CASES / VONNISSE

INTERROGATING IRRESPONSIBLE DRIVING

S v Scholtz 2006 1 SACR 442 (E)

1 Introduction

The defence of non-pathological incapacity has been in something of a state of flux in the wake of the Supreme Court of Appeal's decision in *S v Eadie* (2002 1 SACR 663 (SCA)). This defence again came under the spotlight in the case of *Scholtz*, in the context of a slew of charges arising out of the senseless drunken destruction perpetrated as a result of the driving of the appellant.

2 Facts

The appellant, who was employed as a driver for a courier company, completed his shift between Cape Town and Port Elizabeth, and parked the vehicle at the company depot. He then proceeded to start drinking with other persons present at the drivers' sleeping quarters at the depot, and at least three bottles of brandy were consumed between the appellant and four others. Unfortunately the disinhibitory effects of the alcohol led to a disagreement between the appellant and another person, whereupon the appellant, after apparently tugging on electric wires outside the building, climbed into the vehicle and set off on what would prove to be what the court termed "'n rit van verwoesting" (443g-h), which would only stop after a great deal of damage had been caused.

After demolishing a 7m security gate at the depot on exiting, the appellant proceeded onto the highway, where he knocked over a tree on the island in the middle of the road. Having burst the right front tyre of the vehicle, the appellant then proceeded to drive for more than 35km, meandering over all the lanes on the highway, with the rim of the burst tyre cutting into the road surface. At last, whilst driving on the wrong side of the road, he collided with an oncoming BMW whilst driving on the wrong side of the road, killing the driver. The passengers in the BMW survived the collision. Notwithstanding the collision, the appellant drove another 4,4km, where he was ultimately discovered by a policeman, with his head leaning forward over the steering wheel, and with the vehicle's engine still idling (443i-j).

It was clear from the evidence that the appellant was intoxicated when he took the wheel of the vehicle at the depot. The policeman who found the appellant testified that he was heavily intoxicated, as evidenced by the fact that his speech and gait were affected, and that he was unable to explain where he had come from. He claimed further at the hospital that he could not remember what had happened. His blood alcohol level, from a sample taken 2¼ hours after the collision, was 0,18g/ml (444a-b).

The appellant was accordingly charged with, and convicted of, unauthorised removal for use of the vehicle, malicious injury to property, culpable homicide, driving under the influence of alcohol, failure to stop after an accident, and failure to ascertain injuries or damage following an accident. He was sentenced to fines ranging from R1 000 to R2 000, alternatively imprisonment, for the first two and last two charges, to five years' imprisonment (of which two years were suspended) for culpable homicide, and to three years' imprisonment (half of which was suspended) for driving under the influence of alcohol. His driving licence and permits were suspended for three years (444b-d). The appellant appealed both the convictions and sentences to the Eastern Cape Provincial Division of the High Court.

3 Judgment

The primary focus of counsel for the appellant in appealing the convictions was non-pathological incapacity. It was argued that, taking the factual complex on which the charges were based (as set out above) into account, the State had failed to prove beyond reasonable doubt that the appellant possessed the necessary criminal capacity at the time of the commission of the various offences to be held criminally liable (444e). Counsel then proceeded to argue that if the court found that the appellant's criminal capacity at the time of the offences had not been established, the appellant could also not be convicted of a contravention of section 1 of the Criminal Law Amendment Act 1 of 1988, since it had not been established beyond reasonable doubt by the State that the appellant lacked criminal capacity at the time the harm occurred. (It should be noted that the judgment is somewhat unclear on this point, setting out the argument (444f-g) as "aangesien die redelike moontlikheid dat die appellant wel toerekenings-vatbaar was ook nie bo redelike twyfel deur die vervolging bewys is nie" – it is incumbent on the State to prove beyond reasonable doubt that the accused *lacked* criminal capacity at the time of the harm occurring in order to establish s 1(1) liability.) The court rejected this argument, holding that there was no indication on the facts that the appellant lacked capacity, either on the basis of expert or medical evidence, or on the basis of the appellant's own testimony.

The further arguments raised on behalf of appellant in relation to the appeal against the convictions did not meet with much success. Firstly, whilst the court was prepared to accept that the tachograph readings had not

been proved to be reliable, it was nevertheless prepared to accept the extrinsic evidence of the appellant's driving as sufficient proof for the purposes of the charge of driving under the influence (445i-446a). Secondly, it was argued that the convictions of both culpable homicide and driving under the influence of alcohol amounted to duplication of convictions, but this was also rejected by the court (446a-c). Thirdly, it was argued that the sixth charge included two crimes, and that it would be more correct to refer to only one of these. This argument was accepted by the State, and found favour with the court (446c-d).

As regards the appeal against the sentences, the court held that the option of correctional supervision had not been properly examined, which was indicative of a failure to exercise a proper discretion (446f-g). The court thus confirmed the convictions (making the necessary amendment to charge six mentioned above), but set aside the sentences imposed, and referred the matter back to the regional court to reconsider the sentencing options in the light of the judgment (446h-i).

4 Discussion

There are a number of issues arising out of Froneman J's judgment in *S v Scholtz* that are deserving of attention. These may be divided into matters relating to the defence of non-pathological incapacity, and matters relating to the driving offences, and shall be examined in turn.

4 1 Defence of non-pathological incapacity

Until about a quarter of a century ago, the policy approach prevailed in South African criminal law, as a result of which accused persons who had become voluntarily intoxicated were not entitled to rely on such intoxication as a substantive defence (for an early example of this approach, see *R v Bourke* 1916 TPD 303). The high-water mark of this approach can be found in the Appellate Division decision of *S v Johnson* (1969 1 SA 201 (A)), where the intoxicated appellant was convicted of culpable homicide despite the court *a quo*'s factual finding that at the time of inflicting the fatal harm his conduct was mechanical and automatic in nature (203H-204A), as the court refused to accept the possibility of drunkenness operating as a defence.

This long-standing approach was cast aside by the Appellate Division in the milestone case of *S v Chretien* (1981 1 SA 1097 (A)), which unequivocally established the principled approach to liability as the central tenet of the inquiry into criminal responsibility in South African law. Thus intoxication (even if voluntary) could provide a complete defence to liability by excluding either the voluntariness of the accused's conduct, or her criminal capacity or her intention (1104E-H; 1106E-G). Although the court was at pains to stress that this approach would not apply to someone who uses his intoxicated body as an instrument to commit a crime (1105G-H), and that courts had to guard against accepting too readily that the accused's

intoxication negated liability (1105H), a legislative attempt to curtail the intoxication defence followed shortly thereafter (in the form of s 1 of the Criminal Law Amendment Act 1 of 1988). However, the adoption of the principled approach to liability meant that, in principle, any factor which excluded one of the elements of liability could give rise to a complete defence.

The history of the plea of provocation as a defence followed a similar pattern to intoxication – although in appropriate circumstances provocation could result in a lesser charge or a lesser sentence, weighty policy concerns determined that it could not constitute a complete defence. However, following the principled approach set out in *Chretien*, it was stated in the Appellate Division case of *S v Van Vuuren* (1983 1 SA 12 (A)) that not just intoxication, but "a combination of drink and other facts such as provocation and severe mental or emotional stress" (17G-H) could exclude criminal capacity. It was only a matter of time before the first acquittal on the grounds of provocation and emotional stress, in *S v Arnold* (1985 3 SA 256 (C)). After a few cases where the Appellate Division confirmed the availability of the defence without finding that the appellant was entitled to the defence on the facts (see *S v Campher* 1987 1 SA 940 (A); and *S v Laubscher* 1988 1 SA 163 (A), where the term "non-pathological incapacity" was first used), the defence was finally successful in the Appellate Division in *S v Wiid* (1990 1 SACR 561 (A)). The development of the defence of provocation or emotional stress gave rise to the same policy concerns as those that followed the adoption of the intoxication defence, and these concerns were amplified in the wake of two High Court cases in particular where the defence appeared to be upheld rather too easily (*S v Nursingh* 1995 2 SACR 331 (D); and *S v Moses* 1996 1 SACR 701 (C)). It appears that the underlying rationale of the Supreme Court of Appeal decision in *S v Eadie* (2002 1 SACR 663 (SCA)) was to address the danger of the defence of provocation or emotional stress being accepted too facilely by the courts.

Unfortunately, it is submitted, the *Eadie* judgment, in apparently trying to address this perceived problem, has succeeded only in sowing confusion in the well-established principles of criminal responsibility by conflating the notions of absence of conative capacity and sane automatism:

> "[T]here is no distinction between sane automatism and non-pathological incapacity due to emotional stress and provocation" (par [57]).

The effect of this approach is that an accused can only lack self-control when he is acting in a state of sane automatism (*S v Eadie supra* par [70]; for a detailed critical discussion of the *Eadie* case which goes beyond the scope of this note, see Hoctor "A Peregrination Through the Law of Provocation" [festschrift for Kallie Snyman, as yet untitled, to be published in 2007] forthcoming). As Snyman has argued ("The Tension Between Legal Theory and Policy Considerations in the General Principles of Criminal Law" 2003 *Acta Juridica* 1 15ff) the court's adoption of this approach is ill-considered, and reflects a distortion of the settled precepts of criminal

responsibility. It has been suggested that the *de facto* abolition of the defence of non-pathological incapacity in the *Eadie* judgment should be limited in its application to factual scenarios involving provocation (Snyman *Strafreg* 5ed (2006) 167). It is perhaps significant, however, that this is not the approach followed in *Scholtz* where the *Eadie* case (as opposed to any precedent relating to intoxication) is cited in the discussion of the defence of non-pathological incapacity (443e; and 444h-445e). Froneman J refers at the outset to the tension between the principle that a person should only be punished for that which he or she has freely chosen to do and the normative (or policy) function of the criminal law to lay down standards of behaviour (443c-e), citing dicta from the *Eadie* case and that of *S v Kensley* (1995 1 SACR 646 (A)) which appear to place emphasis on the policy approach. The passage cited from *Eadie* (*supra* par [60]) argues vigorously that no-one should be able to avoid criminal liability as a result of simply giving in to temptation:

> "No self-respecting system of law can excuse persons from criminal liability on the basis that they succumbed to temptation…it is with respect, absurd to postulate that succumbing to temptation may excuse one from criminal liability. One has free choice to succumb to or resist temptation."

Unfortunately this statement reflects a misunderstanding of the nature of the defence of non-pathological incapacity. It is precisely where someone does *not* have "free choice to succumb to or resist temptation" that the defence operates. Where a person is unable to resist the urge to act or to exercise self-control, then there is no capacity to act in accordance with the distinction between right and wrong, and indeed, no capacity to choose whether or not to succumb to temptation. Thus, it is submitted, it is inappropriate for such policy concerns to simply trump principle.

The passage which is cited from *Kensley* (*supra* 658g and following) states that

> "Criminal law for purposes of conviction – sentence may well be a different matter – constitutes a set of norms applicable to sane adult members of society in general, not different norms depending upon the personality of the offender. Then virtue would be punished and indiscipline rewarded: the short-tempered man absolved for the lack of self-control required of his more restrained brother. As a matter of self-preservation society expects its members, even when under the influence of alcohol, to keep their emotions sufficiently in check to avoid harming others …"

Although the emphasis of policy concerns is evident, it is noteworthy that this *dictum* appears in the course of a discussion of evidential matters (such as the onus of proof (658f-g), the need for great caution where the only basis for the defence is the accused's *ipse dixit* (658g-h), and the need to subject the evidence on which a defence of non-pathological incapacity flowing from provocation or emotional stress is based to careful scrutiny (658j)) in the course of the court's evaluation of the evidence of the appellant's conduct. It is submitted that the references to normative factors, which appear in the midst of these cautionary remarks relating to evidentiary matters, and are

not identified as being distinct from or unrelated to these remarks by Van den Heever JA, should be interpreted in this light. Thus these comments are perhaps rather less significant from a substantive criminal law perspective than might appear to be the case if they were excised from this context and examined at face value. In any event, in neither the cases of *Kensley* or *Eadie* does the court overtly seek to override the principled approach to liability, as set out in the test for non-pathological incapacity, in favour of a purely normative, policy-driven approach.

Froneman J proceeds to focus on probative issues in the *Scholtz* case (445b-i, citing the dictum from the *Eadie* case *supra* par [2]). Whilst this approach cannot be faulted, it is submitted that the confusion that has arisen in the *substantive* law (reflected in *Eadie*) regarding the distinction between sane automatism and non-pathological incapacity has its roots in the indiscriminate use of *evidential* dicta, which has tended to deal with the defences in the same terms (see, *eg*, *S v Potgieter* 1994 1 SACR 61 (A) 72h-73b, where although the judgment deals with sane automatism, the following sources relating to non-pathological incapacity are cited: *S v Kalogoropoulos* 1993 1 SACR 12 (A), *S v Laubscher supra*, *S v Calitz* 1990 1 SACR 119 (A), and *S v Wiid supra*). In *S v Cunningham* (1996 1 SACR 631 (A) 635i), sources dealing with non-pathological incapacity (*S v Campher supra*) are cited, although the judgment deals with sane automatism. This is also the case in *S v Henry* (1999 1 SACR 13 (SCA) 19j, where *S v Kalogoropoulos supra* and *S v Kensley supra* are cited). On the other hand, for example, dicta relating to proof of sane automatism in *S v Cunningham* supra are cited in the Cape case of *S v Eadie* (2001 1 SACR 172 (C) 177h-j), and in *S v McDonald* (2000 2 SACR 493 (N) 500d-e), which deal with incapacity. Moreover, in *Eadie* (par [2]) Navsa JA cited the cases of *Potgieter*, *Cunningham*, and *Francis* (1999 (1) SACR 650 (A)) as authority for the evidential matters relating to the defence of "temporary non-pathological criminal incapacity", despite the fact that these cases all deal with the defence of sane automatism. Contrast this with the eminently sound approach to evidential matters in the context of a defence of non-pathological incapacity in *S v Kalogoropoulos* (*supra*). Whilst the respective defences utilize similar evidential principles, it is important not to blur the crucial substantive distinction between the defences through undiscriminating citation of dicta relating to matters of proof. In establishing the presence of automatism, the court resorts to an *objective* test focusing on the nature of the accused's conduct, whereas in relation to non-pathological incapacity the test is *subjective*, notwithstanding the invariable use of inferential reasoning to seek to establish the accused's *state of mind*.

The treatment of the *Eadie* precedent in the case of *Scholtz* is noteworthy. Froneman J interprets the *Eadie* court's comments at par [57] and [58] as a warning against the tendency to interpret the two legs of the test as separate defences (444h-445b). With respect, such an interpretation is simply not tenable. These paragraphs in *Eadie* deal specifically with the purported overlap between sane automatism and lack of conative capacity. Unfortunately it seems that the court in *Scholtz* has also fallen victim to the

same faulty reasoning evidenced in *Eadie*: after finding (445h) that the appellant acted consciously and voluntarily ("bewustelik en vrywillig" that is, not in a state of *sane automatism*), the court concludes that in the absence of further evidence establishing a factual foundation to disturb such finding, the appellant's defence of *non-pathological incapacity* could not succeed (445h-i) (my own emphasis).

4 2 Driving offences

First, it was argued on behalf of the appellant that due to the lack of proof of the reliability of the tachograph test, such evidence was inadmissible to support the driving under the influence conviction. Though the court was prepared to accept this argument, the conviction was however not disturbed, as it was held that the other evidence, and in particular that of a witness (Greeff), was sufficient to establish that the appellant drove in a reckless manner under the influence of alcohol. It is submitted that this finding is correct, but comment is offered in the hope of further elucidation. (Though the charges and convictions were framed in terms of the previous legislation, the Road Traffic Act 29 of 1989, the offences under discussion are formulated in identical terms in the current legislation, the National Road Traffic Act 93 of 1996, and thus the discussion which follows will refer to the current provisions.)

To prove a contravention of driving under the influence of alcohol (presently regulated by s 65(1) of Act 93 of 1996, previously s 122(1) of Act 29 of 1989) it is not necessary for the State to prove that the accused was drunk or incapable (*R v Lloyd* 1929 EDL 270 274; *R v Donian* 1935 TPD 5 9; *R v Tathiah* 1938 NPD 387 392; and *R v Magula* 1939 EDL 207 211). However, it is not sufficient for proof of mere consumption of intoxicating liquor to be established (*R v Donian supra* 9; *R v Tathiah supra* 392; and *R v Jacobs* 1946 (2) PH O22 (E)). What the State must prove is that the skill and judgment normally required of a driver in the manipulation of a vehicle were diminished or impaired as a result of the consumption of intoxicating liquor (*R v Spicer* 1945 AD 433 435-6; *S v Grobler* 1972 4 SA 559 (O) 561D-F; *S v Van Nieuwenhuizen* 1977 (2) PH H114 (O); and *S v Radebe* 1983 (1) PH H9 (O)).

Where the consumption of intoxicating liquor has, for instance, dulled a driver's vision, blunted her judgment or made her reactions sluggish, and she is unable to exercise proper physical control over the vehicle she is driving, it may be held that a driver's skill or driving efficiency is impaired (*R v Donian supra* 9; *R v Magula supra* 211; and see also *S v Schutte* 1971 (2) PH H146 (C)). A collision involving the accused's vehicle may be indicative of her inability to exercise proper control over her vehicle because of the consumption of intoxicating liquor. However, proof of a collision or that she drove negligently is not per se proof that this was due to the consumption of intoxicating liquor by the accused (*R v Spicer supra* 441; *S v Aspeling* 1982 (2) PH H136 (C); and *S v Mazorodze* 1990 1 SACR 256 (ZS) 257d-e).

Whilst a court is not bound by such evidence, a lay witness may give his opinion on whether the accused was under the influence of intoxicating liquor (see *eg*, *R v Brorson* 1949 2 SA 819 (T); and *R v Seaward* 1950 2 SA 704 (N)). A witness should state the facts upon which his opinion is based (*S v Radloff* 1971 (2) PH H(S) 75 (C); and *S v Adams* 1983 2 SA 577 (A) 586B-C). Unless he does so, and his opinion is challenged, it may be of little value because the court may then not be in a position to test and assess its value (the statement by a witness of his observations without his opinion of the accused's condition may be insufficient to support a finding that the latter was under the influence of intoxicating liquor – see *R v Birch-Monchrieff* 1960 4 SA 425 (T)).

In various cases the courts have emphasized the importance of medical evidence (see *eg*, *S v Mhetoa* 1968 2 SA 773 (O) 775E). Nevertheless, however desirable it may be for the State to lead such evidence, its failure to do so will not necessarily result in the accused's acquittal. The effect upon a prosecution of the State's failure to lead medical evidence will depend upon the circumstances of each case. Thus, a court will be justified in convicting on the evidence of lay witnesses only if the facts deposed to by them establish a clear picture of an obviously intoxicated person (as in *R v Mackay* 1955 3 SA 129 (SR); *R v Mathsilso* 1956 (2) PH H258 (O); see too *R v Brorson supra*; *R v Ismail* 1951 1 SA 370 (T); *S v Skeal* 1990 1 SACR 162 (Z); and *S v Mazorodze* 1990 1 SACR 256 (Z) 257b-d). However, if the facts deposed to by lay witnesses do not do so, the State's failure to lead medical evidence – particularly where the other evidence is unsatisfactory – may result in the court holding that the accused's guilt has not been proved beyond a reasonable doubt (as in *S v Adams supra* 589A-C; and *S v Uyttenhoven* 1992 2 SACR 641 (W) 643g-644a). In general, therefore, the more obvious the signs of intoxication noted by lay witnesses, the less is the need for medical evidence to substantiate a charge of contravening section 65(1); conversely, the less obvious the signs deposed to by lay witnesses as indicating intoxication, the greater is the need for the State to lead medical evidence and the risk that its failure to do so may result in the court acquitting the accused (*S v Edley* 1970 2 SA 223 (N) 226C-E; and *S v Adams supra* 586H-587A).

Secondly, the argument that convicting the appellant of culpable homicide and driving under the influence of alcohol amounted to a duplication of convictions was rightly rejected by the court. Apart from the dicta from *S v Viljoen* (1989 3 SA 965 (T) 974H-975A) referred to by the court, it has been held in a number of cases that if an intoxicated driver is involved in a collision in which a person is killed it is not improper for him to be charged with culpable homicide and driving under the influence of intoxicating liquor (*R v Tembokwayo* 1947 (1) PH H27 (T); *S v Grobler* 1972 4 SA 559 (O); *S v Koekemoer* 1973 1 SA 909 (N); and see also *S v Cronje* 1964 (2) PH O23 (GW)).

Third, the argument on behalf of the appellant, acceded to by the State and accepted by the court, that the charge relating to duties of a driver in the

event of an accident (s 118(1) of Act 29 of 1989, presently s 61(1) of Act 93 of 1996) contained two crimes (failing to ascertain nature of injury (s 118(1)(b), presently s 61(1)(b)) and failing to ascertain nature of damage (s 118(1)(d), presently s 61(1)(d)) accords with precedent. It has been held that this section creates seven separate offences (*S v Bruce* 1970 1 SA 291 (N); and see *S v Phyffers* 1970 4 SA 104 (A)), and thus where an accused contravenes more than one of the provisions of section 61(1) the contraventions should be charged separately (see *R v Tolken* 1951 (1) PH H51 (C)).

5 Conclusion

In the wake of the difficulties associated with the case of *Eadie*, it has been hoped that a way forward would emerge from the courts. Unfortunately, the judgment in *Scholtz* does not provide any further clarity regarding the defence of non-pathological incapacity, given the interpretative difficulties and infelicities of analysis referred to above. The court has dealt admirably with the evidence. It has crisply and correctly set out the law relating to the driving offences. There can be no dispute regarding the outcome of the case. Justice has been done. However, those hoping for some guidance in respect of the ambit of the defence of non-pathological incapacity have reason for disappointment.

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