SOUTH AFRICAN LAW COMMISSION

PROJECT 49

OFFENCES COMMITTED UNDER THE INFLUENCE OF LIQUOR OR DRUGS

REPORT

January 1986

To Mr H J Coetsee, MP, Minister of Justice.

I am pleased to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973 (Act 19 of 1973), for consideration the Commissio: 's report on offences committed under the influence of liquor or drugs.

G VILJOEN

CHAIRMAN

11 January 1986

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

The Honourable Mr Justice G Viljoen (Chairman)
The Honourable Mr Justice H J O van Heerden (Vice-Chairman)
The Honourable Mr Justice P J J Olivier
Mr J E Knoll
Mr P A J Kotzé
Prof J T Delport
Mr G G Smit

The Secretary is Mr D A Kruger. The Commission's offices are on the 8th Floor, N G Kerk Sinodale Sentrum, 228 Visagie Street, Pretoria. Correspondence must be addressed to:

The Secretary
South African Law Commission
Private Bag X668
0001 PRETORIA

Telephone: (012) 261121/5

The researcher responsible for the investigation is Mr P Ellis.

HIERDIE VERSLAG IS OOK IN AFRIKAANS BESKIKBAAR

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CHAPTER 1

INTRODUCTION

1. The abuse of alcohol is an age-old transgression that often leads to the commission of serious offences. The blame to be attached to a person who has committed an offence in a state of intoxication is a matter that has exercised legal minds for many centuries. The general public seems to be opposed to the idea that a person who has committed an offence could be acquitted by reason of his lack of criminal responsibility through intoxication or that intoxication could be taken into account as a mitigating factor for purposes of sentence. This was, inter alia, borne out by the following item for discussion included in the 1982-agenda of a National Party congress:

> Congress is concerned about the apparently increasing number of cases of murder, homicide and other crimes committed in our country under the influence of liquor or drugs where this fact is adduced as an extenuating circumstance. Although the discretion of the courts should in no way be interfered with, Congress would like a thorough investigation to be instituted into the matter.

2. You requested the South African Law Commission to consider this matter and it was included in the Commission's Programme in January 1983 under the title: Offences committed under the influence of liquor or drugs.

3. The matter has been researched in the light of the historical background and the present legal position in South Africa. Attention has been given to intoxication as an element of an offence, intoxication as a defence and intoxication as a mitigating factor. A comparative study of how the matter is dealt with in certain other legal systems has also been made. The Commission's tentative findings were embodied in a Working Paper published on 26 July 1984 for general information and comment. The names of persons and institutions that have commented on the Working Paper appear in Schedule B. Two persons asked to give oral evidence on this matter. The Commission's Working Committee heard this evidence which is dealt with below.

4. Although the inquiry deals primarily with drunkenness, it has been extended to cover drugs because the same questions as to blameworthiness and mitigation arise with regard to offences committed under the influence of certain types of drugs.

5. Finally it should be noted that the term drunkenness is used to denote the condition of a person under the influence of liquor (i e alcoholic intoxication) and drug intoxication is used to denote the condition of a person under the influence of drugs. (The term intoxication is also used in the sense of drunkenness in phrases such as "involuntary or voluntary intoxication".)

6. The research was done by the secretariat of the Commission. Independent additional research on the question of the onus of proof was done by the Chairman.

PART ONE: SUBSTANTIVE CRIMINAL LAW

CHAPTER 2

HISTORICAL SURVEY

1. INTRODUCTION

1.1 The old writers distinguished between the following types of circumstances giving rise to drunkenness:

(a) Involuntary drunkenness: This occurs where a person is not to blame for his state of intoxication; for instance, where his drinks have been "spiked" or where he is ignorant of the nature or effect of drinks consumed by him.

(b) Deliberate drunkenness: Where a person fortifies himself with liquor with a view to committing an offence - the so-called actio libera in causa.

(c) Voluntary drunkenness: Where a person gets drunk of his own accord and in his drunken state commits a crime which he did not plan while he was still sober.

1.2 The old writers were unanimous in their approach that deliberate drunkenness was no excuse and offences committed while drunk were punished with the ordinary penalty or even with a more severe penalty. Offences committed in circumstances of involuntary drunkenness were not punished.[1] This was the approach down the ages and so it is today.[2]

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1 Snyman Dronkenskap as verweer in die strafreg (Unpublished LLM thesis: UNISA) at 12-13 (hereinafter referred to as Snyman Dronkenskap).

2 Cf however Chapter 5 paragraph 3.4 sqq.

1.3 More problematic, however, is voluntary drunkenness. The old writers distinguished between different degrees of drunkenness. Attention will be focused mainly on the following aspects:

(a) the culpability of a person who has committed an offence in a state of drunkenness;

(b) the punishment meted out to the offender; and

(c) the justification for (a) and (b) above.

2. ROMAN LAW

2.1 In Roman law there is hardly any indication of a general approach towards the drunk offender. This is so because the Roman criminal law developed casuistically.

2.2 In the writings of the Stoic Seneca[3] and of Quintilian[4] one finds, on ethical grounds, an extremely ruthless attitude towards drunk offenders. Although Seneca regards drunkenness as "self-induced insanity",[5] he draws attention to the serious misdemeanours that can result from the abuse of alcohol. Quintilian, following Aristotle, proposed a double punishment for the drunk offender.

2.3 In the Corpus Juris Civilis one finds mainly three starting points:

(a) D 48.19.11.2: In this text a distinction is made between crimes committed with malice (proposito), impulsively (impetu), and by accident (casu). The first category includes the actions of

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3 c 3 BC-65 AD Epistulae Morales ad Lucillium Ep 83.

4 35 - c 100 AD; 1937 THRHR 291.

5 Campbell Seneca: Letters from a Stoic at 143 translates "voluntaria insania" with "self-induced insanity".

highwaymen, while the last covers hunting accidents. The drunk was regarded as a person who acts impulsively. The full punishment was meted out to those in the first category.[6]

(b) D 48.3.12: This text states that a soldier who, in his drunken state, allows a prisoner of war to escape should not be punished as severely as one who did the same while sober.

(c) D 49.16.6.7: In this text it is stated that Emperor Hadrian decreed that a soldier who injured himself in a drunken state should be punished less severely than one who did so while sober.[7]

3. THE ITALIAN JURISTS OF THE SIXTEENTH CENTURY

3.1 The next step in history that influenced our law relating to drunkenness is found in the writings of the sixteenth century Italian jurists Clarus and Farinacius.

3.2 Clarus (1525-1575)[8]

Clarus poses the question whether a drunk offender should be excused on account of his drunkenness. He then replies that such an offender should be excused of dolus (intention) but not of culpa (negligence). In the latter instance the offender should not be punished with a poena ordinaria (ordinary punishment), but with a poena extraordinaria (extraordinary punishment). From the context it may be inferred that a more lenient

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6 Verloren van Themaat "Die beregting van misdrywe in 'n toestand van dronkenskap gepleeg" 1937 THRHR 291; Van der Merwe Die leerstuk van verminderde strafbaarheid (Unpublished LLD thesis: UNISA) at 140.

7 Ibid.

8 Sententiae Receptae 5.60.12; Cf also Verloren van Themaat 1937 THRHR 272; Snyman Dronkenskap 4; Van der Merwe op cit 142.

punishment is meant by the words poena extraordinaria. He stresses the fact, however, that a drunk offender should not go unpunished.

3.3 Farinacius (1554-1613)[9]

This author explains the apparent anomaly of the punishment of a drunk offender as follows:[10]

> The punishment with which the drunk is punished is not imposed upon him for the crime committed in drunkenness, for which he had no dolus or culpa, but only for the guilt and frivolity in becoming drunk.

4. THE GERMAN JURISTS

4.1 The question of the culpability of drunk offenders also received the intensive attention of the German jurists from the 16th to the 18th centuries. The importance of these writers is that they were frequently quoted as authority for the views of later Roman-Dutch writers.

4.2 Andreas Gaill (1526-1587)

4.2.1 From the early period of reception of the Roman law in Germany, this writer commented extensively on the subject. He contended that drunkenness was no excuse but only a ground for mitigation of punishment, provided that the drunkenness was magna ebrietas (gross drunkenness).[11] However, sometimes drunkenness was an aggravating factor,[12] especially in the case of a habitual drunkard. Gaill distinguishes between occasional

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9 Praxis et theoria criminalium rerum 3.93; 1937 THRHR 292.

10 Translation. The text reads: "ut poena qua afficitur ebrius non ipsi imponatur ob delictum in ebrietate commissum, in quo nec dolum nec culpam habet, sed tantum pro culpa ac levitate quam commissit se inebriando".

11 Practicae observationes 2.110.24: "Ebrietas non excusat a delicto" and "ebrietas magna delictum attenuet".

12 Ibid. "Imo ebrius homicidium committendo dupliciter peccat: Primo: propter ebrietatem, deinde propter homicidium".

drunkenness (ebrietas or Trunkenheit) and habitual drunkenness (ebriositas or Vertrunkenheit, Gewonheit voll zu sein).[13] In the former instance the accused ought to be punished less severely because dolus et voluntas is absent. In the latter instance the accused is given the ordinary punishment because he got drunk knowing that he might commit a crime in his drunkenness.[14]

4.2.2 When mitigation of punishment is allowed, the degree of drunkenness has to be considered. He therefore distinguishes between slight and gross drunkenness. In the former instance, the offender is given the ordinary punishment. In the latter instance the punishment is mitigated, the reason being that drunkenness negatives dolus but not culpa.[15]

4.3 Carpzovius (1595-1666)

4.3.1 After an extensive discussion of the theological abhorrence of drunkenness, he lays down the rule that excessive drunkenness excuses the accused from ordinary punishment.[16] However, he sets the following limitations to this general rule:

(d) slight drunkenness is no excuse;[17]

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13 Op cit 2.110.28.

14 Op cit 2.110.29. "Et homicidium per talem ebrium commissum poena ordinaria puniendum est: maxime se ebrius consueverit esse rixosus et excitare turbas, sciatque se ebrium tali vitio laborare". Although only the term "ebrius" is used here, he defines it as someone ... "quis ex habitu et consuetudine sciens prudensque inebriatur".

15 Ibid. "Praeteria ista accipienda sunt de summa et enormi ebrietate, quae hominis rationis usu privatet dolum in delicto, sed non culpam tollit; non de levi ebrietate quae extraordinaria homicidum non excusat".

16 Practica nova imperialis Saxonica rerum criminalium: Quaestio 146.32: "Pono regulam: Quod ebrietas immodica delinquentem a poena excuset ordinaria".

17 Quaestio 146.48.

(e) the accused must subsequently have shown remorse for the crime;[18]

(f) a person who gets drunk knowing that he is prone to commit crimes in that state must receive the ordinary punishment.[19]

4.3.2 Carpzo us finds the reason for the more lenient punishment of a drunk offender in the absence of evil intent, his mentis alienatio (loss of reason) and his privatio intellectus (deprivation of mental faculties).[20]

4. Leyser (1683-1752)

4.4.1 Leyser states that drunkenness has the effect of mitigating punishment if the following requirements are met:

(a) that the perpetrator did not get drunk with the intention of committing a crime;

(b) that, in the judge's view, the drunkenness was of the most extreme degree; and

(c) that the perpetrator had subsequently shown remorse.[21]

4.4.2 He also draws attention to the fact that the advocates of Helmstadt delivered an opinion in December 1726 laying down four additional requirements:

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18 Quaestio 146.55.

19 Quaestio 146.58.

20 Van Hoogendorp Verhandeling der lÿfstraffelijke misdaaden en haare berechtinge (1752) translates these terms as "vervreemdinge of ballingschap des verstands".

21 Meditationes ad Pandectas (Vol 9) sp 599.7: "Nos tria requirimus ad hoc, ut homicida ab ultimo supplicio liberetur, 1) ut ebrietatem non studio captarit, sed casu quodam in eam incederit, 2) ut enormissa feurit quod arbitrio iudicis dijudicandum relinquimus, 3) ut discussam crapulam poenitentia sequatur".

(a) that the accused had previously led a quiet and exemplary life;

(b) that the deceased had given him reason to become violent;

(c) that he had been locked up for a day; and

(d) that his wife and children would face ruin if the supreme penalty were imposed on him.[22]

4.4.3 Leyser limits this concession to the case where someone has been killed by the accused.

4.4.4 Leyser refers to D.49.6.6.7 as authority for his viewpoint.[23]

4.5 Boehmer (1715-1797)

In his commentary on Carpzovius, Boehmer rejects the distinction between the ebrius (occasional drunk) and ebriosus (habitual drunk) but distinguishes between slight and gross drunkenness.[24] He finds culpa in all cases of voluntary drunkenness. The drunk offender should never go unpunished but should be punished with a poena extraordinaria.[25]

5. THE ROMAN-DUTCH JURISTS

5.1 The School of Louvain

5.1.1 Damhouder (1507-1581)

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22 Ibid. "4) vitam ante tranquille placideque actam, 5) causam rixae ab occiso datam, 6) diurnitatem carceris post confessionem, 7) calamitatem uxori ac liberis suis immitentem, allegabat".

23 See discussion of the text (supra).

24 Observationes selectae ad B. Carpzovii nova rerum criminalium practica Observatio 1 ad quaest 46 n54; Cf Van der Merwe op cit 149.

25 Ibid.

A study of the writings of this author produces no clarity. The matter is approached differently in his Latin work, De practica rerum criminalium (1551), and in the Dutch translation thereof, Practijcke in crimineele saecken (1555).[26]

Even in the Latin version one finds a confusing exposition of the subject. Van der Merwe[27] states that Damhouder first draws up a list of persons who are excused from all crimes (qui excusandi, non puniendi, ob dilicta commissa) - including the drunk without volition - and criminals who are only excused from homicide (qui ab homicidio excusandi) among whom he once again includes the drunk.[28]

5.1.2 Peckius (1529-1589)

This writer asks the question whether the drunk should go scot free or only be punished less severely.[29] He does not however answer this question directly. With reference to the Placaats of Charles V,[30] in which increased penalties were decreed for certain drunk offenders, Peckius states that the ebriosus should undergo the full punishment as decreed in the Placaats, because he does not lack culpa if he gets drunk daily.[31] He does not, however, answer the question with regard to the ebrius.

5.1.3 Wesembecius (1531-1586)

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26 For the purposes of this report the Latin version is accepted.

27 Op cit 143.

28 Cf generally Snyman Dronkenskap 6 and Van der Merwe op cit 143.

29 Regulae iuris pontificii Reg 23.2.

30 For a discussion of these Placaats see S v Johnson 1969 1 SA 201 (A) where Botha JA decided that these Placaats do not apply in South Africa.

31 Op cit Reg 23.3.

In contrast to Peckius, he gives direct attention to the ebrius.[32] He says that, although dolus is absent in the ebrius, he still has culpa having engaged in something unlawful.[33] He then refers to the custom of his time, namely that gross drunkenness mitigated punishment.[34] The reason for this mitigating effect was the absence of dolus.[35]

5.1.4 Zypaeus (1580-1650)

Zypaeus describes the practice of his time with regard to the present theme.[36] He states that although Charles V had laid down strict measures with regard to drunkenness, it was nevertheless customary to punish a drunk offender less severely.[37] Although he uses the term delictum minuit, this cannot be understood to mean the doctrine of crime reduction.

5.2 Dutch authors of the seventeenth century

5.2.1 Matthaeus II (1601-1654)

Matthaeus discusses the subject extensively.[38] He regards drunkenness as an impulse which should be taken into account in mitigation.[39] With

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32 Commentarii in Pandectas Ad D 48.8 par 24.

33 Ibid. "etsi enim dolus abest, tamen per culpam adest, quia opera datur rei illicitae, casus subsequens excusare non videtur".

34 Ibid.: "Magna ebrietas quae mentem aufert poenam mitiget, parva non item".

35 Ibid.

36 Notitia juris Belgici p231.

37 Ibid. "Et quamvis Carolus V decreverit ne homicidia pretextu ebrietatis excusata essent veniave iis daretur, sed duplici poena rei punirentur, tamen id usu receptum non est: sed ebrietas minuit delictum usu patriae".

38 De criminibus 48.18.

39 Ibid.

reference to Gaill[40] he distinguishes between the ebrius[41] and the ebriosus.[42] The former is punished less severely because he acts impulsively (impetu) whilst the latter does not.[43]

He refers to 1 Corinthians 6 as justification for his view that a drunk offender may not go unpunished, and says that occasional drunkenness is a serious sin, and habitual drunkenness even worse.[44]

Although he equates drunkenness with insanity,[45] it cannot be inferred that these two should be treated alike. Furthermore, it is interesting to note that Matthaeus expresses doubts about the effectiveness of legislative measures to curb alcohol abuse.[46]

5.2.2 Groenewegen (1613-1652)

This author briefly states the legal position with reference to Gaill, Carpzovius and Wesembecius. He states that the ebrius is excused from the

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40 Supra.

41 De criminibus 48.18: "Intelligimus per ebrios illos, qui non pro more poculis indulgent, sed forte inebriantur, dum aut suas, aut vini vires ignorant, aut coguntur a protervis et intemperantibus convivis paria cum hisdem facere".

42 Ibid: "Ebriosi sunt, qui prava potandi consuetudine delectantur: non solum si die noctibus continent, sed si vel saepius, licet non cotidie bibant".

43 Ibid.

44 De criminibus 47.6.5: "Quod de foeneratione et alea diximus, id idem intellegendum de ebrietate: nempe grave quidem peccatum esse ebrietatem, gravius ebriositatem, cum Paulus Apostolus 1 Corinth 6 ebriosos jungat scortatoribus et raptores".

45 De criminibus: Prolegomena 2.14.

46 De criminibus 47.6.5.

normal punishment for murder, unless he was only slightly drunk.[47] According to him, this is the position in spite of the Placaats of Charles V.

5.2.3 Van Leeuwen (1626-1682)

Van Leeuwen argues that the Placaats of Charles V altered the legal position effectively.[48]

Before the Placaats gross drunkenness had excused a person from dolus, while the maxim "wat men dronken doet, moet men nugteren boet" applied after the coming into operation of the Placaats. By way of illustration he refers to the case of Syvert van der Have, whose plea in Delft in 1651 did not succeed and who was found guilty of murder and beheaded.[49]

However, Van Leeuwen is willing, in less serious matters, to attribute a mitigating effect to drunkenness.[50]

5.2.4 Ulric Huber (1636-1694)

This Frisian jurist suggests that a drunk offender should not lightly escape the consequences of his actions.[51] Although he acts unknowingly, his ignorance is not the cause of his actions, but the drunkenness which he did not take care to avoid. It is not clear what exactly is meant here. Snyman[52] suggests that Huber meant that drunkenness leads to ignorance,

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47 De legibus abrogatis ad D.49.16.6 and 7: "Adde quod vel ille Doctores qui ebruim ab ordinaria homocidii poena excusant id obtinere negant in modica ebrietate, in qua mentis alienatu et oblivis non ommino deprehenditur".

48 Rooms-Hollands regt 4.32.5; 4.34.8.

49 Ibid. See discussion of this case infra.

50 Ibid.

51 Heedendaagsche rechtsgeleertheydt 6.1.18.

52 Dronkenskap 7.

but because drunkenness is the cause of the ignorance, this ignorance cannot excuse.

5.2.5 Voet (1647-1713)

The discussion of the subject by Voet throws more light on the subject. His discussion is not clouded by t : Placaats of Charles V, for he describes the development of the Roman law.

Voet asserts that drunkenness is a ground for mitigation of punishment.[53] He explains this principle with reference to insanity: although on the face of it there appears to be a similarity between an insane person, a sleeping person and one who is drunk, because the minds of all three are clouded, the drunk person should not be acquitted, because he allowed himself to get drunk.[54] He then refers with approval to an observation by Marcianus, who said that the drunk person transgresses, not by reason of casus fortuitus (fortuitously), but by reason of impetus (impulsively).[55]

5.2.6 Van Zurck (1656-1726)

This author merely states, with reference to the Placaat of 1545, that murders or other delicts committed during "Kermisse" (fairs) may not be mitigated,[56] and further that drunkenness serves as no excuse and no mitigation may be granted in the case of homicide by a drunk person.[57]

5.2.7 The case of Syvert van der Have[58]

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53 Commentarius ad Pandectas 48.8.9. In fin.

54 Op cit 47.10.1.

55 Ibid. It is uncertain what Voet means in the following paragraph where he writes about "non simpliciter ebrii".

56 Codex Batvus 315.

57 Op cit 316.

58 This sorry tale was recorded in the Hollandsche Consultatien Vol 4 Cons 292 sqq.

This case presents an illustration of how a drunk offender was dealt with in practice. The facts of the case were as follows. On Sunday 17 April 1651 Syvert met an old friend in Delft. This friend decided to entertain the honourable Syvert, to such an extent that Syvert became very drunk. On his way home in the "Akkersteegje" Syvert became involved in a fight. Youths and hooligans started throwing stones at him. Inflamed by liquor he drew his rapier, drew his hat over his eyes and killed Adriaan Gerritz van Beyeren.

After having confessed his guilt and being tried, he received the death sentence. On his application for reprieve ("Requirant van Remissie") his lawyers submitted that "in alle delicten principalijken moet ingezien werden de wille van de delinquanten; en dat die gene in wie de wille deficieert niet werd verstaan crimen te committeren; als by exempel kleine kinderen, menschen die slapen of die dol en berooft zijn van zinnen ... En dat ook om die redenen eenige menschen geheel dronken zijnde (hoewel de dronkenschap door eigen faute toe komt) evenwel door gebrek van wille niet mogen gestraft werder met de ordinaris straffen". It may be inferred from the context that mitigation of punishment is meant here and not acquittal.

This "Requirant van Remissie" was supported by an opinion of one Van Andel and six other jurists. In this opinion the position is explained as follows:

(a) A drunk person suffers from a mentis exilium and he lacks the capacity to direct his life correctly.

(b) With reference to the above-mentioned authors it is submitted that the drunk person lacks dolus although not culpa. Therefore he should be punished with a poena extraordinaria.

This opinion was submitted to the Court of Holland on Saturday 6 May 1651. This court did not however agree with the opinion and ordered that Syvert be beheaded in public.[59]

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59 Cons 294.

5.3 The authors of the eighteenth century

5.3.1 Moorman (1696-1743)[60]

Moorman proceeds on the assumption that the Placaats of Charles V no longer applied, and therefore states the pure common law position of his time.[61] He submits that it is commonly held by jurists that there shou be a distinction between the ebrius and the ebriosus. The former is entitled to mitigation provided he was dead drunk, while the latter was not entitled to mitigation.[62] He justifies his contention by saying that the ebrius lacks evil intent but the ebriosus[63] does not.

Moorman also suggests that the Legislature should make drunkenness as such punishable.[64]

5.3.2 Kersteman (1728-1792)

Kersteman is in direct opposition to Moorman. He states that the general view of his time was that a person who commits a crime while excessively drunk deserves no mitigation.[65]

5.3.3 Van der Keessel (1738-1816)[66]

With regard to homicide he states that drunkenness should be a ground for mitigation of punishment because drunkenness does not allow the unimpaired

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60 Cf in general Snyman Dronkenskap 10-11; Van der Merwe op cit 148.

61 Verhandelinge over de misdaaden en der zelver straffen 2.25 and 2.26.

62 Op cit 2.29.

63 Op cit 2.26

64 Op cit 2.28.

65 Hollandsch rechtsgeleerd woordenboek 112; Cf also Snyman Dronkenskap 11.

66 Cf generally Snyman Dronkenskap 11 van Van der Merwe op cit 149.

functioning of the mind.[67] With reference to Matthaeus he states that the general view is that there is a distinction between the ebrius and the ebriosus. The former deserves mitigation but not the latter. With reference to Leyser he lays down three prerequisites for drunkenness as a ground for mitigation of punishment:

(a) that the drunkenness came about not studio (intentionally) but casu (fortuitously);

(b) that the drunkenness, in the judge's opinion, was summa ebrietas (gross drunkenness);

(c) that the drunkenness was followed by remorse.[68]

With regard to offences other than murder committed in drunkenness, Van der Keessel states that the accused may be fined.[69]

5.3.4 Pauw (1712-1787)

Willem Pauw reflects a picture of the administration of justice in his reports on the legal decisions of the eighteenth century.[70] He describes a murder that occurred in Amsterdam in 1778. A dissolute sailor Sejus[71] had lost his heart to the prostitute Thaïs. However, she continued her objectionable trade and Sejus took to drink. After repeated threats to kill her, Sejus

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67 Praelectiones ad ius criminale 48.8.8.

68 Ibid. "Condiciones itaque exigit tres ut ebrietati aliqua venia detur, primo, ut non studio fuerit captata, sed casu reus in eam inciderit; secundo ut fuit summa ebrietas, cujus rei judici arbitrium permittit; tertio poenitentia sequatur".

69 Op cit 47.8 Appendix 2.2: "... cum absque insigni malitia in ebrietate vel per lasciviam damnum, licet forte majoris momenti sit, datum est. Quibus casibus lex permittit illud puniri mulcta pecuniaria, numquam tamen excedente quingentos florenos".

70 Observationes tumultuariae novae Obs 1564.

71 The names are fictitious.

carried out his threat while she was in the company of one Maevius one night. Sejus was drunk. On 28 January 1779 he was sentenced to death by the Court of Amsterdam. The Court of Holland however mitigated the punishment on appeal from execution on the gallows to execution by beheading. He then appealed to the Hooge Raad. The finding was confirmed but the Hooge Raad decided on the (more dishonourable) punishment on the gallows.

With regard to Sejus's plea for mitigation on account of his drunkenness Pauw states that drunkenness caused fortuitously or at the instigation of someone else may be an excuse, but not voluntary drunkenness. He then states that Sejus knew that when drunk he entertained murderous feelings towards Thaïs and that he had formed the intention to murder her, despite his drunkenness.[72]

5.3.5 Van der Linden (1756-1835)

This author submits that drunkenness is in itself wrongful and therefore no sufficient excuse.[73] However, the judge should sometimes mitigate punishment: "Heeft de dronkenschap, schoon vrijwillig op den hals gehaald zijnde, eene geheelde sinneloosheid te weeg gebragt, is er geen blijk van een vooraf genomen voornemen om te misdrijven, en betoont integendeel de misdaadiger een opregt berouw, zoo kunnen er zomtijds redenen tot verzagting van straf zijn".[74] He stresses however that everything will depend upon circumstances. Van der Linden adds that the judge should not lightly accept drunkenness as a good defence.[75]

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72 Feenstra, Van Warmelo and Zeffertt Some cases heard in the Hooge Raad reported by Willem Pauw 75 sqq state that Sejus's plea for reprieve to the Prince of Orange secured for him the less dishonourable punishment of beheading.

73 Koopmans Handboek 2.1.4.9.

74 Ibid.

75 He refers to the above-mentioned texts of Leyser and Carpzovius as authority.

It is most important to note that this dictum of Van der Linden appears under the heading "Van de Misdaaden in het algemeen". This justifies the inference that this concession was available to all who were tried for any crime and was not limited to homicide.

6. CONCLUSION

6.1 Our common law never recognised drunkenness as a complete defence against criminal liability.

6.2 From the Roman period up to the end of the eighteenth century in Holland our common law developed in such a way that voluntary intoxication could be pleaded as a ground for mitigation in court proceedings with regard to any crime.

6.3 The courts were always reluctant to accept drunkenness as a ground for mitigation.

6.4 Although most of the old authors are vague about the ratio for the mitigating effect of drunkenness,[76] the development, up to the end of the eighteenth century in Holland, is correctly reflected by Van der Merwe where he states:[77]

> This mitigation of punishment is normally justified by seeing it as a case of culpa. Carpzovius specifies this culpa further as an imputation against a person because he drank while he should have foreseen the consequences of his drunkenness.

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76 Cf De Wet and Swanepoel Strafreg (Vierde uitgawe) 124.

77 Van der Merwe op cit 151. Our translation.

CHAPTER 3

DRUNKENNESS OR DRUG INTOXICATION AS AN ELEMENT OF CRIME IN SOUTH AFRICA

1. INTRODUCTION

There are many enactments in South Africa that were designed to control and regulate the abuse of alcohol and drugs.[1] In this chapter attention is focused on some of the offences of which drunkenness is an element in an endeavour to discover the ratio behind such provisions.

2. DRUNKENNESS AS AN ELEMENT OF CRIME

2.1 Drunkenness in a public place

2.1.1 Section 186(g) of the Liquor Act 87 of 1977 reads:

> Any person shall be guilty of an offence if he is drunk, violent, or disorderly upon any licensed premises or any premises upon which any person is authorized under this Act to sell liquor without a licence, or is drunk in or near -
>
> (i) any road, street, lane, thoroughfare, square, park or market place; or
>
> (ii) any shop, warehouse or public garage; or
>
> (iii) any place of entertainment, café, eating house, race course or other premises or place to which the public are granted or have access, whether or not the right of admission be granted on payment or be reserved to any class.

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1 Cf in general Milton and Fuller South African criminal law and procedure (Vol III: Statutory offences) at 589-90.

2.1.2 The penalty for contravention of this section is a fine not exceeding five hundred rand or in default of payment imprisonment for a period not exceeding six months.[2]

2.1.3 This section makes drunkenness on licensed or public premises an offence. Normally prosecutions are instituted only against persons who are in an advanced state of drunkenness and who are disorderly or who make a nuisance of themselves or pose a danger to themselves or to others. Despite the severe penalty provision, fairly small fines are imposed as a rule. In recent times it has become the custom in certain areas to arrest the drunk person and to detain him until he is sober and then to withdraw the charge and release him. The aim is to protect the offender as well as the public and not to prosecute him for drunkenness.

2.2 Driving under the influence of liquor or drugs[3]

2.2.1 Section 140(1) of the Road Traffic Ordinance, 21 of 1966, reads:

> Any person who on a public road-
>
> (a) drives a vehicle, or
>
> (b) occupies the driver's seat of a motor vehicle, the engine whereof is running, while under the influence of intoxicating liquor or a drug having a narcotic effect,
>
> shall be guilty of an offence and liable on conviction to a fine not exceeding eight hundred rand or to imprisonment for a period not exceeding two years, or to both such fine and such imprisonment.

2.2.2 Section 140(2) of the Road Traffic Ordinance, 1966, reads:

> Any person who on a public road-
>
> (a) drives a vehicle, or
>
> (b) occupies the driver's seat of a motor vehicle, the engine whereof is running, while the concentration of alcohol in any specimen of

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2 Sec 187(1)(a) of the Liquor Act, 1977.

3 Sec 140 of the standard Road Traffic Ordinance 21 of 1966.

blood taken from any part of his body is not less than nought comma nought eight gram per one hundred millilitres

shall be guilty of an offence and liable on conviction to a fine not exceeding four hundred rand or to imprisonment for a period not exceeding one year, to to both such fine and such imprisonment.

2.2.3 The ratio for these measures is well known, i e the danger inherent in the driving of a vehicle in circumstances where the driver does not have full control over his faculties.[4]

2.3 Drunkenness on railway premises

2.3.1 Section 59(1)(c) of the South African Transport Services Act, 65 of 1981, reads:

> Any person who within the area of the South African Transport Services ... is in a state of intoxication, or behaves in a violent or offensive manner, to the annoyance of others ... shall be guilty of an offence and liable on conviction to a fine not exceeding fifty rand or, in default of payment, to imprisonment for a period not exceeding three months or to both such fine and such imprisonment ...

2.3.2 Liability based on this section is limited to drunkenness within the jurisdiction of the Transport Services.[5] The ratio for this offence appears to be the averting of conduct that might be harmful or offensive to users of the Transport Services.

2.4 Drunkenness in the Defence Force

2.4.1 Section 33 of the Military Discipline Code[6] provides:

> Any person who-

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4 Cf (H R Hahlo) and (E Kahn) "The menace of the drunken driver" 1953 SALJ 85.

5 This Act also contains a number of measures relating to the control of the distribution and use of liquor in the Service.

6 As contained in the First Schedule to the Defence Act 44 of 1957.

(a) is drunk whether on or off duty; or

(b) unfits himself for the proper performance of his duty by excessive use of alcohol or narcotic drugs,

shall be guilty of an offence and liable on conviction, if he committed the offence while on service and on duty, to imprisonment for a period not exceeding one year, and in any other case, to imprisonment not exceeding three months.

2.4.2 Liability under this section is limited to members of the South African Defence Force.[7] The ratio for this offence appears mainly to be aimed at the maintenance of discipline in the Defence Force.

2.5 Conclusion

2.5.1 Drunkenness in itself is no offence at common law. The Legislature has, however, created specific offences of which drunkenness is an element or the main element. Penalties are imposed upon persons whose drunkenness constitutes a danger to themselves or to others or where their drunkenness violates the norms of public decency. Except in the case of drunken driving, which is regarded as a very serious offence, the penalties imposed for drunkenness are generally light.

2.5.2 The principle of making drunkenness punishable in particular circumstances does not give rise to appreciable difficulties. In such cases the issue generally revolves round the factual question of drunkenness or the degree of drunkenness of the accused. The question as to whether the accused was in fact capable of committing the actus reus complained of almost never arises. It should be noted that the degree of drunkenness in these offences often plays an aggravating role with regard to punishment.

3. DRUG INTOXICATION AS AN ELEMENT OF A CRIME

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7 Sec 104(5) of the Defence Act 44 of 1957.

3.1 Drug intoxication in itself is no crime in South Africa. The use or possession of certain drugs has, however, been rendered punishable by the Legislature. The use of drugs is a prerequisite for drug intoxication and will therefore be dealt with here.

3.2 Use of dependence-producing drugs

3.2.1 Section 2(b) of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971 provides that notwithstanding anything to the contrary in any law contained, any person who has in his possession or uses any prohibited[8] dependence-producing drug or any plant from which such dependence-producing drug can be manufactured shall be guilty of an offence.

3.2.2 The penalty for contravention of this section is, for a first conviction, imprisonment of from two to ten years, and for a second and further conviction from five to fifteen years.[9]

3.3 The Medicines and Related Substances Control Act 101 of 1965

3.3.1 This Act created a Medicines Control Council. This Council has a Registrar of Medicines in its employ who keeps a medicines register. In order to enforce the system of medicines control this Act creates a number of statutory offences and inter alia prohibits the use or possession of certain types of medicine.[10]

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8 Sec 2(d) contains a similar prohibition of the possession or use of dangerous dependence-producing drugs, while sec 2(a) and (c) prohibits dealing in such drugs. Prohibited dependence-producing drugs are those contained in Part I of the Schedule while their dangerous counterparts are found in Part II. Cf also clause 15(13) of the Draft Medicines and Related Substances Control Bill, Notice 20 of 1984 in Government Gazette No 9029 of 13 January 1984.

9 Sec 2(iii) and (iv). The minimum penalties do not apply to cases in which dagga are involved. Clause 22(1) of the new Draft Bill provides for a penalty of R50 000 and/or 15 years' imprisonment.

10 Cf e g sec 22A of the Act and Milton and Fuller op cit 476 sqq.

3.3.2 This Act is primarily aimed at the control of medicines and is under review at present.

3.4 Conclusion

3.4.1 Like drunkenness, drug intoxication is no offence at common law. Unlike drunkenness in a public place, drug intoxication in a public place is no crime either. The driving of a motor vehicle under the influence of drugs is, however, an offence.

3.4.2 The Legislature views the abuse of drugs in a very serious light. Provision is made for severe penalties for the unlawful use or possession of drugs. The ratio appears to be the protection of society from the evils of dependence-producing substances.

4. GENERAL CONCLUSION

Although legislation aimed at combating the abuse of liquor or drugs does exist, drunkenness and drug intoxication are not in themselves crimes. It is a well known fact that serious crimes are committed by persons who are under the influence of liquor or drugs. The question is whether the general principles of criminal liability are sufficient to ensure that justice is done in such cases or whether specific offences ought to be created to prevent such persons from escaping liability by reason of their intoxication. These questions are dealt with in the chapters that follow.

CHAPTER 4

DRUNKENNESS OR DRUG INTOXICATION AS A DEFENCE IN SOUTH AFRICA

1. INTRODUCTION

1.1 Although the defence of drunkenness is raised in our courts daily, the defence of drug intoxication occurs very seldom. In principle there should be no difference between these two defences. However, this matter is not always treated in the same way and a separate section will be devoted to drug intoxication.

1.2 With regard to a person's criminal liability for acts committed in a state of drunkenness, three sets of circumstances resulting in the drunkenness are usually distinguished, namely involuntary, intentional and voluntary drunkenness. Involuntary drunkenness leads to a person's acquittal. Intentional drunkenness[1] occurs where a person fortifies himself with liquor with the intent to commit a crime with "Dutch courage" or, as Van der Linden puts it, "met meerder moed en stoutheid".[2] Voluntary drunkenness occurs where a person voluntarily consumes liquor, aware of its intoxicating effect and possibly aware that it might cause him to commit offences, but without the intent to commit any such offence. Each of these sets of circumstances will be discussed more fully below.

1.3 Lastly the law relating to voluntary drug intoxication will be discussed separately.

2. INVOLUNTARY DRUNKENNESS OR DRUG INTOXICATION

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1 The so-called actio libera in causa cases. Cf p 4 para 1 supra.

2 Koopmans Handboek 2.1.4.9.

2.1 As was pointed out above,[3] our old writers who dealt with this subject agreed that involuntary drunkenness is a complete defence to criminal liability. No confirmation could however be found in the contemporary law reports that such a defence had ever succeeded or even that it had been raised.

2.2 South African writers are unanimous in recognising the defence of involuntary drunkenness.[4] In a series of decisions the courts also approved this defence in principle.[5] Nevertheless for years no accused ever raised this defence with success.[6] The first reported case in which this defence succeeded was S v Hartyani.[7] As fas as is known involuntary drug intoxication has never been successfully raised as a defence.

2.3 The justification for the recognition of this defence lies in the fact that no moral blameworthiness attaches to a person who commits a wrong while involuntarily drunk.[8] In S v Hartyani it was decided that the defence of involuntary drunkenness amounted to absence of mens rea on the part of the offender.[9] It may therefore be stated that a person who gets drunk involuntarily and then commits a wrong might be regarded as someone who lacks a blameworthy state of mind with reference to that wrong, depending on the degree of his intoxication.

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3 Cf p 4 supra.

4 Burchell and Hunt South African criminal law and procedure (Vol I: General principles) (Second edition) at 293-4; Snyman Strafreg at 146; Snyman Dronkenskap 88; Bennett 1973 SALJ 69 at 73.

5 R v Bourke 1916 TS 303; R v Innes Grant 1949 1 SA 753 (A); R v Kaukakani 1947 2 SA 807(A); S v Johnson 1969 1 SA 201 (A); R v Ngobese 1936 AD 296; Fowlie v Rex 1906 TS 505; R v Holliday 1924 AD 250; R v Taylor 1949 4 SA 702 (A).

6 Snyman Case note on S v Hartyani 1980 3 SA 613 (T) in 1980 THRHR 445.

7 Supra.

8 Snyman 1980 THRHR 445 on 446.

9 At 624 F of the report.

2.4 Although this defence is recognised in principle the ambit of its application is uncertain. At common law the defence was limited to the accused who took liquor which had been "spiked" without his knowledge and the case of the person who was ignorant of the effect that liquor might have on him. In R v Bourke[10] is was said that:

> If the drunkenness is not voluntary, and it is severe, it is an excuse - that is, if the drunkenness was caused not by the act of the accused person but by that of another, and was such as to make him unconscious of what he was doing, then he would not be held in law responsible for an act done in that state.

2.4.1 In R v Innes Grant[11] Centlivres JA held that where a person gets drunk "through no fault of his own", his guilt depends on the degree of his drunkenness. In S v Johnson[12] Botha JA remarked: "involuntary drunkenness, as a result of which a person acts without being aware of what he is doing, remains an excuse for any misdeed committed in that state"[13]

2.4.2 It therefore appears that this defence is limited in our law to a person:

(a) who is ignorant of the wrong that he commits in his drunken state; and

(b) who got drunk through no fault of his own.[14]

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10 Supra at 307.

11 Supra at 766.

12 Supra at 205 E-F.

13 Our translation and underlining.

14 In R v Kaukakani (supra) at 813 this requirement is further limited to drunkenness caused by "the unlawful act of a third person without the will of the accused".

2.5 Bennett[15] and Snyman[16] suggest that this approach is too narrow and that this defence should be extended to the following cases:

2.5.1 Drunkenness or drug intoxication as a result of error

This includes the case where the person bona fide errs in regard to the nature of the substance that he takes and consequently does not or cannot know that it will inebriate him.[17]

It is suggested that the decision in S v Hartyani,[18] namely that the defence of involuntary drunkenness is tantamount to the absence of mens rea, covers this situation.

2.5.2 Drunkenness or drug intoxication of the addict

The argument here is that the addict has no control over his own will, and cannot therefore form the will to refrain from taking liquor or drugs. This would include the case of a person who in a state of withdrawal breaks into a pharmacy to steal drugs. Bennett suggests that such a person should be able to raise the defence of necessity or even, in appropriate circumstances, automatism.[19] Snyman submits that section 255 of the Criminal Procedure Act 51 of 1977, in terms of which the court may refer the accused to a rehabilitation centre instead of sentencing him, provides statutory recognition of this defence.[20]

The validity of these views is doubtful. This form of involuntary intoxication is analogous to a defence of necessity or impossibility. These

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15 1973 SALJ 69 at 76.

16 1980 THRHR 445 at 446.

17 Ibid at 447.

18 Supra.

19 1973 SALJ 69 at 77.

20 1980 THRHR 445 at 448.

defences are not available to a person who has created the necessity or impossibility himself. If one assumes on the other hand that this defence is tantamount to a defence of the absence of mens rea it cannot correctly be submitted that the addict lacks mens rea. If the accused is charged with an offence requiring intent, as in the example, he, despite his state of withdrawal, still forms the intention to commit a crime - unless he raises the defence of insanity of lack of criminal responsibility, where other rules apply.

2.5.3 Drunkenness or drug intoxication under duress

Under this category would fall the case where a woman is forced against her will to consume liquor or drugs in order to break down her inhibitions and who then performs an unlawful strip-tease. Snyman[21] submits that, according to R v Kaukakani,[22] it is not sufficient that the liquor was given against the will of the accused, it must have happened without his will.

It is submitted that Snyman's distinction is forced and that, in the light of the Hartyani case, no blame should attach to the accused in such circumstances.

2.5.4 Innocent drunkenness or drug intoxication

Snyman takes this to include the case of an accused who had imbibed a quantity of alcohol that itself could not intoxicate him but who does become drunk by reason of some external factor (e g a blow on the head).[23]

It appears that such a case would also fall squarely within the ambit of S v Hartyani and would afford the accused a complete defence, provided that the external factor was beyond the accused's knowledge and control.

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21 Ibid.

22 Supra.

23 1980 THRHR 445 at 448.

2.6 Conclusion

(a) Involuntary drunkenness is a complete defence in the South African criminal law.

(b) The basis of the defence lies in the absence of mens rea on the part of the perpetrator.

(c) In so far as there may be uncertainty about the scope of the defence, it is recommended that the development of the law in this field should be left to the courts.

3. INTENTIONAL DRUNKENNESS OR DRUG INTOXICATION[24]

3.1 All our old writers agreed that a person who gets drunk with the intention of committing a crime cannot be absolved from criminal responsibility for an offence committed in this drunken state. No such case could be found in the law reports of that time.

3.2 Modern South African authors also hold the view that intentional intoxication cannot excuse the commission of an offence. No such case has yet come before our courts. The courts have however repeatedly obiter expressed the opinion that a person cannot raise his drunkenness as a defence in such a case.[25]

Thus in S v Johnson Botha JA said the following:[26]

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24 The actio libera in causa. Cf generally Snyman Dronkenskap 94 et seq; Snyman "Die actio libera in causa" 3978 De Jure 227; Rabie "Actiones liberae in causa" 1978 THRHR 60; Joubert (Ed) The law of South Africa (Vol 6) at 62 (hereinafter referred to as LAWSA); Snyman Strafreg 147 Burchell and Hunt op cit (Volume 1: 2nd edition) at 291.

25 Burchell and Hunt op cit 292 and the authorities cited there.

26 1969 1 SA 201 (A) at 211. Our translation.

> A person who drank himself into a volitionless state for the precise purpose of committing a crime in that drunken state (the actio libera in causa) was, according to our old authors, guilty of the crime committed and not entitled to mitigation. His fault in respect of the crime therefore arose, not when he committed the crime - he was then not criminally responsible or capable of a voluntary act - but when he, in his sober state, drank himself into a volitionless state for the said express purpose thus setting a chain of acts in motion which resulted in the commission of the planned crime.

3.3 Although the decision in the Johnson case was overruled in the Chretien case, this dictum of Botha JA still represents the current legal position.

3.4 In a recent case, S v Baartman,[27] the evidence was that the accused had expressed his intention of inebriating himself and stabbing the deceased to death, an intention which he carried out. The court however found that the accused was criminally responsible when he stabbed the deceased. Steenkamp J also found it necessary to express himself obiter on the matter in the following terms:[28]

> In the light of Chretien's case supra it is, in my opinion, wrong to find a person guilty if he committed a crime while he was not criminally responsible, even though he had intended to commit that crime while still sober. In such a case he might possibly be guilty of attempt to commit such a crime because he had formed an intention and had begun to commit certain acts to carry out his intention. If a person does not know what he is doing, it cannot be alleged that he has carried out the intention previously formed.

3.5 The correctness of this view is questionable. The traditional view is that a person who fortifies himself with liquor in order to commit an offence and does in fact carry out his intent, merely uses his intoxicated body as an instrument in the commission of the offence. It is in any event hard to imagine a situation in which a person is intoxicated to a degree where he is unable to direct his will but nevertheless carries out his original evil intent which he formed while still sober.

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27 1983 4 SA 395 (NCD).

28 At 400 E-G. Our translation.

3.6 In modern literature it is suggested in this regard that liability under the actio libera in causa principle should be extended rather than limited. The following extensions have been proposed:

3.6.1 Liability need not be limited to cases of drunkenness: other cases of criminal incapacity should be included.[29]

3.6.2 Liability should not be limited to cases of dolus directus but should include cases of dolus eventualis.[30]

3.6.3 Liability should not be limited to cases of intent but should be extended to the so-called negligent actio libera in causa, i e where the offender should, while still sober, like the reasonable man, have foreseen that he might commit a crime in his drunkenness.[31] It is submitted, however, that this is something entirely different from intoxication with the intent to commit a crime.

3.6.4 Liability should not be limited to cases where the accused is not criminally responsible, but should also include cases where the perpetrator acts involuntarily.[32]

3.7 It is submitted that these so-called extensions of the actio libera in causa principle are nothing else than the application of the general principles of criminal law. This is an obvious attempt by the authors to found criminal liability of the drunk offender in general in the light of the criticism evoked by the reasoning in the Johnson case. It would be more accurate not to speak of the extension of the "actio libera in causa-soort beginsel" - as it is called by Rabie - but to speak of the application of general principles of criminal law.

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29 Rabie 1978 THRHR 60.

30 Ibid; Snyman 1978 De Jure 228.

31 Rabie 1978 THRHR 60 at 61; Snyman 1978 De Jure 228; Burchell and Hunt op cit 292.

32 Rabie 1978 THRHR 60 at 61.

3.8 Conclusion

(a) Drunkenness, when caused with the intention to commit a crime, is no defence in South African law.

(b) It is submitted that this principle is in accordance with existing legal theory and is sound legal policy that should be retained. There does not appear to be any reason for either the extension or the limitation of this principle.

(c) There is now a dictum, from the Northern Cape Division, that may be indicative of a tendency that drunkenness, even though caused with the intent to commit a crime, may become a complete defence.

4. VOLUNTARY DRUNKENNESS

4.1 Introduction

4.1.1 Legal rules should always be seen in historical perspective. The development of the theory of criminal law over the years should therefore be borne in mind: it would be just as wrong to say that the decision in S v Chretien was wrong in the light of the common law, as it would be to criticise Fowlie v Rex in the light of the Chretien case.[33]

4.1.2 The current theory of criminal law sets the following general requirements for criminal liability:

(a) actus reus,

(b) unlawfulness,

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33 Cf e g the scathing attacks by De Wet and Swanepoel op cit 126 et seq on the old cases in which drunkenness was not recognised as a defence.

(c) mens rea, and

(d) in the case of common law crimes also

(i) causality and

(ii) consequence.

4.1.3 It would be inappropriate to try to force the old judicial decisions into this pattern. The method that will be adopted here will be to analyse the principles applied by the courts to the phenomenon of voluntary drunkenness, against the background of the developing theory of criminal law, and then to evaluate the present position, as represented by S v Chretien.

4.1.4 Three main phases of development may be distinguished:

(a) The period of the doctrine of reduction;

(b) The period of S v Johnson; and

(c) The period of S v Chretien.

4.2 The period of the doctrine of reduction

4.2.1 The theory of criminal law generally accepted during the first half of the twentieth century is summed up in the definition of a crime by Gardiner and Lansdown in consecutive editions of their standard work:[34]

> To constitute a crime three element are essential - (a) a violation of law, (b) the existence in law of a punishment for the violation, (c) a right in the State to ask from the courts that punishment shall be inflicted for the violation.

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34 South African criminal law and procedure: Volume 1 (6th edition) at 1.

4.2.2 In order to constitute a "violation of law", "some overt act or some omission" is required. In cases where mens rea is required, the accused should have entertained a "guilty state of mind at the time when he performed the physical act".[35] An objective evaluation of the facts was made and then it was asked whether any defence could be raised to justify the violation of law, or to negative mens rea. The defences which were judicially recognised, were approached casuistically: it was only later that our modern doctrines of unlawfulness and fault were abstracted from these defences.

4.2.3 One such defence was drunkenness. In contrast to most other defences, drunkenness was no absolute defence, but only a partial defence.[36] The effect of this defence was to reduce the punishment, which was normaliter imposed for a specific crime, in the case of drunkenness to a lesser punishment or to reduce the crime to a lesser crime.

4.2.4 The doctrine of mitigation of punishment

In Fowlie v Rex[37] Wessels J stated the position as follows:

> It would be absurd to say that if a man in his cold, sober senses did the act, he should be punished with no greater severity than the man who did it whilst under the influence of liquor. That there should be a difference in the degree of punishment has been recognised in almost every system of jurisprudence ... although a man may not be so drunk as to be excused the commission of a crime requiring specific intent, yet he may have been so affected with liquor that his punishment should be softened.

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35 Ibid.

36 Snyman Strafreg 148.

37 1906 TS 505 at 511.

This view accords with that of our old authorities,[38] and is an established principle of our criminal law.[39]

4.2.5 The doctrine of reduction of crime

The doctrine of reduction of crime was imported into our law by Wessels J in Fowlie v Rex. This dubious doctrine was based on the specific intent doctrine of the English law, and can only be understood with reference to it. The history and substance of this doctrine have been described fully by Pain[40] who wrote the following:

> The pressing need was to avoid passing sentence of death upon a grossly intoxicated accused. Consequently, the rule was seen as a device to achieve mitigation without complete exculpation in the remaining capital offences against the person, all of which were amenable to reduction to some lesser crime.

Although the rule was originally designed to rescue the accused from the gallows in cases of murder or other capital offences, it was in practice extended to other crimes requiring specific intent.[41] The exact meaning of the term specific intent however remains obscure:[42]

> Although the phrase has become part of the vocabulary of the law, 'specific intent' is nowhere defined; elucidation is attempted by contrasting crimes that do require it and crimes that do not. In other words, a dichotomy of crimes is assumed but the principle of the distinction is not stated: an attempt is made to explain it by using examples. Invariably, however, the examples given demonstrate the use of the term to express mutually exclusive meanings. For instance, murder and burglary are indiscriminately classified as crimes requiring specific intent, but within the general-intent category, are found such disparate offences as manslaughter and assault.

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38 See Chapter 3 supra.

39 Snyman Strafreg 154. See also Chapter 6 infra. Van der Merwe op cit 135.

40 "Specific intent" 1974 SALJ 467.

41 Director of Public Prosecutions v Beard (1920) All ER 21.

42 Pain 1974 SALJ 467 at 472.

> It need hardly be said that, in the absence of agreement as to the meaning and hence the content of at least one of the categories, the exercise is futile. An examination of the English law reveals no such agreement.

Practically speaking it may be said that the rule implied that, in the case of a drunk offender, murder was reduced to culpable homicide, assaults with intent to co..mit another crime to common assault, etc.[43] Where, however, a person committed a crime of which "specific intent" was not an element, e g common assault or culpable homicide, his drunkenness offered no excuse and he was at most punished less severely.[44]

This doctrine of crime reduction has been severely criticised. The main points of criticism are the following:

(a) The doctrine is vague and illogical

Snyman states the following:[45]

> The criticism against the theory is, first, that it is illogical. If the accused is so drunk that he cannot form the specific intent, how can he nevertheless form the ordinary intent (which is, for example, required for assault)? The existence of an ordinary intent remains a fiction in these cases.
>
> The second point of criticism of the theory is that the distinction between crimes requiring a specific intent and crimes requiring an ordinary intent does not make sense. According to what criteria will it be established whether a crime falls under the one or the other category? One seeks an answer to this question in vain. The furthest our courts have gone is to illustrate the distinction; it has never, however, been explained.

(b) The doctrine is an unjustified adoption of English law

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43 Snyman Strafreg 149.

44 R v Innes Grant 1949 1 SA 755 (A).

45 Op cit 149. Our translation.

In Fowlie v Rex[46] Wessels J states:

> Now it is perfectly clear from a series of English decisions that drunkenness cannot as a rule be set up as an excuse for a crime ... but it may sometimes absolve an accused from a particular crime which requires in addition to the ordinary mens rea some specific intent.

Ten years later, in 1916, Wessels J was faced with the same question, this time in a case of rape. He decided the following in R v Bourke:[47]

> Though it has been enunciated in our courts as a principle, I am inclined to agree with the Attorney-General that it would have been wiser if we had left that principle alone and adopted the principle of our own jurists, who would not in such a case have dealt with the intention of the criminal but would have said that it reduced the more serious crime to a less serious one, and as a consequence of this the punishment is less than it otherwise would be, I think this last proposition is only another way of stating the principle approved of by our authorities, that drunkenness serves to mitigate the punishment by reducing the seriousness of the crime.[48]

In this dictum the learned judge tried to undo what he had done in Fowlie's case. This he tried to do, not by rejecting the unsound doctrine he had laid down in Fowlie's case, but by attempting to base this doctrine on so-called common law grounds. The judge, with respect, errs in saying that reduction of the seriousness of the crime is a prerequisite for mitigation of punishment. Although the reduction of murder to culpable homicide[49] was in 1916 a practical prerequisite for the non-imposition of the death penalty, that was not the position with regard to other offences, was not the position in the Roman-Dutch law and was not necessary in South

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46 Supra at 508. In this case the charge was one of malicious damage to property. Wessels J found that specific intent was not required here.

47 1916 TS 303.

48 Our underlining.

49 Or complete acquittal.

Africa after 1935.[50] Nevertheless this fundamental error was to form the basis of the South African law relating to intoxication for many years to come.[51]

4.3 The period of S v Johnson[52]

4.3.1 Since 1906 the theory of criminal law has developed tremendously. Proof of this is to be found in the consecutive editions of the standard work of Gardiner and Lansdown, the appearance of De Wet and Swanepoel's work on criminal law, and the numerous articles on criminal matters. A clear distinction has developed between the actus reus, unlawfulness and mens rea, and the principles applicable to each have been worked out in detail. The drama of S v Johnson was set against this background.

4.3.2 In this case the defence of voluntary intoxication was examined afresh. Without going into detail about the facts, it may be stated that the court found that the accused, because of the influence of the liquor on him, in the circumstances was not conscious of what was happening in the cell, and that, when he killed the deceased by striking him with a bucket, he was not performing a voluntary act because he was not capable of such an act, and that, because of his condition he acted purely mechanically and like an automaton.[53]

4.3.3 On the strength of convincing and overwhelming Roman-Dutch authorities, the Appellate Division decided per Botha JA that a voluntary act or omission, in the sense that the accused was capable of deciding whether to act or not, was a fundamental requirement of criminal

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50 Sec 338 of the Criminal Procedure and Evidence Act 31 of 1917, as amended by secs 34 and 61 of the General Law Amendment Act 46 of 1935; Pain 1974 SALJ 467 at 479.

51 Pain op cit 483 and the authorities cited by him.

52 1969 1 SA 201 (A).

53 At 203-4 of the report.

responsibility.[54] In applying this to the facts, the court held[55] that because a fundamental requirement of criminal responsibility was absent, it had to follow that the appellant could not be held criminally liable for the death of the deceased.

4.3.4 Directly contrary to this principle is the principle that drunkenness is not accepted as a complete defence in common law.[56] After an exhaustive discussion of the common law sources, the learned judge of appeal came to the following conclusion:[57]

> From what our old writers ... say, it is clear that voluntary drunkenness was no excuse for a wrong but was at most a ground for mitigation of sentence: Here I mean such a degree of drunkenness that the perpetrator had lost volition and was not conscious of what he was doing and that, when he committed the act, he was not capable of performing a voluntary act or was not criminally responsible.[58]

4.3.5 The court was not prepared to depart from the above-mentioned common law approach. Botha JA realised however that this approach was open to criticism on grounds of principle and attempted to explain the decision as follows:

> His guilt therefore arose, not when he committed the wrong, but when he, while still sober, improperly inebriated himself, which led to loss of volition and the commission of the wrong. A person who committed a wrong in a state of drunkenness was therefore not punished because, despite his unawareness, he performed a voluntary act and was criminally responsible, but because, when he was still capable of a voluntary act and was criminally responsible, he improperly inebriated himself and placed himself in a condition which led to the commission of

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54 At 204 F.

55 At 205 C.

56 At 205 D.

57 At 210 H. Our translation.

58 Cf also Chapter 3 supra.

the wrong. That is why, in the case of a wrong committed in a state of involuntary drunkenness, the perpetrator would be guiltless.[59]

It is true, as Carpzovius correctly admits, that the drunk is punished not so much for the crime as for the drunkenness itself. The reprehensibility of the abuse of liquor is projected, as it were, on to the wrong committed in drunkenness, and the guilt of the perpetrator with regard to that wrong, is based on the reprehensibility of his abuse of liquor which led to the wrong.[60]

4.3.6 The court did not however reject the specific intent doctrine expressis verbis.[61] Because the decision of the court is based on grounds not reconcilable with this doctrine, the inference is justified that this English doctrine was rejected by implication by the Appellate Division.[62]

4.3.7 This decision of the Appellate Division was criticised from nearly every quarter.[63] Two points of criticism in particular are levelled against this decision:

(a) This decision is tantamount to an application of the versari in re illicita doctrine.

Although this is expressly denied by the learned judge, the authors submit[64] that the effect of this decision is nothing else than an application of the versari doctrine. It is then stated that, if the versari doctrine is objectionable because a person is punished for the consequences of a crime,

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59 At 211 C-E. Our translation.

60 At 212. Our translation.

61 At 205 D-G.

62 This doctrine was however again applied in the second Johnson case, S v Johnson 1970 3 SA 535(C).

63 Cf e g De Wet and Swanepoel Strafreg (Third edition) 126 who call it an "onoordeelkundige versameling mistastings"; Burchell 1969 SALJ 127; Burchell and Hunt op cit 231 et seq; Pain 1974 SALJ 467.

64 De Wet and Swanepoel loc cit and Pain loc cit.

it is so much more objectionable if he is punished for the consequences of what is no crime.[65]

This criticism would have been valid had the court not answered the question whether, at the time of the consumption of the liquor, the accused had or should have foreseen the consequences. The court, however, found mens rea on the part of the accused at the time of the consumption of the liquor.[66] Mens rea in the case in question can only exist with reference to the consequences, namely the death of the deceased. It would therefore be unfair to say that Botha JA applied the versari doctrine.

(b) The court erred in projecting fault on to the consumption of liquor

It is a fundamental requirement that the accused should have had mens rea (fault) in some form at the time of committing the wrongful act. Pain states:[67]

> This "fault projection" exercise, whereby the fault involved in the prior drinking supplies the mens rea for conviction, ignores the principle of concurrence and the requirement of an appropriate mens rea for the crime charged.

4.3.8 Whatever the merits of the criticism against S v Johnson the fact remains that the decision of Botha JA was essentially a policy decision:[68]

> Obviously it is a decision dictated by policy considerations, but who can say that the policy is wrong? Can it be seriously urged that general principle should be slavishly followed with the result that persons who commit crimes like Johnson's crime go free, with no right reserved in the community to exercise compulsory restraint?

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65 Snyman Dronkenskap 110.

66 At 211 C-D.

67 1974 SALJ 467 at 486.

68 Pain 1974 SALJ 467 at 487.

4.4 The period of S v Chretien[69]

4.4.1 By the end of the 1970s the theory of criminal law had developed to such an extent[70] that there were indications that our law relating to drunkenness was going to be reviewed.[71] The opportunity presented itself in S v Chretien. The facts briefly were that the accused was an uninvited guest at an open party where he consumed a large quantity of liquor. The party become riotous and the accused decided to leave. He got into his Kombi and drove off. A few street blocks away he decided to make a U-turn and drove back to the house where the party was. The guests had gathered in the street.

The accused saw the crowd but, according to his evidence, he believed that they would disperse before his approaching vehicle. They did not disperse however and he drove into them. One person was killed and five were injured. The accused was arraigned before the Durban and Coast Local Division on a charge of murder and five counts of attempted murder, as well as certain traffic offences.

4.4.2 Friedman J, who presided at the trial, found the accused guilty of culpable homicide but acquitted him on the five counts of attempted murder. The reason for the first finding was that the accused did not have the intention to kill the deceased, but that he was negligent with regard thereto.[72] With regard to the counts of attempted murder, the judge considered whether the accused should not be found guilty of common assault. The learned judge then held as follows:[73]

> It is often assumed however in the case of an assault that "specific intent" refers to cases of an assault with the specific intent to cause

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69 1979 4 SA 871 (D+C) and on appeal 1981 1 SA 1097 (A).

70 Kok "Skuldmetamorfose: De Blom, Dladla en Chretien" 1982 SACC 27.

71 S v V 1979 1 SA 656 (A) at 664 G-H.

72 At 875 C-D of the report of the court a quo.

73 At 875-6.

> grievous bodily harm or murder, as the case may be, whereas in the case of a common assault no such specific intent is required. I do not agree. Assault consists of the intentional application of force, directly or indirectly to the person of another. Unintentional application of force does not in law constitute an offence ... (W)e find ourselves unable to exclude as a reasonable possibility that the accused believed the crowd would disperse; therefore he did not, subjectively speaking, intend to apply force to the person of another.

The State was not satisfied with the decision of the court a quo and submitted the following question of law[74] to the Appellate Division in terms of section 319 of the Criminal Procedure Act, 1977:[75]

> Whether on the facts found proven by the court the learned Judge was correct in law in holding that the accused on a charge of attempted murder could not be convicted of common assault where the necessary intention for the offence charged had been influenced by the voluntary consumption of alcohol.

4.4.4 This question, according to Du Plessis a "masterpiece of cautious and circumspect legal draftsmanship",[76] attempted to limit the Appellate Division to the question whether drunkenness may be validly raised as a defence to a charge of common assault. The Appellate Division, per Rumpff CJ, as he then was, wisely decided however to review the whole question of drunkenness. The main findings of the court will now be analysed.

4.4.5 The Appellate Division's interpretation of public policy

The public policy basis of the earlier cases is analysed by Rumpff CJ as follows:[77]

> Because so many assaults and deaths are caused by persons under the influence of liquor, a section of society has in the past been sceptical of "soft" treatment of drunks and the view has been expressed that

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74 At 1102 C-D of the Appellate Division report.

75 Act 51 of 1977.

76 "Chretien: Guest uninvited, geographer extraordinary, witness first class" 1982 SALJ 189 at 196.

77 At 1103 E-F. Our translation.

drunkenness can never be a defence, except if it had led to a form of insanity. Therefore this Court, after studying our old authorities and previous judicial dicisions, did not wish to depart from the old approach in the Johnson case.

The learned judge then continued and held:[78]

In my opinion it is preferable to accept that, if it appears from the evidence that an accused was really so drunk that he in fact did not realise what he was doing, public policy (the sense of justice of society) does not require a departure from the purely jurisprudential approach, and that an accused should undergo punishment merely because he voluntarily reached a condition in which he could not perform a juristic act or was not criminally responsible.

4.4.6 The effect of the defence

Rumpff CJ start with a distinction between the degrees of drunkenness:

(i) A person who is "smoordronk" (dead drunk) or "papdronk" (incapably drunk) and can only carry out involuntary muscular movements commits no actus reus in the juridical sense of the word, for his acts are not governed by his mind.

(ii) A person who had imbibed only a small quanity of liquor that had had no noteworthy effect on his mental faculties should be fully punishable.

(iii) Between these two extremes lies a large variety of cases where a person had in fact acted in a juridical sense but where the question arises to what extent his inhibitions were diminished. In this case, the learned Chief Justice held, the court should decide the question of criminal capacity. He laid down the following criterion:[79]

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78 At 1105 F-G. Our translation.

79 At 1106 B-C. Our translation.

> Only then when a person who commits a consequential act (sic) is so drunk that he does not realise that what he is doing is unlawful, or that his inhibitions have broken down substantially, can he be deemed to be not criminally responsible.

(iv) The learned Chief Justice held the following regarding the specific intent doctrine and the defence of drunkenness in the case of crimes requiring negligence:[80]

> So far as our law is concerned, the whole idea of "specific intent" in respect of liquor, as it occurs in English law, should be regarded as unacceptable. There is no place for that particular approach in a proper application of our law. Obviously, a court may, under our law, find that, owing to the influence of liquor, a person did not foresee a certain consequence which he would have foreseen had he been sober, and that he is therefore guilty of a less serious crime.

(v) As no statutory crime was involved in this case, the court did not express an opinion on the matter.

4.4.7 The application of the defence

Rumpff CJ warns, with regard to the way in which the defence should be applied, that, if a court were lightly or readily to accept that a drunk person who for example had raped a woman was unaware of what he was doing, and therefore not criminally responsible, the administration of justice would very soon be brought into disrepute. The court then laid down the following guideline:[81]

> But I would repeat that a court will come to the conclusion, or reasonable doubt, only on the grounds of evidence that justifies it that, when a person has in fact committed an act (or omission) which constitutes a crime, he was so drunk that he was not criminally responsible.

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80 At 1103 H-1104 A. Our translation.

81 At 1106 G. Our translation.

4.4.8 This decision of the Appellate Division sparked off a lively and interesting controversy.[82] It would be an impossible task, and also inappropriate, to deal with all the points of criticism. The reaction to the Chretien case may be divided into two main categories:

(d) the jurisprudential ("regswetenskaplike") approach; and

(e) the policy approach.

4.4.9 Proponents of the jurisprudential approach generally agree that S v Chretien correctly represents current jurisprudence,[83] in terms of which the term intention is correctly used subjectively.[84] The only two points of criticism that they level at this decision are, first that the learned Chief Justice in certain instances expressed himself inexactly,[85] and secondly that the question of drunkenness should have been dealt with under the concept of mens rea rather than the concept of criminal capacity.[86]

4.4.10 Be that as it may, we think that the decision in the Chretien case is an accurate interpretation of our modern jurisprudence and that the current position in our law is as follows:

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82 Cf Snyman Strafreg 151; Burchell & Hunt op cit Vol 1 (2nd edition) 298; Skeen "Chretien: A riposte and certain tentative suggestions for reform" 1982 SALJ 547; Du Plessis 1982 SALJ 189; Burchell "Intoxication and the criminal law" 1981 SALJ 177; Rabie "Vrywillige dronkenskap as verweer in die strafreg: Die Chretien-saak" 1981 SACC 111; Kok 1982 SACC 27; and the case notes of Badenhorst 1981 SALJ 148; Middleton 1981 SACC 83; Kruger 1981 SACC 84 and Du Plessis 1984 THRHR 98.

83 Burchell 1981 SALJ 177.

84 Kok 1982 SACC 27 AT 29.

85 Kok op cit 29; Kruger 1981 SACC 84. This criticism refers to the learned Chief Justice's use of the words "inhibisies wesenlik verkrummel" etc - something to which it is not easy to give legal substance.

86 Kruger 1981 SACC 84.

(a) To satisfy the actus reus requirement, an offender's act must be subject to the control of his will. The moral blameworthiness of voluntary intoxication cannot supply the lack of control of the will, and there is therefore theoretically no reason why drunkenness should be treated differently from automatism due to some oth cause.

(b) Criminal capacity is a further prerequisite for criminal liability. To satisfy this requirement the accused must have had the mental capacity, at the time he committed the crime, to distinguish between right and wrong and to direct his actions accordingly. The drunk offender may undoubtedly sometimes not be criminally responsible.

(c) It is indisputable that the test for intention is a subjective test and that the accused can have intention only if he knew or at least foresaw the possibility that his actions were unlawful and he nevertheless acted. Although this question was not specifically dealt with by the Appellate Division, we submit that a drunk offender, although criminally responsible, may because of the influence of liquor on him misjudge the unlawfulness or otherwise of his actions, and would therefore not be liable.

(d) Unfortunately the Appellate Division was limited by the question of law put to it to deciding the question of intention. Therefore the court did not lay down any guidelines with regard to crimes requiring negligence. Although the locus classicus, S v Johnson, was rejected by Rumpff CJ as unsound in law, we think that the construction of Botha JA of antecedent responsibility still represents our law. Snyman states the following:[87]

> The test for negligence is in principle objective. When a person is charged with an offence which requires mens rea in the form of negligence, eg culpable homicide or negligent driving, the mere drunkenness per se would already found

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87 Strafreg 153. Our translation.

> negligence, because the reasonable man would not drink to such excess that he committed a crime. Instead of excluding mens rea, drunkenness would rather serve here as confirmation of mens rea.

4.4.11 Proponents of the policy approach are of the opinion that Rumpff CJ incorrectly interpreted the boni mores (or, as it is sometimes put, "public policy" or the "sense of justice of society" or "regsoortuiging van die gemeenskap").[88]

Even the proponents of the jurisprudential approach draw attention to the fact that public opinion would probably react adversely to the Chretien decision,[89] and Badenhorst states:[90]

> The primary function of the science of criminal law is precisely to reflect society's sense of justice. The moment this function is abandoned, this science degenerates into l'art pour l'art, without any justification for its existence.

4.4.12 Next an attempt will be made to answer the question whether the decision in S v Chretien interpreted the boni mores correctly. In view of the "nebulous nature" of the term boni mores, however, it is a difficult question to answer with empirical exactness. At most, certain pointers to a positive or a negative answer may be singled out.

(a) Pointers in legal history

(Legal) history, being the collective experience of a (legal) society, is always a good indication of the content of the boni mores. It has been pointed out above that since earliest times our common law, and up to 1981, our own law, never recognised drunkenness as a complete defence. This

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88 Burchell & Hunt op cit 301; Rabie 1981 SACC 111 at 119; Skeen 1982 SALJ 547 at 548-9; Du Plessis 1982 SALJ 189 at 197; Snyman Strafreg 155.

89 Burchell 1981 SALJ at 192-3.

90 1981 SALJ 148 at 153. Our translation.

fact is admitted in the Chretien case.[91] It is therefore to be regretted that the learned Chief Justice did not go further into the question whether any material change has taken place in this pattern: the impression is merely created that there is now only a small and insignificant group in society that still entertains this view.[92]

(b) Views of authors

The views of legal writers as formers of the law and interpreters of the boni mores should never be underestimated. The following quotations represent the views of proponents of the policy approach:[93]

> The practical demands of society are that a drunk person who is himself to blame for his drunken state should not be treated more leniently than a sober person who committed the same act.
>
> and
>
> Effect must be given to the weight of public opinion and a natural repugnance that results if a person should be able to shield behind an antecedent binge which led to directly harmful consequences that otherwise would not have occurred.[94]

Even authors who are in favour of the purely jurisprudential approach admit that public opinion may not be in agreement with the Chretien case.[95]

It may therefore be concluded that the authors, as interpreters of the boni mores, generally hold the view that public opinion is not disposed to allow an offender to shield behind his own voluntary intoxication in order to escape criminal liability.

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91 At 1103 D-G.

92 Cf the dictum at 1103 D-E.

93 Snyman Strafreg 155. Our translation.

94 Skeen 1982 SALJ 547 at 549.

95 See para 4.4.11 supra.

(c) Views of the courts in analogous cases

Rabie,[96] in a very thorough study of the subject, points out that our law is generally reluctant to allow a person the benefit of a defence if the defence depended on a state of affairs for which the accused through his own fault was responsible, especially in cases where the state of affairs is furthermore condemned by society.

He mentions the following examples:

(i) an accused cannot raise the defences of impossibility, self-defence or necessity successfully if he created these situations himself;

(ii) an accused cannot raise the defence of drunkenness if he got drunk deliberately in order to commit a crime;

(iii) under private law the blood-stained hand cannot inherit, the creditor who made performance impossible cannot raise breach of contract, etc.

(d) Views expressed in the press

Without saying that the popular press necessarily always interprets the boni mores, we take the following as a starting point:[97]

> A free, responsible press is one of the greatest assets of any society. In a constitutional state the press is the artery through which the lifeblood of democracy flows. The press is the medium through which information on current affairs is supplied; through which all citizens - from the highest to the lowest - are given the opportunity to air their views. Through which the never-ending debate is conducted which is necessary for the formation of healthy public opinion; through which the government is subjected to continual criticism and is called to account; through which the spirit and conscience of the

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96 1981 SACC 111 at 117.

97 Strauss, Strydom and Van der Walt Die Suid-Afrikaanse persreg (Third edition) at 55. Our translation.

> nation are stirred; through which the apathetic are spurred to action and the impetuous are admonished to be circumspect. In the machine of democracy the press is one of the most important safety valves.

It is evident from press reports collected since research on this project was commenced that society demands strict action against drunk offenders.[98] The following are representative of ti se reports:[99]

> It is high time that the courts should not accept drunkenness as an excuse when persons appear for knife attacks. The time may well come when a person can simply walk into a bar, have a drink and stab his enemies to death, knowing that he can blame the liquor.
>
> and
>
> Public indignation demands that the voluntary intake of alcohol which leads to a crime should be punished.[100]

(e) Views of various interest groups

Since the beginning of this research, the Secretariat has received spontaneous unsolicited comments from various interest groups.[1] These interest groups invariably express their concern about the lenient treatment a drunk offender apparently receives in the courts.

(f) The opinion of the general public

In 1977 the HSRC published a research finding to the effect that 89 % of the 5 000 respondents were of the opinion that the courts should under no

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98 Cf reports in The Star (25.2.83); Transvaler (2.2.83); Beeld (28.8.83); Transvaler (17.8.83); The Citizen (15.12.82); The Caret (May 1983).

99 Beeld (27.8.83). Our translation.

100 The Star (25.2.83).

1 E g the S A Vroue Landbou-Unie, the Cape Corps Ex Servicemen's Laugue, etc.

circumstances accept drunkenness as a defence in respect of serious crimes.[2]

4.5 Conclusion

4.5.1 The Chretien case is endorsed as a correct exposition of our current jurisprudence. The effect of this case is that a person who is charged with a crime requiring intention may successfully plead that he was, at the time he committed the offence, voluntarily drunk to the point of criminal incapacity. Although this extreme situation is seldom encountered in practice, the current legal position does not satisfy the sence of justice of society, which demands that a drunk offender should not be allowed to shield behind his drunkenness, brought about by his own reprehensible behaviour, in order to escape criminal liability.

4.5.2 With regard to crimes of negligence, the position in positive law still is that drunkenness is not a complete defence. It is an open question whether this legal position will continue unchanged after the Chretien case. On jurisprudential grounds it may be argued that, on the facts of the Johnson case, Johnson "juridically did not murder the accused with the bucket", even though he did just that in practice and in ordinary language. To say then that Johnson "juridically killed the deceased negligently with the bucket" seems to be a contradictio in terminis. It remains to be seen what the future will bring.

5. VOLUNTARY DRUG INTOXICATION

5.1 Although much has been written about drunkenness as a defence, very little has been written about drug intoxication as a defence. This defence is also seldom raised before the courts. No reported case could be found in which it was expressly raised as a defence. In South Africa, so

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2 Van der Burgh Multipurpose Survey amongst Whites 1975: Views on drug legislation and on the excessive use of alcohol and criminal responsibility Research Finding S-N 94/1977. Cf further Chapter 8 infra.

far as could be established, the only case in which this defence was expressly raised was the well-known Leisher case.[3]

5.2 Without attempting to present the facts in full, it may be stated that the trial court found that Leisher (Accused No 2):

(a) had a psychopathic personality and that this abnormality was not due to a mental defect or illness, but was a personality defect; and

(b) was addicted to drugs and from time to time participated in drug orgies.

5.3 The accused's defence was mainly based on psychopathy and the influence of drugs. As regards the psychopathy aspect the court found the following:

> The court is also satisfied that accused No 2, notwithstanding the fact that he is a psychopathic personality, was capable of appreciating the wrongfulness of his acts generally and capable of acting in accordance with such appreciation.

5.4 As regards the influence of the drugs the court found the following:[4]

> The material issue that remains ... is the extent to which he was drugged at the time he did the killings, and the extent to which such drug intoxication had reduced his criminal reponsibility. Mr Alexander, on behalf of accused No 2 - argued ... that accused No 2 had ingested LSD just prior to the killings and that the effect that this drug had on the mind of accused No 2 was such that he should be regarded as temporarily suffering from a mental disease to the extent

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3 S v BB Thomas and XTA Leisher (not reported) 4 March 1977 WPD per Boshoff J, as he then was. The case of S v Thomas and another 1978 1 SA 329(A) is a part of the Appellate Division decision. In this reported decision very few dicta are found about the force of this defence. When we refer to the Appellate Division decision, we are therefore referring to the (unpublished) full decision.

4 Because this decision was not published, the finding is given in some detail.

that he had no criminal responsibility at all, and that a special verdict under the provisions of sect 29 of the Mental Disorders Act No 38 of 1916 should be entered against him. He properly conceded that the onus of persuasion rested on accused No 2 to satisfy the court on a balance of probabilities that such was his mental state when he perpetrated the killings. He argued in the alternative that if this onus is not discharged by accused No 2, the onus was on the prosecution to establish beyond a reasonable doubt that accused No 2 had the necessary intention to kill his victims before he can be con\ cted of murder and that the evidence showed that there was a reasonable possibility that the drug had such an effect on his mind that he did not appreciate what he was doing, could not control his actions and that his criminal responsibility was to that extent reduced, thus making him only guilty of culpable homicide.

Having reviewed the evidence, the court found the following:

(a) With regard to the actus reus:

Although his mind may have been clouded by the Vesperax and the Mandrax he had taken that day, he certainly was able to control his behaviour by voluntarily exercising his will. There was no acceptable evidence at all which could suggest that he acted under an automatism.

(b) With regard to criminal responsibility:

There is no evidence on which the court can find that he was mentally diseased or defective as known in the law, and the court must come to the conclusion that he had criminal responsibility when he did the killings. Although there is sufficient evidence on which to conclude that No 2 accused was under the influence of drugs when he did the killings, the court is satisfied beyond a reasonable doubt that he knew what he was doing and that he had sufficient control over his actions.

(c) With regard to intention:

After a further review of the facts the court concluded that the accused had the necessary intention to commit the murders.

5.5 At the risk of being repetitive, it may be stated that this question was carefully reconsidered by the Appellate Division per Muller JA

and that the Appellate Division came to the same conclusion as the court a quo.

5.6 Conclusion

(a) The mere fact that an accused was under the influence of drugs at the time he committed a crime is no defence.

(b) On the basis of the general principles of criminal liability the degree of drug intoxication is analysed as follows:

(i) Did the accused perform a voluntary act?

(ii) Was the accused criminally responsible? I e did he have the capacity to distinguish between right and wrong and to direct his actions accordingly? and

(iii) Did the accused have the required mens rea?

(c) Finally reference is made to the accused's defence of "temporary insanity" as a result of taking drugs. The court rejected this defence on the evidence and therefore did not find it necessary to determine the juridical value thereof. Whilst it is a fact that intoxication may sometimes cause temporary (or permanent) insanity, the defences of insanity and intoxication should be clearly distinguished. Apart from the procedural and evidentiary differences, there are many substantial differences - the most important being that intoxication may involve either a plea that there was no actus reus or no criminal responsibility or no mens rea. Insanity, however, excludes criminal responsibility.

(d) It may therefore be concluded that the same jurisprudential approach as followed by the court in S v Chretien with regard to drunkenness was followed by the court in the Leisher case with regard to drug intoxication.

6. GENERAL CONCLUSION

6.1 The law relating to involuntary drunkenness and drunkenness with intent to commit a crime presents little difficulty in practice. Although the courts have not yet worked out these questions in detail with regard to drug intoxication it is suggested that the position is the same as in the case of drunkenness.

6.2 The courts follow the purely jurisprudential approach with regard to voluntary drunkenness and drug intoxication. This approach accords with the general principles of our criminal law.

6.3 It is evident that there has been reluctance through the centuries to allow someone who is not criminally responsible for his crimes by virtue of his consumption of liquor or drugs to go free for crimes committed by him in that condition. This reluctance exists to this day. Although the number of acquittals is small, they do occur. Great prominence is given to these cases and society disapproves of such acquittals. We believe that the purely jurisprudential approach does not satisfy the sense of justice of society with regard to this small number of cases.

6.4 It is suggested that the legislature should consider the possibility of placing more effective protection against drunk or drug-intoxicated offenders on the statute book.

CHAPTER 5

PUNISHMENT

1. INTRODUCTION

1.1 There appears to be a fairly general view among the public that the law should not allow a person who has committed a serious crime to shield behind his drunkenness in order to escape conviction or the normal penalty imposed for such crime. Our courts are sometimes criticised for imposing too lenient sentences on intoxicated offenders. It is very difficult to establish whether such criticism is justified or not. What is often overlooked is that sentencing is a complex task in which many factors have to be taken into account. Intoxication is only one of the factors that may play a role. It would therefore not be possible to establish statistically whether our courts attach too much weight to drunkenness an extenuating circumstance.

1.2 Because of the complexity of the matter it is of the greatest importance that the courts should have the widest possible discretion with regard to the imposition of punishment. The legislature generally prescribes only maximum penalties, but as a rule wisely refrains from binding the court's discretion as to the appropriate punishment that should be imposed.

1.3 Broadly speaking the aims of punishment are threefold, namely, retribution, protection of society and rehabilitation of the offender. Depending on the circumstances of each case, more weight might be attached to any one of these aims. Our courts have over many years developed broad guidelines with regard to punishment. In short, these guidelines require that punishment should be consistent with the nature and circumstances of the offence, the personal circumstances of the offender and the interests of society. In this process the courts employ concepts

2.2 Drunkenness, alone or together with other factors, has been recognised by the courts as a ground for mitigation of punishment. The following decision of Holmes, JA in S v Ndhlovu(2),[4] may be cited as representative of judicial practice:

> Intoxication is one of humanity's age-old frailties, which may, depending on the circumstances, reduce the moral blameworthiness of a crime, and may even evoke a touch of compassion through the perceptive understanding that man, seeking solace or pleasure in liquor, may easily overindulge and thereby do the things which sober he would not do. On the other hand intoxication may, again depending on the circumstances, aggravate the aspect of blameworthiness.

It must be stressed, therefore, that drunkenness, per se is no ground for mitigation, but only if the proved consumption of alcohol had influenced the accused at the time of the crime to such an extent that he may be considered less blameworthy on account of that factor.[5]

2.3 In theory the same consideration should apply if an accused was under the influence of drugs at the time of the crime.[6] No decision could be found in which drug intoxication per se was offered as a ground for mitigation. However, in S v Webb (2)[7] Human J found that the fact that the accused was under the influence of drugs at the time of the crime, together with psychopathy and other considerations, had a mitigating effect. In the Leisher case,[8] however, it was also found that the accused

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4 1965 4 SA 692 (A) at 695 C-E.

5 Du Toit op cit 13.

6 Du Toit op cit 16.

7 1971 2 SA 343 (T).

8 Supra.

like aggravating or mitigating circumstances or factors.[1] The application of these guidelines to the problem of intoxication will now be discussed.

1.4 There are three ways in which drunkenness or drug intoxication is relevant to punishment:

(a) as a ground for mitigation of punishment;

(b) as a ground for increase of sentence; and

(c) as a factor to be considered in committing an addicted accused to a rehabilitation centre.[2]

2. MITIGATION OF PUNISHMENT

2.1 In order to ascertain whether there is any ground for mitigation of punishment the court must determine:

(a) whether there are factors that have a bearing on the mental faculties or state of mind of the accused;

(b) whether these factors in fact influenced the accused; and

(c) whether the influence was of such a nature as, in the view of the trial court, to render the accused's act less blameworthy.[3]

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1 For a distinction between "circumstances" (omstandighede) and "factors" (faktore) see Du Toit Straf in Suid-Afrika at 5. For the purposes of this investigation it was deemed unnecessary to go into this distinction. What is said about the one applies mutatis mutandis to the other.

2 Snyman Dronkenskap 168 sqq.

3 S v Babada 1964 1 SA 26 (A) at 27 F-H. This dictum has been generally accepted as the basis of our mitigation theory. Cf e g Hiemstra Suid-Afrikaanse strafproses (Third Edition) at 597; Van der Merwe op cit 296 points out that this decision was followed in principle by many other decisions.

was a psychopath and had committed the crime while under the influence of drugs. The court a quo as well as the Appellate Division was not prepared to accept this as a ground for mitigation in that case. Boshoff J decided:

> The fact that such an accused acted under the influence of drugs when he committed the murder may conceivably in certain cases reduce the moral blameworthiness of such an accused. The court may in such a case have regard to all the circumstances including the fact that he is a psychopathic personality but the court may also have regard to the planning that went into the perpetration of the murder and the material gain or benefit the accused had contrived to get out of his misdeed and in exercising a moral judgment come to the conslusion that the first-mentioned factors were not sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.

2.4 Conclusion

Neither drunkenness nor drug intoxication per se is a ground for mitigation of punishment. In some cases, however, it may be regarded as such, if the following requirements are met:

(a) the alcohol or drugs must have influenced the accused's mental faculties or state of mind at the time of the crime; and

(b) this influence must have been such as to reduce the moral blameworthiness of his act.

3. INCREASE OF SENTENCE

3.1 Whereas a mitigating factor is a factor that reduces the moral blameworthiness of the accused, an aggravating factor is a factor that increases his moral blameworthiness. It is therefore conceivable that

drunkenness or drug intoxication may serve as a ground for increase of sentence in appropriate cases.[9]

3.2 The courts have identified the following circumstances in which drunkenness is to be taken into account as an aggravating factor:

(a) where the accused got drunk with the intention of committing a crime;[10]

(b) where the accused knew that he was prone to violence when drunk and he nevertheless got drunk and committed a crime of violence;[11]

(c) where the accused is charged with an offence of which drunkenness is an element.[12] The most obvious example is that of driving while under the influence of liquor or narcotic drugs.[13] In this case the degree of drunkenness is one of the most important factors to be considered in sentencing: the

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9 S v Ndhlovu (2) 1965 4 SA 692 (A) at 695 D-F.

10 Ibid.

11 S v Ndhlovu 1972 3 SA 42 (W) at 43 H.

12 S v Kelder 1967 2 SA 644 (T) at 647 C-D.

13 Contraventions of section 140 of Ordinance 21 of 1966, in which more than one offence is created.

higher the degree of drunkenness, the more severe the punishment;[14]

(d) where the consequences of the accused's act are serious. Snyman[15] cites the case of culpable homicide resulting from the driving of a motor vehicle under the influence of liquor and the case of a doctor who performs an operation when drunk, as a result of which the patient dies.

3.3 Although no reported decision could be found in which drug intoxication was regarded as an aggravating factor, it is suggested that the principles set out above would equally apply to drug intoxication.

3.4 Conclusion

3.4.1 Drunkenness or drug intoxication may be taken into account as an aggravating factor.[16]

4. COMMITTAL OF AN ADDICT TO A REHABILITATION CENTRE

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14 S v Kelder (supra); R v Poezyn 1947 2 SA 262 (C); R v De Villiers 1949 3 SA 149 (O); S v Oshman 1962 3 SA 643 (O); R v Pistorius 1949 4 SA 149 (N); Cooper Motor Law (Vol 1) at 575 and the authorities cited by him.

15 Dronkenskap 175.

16 Despite the repeal of section 350 of the old Criminal Procedure Act 56 of 1955. See in this regard Snyman Dronkenskap 173 sqq.

4.1 Although a person is strictly speaking not punished if he is sent to a rehabilitation centre,[17] this procedure represents a real alternative to punishment and involves the possibility of a long period of deprivation of liberty for the accused.[18] Legislative authority for the committal of an accused to a rehabilitation centre is found in two sections of the Criminal Procedure Act, 1977:

4.1.1 Section 255(1)(a) of the Criminal Procedure Act, 1977[19]

This section provides:

> If in any court during the trial of a person who is charged with an offence other than an offence in respect of which the sentence of death may be passed, it appears to the judge or judicial officer presiding at the trial that such person is probably a person as is described in section 29(1) of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, 1971 (in this section referred to as the said Act), the judge or judicial officer may, with the consent of the prosecutor given after consultation with a social welfare officer as defined in section 1 of the said Act, stop the trial and order that an enquiry he held in terms of section 30 of the said Act in respect of the person concerned by a magistrate as defined in section 1 of the said Act and indicated in the order.

Section 29(1) of the Abuse of Dependence-producing Substances and Rehibilitation Centres Act, 1971,[20] lists different classes of persons who are eligible for committal to a rehabilitation centre, including a person who is

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17 S v Strauss: In Re Strauss 1970 2 SA 18 (NC) at 21 F where it was decided that no finding of guilty is involved.

18 S v Fisher 1971 2 SA 196 (O).

19 Act 51 of 1977.

20 Act 41 of 1971.

"dependent on alcoholic liquor or dependence-producing drugs and in consequence thereof squanders his means or injures his health or endangers the peace or in any other manner does harm to his own welfare or the welfare of his family".

It is important to note that this procedure may be followed only in respect of offences that do not carry the death penalty[21] and then only with the consent of the prosecutor[22] after consultation with a welfare officer.[23]

The following guidelines have already been developed with regard to the application of this procedure:[24]

(i) If the accused is unable to afford a fine or if any other sentence is inappropriate in the light of the circumstances, the accused may be committed.[25]

(ii) Before a court commits an accused, it must be satisfied that the accused is a type of person who needs treatment and who would probably benefit from a rehabilitation programme.[26]

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21 Cf sec 255(1)(b).

22 Hiemstra op cit 523.

23 Cf also S v Venter 1969 2 SA 145 (O).

24 Hiemstra op cit 523.

25 Ibid.

26 R v Van der Vent 1951 3 SA 879 (C).

(iii) The modern tendency is to regard an alcoholic as a sick person requiring medical treatment.[27]

(iv) The accused's prospects of rehabilitation are however not more important than the interests of society as a whole: these two considerations should be weighed against each other.[28]

4.1.2 Section 296(1) of the Criminal Procedure Act, 1977

This section provides:

> A court convicting any person of any offence may, in addition to or in lieu of any sentence in respect of such offence, order that the person be detained at a rehabilitation centre established under the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, 1971 (Act 41 of 1971), if the court is satisfied from the evidence or from any other information placed before it, which shall include the report of a probation officer, that such person is a person as is described in section 29(1) of the said Act, ...

4.2 Conclusion

The procedures for the committal of an addicted accused to a rehabilitation centre offer a valuable alternative to punishment which should be invoked whenever appropriate.

5. GENERAL CONCLUSION -

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27. S v Leach 1966 3 SA 389 (T).

28 S v Jacobs 1968 4 SA 691 (O); S v Nkosi and Others 1972 2 SA 753 (T) at 756 G-757 B.

5.1 Although the public was invited to comment on this matter, not a single comment was received which referred to a concrete incident of too lenient punishment of a drunk offender. The Commission could therefore not investigate any specific complaints. These allegations therefore seem to be unfounded.

5.2 Although it might appear to layme that the courts tend to treat the drunk or drugged offender with too large a measure of leniency, the courts in fact apply only guidelines that have been evolved to do justice to the offender as well as society. If cases do occur where too much weight is attached to the drunken or drugged state of the accused, a fact which was not found to be proven, this must be ascribed to the fallibility of human judgment.

5.3 On the whole the Commission is satisfied that the difficult task of imposing appropriate punishment can with confidence be left to the courts. The Commission is strongly opposed to the limitation of the courts' discretion in sentencing: any such limitation or interference would amount an infringement of the independence of the judiciary.

when, with the decision in R v Meade,[4] it was decided that drunkenness may in appropriate circumstances negative intent.

2.1.2 The next step in this development, namely to admit that drunkenness may sometimes negative mens rea in toto, has never been taken in England. The current law of England, as laid down in Director of Public Prosecutions v Majewski,[5] a decision by the House of Lords, is that voluntary drunkenness may be raised as a defence in cases where the accused is arraigned on a charge requiring specific intent, e g murder, but not in cases where general intent is required, e g manslaugher. The classical specific intent theory in its harshest form, therefore, forms the basis of the English law relating to drunkenness as a defence.

2.1.3 Lord Elwyn-Jones admitted in the Majewski case that the specific intent theory was illogical and contrary to general legal principles, but, stated Lord Salmon:[6]

> If, as I think, the long-standing rule was salutary years ago when it related almost exclusively to drunkenness, and hallucinatory drugs were comparatively unknown, how much more salutary it is today, when such drugs are becoming a public menace? My Lords, I am satisfied that this rule accords with justice, ethics and common sense, and I would leave it alone even if it does not comply with strict logic. It would, in my view, be disastrous if the law were changed to allow men who did what Lipman did to go free. It would shock the public, it would rightly bring the law into contempt and it would certainly increase one of the really serious menaces facing society today.

2.1.4 A further development in England which should be taken into account is the recommendation, a year prior to the Majewski case, of the Butler Committee:[7]

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4 1909 1 KB 895.

5 1976 2 All ER 142 (HL).

6 At 159.

7 The Committee on Mentally Abnormal Offenders (1975). The Butler Report could not be traced, however, but the relevant parts are discussed in the Majewski case at 152.

> We propose that it should be an offence for a person while voluntarily intoxicated to do an act (or make an omission) that would amount to a dangerous offence if it were done or made with the requisite state of mind for such an offence.

One wonders whether the Majewski case would not have been decided differently had the recommendation of the Butler Committee been accepted.

2.1.5 In 1981 the Criminal Law Revision Committee recommended:[8]

> (i) That evidence of voluntary intoxication should be capable of negativing the mental element in murder and the intention required for the commission of any other offence; and
>
> (ii) in offences in which recklessness constitutes an element of the offence, if the defendant owing to voluntary intoxication has no appreciation of a risk which he would have appreciated had he been sober, such lack of appreciation is immaterial.

2.1.6 In conclusion it may be said that the Majewski case currently forms the basis of the entire Anglo-American criminal law on this subject.

2.2 The American law

2.2.1 American decisions follow the rule laid down in the Beard case, which was confirmed by the House of Lords in Majewski: Thus LaFave states:[9]

> Thus it is commonly held that voluntary intoxication is no defense where the offense is of the general intent type ... On the other hand a "defense" of intoxication may be interposed[10] where the crime is characterized as one requiring a specific intent.

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8 Fourteenth Report of the Criminal Law Revision Committee on Offences against the Person (Cmnd 7844) Unfortunately no copy of this report could be obtained. This information was taken from 1982 CILSA 92 at 99.

9 La Fave Modern Criminal law: Cases, comments and questions at 394 sqq.

10 The position is the same as regards drugs: S v Hall (1974) 214 NW 2d 205 (Iowa) as quoted in LaFave op cit 397.

2.2.2 Apart from this common law position, this is also the position in the penal codes of most of the American states.[11] As an example of these statutory provisions section 2.08(2) of the Model Penal Code may be cited:

> When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication is unaware of a risk of which he would have been aware had be been sober, such unawareness is immaterial.

2.3 The Canadian Law

2.3.1 In 1977 the Canadian Supreme Court was confronted with the Majewski case in Leary v The Queen.[12] The accused was charged with rape. He submitted that he was drunk at the time of the act. The judge directed the jury that they could not take the drunkenness into account because rape is a crime requiring general intent. The accused was found guilty of rape. He appealed to the British Columbia Court of Appeal but his appeal was dismissed. He then appealed to the Supreme Court of Canada but his appeal was again dismissed by a majority of six judges to three. The majority judgment approved of the specific intent theory as the law of Canada. The minority judgment delivered by Dickson J adopted the following approach:

(d) Drunkenness per se is no defence.

(e) Drunkenness and all other evidence must be considered in order to ascertain whether the accused had mens rea.

(f) If the jury is not allowed to consider drunkenness in so-called general intent crimes, the illogical effect is that the State is exempted from proving fault in such cases.

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11 LaFave op cit 397; Torcia (Ed) Wharton's Criminal Law (Vol II) (14th Edition) paras 107 and 108.

12 (1977) 33 CCC 473.

2.3.2 The Leary case evoked severe criticism[13] and was also examined by the Law Reform Commission of Canada as part of an attempt to revise the penal code.[14] The Commission severely criticised this theory[15] but found that it satisfies the sense of justice of society:[16]

> Whatever the defendant's intent, no one who allows himself to be a source of danger to others should be let off scot-free.

2.3.3 The Law Reform Commission found that there were two possible solutions to this conflict between logic and legal policy:

(a) The specific intent theory may be retained; or

(b) The specific intent theory may be rejected so that the accused may raise drunkenness as a defence in all cases. In that case it would be necessary to create a new crime "criminal intoxication".

2.3.4 The former possibility was set forth as follows:[17]

> 6(1) Everyone is excused from criminal liability for an offence committed by reason of intoxication by alcohol or other drugs, unless such intoxication was self-induced.
>
> (2) Where the intoxication is self-induced no one shall be excused from criminal liability for an offence unless such an offence requires a purpose on his part and he proves that he lacked such purpose.

2.3.5 The latter possibility was set forth as follows:[18]

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13 Cf the case note of Parker 1977 Canadian Bar Review 691 sqq.

14 Law Reform Commission of Canada Working Paper 29: Criminal Law - The General Part: Liability and Defences 1982.

15 Op cit 54 sqq.

16 Op cit 58.

17 Op cit 59.

18 Ibid.

6(1) Unless otherwise provided, everyone is excused from criminal liability by reason of intoxication by alcohol or other drugs.

(2) Everyone excused under sub-section (1) of this section shall be convicted of Criminal Intoxication under Part ... of this Code unless he proves that his intoxication was due to fraud, duress, physical compulsion or reasonable mistake.

2.3.6 The provision creating the offence reads as follows:[19]

Anyone committing what would, but for his intoxication, constitute an offence is guilty of Criminal Intoxication unless he proves that his impairment was due to fraud, duress, physical compulsion or reasonable mistake.

With this draft the Law Reform Commission followed the recommendation of the Butler Committee. Only those persons who would be found not guilty of specific intent crimes under existing law, but guilty of general intent crimes, are covered by this draft.

2.3.7 In conclusion the Law Reform Commission states that the offence of "Criminal Intoxication" should logically consist in "allowing oneself to become so intoxicated as to be likely to commit an offence".[20] The Commission then decided rather to limit the offence to cases where the accused actually commits an act which would otherwise be a crime, for the following reasons:

(c) In the law of evidence the possibility that an accused may commit a crime is difficult to prove;

(d) In the interests of the economic utilisation of resources it is necessary to limit prosecutions to cases where an actual crime was committed;

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19 Op cit 61.

20 Op cit 62.

(e) In the interests of civil liberty it is necessary to limit prosecutions to cases where the accused causes actual harm.[21]

2.4 The Australian Law

2.4.1 In Australia the High Court of Australia was faced with the decision whether or not to follow Majewski, in the case of The Queen v O'Connor.[22] This case will now be discussed.[23]

2.4.2 The accused, O'Connor, was charged with theft and two statutory offences, "wounding with intent to resist arrest" and "unlawful wounding". His explanation was that he had consumed alcohol over a long period of time together with a certain drug. The trial judge in the court of Victoria directed the jury to consider the evidence about his drunkenness with regard to the charges of theft and "wounding with intent" but not "unlawful wounding". The trial court therefore followed Majewski. The accused appealed successfully to the Court of Criminal Appeal of Victoria. The Attorney-General applied for special leave to appeal to the High Court of Australia, which leave was granted. The court then had to decide whether or not to follow Majewski: The Court decided by a majority of four to three not to follow Majewski.

2.4.3 Sir Garfield Barwick CJ rejected the specific intent theory in the following eloquent manner:[24]

> With great respect to those who have favoured this terminology in a classification of crimes, it is to my mind not only inappropriate, but it obscures more than it reveals.

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21 Op cit 62. For a full discussion of the Canadian Law on this matter cf Beck and Parker 1966 Canadian Bar Review 563-609 in which support is to be found for the Law Reform Commission's second alternative.

22 1980 ALJR 349.

23 Cf also the case note by Burchell 1981 SALJ 186 sqq.

24 At 356. Cf also the dicta of Stephen J at 361.

2.4.4 The court admitted per Barwick CJ that drunkenness may in appropriate circumstances be a complete defence to criminal responsibility but pleaded that the Legislature should intervene to create a crime as envisaged by the Butler Committee and the Canadian Law Reform Commission:[25]

> I can readily understand that a person who has taken alcohol or another drug to such an extent that he is intoxicated thereby to the point where he has no will to act or no capacity to form an intent to do an act is blameworthy and that his act of having ingested or administered the alcohol or other drug ought to be visited with severe consequences. The offence of being drunk and disorderly is not maintained these days in all systems of the common law. In any case it has not carried a sufficient penalty properly to express the public opprobrium which should attach to one who, by the taking of alcohol or the use of drugs, has become intoxicated to the point where he is the vehicle of unsocial or violent behaviour. But though blameworthy for becoming intoxicated, I can see no ground for presuming his acts to be voluntary and relevantly intentional. For what is blameworthy there should be an appropriate criminal offence. But it is not for the judges to create an offence appropriate in the circumstances ... It must be for the Parliament ...

2.4.5 In 1982 this matter was considered by the Law Reform Commissioner of Victoria as part of an investigation into provocation and diminished responsibility in cases of murder. In his report to the Attorney-General in January 1982 the Commissioner puts it thus:[26]

> In the general criminal law, however, and in diminished responsibility in particular, it is more problematical whether intoxication by itself should extenuate crime. This has been the subject of enduring debate - as evidenced recently by the polarisation of views in the High Court in O'Connor. It is considered that, since the issue has proven so intractable and so controversial, it should be the subject of further detailed investigation ... Some thought might be given, for example, to the suggestion of Barwick CJ in O'Connor that there be created an offence of being so intoxicated as not to be responsible for one's criminal acts.

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25 At 358.

26 Law Reform Commissioner Victoria Report No 12: Provocation and Diminished Responsibility as Defences to Murder at 39.

2.4.6 On the strength of this suggestion the Attorney-General requested the Commissioner to investigate the matter. An Issues Paper was prepared and a public seminar was held on 27 February 1984 in Melbourne. The initial indications are that the Canadian approach will be followed:

> According to our research, the majority of those who consider that the . w should be changed favour the introduction of a separate offence.

Correspondence between this Commission and the Law Reform Commissioner of Victoria supported this view. It is interesting to note the recent High Court ruling in R v Martin[27] that drunkenness may be taken to negative the guilty state of mind of the accused even on a charge of manslaughter.

2.5 The New Zealand Law

2.5.1 The leading case in New Zealand in R v Kamipeli.[28] In this case the jurisprudential approach was also followed. The court decided that drunkenness is no defence per se but should be considered to ascertain whether the accused had the required mens rea. If that is not the case, the accused is acquitted, whether he had committed a specific intent or a general intent crime. The court rejected the specific intent theory by saying that it would amount to a situation whereby the State is exempted from proving mens rea.

2.5.2 Shortly after the Kamipeli case, judgment was given by the House of Lords in England in Majewski. The current question in New Zealand is still whether or not Majewski should be followed. In R v Roulston[29] the Court of Appeal was not however prepared to answer the question. Legal

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27 A copy of which was supplied to us by a researcher of the Law Reform Commissioner of Victoria . This case has subsequently been reported: 1984 ALJR 217.

28 1975 2 NZLR 610 (CA).

29 Ibid.

writers seem to be unaminous in their view that Kamipeli should be followed and not Majewski. Thus Walker states:[30]

> It is submitted that the law of self-induced intoxication as a "defence" to crime as stated in Kamipeli, is consonant with principle and perfectly defensible in terms of policy.[31]

2.5.3 This question has recently formed the basis of an investigation by the New Zealand Criminal Law Reform Committee.[32] This Committee decided to maintain the status quo as set out in Kamipeli.

2.6 Conclusion

(a) In England, the United States of America and Canada the absolute policy approach, explained in terms of the specific intent theory, is followed by the courts.

(b) This approach is losing ground in the Anglo-American systems. For example, it has already been rejected by the courts in Australia and New Zealand while alternative solutions have been suggested in England (by the Butler Committee) and in Canada (by the Law Reform Commission of Canada), and is being considered in Australia (by the Law Reform Commissioner of Victoria).

(c) The solutions suggested as alternatives maintain a balance between jurisprudence and legal policy: on the one hand the principle of nullum crimen sine culpa is upheld, and on the other hand effect is given to society's disapproval of drunkenness and drug intoxication, while the principle of nullum crimen sine lege is upheld - therefore an integrative approach.

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30 Walker "Intoxication at the crossroads" 1977 NZLJ 401 sqq.

31 "Policy" here in the sense that the State has to prove all elements of the crime, including mens rea.

32 Report on Intoxication (1984).

(d) The absolute jurisprudential approach is followed in Australia and New Zealand. There is a measure of controversy on this point. This is evident from the fact that the English, American and Canadian courts, despite severe criticism of the specific intent theory, are not prepared to depart from the policy approach. In countries where the jurisprudential approach is followed or suggested, it is also proposed that a crime of "criminal intoxication" be created in order to ensure that a criminal cannot be excused from criminal liability because of his blameworthy self-induced drunkenness.

(e) It may be said therefore that the emphasis is shifting in the Anglo-American systems from adherence to the pure policy approach to an integrative approach that is jurisprudentially sound, while meeting society's objection to drunkenness.

3. THE ROMANO-GERMANIC SYSTEMS

3.1 The German Law

3.1.1 In German law a crime is seen as an unlawful and guilty act, which act must conform to the definition of the crime ("Tatbestandsmässigkeit") and which must be voluntary.[33] From this it is evident that the following elements of crime are important for the purposes of this discussion:

(a) the aspect of voluntariness; and

(b) the requirement of criminal capacity.

3.1.2 In German law an act is punishable only if it is voluntary. Drunkenness may exclude this requirement if it results in a condition of

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33 Snyman Dronkenskap 14; Petters/Preisendanz Strafgesetzbuch at 11.

unconsciousness and the perpetrator commits and "act" in that condition which could otherwise be regarded as a crime.[34]

3.1.3 An act is also punishable only if the accused had criminal capacity at the time he committed the crime. Section 52 of the Strafgesetzbuch (StGB) provides:[35]

> (1) Eine strafbare Handlung ist nicht vorhanden, wenn der Täter zur Zeit der Tat Wegen Bewusstseinstörung, wegen krankhafter Störung der Geistestätigkeit oder wegen Geistesswäche unfähig ist, das Unerlaubte der Tat einzusehen oder nach dieser Einsicht zu handeln.
>
> (2) War die Fähigkeit, das Unerlaubte der Tat einzusehen oder nach dieser Einsicht zu handeln, zur Zeit der Tat aus einem dieser Gründe erheblich vermindert, so kann die Strafe nach den Vorschriften über die Bestrafung des Versuchs gemildert werden.

3.1.4 With reference to criminal incapacity in terms of section 52(1) StGB it may be stated that drunkenness (or drug intoxication) may be regarded as "Bewüsstseinstörung" only if it constitutes a disturbance of consciousness which has the effect of seriously impairing normal consciousness.[36] In addition to this biological effect, Snyman submits,[37] it should also be certain that the drunkenness had an effect on the accused's mental life in that the perpetrator was deprived of his capacity to appreciate the wrongfulness of his act or to act in accordance with such appreciation.

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34 Snyman Dronkenskap 16.

35 Translation: "(1) There shall be no punishable act if the perpetrator at the time of the act, by reason of a disturbance of the consciousness, or a morbid mental disorder, or a mental defect, was not capable of appreciating the wrongfulness of the act or of acting in accordance with such appreciation. (2) If the capacity to appreciate the wrongfulness of the act or to act in accordance with such appreciation was at the time of the act materially diminished by one of the above-mentioned factors, the punishment may be mitigated in terms of the provisions with regard to punishment of attempt".

36 Snyman Dronkenskap 20 and the authority cited by him.

37 Op cit 22.

3.1.5 Snyman[38] states, with reference to diminished responsibility in terms of section 53(2) StGB, that it is required that the accused's capacity to appreciate the wrongfulness of his act or to act accordingly must be diminished materially ("erheblich");

3.1.6 If it is found that the accused's "act" lacked volition or criminal capacity, and if it is further found that this condition was due to his own fault, section 323(a)(1) StGB comes into operation, which reads as follows:[39]

> Anybody who negligently or intentionally becomes intoxicated with alcoholic beverage or other intoxicating substance, ... if he commits an illegal act in this (intoxicated) condition for which he cannot be punished because, due to his intoxication he cannot be held criminally liable for the actual crime - he can be punished merely because he was in this condition.

3.1.7 With these provisions the German law solves the problem that arises when voluntarily intoxicated offenders are acquitted in terms of section 52(1) StGB.

3.2 The Swiss Law

3.2.1 The Swiss law adopts the same approach as the German law. The same requirements are laid down for the punishability of an act. Section 10 StGB provides:[40]

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38 Op cit 23.

39 In an article published after the publication of Working Paper 5, Farran "Offences committed under intoxication: a comparative survey and proposals for reform" 1984 SACC 109 sqq discusses the latest amendments to the German Code. The text of this provision was not available to the present researcher. Farran's translation is given here.

40 Germann Schweizerisches Strafgesetzbuch. Translation: "Any person who, because of mental disease, mental deficiency or serious mental disturbance, was not at the time of the act capable of appreciating the wrongfulness of his act or of acting in accordance with his appreciation of the wrongfulness of his act, shall not be punishable".

Wer wegen Geisteskrankheit, Blödsinns oder schwerer Störung des Bewusstseins zur Zeit der Tat nicht fähig war, das Unrecht seinen Tat einzusehen oder gemäss seiner Einsicht in das Unrecht der Tat zu handeln, ist nicht strafbar.

3.2.2 Section 263 StGB provides for the punishment of guilty causation of criminal incapacity:[41]

Wer infolge selbstverschuldeter Trunkenheit oder Betäubung unzurechnungsfähig ist und in diesem Zustand eine als Verbrechen oder Vergehen bedrohte Tat verübt, wird mit Gefängnis bis zu sechs Monaten oder mit Busse bestraft.

3.3 The Austrian Law

3.3.1 The same approach is adopted in Austria. Section 11 of the new Austrian Strafgesetzbuch,[42] which came into operation on 1 January 1975, provides the following with regard to criminal capacity:[43]

Wer zur Zeit der Tat wegen Geisteskrankheid, wegen Schwachsinns, wegen einer tiefgreifenden Bewusstseinstörung oder wegen einer anderen schweren, einem dieser Zustände gleichwertigen seelischen Störung unfähig ist, das Unrecht seiner Tat einzusehen oder nach dieser Einsicht zu handeln, handelt nicht Schuldhaft.

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41 Note the difference in punishment: five years in Germany and only six months in Switzerland. Translation: "Any person who is in a condition of criminal incapacity on account of self-induced drunkenness or intoxication and in this condition commits an act which is a punishable crime or offence is liable to a penalty of imprisonment not exceeding six months or with a fine". Cf also Panchaud/Ochsenbein Code Penal Suisse Annoté.

42 Mayerhofer/Rieder Das österreichische Strafrecht. Erster Teil: Strafgesetzbuch.

43 Translation: "Any person who at the time of the act is incapable of appreciating the wrongfulness of his act or of acting in accordance with such appreciation on account of mental disease, mental deficiency, severe disturbance of consciousness, or any other severe mental disorder similar to any of these conditions, shall not be guilty".

3.3.2 Gross drunkenness ("Volle Berauschung") is regarded as such a disturbance of the consciousness.[44]

3.3.3 Section 287 StGB however provides for the punishment of the unlawful and guilty causation of such a condition:[45]

> Wer sich, wenn auch nur fahrlässig, durch den Genuss von Alkohol oder den Gebrauch eines berauschenden Mittels in einen die Zurechnungsfähigkeit ausschliessenden Rausch versetzt ist, wenn er im Rausch eine Handlung begeht, die ihm ausser diesem Zustand als Verbrechen oder Vergehen zugerechnet wurde, mit Freiheitstrafe bis zu drei Jahren oder mit Geldstrafe bis zu 360 Tagessätzen zu bestrafen. Die strafe darf jedoch nach Art und Mass nicht Strenger sein, als sie das Gesetz für die im Rausch begangene Tat androht.

3.4 The Dutch Law

3.4.1 A completely different approach is followed in the Dutch law: voluntary intoxication is no defence. Although criminal capacity is required for criminal liability, the test therefore is negative rather than positive: i e it is not in every case established positively whether the accused had criminal capacity or not, but it is provided that the absence of criminal capacity may lead to a finding of not guilty.[46] Section 37(1) of the Dutch penal code (SWB) provides:[47]

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44 Ibid.

45 Translation: "Any person who, even negligently, by the use of alcohol or any other intoxicating substance, inebriates himself to such an extent that he is criminally incapable, if he commits an act in this condition which would have been a crime or offence were it not for this condition, shall be liable to imprisonment not exceeding three years or a fine not exceeding 360 units of the daily tariff. The penalty shall not however in nature or measure exceed the penalty prescribed by law for the act committed during drunkenness". A similar provision is to be found in sec 523 of the old StGB. Cf Kaniak Das österreichische Strafgesetz.

46 Snyman Dronkenskap 38.

47 Noyon/Langemeijer Het Wetboek van Strafrecht (Sevende druk). These authors present a fairly complete history of this section at 197 sqq. Our translation: "A person is not punishable who commits an act

Niet strafbaar is hij die een feit begaat dat hem wegens de gebrekkige ontwikkeling of ziekelijke storing zijner geestevermogens niet kan worden toegerekend.

3.4.2 It is clear that in terms of section 37(1) SWB only a morbid mental disorder or deficiency will lead to non-liability. Drunkenness will be included only in very exceptional cases, i e in the case of the insane drunk. Voluntary drunkenness is therefore not included.

3.4.3 The Dutch approach therefore forms an exception to the general rule of mens rea in criminal law, because it excludes the mens rea requirement in the case of drunkenness.[48] This approach is clearly based on grounds of policy but has repeatedly been criticised on jurisprudential grounds.[49] Certain authors seek the solution in the creation of a statutory crime as in German law.[50]

3.5 The Italian Law

3.5.1 The Italian approach is similar to that of the Dutch but is far more detailed.[51] In section 85 of the Codice Penale criminal capacity is expressly laid down as a requirement for criminal liability. Section 87 CP, however, excludes self-induced criminal incapacity as a defence. Furthermore section 92 CP provides:[52]

L'ubbriachezza non derivata da caso fortuito o da forza maggiore, non esclude ne diminuisce l'imputabilità.

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which cannot be imputed to him because of defective development or morbid disturbance of his mental faculties".

48 Snyman Dronkenskap 46.

49 Cf e g the criticism of Noyon/Langemeijer op cit 199.

50 Snyman Dronkenskap 47.

51 Cf generally Manzini Trattato di diritto penale Italiano (Vol 2) 145 sqq; Delaney (Ed) The Italian Penal Code.

52 Translation: "Drunkenness not caused fortuitously or by force majeure shall not exclude or diminish criminal capacity".

Furthermore, the Italian code distinguishes between occasional and habitual drunkenness: the latter is punished more severely than the former.[53] With regard to occasional drunkenness, the Code distinguishes between drunkenness with intent to commit a crime (which is punished more severely)[54] involuntary drunkenness (which leads to a finding of not guilty)[55] and voluntary drunkenness (which is punished n maliter).[56]

3.6 Conclusion

(a) In Germany, Switzerland and Austria the integrative approach is followed with regard to crimes committed under the influence of liquor or drugs. These systems allow drunkenness or drug intoxication in appropriate circumstances as a defence to criminal liability. This defence is treated as an aspect of voluntariness or criminal capacity. On the other hand these systems maintain a balance between jurisprudence and legal policy by making punishable the self-induced condition of drunkenness or drug intoxication that excludes criminal capacity. Mens rea is a requirement for this crime. This approach is jurisprudentially sound and upholds the principles of nullum crimen sine culpa and nullum crimen sine lege.

(b) In the Netherlands and Italy the absolute policy approach is followed in that neither self-induced drunkenness nor drug intoxication is recognised as a defence. This approach is in conflict with the nullum crimen sine culpa rule and with the rule that the prosecution has to prove all the elements of the crime.

4. THE NORDIC SYSTEMS

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53 Sec 94 CP.

54 Sec 92(2) CP.

55 Sec 91 CP.

56 Van Zyl Beginsels van regsvergelyking at 243.

4.1 Although Roman law has never been received anywhere in Scandinavia, Sweden in particular has had close contact with the development of German jurisprudence since the seventeenth century.[57] It would therefore be appropriate to examine these systems more closely. Since there are more similarities than differences between the various Nordic legal systems, the approaches followed in Sweden and Norway will be referred to as examples here.

4.2 Section 2 of the Swedish penal code provides that mens rea is required for criminal liability but that, if the accused had got himself into a condition of criminal incapacity through drunkenness or drug intoxication, he will not be allowed to go unpunished.[58]

4.3 Section 45 of the Norwegian penal code similarly provides that drunkenness or drug intoxication is no defence.[59] This provision was placed on the statute book in 1922. In 1935 the matter was discussed by the Norwegian Association of Criminalists and criticised by all present. Andenaes summed up the sense of this conference with a reference to a speech by Ragnar Vagt who described this provision as "a stain on the law because it violated one of the basic rules of ethics: guilt as a basis for punishment".[60]

4.4 The conclusion may therefore be drawn that the Nordic systems refuse to recognise drunkenness or drug intoxication as a defence. These legal systems prefer the absolute policy approach to the jurisprudential or integrative approach. Criticism is levelled in these countries against the former approach because it violates the guilt principle.

5. AFRICA

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57 Van Zyl Beginsels van regsvergelyking at 243.

58 Sellin The Penal Code of Sweden.

59 Andenaes The general part of the criminal law of Norway at 267.

60 Ibid. Cf also Scholdager The Norwegian penal code.

5.1 For interest's sake and without claiming to give the full picture, we briefly refer to the relevant law of Zambia and Bophuthatswana.

5.2 The Zambian law relating to voluntary intoxication was described in detail by John Hatchard in a recent article.[61] The relevant provision is section 513 of the Zambian penal code which reads as follows:

> (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
>
> (2) Intoxication shall be a defence to any criminal charge if, by reason thereof, the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -
>
> (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
>
> (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or ommission.
>
> (3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused person shall be discharged, and in a case falling under paragraph (b) the provisions of section one hundred and sixty-seven of the Criminal Procedure Code relating to insanity shall apply.
>
> (4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be quilty of the offence.
>
> (5) For the purpose of this section, "intoxication" shall be deemed to include a state produced by narcotics or drugs.

According to Hatchard section 13(4) presents the most serious problems because it would seem according to this section that drunkenness is a complete defence in any case.

Although this aspect has never come before the Zambian courts, Hatchard submits that section 13(4) was based on an erroneous interpretation of the common law and is in any case a contradictio in terminis in the light of the

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61 "The law of intoxication in Zambia" 1982 CILSA 92.

other provisions of section 13. He suggests that the recommendation of the Butler Committee, i e the creation of a statutory crime of "dangerous intoxication", be implemented.

5.3 The Chretien case also determined the law of Bophuthatswana. This matter was discussed by the Law Commission of Bophuthatswana. The Commission decided to recommend that a new offence of criminal intoxication be enacted. This recommendation resulted in the enactment of the following provision:[62]

> (1) Any person who, after having intentionally or negligently consumed intoxicating liquor or any drug having a narcotic effect, performs or omits to perform an act of which the performance or omission or result would have rendered him liable in respect of any offence for which intent is the requisite form of mens rea, had it not been for the fact that he was under the influence of alcohol or such drug at the relevant time, shall be guilty of an offence.
>
> (2) In sentencing an accused convicted of an offence in terms of subsection (1), the court may, in appropriate circumstances, impose any sentence (other than the death penalty) which it would in law have been competent to impose had the accused been convicted of the offence first referred to in that subsection.

6. GENERAL CONCLUSION

6.1 There are three approaches which are followed by other legal systems:

(a) the absolute policy approach, i e that voluntary drunkenness or drug intoxication is never a complete defence to criminal liability;

(b) the absolute jurisprudential approach, i e that voluntary drunkenness or drug intoxication may be a complete defence to criminal liability; and

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62 Sec 1 of the Criminal Law Amendment Act 14 or 1984 (B).

(c) the integrative approach, i e that voluntary drunkenness or drug intoxication may constitute a complete defence, but that legal effect should be given to society's disapproval of drunkenness by the creation of an offence of criminal intoxication.

6.2 The absolute policy approach is followed in some countries in the Anglo-Amerian legal family (England, the USA and Canada), some countries of the Romano-Germanic legal family (Italy and the Netherlands), and in the Nordic systems. This approach has been criticised from virtually every quarter as being contrary to the principle of nullum crimen sine culpa. In these systems the integrative approach is suggested as an alternative.

6.3 The absolute jurisprudential approach is followed in Australia and New Zealand (and also in South Africa). This approach is criticised because it does not give effect to society's disapproval of drunkenness and drug intoxication as factors causing crime. In these systems the integrative approach is also suggested as an alternative.

6.4 The integrative approach is followed in Germany, Switzerland, Austria and Bophuthatswana and is recommended in England, Canada, Australia and Zambia.

PART TWO : ADJECTIVE CRIMINAL LAW

CHAPTER 7

THE ONUS OF PROOF

1. INTRODUCTION

1.1 The question that has to be answered in this chapter is: who should prove intoxication? This question has been approached from the following angles:

(a) Proof of intoxication as an element of the offence;

(b) proof of intoxication as a defence; and

(c) proof of intoxication as a mitigating or aggravating factor.

1.2 The following view has been adopted:[1]

> Possibly principles of the onus of proof might be simplified considerably if it were constantly borne in mind that by "proof" actually nothing else than "persuasion" is meant. A fact is "proved" if the court is satisfied of its existence. The onus of proof could therefore be effectively described as the "obligation to persuade". The actor (party on whom the onus rests) therefore always has the

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1 Oosthuizen Die bewys- en weerleggingslas in die Suid-Afrikaanse reg (Unpublished LLD-thesis: UP) at 170. Our translation.

obligation to persuade, while the reus (the actor's opponent) on the other hand only has the obligation to prevent such persuasion. Both obligations are however through evidence or factual material except in those cases where an admission, a presumption of law or judicial notice takes the place or function of such evidence. From this it follows logically that the obligation to produce evidence at a certain stage of the trial shifts from the actor to the reus.

2. PROOF OF DRUNKENNESS OR DRUG INTOXICATION AS AN ELEMENT OF THE CRIME

2.1 In cases where drunkenness or drug intoxication forms an element of the crime with which the accused is charged, the onus is on the State to prove this element beyond reasonable doubt.[2] The nature and extent of the drunkenness to be proved depend upon the crime-creating provision.[3] In order to discharge this onus the State uses three types of evidence:

(a) the opinion of a layman;

(b) the opinion of an expert (e g a doctor); or

(c) scientific determination of the accused's blood alcohol content or the presence of drugs.

2.2 The opinion of a layman

2.2.1 The opinion of a layman is readily accepted by the courts with regard to drunkenness, as it is such a common phenomenon.[4] The requirements regarding such a layman's opinion are:

(a) the witness must be competent to express an opinion; and

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2 Cf Reed Drug Offences in South Africa at 33 sqq with regard to drugs.

3 Cf the different requirements laid down in sections 140(1) and (2) of the Road Traffic Ordinance 21 of 1966 (supra).

4 Schmidt Bewysreg (2de uitgawe) at 524; S v Adams 1983 2 SA 577 (A) at 586A-B.

(b) the grounds for the opinion must be given; and

(c) the court is not bound by the opinion.[5]

2.2.2 The opinion of a layman as to whether or not a person had taken drugs is more problematic. Although the courts would naturally be cautious about accepting a layman's opinion in this regard, we suggest that the same requirements as for a layman's opinion with regard to drunkenness should apply to the use of drugs.

2.3 The opinion of an expert

In borderline cases of drunkenness and in the case of drug intoxication it is far more difficult for a layman to express an authoritative opinion, and the evidence of an expert therefore carries more weight. As regards the admissibility of the evidence of an expert, the same rules apply as those given above for a layman:

(a) the witness must be competent to express an opinion; and

(b) the grounds for the opinion must be given; and

(c) the court is not bound by the opinion although it would rely with greater confidence on such an opinion.

2.4 Scientific determination

2.4.1 Section 37(2) of the Criminal Procedure Act, 1977 provides:

> (a) Any medical officer of any prison or any district surgeon or, if requested thereto by any police official, any registered medical practitioner or registered nurse may take such steps, including the taking of a blood sample, as may be deemed necessary in order to ascertain whether the body of any person referred to in paragraph (a)(i) or (ii) of subsection (1) has any mark, characteristic or distinguishing feature or shows any condition or appearance.

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5 Ibid.

(b) If any registered medical practitioner attached to any hospital is on reasonable grounds of the opinion that the contents of the blood of any person admitted to such hospital for medical attention or treatment may be relevant at any later criminal proceedings, such medical practitioner may take a blood sample of such person or cause such sample to be taken.

2.4.2 Blood alcohol analysis[6]

The analysis of a person's blood alcohol content is useful in proving drunkenness. As a rule blood samples are taken in all cases of drunken driving, and samples are also sometimes taken in other cases where drunkenness might have played a role. Because valuable evidence my be lost, it is advisable for all persons who are arrested while under the influence of alcohol to be taken to a district surgeon for a blood test. This rule should naturally only be applied to more serious cases and cases where the accused is arrested shortly after the commission of the offence.[7]

The analysis of blood samples is undertaken by the forensic laboratory of the Department of Health and Welfare. The apparatus used in this process is the gas chromatograph. The accuracy of analyses with this instrument has repeatedly been attacked in our courts,[8] and the following guidelines have been developed in time:

(a) The State has to prove that the result of the analysis is reliable and that a reasonable inference can therefore be based upon it;[9]

(b) The State is obliged to prove the accuracy of the analysis only if the accused had laid a basis therefor in his defence;

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6 Because the "breathalyzer test" is not yet accepted by our courts, it will not be discussed further: Strauss Doctor, patient and the law at 330.

7 This is now standard Police practice, according to the Commissioner of the South African Police.

8 S v Strydom 1978 4 SA 748 (EC); S v Terblanche 1981 1 SA 791 (T); S v Dickenson 1982 3 SA 84 (A).

9 Schmidt op cit 114.

(c) Each case has to be considered on its own merits.[10]

In S v Dickenson[11] a detailed evaluation of the evidence with regard to the accuracy of the gas chromatograph was made. In that case the instrument was found to be accurate.

2.4.3 Scientific determination of the influence of drugs on a person

Although the scientific identification of a drug is every-day practice, the same cannot be said of the determination of the influence of a drug on a person.[12]

Methods for establishing the drug content of the body have already been developed by forensic scientists.[13] The method of analysis which is currently the most popular overseas is gas chromatography but other methods are also sometimes employed.[14]

We are of the opinion that this is a fertile field for exploration by forensic scientists and that, when a matter such as this does come before a court, the same guidelines as set out above will be decisive.

2.5 Conclusion

2.5.1 The rules of evidence relating to the onus of proof in cases where drunkenness forms an element of the crime are clear and present no problems in practice.

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10 S v Dickenson (supra) at 94 G.

11 Supra.

12 No reported decision in point could be found. Reed op cit is also silent on this point. The only known experiments of this nature are at present being carried out by the Department of Transport in Australia: Australian Weekly Newsletter Vol 42 No 6 p 8.

13 Cf eg Niyogi "Methods of Separation of Drugs from Biological Materials" 1970 Journal of Forensic Medicine 20 sqq.

14 Gray Attorney's Textbook of Medicine par 29A22(1).

2.5.2 In practice there is still a large fallow field which can be explored by forensic scientists to assist the courts in establishing the influence of drugs on the mental faculties of an accused.

3. PROOF OF DRUNKENNESS OR DRUG INTOXICATION AS A DEFENCE

3.1 The question to be answered in this section is upon whom the onus of proof should be when drunkenness is raised as a defence. This question has long been a point of controversy in our law and has recently been revived by a suggestion by Rumpff CJ in the Chretien case that the existing law might be reviewed.

3.2 The controversy basically revolved round two Appellate Division decisions, R v Kaukakani[15] and R v Pethla.[16] In the former case the court placed the onus on the accused to prove his drunkenness by a preponderance of probabilities while in the latter case the Court held that the onus was on the State to prove the absence of drunkenness beyond reasonable doubt. Since 1956 S v Pethla has been followed without much opposition, until S v Chretien reopened the debate.

3.3 The Pethla case evoked positive[17] as well as negative[18] criticism, but was followed in practice.[19] But was the Pethla case correctly decided? The chairman of this Commission does not think so. His views, as conveyed to the other members of the Commission, may briefly be stated as follows:-

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15 1947 2 SA 807 (A).

16 1956 4 SA 605 (A).

17 Burchell 1957 SALJ 148 at 149-150.

18 De Wet 1957 THRHR 89 at 92.

19 S v S 1963 4 SA 792 (N); S v Engelbrecht 1966 1 SA 210(C); Burchell 1962 SALJ 131; Snyman Dronkenskap 190.

3.3.1 In the course of his judgment in Pethla Hoexter J A held:[20]

> Our modern case law takes a different view of the effect of drunkenness in certain cases; it recognises that the mind of an accused may be so obscured or affected by the consumption of alcohol that he is incapable of forming the intention to kill which must be proved in a charge of murder.

3.3.2 Of course, the State has to prove, in a charge of murder, the intention to kill. But the intention which is postulated here is the intention of the normal person. This intent encompasses mens rea (wederregtelikheidsbewussyn).

3.3.3 Since the promulgation of the McNaghten rules the onus has always been, in England and in our law, on the accused to prove insanity. That is because the community and the law proceed from the premiss that the normal person is criminally responsible.[21]

3.3.4 Insanity is but one phenomenon of a person's psyche being so affected as to render him criminally non-responsible. Inebriation is another.

3.3.5 The criteria for determining whether a person is criminally responsible or not are laid down in section 78 of the Criminal Procedure Act 51 of 1977. These criteria represent an extension of the tests formulated in the McNaghten rules.

3.3.6 The defence of drunkenness amounts, in effect, to a defence of criminal non-responsibility and not of incapability of forming an intention. As previously stated, the intent which the State has to prove, is the intent

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20 608 F-G.

21 Rumpff Commission Report 2.5; R v Hay supra 298; R v Smit 1950 4 SA 165 (O); R v Kennedy 1951 4 SA 431 (A), 345; R v Koortz 1953 1 SA 371 (A), 375; R v Von Zell (1) 1953 3 SA 303 (A); R v Roberts 1957 4 SA 265 (A), 272-3; S v Van Zyl 1964 2 SA 113 (A), 121; S v Harris 1965 2 SA 340 (A), 345; S v Mahlinza 1967 1 SA 408 (A), 419; S v Trickett 1973 3 SA 526 (T), 532.

of a normal person. The accused who maintains that his psyche was, by reason of the consumption of alcohol, affected to such an extent that he should not be found guilty, is raising a defence of criminal non-responsibility and the tests relating thereto have to be applied. It is submitted that in this regard Rumpff C J approached the matter correctly in Chretien.

3.3.6 In another regard, however, Rumpff C J found it difficult to reconcile his views expressed in the Rumpff report with the view he seemed to prefer in Chretien. In Chretien Rumpff C J, even though he accepts that the onus is on the State, considers that if the defence of criminal non-responsibility due to drunkenness is raised, there should be clear evidence which justifies such a conclusion.[22] Had the Rumpff Commission been consistent[23] in its attitude that the law proceeds from the premiss of the normal person, it would not have come to the conclusion, as it did in its report, that the onus was on the State, and it would not have been necessary for Rumpff C J in Chretien to feel perturbed about this and to hint that the law relating to the onus may have to be reviewed.[24]

3.4 These views of the Chairman which were conveyed to the other members of the Commission were not fully debated or considered. Tentative views were expressed, some in disagreement with those of the Chairman, but it was not found necessary to count heads, mainly for two reasons:-

- The Chairman agreed that, in spite of his views, even though the incidence of success of defences of drunkenness might be reduced if he were right, it might still be desirable to proscribe acts done

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22 Chretien, supra 1106 B-C en F-G.

23 The inconsistency is to be found in 10.53-65 where reference is made to "gesindheid" (intent). It is submitted that the "gesindheid" which has to be proved by the State is that of the normal, sane person. A person who lacks criminal responsibility due to an aberration albeit temporarily, cannot be said to be able to display any intent.

24 Chretien, supra 1106 C.

under the influence caused by the voluntary consumption of liquor.

The Commission agreed that the matter of settling the onus, including the onus relating to a defence of committing an act ur 'er the influence of drugs, should be left to the Appellate Division.[25]

4. PROOF OF DRUNKENNESS OR DRUG INTOXICATION AS A MITIGATING OR AN AGGRAVATING FACTOR

4.1 Despite the apparent acquiescence with which the principle that an accused has to prove the existence of mitigating factors on a preponderance of probabilities is accepted, there is a difference of opinion on this matter.

4.2 The following two statutory provisions serve as a starting point:

(a) With regard to capital offences:[26]

Where a woman is convicted of the murder of her newly born child or where a person under the age of eighteen years is convicted of murder or where the court, on convicting a person of murder, is of the opinion that there are extenuating circumstances, the court may impose any sentence other than the death sentence.

(b) With regard to other offences:[27]

(i) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

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25 Cf the view expressed in 10.65 of the Rumpff Commission Report.

26 Sec 277(2) of the Criminal Procedure Act 51 or 1977.

27 Sec 274 of the Criminal Procedure Act 51 of 1977.

(ii) The accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court.

4.3 In R v Lembete[28] Greenberg JA held that the onus to prove extenuating circumstances on a preponderance of probability is on the accused. As the ground for this decision, Greenberg JA referred to the general rule that the onus rests on the party who asserts the affirmative.[29]

4.4 Another explanation for this rule was found by Schmidt merely in the principle that he who makes the assertion must prove it.[30] The State must prove aggravating circumstances and the accused must prove extenuating circumstances. Although the State is required to prove aggravating circumstances, Schmidt raised the question whether the opposite necessarily holds true. The fact that the accused has an evidential burden before judgment, but an onus of proof thereafter, seems anomalous to Schmidt.[31]

4.5 Oosthuizen provides yet another explanation:[32]

> It seems, however, that a plea in mitigation, i.e. the reduction of legal liability resulting from an offence, is nothing else than a special defence and analogous to a plea of contributory negligence in private law. This defence is also aimed at a finding of legal liability. The approach that the onus is on the accused to prove extenuating circumstances therefore appears to be completely correct and in accordance with the Roman law principle: agere etiam is videtur qui exceptione utitur nam reus in exceptione actor est.

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28 1947 2 SA 603 (A) at 610. Despite the criticism of Colman J in S v Shepard 1967 4 SA 170 (W) 181B-C this decision has been applied consistently. Cf eg S v Ndlovu 1970 1 SA 430 (A) and now S v Theron 1984 2 SA 868 (A).

29 At 609.

30 Schmidt op cit 65.

31 Ibid.

32 Op cit 295. Our translation.

4.6 There is no unanimity with regard to the application of this principle either. In R v Von Zell(2)[33] Schreiner JA held:

> R v Lembete, 1947 (2) SA 603 (AD), decided that the onus of satisfying the triers of fact that there are extenuating circumstances rests on the accused. The case has little, if any, bearing on the proper approach to be adopted by a trial Judge who has in terms of the statute been given by the triers of fact a discretion as to what sentence to impose. The use of the term onus is in the latter connection inappropriate. The Judge has to weigh a variety of factors, some of them facts, others impressions regarding the accused's character and probable reactions to clemency, others again matters of policy. In so far as there is room at the sentencing stage for doubt as to the existence of any relevant fact the trial Judge, if he does not wish to exercise the powers given him by sec. 206(1), must reach his own conclusions as he thinks right, and there is no obligation upon him to use the language of onus of proof in examining the issues. All that can fairly be said in this connection is that mitigating factors are naturally put forward and supported by the defence and the Judge is accordingly entitled to ask himself whether he is satisfied of their existence and, if not so satisfied to treat them as if they did not exists for the purpose of deciding on his sentence. That, I think was Murray, J's approach to the matter and it is in my view wholly unobjectionable.

4.7 In S v Seleke[34] the Court held:

> There is no formal onus of proof on the accused to supply the court with and persuade it of the existence of extenuating circumstances in respect of his crime of violence. Although he should be afforded every opportunity of doing so, it is in the final analysis the duty and task of the trial court (assisted by the State as well as the defence) to discover and consider all reasonable possibilities in the direction of extenuating circumstances, in order to arrive at an appropriate sentence.

4.8 On the strength of these dicta Schmidt argues that sentencing is more in the nature of an administrative than a judicial act and that the ordinary rules of evidence relating to onus should not be applied here. On the other hand the rules of evidence cannot be argued away so easily. He suggests the following compromise:[35]

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33 1953 2 SA 552 (A) at 561.

34 1976 1 SA 675 (T) at 690 F-G. Our translation.

35 Op cit 65-66. Our translation.

> Whilst some sort of onus of proof will sometimes have to be applied in respect of a fact which may influence sentence, the State should bear it - for the considerations which lead to the States having to prove all the elements in the pre-conviction stage, are also relevant in regard to sentencing.

4.9 The rule that the onus is on the accused to prove extenuating circumstances was recently confirmed by the Appellate Division in S v Theron.[36] However in S v Sephuti[37] Smalberger AJA expressed his doubts on this point with reference to extenuating circumstances in a murder case:[38]

> In casu it would mean that the appellant, notwithstanding the fact that he has been found guilty on the basis of facts that substantially reduce the moral blameworthiness of his act, would have to be sentenced to death because he has not proved extenuating circumstances. It is difficult to accept that such a situation could develop in our law.

4.10 Snyman,[39] however, refers to the practice, referred to in R v Hartley[40] as a "time-honoured procedure which has been so firmly enshrined in the practice of our courts, that it has become now a case of cursus curiae est lex curiae," i e the custom of the court's taking cognisance of ex parte statements of the accused or his legal representative about the existence of extenuating circumstances. Snyman seriously questions this practice. His criticism is based on section 274(2) of the Criminal Procedure Act, 1977,[41] which only provides for the address to the court "on any evidence received under subsection (1)."[42]

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36 Supra.

37 1985 1 SA 9 (A).

38 Op 18 E.

39 Dronkenskap 191 et seq.

40 1966 4 SA 219 (R) at 221D.

41 Act 51 of 1977.

42 This approach was also adopted in S v Van Rensburg 1968 2 SA 622 (T).

Du Toit[43] says that this rule should not be confused with the accused's right in terms of section 274(2) to address the court on the evidence, and sums up the position in South Africa as follows:

(c) It is highly desirable that mitigating or aggravating factors be laid before the court by way of evidence under oath so that it may be tested in cross-examination and the court will be in a position to base its findings with regard to sentence on proved facts.

(d) In order to receive such evidence the court will always give the parties the opportunity to call witnesses.

(e) Mitigating or aggravating factors may also be brought to the attention of the court ex parte (or: from the Bar) by the two legal representatives, but are, in the absence of admission by the other party, worth no more than mere address or argument. On admission by the other party the ex parte statements acquire the same force as evidence under oath and will be considered by the court as if proved by evidence.

(f) If the court doubts the ex parte statements, the legal representative of the party concerned is informed so that he may consider presenting evidence under oath.

4.11 Conclusion

4.11.1 The rules relating to the proof of facts that have a bearing on sentence are in a phase of development. The matter is primarily a problem of practice which does not warrant the intervention of the Legislature: law reform may in this case be left to the courts with confidence.

4.11.2 Although the accused and his representative are expected to submit to the court all facts which may help it to impose an appropriate

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43 Straf in Suid-Afrika at 139.

sentence, the reverse is also true: the public prosecutor, as the mouthpiece of the sense of justice of society, also has a bounden duty to furnish the court with all facts of which he is aware, be they aggravating or mitigating. The court can impose an appropriate sentence only when both parties, the State and the defence, play an active part in the process of sentencing.

4.11.3 It may therefore be concluded that development should take place in accordance with the following guidelines:

(a) Sentencing is a discretionary power of the judge. He ought therefore not to be bound by rigid rules of onus of proof.

(b) The judge's sentence should be based on facts and not on rhetoric or speculation.

(c) Mitigating factors which have not come to light before judgment should be placed before the court by the defence, either by way of evidence under oath or ex parte.

(d) The State should not play a passive role in the acceptance of the evidence or of ex parte statements: evidence in rebuttal to which the State has access should be placed before the court.

(e) If there is a more or less equal balance of probabilities on the evidence with regard to sentence, the accused should be given the benefit of the doubt.

PART THREE

EVALUATION OF COMMENTS AND RECOMMENDATIONS

CHAPTER 8

EVALUATION OF COMMENTS

1. INTRODUCTION

The Commission's Working Paper was distributed to 301 persons and bodies in South Africa, 74 overseas contacts (Law Commissions, etc.) and 51 law libraries. 62 written comments were received and 2 persons gave oral evidence before the Commission's Working Committee. The names of these respondents appear in Schedule B to this report.

2. PUBLIC OPINION

2.1 In view of the recently published HSRC reports on this matter and in view of the current economic climate it was considered inappropriate to conduct a new formal opinion poll to gauge public opinion on the matter. However, the public was invited through the press and popular periodicals to comment on the question.

2.2 The most striking feature of these comments was that not a single letter was received in which the absolute jurisprudential or (as it is popularly known) "mitigatory" approach to drunkenness and drug intoxication was favoured. On the contrary every respondent strongly condemned the fact that the courts seem to be too lenient towards drunk or drug intoxicated offenders.

2.3 This response is in line with the opinion poll conducted in 1977 by the HSRC in which it was found that 89 % of the 5 000 respondents held the opinion that the courts should under no circumstances accept drunkenness as a defence in respect of serious crimes.

3. ACADEMIC OPINION

3.1 Opinions on this matter were widely divergent. All three approaches drew some support from academic circles.

3.2 Those in favour of the absolute jurisprudential approach

Respondents who favour this approach argue that:[1]

(a) a person cannot be held responsible for offences committed when he had no mens rea;

(b) the Chretien approach accords with current legal theory.

On the question whether society will be adequately protected if this approach is adopted, Oosthuizen remarks:[2]

> The courts' sceptical attitude to drunkenness as a defence also greatly contributes to protecting society, as is evident from the Chretien case.

This argument seems to imply that in the final analysis the public will be protected against intoxicated offenders only by the courts' prejudice (sceptical attitude). This is totally inconsistent with the fundamental principles of justice and impartiality. It is difficult to understand why, in a developed legal system such as ours, the public should be dependent for their protection on such a fluid concept as the courts' "sceptical attitude".

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1 Prof S A Strauss, P M Bekker, J H van Rooyen (from UNISA) and Mr M M Oosthuizen (UPE).

2 At p 19 of his comment. Our translation. Cf now Oosthuizen "Dronkenskap in perspektief - 'n strafregtelike bespreking" 1985 THRHR 407 at 421.

This argument seems also to imply that there is a difference between the rule and its application. Nothing is further from the truth. The Chretien decision laid down a rule and this has to be applied by the courts. To say that it is not the principle that matters but the way in which it is applied, is to imply a measure of distrust in the principle.

3.3 Those in favour of the absolute policy approach

This approach drew limited support from academic circles. Prof R C Whiting (Wits) submitted (in writing and in oral evidence) that:

(a) a new statutory measure be introduced whereby any person who unlawfully causes the death of another person, applies force to a person or threatens a person with force or causes damage to another's property, shall be guilty of an offence; and

(b) that in such cases drunkenness shall be no defence.

This approach is an obvious attempt to limit the validity of the defence of drunkenness to cases other than assault (and similar crimes) and damage to property. In practice it is found that these are the crimes that are most frequently committed by drunk offenders and that outrage public opinion.[3]

While there may be some merit in the idea of taking only assault and damage to property out of the ambit of the Chretien case, the Commission is not

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3 This argument also underlies the recommendations made by Mr E du Toit (Deputy Attorney-General - Johannesburg) infra.

persuaded that the codification of those crimes in the manner suggested by Prof Whiting is justified.

3.4 Those in favour of the integrative approach

The majority of academics who responded to the Working Paper supported the integrative approach.[4]

These respondents gave the following reasons for their view:

(a) Society requires that an intoxicated offender who causes his own intoxication should not be treated more leniently than a person who committed the same offence while sober.

(b) The same problem has been solved by most Western countries by creating a statutory offence based on the integrative approach.

(c) The Chretien case does not adequately reflect the sence of justice convictions of society.

(d) The public need to be protected against dangerous or violent intoxicated offenders.

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4 Proff C R Snyman (UNISA); L F van Huyssteen (UWC); J R du Plessis "Hans Welzel's final-conduct doctrine - an importation from Germany we could well do without" 1984 SALJ 301 on 314 (University of Fort Hare) and Mr S E Farran "Offences committed under intoxication: a comparative survey and proposals for reform" 1984 SACC 109 (Natal); The Institute for Public Service and Vocational Training and Mr A St Q Skeen (Wits).

Farran suggested that the statute be drafted in accordance with the following guidelines:[5]

(a) The statute should preserve the principle of mens rea.

(b) Such an offence should be separate from the unlawful conduct committed under the influence of liquor or drugs in so far as mens rea and punishment are concerned, but related to the unlawful conduct in that voluntary intoxication should not be punishable unless a crime other than the proposed statutory offence has been committed.

(c) Defining limitations such as "dangerous" - as used in the Butler Report - should be avoided.

Skeen suggested the following draft:

> Any person who, after having intentionally or negligently consumed intoxicating liquor or a substance or drug having a narcotic effect, performs or omits to perform an act of which the performance or omission or result would have rendered him liable in respect of any offence, had he not been under the influence of intoxicating liquor or substance or drug having a narcotic effect at the relevant time shall be guilty of an offence: Provided that such person shall not be liable under this section if he proves to the satisfaction of the court that his intoxication resulted from a fact unknown to him, and could not have with reasonable diligence been ascertained by him.

4. THE BENCH

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5 Supra.

The response from the Bench was disappointing. Only a few magistrates submitted comments, but no comment was received from judges.

The magistrates of Cape Town and Goodwood supported the integrative approach. The following extract from the comment of Mr J L Cilliers (magistrate: Goodwood) will serve as an illustration of their views:[6]

> In an area such as the Cape Peninsula where thuggery on the part of drunk and half-drunk less-developed people is rife, it is a daily experience in our courts that drunkenness is submitted as an excuse (in toto or in mitigation), sometimes for the most shocking offences, not only against people of another race as the accused, but frequently against members of the same race as the accused or members of his family. This situation outrages the community's sense of justice.

Mr W A J van Zyl and Mr M C de Wit (Pretoria), regional court magistrates, thought that the solution to the current problem would be to shift the onus of proof to the accused. Two reasons were advanced for this suggestion:

(a) Under the present system the accused has to be acquitted if there is only insufficient evidence about his state of mind; and

(b) the only way to distinguish a genuine from a fabricated defence of intoxication is to test the defence under cross-examination.

While there is certainly some merit in these arguments, they hold true equally of all other cases in which drunkenness plays no role. It is not clear why drunkenness should be singled out specifically for special treatment in the law of evidence.

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6 Our translation.

5. LEGAL PRACTITIONERS

5.1 The Bar

Comments were received from members of the Bloemfontein, Pretoria, Cape Town and Durban Bars. The General Council of the Bar of South Africa did not adopt an official stand.

Mr A Findlay, SC (Durban) suggested that instances of outright acquittal on account of intoxication were rare and he posed the question whether legislative intervention was needed. If alternatives were sought, however, he agreed with the integrative approach and made certain suggestions as to what the elements of the proposed offence should contain.

Mr A R Erasmus (Bloemfontein) thought that there was no need for legislative intervention in this field and drew attention to possible negative effects of the proposed enactment: if its provisions were strictly interpreted, they would have little or no influence on our administration of justice, since virtually nobody could be convicted. On the other hand, if a broad interpretation were given the provisions, prosecutors with their heavy work-load might be tempted to accept pleas of guilty to this lesser offence rather than to press the more serious charges. This would bring the law into greater disrepute among the public.

Mr D A Preis (Pretoria) supported the integrative approach. He suggested the following wording:[7]

> Any person who commits an act which would be an offence were it not for his drunkenness or drug intoxication caused by the consumption of alcoholic liquor or any other substance shall be guilty of an offence unless he proves that such drunkenness or drug intoxication was fault of his own.

In a memorandum prepared by Mr A H Veldhuizen, Mr B M Griesel and Mr N J Treurnicht (Cape Town) the integrative approach was found to be the most acceptable alternative.

They suggested the following wording:[8]

> Any person who voluntarily consumes intoxicating liquor or any other substance that affects his mental faculties and thus places him in a state in which he cannot be held criminally responsible for his actions or behaviour, and who commits an act or omission for which he would be criminally responsible if he were not in the said state, shall be guilty of an offence ...

5.2 The Side Bar

The Law Society of the Cape of Good Hope agreed with the integrative approach and suggested that "knowledge or reasonable foreseeability" that alcohol or drugs may influence the offender into conduct which would have been a crime be made an element of the offence.

The Natal Law Society also supported the integrative approach. They submit that, even though the creation of such an offence would revive the versari principle to some extent, it is the legislature's duty and prerogative to satisfy the sense of justice of society.

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7 Our translation.

8 Our translation.

The integrative approach was also adopted in an individual memorandum submitted by the firm of Couzyn, Hertzog & Horak.

5.3 Public Prosecutors

As public prosecutors are in the front line in handling this problem, their views would have been regarded as an important guideline. However, we regret to report that response from this quarter was sadly lacking.

A very notable exception was the evidence given by Mr E du Toit (Deputy Attorney-General: Johannesburg). He gave evidence in his personal capacity. Mr Du Toit argued that the Chretien controversy would probably not have arisen were it not for the fact that our law knows no such offence as "negligent assault", an offence on which the State could fall back if intent to assault or kill could not be proved on account of drunkenness. The fact is, argued Mr Du Toit, that a drunk man invariably commits offences of which the application of force to the person or property of another is an element. He therefore argued in favour of an offence of negligent application of violence to the person or property of another.[9]

Although Mr Du Toit's suggestion might ensure that a drunk person who causes injury to another or damage to the property of another is properly punished, it would also catch up in the net of criminal law persons who merely act clumsily in circumstances where intoxication plays no role at all. The Commission is not in a position to consider the desirability or otherwise of the creation of such an offence without making a thorough study of all the implications of and the need for such a step.

6. THE MEDICAL PROFESSION

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9 This was also suggested by Steenkamp J in S v Matle 1984 3 SA 7 & 8 (NK).

The medical profession made a substantial contribution to the current debate. The South African Society of Full Time District Surgeons and Forensic Pathologists were of the opinion:

(a) that the general public is concerned about the fact that a drunk offender seems to be dealt with leniently by the couts, and that this opinion should be heeded if public confidence in the courts is not to be diminished;

(b) that offenders are sometimes over-anxious to be sent for rehabilitation in order to avoid punishment or to serve their punishment in more comfortable conditions.

Prof J D Loubser, Chief Specialist, Medico-Legal Services of the Department of Health and Population Development and Head of the Department of Forensic Medicine of the University of Pretoria, pleaded for greater awareness on the part of doctors of the role they should play in solving the complex problems of forensic medicine.

The Executive Committee of the Society of Psychiatrists of South Africa was of the opinion that, since the psychiatrist (who has made no special study of the abuse of drugs) can only testify as to the accused's mental condition at the time of the examination, it is of vital importance for the examination to be done immediately after arrest. According to the Commissioner of the South African Police, this is already standard practice in all cases where such evidence may be relevant and is at hand. It was also recommended that two blood samples be taken on arrest: one for use by the prosecution and one by the defence.

In a separate memorandum, Prof J A Plomp argued that the absolute jurisprudential approach was, from a psychiatric point of view, the most sound. However, regard must be had to public indignation and therefore he supported the introduction of an offence of criminal intoxication. Prof Plomp also expressed doubt about the principle that something that is normally no offence (intoxication) should become an offence because something else (which is also no offence because of intoxication) was committed. He suggested that an arbitrary blood-alcohol percentage be laid

down above which a crime is committed. He did not however say what the limit should be.

7. WELFARE ORGANISATIONS

Those who render practical welfare services[10] were equally divided into supporters of the jurisprudential approach and supporters of the integrative approach. The South African National Council for Child and Family Welfare supported the integrative approach and argued:[11]

> In this way the principles underlying the sound administration justice and the need to protect society against persons who voluntarily place themselves in an irrational state are reconciled.

The Family and Marriage Society of South Africa (FAMSA) supported the jurisprudential approach and argued:

> We feel that this approach is jurisprudentially sound; however, society must be protected, and therefore we suggest that in these cases the court should commit such an accused person to a rehabilitation centre from which he may not be released unless a multidisciplinary team ... certify that in their opinion he has been rehabilitated.

The integrative approach is rejected because it is believed to place too much emphasis on punishment rather than treatment.

8. THE VIEWS OF BLACK PEOPLE

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10 The following persons and organisations responded: The Department of Health Services and Welfare (Administration: House of Assembly); Mr M J Joubert (Montana Mission); The S A National Council for Child and Family Welfare; The Family and Marriage Society of South Africa.

11 Our translation.

Although the availability of the Working Paper was widely advertised and although many copies were distributed among Black people, no direct comments were received from this source.

However, the Director-General of the Department of Co-operation and Development commented as follows:[12]

> It seems that the absolute policy approach would be the most acceptable to most Blacks because the interests of society are sovereign to Black people. In general, however, the law is in fact subordinate to the interests of society. There is some merit in the integrative approach but problems may arise because the acquittal of a person of a serious charge such as murder and his subsequent conviction of a statutory offence may be incomprehensible to a Black person.

9. MISCELLANEOUS OTHER ORGANIZATIONS

In supporting the integrative approach, the Women's Legal Status Committee argued:

> The introduction of a new offence of criminal intoxication where a person has been guilty of harm to others or damage to property whilst under the influence of drink or drugs, is not only necessary, for the protection of society, it would also curb persons from pleading intoxication falsely.

The National Council of Women of South Africa also supported the integrative approach and said that:

> Public opinion ... appears at a loss to understand why a self-induced incapacity (which in most cases can be avoided, or the consequences of which can be or reasonably should be foreseen) may be used as a mitigating factor.

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12 Our translation.

10. CONCLUSION

10.1 There still seems to be some difference of opinion, especially amongst lawyers, as to the approach to be adopted to solve the problem of intoxication. The weight of opinion however seems to incline to the integrative approach.

10.2 A notable feature of the comments was the striking absence of any specific reference to any instance in which an accused "got off too lightly" because of drunkenness.

CHAPTER 9

RECOMMENDATIONS

1. THE ADJECTIVE LAW

The Commission recommends that the existing law relating to evidence in cases of offences committed under the influence of liquor or drugs be left unchanged.

2. THE SUBSTANTIVE LAW

2.1. Drunkenness or drug intoxication as an element of a crime

In Chapter 3 above the criteria by which drug abuse is made punishable were highlighted. The question of the possibility of extending the punishability of drunkenness depends on the solution proposed to the whole problem of drunkenness and drug intoxication.

Apart from recommendations contained elsewhere in this report, we make no recommendations in this regard.

2.2 Drunkenness or drug intoxication as a defence

It was pointed out in Chapter 4 above that voluntary drunkenness or drug intoxication resulting in criminal incapacity constitutes a complete defence to criminal liability in the case of a crime requiring intent but not in the case of a crime requiring negligence. Involuntary drunkenness or drug intoxication remains a complete defence in both cases. Voices have, however, been raised in favour of recognising a defence of drunkenness, even if induced with the intention of committing a crime, in the light of the Chretien case.

The fact that drunkenness or drug intoxication may result in the acquittal of an accused does not satisfy the sense of justice of society. It must be

admitted, however, that cases where such acquittals do occur are confined to crimes requiring intent and further to cases where the accused was drunk or drugged to the extent of criminal incapacity at the time of the crime. In the majority of cases drunkenness or drug intoxication as a defence therefore poses no serious problem.

The Commission is strengthened in this belief by the comment received on the Working Paper. The general public is invariably in favour of severe punishment of the drunk or drug-intoxicated offender. The majority of other respondents also interpret the sence of justice of society as not being satisfied with the acquittal of a drunk or drug-intoxicated offender.

The Commission is of the opinion that although very few cases occur in which an accused is acquitted by reason of intoxication, the present state of our law in this regard calls for legislative intervention. The Commission considers that the integrative approach adequately reflects the sense of justice of society and is in accordance with the general principles of criminal law. It is therefore recommended that legislation be passed to give effect to this finding. A draft bill appears in Schedule A to this report.

3. PUNISHMENT

The Commission is satisfied that justice requires that the extent to which an offender was under the influence of liquor or drugs when he committed the offence should, together with all other relevant factors, be taken into account as a mitigating or an aggravating factor when punishment is considered. The Commission has no concrete evidence that our courts tend to over-emphasise this factor. No adaptation of the law in this regard is recommended.

In order to ensure that our courts at all times give proper effect to the well-established penal policy as enunciated in authoritative judgments, prosecutors might play a more active role at the sentencing stage by way of argument or the leading of evidence.

SCHEDULE A

BILL

To declare certain acts committed by a person in a state of drunkenness or drug intoxication an offence, and to provide for matters incidental thereto.

To be introduced by the Minister of Justice

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Offences committed under the influence of liquor or drugs.

1. (1) Any person who voluntarily consumes liquor or any drug or substance which affects his mental faculties, knowing that such liquor, drug or substance has that effect, and who, while his mental faculties are thus affected, commits an act for which he would have been criminally liable had his mental faculties not been thus affected, shall be guilty of an offence and shall be liable on conviction to any punishment, except the death penalty, which could have been imposed on him had he been held criminally liable for such act.

(2) If, in a prosecution on a charge of any offence, it is found that the accused is not criminally liable for the offence charged, owing to the fact that his mental faculties had been affected by liquor or any drug or other substance, the accused may be found guilty of the offence in subsection (1) if the evidence proves such offence.

Short Title.

2. This Act shall be called the Criminal Law Amendment Act, 1986.

SCHEDULE B

LIST OF PERSONS AND BODIES WHO COMMENTED ON WORKING PAPER 5

A. GENERAL PUBLIC

Mrs M Martin	Lothair
Mr C L de Wit	Pretoria
Mrs N I Nicholls	Edenvale
Mrs A Leven	Kimberley
Mrs W Martin	Heidelberg
Mrs J C Proos	Mooinooi
Mr J W Diedericks	Rustenburg
Mrs G Vorster	Despatch
Mrs R du Toit	Bloemfontein
Mrs J A Louw	Pretoria
Mrs N Vujkovic	Botswana
Mrs J Jooste	Oudtshoorn
Mr J vd S Hugo	Windmeul

B. UNIVERSITIES

Prof R C Whiting	University of the Witwatersrand
Prof C R Snyman	University of South Africa
Prof S A Strauss	University of South Africa
Mr M M Oosthuizen	University of Port Elizabeth
Prof L F van Huyssteen	University of the Western Cape
The Director, Institute for Public Service and Vocational Training	University of Zululand
Mr S E Farran	University of Natal
Mr A St Q Skeen	University of the Witwatersrand

C. LEGAL PRACTITIONERS

Mr E du Toit (Deputy Attorney-General)	Johannesburg
Mr A de V Horak (Attorney)	Pretoria
The Law Society of the Cape of Good Hope	Cape Town
The Natal Law Society	Pietermaritzburg
Mr A Findlay SC	Durban Bar
Mr A R Erasmus	Bloemfontein Bar
Mr D A Preis	Pretoria Bar
Mr A H Veldhuizen	Cape Town Bar
Mr B M Griesel	Cape Town Bar
Mr N J Treurnicht	Cape Town Bar

D. MAGISTRATES

Mr J L Cilliers	Magistrate, Goodwood
Mr C F W van Zyl	Chief Magistrate, Cape Town
Mr R H Peckham	Senior Magistrate, Cape Town
Mr W F Krugel	Regional Court President, Pretoria
Mnr W A J van Zyl	Regional Magistrate, Pretoria
Mr M C de Wit	Regional Magistrate, Pretoria

E. MEDICAL PROFESSION

The Medical Association of South Africa	Pretoria
The South African Society of full time District Surgeons and Forensic Pathologists	Bronkhorstspruit
Prof J D Loubser: The Institute of Pathology (UP)	Pretoria
Prof J H Wessels: The Society of Psychiatrists of S A	
Prof J A Plomp: The Society of Psychiatrists of S A	Pretoria

F. MISCELLANEOUS OTHER PERSONS AND BODIES

The Chief Executive Director: Administration: House of Assembly	Cape Town
Mr M J Joubert (Montana Mission)	Pretoria
Mr J Bachmann	Johannesburg
The National Council of Women of S A	Durban
The S A National Council for Child and Family Welfa :	Johannesburg
S A Women's Legal Status Committee	Johannesburg
The Family and Marriage Society of S A	Kempton Park
The Department of Co-operation and Development	Pretoria
Sinodale Kommissie vir die Diens van Barmhartigheid (N G Sinode van Suid-Transvaal)	Johannesburg

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