A GUIDE TO THE CRIMINAL LAW OF ZIMBABWE -
GENERAL PRINCIPLES AND DEFENCES

BY

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Drawing mainly on the Zimbabwean cases, and noting the points of difference from South African law, the author outlines the criminal law of Zimbabwe under four main headings:

1. General principles
2. Defences
3. Specific crimes
4. Sentencing

Section 1 and 2 are printed here; sections 3 and 4 will appear in subsequent issues of the journal.
INTRODUCTION

This guide does not seek to cover comprehensively the field of Zimbabwean criminal law. It is intended simply to provide a useful source of reference for practitioners, particularly foreign trained practitioners. It will also serve as an introduction to the subject for students.

It was felt that in the field of criminal law the absence of a textbook specifically on the Zimbabwean law and the lack of an adequate consolidated index on the local cases made locating of relevant cases on a particular subject rather a laborious process. Hopefully this guide will facilitate the process of finding such cases. It should, however, be noted that the guide does not refer to every single case which has been decided by our courts. It attempts only to refer to some of the leading and more useful illustrative cases. For instance where a later Appellate Division case refers to a whole line of previously decided cases on the subject then only that later case is referred to. As regards reference to South African cases these are only cited as a supplement to our local cases or where there are points of difference between Zimbabwean and South African cases on a particular subject. Such South African cases are normally cited after the Zimbabwean cases. The focus is thus upon Zimbabwean cases and points of difference between our law and South African law.

The main books used in the compilation of this booklet were the first two volumes of South African Criminal Law and Procedure (vol 1 by Burchell and Hunt, and vol 2 by Hunt). In this guide these volumes will be referred to by using the authors' names only, ie vol 1 Burchell and Hunt and vol 2 Hunt). Additionally a substantial amount of material was drawn from the BSAP Common Law Manual (which in turn heavily relied upon the work of Burchell and Hunt). Frequent reference is made in the text to the two volumes of South African Criminal Law and Procedure and what is contained in this guide should be read in conjunction with those texts.

I would like to express my gratitude to Advocate B Meredith for his valuable assistance both by way of allowing me to make use of the indexes to local criminal cases compiled by him and by way of comments and criticism on my text. I would also thank Advocate C Glaum for allowing me to make use of his personal indexes to the local cases. These persons bear no responsibility for any errors contained in the text.

Section 1 - General principles
1. The physical aspects of crimes
2. The mental aspect of crimes

Section 2 - Defences
1. Defences affecting the mental element
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1. Incomplete crimes and accomplices
2. Common law crimes
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SECTION 1
GENERAL PRINCIPLES

INTRODUCTION

Crimes can be divided into three main categories:

(i) Crimes which require proof of intention.
(ii) Crimes which require proof of negligence and
(iii) Strict liability crimes.

In respect of every crime at common law, except culpable homicide which requires proof of negligence only, the prosecution can only obtain a conviction if it can prove that the accused intentionally committed the crime in question.

As regards statutory crimes some require proof of intention, some proof of negligence and some, those of strict liability, require proof neither of intention nor negligence.

In broad terms it can be said that in respect of crimes other than strict liability crimes the prosecution must prove that the accused caused a certain event or state of affairs and that his conduct was accompanied by the prescribed mental state.

Crimes can thus be analysed under two headings: the physical aspects and the mental aspect.

1. THE PHYSICAL ASPECTS OF CRIMES

These comprise all the ingredients which the prosecution has to prove to secure a conviction for a crime apart from the required mental state of the accused. Thus, putting aside the required state of mind of the accused, the question is what is left in the definition of the crime. The residue will consist of all the circumstances and consequences which are included in the definition of the particular crime in question.

Analysed in these terms the majority of crimes consist of a central act of conduct and certain surrounding circumstances. In some cases a person will be criminally liable if in certain circumstances he fails to act positively (i.e., he is liable for an omission). Occasionally a person will be liable if a certain state of affairs exists.

A few examples will illustrate this mode of analysis:
<table>
<thead>
<tr>
<th>Crime</th>
<th>Physical Aspects</th>
<th>Mental Aspect</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Murder</td>
<td>Unlawful killing of human person who was alive at the time</td>
<td>Intention to kill</td>
</tr>
<tr>
<td>2. Rape</td>
<td>Sexual intercourse with a woman without her consent</td>
<td>Intention to rape</td>
</tr>
<tr>
<td>3. Perjury</td>
<td>Telling lie under oath during course of judicial proceedings before authority of</td>
<td>Intention to make false statement</td>
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<tr>
<td></td>
<td>competent jurisdiction</td>
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<tr>
<td>4. Contravening s6 (e) of Miscellaneous</td>
<td>Resisting police officer who is executing his duty</td>
<td>Intention to resist a policeman</td>
</tr>
<tr>
<td>Act [Chapter 68]</td>
<td></td>
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<tr>
<td>5. Contravening s4 (a) of Dangerous</td>
<td>Possess dagga</td>
<td>Knowingly have in possession</td>
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<tr>
<td>Drugs Act, 1956</td>
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</table>

Where a positive act is required as part of the crime in question, the act must be a voluntary act of the accused. This voluntary aspect would be absent in the following examples:

(i) A forces B's hand in which A holds a knife towards C, causing C injuries.

(ii) A swarm of bees enters the cab of A's car and stings him. A loses control of the vehicle and causes an accident.

In this regard a distinction must be drawn between sane and non-sane automatism. See under automatism in section 2 - Defences.

For cases on liability for omissions see under culpable homicide in section 3 - Specific crimes and also Burchell and Hunt pp 103-5.

2. THE MENTAL ASPECT OF CRIMES

NOTE. What follows is a brief summary. For further details together with relevant cases see Burchell and Hunt, Chapter 6. For cases dealing with the mental element in respect of specific crimes see section 3 - Specific crimes of this guide.

Where the crime in question is not a strict liability crime, it will either be a crime which requires proof of intention (ie that the accused committed the crime intentionally) or it will be a crime of negligence (ie that the accused was negligent in causing the consequences).
(a) INTENTION

Wherever the prosecution is called upon to prove intentional commission of the crime, it can prove either actual or legal intention. The test for both these forms of intention is a subjective one. The subjective test involves a consideration of the personal state of mind of the accused at the time of the alleged commission of the crime. His personal mental makeup and personality must therefore be considered together with factors such as intoxication which may have influenced that accused's ability to form the requisite intention at the relevant time. The issue therefore is what was that accused's state of mind at the time, not what would have been the state of mind of a reasonable man placed in that situation.

(i) Actual intention

This is the most blameworthy state of mind at criminal law. Here the accused deliberately causes the criminal consequence. He desires the criminal consequence and strives to bring it about; it is his aim and object. (Note that Burchell and Hunt say there is a sub-species of actual intention, namely where, although the causing of the criminal consequence was not the accused's aim and object, he subjectively foresaw that consequence as certain or substantially certain. This form of actual intention is of little more than academic interest if it does exist because there appear to be no Zimbabwean cases in which it has been applied).

(ii) Legal intention

Here the accused does not mean to bring about the criminal consequence but in the process of engaging in some activity he subjectively foresees the real possibility that he may cause the criminal consequence to occur and nonetheless proceeds with his activity reckless as to whether or not the criminal consequence ensues.

Where the accused denies that he foresaw the consequence the court may nonetheless conclude that the only reasonable inference which can be drawn from the facts is that the accused must have foreseen the consequence and the court will then proceed to find as a matter of inference that the accused did subjectively foresee the consequence.

Motive. Intention must be carefully distinguished from motive. Motive may be seen as the reason why the accused acted. If the accused intentionally brought about a criminal consequence, the fact that he may have had a good motive for doing so will not excuse him from criminal liability. Thus if the accused stole food in order to feed his starving family or killed his wife at her request because she was suffering from severe pain as a result of a terminal disease, the accused would be guilty of theft and murder respectively, although the circumstances would serve to mitigate the punishment which would be imposed.

On the other hand proof of a bad motive often assists in proving that the accused intentionally committed the crime in question.

(b) NEGLIGENCE

Here the objective test is applied. The issue is not what the
accused himself intended or subjectively foresaw at the time the criminal consequence resulted. The central issue is whether the reasonable man placed in the same circumstances as the accused would have foreseen the possibility of the consequence and would have guarded against it. The accused is blameworthy therefore because he fell below the reasonable man standard. The reasonable man is therefore in effect the embodiment of societal norms of behaviour. The reasonable man standard is a uniform standard and takes no account of the race, idiosyncracies, superstitions, beliefs or level of intelligence of the accused. Where, however, the accused possesses special skills, for example he is an expert surgeon with long experience, the standard of reasonable care expected from him will be of a higher order than that expected of a newly qualified doctor.

(c) **STRICT LIABILITY**

See under statutory crimes in section 3.

**SECTION 2**

**INTRODUCTION**

In this section the various defences which can be raised in criminal cases are dealt with in alphabetical order in two categories. Defences affecting the mental element are examined first and then defences affecting the unlawfulness element are treated. Below is a table setting out which of the defences fall into each of these two categories. If successful, defences affecting the mental element lead either to an acquittal or a conviction on a lesser charge because the accused will lack the state of mind required for the crime in question. Defences affecting unlawfulness are those where, despite the presence of intention or negligence, if these are successful the action of the accused will be deemed in the circumstances to be either totally or partially excusable.

<table>
<thead>
<tr>
<th>Defences affecting the mental element</th>
<th>Defences affecting unlawfulness</th>
</tr>
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<tbody>
<tr>
<td>Automatism</td>
<td>Authority</td>
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<tr>
<td>Insanity</td>
<td>Compulsion</td>
</tr>
<tr>
<td>Intoxication</td>
<td>Consent</td>
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<tr>
<td>Mistake of fact</td>
<td>De minimis non curat lex</td>
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<tr>
<td>Mistake of law</td>
<td>Entrapment</td>
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<tr>
<td>Provocation</td>
<td>Impossibility</td>
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<tr>
<td>Youthfulness</td>
<td>Necessity</td>
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<td></td>
<td>Obedience to superior orders</td>
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<tr>
<td></td>
<td>Self defence, defence of third parties and defence of property</td>
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</tbody>
</table>
Onus of proof. In all defences except insanity, it is laid down that once the evidential onus is discharged of introducing sufficient evidence of the defence to put it in issue (or to put it another way as soon as a foundation has been laid for the defence), the substantive onus to disprove the defence rests squarely on the prosecution. See for example

_Damascru_ 1965 (4) SA 598 (SR) at 603 G; 1965 RLR 477
_Latham_ 1980 (1) SA 723 (RA) at 728 C
_Trickett_ 1973 (3) SA 526 (T)

Insanity is the one exception to the rule that the onus rests upon the State throughout to disprove the accused's defence. In respect of the defence of insanity, it is laid down that it is incumbent upon the defence to prove on a balance of probabilities that the accused was insane at the time he committed the crime.

1. DEFENCES AFFECTING THE MENTAL ELEMENT

Contents

A. Automatism
B. Insanity and non-sane automatism
C. Intoxication
D. Mistake of fact
E. Mistake of law
F. Provocation
G. Youthfulness.

A. AUTOMATISM (see also INSANITY)

There are two species of automatism: sane and non-sane automatism. Because of the wide coverage of our Mental Health Act provisions (see INSANITY) many of the cases which previously would have been treated as instances of sane automatism will now result in the returning of special verdicts in terms of the Mental Health Act. There are, however, certain residual cases of sane automatism. These are mostly confined to sudden and unforeseeable heart attack whilst the accused is driving his car which causes him to lose control over his vehicle and have an accident. In such an instance the accused would escape liability on the basis of sane automatism if he was charged with negligent driving or culpable homicide. If, on the other hand, the accused caused an accident after continuing to drive when he was unfit to do so due, for instance, to drowsiness, or if he drove knowing that he was, for example, an epileptic and that he could have an epileptic attack and cause an accident, he would not escape liability on the basis of automatism.

CASES

Motor vehicle cases

_Shevill_ 1964 (4) SA 51 (SRAD). Negligent to continue to drive when drowsy.
_Crockart_ 1971 (2) SA 496 (RA). Driver's wife striking match and flaming match breaking off and landing between driver's legs - panicking and taking eyes off road momentarily - veering across
road and causing accident - guilty of negligent driving - should, by exercise of reasonable care and skill, have coped with emergency while maintaining car on its proper course.

Lombard 1964 (4) SA 346 (T). Horsefly coming into cab of vehicle and stinging driver on cheek - driver who was allergic to insect stings panicking, losing control of vehicle and having accident - guilty of negligent driving - reasonable driver would not have lost control - would have applied brakes immediately and brought vehicle to halt.

Trickett 1973 (3) SA 526 (T). Defence of sane automatism to charge of negligent driving. Accused said that she may have suffered unexpected blackout. Defence failed because accused had not discharged evidential onus. Court describes a number of cases of sane automatism in driving situations where either the automatism would lead to an outright acquittal, or where the accused would nonetheless be convicted of crimes involving negligence because the accused was at fault in allowing the situation to develop, e.g., a person who knows he is an epileptic and subject to blackouts, driving a car.

Erwin 1974 (3) SA 438 (C). Bee stinging driver on cheek - driver instinctively pulled away and bumped spectacles against window, breaking lens - then releasing steering wheel and grabbing spectacles to protect eyes - vehicle going out of control and causing accident - guilty of negligent driving, error of judgment caused while in a state of emergency not one which reasonable-driver would have made.

Sleepwalking and awaking from nightmare

Ncube 1978 (1) SA 1178 (R); 1977 (2) RLR 304. In certain cases where the accused acts violently because he is responding to a nightmare, an acquittal on the basis of sane automatism may follow rather than a special verdict being handed down.

B. INSANITY AND NON-SANE AUTOMATISM

Omus of proof. Exception to general rule that prosecution has to disprove defence after defence has discharged its evidential burden. Onus on defence to prove on a balance of probabilities that accused was insane at time committed crime.

Common law. M'Naghten rules applied, with addition of concept of irresistible impulse.

1. Was accused unaware of physical nature and quality of act because of a disease of mind?

2. Even if he was aware of the physical nature and quality of his act, was he unaware that the act was wrong because of a disease of the mind?

3. Even if he was aware both of the nature and quality of his act, and that it was wrong, was he unable to resist the impulse to commit the crime because of a disease of the mind?

Even if the mental disturbance did not satisfy these tests, there
could still be a factor of diminished responsibility affecting sentence.

Statute. Mental Health Act 23 of 1976. S 28 as read with s 2 of this Act deals with the defence that the accused was "mentally disordered or defective so as not to be responsible according to law for his action at the time when the act was done or the omission made."

Where an accused is found to fall within the terms of these provisions the verdict will be that he was guilty but mentally disordered or defective. The effect of this verdict will be that the accused will be sent to a mental institution for treatment.

The scope of these provisions is far wider than the common law on insanity. The following points are important in relation to the special verdict under this Act:

1. The disorder, defect or disability of the mind can be of a temporary nature providing that it was present when the crime was committed.
2. The cause of the defect, disorder or disability is immaterial. It can be organic, functional or physical in its origin.
3. The fact that the accused is apparently fully recovered at the time of his trial may not prevent the special verdict being returned.
4. The likelihood of recurrence of the complaint may be weighed in deciding if the special verdict is applicable.
5. The special verdict may be returned even if the defence was that of sane automatism.
6. The court itself may call for medical evidence in relation to the accused's mental condition at the time of the crime.
7. The special verdict in terms of the Act is not a verdict of insanity and imputes no moral blameworthiness to the accused.
8. Because of the wide wording of the provisions in the Act, many cases which were previously treated as cases of sane automatism leading to outright acquittal of the accused will now result in the special verdict being returned.
9. Accused who are unfit to stand trial. In terms of s 35 of the Mental Health Act, even if the accused is discharged because he is mentally disordered or defective and would not be able to understand the nature of the proceedings and properly to conduct his defence, the court can still order the committal of the discharged person if there is medical evidence that such person is a danger to others.

CASES

Murder

Senekal 1969 (4) SA 478 (RA). Special verdict to be returned where accused's mind temporarily disabled or disordered due to concussion even if accused apparently fully recovered at
time of his trial.

Johnston 1970 (1) RLR 58 (GJ). Amnesia, which is not associated with any form of mental disorder or unconscious action amounting to automatism is not a defence to a criminal charge. (However, if the amnesia in respect of the past events is genuine, the crime must be brought home to the accused).

Mawonani 1970 (3) SA 448 (RA); 1970 (1) RLR 41. Special verdict returned where accused fatally stabbed brother when in state of hysterical dissociation after went into trance at seance where as a medium he was trying to communicate with ancestral spirits.

Naube 1978 (1) SA 1178 (R); 1977 (2) RLR 304. Special verdict returned where accused fatally stabbed brother when sleepwalking and reacting to threatening realities of his dream.

Mapfumo A - 48 - 79. Possibility that suffering from hysterical dissociation, but no evidence that unaware of nature and quality of his acts and that what he was doing was wrong.

Time A - 21 - 81. Appeal court ordering psychiatric examination to determine mental state of accused when committed murder of daughter to see in particular if was some diminished sense of responsibility. Motiveless murder.

[Note: Earlier cases on sane automatism should be carefully considered to ensure that they still hold good in the light of the wide coverage of the Mental Health Act provisions].

Abnormality short of mental disorder

Nyati A - 12 - 74
Mapfumo A - 48 - 79

Person cannot be tried who is mentally disordered or defective

Ayling 1969 (2) RLR 426
Moyo G - B - 88 - 78

South African cases

Irresistible impulse

Kavin 1978 (2) SA 731 (W)
McBride 1979 (4) SA 313 (W)

Psychopathy

Mnyanda 1976 (2) SA 751 (AD)

C. INTOXICATION

This relates to both consumption of liquor and drugs.

Involuntary

If a person who has become intoxicated due to no fault of his own (e.g. his drink was "spiked"), it would seem that he would escape liability even in respect of a non-specific intent crime (see below), providing that the degree of intoxication was such that the accused lacked the required mental state for the crime in question.
Voluntary

1. Special verdict not to be returned unless alcohol or drug consumption led to permanent insanity.

2. Where the accused voluntarily became drunk and temporarily lost control over his mental faculties thereafter, intoxication can at most be a partial defence.
   
   (a) If charged with a *specific intent crime*, the accused will be found guilty only of a lesser crime if he was so drunk that he was unable to and did not form the intention for the specific intent crime in question. Where this is the case he will automatically be found guilty of the lesser crime even if he did not have the intention for that crime.
   
   (b) If charged originally with a *non-specific intent crime*, he will be found guilty of that crime even if he did not have the requisite intent, but the intoxication may mitigate the sentence.

Below is a chart showing the recognised specific intent crimes in the first column and in the second column the lesser crimes to which they will be reduced if because of voluntary intoxication, the accused lacked the intention for the specific intent crime.

<table>
<thead>
<tr>
<th>Specific intent crime</th>
<th>Non-specific intent crime</th>
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<tbody>
<tr>
<td>Murder</td>
<td>Culpable homicide</td>
</tr>
<tr>
<td>Rape</td>
<td>Indecent assault</td>
</tr>
<tr>
<td>Assault with intent to murder )</td>
<td>Common assault</td>
</tr>
<tr>
<td>Assault with intent to do grievous bodily harm )</td>
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</tbody>
</table>

**Drinking for Dutch courage**

Where accused forms the intent to commit a crime and then drinks to give himself "Dutch courage", his liability if he commits the crime can be based upon the intention that he formed prior to getting himself drunk.

**CASES**

**Involuntary intoxication**

**Gardener 1974 (4) SA 304 (R).** Charged with *drunken driving*. Involuntarily intoxicated because vodka had been poured into beer without her knowledge. Found guilty because intentionally drove her vehicle and was not unaware of what she was doing when she drove towards her home.

**Innes Grant 1949 (1) SA 753 (A).** Charged with *culpable homicide* after fatal motor accident. Found guilty because even if accused's condition was involuntary, accused was not so incapacitated that he did not know what he was doing. He did not drive his car without realising that he was doing so.
Voluntary intoxication

1. Homicide

(a) Murder despite intoxication:

Sibanda A - B - 9 - 71. Drunk, but knew what was doing.

Ncube A - 186 - 75. Intoxicated, but knew what he was doing when threw heavy stone onto woman smashing her ribs.

Grove-Mitchell 1975 (3) SA 417 (A). Appeal against conviction for murder dismissed. State had proved that despite intoxication (and provocation and immature personality), he had the requisite intention at the time.

V 1979 (2) SA 656 (A). Degree to which accused affected by drink and quantity consumed must be weighed up. The understanding and judgment of an ordinary sober person must not be ascribed to a drunkard.

(b) Murder reduced to culpable homicide because of intoxication.

Mahoko 1949 (2) PH H 110 (SR). Very much under influence of drink - slight provocation - struggle in which accused stabbed deceased - intention to kill absent - culpable homicide.

Ndiveau 1971 (3) SA 260 (R). Charged with murder. Voluntarily taken dagga. Had acted without apparent motive and in completely irrational manner. Lacked intention to kill. Found guilty of culpable homicide. (Not case where special verdict could be returned).

Baloyi A - 158 - 77.

Jackson A - 31 - 79. Young man not used to drinking becoming substantially intoxicated. Murder reduced to culpable homicide.


Lipman [1969] 3 All ER 410. Manslaughter - killing under influence of LSD.

(For cases of a combination of provocation and intoxication see under provocation).

2. Assault with intent to do grievous bodily harm

Tsotsotsa 1976 (1) SA 364 (A). Assault with intent to do grievous bodily harm to be reduced to common assault if accused so drunk that did not know what he was doing.

3. Theft

MacGregor 1975 (2) SA 385 (R); 1975 (1) RLR 77. Theft. Magistrate returning special verdict. Not competent. Voluntary intoxication cannot result in special verdict unless caused permanent mental disease. It is no defence to crime requiring no specific intent.

Onus

Tavakonza A - 24 - 71. Onus on State at all stages to prove intent
to kill, but must be some basis for holding that the accused was so drunk as not to know what he was doing.

D. **MISTAKE OF FACT**

Approach towards defence the same in both Zimbabwe and South Africa.

**Requirements for defence**

1. **Mistake of fact.**
2. Must be in respect of a material or essential element of the crime. (Test - if facts were as mistakenly believed them to be, would not have been committing the crime charged?). It would be an essential mistake if, e.g., when X killed a person he thought he was shooting an animal, or if when X took Y's ox he thought it was his (X's) ox. It would be an immaterial mistake and would not avail as a defence if X intending to kill Y shot Z instead thinking him to be Y.
3. Must be genuine (honest, bona fide).
4. (a) **Crimes of intention.** Genuine mistake will excuse. Does not have to be reasonable mistake. (But gross unreasonableness may be proof of absence of genuineness).
   (b) **Crimes of negligence.** Mistake must be both genuine and reasonable.
   (c) **Strict liability crimes.** Defence will not avail.

**Statutory crimes**

See section on statutory crimes.

**CASES**

**Common law crimes**

**Murder**

*Mkize 1951 (3) SA 28 (A)*. Verdict altered to culpable homicide. Killed husband by using poison which thought was love potion. Genuine but unreasonable mistake.

**Assault with intent to murder**

*Jassane 1973 (4) SA 658 (T)*. Combination of intoxication and mistake of fact. Reduced to common assault. Mistook child for tokoloshe (evil spirit).

**Theft**

*Clarke and Arnold 1976 (1) PH H 108 (R)*. Genuine but unreasonable. Thought vehicle abandoned. Not guilty of theft when took parts from vehicle.

*Randen & Another A - 165 - 80.

[Note: Caution should be exercised in respect of earlier cases which may seem to suggest that in respect of crimes of intention a mistake of fact must be both genuine and reasonable to succeed. These cases will
have been decided before the objective test for intention was discarded in favour of a totally subjective approach. One example in this regard is the case of -

Mbombela 1933 AD 269].

E. MISTAKE OR IGNORANCE OF THE LAW

Approach in Zimbabwean law presently different from approach in South Africa.

Zimbabwean law

Rule that ignorance of law is no excuse.

Straight or naked ignorance or mistake of law is no excuse. But claim of right defence is recognised. "Decently clothed" ignorance or mistake of law may avail as defence. It seems that ignorance or mistake of law is decently clothed where accused either knows or suspects that his actions would normally be illegal but because of some extraneous factual basis he believes that it will not be unlawful in present circumstances. [It is often difficult to distinguish naked ignorance from properly clothed ignorance].

Requirements for claim of right defence.

1. Mistake must be material.
2. (a) Crimes of intention. Genuine mistake will excuse. Does not have to be reasonable but unreasonableness may be evidence of lack of genuineness.
   (b) Crime of negligence. Mistake must be both genuine and reasonable.
   (c) Strict liability crimes. Defence will not avail.
3. Must be properly clothed mistake or ignorance (see cases).

South African law

The rule that ignorance of the law is no excuse has been abandoned. No distinction drawn between naked mistake or ignorance and claim of right defences. Knowledge of unlawfulness now seen as an integral ingredient in the mental element.

Thus ignorance or mistake of law is now treated as being a defence whether the mistake or ignorance is naked or otherwise. Therefore, in respect of -

1. Crimes of intention - genuine mistake or ignorance will excuse.
2. Crimes of negligence - the mistake or ignorance must be genuine and reasonable.
3. Strict liability crimes - the defence will not avail.

CASES

Zimbabwean law

1. Application of the rule that ignorance of the law is no excuse
(naked mistake or ignorance).

Charangwa 1962 R&N 562 (SR)

Bledig and another 1974 (2) SA 613 (RA). Statutory provision requiring subjective intention. Defence that genuinely thought that provision did not apply to their situation. Defence rejected and rule that ignorance of law is no excuse was applied.

2. Claim of right defence (properly clothed mistake or ignorance).

Common law crimes

Theft

Ellis 1961 R&N 468 (FSC). Honest belief that entitled to use money.

Banet 1973 (4) SA 430 (RA); 1973 (1) RLR 335. Not guilty of theft by conversion. Using money given for business expenses for entertainment. Genuinely thought allowed to use, provided that replaced. [Case criticised in Johnson 1977 (4) SA 116 (RA) at 123H - 124C. Suggested that Banet's mistake was naked ignorance of the law].


Musau A - 67 - 80. No matter how wrong-headed or unreasonable, if the accused believed that he was entitled to take the property, he is free from responsibility.

Randen and another A - 165' - 80. Theft by finding only defence if accused genuinely believed property abandoned by owner or lost by owner and circumstances were such as to reasonably lead accused to believe owner unascertainable.

Robbery

Fisher 1970 (3) SA 446 (RA); 1970 (1) RLR 179. Not guilty of robbery. Debt collector genuinely thought entitled to assault complainant to extract money owing to his principal. Guilty of assault only as no intention to steal.

Johnson 1977 (4) SA 116 (RA). Not guilty of robbery. Genuinely, but mistakenly, believing that money had been stolen from him and genuinely believing that had a right to extract it by using force. Guilty of assault.

Statutory crimes

Zemura 1974 (1) SA 584 (RA). Alleged contravention of statutory provision requiring some mental state, but onus on accused to prove absence of the required mental state. Genuinely and reasonably believing that entitled at law to do what he did as relying upon erroneous advice of administrative official who would be likely to know about the workings of the legislation in question as he administered that statute. Defence succeeded as properly clothed mistake (claim of right) and also court stated that public policy demanded that here exception be allowed to ignorance of law no excuse rule. (But see Bledig and another 1974 (2) SA 613 (RA) at 617G and 618E).
Comment

Defence will succeed where genuinely relies on advice of administrative official administering statute. This may be extended to reliance upon mistaken legal advice. If so, South African cases of -

Sachs 1953 (1) SA 392 (A), and
Colgate Palmolive Ltd 1971 (2) SA 149 (T)
would not be followed. (See Zemura 1974 (1) SA 584 (RA) at 592H-593F).
As regards reliance upon advice from official who is not a Government official or a lawyer, see the South African case of -

Rabson 1972 (4) SA 574 (T).

This latter case has been subject to criticism and may not be followed by our courts. (See Zemura 1974 (1) SA 584 (RA) 593G - 594A).

Will we follow approach of South African Appellate Division in the case of -

De Blom 1977 (3) SA 513 (A)?

In the case of -

Lorenz A - 47 - 81

stated that the matter would have to be considered by a full bench of our Appellate Division before a decision could be made.

South African law

De Blom 1977 (3) SA 513 (A). The rule that ignorance of the law is no excuse is no longer part of SA law. All the earlier SA cases on mistake of law must therefore be re-considered in light of this radical decision. See also Palmos 1979 (2) SA 82 (A).

F. PROVOCATION

Zimbabwean law differs somewhat from South African in respect of homicide cases.

Zimbabwean law.

Homicide cases

Twofold approach:

First rung subjective test. Did accused have intention to kill taking into account the factor of provocation and the effect of the provocation on the accused and also taking into account all other salient subjective factors (such as the degree of intoxication) which may have affected the accused's ability to form the requisite intention?

If the accused did not form intention to kill he cannot be found guilty of murder but only of culpable homicide.

Second rung objective test. If the accused intended to kill his victim, did he lose his self-control and intentionally kill his victim in circumstances where the reasonable man would have acted in the same manner as the accused? If so murder will be reduced to culpable homicide.
(i.e., the accused will have a partial defence.) At this second stage the accused's actions must be judged objectively without regard to his personal eccentricities or abnormalities or to the fact that he was drunk or sober. It must, however, be established that the accused lost his self-control before the second rung applies. He would not fall under this rubric if it is clear that he did not lose his self-control even if in the circumstances the reasonable man would have done so.

**Crimes other than murder**

Here the specific intent rule is applied. If because of provocation and any other subjective features the accused lacked the intention necessary for the specific intent crime in question he would be found guilty of a lesser non-specific intent crime. If charged with a non-specific intent crime the factor of provocation will be relevant only to the matter of sentence. (See under intoxication for a listing of the recognised specific intent crimes).

**South African law**

**Homicide cases**

The only question which is asked in SA law is, did the accused intend to kill, taking into account the provocation and all other salient subjective factors. The second rung of the Zimbabwean law is not used.

**Crimes other than murder**

It would seem that the specific intent approach would be used.

**CASES**

**Homicide**

* Tenganyika 1958 R&N 228 (FSC); 1958 (3) SA 7. Two-fold approach in murder cases laid down.

* Tenganyika followed in.

* Bureke 1960 (1) SA 49 (FSC) and Majaye 1965 RLR 106 (GD)

But in Howard 1972 RLR 247 (GD) it was stated "It would indeed be a rare case in which it would be proper to hold that even a reasonable man would have acted ... purposefully with actual desire to kill."

Liable for murder despite provocation or provocation and intoxication:

* Bureke 1960 (1) SA 49 (FSC)

* Majaye 1965 RLR 106 (GD)

* Wilson A - 157 - 69

* Howard 1972 RLR 247 (GD). Court should be careful not to infer too readily from the very extravagance of behaviour, the reasonable possibility of complete loss of all self-control sufficient to deprive accused of capacity to form intention to kill, when such extreme behaviour may have been the result of yielding to passion which aroused in him an actual desire to bring about death.
Murder reduced to culpable homicide because of provocation or provocation and intoxication:

Tenganyika 1958 R&N 228; 1958 (3) SA 7.
Turk 1979 (4) SA 621 (R) and A - 159 - 79.

Culpable homicide not reduced:

Hove G - S - 123 - 73. Plenty of time to regain self-control before delivering fatal blow.

Attempted murder reduced to assault with intent to do grievous bodily harm:

Ncube A - 198 - 74

Charges other than murder

Arson

Matowo A - 52 - 81. Father who had been told by dying son that X had poisoned him had no right to take the law into his own hands.

Assault with intent to do grievous bodily harm

Douglas A - 219 - 72. Provocation did not reduce to common assault on facts.

Gomende G - S - 115 - 79. Reduced to common assault.

Common assault

Zengeya 1978 (2) SA 319 (RA): 1978 RLR 29. Provocation is not defence to common assault; only affects sentence.

G. YOUTHFULNESS

Approach in Zimbabwe coincides with that in South Africa.

Children under seven (i.e., children who have not completed their seventh year). Deemed to be absolutely incapable of committing crimes. Applied to all categories of crime and applies even if it can be proved that child in question knew the wrongfulness of what he was doing.

Children between seven and fourteen (i.e., children who have completed their seventh year but not their fourteenth). Rebuttable presumption that lacks criminal capacity. Prosecution can rebut presumption by establishing that his:

(a) mind was sufficiently mature to understand, and

(b) he did understand the wrongfulness of his action.

Presumption weakens with advance of years towards fourteen. Stronger evidence required to rebut presumption in respect of statute which is morally neutral in character. Also rebuttable presumption of compulsion if child commits crime in presence of older person whom he would be expected to obey.
Sexual offences. Boys under fourteen are irrebuttably presumed to be incapable of sexual intercourse, and, therefore, cannot be guilty of rape or incest as principal offenders. In South Africa they can be found guilty, however, of sodomy as principal offenders.

Children over fourteen. Deemed to have full criminal capacity.

CASES

Mahlahla and another 1956 (1) SA 250 (SR). Child between 7-14 should not be prosecuted for statutory offences which may be no more than boyish pranks.

Eva 1967 (3) SA 627 (R). Child under 14 may not be taken to court on any charge without consent of A.-G.

Recent South African cases

Presumption of incapacity

M and another 1979 (4) SA 564 (B)

Presumption of coercion

James and another 1977 (1) H H 84 (0)

Khubeka and others 1980 (4) SA 221 (0)

Boys between 7-14 can commit sodomy

S 1977 (3) SA 305 (0)

2. DEFENCES AFFECTING THE UNLAWFULNESS ELEMENT

Contents

A. Authority
B. Compulsion
C. Consent
D. De minimis non curat lex
E. Entrapment
F. Impossibility
G. Necessity
H. Obedience to superior orders
I. Self-defence and defence of third persons and of property

A. AUTHORITY

Two types:

Public authority
Private authority

Public authority

'Act or omission authorised by State.'

(a) Court authority - person authorised to carry out sentence of court, e.g hangman or person inflicting corporal punishment.
(b) **Lawful arrest** - circumstances in which peace officers and private citizens can make lawful arrests set out in Criminal Procedure and Evidence Act [Chapter 59]. Not liable for assault or other crime providing acts within specified limits. In certain very restricted circumstances, killing to prevent flight of or resistance from the person who is being arrested is legally permitted.

Certain immunities are provided for by legislation in respect of public officers causing harm whilst carrying out certain tasks.

**Private authority**

Under common law it is recognised that it is legally permissible for a private person to inflict harm in certain circumstances.

(a) **Legal authority** - Parents, guardians and school-teachers are legally authorised to inflict moderate corporal chastisement upon children in their care. In terms of the Education (Corporal Punishment) Regulations, 1973, in Government schools the right to inflict corporal punishment is limited to headmasters and deputy headmasters. Husbands have no legally recognised right to chastise their wives. Such chastisement would constitute an assault. Employers have no legally recognised right to chastise their employees.

(b) **Proper exercise of the authority** - To serve as a ground for justification the chastisement must be moderate and presumably the child must have deserved the punishment. If the bounds of moderation are exceeded, an assault is committed. The salient factors to be weighed in this regard are age, physical condition and sex of child, gravity of offence, nature of instrument used and amount of force used.

**CASES**

**Public authority**

- Purcell-Gilpin 1971 (3) SA 548 (RA)
- Reed 1971 (1) RLR 315 (RA): Servants of the State are not privileged class of persons, and an agent or servant of the State committing an act prohibited by statutory provision only escapes criminal liability if the act in question was expressly or impliedly authorised by the State, and, as such, an act of the State itself.

**Private authority**

- Collett (1) 1978 RLR 205 (A)
- Meeuwis 1970 (4) SA 532 (T)

**B. COMPULSION**

**Requirements**

1. Accused's actions must not be disproportionate to evil threatened.
2. Conduct must have been dictated throughout by threat.
3. Threat must have inspired a present fear on reasonable and substantial grounds.
4. Fear must be of death or serious bodily harm to himself or to others to whom stood in protective relationship.
5. The accused must have refrained from the illegal conduct at the earliest possible moment.

Leading Zimbabwean case -
*Damascus* 1965 (4) SA 598 (SR); 1965 RLR 477

Requirements of defence
1. Not disproportionate
   *Chipesa* 1964 (4) SA 472 (SRAD)
   *Damascus* 1965 (4) SA 598 (SR); 1965 RLR 477
2. Dictated throughout
   *Samuel and others* 1960 (4) SA 702 (SR)
3. Threat immediate
   *Chipesa* 1964 (4) SA 472 (SRAD)
   *Damascus* 1965 (4) SA 598 (SR); 1965 RLR 477
   *Moyo G - B - 55 - 79*
   *Sibanda and another A - 201 - 79*
   *Mujere A - 40 - 80*
   *Mahomed and another 1938 AD 30*

   Reasonable man test
   *Alfeus* 1979 (3) SA 145 (A)
4. Harm to himself or those to whom stood in protective relationship
   *Bhya* 1953 (3) SA 143 (N)
5. Desist as soon as possible
   *Samuel* 1960 (4) SA 702 (SR)

Homicide - can defence avail to charge of murder?

Zimbabwe
*Mujere A - 40 - 80*

South Africa
*Goliath* 1972 (3) SA 1 (A)
*Peterson and others* 1980 (1) SA 938 (A)

[Prior South African cases such as
*Werner and another* 1947 (2) SA 828 (A)
C. CONSENT

As crimes are wrongs against community, consent of affected parties does not normally negate criminal responsibility. Thus defence has very restricted application in criminal law. But certain limited instances where consent is a defence. Also certain crimes are defined in such a way that absence of consent of complainant is essential element.

Requirements

1. In some cases law will not allow defence for public policy reasons, e.g. accused beats woman with her consent for purposes of his sexual gratification. But law will allow consent as defence in following circumstances:

(a) Medical operations or treatment for therapeutic reasons.

But consent must be free and informed. If it is, consent will avail even in respect of serious bodily harm provided doctor exercised due care and skill. If consent of patient unobtainable (e.g. patient unconscious, drunk or insane), next of kin, guardians etc can give consent. If patient's or alternative consent not reasonably obtainable, operation or treatment may still be justified on grounds of necessity. If parental consent to treatment unreasonably withheld, application can be made to magistrate in terms of s76 of the Children's Protection and Adoption Act [Chapter 33] for an over-riding of parents' wishes. Where no consent, treatment will be unlawful assault.

(b) Sports and entertainments

(i) Unlawful contests. Where contestants subject to immediate risk of death or serious injury, consent no defence.

(ii) Lawful contests. Where intention of players is not to inflict serious injury and rules (formal or otherwise) are designed for this purpose. However, even here consent only extends to normal risks and not to such things as deliberate assaults outside scope of rules. [Questionable whether consent avails, e.g. stunt men performing dangerous stunt for film or circus performer executing highly dangerous trick].

(c) Acts committed for religious, customary or superstitious purposes. But only if no more than minor injury caused.

2. Consent must be real

(a) Persons incapable of consenting
(i) Children under seven;
(ii) Girls below certain ages in connection with sexual offences -
   Girls under 12 for rape and indecent assault
   Girls under 16 for statutory rape
(iii) Children generally
   No fixed age for consent. Vital question was child mature
   enough to understand and give proper consent.
(iv) Insane persons
(v) Unconscious persons unless prior consent
(vi) Drunk persons if did not realise what they were doing.

(b) Where induced by duress consent may not be real consent but simply
   mere submission.
(c) Where induced by fraud may not be real consent, but fraud must
   induce mistake as to material or essential factor.

CASES

1. Public policy dictates consent should not avail.
   
   McCoy 1953 (2) SA 4 (SR); 1952 SR 320. Caning of female employee
   by male employer. Conduct malum in se and consent would not
   avail. In any case consent not true consent but only mere
   submission.
   
   Phiri 1963 R&N 395 (SR)
   Collett (1) 1978 (3) SA 206 (RAD); 1978 RLR 205. Consent never a
   defence in case of "master" inflicting corporal punishment on
   "servant", where assault such as is likely or intended to do
   bodily harm.

2. Sports and contests

   Consent no defence.

3. Acts done for customary or superstitious purposes

   Phiri 1963 R&N 395 (SR). Serious injury inflicted by witch-doctor
   on whole family. Father consenting to infliction of harm on
   young sick child. Consent did not avail as defence.
   
   Njikelana 1925 EDL 204
   Sikunyana 1961 (3) SA 549 (E)

4. Real consent

   Duress or pressure
   
   McCoy 1953 (2) SA 4 (SR); 1952 SR 320
   Kladides A - 141 - 72

   Fraud or deception

   Where vitiates consent

   Flattery [1877] 2 QB 410
   Williams [1923] 1 KB 340
Where does not vitiate consent
Willians 1931 (1) PH H 38
K 1965 RLR 571 (A)

Fraud inducing mistake as to identity
C 1952 (4) SA 117 (0)

D. DE MINIMIS NON CURAT LEX

The law does not concern itself with trivialities. If harm of trifling nature, the accused may be acquitted.

CASES

General
Zita A - 73 - 81

Assault
Maquire 1969 (4) SA 191 (RA)
Zengeya 1978 (2) SA 319 (RA)
De Swart 1977 (2) PH H 122 (0)

Malicious injury to property
Dane 1957 (2) SA 472 (N)

Theft
Kgogong 1980 (3) SA 600 (A)

E. ENTRAPMENT

Apparently not a defence in our law but "if there is any reasonable possibility that a person caught in a trap is a person who might not otherwise have offended against the law contravened, the appropriate penalty might well be a caution and discharge".

CASES
Blumeris A - 10 - 80
and see cases referred to in 1974-(1) RLJ 52.

F. IMPOSSIBILITY

The law does not oblige people to perform duties which are completely impossible to perform and thus it is a defence to a criminal charge that it was impossible to perform the obligation in question.

Requirements
1. Positive obligation imposed by law, e.g. must be legal rule obliging a person to do a particular act. Does not apply if law
merely prohibits a certain act.

2. Must be \textit{absolutely physically impossible} to perform. The fact that the accused could only perform the obligation with difficulty will not avail. Also alleged financial incapacity to comply with any obligation to pay taxes will not avail.

3. Impossibility must not be due to accused's own fault.

\textbf{CASES}

\textbf{Requirements}

1. \textit{Positive obligation}
   
   Canestra 1951 (2) SA 317 (A)

2. \textit{Absolute impossibility}
   
   Hoko 1941 SR 211 (HC)
   
   Leew 1975 (1) SA 439 (0)

3. \textit{Not due to own fault}
   
   Korsten (1927) 48 NLR 12

\textbf{NECESSITY}

Situation of a choice of evils. Faced with choice between suffering some threatened damage or breaking the law to avoid that harm and accused chooses the latter alternative.

Differs from self-defence. In self-defence defender injures creator and embodiment of threat, in necessity a person may be harmed who was in no way responsible for imminent danger.

\textbf{Requirements}

1. A legal interest of the accused must have been endangered. There must be some actual danger of such things as death, bodily injury or property damage. The existence and nature of threat is to be judged according to reasonable man criterion.

2. Threat must have commenced or be imminent. Cannot be threat of future harm. Test for imminence is, would reasonable man have believed danger to be imminent.

3. Threat must not be caused by accused's own fault.

4. Action must be necessary to avert danger. Necessity of action to be judged by reasonable man test. Would reasonable man have been able to free himself from threat without inflicting harm?

5. Means used to avert danger must be reasonable in the circumstances. Accused must do no more than reasonably necessary to avert threat and must desist from his act immediately the danger is past.

\textbf{CASES}

\textit{Dudley and Stephens} [1884] 14 QB 273

\textit{Bourne} [1938] 3 All ER 615
H. OBEYDENCE TO SUPERIOR ORDERS.

Really sub-species of defence of compulsion. Usually applies to members of armed forces and can apply whether they are on service in war time or in peace time.

Requirements
1. Order must come from person lawfully placed in authority over accused.
2. Must have duty to obey order. Duty to obey not blind duty. Soldier must honestly believe that it was his duty to obey and that belief must be reasonable in the circumstances. If the orders are manifestly illegal it would seem that the soldier, if he knows this, could not reasonably consider himself obliged to execute that order. However, especially during war-time the soldier is obviously in a very invidious position when told to do something which is manifestly illegal.
3. The accused must do no more harm than was necessary to carry out the order.

CASES

Requirements
1. Order from person in authority
   Werner 1947 (2) SA 828 (AD)
2. Duty to obey
   Smith 17 SC 561
   Ignorance of unlawfulness of order - test of reasonableness of ignorance that order unlawful - whether test entirely objective.
3. No excess over what necessary
   Mayers 1958 (3) SA 793 (SR); 1958 SR 277.
4. Can cover policemen
   Arlow and another 1960 (2) SA 449 (T)
   Tekere and others GD 8th Dec. 1980. Whether available to soldier not on active service

I. SELF-DEFENCE AND DEFENCE OF THIRD PERSONS AND OF PROPERTY

Approach in Zimbabwe coincides with that in South Africa.

Requirements
1. Unlawful attack
2. Upon accused or upon a third party, where accused intervenes to protect that third party.

3. Attack must have commenced or be imminent.

4. Action taken must be necessary to avert attack.

5. Means used to avert attack must be reasonable.

A few important points should be noted:

(a) The courts do not adopt an armchair approach to situations of self-defence. The courts will take into account the invidious circumstances of the accused who was under attack and ask the question, what would the reasonable man have done in those circumstances? They would thus take heed of the fact that the accused often will not have had the time to decide carefully upon what weapon and method of defence he would use. The question is were the means used necessary to ward off the attack, and were they reasonable in the circumstances? Thus it may be that an accused attacked by a mob armed with sticks and stones may be justified in using a firearm to defend himself.

(b) Although the accused normally has a duty to flee, he does not have to do so in circumstances where it is not reasonable to expect him to do so and where the reasonable man would have stood his ground in order to protect himself.

(c) Pre-emptive self-defence may be permissible providing that there were reasonable grounds for believing that an attack was imminent. Even if the accused believes, mistakenly, that an attack was about to be mounted, he may still escape liability for the crime charged if the mistake in the circumstances was a reasonable one (providing the other requirements for the defence have been satisfied).

(d) Where an accused exceeds the bounds of reasonable self-defence and kills the assailant, he may nonetheless still be found guilty of culpable homicide unless the excess was immoderate.

(e) When defending a third person (who can be a person to whom the accused is unrelated, i.e., owes no protective duty at law), the court applies the reasonable man test but uses it somewhat differently to a case involving self-defence. This is because here the accused himself is not under attack and therefore the accused is not having to respond to threat to himself.

Defence of property

Requirements the same as for defence of person. In South Africa recognised that right in certain extreme circumstances to kill as last resort in defence of property. It is yet to be decided whether same right would be recognised in Zimbabwe. In Zimbabwe there are still existing wide-ranging emergency provisions allowing for the protection of property. See s 16 of the Emergency Powers (Maintenance of Law and Order) Regulations, Statutory Instrument 441 of 1980.

CASES

Recent South African cases

Nyokong and another 1975 (3) SA 792 (0). Reasonable man must be
placed in position of accused subject to all the external circumstances to which accused exposed.

Motleleni 1976 (1) SA 403 (A). Pre-emptive self-defence. Accused believing on reasonable grounds that deceased had him cornered and that intended to stab him. (In fact deceased did not have knife). Conviction for murder set aside on appeal.

Mokoena and another 1976 (4) SA 161 (0). Defence of a third party. (It is questionable whether court applied correct test in this case).

MoLean 1977 (1) PH H 7 (A). Not proven that in circumstances accused should have fled rather than defending himself. Where reasonably believed that attacker was going to produce dangerous weapon, could not be expected to speculate how long his attacker was going to take to produce weapon.

Excess over what was reasonable, not immoderate. Verdict of culpable homicide, not murder.

Koning 1953 (3) SA 220 (T)
Detsera 1958 (1) SA 762 (FSC)
Ngumane 1979 (3) SA 859 (A)

See also

Muchima A - 129 - 71 where attempted murder was reduced to assault with intent to do grievous bodily harm, and

Ndhlamini G - B - 58 - 72 where assault with intent to do grievous bodily harm was reduced to common assault.

Defence of property

van Wyk 1967 (1) SA 488 (A)

Smart 1971 RLR 256 (A). Owner of land is justified in using reasonable and necessary force to eject persons trespassing on his land and who refuse or fail to leave when requested to do so.

If more attention had been paid to comfort in the design of the bench we might have been spared this outburst from a harrassed witness: "It's all very well for your worship to sit there scratching your worship's arse . . .".