criminal incapacity owing to emotional stress and provocation, on the one hand, and the defence of sane automatism, on the other

--- The court held that there is no difference between the second (conative) leg of the test for criminal capacity and the requirement which applies to the conduct element of liability that

X's bodily movements must be voluntary.

--- The court does not hold that the defence of non--- pathological criminal incapacity

--- no longer exists, and in fact makes a number of statements which imply that thedefence does still exist.

Fourie 2001 (2) SACR 674 (C)

Fourie 2001 (2) SACR 674 (C), the facts were the following: X was a regional court magistrate, resident in George. He had to preside at the sessions of the regional court in Knysna. The court's sessions commenced at 9:00. Because of certain circumstances, he left George for Knysna in his motorcar somewhat late on that particular day. On the road between George and Knysna, he was caught in a speed trap, which showed that he had exceeded the speed limit of 80 km/h, which applied to that part of the road. On a charge of exceeding the speed limit, he pleaded not guilty. His defence was that although he exceeded the speed limit, his act was not unlawful. He argued that although not one of the recognised grounds of justification, such as private defence, was applicable to the case, his act should nevertheless be regarded as lawful on the following ground: the act was not in conflict with the legal convictions of the community, because by merely striving to arrive at the court on time, he drove his car with the exclusive aim of promoting the interests of the administration of justice. He did not seek to promote his own private interests, but those of the state and, more particularly, those of the administration of justice.

The court dismissed this defence. If this defence had been valid, it would have opened the floodgates to large-scale unpunishable contraventions of the speed limits on our roads. Many people would then be entitled to allege that since they would otherwise be late for an appointment in connection with a service they render to the state, they are allowed to contravene the speed limit. In the course of the judgment, the court confirmed the principle set out above, namely that the enquiry into unlawfulness is preceded by an enquiry into whether the act complied with the definitional elements, and also that the test to determine unlawfulness is the *boni mores* or legal convictions of the community.

Minister van Polisie v Ewels 1975 (3) SA 590 (A) 597A-B.

It was held in ***Minister van Polisie v Ewels*** 1975 (3) SA 590 (A) that a policeman who sees somebody else being unlawfully assaulted has a duty to come to the assistance of the person being assaulted. In ***Gaba*** 1981 (3) SA 745 (O), X was one of a team of policemen who were trying to trace a certain dangerous criminal called "Godfather".

Other members of the investigation team had arrested a suspect and questioned him in X's presence with a view to ascertaining his identity. X knew that the suspect was in fact "Godfather", but intentionally refrained from informing his fellow investigation team members accordingly. Because of this omission, he was convicted of attempting to defeat or obstruct the course of justice.

Relying on ***Minister van Polisie v Ewels*** (*supra*), the court held that X had a legal duty to reveal his knowledge, and that this duty was based upon X's position as a policeman and a member of the investigating tea An omission is punishable only **if there is a legal duty upon X to act positively**. A moral duty is not the same as a legal one. When is there a legal duty to act positively? The general rule is that **there is a legal duty upon X to act positively if the legal convictions of the community require him to do so.**

Steyn 2010 1 SACR 411 (SCA)

Steyn (*supra*) serves as a good example in this regard. X shot and killed her former husband (Y) in the following circumstances: Y drank heavily and continuously abused X, both mentally and physically over a long period of time. He often told her that he would slit her throat and regularly locked her in her bedroom. X eventually divorced her husband (Y). X got her own fl at, but because of fi nancial difficulties, she returned to the matrimonial home, although she no longer shared a bedroom with Y. Y continued to abuse her and, at times, she locked herself in her bedroom to prevent Y from assaulting her. One evening, X, who was suffering from depression and anxiety, told Y that she had contacted the medical aid to find out whether it would pay for treatment for her anxiety at a nearby clinic. Y, who had been drinking, lost his temper, verbally abused X, claiming she was mad, and then grabbed her by the throat and began to hit her. She managed to escape and ran to her bedroom, where she locked herself in. Later that evening she went to the kitchen to find something to eat before taking some prescribed medicine for an ulcer. Because she was overcome with fear, she armed herself with her.38 revolver, which she hoped would dissuade Y from attacking her again.

On seeing her, Y shouted that he had told her to stay in her room and that she was not to get anything to eat. Holding a steak knife, he jumped to his feet and rushed at her, shouting that he was going to kill her. X then fi red a shot at Y and immediately returned to her room, where she phoned a friend. She was charged with culpable homicide and her plea that she had acted in self-defence was

rejected. The trial court held that a reasonable person in X's position would have foreseen the possibility that Y might attack her and would not have left the room. It concluded that she (X) had acted unreasonably and that the fatal incident could have been avoided if she had telephoned for help.

The Supreme Court of Appeal rejected this reasoning of the trial court. The court recognised that there must be a reasonable balance between the attack and the defensive act. However, strict proportionality is not required, the proper consideration being whether, in the light of all the circumstances, the defender acted reasonably (at 417*e-f*). The court was of the view that it could not have been expected of X to gamble with her life by turning her back on the deceased who was very close to her and about to attack her with a knife, in the hope that he would not stab her in the back. Leach AJA commented that "she would have had to turn around in order to get back to her room, by which time the deceased would have been upon her and flight would have been futile" (418*c*). Her assumption that Y would catch her was a reasonable one and therefore "she could not be faulted for offering resistance to the deceased rather than attempting to flee from him" (418*d*). The court added that X was entitled to leave her bedroom, in her own home, and go to the kitchen to find something to eat. Her life was under threat and she was entitled to use deadly force to defend herself. Her plea of self-defence was accordingly upheld

Goliath

the Appeal Court conclusively decided that necessity can be raised as a defence against a charge of murdering an innocent person in a case of extreme compulsion. In this case, X was ordered by Z to hold on to Y so that Z might stab and kill Y. X was unwilling throughout, but Z threatened to kill him if he refused to help him. The court inferred, from the circumstances of the case, that it had been impossible for X to run away from Z – Z would then have stabbed and killed him. The only way in which X could have saved his own life was by yielding to Z's threat and assisting him in the murder. In the trial court, X was acquitted on the ground of compulsion, and on appeal by the state on a question of law, the Appeal Court held that compulsion could, depending upon the circumstances of a case, constitute a complete defence to a charge of murder.

The Appeal Court added that a court should not lightly arrive at such a conclusion, and that the facts would have to be closely scrutinised and judged with the greatest caution. One of the decisive considerations in the court's main judgment, delivered by Rumpff JA, was that we should never demand of an accused more than is reasonable; that, considering everyone's inclination to self-preservation, an ordinary person regards his life as being more important than that of another; that only somebody "who is endowed with a quality of heroism" would purposely sacrifice his life for another, and that to demand of X that he sacrifice himself therefore amounts to demanding more of him than is demanded of the average person. The court in ***Goliath*** did not regard it as necessary to state whether the defence of necessity in the given circumstances is based on justification or absence of culpability

Masilela 1968 (2) SA 558 (A)

The decision in ***Masilela*** 1968 (2) SA 558 (A) constitutes an apparent exception to the general rule in relation to contemporaneity. In this case, X assaulted and strangled Y, intending to kill him; then, believing him to be dead, he threw his body onto a bed and ransacked the house. He then set fi re to

the bed and the house and disappeared with the booty. Y was, in fact, still alive after the assault and died in the fi re. The Appellate Division confirmed X's conviction of murder. The court did not accept the argument that there were two separate acts, of which the fi rst, although committed with the intention to murder, did not actually kill Y, while the second did kill Y, but was not accompanied by the intention to murder (because to dispose of what is believed to be a corpse cannot be equated with an intention to kill a human being). According to the Appellate Division, X's actions amounted to "a single course of conduct"

De Blom 1977 (3) SA 513 (A)

In this case, X was charged, *inter alia,* with contravening a certain exchange-control regulation, according to which it was (at that time) a crime for a person travelling abroad to take jewellery worth more than R600 out of the country without prior permission. X's defence with regard to this charge was that she did not know that such conduct constituted a crime.

The Appeal Court held that she had truly been ignorant of the relevant prohibition, upheld her defence of ignorance of the law, and set aside her conviction on the charge. Rumpff CJ declared (at 529) that at this stage of our legal development, it had to be accepted that the cliché "every person is presumed to know the law" no longer had any foundation, and that the view that "ignorance of the law is no excuse" could, in the light of the present-day view of culpability, no longer have any application in our law. If, owing to ignorance of the law, X did not know that her conduct was unlawful, she lacked *dolus*; if *culpa* was the required form of culpability, her ignorance of the law would have been a defence if she had proceeded, with the necessary caution, to acquaint herself with what was expected of her (see 532). There is no indication in the judgment that ignorance of the law excludes *dolus* only if such ignorance was reasonable or unavoidable. In other words, the test is purely subjective in this respect.

Lungile 1999 (2) SACR 597 (A)

Three robbers, among them X, acting with a common purpose, robbed a shop. A policeman, Z, tried to thwart the robbery. In a wild shoot-out between Z and the robbers, which took place in the shop, a shop assistant, Y, was killed. On a charge of murder, X relied, *inter alia,* on the defence of absence of a causal link between his conduct and Y's death. According to him, his conduct was not the cause of Y's death because the shot fi red by Z on Y, killing Y, constituted a *novus actus interveniens*. The court rejected this argument, holding that Z's act was not an abnormal, independent occurrence. However, the question arises whether X could not perhaps have relied on the defence that he was mistaken as to the causal course of events: could he not have raised the defence that he was under the impression that Y would die as a result of a shot fi red by him or one of his associates, whereas Y was, in fact, killed by a shot fi red by Z? The court convicted X of murder without considering such a possible argument. We submit that the court's conclusion is correct, on the following ground: even if X had alleged that he was mistaken as to the chain of causation, such a defence should not have succeeded because there was not a substantial difference between the foreseen and the actual course of events.

Chretien 1981 (1) SA 1097 (A)

In this case, X, who was intoxicated, drove his motor vehicle into a group of people standing in the street. As a result, one person died and five people were injured. He was charged with murder in respect of the person who died and attempted murder in respect of the fi ve persons injured.

The court found that owing to his consumption of alcohol, X expected the people in the street to see his car approaching and move out of the way, and that, therefore, he had no intent to drive into them. On the charge of murder, he was convicted of culpable homicide, because the intention to kill had been lacking. X could not be found guilty on any of the charges of attempted murder owing to the finding that he did not have any intent to kill. The question arose, however, whether X should not have been found guilty of common assault on the charges of attempted murder. The trial court acquitted him on these charges. The state appealed to the Appellate Division on the ground that the trial court had interpreted the law incorrectly and that it should have found the accused guilty of assault. The Appeal Court found that the trial court's decision was correct

Safatsa 1988 (1) SA 868 (A)

A crowd of about 100 people attacked Y, who was in his house, by pelting the house with stones, hurling petrol bombs through the windows, catching him as he was fl eeing from his burning house, stoning him, pouring petrol over him and setting him alight. The six appellants formed part of the crowd. The court found that their conduct consisted, *inter alia*, of grabbing hold of Y, wrestling with him, throwing stones at him, exhorting the crowd to kill him, forming part of the crowd that attacked him, making petrol bombs, disarming him and setting his house alight.

In a unanimous judgment delivered by Botha JA, the Appellate Division confirmed the six appellants' convictions of murder by applying the doctrine of common purpose, since it was clear that they all had the common purpose to kill Y. It was argued on behalf of the accused that they could be convicted of murder only if a causal connection had been proved between each individual accused's conduct and Y's death, but the court held that where, as in this case, a common purpose to kill had been proved, each accused could be convicted of murder without proof of a causal connection between each one's individual conduct and Y's death. If there is no clear evidence that the participants had agreed beforehand to commit the crime together, the existence of a common purpose between a certain participant and the others may be proven by the fact that he **actively associated** himself with the actions of the other members of the group

Thebus 2003 (2) SACR 319 (CC)

Liability for murder on the basis of active association with the execution of a common purpose to kill was challenged on the grounds that it unjustifiably limits the constitutional right to dignity (s 10 of the Constitution), the right to freedom and security of a person (s 12(1)(a)) and the right of an accused person to a fair trial (s 35(3)). The Constitutional Court rejected these arguments and declared constitutional the common-law principle that requires mere "active association" instead of causation as a basis of liability in collaborative criminal enterprises

Molimi 2006 (2) SACR 8 (SCA)

the Supreme Court of Appeal held that conduct by a member of a group of persons that **differs** from the conduct envisaged in their initial mandate (common purpose) may **not be imputed** to the other members, unless each of the latter **knew** (*dolus directus*) that such conduct would be committed, or **foresaw the possibility** that it might be committed and **reconciled** themselves to that possibility (*dolus eventualis*).

Schoombie 1945 AD 541

X had gone to a shop in the early hours of the morning and had poured petrol around and underneath the door, so that the petrol flowed into the shop. He placed a tin of inflammable material against the door, but his whole scheme was thwarted when, at that moment, a policeman appeared.

The Appellate Division confirmed his conviction of attempted arson and, in the judgment, authoritatively confirmed that **the test to be applied in these cases was to distinguish between acts of preparation and acts of consummation**

Davies 1956 (3) SA 52 (A)

the court had to decide whether X was guilty of an attempt to commit the former crime of abortion if the foetus, which he had caused to be aborted, was already dead, although he had believed the foetus to be still alive. (The crime of abortion could, in terms of its defi nition, be committed only in respect of a live foetus.) The Appellate Division adopted the subjective test and held that X was guilty of attempt. It further held that X would have been guilty of attempt even if the woman had not been pregnant, provided, of course, that X had believed that she was pregnant and had performed some act intending to bring about an abortion.

The court further held that it is immaterial whether the impossibility of achieving the desired end is attributable to the wrong **means** employed by X, or to the fact that the **object in respect of which the act is committed** is of such a nature that the crime can never be committed in respect of it.

In cases of attempt to commit the impossible, the **test according to this decision is, therefore, subjective** and not objective. What the law seeks to punish in cases of this nature is not any harm that might have been caused by X's conduct (because such harm is non-existent), but X's "evil state of mind", which manifested itself in outward conduct that was not merely preparatory, but amounted to an act of execution.