Intoxication as a Multiple Defence in South African Criminal Law

Crime statistics show that alcohol and drug consumption has in many cases a direct and substantial influence on criminal conduct. It is, therefore, alarming that people who become voluntarily drunk stand a good chance of being acquitted in the South African courts if the evidence reveals that, at the time of the act, the accused happened to fall in the grey area between ‘slightly drunk’ and ‘very drunk’.

In order to explain this position, the cases of S v Johnson 1969 (1) SA 201 (A) and S v Chretien 1981 (1) SA 1097 (A) as well as s 1 of the Criminal Law Amendment Act 1 of 1988 (the Act) will be briefly discussed.

Prior to the Appellate Division judgment handed down in the Chretien case South African law relating to the defence of intoxication followed the English ‘specific intent’ rule. According to this rule, voluntary intoxication would be a valid defence to a crime committed during the time of such intoxication if it was of a degree sufficient to negate the relevant ‘specific intent’ required for a particular crime. The accused would therefore be found not guilty of the crime charged, but guilty of a less serious offence for which a verdict was competent. Voluntary intoxication would not be a defence at all in crimes not requiring specific intent (such as culpable homicide), but could be taken into account in the mitigation of sentence.

In the Johnson case (the leading case prior to Chretien) the judge of appeal stated that it is a rule in our law that voluntary intoxication is generally not a defence to a criminal charge unless the voluntary intoxication resulted in a mental disease.

Since the Chretien decision in 1981, intoxication is a multiple defence to a criminal charge and the defence of intoxication could, in a proper case, constitute a complete defence to criminal liability. The defence of intoxication is now a complete, multiple defence as it may exclude

- the voluntariness of the act;
- criminal capacity; and
- criminal intention.

Voluntary intoxication can now affect criminal liability in the same way and to the same extent as youth, insanity, involuntary intoxication and provocation.

The realisation that intoxicated persons may too easily escape conviction due to the lenient approach to intoxication as a defence as laid down in Chretien, led to the legislature passing the Act. It was argued that the legislature ought to enact a provision to the effect that a person commits a crime if he voluntarily becomes intoxicated and while the intoxicated person commits an act which would have been a crime but for the rules relating to intoxication laid down in Chretien. In s 1 of the Act the legislature created such a crime.

The section reads as follows:

‘1(1) Any person who consumes or uses any substance which impairs his or her faculties to appreciate the wrongfulness of his or her acts or to act in accordance with that appreciation, while knowing that such substance has that effect, and
who while such faculties are thus impaired commits any act prohibited by law under any penalty, but is not criminally liable because his faculties were impaired as aforesaid, shall be guilty of an offence and shall be liable on conviction to the penalty [except the death penalty] which may be imposed in respect of the commission of that act.

'(2) If in any prosecution for any offence it is found that the accused is not criminally liable for the offence charged on the account of the fact that his faculties referred to in subsection (1) were impaired by the consumption or use of any substance, such accused may be found guilty of a contravention of subsection (1), if the evidence proves the commission of such contravention.’

The elements of this new offence are therefore

- consumption or use of any substance;
- impairment of the accused’s faculties to appreciate the wrongfulness of his act or to act in accordance with that appreciation as a result of the consumption or use of any substance;
- knowledge that the substance consumed or used by the accused has that effect of impairing his faculties to appreciate the wrongfulness of his conduct or to act in accordance with that appreciation;
- commission by the accused of any act prohibited by law for which no liability ensues as a result of this impairment of his faculties to appreciate the wrongfulness of his act or to act in accordance with that appreciation; and
- the accused is not criminally liable because his faculties are so impaired (see Burchell (1988) 2 SACJ 274 and JM Burchell and J Milton, Principles of Criminal Law 3ed (Juta 2005) at 409).

There has been criticism against the very existence of this section in that it amounts to a ‘statutory form of versari’. Writers such as CR Snyman (see CR Snyman, Criminal Law 4ed (Durban: Butterworth 2002) at 229) are, however, of the opinion that such a view is incorrect. Somebody who voluntarily starts to drink ought not to have a ground for complaining, if in his intoxicated state, he commits a wrongful act for which the law calls him to account. The retributive and deterrent theories also demand that the intoxicated perpetrator should not be allowed to hide behind his intoxication in order to escape conviction.

Section 1(1)(c) of the Act creates a criminal offence in the event that a person had

‘knowledge that the substance consumed or used by the accused has that effect of impairing his faculties to appreciate the wrongfulness of his conduct or to act in accordance with that appreciation.’

The question that arises is whether a person who becomes voluntarily intoxicated may be convicted under this section only if his intoxication results in his lacking of criminal capacity, or whether he may also be convicted if it results in absence of intention or in his being unable to perform a voluntary act.

The answer is that this section covers a person who, as a result of voluntary intoxication, lacks criminal capacity (see Burchell (op cit) 277 and Snyman (op cit) 231). The Appellate Division in the Chretien case held that intoxication may be a complete defence on three possible grounds:

- Firstly, if it results in the accused being unable to perform a voluntary act.
- Secondly, if it results in lack of capacity.
- Thirdly, if it excludes the intention that may be required for a conviction.

The accused in the Chretien case had criminal capacity but he was acquitted of attempted murder and common assault because, in his drunken state, he thought the people in the road would move out of his way and, therefore,
there was a reasonable doubt as to whether he possessed the required intention for these crimes. Under the new Act, he would still escape liability, since the intoxication did not lead to a lack of criminal capacity but rather a lack of mens rea.

Problems arise in the application of s 1(1). The question that arises is whether the acquittal of an offender on the initial charge would be sufficient to secure a conviction under s 1(1) or whether the prosecution would have to prove beyond reasonable doubt that the accused was not criminally liable on the grounds of intoxication on the initial charge. Had the legislature used the words 'not convicted' instead of 'not liable' the matter would have been easier to decide (see Burchell and Milton (op cit) 411). According to general principles the state has the burden of proving the presence of all the elements of the crime, including lack of criminal capacity, beyond reasonable doubt. This leads to the unusual situation that, in order to secure a conviction of contravening s 1(1), the state must do what the accused normally does at trial, namely to try and persuade the court to find that the accused is not guilty of a crime. The state therefore bears the burden of proving the opposite of which it normally has to prove.

The practical application of s 1(1) leads to difficulties. Initially the state needs to establish the accused’s liability beyond a reasonable doubt and then later, in an attempt to secure a conviction under s 1(1), has to prove the accused’s non-liability beyond a reasonable doubt. It is difficult for the state to prove beyond reasonable doubt that, because of incapacity resulting from intoxication, the accused cannot be held criminally liable for his act. The court in Chretien at 1106 C-D made the following remark

‘a court should not easily conclude that at the time of the act the accused lacked criminal capacity’.

In S v V 1979 (2) SA 656 (A) the court held that it was wrong to assume that a court could only in highly exceptional circumstances hold that the accused lacked criminal capacity due to intoxication. It was further held that there is no logical reason why the normal standard of proof in a criminal case was not applicable to proof of incapacity for the purpose of this statutory crime.

An intoxicated wrongdoer will escape liability if neither his liability nor his non-liability can be established in the stringent criminal standard of proof – see A Paizes ‘Intoxication through the looking-glass’ (1988) 105 SALJ 781: Non-liability is very different from non-conviction. The accused’s acquittal on a charge of assault means no more than that the court was not convinced of his guilt beyond reasonable doubt. It does not mean that the court found him ‘nonliable’. And it certainly does not mean that his non-liability has been proved beyond reasonable doubt.

The twilight zone of the semi-drunk offers the accused asylum. Snyman (op cit) 233 illustrates this by taking the following situation into account: If the accused is charged with assault and the evidence shows that he was only slightly drunk at the time of the act, he will not escape liability, because he will be convicted of assault and the only role intoxication will play will be to serve as a ground for mitigation of punishment. If the evidence shows that at the time of the act the accused was very drunk – that is, so drunk that he lacked criminal capacity – he would likewise not escape the clutches of criminal law, because he would then be convicted of contravening s 1(1) of the Act.

If, however, the evidence reveals that, at the time of the act, the accused happened to fall in the grey area between ‘slightly drunk’ and ‘very drunk’ it would be impossible to convict the accused of any crime (see Paizes (op cit) 781). The accused will escape liability completely. I submit that it is unlikely that the legislature could have intended that the section be circumvented so easily. Snyman (op cit) 233 is of the opinion that it is for this reason that the courts ought not to require an
unrealistically high degree of proof of incapacity.

Snyman, (op cit) 234 summarises the legal position at present as far as the effect of voluntary intoxication on criminal liability is concerned as follows:

• If the accused is so intoxicated that he is incapable of committing a voluntary act (in other words, his conduct takes place while he is in a state of automatism resulting from the intoxication), or if the accused is so intoxicated that he lacks criminal capacity, he will, in terms of Chretien, not be guilty of the crime with which he is charged. He must, however, be convicted of contravening s 1 of the Act.

• If the accused is so intoxicated that, although he has criminal capacity, he lacks the intention required for a conviction he will, in terms of Chretien, not be guilty of the crime with which he is charged. Neither can he be convicted of contravening s 1 of the Act. However, if the accused is charged with murder, he may, on the ground of negligence, be found guilty of culpable homicide.

• If on a charge of committing a crime requiring negligence (such as culpable homicide) the evidence reveals that the accused was intoxicated while engaging in the conduct, the intoxication will not exclude the accused’s negligence; to the contrary, it serves as a ground for finding that the accused was negligent.

• If, despite the consumption of alcohol, the accused complies with all the requirements for liability, including intention, he will be found guilty of the crime with which he is charged, but the measure of intoxication may serve as a ground for the mitigation of punishment. In exceptional cases the intoxication may, in terms of s 2 of the Act, serve as a ground for increasing punishment.

Legislation is needed to fill the gap in our law left by Chretien and to reflect public opinion. The spirit of the current legislation does attempt to reflect the present needs of society, however, there are a number of major problems that arise from the detail of this particular enactment (see Burchell and Milton (op cit) 415). An amendment of the current legislation is required as the idea behind the legislation is firm but the translation of the idea into a viable, statutory form is more challenging (see Burchell (op cit) 277 and Paizes (op cit) 776). The wording of s 1 (1) of the Act is currently under review by the South African Law Commission.

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