

# CRIMINAL LAW IN SOUTH AFRICA

SHANNON VAUGHN HOCTOR



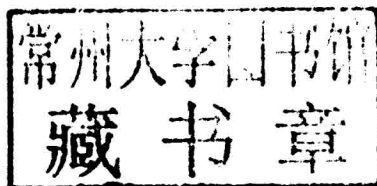
Wolters Kluwer  
Law & Business

# **Criminal Law in South Africa**

**Shannon Vaughn Hoxtor**

This book was originally published as a monograph in the International  
Encyclopaedia of Laws/Criminal Law.

General Editor: Roger Blanpain  
Associate General Editor: Michele Colucci  
Volume Editor: Frank Verbruggen



**Wolters Kluwer**  
Law & Business

*Published by:*  
Kluwer Law International  
PO Box 316  
2400 AH Alphen aan den Rijn  
The Netherlands  
Website: [www.kluwerlaw.com](http://www.kluwerlaw.com)

*Sold and distributed in North, Central and South America by:*  
Aspen Publishers, Inc.  
7201 McKinney Circle  
Frederick, MD 21704  
United States of America  
Email: [customer.service@aspenpublishers.com](mailto:customer.service@aspenpublishers.com)

*Sold and distributed in all other countries by:*  
Turpin Distribution Services Ltd.  
Stratton Business Park  
Pegasus Drive, Biggleswade  
Bedfordshire SG18 8TQ  
United Kingdom  
Email: [kluwerlaw@turpin-distribution.com](mailto:kluwerlaw@turpin-distribution.com)

DISCLAIMER: The material in this volume is in the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The editor and the contributing authors expressly disclaim all liability to any person with regard to anything done or omitted to be done, and with respect to the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this volume. No reader should act or refrain from acting on the basis of any matter contained in this volume without first obtaining professional advice regarding the particular facts and circumstances at issue. Any and all opinions expressed herein are those of the particular author and are not necessarily those of the editor or publisher of this volume.

*Printed on acid-free paper.*

ISBN 978-90-411-4728-8

This title is available on [www.kluwerlawonline.com](http://www.kluwerlawonline.com)

© 2013, Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Email: [permissions@kluwerlaw.com](mailto:permissions@kluwerlaw.com)

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

# **Criminal Law in South Africa**

# Table of Contents

The Author	3
General Introduction	19
§1. THE GENERAL BACKGROUND OF THE COUNTRY	19
I. Geography	19
II. Population	20
III. Economy	21
IV. Political System and Administrative Structure	21
A. Constitutional Arrangements	21
B. The Apartheid System	22
C. Full Democracy	23
D. Administrative Divisions	23
V. The Judicial System	24
§2. CRIMINAL LAW, CRIMINAL JUSTICE AND CRIMINAL SCIENCE	26
I. Definitions of Criminal Law	26
A. Criminal Law	26
B. Substantive Criminal Law	26
C. Criminal Procedure	27
D. Crimes and Offences	27
II. Characteristics of Criminal Law	27
III. Overview of the Criminal Justice System	28
A. The Police	28
B. The Prosecution Service	29
C. The Judicial Service	29
D. Trial Jurisdictions	30
E. Legal Representation	30
F. Correctional Services	31
IV. Trends in the South African Criminal Justice System	31
§3. HISTORICAL BACKGROUND	32
I. The Roman-Dutch Law	32
II. The Dutch Era	33
III. The British Era	34
IV. Criminal Law and Apartheid	36
V. Post-constitutional Jurisprudence	37

## Table of Contents

§4. SOURCES OF CRIMINAL LAW	39
I. International Sources	39
II. National Sources	40
A. The Common Law	40
B. The Judgments of the High Court	40
C. Legislation	41
§5. CLASSIFICATIONS AND TECHNIQUE	42
Part I. Substantive Criminal Law	43
Chapter 1. General Principles	43
§1. THE PRINCIPLE OF LEGALITY	43
I. Limitation on Penalization	43
A. Nullum Crimen Sine Lege	43
B. Nullum Crimen Sine Poena	45
C. Nulla Poena Sine Lege	45
II. Legality and Interpretation	46
§2. THE PRINCIPLE OF THE INDIVIDUAL GUILTY MIND	46
§3. VICARIOUS LIABILITY	47
§4. THE PRINCIPLE OF PROPORTIONALITY	47
Chapter 2. Scope of Application of Criminal Law	48
§1. PRINCIPLES CONCERNING THE APPLICABILITY OF THE CRIMINAL LAW WITH RESPECT TO TIME	48
I. Prohibition of Retroactive Criminal Law	48
§2. PRINCIPLES CONCERNING THE APPLICABILITY OF THE CRIMINAL LAW WITH RESPECT TO SPACE	48
I. Territoriality Principle	48
II. Extra-territorial Criminal Jurisdiction	49
§3. PRINCIPLES CONCERNING THE APPLICABILITY OF THE CRIMINAL LAW WITH RESPECT TO PERSON	50
I. Corporations	50
II. Immunities Based on National Public Law	51
III. Immunities Based on International Public Law	52
Chapter 3. General Principles of Liability	53
§1. INTRODUCTION: THE BASIC ELEMENTS OF CRIMINAL OFFENCES	53

## Table of Contents

§2. THE MATERIAL OR PHYSICAL ELEMENT ( <i>ACTUS REUS</i> )	54
I. Description	54
II. Acts, Omissions and Causation	54
A. Human Act	54
B. Voluntary Act	55
C. Commission and Omissions	55
D. Causation	56
III. Classification of Offences by the Material Element	58
§3. THE MENTAL (OR MORAL) ELEMENT ( <i>MENS REA</i> )	58
I. Subjective Guilt or Culpability	58
II. Intention	59
A. Degrees of Intent	59
B. Types of Intention with Reference to Their Consequences	60
1. Dolus directus (Direct Intent)	60
2. Dolus eventualis (Indirect or Eventual Intent)	60
III. Negligence	61
A. Definition	61
B. An Evaluation of Negligence	62
C. Types of Negligence	62
IV. Knowledge of Unlawfulness	63
V. The Required Form of Guilt	63
§4. THE COINCIDENCE OF ACTS AND MENS REA	65
§5. THE ELEMENT OF CRIMINAL CAPACITY (INSIGHT AND SELF-CONTROL)	66
 Chapter 4. Grounds of Impunity or Defences (Justification and Excuse)	 67
§1. GENERAL PRINCIPLES	67
§2. DEFENCES SHOWING THE <i>ACTUS REUS</i> TO BE INVOLUNTARY	67
§3. DEFENCES SHOWING THE <i>ACTUS REUS</i> TO BE NOT UNLAWFUL	67
I. (Self-) Defence or Private Defence	67
A. Position in South African Law	68
B. Conditions	68
1. Conditions Relating to the Attack	68
2. Conditions Relating to the Defence	69
C. Exceeding the Bounds of Private Defence	69
II. Private Defence of Property	70
A. Position in South African Law	70
B. Conditions	70
1. Conditions Relating to the Attack	70

## Table of Contents

2. Conditions Relating to the Defence	71
III. Necessity	72
A. The Position in South African Law	72
B. Conditions	72
IV. Consent	73
V. Impossibility	74
VI. Superior Orders	75
VII. Parental Authority	76
VIII. Public Authority	76
§4. DEFENCES SHOWING THE ABSENCE OF CRIMINAL CAPACITY	76
I. Minority	76
A. Children under 10 years	77
B. Children between 10 and 14 years	77
C. Children from 14 years upward	77
II. Pathological Incapacity	77
A. Incapacity at the Moment of the Act or Omission	77
B. Incapacity at the Moment of Trial	78
C. Presumption of Capacity	79
D. Verdict	79
E. Order of Internment or Release	79
III. Intoxication	80
IV. Non-pathological Incapacity (Provocation and Emotional Stress)	81
§5. DEFENCES SHOWING ABSENCE OF <i>MENS REA</i>	81
I. Ignorance or Mistake	81
A. Ignorance or Mistake of Law	82
B. Ignorance or Mistake of Fact	82
II. Youthfulness, Insanity, Intoxication, Provocation	83
§6. OTHER GROUNDS OF IMPUNITY	83
I. <i>De Minimis Non Curat Lex</i>	83
Chapter 5. Incomplete or Partly Perpetrated Crimes	84
§1. CRIMINAL ATTEMPT	84
I. Actus Reus	84
A. Completed Attempts	84
B. Interrupted (Incomplete) Attempts	85
C. Interruption by Reason of Voluntary Withdrawal	85
II. Mens Rea	85
III. Attempting the Impossible	86
§2. PARTICIPATION IN, OR PARTIES TO, CRIMINAL OFFENCES	86
I. General Remarks	86
II. Perpetrators and Co-perpetrators	87



## Table of Contents

A. The Doctrine of Common Purpose	87
B. Joining-In	90
III. Accomplices	90
A. Requirement of a Principal Offence	90
IV. Accessory after the Fact	91
V. Special Cases	92
A. Entrapment	92
§3. INCITEMENT AND CONSPIRACY TO COMMIT CRIME	92
I. Incitement	92
II. Conspiracy	93
Chapter 6. Classification and Survey of Specific Crimes	94
§1. CLASSIFICATION OF CRIMES	94
§2. CRIMES AGAINST THE PERSON	94
I. Abortion	94
II. Homicide	95
A. Murder	95
B. Suicide	96
C. Infanticide	96
D. Culpable Homicide	96
III. Crimes against Bodily Integrity	97
A. Common Assault	97
B. Assault with Intent to Do Grievous Bodily Harm	98
C. Sexual Assault, Compelled Sexual Assault and Compelled Self-sexual Assault	99
D. Rape and Compelled Rape	99
E. Defamation	101
F. Crimen Injuria	101
G. Kidnapping	102
H. Hijacking	102
§3. CRIMES AGAINST THE FAMILY	103
I. Abduction	103
II. Bigamy	104
III. Incest	104
§4. CRIMES AGAINST PROPERTY	104
I. Theft	104
II. Theft by False Pretences	107
III. Theft of Trust Money	107
IV. Receiving Stolen Property	108
V. Unauthorized Borrowing	108
VI. Game Theft	108

## Table of Contents

VII. Robbery	109
VIII. Extortion (Blackmail)	109
IX. Fraud	110
X. Forgery and Counterfeiting Offences	111
XI. Malicious Injury to Property	112
XII. Arson	112
XIII. Housebreaking	112
XIV. Trespass	113
XV. Crimes against Intellectual Property	114
§5. CRIMES AGAINST COMMUNITY INTERESTS	114
I. Public Indecency	114
II. Blasphemy	115
III. Road Traffic Offences	115
IV. Drug Offences	116
V. Witchcraft	116
VI. Arms and Weapons	116
VII. Protection of the Environment	117
VIII. Money Laundering and Organized Crime	118
§6. CRIMES AGAINST SEXUAL MORALITY	122
I. Prostitution	122
II. Sexual Offences against Children	122
III. Sodomy	123
IV. Bestiality	123
V. Transvestitism	123
§7. CRIMES AGAINST THE STATE	124
I. Treason	124
II. Espionage	124
III. Sedition	125
IV. Terrorism and Sabotage	125
V. Public Violence	128
§8. CRIMES AGAINST THE ADMINISTRATION OF JUSTICE	129
I. Contempt of Court	129
II. Defeating or Obstructing the Administration of Justice	131
III. Perjury	131
IV. Subornation of Perjury	132
V. Conflicting Statements on Oath	132
VI. Compounding	132
§9. INTERNATIONAL CRIMES	133
I. Rome Statute	133

## Table of Contents

Chapter 7. The Sanctioning System	134
§1. THE GENERAL SANCTIONING SYSTEM	134
I. Types of Sanction	134
II. Mandatory Sentencing Provisions	134
III. Minimum Sentencing Provisions	136
IV. Substantial and Compelling Circumstances in Minimum Sentencing	138
V. Role of Constitution	140
§2. PUNISHMENTS	141
I. The Sentence of Death	141
II. Imprisonment	141
III. Periodical Imprisonment	142
IV. Declaration as an Habitual Criminal	142
V. Committal to an Institution Established by Law	143
VI. Fines	144
VII. Corporal Punishment	145
VIII. Correctional Supervision	145
IX. Declaration as Dangerous Criminal	145
§3. OTHER MEASURES RELATED TO PUNISHMENT	146
I. Measures Applicable to Children	146
II. Compensation Order	146
III. Forfeiture	147
§4. MODES OF PUNISHMENT	147
I. Introduction	147
II. The Postponement of Sentence	147
III. The Suspension of Sentence	148
§5. PRINCIPLES AND RULES CONCERNING SENTENCING	148
I. The General Principles	148
II. Specific Factors	149
III. Cumulative and Concurrent Sentences	150
Part II. Criminal Procedure	153
Chapter 1. General Characteristics	153
§1. ORGANIZATION OF CRIMINAL JURISDICTION	153
I. Criminal Trial Courts	153
II. Substantive Jurisdiction of Criminal Courts	154
III. Territorial Jurisdiction of Criminal Courts	154
IV. Procedural Matters Governing Territorial Jurisdiction	155

## Table of Contents

V. Punitive Jurisdiction of Criminal Courts	156
VI. Compensatory Orders	156
§2. STAGES OF THE PENAL PROCESS	157
§3. DIFFERENT FORMS OF TRIAL	158
I. A Single Form of Trial	158
II. Trial by Judge and Assessors	158
III. Trial by Magistrate (or Regional Magistrate) and Assessors	159
§4. PRINCIPLES CONCERNING PROCEDURES	159
I. A Crime Control versus Due Process Perspective	159
II. The Doctrine of Procedural Legality	162
III. Principles Concerning Trial Procedures	162
§5. RIGHTS OF THE SUSPECT AND HIS LAWYER	163
I. The Right to a Lawyer	163
II. Prison Service Regulations Governing a Lawyer's Access to a Prisoner	164
III. Legal Professional Privilege	164
§6. SYSTEM AND FORMS OF EVIDENCE	165
I. The System of Evidence	165
II. Forms of Evidence	166
§7. EXCLUSION OF EVIDENCE	167
I. The Exclusion of Irrelevant Evidence: The Previous Convictions and Bad Character of an Accused	167
II. The Exclusion of Hearsay Evidence	168
III. Confessions	169
IV. Unconstitutionally Obtained Evidence	170
V. Privilege as the Basis for Excluding Evidence	171
A. The Privilege against Self-incrimination: The Witness	172
B. The Privilege against Self-incrimination: The Accused	173
C. Witness Statement Privilege	174
D. Marital Privilege	174
E. The Police Informer's Privilege	175
F. Privilege governing Investigative Methods of the Police	175
VI. Competence and Compellability of Witnesses	175
A. Mentally Disordered or Intoxicated Persons	175
B. Children	175
C. The Accused's Spouse as a Prosecution Witness	176
D. The Accused and Spouse of the Accused as Defence Witnesses	176
§8. PRESCRIPTION OF THE RIGHT TO PROSECUTE	176

## Table of Contents

Chapter 2. Investigation	177
§1. THE DIVISION OF POWER: POLICE, PROSECUTION AND JUDICIAL OFFICERS	177
I. The Police	177
II. The Police and the Prosecuting Authorities	177
III. The Prosecuting Authority	178
IV. The Prosecutors	179
V. Private Prosecutions	180
VI. Magistrates and Judges: Their Role in the Investigation of Crime	180
§2. INFILTRATION AND DECEPTIVE FORMS OF INVESTIGATION	181
I. Infiltration	181
II. The 'Police Trap' (Entrapment)	182
III. The Police Informer	182
§3. ELECTRONIC EAVESDROPPING	183
§4. ARREST, SEARCH AND SEIZURE	184
I. Arrest	184
A. Purpose and Effect of Arrest	184
B. Basic Principles Governing a Lawful Arrest	184
C. Warrant of Arrest by Magistrate or Justice of the Peace	185
D. Arrest by Peace Officer without a Warrant	186
E. Arrest by Private Person without a Warrant	187
F. Breaking Open Premises for Purposes of an Arrest	187
G. The Use of Force (Including Lethal Force) in Effecting an Arrest	187
II. Entry, Search and Seizure	189
A. Seizure by the State	189
B. Seizure under Search Warrant	190
C. Search and Seizure Without a Warrant	190
D. Search of Premises Where Police Official is Not Readily Available	191
E. Power of Police to Enter Premises	191
F. Search to Be Conducted in Decent and Orderly Manner	192
G. Entry, Search and Seizure in Terms of the South African Police Service Act 68 of 1995	192
H. Search without Warrant in Terms of the Drugs and Drug Trafficking Act 140 of 1992	193
§5. IDENTIFICATION PROCEDURES	193
I. Section 37 of the Criminal Procedure Act 51 of 1977	193
II. Blood Samples	193
III. Identification Parades	194

## Table of Contents

IV. Destruction of Certain Evidence	194
V. Furnishing of Name and Address	195
§6. INTERROGATION OF WITNESSES AND SUSPECTS	195
I. Witnesses	195
II. Police Questioning of Suspects: The Judges' Rules	196
III. Other Instances of Detention for Purposes of Interrogation	198
§7. LEGAL AID	198
I. Governmental Structures	198
II. The <i>Pro Deo</i> -system	198
III. The Public Defender System	199
Chapter 3. Pre-Trial Proceedings	200
§1. THE DECISION TO PROSECUTE	200
I. The Discretion to Prosecute	200
II. The Discretion and the Executive	200
III. The Discretion and the Judiciary	200
IV. Withdrawal of the Charge	201
V. Stopping the Prosecution	201
VI. Acceptance by a Prosecutor of an Accused's Plea	202
§2. COMMITTAL PROCEEDINGS	202
§3. INDICTMENTS AND CHARGES	203
I. Terminology	203
II. Rules Peculiar to an Indictment	203
III. Indictments and Charges: Rights of the Accused	204
A. The Right to Be Informed	204
B. The Right to Examine Charge	204
C. The Right to Object to the Charge	204
D. The Right to Have Character Protected	205
IV. Statutory Provisions Favouring the Prosecution	205
A. Defect in Charge Cured by Evidence	205
B. Charges Where It Is Doubtful What Offence Was Committed	205
C. Charge Need Not Specify or Negative Certain Defences	205
§4. PLEA BARGAINING	206
§5. PRE-TRIAL DETENTION	207
I. Witnesses	207
A. Pre-trial Detention of Witness on Application by Director of Public Prosecutions (DPP)	207
B. Pre-trial Detention of a Witness on His Own Application	207
II. Accused	208
A. Bail: Nature, Purpose and Effect	208

## Table of Contents

B. Bail Granted by Police or Authorized by DPP	209
C. Bail Application in Court	209
D. Evidential Rules Governing Bail Applications	210
E. Factors a Court Must Consider in a Bail Application	211
F. Bail Conditions	211
G. Cancellation of Bail	212
§6. TRANSACTIONS	213
Chapter 4. The Trial Stage	214
§1. ORDER OF PROCEEDINGS	214
§2. PRESENCE AND REPRESENTATION OF AN ACCUSED	214
I. Presence of an Accused	214
A. Methods of Securing Attendance of the Accused in Court	214
B. Right of an Accused to Be Present	214
C. Limitations on the Right to Be Present	215
D. Absence During Verdict	216
II. Representation by a Legal Representative	217
A. Legal Representation as a Trial Right	217
B. Reasonable Opportunity to Obtain Legal Representation	217
C. Main Duties of Legal Representative in Defending an Accused	218
D. Duty of Counsel in Defending the Admittedly Guilty	218
E. Withdrawal by Legal Representative	219
III. Assistance to an Accused by Someone Who is Not Legally Qualified	219
A. Assistance to Adult Accused	219
B. Assistance to an Accused under 18 Years	220
§3. ARRAIGNMENT AND PLEA	220
I. The Various Possible Pleas upon Arraignment	221
II. Mental Illness of the Accused	222
A. The Distinction between Non-triability on Account of Mental Illness and Lack of Criminal Capacity on Account of Mental Illness	222
B. The Psychiatric Enquiry and Report	223
C. The Finding of Non-triability: Effect and Consequences	224
D. The Finding of Lack of Criminal Capacity: Effect and Consequences	225
III. The Plea of Previous Acquittal ( <i>Autrefois Acquit</i> ) or Previous Conviction ( <i>Autrefois Convict</i> ): Policy Considerations	226
A. Court of Competent Jurisdiction	227
B. The Same Offence or Offence Substantially Identical	227
IV. Conviction Solely on a Plea of Guilty	227

## Table of Contents

V. The Plea of Guilty and Peremptory Judicial Questioning of the Accused	228
A. After a Plea of Guilty	229
B. Procedure in Favorem Innocentiae	230
VI. The Plea of Not Guilty and Judicial Questioning of the Accused: The Explanation of Plea	230
A. Procedural Rights of the Accused and Judicial Warnings	231
B. Purpose, Manner and Ambit of Judicial Questioning During the Explanation of Plea	231
§4. PRESENTATION, EXAMINATION AND CONFRONTATION OF EVIDENCE	232
I. The Presentation of the Case for the Prosecution	232
A. The Opening Address and General Provisions	232
B. Examination and Confrontation of Prosecution Witnesses	232
C. Closure and the Application for Discharge of the Accused	233
II. The Presentation of the Case for the Defence	234
A. Opening Address	234
B. The Order in Which Witnesses Should be Called	234
C. Examination and Confrontation of the Accused and Other Defence Witnesses	235
D. Closure of the Case for the Defence	235
III. Witnesses Called by the Court	235
IV. Address by Parties at Conclusion of All the Evidence	236
§5. JUDGMENT, VERDICT AND SENTENCE	236
I. Judgment	236
II. Competent Verdicts	236
A. Attempts	237
B. Accessory after the Fact	237
III. Sentencing Procedures	237
A. Proof of Previous Convictions	237
B. Evidence for Purposes of Determining an Appropriate Sentence	238
C. Final Right to Address	238
Chapter 5. Appeal and Review	239
§1. POST-TRIAL REMEDIES	239
§2. THE DISTINCTION BETWEEN APPEAL AND REVIEW	239
§3. THE RIGHT TO APPEAL	239



## Table of Contents

I. The Accused	239
II. The Prosecution	240
§4. POWERS OF COURT OF APPEAL	241
§5. SPECIAL ENTRY	241
§6. REVIEW	242
I. Grounds of Review	242
II. Automatic Review	242
III. Review of Proceedings before Sentence	242
IV. Powers of High Court as Court of Review	243
§7. INSTITUTION OF PROCEEDINGS DE NOVO WHERE CONVICTION SET ASIDE ON APPEAL OR REVIEW	243
Part III. Execution and Extinction of Sentence	245
Chapter 1. Sources of Penitentiary Law and Nature of Regulations	245
Chapter 2. General Principles Concerning the Purposes and Functioning of the Correctional System	247
Chapter 3. The Correctional System	248
§1. ORGANIZATIONAL STRUCTURE	248
I. Administration	248
II. Classification of Inmates	249
§2. CORRECTIONAL CENTRE REGIME	249
I. Minimum Requirements for Treatment of Inmates	249
II. The Privilege System	251
III. Other Aspects of Living Conditions	251
A. Labour	251
B. Disciplinary Measures and Security	252
C. Location and Leave	252
§3. COMPLAINTS PROCEDURES AND JUDICIAL CONTROLS	253
Chapter 4. Community Corrections	255
Chapter 5. The Release of Sentenced Prisoners	256
§1. CONSTITUTIONAL POWERS OF PARDON AND REPRIEVE	256