



<u>FACULTY</u>	: Law
<u>DEPARTMENT</u>	: Public Law
<u>CAMPUS</u>	: APK
<u>MODULE</u>	: CRL 41 YO CRIMINAL LAW
<u>SEMESTER</u>	: SECOND SEMESTER
<u>EXAM</u>	: MAIN EXAMINATION 2020

<u>DATE</u>	: 2 November 2020	<u>SESSION</u>	12H30 – 16H30
<u>ASSESSOR(S)</u>	: Prof MM Watney		
<u>MODERATOR</u>	: Dr E Fourie		
<u>DURATION</u>	: 4 hours	<u>MARKS</u>	: 80

NUMBER OF PAGES: 15 PAGES (INCLUDING THIS PAGE)
INSTRUCTIONS:

1. Please ensure your surname, initials, student number and email address are on the answer paper.
2. Please answer all the questions on the answer paper.
3. Please ensure your answer paper is legible.
4. Please do not type your answers in bold and capital letters.
5. Email your answer paper to mwatney@uj.ac.za
6. Please submit only **ONE** answer paper. Attach a read receipt if you need proof that it was received.
7. If you have any enquiries during the exam, please email me.
8. Please take note: You may not seek assistance of a fellow student or the tutor. You may not use any part of another students' answers to complete this assessment. You are reminded that all relevant rules and policies of the University and the Faculty applies to

this test. In regard to the assessment, the normal academic integrity rules apply. For example, this means that you cannot cut-and-paste material other than your own work as answers for this assessment.

By undertaking this online assessment, you will be deemed to have made the following declaration:

“I certify that my submitted answers are entirely my own work and that I have neither given nor received any unauthorized assistance in this assessment.”

9. Good luck with the examination.

QUESTION 1

- ❖ Please take note that the set of facts provided hereafter received a lot of media attention since 2019.
- ❖ Please take further note that for purposes of this assessment, I applied academic freedom.

SET OF FACTS

In October 2019, Zayyaan Sahed, a 10 year old boy, was admitted to Park Lane Clinic, Johannesburg for an operation that at the time was not considered a high risk operation.

Zayyaan died after undergoing what should have been a routine laparoscopic operation to stop acid reflux. The operation allegedly took longer than usual and the young boy's lungs collapsed soon after surgery and he sadly passed away in intensive care.

His parents are devastated by the unexpected death. They wanted the doctors who had performed the surgery to be held criminally liable.

An anaesthetist, Dr Munshi, along with. a paediatric surgeon, Professor Beale were charged for the death of Zayyaan Sahed.

The doctors were suspended as a Netcare investigation got underway. However, before the investigation was completed, a warrant for their arrest had been issued, and in December 2019, the two men handed themselves over to Hillbrow police.

In August 2020, the Johannesburg Magistrate's Court postponed the case to 16 November 2020 for further investigations. The J88 is not available and the cause of death has not been disclosed except that there were complications during the operation. Prof Beale and Dr Munshi were released on bail of R10 000 each.

On 16 September 2020 it was reported that Dr Munshi was shot dead in Gauteng in what some suspect was a revenge killing.

According to Social Cohesion Advocate Yusuf Abramjee, the fatal shooting took place on Wednesday, 16 September 2020 in Orange Grove when a car with no registration plates bumped into the doctor's car. When he got out, they opened fire and fled. Nothing was stolen.

Jonathan Witt, a medical doctor and co-founder of the Renegade Report, said on Twitter on 16 September 2020: "A colleague was shot 6 times in what appears to be revenge for a poor patient outcome." Witt called on his colleagues to stand together, and said: "Murdering a doctor is an assault on our entire profession and an attack on the public as a whole. If you have influence please exercise it to ensure justice is served for Dr Munshi. Today him, tomorrow any one of us."

Assume for purposes of this assessment, you were appointed as a watching brief to represent the interests of the family of the deceased.

After the death of Dr Munshi, you issued a statement on behalf of the family denying any involvement in the death of Dr Munshi. The parents emphasise that they wished that the two doctors involved in the death of their son would be held criminally liable as they did not want any other parent to suffer what they had suffered.

Answer the following questions with reference to the provided set of facts:

1.1 Why was criminal proceedings instituted?

(3)

1.2 Indicate and motivate very briefly whether an initial judicial inquest would have been the preferred way of dealing with this matter rather than instituting criminal proceedings immediately. (3)

1.3 The accused were charged with a specific crime.

Instructions: You must identify the specific crime for which they will be charged.

1.3.1 Indicate why both doctors were charged. (1)

1.3.2 Provide the elements of the specific crime in tabular format with reference to the elements for a crime in general. (5)

1.3.3 Discuss critically the test applied to establish if the conduct complies with the necessary form of fault pertaining to the specific crime. Refer to case law if relevant. (6)

Instructions: For 6 marks, you must refer to 6 facts.

1.4 The J88 has not been released and the cause of death has not been disclosed. Assume (this has not been confirmed at all and is mere speculation for purposes of this assessment) the deceased died of an underlying health issue that no one (not the parents nor doctors) were aware of and which may have been triggered during the operation. (It could for example be similar to sudden death syndrome where a person dies without any prior health issues.)

The specific crime is a consequence crime. Outline very briefly which requirement may not have been complied with if the child had an underlying health condition that no one was aware of and which could result in an acquittal. You do not refer to case law. (6)

1.5 It has not been confirmed whether the killing of Dr Munshi was a revenge killing or not. Provide 3 constitutional rights that are violated by revenge killings. (3)

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QUESTION 2

SET OF FACTS

In 2017, Mr Raphalalani, a procurement officer and deputy director at the Kutuma Sinthumele correctional facility in the Limpopo province, awarded a R2.7 million tender to Pengson Manufacturing, a company belonging to Mr Pengson without following due processes.

Raphalalani conspired with Pengson to inflate the prices of the items procured for the facility in return for R369 380 payment that was transferred from Pengson Manufacturing company into the bank account of Clemson Carriers company which belonged to Raphalalani.

The Hawks investigations also revealed that in the very same year, Raphalalani also unlawfully awarded another tender valued at R1 071 831 to Vhalenda Zwashu Trading Enterprise, owned by his girlfriend, Ms Sadiki. It was established that Raphalalani transferred R132 500 into Sadiki's personal bank account.

Furthermore, Raphalalani together with Mr Makamane, who was also a deputy director at the facility, awarded a tender worth R3 588 707 to Durafoam Distributors CC without following due processes and in return for awarding this tender, R569 500 from the company was paid into their accounts.

In December 2018 Raphalalani, Makamane, Pengson and Sadiki were arrested during a sting operation by the Hawks. The Kutuma Sinthumele correctional facility suffered a loss of over R18 million due to these activities.

Assume you are the prosecutor.

You have drafted the J15 charge sheet outlining the crimes for which the accused are being charged with.

Answer the following questions with reference to the provided set of facts:

- 2.1 Provide the jurisdiction of the court. (3)
- 2.2 List in tabular format the 3 crimes that you will prosecute the accused with, define each and indicate the source of each. (9)
- 2.3 Assume the accused bought a car (a very expensive imported car), then sold it 2 weeks later and invested the money from the sale of the car in cryptocurrencies. Indicate and define for which crime you will prosecute the accused. (2)
- 2.4 The crimes referred to at 2.2 and 2.23 are cybercrimes. Provide 2 reasons why these crime are cybercrimes. (2)
- 2.5 Assume the accused are convicted for the crimes charged. The presiding officer indicates that he wants you to address the court on the following issues: (13)
- 2.5.1 What lies at the heart of all sentencing?
- 2.5.2 Discuss the relevant legislation.
- 2.5.3 How he should deal with the different counts that the accused are charged with? Refer to case law.
- 2.5.4 Whether the court is bound by legislation or whether the court has a discretion to deviate from the prescribed sentence.
- 2.5.5 Which sentence you propose with a motivation.
- 2.6 Assume that one of the accused flees South Africa. Explain very briefly the legal position to ensure the accused stands trial. (3)

[32]

QUESTION 3

MULTIPLE CHOICE QUESTIONS

Question 3.1

In *S v Jahaar* 2010 (1) SACR 23 (SCA) the adult victim was hijacked by 2 offenders and forced to accompany them in his car on a trip from Cape Town to Mossel Bay and back. Apparently, the ordeal lasted 2 days. Which crimes were committed?

- a. Theft of his car and abduction;
- b. Robbery and abduction;
- c. Theft of his car and kidnapping;
- d. Robbery and kidnapping.

Question 3.2

An accused stood trial for rape. The parents of the accused approached the victim of the rape and offered her R2 000 if she withdrew the charges of rape against the accused (their son). They also threatened her that if she did not withdraw the charge, her family may suffer as a result of her decision. Which crime(s), if any, did the parents of the accused commit?

- a. The parents committed no crime; they acted out of love for their son, the accused.
- b. Extortion and defeating the ends of justice;
- c. Corruption and contempt of court;
- d. Contempt of court.

Question 3.3

Msomi and Mkhize forced a 15-year-old girl into their taxi, and took her to a secluded place, where Mkhize tried to rape her. When she resisted and tried to escape, Msomi recaptured her and took her back to Mkhize, who violently raped her. Msomi sat in the taxi while the rape was taking place. The court, having accepted the veracity of the complainant's version of events, was required to assess Msomi's participation in respect of the crime of rape.

- a. Msomi was a co-perpetrator, since he forced the complainant into the car and took her to Mkhize to rape her;
- b. Msomi was an accomplice, since he assisted Mkhize;
- c. Msomi was an accessory after the fact, since he merely assisted Mkhize and did not commit the crime;
- d. Msomi was a joiner-in, since he sat in the car while Mkhize raped the complainant.

Question 3.4

A is a witness in a court case who has already given evidence. While in court, A texted on her mobile (cell) phone to B, another witness waiting outside the court, some of the questions the defense posed to her. Did A, the witness commit a crime?

- a. No, A was merely communicating with B. It constitutes freedom of expression;
- b. Yes, A is guilty of defeating the ends of justice;
- c. Yes, A is guilty of perjury;
- d. Yes, A is guilty of contempt of court.

Question 3.5

In *S v Steyn* 2010 (1) SACR 411 (SCA) the accused was charged with murder.

- a. The accused cannot be found guilty since she was a battered (abused) woman and may use the “battered woman syndrome” as her defence during trial similar to *S v Ferreira and Others* 4 ALLSA 373 (SCA) (1 April 2004);
- b. The accused cannot be found guilty since she acted in private defence unlike *S v Ferreira and Others* 4 ALLSA 373 (SCA) where the murder was pre-meditated;
- c. The accused can be found guilty but during sentencing the “battered woman syndrome” may be used as mitigation of sentence similar to *S v Ferreira and Others* 4 ALLSA 373 (SCA) (1 April 2004);
- d. The accused can be found guilty but during sentencing the “battered woman syndrome” may be used in mitigation of sentence similar to *S v Maieane* (92/2008) [2008] ZAFSHC 115 (26 May 2008).

Question 3.6

A blows up an ATM and absconds with R20 000. A may be charged with:

- a. Arson and theft;
- b. Malicious damage to property and theft;
- c. Fraud and theft;
- d. Malicious damage to property and fraud.

Question 3.7

The soccer team, Moroka Swallows won a soccer game against Mamelodi Sundowns at the Dobsonville stadium. Some soccer supporters of Mamelodi Sundowns were so

annoyed by their team losing that they went on a rampage by breaking the fence at the Dobsonville stadium, storming the pitch and throwing vuvuzelas at the coach of Sundowns. The Premier Soccer League (PSL) laid criminal charges against the Sundowns fans. With which crimes, if any, will they be charged?

- a. Trespassing in terms of the common law;
- b. Statutory trespassing and malicious damage to property;
- c. Statutory trespassing, malicious damage to property and assault;
- d. No crime has been committed; it is a delictual matter which should be dealt with by means of the civil law.

Question 3.8

While a few people are having a barbeque at their house, 2 assailants walk through the open gate, hold the people at gun point and demand they hand over money and jewels. The assailants may be charged with:

- a. Housebreaking with the intent to commit a crime;
- b. Robbery;
- c. Theft;
- d. Statutory offence of trespassing and housebreaking with the intent to commit a crime.

Question 3.9

Two (2) accused held four (4) customers and two (2) bank employees in a bank at gunpoint and demanded that they hand over their money and jewellery. The accused were convicted on 6 counts of robbery and sentenced. The two accused appeal against the conviction arguing that they can only be convicted on 1 count. The court of appeal:

- a. Upholds the appeal and similar to *S v Dlamini* 2012 (2) SACR 1 SCA the court finds the accused guilty on one count of robbery;
- b. Upholds the appeal and finds the accused guilty on one count of theft of money and jewellery;
- c. Rejects the appeal and confirms the conviction on the 6 counts of robbery stating that the case of *S v Dlamini* 2012 (2) SACR 1 SCA does find application to the given set of facts;
- d. None of the above-given answers.

Question 3.10

Linda used a stolen identity document belonging to Mandisa Mkhwebula without her knowledge and took out life insurance. After 5 months of paying monthly premiums, the accused falsely declared Mkhwebula dead and prepared the necessary documents with home affairs, a funeral parlour and a doctor to enable her to institute the claim for the insurance policy to pay out. Which crime, if any, did she commit?

- a. The crime of fraud against the insurance company;
- b. The crime of theft of identity;
- c. The crime of corruption;
- d. No crime against the insurance company since Linda had paid the insurance policy on a monthly basis.

Question 3.11

A security guard and the complainant in this case, A, shot and killed a suspected robber allegedly in private defence and in defence of property. Two policemen at the time investigated the case. They visited A at his place of employment and obtained a statement from him. Both police officers then suggested to A that he should pay them a sum of money in order for them to withdraw the case. They also threatened to arrest him and lock him up if he failed to do so. The complainant said that he did not have money but that he would speak to his employer. The employer of the complainant reported the matter to the police and a trap was set for the policemen resulting in the subsequent arrest of the accused. Did the police officials commit an offence?

- a. No, the police officials did not commit a crime since they were caught in a police trap and entrapment exclude unlawfulness;
- b. Yes, the police officials committed extortion;
- c. Yes, the police officials committed fraud;
- d. Yes, the police officials committed corruption.

Question 3.12

Peter and Anna woke up and saw a burglar, B, in their bedroom. Peter grabbed the burglar. Peter and Anna held the burglar at gun point while they waited for the police to arrive. Out of nervousness the burglar urinated on the floor and they forced him to lick the urine from the floor. They made fun at his ineptness as a burglar indicating to

him that had he been a competent burglar, he would not be in this position. Did Peter and Anna commit a crime?

- a. No, they were in their own home and did nothing wrong;
- b. Yes, the facts are to some extent similar to *S v A* 2003 (1) SACR 600 (A) and they may be charged with assault;
- c. Yes, the facts are to some extent similar to *S v Rabako* 2010 (1) SACR 310 (FB) and they may be charged with assault with the intent to do grievous bodily harm;
- d. Yes, they will be charged for conspiracy to commit a crime unknown to the state as they had a legal duty to protect the burglar once they had carried out a civil arrest.

Question 3.13

A and B had marital problems. B had an affair with A's friend, C. Everyone knew about it and discussed it behind A's back. B told A that she had ended the affair with C. One day A saw B and C in B's car and they were kissing each other. He walked to his office where he kept a gun and shot C dead. C is charged for murder. Indicate which statement is correct:

- a. He can use provocation as a defence to exclude criminal capacity;
- b. He can use provocation at sentencing for mitigation purposes;
- c. He can use provocation to exclude unlawfulness;
- d. He cannot use provocation as a defence to exclude criminal capacity or during sentencing. People should be able to control their emotions.

Question 3.14

Henry is not happy that his girlfriend, Lerato is pregnant. She refuses to go for an abortion since it is against her religious beliefs. She is 7 months pregnant when they have a fight and he violently punches her in the stomach with his fists. She has a miscarriage but also suffer internal haemorrhage which almost causes her death. Did he commit a crime?

- a. Yes, Henry committed the crime of attempted murder of Lerato and similar to *S v Mshumpa* 2008 (1) SACR 126 (E) he cannot be charged for murder of the foetus;
- b. Yes, Henry committed the crime of murder of the foetus and attempted murder of Lerato and similar to *S v Masiya* 2007 SACR 435 (CC) the definition of murder has been extended to include the killing of a foetus;

- c. Yes, the accused is guilty of the murder of the unborn child and attempted murder of the mother, similar to *S v Mshumpa* 2008 (1) SACR 126 (E);
- d. Yes, the accused committed the crime of assault of Lerato.

Question 3.15

A is called as a state witness. During questioning A refuses to answer any questions put to him by the prosecutor or presiding officer. Did A commit a crime?

- a. Yes, perjury was committed;
- b. Yes, contempt of court was committed;
- c. Yes, obstruction of justice was committed;
- d. No crime was committed as A has freedom of expression which includes the right to keep quiet.

Question 3.16

A and B decide to commit suicide by drinking pills. A mixed the sleeping pills and gave it to B to drink. B drank it. A decided against drinking the potion and tried to revive B but B was dead. A is prosecuted for murder.

- a. A and B had the same motive, namely to kill themselves and therefore A cannot be charged with a crime;
- b. A can be charged and may be convicted of murder since he had *dolus* to assist B in killing herself;
- c. A cannot be charged as B gave permission to be killed (*volenti non fit iniuria*);
- d. A can be charged but can only be convicted of culpable homicide since *dolus* was absent.

Question 3.17

Two sisters were sexually abused from 1980 to 1989. At the time they were respectively 12 and 16 years old. May the sisters still lay a charge in 2020 approximately 40 years after the commission of the alleged crime?

- a. No, the accused cannot be prosecuted as prescription is applicable. This is sexual abuse which prescribes after 20 years;
- b. Yes, the accused may be prosecuted as prescription is not applicable in respect of the alleged crime;
- c. No, the sisters may lay a charge but the prosecutor will decline to institute prosecution;

- d. Prescription is not applicable but it is doubtful that there are evidence that will result in a successful prosecution.
- e. No, the sisters cannot lay a charge as the legislation nor the common law provides for such a charge.

Question 3.18

Today devices and computers can perform tasks that require intelligence similar to human intelligence. Some of these devices may have the ability by means of deep learning to think for itself and act upon this acquired ability. Why is criminal liability of a device/computer relevant within the context of the Fourth Industrial Revolution (4IR)?

- a. Questions relating to the criminal accountability of for example drones and whether it can manifest itself in the subjectivity of *dolus* will be relevant in an age in which technology increasingly dominate society on all spheres;
- b. Questions relating to the criminal accountability of for example drones and whether it can manifest itself in the objectivity of *dolus* will be relevant in an age in which technology increasingly dominate society on all spheres;
- c. Questions relating to the criminal accountability of for example drones will manifest itself mainly in the subjectivity of *culpa* will be relevant in an age in which technology increasingly dominate society on all spheres;
- d. It manifests itself mainly in respect of the subjectivity of *culpa* and is relevant in respect of the Fourth Industrial Revolution.

Question 3.19

The Constitutional Court determined that the accused in *S v Masiya* 2007 (2) SACR 435 (CC):

- a. Not be found guilty on the developed crime as it would result in legal uncertainty;
- b. Could be found guilty on the developed crime as the magistrate included it in the definition anal penetration;
- c. Not be found guilty on the developed crime as it would result in the development being applied retrospectively;
- d. Could be found guilty on the developed law as the accused had acted reprehensively when he anally penetrated the 9 year girl old without her consent.

Question 3.20

A is a recovering drug addict. He is in a relationship with B and they have a child together. He experiences a relapse and goes on a drug binge. He consumes cocaine with liquor and smokes dagga over a period of 2 days. A few days later the dead body of the girlfriend is discovered in their flat. She was bludgeoned to death. She has various stab wounds on her body. The accused pleads not guilty and relies on the case, *S v Ramdass* 2017 (1) SACR 30 (KZD) where the court found

- a. The accused not guilty for the murder of his girlfriend due to not having criminal capacity. He was found him guilty of the crime, culpable homicide;
- b. The accused guilty for the murder of his girlfriend as he had criminal capacity;
- c. The accused not guilty for the murder of his girlfriend as well as not guilty to culpable homicide due to lack of criminal capacity;
- d. That there was no case against the accused and dismissed the case as the accused had consumed such a huge amount of prohibited mind-altering drugs that he could not remember killing his girlfriend.

Question 3.21

Four accused decided that they want to rob a shop at a shopping centre. There was a prior agreement that they will commit robbery. During the robbery there is a shoot-out between the police and the robbers. One of the robbers run into a shop and takes a by-stander hostage. A member of the public sees the robber taking the person hostage and fires at the robber but the bullet kills the hostage. The prosecutor prosecutes the four accused on the charge, murder. You are the presiding officer and make the following judgement:

- a. The accused who had taken the hostage acted on a frolic of his own and only that accused may be convicted on a charge of murder. The other three accused cannot be convicted of murder of the hostage.
- b. All the accused had *dolus eventualis* and are convicted for murder.
- c. If the four accused had not decided to commit robbery, the victim (hostage) would not have died and therefore all the accused are convicted for murder since there is a link between the conduct of the group and the death of the hostage.
- d. All the accused had common purpose to commit murder and are convicted on the charge of murder.

[21]**TOTAL: 80**

Final comments:

- All of the best with all your other assessments.
- Thank you for hard work this year.
- I wish all of you a peaceful holiday and a blessed 2021.