



PROGRAM:	LLB
MODULE:	LAW OF CRIMINAL PROCEDURE
CODE:	SAR0011 / CPR41A0
DATE:	30 JULY 2021 (12:00 – 15:00)
DURATION:	3 HOURS
TOTAL MARKS:	80
EXAMINERS:	DR W N NEL
MODERATOR:	PROF D S DE VILLIERS
NO OF QUESTIONS:	6

## MEMO

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### INSTRUCTIONS

- This is an **online, open-book examination**, which is **subject to all the normal rules and regulations of the University pertaining to formal assessments**. By answering this paper, you acknowledge and accept the University's rules on plagiarism and dishonest behaviour.
- You may use any printed, typed, photocopied or written material at your disposal to answer the questions, including digital versions of the textbook and study material. **Do not include irrelevant information**, as this detracts from the overall impression of your answer.
- You are **not** allowed to contact or exchange any information with any third party during the examination period. Your answers will be tested for plagiarism in general and in respect of the answers of other students.
- You are **not** allowed to use any internet sources.
- The exam paper will be made available from **12:00 – 15:00** on **30 July 2021**. The **deadline for submissions is strictly 15:05** on **30 July 2021**, at which time system will

auto submit your answers. Remember to click the 'save' button occasionally.

- **Please read each question carefully and thoroughly before answering**, and make sure to obey the instructions of each question. Take note of the marks allocated and approximate time required when answering each question.
- **Structure and layout of longer questions:**
  - Remember to refer to relevant case law and/or legislation in your answer.
  - **Plan your answer so that it is organized, relevant, and concise.**
  - The use of correct legal language and terminology is essential.
  - **Refrain from answering a question as one continuous discussion. Separate sections of your answer into different paragraphs** and use bullet points, headings, and digital highlights, where appropriate.
- **Queries during the exam can be directed to Dr Nel** ([wannel@uj.ac.za](mailto:wannel@uj.ac.za)).

You **can** do this, good luck!

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**Question 1****[+/- 20 minutes]****[10]**

Jonathan Nglovu, a prosecutor and colleague of yours, drafted the following charge-sheet:

“It is alleged that in March 2021 and at or near Sunnyside in the district of Pretoria, X (an adult person) intentionally and unlawfully broke down a door in order to enter the victim house and proceeded to steal a television.”

Before lodging this charge-sheet with the clerk of the court, Jonathan Nglovu falls ill, and the case is handed to you as lead prosecutor. You deduce that X’s conduct constitutes multiple offences, including the crime of housebreaking with the intent to commit a crime, housebreaking with intent to steal, theft, malicious injury to property, trespassing, and possibly, the possession of housebreaking implements.

With reference to the relevant legislative provisions, comment on whether the particulars of the offence found in the charge-sheet above, have been sufficiently and clearly formulated.

**Answer:****Relevant legislative provisions:**

- **Section s35(3)(a) of the Constitution states that: every accused person has a right to be informed of charges in clear and unambiguous terms to the extent that it enables the accused sufficient detail to answer it;** This is supplemented by certain **fundamental rights, related to a fair trial, in terms of the Constitution:**
  - every accused person has a right to adequate **time and facilities to sufficiently prepare his/her defence** – s35(3)(b);

- every accused person has a right to **properly exercise his/her right to adduce and challenge evidence** – s35(3)(i);
  - every accused person has a right **not to be prosecuted for an act or omission that was not an offence** under either national or international law **at the time it was committed or omitted** – **principle of legality** s35(3)(i);
  - everyone has the **right of access to any information held by the state, including access to the content of the police docket and the prosecution's case** as they are vehicles of the state – s32, which links further with sec 87 of CPA (request for particulars relating to charge)
- **Section 84** of the CPA contains the **essentials of a charge** and states that a charge shall set forth the relevant offence in such manner and with such particulars in respect of which the offence is alleged to have been committed, as may be *reasonably sufficient to inform the accused of the nature of the charge*, and should include:
- the **time and place** at which the offence is alleged to have been committed,
  - the **person, if any, against whom**, and/or
  - the **property, if any, in respect of which the offence is alleged to have been committed**.
- The charge-sheet shall in addition to the **charge against the accused** include the **name and, where known and where applicable, the address and description of the accused with regard to sex, nationality and age** – section 76(2) of the CPA.

#### Application of law to facts:

- *In casu*, the charge-sheet fails to formulate the **charges against X in clear and unambiguous terms to the extent that it enables the accused sufficient detail to answer it**, as required by s35(3)(a) of the Constitution.
- The charges in the charge-sheet does not **set forth the relevant offence in such manner and with such particulars in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge** as required by s84 of the CPA. The charge-sheet does not clearly specify: (1) time and place at which the offence is alleged to have been committed, or (2) the person against whom the offence is alleged to have been committed.
- The charge-sheet does not include the required information about the accused as outlined in section 76(2) of the CPA. It does not specify: (1) the name of the accused, (2) where known and where applicable, the address of the accused, and (3) a description of the accused with regard to sex, nationality or age.

#### Conclusion:

The charge-sheet must be corrected regarding the errors identified above.

If the charges in the charge-sheet is not corrected, the accused may, before pleading to the charge, object to the charge on the grounds identified above – s85 of the CPA.

#### Question 2

[+/- 20 minutes]

[10]

Read the following newspaper article and answer the question below:

**The Witness**

26 April 2021

**Five arrested after being found with car and other items of murdered KZN farmer**

Five people have been arrested in connection with the murder of Karkloof farmer, Trevor Murphy (50), on Friday.

Murphy was stabbed multiple times when three armed men entered his house in the early hours of Friday morning. They ransacked Murphy's home, stabbed him and ran off with some of his belongings. A female employee, who lives on the property, was tied up by the robbers after she interrupted them. Murphy died en route to the hospital.

Shaheen Suleiman of Magma security said Murphy's attackers took off in his Ford Ranger bakkie, with other items from the house including firearms. Suleiman said that on Sunday at around 6.30 pm, information was received that Murphy's bakkie was spotted in the vicinity of Table Mountain, in the Pietermaritzburg area. He said Magma members along with police officers from Pietermaritzburg started patrolling the area immediately. Just after 1 am on Monday morning, April 26, Suleiman said an informant contacted Magma and informed them that the bakkie was in Pietermaritzburg. He said with assistance from the police, the bakkie was stopped and three people, one man and two women, were found inside the car. A 9mm pistol that belonged to Murphy was recovered from the driver. "Further investigation had been done where clothing items taken during the crime, some stained with blood, were also seized," said Suleiman. He said follow-up investigations led them to the Swapo informal settlement area where two more people were arrested. Suleiman said a large quantity of items, including shoes, a hi-fi and amplifiers, a burned out TV, safe and clothing items, belonging Murphy were seized from two properties. Those who were arrested are expected to appear in court soon. Suleiman said investigations are ongoing.

With reference to the relevant constitutional provisions, list the fundamental criminal procedural rights applicable in the situation above.

**Answer:**

**Section 35 enshrines due process and guarantees certain fundamental criminal procedural rights of *arrested, detained and accused* people. In the article above, it is clear that the**

relevant persons have *not* been formally charged, therefore section 35(3) pertaining to 'accused' persons is *not* applicable.

The persons have been arrested and is in custody, awaiting their first appearance. Therefore, section 35(1) pertaining to the rights of arrested persons and section 35(2) pertaining to the rights of detained persons are applicable.

**5 marks for listing rights in s35(1) and 5 marks for listing rights in section 35(2) – deduct 2 marks for listing rights in section 35(3).**

1. Everyone who is arrested for allegedly committing an offence has the right-
  - a. to remain silent;
  - b. to be informed promptly-
    - i. of the right to remain silent; and
    - ii. of the consequences of not remaining silent;
  - c. not to be compelled to make any confession or admission that could be used in evidence against that person;
  - d. to be brought before a court as soon as reasonably possible, but not later than-
    - i. 48 hours after the arrest; or
    - ii. the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
  - e. at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
  - f. to be released from detention if the interests of justice permit, subject to reasonable conditions.
2. Everyone who is detained, including every sentenced prisoner, has the right-
  - a. to be informed promptly of the reason for being detained;
  - b. to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
  - c. to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
  - d. to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
  - e. to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
  - f. to communicate with, and be visited by, that person's-
    - i. spouse or partner;
    - ii. next of kin;
    - iii. chosen religious counsellor; and
    - iv. chosen medical practitioner.

**Question 3****[+/- 20 minutes]****[10]**

Indicate whether the following statements are true or false:

1. Section 37 of the CPA states that if a person is found not guilty at his trial, the fingerprints used in the trial shall be destroyed. **TRUE**
2. As a result of the Constitutional Court case *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* 2002 (4) SA 613 (CC) an arrestor may kill a suspect merely because he is fleeing or resisting arrest. **FALSE**
3. Bail can be granted by the President before the first appearance of the accused in the lower court if the accused is in custody in respect of any offence other than an offence referred to in Part II or Part III of Schedule 2 to the CPA. **FALSE**
4. Legally, you are not allowed to film or photograph a police officer at a roadblock and it is legal for an officer to confiscate or damage your recording equipment or force you to remove images or footage. **FALSE**
5. In terms of Section 29 of the CPA, an article may not be seized by a police official without a search warrant, even if the person concerned consents to the search for and the seizure of the article in question. **FALSE**
6. Bail conditions are important aspects of the criminal trial that is supposed to inform the accused of the charges against him/her in sufficient detail to the extent that he/she will be able to answer to such charges and prepare a defence. **FALSE**
7. After the investigation and charge sheet is completed, the accused must appear before the court. This can be achieved by serving a summons on the accused to appear in court in terms of section 54 of the CPA. **FALSE**
8. A failure to observe conditions of bail may result in the court cancelling the bail and declaring the bail money forfeited to the State. **TRUE**
9. X, who was recently involved in a bar fight, was arrested by police officials for assault at the scene directly following the incident. At the police station, the police officials ordered that X's fingerprints must be taken. The police officials are empowered, in terms of section 339 of the CPA, to order the taking of fingerprints from X. **FALSE**
10. Correctional supervision is a type of sentence intended to avoid overfilling the prisons on the one hand but on the other hand to punish effectively but strictly. **TRUE**

**Question 4****[+/- 30 minutes]****[15]**

List and briefly discuss the various types of review procedures relevant to criminal proceedings and related matters.

**Answer:**

1. **Review in terms of the Superior Courts Act (Reviews in terms of Rule 53 of the High Court Uniform Rules of Court)**
  - In terms of s 21(1)(a)-(b), a division of the **High Court** (that has jurisdiction) **may exercise its powers of review with regards to lower court proceedings in respect of specified irregularities that happened before or during such proceedings** in the court *a quo*.
  - **Grounds of Review** - The grounds of such 'specified irregularities' upon which a review procedure may be instituted are listed in **s22(1) of the Act** (ALLY textbook says sec 24).
  - **The procedure to be followed is formally embodied in rule 53 of the High Court Uniform Rules of Conduct.**
2. **Automatic review** in terms of **section 302** of the CPA;
  - Certain sentences of lower courts must be reviewed by a High Court in the ordinary course of events, without the accused having to request it. This review process depends on three important factors, including but not limited to the seniority of the presiding magistrate, the nature of the sentence imposed by him or her, and whether or not the accused person was legally represented during the court proceedings. In general, the provision only applies to unrepresented accused persons. The specified sentences that are subject to automatic review is provided for in terms of s302 of the CPA
3. **Extraordinary review** in terms of **section 304(4)** of the CPA;
  - Section 304(4) of the CPA provides that if in any criminal case it is brought to the notice of the provincial or local division of the High Court having jurisdiction or any judge thereof that the proceedings in which **the sentence was imposed were not in accordance with justice**, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.
  - Extraordinary review deals with applications for **the review of criminal proceedings that are not subject to automatic review** in terms of section 302 of the CPA
4. **Review of proceedings before sentencing** in terms of **section 304A** of the CPA;
  - Section 304A provides for the situation where a magistrate, who opines or doubts that the proceedings are in accordance with justice, may refer his recorded conviction for review, **before passing sentence**. If a magistrate or regional magistrate, after having convicted the accused but before imposing sentence, is of the opinion that the proceedings in respect of which he/she (or another magistrate) brought in a

conviction are not in accordance with justice, or that **doubt exists whether the proceedings are in accordance with justice**, he shall, without sentencing the accused, record the reasons for his opinion and transmit them, together with the record of the proceedings, to the registrar of the provincial division having jurisdiction, and such registrar shall, as soon as practicable, lay the same for review in chambers before a judge.

5. **Setting down of a case for argument** in terms of **section 306** of the CPA.
  - Section 306(1) provides that a person that has been convicted and sentenced to a specified sentence subject to automatic review in terms of s302, may inspect and make a copy of the record of the proceedings in the magistrate's court, and bring the court proceedings under review by setting down the case for argument before a High Court with jurisdiction. In such instances, the represented accused may enrol the case before the record of the proceedings has been transmitted to the High Court. Thus, similar grounds of review apply as was discussed in terms of automatic review, but here the procedure is not limited to an unrepresented accused.
6. **Constitutional judicial review**
  - **Relief sought through judicial review for an alleged infringement or disregard of a person's fundamental human right in relation to criminal proceedings.**
7. **Judicial review of common-law origin, including the High Court's common-law inherent jurisdiction to review.**
  - In criminal cases, the court's inherent power must be exercised sparingly, and the Supreme Court of Appeal has no inherent power to review any proceedings of High Courts which are not brought before it by way of appeal.

**Question 5****[+/- 30 minutes]****[15]**

"Mental illness is a disorder (or a disease) of the mind that is judged by experts to interfere substantially with a person's ability to cope with the demands of life on a daily basis. It can profoundly disrupt a person's thinking, feeling, moods and ability to relate to others. Mental illness is manifested in behaviour that deviates notably from normal conduct. Mental illness in a legal context is defined as a positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health practitioner authorised to make such diagnosis."



Mental illness or intellectual disability may have two very important implications in the context of criminal justice, which should, where applicable, be distinguished. With reference to the relevant provisions of the CPA, discuss how the court will deal with the trial of a mentally disabled person.

### Answer:

An accused, by reason mental illness or intellectual disability, may (1) be **incapable of understanding the criminal proceedings so as to make a proper defence** (s77), and (2) may or may not, also have **lacked criminal responsibility at the time of the commission or omission of the offence** (s78). In either instance, court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

### The capacity of the mental ill accused to understand proceedings

Sections 77, 78 and 79 of the CPA provide for procedures relating to the management of court processes and custody or remand of detainees where mental illness affects the criminal proceedings. The capacity of the accused to understand proceedings is relevant, whether or not criminal incapacity has been alleged by the defence.

**Section 77(1): If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or intellectual disability not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.**

An accused who is by reason of mental illness or intellectual disability **not capable of understanding the proceedings at the onset of criminal proceedings, must be dealt with in terms of section 77**, even if the defence intends to raise the defence of criminal incapacity as a result of such mental illness or intellectual disability. The simple reason is that **the accused's presence at the trial is rendered ineffective if he/she is incapable of comprehending the proceedings** (as provided for in terms of s35(3) of the Constitution). **For an accused to be "present" during the criminal proceedings, require not only his/her physical presence, but also mentally** (i.e. he/she must be capable of understanding the nature and effect of the proceedings). If the accused's mental incapacity affects his/her ability to comprehend and follow the criminal proceedings, he/she will be **incapable of participating meaningfully and making a proper defence**. Therefore, such an accused who is incapable of understanding the proceedings from the outset, **cannot and should not enter a plea at the start of the trial**.

Consequently, the **court must adjourn proceedings for a medical examination** – s79. Section 79 deals with the panel for purposes of enquiry and report under sections 77 and 78. During this time, mentally handicapped persons are usually detained in a mental hospital, where an enquiry is held to evaluate their fitness to stand trial and/or determination of criminal responsibility.

If the court finds that the accused *can understand* the proceedings so as to make a proper defence, the proceedings shall be continued in the ordinary way – s77(5).

In terms of section 77(6), should the court find that the accused is **not capable of understanding the proceedings so as to make a proper defence**, the court may, if it is of the opinion that it is in the interests of the accused, taking into account the nature of the accused's incapacity, **investigate whether the accused committed the offence**. The purpose of the investigation is not to make a finding

of guilt or innocence, but to guide the court, in relation to the nature of the crime committed, in making certain judicial directions regarding the institutionalisation or other placement of the accused in terms of s77(6)(a)(i) & (ii).

Where the court has issued such a judicial direction, and the **accused has pleaded** to the charge, the accused shall **not be entitled under section 106(4) to be acquitted or to be convicted in respect of the charge in question**, and may, **if the accused becomes capable of understanding later on, be prosecuted and tried for the offence in question – s77(7).**

For a more detailed discussion regarding the position of a mentally disabled accused, see Joubert 301-308.

### **The effect of mental illness or intellectual disability on criminal capacity**

We have to measure a person's conduct against the requirements for liability to determine whether he/she has committed a crime. Included in the requirements for criminal liability, is the requirement that, **at the time of the commission or omission of the offence**, the accused must have had the necessary criminal capacity. In this context, **section 78(1)** of the CPA states that:

"A person who commits an act or makes an omission which constitutes an offence and who **at the time of such commission or omission** suffers from a mental illness or intellectual disability (mental defect) which makes him or her **incapable**–

- (a) of **appreciating the wrongfulness of his or her act or omission**; or
  - (b) of **acting in accordance with an appreciation of the wrongfulness** of his or her act or omission,
- shall not be criminally responsible for such act."**

In other words, if the accused suffered from mental illness or intellectual disability **at the time of the commission or omission of the offence**, such **incapacity can be raised as a defence against criminal liability** and may absolve the accused's criminal responsibility.

Importantly, there exists a judicial presumption that **every person is mentally competent and thus criminally responsible, until the contrary is proved on a balance of probabilities – s78(1A)**. In order to shift the presumption of mental competence, **the burden of proof is on the party who raises the issue – s78(1B)**. Thus, in raising the defence of criminal incapacity as a result of mental illness or mental defect, **the burden to prove incapacity rests with the defence.**

In terms of s78(2) - **If it is alleged or if it appears to the court at criminal proceedings** that the accused might, by reason of mental illness, not be criminally responsible for the offence charged, the court must direct that the matter be enquired into and be reported on in accordance with the provisions of **s79**.

Regarding the consequent **verdict of the court, s78(6)** provides that if the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or intellectual disability not criminally responsible for such act, **the court shall find the accused not guilty and has a discretion to issue a number of possible directions**, such as that the accused be admitted to, detained in and treated in a psychiatric institutions. However, if the court finds that the accused at the time of the commission of the act in question **was criminally responsible for the act but that his criminal capacity was diminished** by reason of mental illness or mental defect, **the court may take the fact of such diminished responsibility into account when sentencing the accused** (mitigating factor) - s78(7).

**Question 6****[+/- 40 minutes]****[20]**

Y, the complainant and victim in a rape case, is your client and is seeking your legal advice. Y was allegedly raped at a work function by two of her most senior colleagues. After the incident, Y went to a local hospital for an examination and a rape-kit was compiled. This evidence was, however, misplaced at the police station and could not be included in the police docket. Under the authority of the Director of Public Prosecutions, the National Prosecuting Authority (NPA) has officially declined to prosecute for the alleged offence, citing a lack of evidence. However, Y believes the NPA's decision was influenced by the two alleged perpetrators' political connections, and she therefore feels very aggrieved by the NPA's decision. Advise Y regarding the following aspects:

- 6.1. The NPA's discretion to prosecute and whether, in your view, such a discretion was improperly exercised *in casu*. (12)

**Answer:**

**South Africa does *not*, in principle, follow a system of compulsory prosecution, and prosecuting officials are afforded a *discretion*, on behalf of the Director of Public Prosecutions, *whether or not to prosecute the suspect*.**

***Discretionary* prosecution is no licence for *discriminatory* prosecution. In the exercise of the discretion to prosecute there must be no selective enforcement or non-enforcement of the criminal law, amounting to unjustifiable distinctions between persons in similar circumstances. Discriminatory prosecution not only conflicts with the equal protection and due process principles of the criminal justice system, but also constitutes unfair discrimination in terms of sec 9(1) of the Constitution.**

**All decisions by the NPA to prosecute or not to prosecute must be taken impartially, *without fear, favour or prejudice*.**

- ✗ The discretion to prosecute means that there may be instances where the prosecutor decides not to prosecute, in which case he/she will write on the docket '*nolle prosequi*'. A decision of the NPA not to prosecute must be made for a good reason.**
- ✗ A prosecutor has a *duty to prosecute* if there is *prima facie* (sufficient) evidence for a reasonably successful prosecution, and there are no compelling reasons for a refusal to prosecute.**

**The NPA's discretion does not a *carte blanche* in deciding to institute prosecution or not, as the judicial authority can intervene where such discretion is *improperly* exercised. In exercising this discretion, prosecutors should consider all relevant**

**factors**, such as the nature and seriousness of the crime, the interests of the victim and the broader community, and the circumstances of the offender. The relevance of these factors and the weight attached to them will depend upon the circumstances of each case.

**Student's opinion must be justified, regardless. Most appropriate conclusion is probably that *in casu*:**

- **Tampering of evidence during the investigation cannot be ruled out;**
- **Political interference with the decision of the NPA cannot be excluded;**
- **However, based on the available info, there seems to be no *prima facie* evidence that supports a conviction beyond a reasonable doubt. Thus, NPA's decision seems justified under the circumstances.**

6.2. The possible legal proceedings Y can institute against the two alleged perpetrators and her chances of success in your opinion. (8)

**Answer:**

**An official refusal to prosecute might aggrieve an individual who happens to be the victim of a crime. Such an aggrieved individual may proceed with private prosecution proceedings in terms of section 7, based on a certificate *nolle prosequi*.**

**In terms of section 7 of the CPA, the following persons may, with or without legal assistance, institute a private prosecution in a competent court if the Director of Public Prosecutions has declined to prosecute for an alleged offence: a private person who must demonstrate a *substantial and a peculiar interest* in the trial. In addition, he or she must also show that *he or she suffered an injury as a result of the offence committed by an accused person*.**

**Private prosecutions are not *civil actions*, rules and principles of law of criminal procedure is applicable and the standard of proof remains beyond a reasonable doubt and the intended outcome is in line with the objectives of sentence (*viz.* retribution, rehabilitation and deterrence).**

**Student's opinion must be justified, regardless. Most appropriate conclusion is probably that *in casu*: based on the standard of proof "beyond a reasonable doubt" there is currently, insufficient evidence to prosecute. If further evidence can be obtained through the assistance of e.g. a private investigator, this option can be revisited.**

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**Total marks: 80**