

NOTES / AANTEKENINGE

A CRITICAL LEGAL PERSPECTIVE ON STATUTORY INTOXICATION – TIME TO SOBER UP?

“Drunkenness is nothing but voluntary madness” (Seneca)

1 Introduction

Intoxication has been a phenomenon since time immemorial. Alcoholic beverages play a central role in South African life and culture. Millions of rands are spent annually by government on “Arrive Alive” and “Zero Tolerance” campaigns in the fight against drunken driving (compare Jacobs *Drunk Driving: An America Dilemma* (1989) 13). The liquor industry advertises aggressively, linking its products to positive cultural symbols and social needs. The use of alcohol and drugs is, however, also associated with personal, social and legal problems. The role of alcohol and drugs in South Africa’s escalating crime rate cannot be ignored (Snyman *Criminal Law* (2020) 194). According to Jacobs, alcohol abuse is involved in a quarter of all admissions to general hospitals in the United States of America (Jacobs *Drunk Driving* 13). This is precisely the reason that government put a total ban on the sale of alcoholic beverages when the Covid pandemic hit South Africa and hospitals were flooded with Covid patients. Alcohol abuse also plays a major role in the four most common causes of death of men aged 20 to 40: suicide, accidents, murder and cirrhosis of the liver (Vaillant *The Natural History of Alcoholism Revisited* (1995) 1; Klein, Martel, Driver, Reing and Cole “Emergency Department Frequent Users” 2018 *Western Journal of Emergency Medicine* 398). On 9 May 2022, the World Health Organization stated that the harmful use of alcohol is a causal factor in more than 200 disease and injury conditions. A million deaths annually result from harmful use of alcohol globally, which amounts to 5,3 per cent of all deaths worldwide. It was further stated that alcohol consumption causes death and disability relatively early in life; in mortalities of persons aged 20–39 years, approximately 13,5 per cent of total deaths are attributable to alcohol (Obodeze “Alcohol and Crime: Does the Popular Drug Influence Offence Levels?” (7 August 2019) <https://alcorehab.org/the-effects-of-alcohol/alcohol-related-crimes> (accessed 2023-01-23) 1).

It is, therefore, alarming that people who become voluntarily drunk, to this day, still stand a chance of being acquitted in South African courts if the evidence reveals that, at the time of the act, the accused happened to fall into the grey area between “slightly drunk” and “very drunk”. This legal position was once again confirmed in the case of *S v Ramdass* (2017 (1)

SACR 30 (KZD)). The decision represents yet another instance where an accused who committed alleged crimes in a state of voluntary intoxication was acquitted on both counts.

South Africa's legal position on voluntary intoxication is clearly at odds with the global and national call for stricter regulations on the public's excessive use of alcohol, which makes a consideration of the *Ramdass* judgment, and the policy behind it, deserving of closer analysis.

2 Schools of thought shaping the defence of voluntary intoxication

The defence of voluntary intoxication in the context of South African criminal law has undergone various phases of development over the years. The defence has a long history but was never acknowledged as a defence in Roman-Dutch law (see Burchell *Principles of Criminal Law* (2014) 304). In the classic decision of *R v Bourke* (1916 TPD 303), Wessels J held:

"To allow drunkenness to be pleaded as an excuse would lead to a state of affairs repulsive to the community ... the regular drunkard would be more immune from punishment than the sober person." (306)

After many developments and attempted judicial advances pertaining to the defence of voluntary intoxication, South African criminal law finds itself in the exact position Wessels J cautioned against in *Bourke*.

It is well known that the effect of intoxication on criminal liability has vacillated between an unyielding approach (according to which voluntary intoxication could never serve as a defence against criminal liability) and a lenient approach (according to which voluntary intoxication could serve as a complete defence against criminal liability). Of particular importance for purposes of this contribution are two opposing schools of thought regarding the effect of intoxication on criminal liability (Snyman *Criminal Law* 194). The policy-based approach holds that the community will not accept a position in which a sober person who commits a crime is punished for such crime, while an intoxicated person who commits the same crime is exonerated merely because they were intoxicated when they committed the crime. This approach allows no room for intoxicated persons to be treated more leniently than sober persons, despite the fact that one or more of the elements of the criminal charge might have been excluded owing to voluntary intoxication. The principle-based approach, on the other hand, holds that, if the ordinary principles of liability are applied to the conduct of an intoxicated person, there is the possibility that such a person should be exonerated either because they lacked voluntariness, criminal capacity or intention at the time of the act. This approach allows room for intoxicated persons to be treated more leniently than sober persons.

Snyman notes that, historically, our common law did not recognise a defence of voluntary intoxication, and that it was, at most, considered a mitigating factor in sentencing (Snyman *Criminal Law* 195; Burchell *Principles of Criminal Law* 304). In *S v Johnson* (1969 (1) SA 201 (A) 205C–E), Botha JA confirmed that voluntary intoxication was at the time not a defence to a criminal charge unless the voluntary intoxication resulted in a

mental disease. This was the case even if the accused was so drunk that they lacked criminal capacity (*S v Johnson supra* 207F–G). This was said to be merely in accordance with the legal convictions of society. This stance represents a policy-based approach to the effect of intoxication on criminal liability (Watney “Voluntary Intoxication as a Criminal Defence: Legal Principle or Public Policy?” 2017 *TSAR* 547). Botha JA concluded that, although illogical in principle, on policy grounds the fundamental requirement of voluntariness does not apply to self-induced intoxication except where the intoxication causes a type of mental illness (Van Oosten “Non-Pathological Criminal Incapacity Versus Pathological Criminal Incapacity” 1993 *South African Journal of Criminal Justice* 134; *R v Bourke supra*; *R v Holiday* 1924 AD 250; *R v Taylor* 1949 (4) SA 702 (A); *R v Schoonwinkel* 1953 (3) SA 136 (C) 137G; *R v Dhlamini* 1955 (1) SA 120 (T) 121B; *R v Mkize* 1959 (2) SA 260 (N) 264, 265; *R v Ahmed* 1959 (3) SA 776 (W) 780A; *R v Ngang* 1960 (3) SA 363 (T) 366E).

Until 1981, the courts, under the influence of English law, followed a middle path between an unyielding (policy-based) and a lenient (principle-based) approach, applying the so-called “specific intent theory”. According to this theory, crimes could be divided into two groups: those requiring a “specific intent” (such as murder and assault with intent to do grievous bodily harm) and those requiring only an “ordinary” or “basic” intent. Where an accused was charged with a crime requiring a “specific intent”, his intoxication could exclude the “specific intent” but not the “ordinary intent”. The accused was then partially excused and not convicted of the “specific” intent crime with which he was charged, but only of a less serious crime requiring only an “ordinary intent” (Snyman *Criminal Law* 195; Burchell “Intoxication and the Criminal Law” 1981 *South African Law Journal* 177). The “specific intent theory” was not based on legal principle and was later abandoned in 1981 in the judgment of *S v Chretien* (1981 (1) SA 1097 (A) par 1103H–1104A (*Chretien*)).

The *Chretien* judgment introduced a more lenient, principle-based approach to the defence of voluntary intoxication. After *Chretien*, voluntary intoxication was accepted as affecting criminal liability to the same extent as youth, mental illness and involuntary intoxication. This finding was in stark contrast to the previous legal position, namely that intoxicated assailants could not escape criminal liability on the strength alone of their voluntary intoxication (see Paizes “Intoxication Through the Looking Glass” 1988 *South African Law Journal* 776). The Appellate Division held that voluntary intoxication could, albeit only in highly exceptional circumstances, lead to a complete acquittal. On the facts, *Chretien* was acquitted on one count of murder and five counts of attempted murder because his voluntary intoxication excluded his intention (compare Hiemstra “Dronkenskap ná *Chretien* of: Die Losgemaakte Remkabel” 1981 *Journal of Contemporary Roman-Dutch Law* 249; Ellis “Vrywillige Dronkenskap: ‘n Nuwe Dag” 1981 *Journal of Contemporary Roman-Dutch Law* 175; Rabie “Vrywillige Dronkenskap as Verweer in die Strafreg: Die *Chretien*-Saak” 1981 *South African Journal of Criminal Law and Criminology* 111). As anticipated, the decision in *Chretien* was met with ardent support as well as tenacious criticism, not only among lawyers but also in the community generally (see Burchell 1981 *SALJ* 171).

In order to neutralise the effect of the *Chretien* decision, and owing to public distaste for the lenient approach, the legislature intervened and passed the Criminal Law Amendment Act 1 of 1988 (the Act), which was promulgated on 4 March 1988 (see also Paizes 1988 *SALJ* 777–788; Burchell “Intoxication After Chretien: Parliament Intervenes” 1988 *South African Journal of Criminal Justice* 274; Coetzee “Artikel 1 van die Strafwysigingswet 1988” 1990 *South African Journal of Criminal Justice* 285). The inherent aim of the Act was to:

“[a]ccommodate the sense of justice of the society in respect of the judicial treatment of (intoxicated) persons for actions committed by them while they are in that condition in cases where such condition was brought about by the voluntary use of intoxicating liquor or drugs.” (see the Memorandum on the Objects of the Criminal Law Amendment Bill 1987 as discussed by Paizes 1988 *SALJ* 777)

The provisions of the Act (discussed below) reflect the current legal position in respect of voluntary intoxication as a criminal defence. The Act provides a statutory framework for the crime of statutory intoxication (see Snyman *Criminal Law* 199–204; Burchell and Milton *Principles of Criminal Law* (2014) 303–315; Burchell *Cases and Materials on Criminal Law* (2016) 433–444). Almost three decades after its enactment, and despite the inherently well-intended aims of the Act, application of the Act’s provisions remains problematic and contentious.

Although the Act was not applied in the judgment of *Ramdass* (and was only referred to *obiter*), the inherent deficiencies of section 1(1) of the Act were once again brought to the fore, ultimately highlighting the need for law reform.

3 S v Ramdass 2017 (1) SACR 30 (KZD) – once again exposing the intrinsic deficiencies in the Act

The facts of the decision appear from the judgment delivered by Ploos van Amstel J. The accused was charged with the murder of his girlfriend, as well as robbery with aggravating circumstances. On 2 March 2014, the accused, the deceased and the deceased’s mother went to a shopping mall and had lunch (par 3). On their way home, the deceased and her mother dropped the accused at a tavern and went home. The accused returned later in the afternoon. According to testimony by the deceased’s mother, he appeared to be intoxicated when he arrived home (par 3). The deceased’s mother then left to visit a casino and returned later in the evening. Upon entry, she noticed that the house had been ransacked. When she entered the deceased’s room, she found the deceased on her bed with a plastic bag over her head (par 3). There was no sign of forced entry. The accused was found the next morning in possession of the deceased’s handbag containing her cellphone and house keys (par 3). He admitted to killing the deceased but averred that he had no recollection of the events, and that the events transpired as a result of his state of intoxication, precipitated by the use of alcohol and crack cocaine (par 3). The accused was accordingly charged with murder and robbery with aggravating circumstances (par 2).

The accused relied on the defence of criminal incapacity as a result of the consumption of alcohol and crack cocaine. The accused specifically raised, as a defence, the inability to appreciate the wrongfulness of his act and to act in accordance with such appreciation. He also alleged that he did not have the intention to kill the deceased (par 7). The court, in assessing the defence raised by the accused, reaffirmed that criminal capacity is an essential prerequisite for criminal liability (par 4). In cases of non-pathological criminal incapacity, the State bears the onus of proving, beyond a reasonable doubt, that the accused had the requisite criminal capacity at the time of the commission of the alleged crime. The latter was confirmed by the court while also emphasising that amnesia in itself constitutes no defence, but could be helpful in assessing the possible lack or not of criminal capacity (par 7; see also *S v Humphreys* 2013 (2) SACR 1 (SCA) par 10–11; *S v Majola* 2001 (1) SACR 337 (N) 339–340; Le Roux “Strafregtelike Aanspreeklikheid en die Verweer van Nie-Patologiese oftewel Gesonde Automatisme: Ware Amnesie onderskei van Psigogene Amnesie – Blote Verlies van Humeur onderskei van Verlies van Kognitiewe Geestesfunksie – *S v Henry* 1999 (1) SACR 13 (SCA)” 2000 33 *De Jure* 190; Hoctor “Amnesia and Criminal Responsibility” 2000 13(3) *South African Journal of Criminal Justice* 273).

The State called a psychiatrist, Professor Mkhize, who was one of the specialists who assessed the accused’s triability in terms of sections 77, 78 and 79 of the Criminal Procedure Act (51 of 1977 (CPA)). The accused was found fit to stand trial and did not suffer from any mental illness or defect at the time of the commission of the offence (par 11). According to Professor Mkhize, it is a common occurrence for a person to be unable to recollect past events after the excessive use of alcohol (par 12). When asked whether it was a reasonable possibility that, as a result of the consumption of alcohol and crack cocaine, the accused lacked the capacity to appreciate the wrongfulness of his actions, Professor Mkhize testified that it was a reasonable possibility (par 13). It was noted by Ploos van Amstel J that no evidence was presented as to the degree of intoxication of the accused (par 27). The State contended that it was unlikely that the accused had been so intoxicated that he lacked criminal capacity (par 28).

The court held as follows in respect of the defence of criminal incapacity:

“I am conscious of the need for caution in finding too readily that a person who had killed someone is not criminally responsible because he acted involuntarily or without criminal capacity ... Nevertheless, this does not mean that the court may shirk its duty to determine whether the guilt of an accused person was established beyond a reasonable doubt. If there is a reasonable doubt as to his criminal capacity then he must get the benefit of that.” (par 29)

Ploos van Amstel J was satisfied that the accused had established a sufficient foundation for his defence of criminal incapacity (par 30). Having regard to the totality of the evidence, it was held that there was reasonable doubt as to whether the accused had the required criminal capacity (par 30). It was further held, albeit *obiter*, that the accused could not be found guilty in terms of section 1(1) of the Act:

“The difficulty with the statutory offence is the requirement that the accused must have been so drunk that he lacked criminal capacity. In a case where

the accused is acquitted on a charge of murder on the basis that there is a reasonable possibility that he was so drunk that he lacked the required capacity, he cannot be convicted of the statutory offence unless the court can find beyond a reasonable doubt that he did not have such capacity." (par 33)

The court held further:

"The outcome of this case does not mean that persons charged with violent crimes can escape liability easily by claiming a lack of criminal capacity due to the use of alcohol and drugs. Each case will be decided on its own facts, and the evidence scrutinized carefully." (par 34)

The court further emphasised the need for cogent and thorough expert evidence in cases of this nature (par 34). *In casu*, the evidence revealed that, at the time of the act, Ramdass was more than "slightly drunk" and he could therefore not be convicted of murder. The evidence also did not prove beyond a reasonable doubt that Ramdass was "very drunk" – that is, drunk enough to lack criminal capacity at the time of the act. He could therefore not be convicted of a contravention of the Act either. To convict the accused of the original offence (murder), the State needed to prove criminal capacity beyond a reasonable doubt. Alternatively, to obtain a conviction on the statutory offence, the State needed to prove criminal incapacity beyond a reasonable doubt. For a conviction on the statutory offence, the State thus had to prove the opposite of what it originally needed to prove. Judged by the law on intoxication as it stands, Ramdass was simultaneously too drunk (for a conviction on the main charge) but not drunk enough (for a conviction on a contravention of the Act). He "fell" between the proverbial "two chairs", as Snyman so aptly puts it (Snyman *Criminal Law* 203). All that was needed for an acquittal on the murder charge was for the accused to raise reasonable doubt about his capacity, which he indeed did. Such an acquittal did not require the accused to prove the absence of capacity beyond reasonable doubt. The accused was accordingly acquitted on both charges. Indeed, the twilight zone of the semi-drunk offered the accused asylum.

4 Statutory intoxication in the twilight zone again

A proper understanding of the case under discussion necessitates that the history behind the Act be contextualised. Intoxication may result in conditions such as impulsiveness, diminished self-criticism, overestimation of a person's abilities and underestimation of dangers (Snyman *Criminal Law* 192; in respect of intoxication as a defence in criminal law, see Burchell 1981 *SALJ* 177; Burchell 1988 *SAJCJ* 274; Rabie 1981 *South African Journal of Criminal Law and Criminology* 111; Rabie "Actiones Liberae in Causa" 1978 *Journal of Contemporary Roman-Dutch Law* 60; Snyman "Die Actio Libera in Causa: Die Benadering in die Duitse en Suid-Afrikaanse Reg" 1978 *De Jure* 227; Snyman "Die Actio Libera in Causa: 'n Onsekere Wending in die Suid-Afrikaanse Reg" 1984 *South African Journal of Criminal Law and Criminology* 227).

Goldman, Brown and Christiansen state the following in respect of the effects of intoxication:

"If any characteristic has been seen as a central, defining aspect of alcohol use, it is the presumed capacity of alcohol to alter anxiety, depression and

other moods.” (Goldman, Brown and Christiansen “Expectancy Theory: Thinking About Drinking” in Blane and Leonard *Psychological Theories of Drinking and Alcoholism* (1987) 200)

The major driving force behind the enactment of the Act historically, was the judgment handed down by Rumpff CJ in *Chretien*. As stated above, the accused had been charged with one count of murder and five counts of attempted murder. The charges emanated from events that occurred after the accused had attended a social event. After the social event (where the accused consumed a large quantity of liquor), the accused got into his vehicle and drove in the direction of people who were standing in his way. Thinking that the crowd would disperse, the accused continued driving. He drove in amongst them, killing one person and injuring five. The trial court acquitted the accused on the charges of murder and attempted murder on the basis that he lacked intention. The accused was convicted on one count of culpable homicide. The prosecution appealed against the judgment on a question of law, namely, whether the accused should have been convicted of common assault on the attempted murder charges. Rumpff CJ, however, held on appeal that the trial court had been correct in holding that the accused was not guilty of common assault.

The legal position pertaining to intoxication as a defence after the *Chretien* decision was as follows:

- (a) If a person is so drunk that their muscular movements are involuntary, there is no act or conduct on their part, and accordingly although the condition can be ascribed to the use of an intoxicating substance, they cannot be found guilty of a crime (1103D–F).
- (b) A person may also as a result of the excessive use of alcohol completely lack criminal capacity and accordingly not be criminally liable; this will be the case where the person is so intoxicated that they are no longer aware of what they are doing or where their inhibitions were substantially affected.
- (c) The “specific intent theory” was rejected (1103H–1104A). Intoxication could also exclude ordinary intent. It was owing to the latter principle that voluntary intoxication was held in this case to be a complete defence.
- (d) It was also held by Rumpff CJ that a court should not lightly infer that, as a result of intoxication, an accused acted involuntarily or was not criminally responsible or that intention was absent as this would bring the administration of justice into discredit (1105H–1106D; Snyman *Criminal Law* 196; Badenhorst “*S v Chretien* 1981 (1) SA 1097 (A): Vrywillige Dronkenskap en Strafregtelike Aanspreeklikheid” 1981 *Journal of South African Law* 185).

Chretien thus constitutes the leading authority pertaining to the multiple effects of voluntary intoxication on criminal liability (Snyman *Criminal Law* 195; Burchell *Principles of Criminal Law* 305–306; see also Badenhorst “Vrywillige Dronkenskap as Verweer Teen Aanspreeklikheid in die Strafrege – ‘n Suiwer Regswetenskaplike Benadering” 1981 *South African Law Journal* 148; Badenhorst 1981 *Journal of South African Law* 185. See also *S v Baartman* 1983 (4) SA 393 (NC); *S v D* 1995 (2) SACR 375 (C); *S v Flanagan* [2005] JOL 14700 (E); *S v Hartanyi* 1980 (3) SA 613 (T); *R v Holiday*

supra; *R v Innes Grant* 1949 (1) SA 753 (A); *S v Johnson supra*; *S v Kelder* 1967 (2) SA 644 (T); *S v Lange* 1990 (1) SACR 1999 (W); *S v Lombard* 1981 (3) SA 198 (A); *S v Maki* 1994 (2) SACR 414 (E); *S v Mbele* 1991 (1) SA 307 (T); *S v Mpumgathe* 1989 (4) SA 169 (E); *S v Mula* 1975 (3) SA 208 (A); *S v Ndhlovo* (2) 1965 (4) SA 692 (A); *S v Pienaar* 1990 (2) SACR 18 (T); *S v Saaiman* 1967 (4) SA 440 (A); Paizes 1988 SALJ 779).

To further contextualise the legal problem under discussion, it is important to distinguish between voluntary and involuntary intoxication. Voluntary intoxication denotes the conscious consumption of alcohol, drugs or any intoxicating substance. The individual must know or foresee that the substance may impair his or her awareness and understanding (see, in general, Haque and Cumming “Intoxication and Legal Defences” 2003 *Advances in Psychiatric Treatment* 144–151). Involuntary intoxication refers to intoxication resulting from ignorant or unconscious consumption of an intoxicating substance by the accused, or such consumption brought about by an absolute force over the accused. Involuntary intoxication can also be caused by the use of prescribed medicine taken in accordance with a medical practitioner’s instructions that usually does not cause unpredictability or aggressiveness. Involuntary intoxication is a complete defence to any crime, owing to the fact that the accused could not have prevented it. The court in *Chretien* did not change the law pertaining to involuntary intoxication (Snyman *Criminal Law* 193–194; *S v Hartyani* 1980 (3) SA 613 (T); *S v Els* 1972 (4) SA 696 (T) 702). The court in *Chretien* also did not change the law pertaining to intoxication leading to mental illness or the *actio libera in causa*. Where chronic consumption of alcohol has resulted in a mental illness such as *delirium tremens*, the rules relating to the defence of mental illness (as contained in ss 77–79 of the CPA) apply. The *actio libera in causa* refers to a situation where the accused forms the intention to commit a crime while still sober. The accused then consumes an intoxicating substance to build courage, whereafter they merely use their intoxicated body as an instrument to commit the crime. An *actio libera in causa* situation is never a defence but could, on the contrary, be an aggravating factor in punishment (Snyman *Criminal Law* 193; Rabie “*Actiones Liberae in Causa*” 1978 *Journal of Contemporary Roman-Dutch Law* 60; Vorster “*Actio Libera in Causa en Dronkenskap*” 1984 *Journal of South African Law* 89; Oosthuizen “*Dronkenskap in Perspektief - ‘n Strafregtelike Bespreking*” 1985 *Journal of Contemporary Roman-Dutch Law* 407; *S v Ndhlovu* (2) 1965 (4) SA 629 (A) 692).

In short, voluntary intoxication could potentially have the following effects (Snyman *Criminal Law* 196–197):

- (a) Intoxication might result in an accused acting involuntarily, in which case they will not be guilty of a crime.
- (b) Intoxication may cause an accused to lack criminal capacity in which case they will not be guilty of a crime.
- (c) If, despite intoxication, an accused was able to perform a voluntary act and also had criminal capacity, the intoxication may result in the accused lacking the intention required for the particular crime. In the latter instance, the accused will not necessarily escape the clutches of the criminal law: the evidence might reveal that they were negligent, in

which case they might be convicted of a crime requiring culpability in the form of negligence.

- (d) Intoxication may also serve as a ground for the mitigation of punishment.

While voluntary intoxication was never regarded as a complete defence before the *Chretien* decision, after the *Chretien* decision, voluntary intoxication could in certain circumstances constitute a complete defence. The decision in *Chretien* was criticised severely in the sense that it was difficult to accept a situation where a sober person is punished for criminal conduct while the same conduct performed by an intoxicated person is condoned merely because they were intoxicated. The reality of intoxicated persons escaping conviction too easily, owing to the lenient approach to intoxication as a defence as enunciated in *Chretien*, called for the legislature to enact a provision to the effect that a person incurs liability if they voluntarily become intoxicated and, while intoxicated, committed an act that would have resulted in liability but for the rules relating to intoxication laid down in *Chretien*. The retributive and deterrent theories also demand that the intoxicated perpetrator should not be allowed to hide behind intoxication in order to escape conviction (compare *S v Mafu* 1992 (2) SACR 494 (A) 497c–d; Snyman *Criminal Law* 10–15). The need accordingly arose to enact legislation to curb the lenient approach followed in *Chretien*. In response, the legislature enacted the Criminal Law Amendment Act 1 of 1988 (Snyman *Criminal Law* 201; Burchell *Principles of Criminal Law* 309. See also Paizes 1988 SALJ 776).

Section 1 of Act 1 of 1988 reads as follows:

- “(1) Any person who consumes or uses any substance which impairs his or her faculties to appreciate the wrongfulness of his or her acts or to act in accordance with that appreciation, while knowing that such substance has that effect, and who while such faculties are thus impaired commits any act prohibited by law under any penalty, but is not criminally liable because his or her faculties were impaired as foresaid, shall be guilty of an offence and shall be liable on conviction to the penalty which may be imposed in respect of the commission of that act.
- (2) If in any prosecution for any offence it is found that the accused is not criminally liable for the offence charged on account of the fact that his faculties referred to in (1) were impaired by the consumption or use of any substance, such accused may be found guilty of such a contravention of sub-section (1) if the evidence proves the commission of such contravention.”

The Act clearly recognises intoxication as a ground excluding criminal capacity. The section refers to impairment of an accused’s “faculties to appreciate the wrongfulness of his acts or to act in accordance with that appreciation” (Snyman *Criminal Law* 200–201). This refers to the impairment of the perpetrator’s cognitive or conative mental abilities (see *S v Laubscher* 1988 (1) SA 163 (A) 166H–I; *S v Wiid* 1990 (1) SACR 561 (A) 563i–j; *S v Lesch* 1983 (1) SA 814 (O) 823H–824B; *S v Campher* 1987 (1) SA 940 (A) 956, 958I). The Act is silent on instances where intoxication excluded the voluntariness of the accused’s conduct or intention or where the accused’s alleged conduct took the form of an *omissio*. The court in *S v Ingram* (1999 (2) SACR 127 (W)) correctly found that an accused who was so intoxicated

at the time of the alleged crime that the conduct was involuntary will automatically also lack criminal capacity. That is because intoxication resulting in involuntary conduct is a more severe degree of intoxication than that resulting only in incapacity. One therefore has to assume that the legislature aimed to include intoxicated persons who were exonerated under common law owing to a lack of voluntariness and incapacity. This conclusion is supported by Burchell (1988 SACJ 277), Burchell and Milton (*Principles of Criminal Law* (1991) 410) and Snyman (*Criminal Law* 202).

Snyman submits the following:

“Intoxication resulting in automatism is surely a more intense form of intoxication than that resulting in lack of criminal capacity; if, therefore, the legislature intended to cover the latter situation, it is inconceivable that it could have intended to exclude the former, more serious, form of intoxication.” (Snyman *Criminal Law* 201)

The burden of proving all of the elements of the crime created in Act 1 of 1988 beyond a reasonable doubt falls on the State. One of these elements entails that the State has to prove that an accused is not criminally liable for their act because they lacked criminal capacity. An intoxicated accused will escape liability if neither their liability nor their non-liability can be established beyond a reasonable doubt (see Paizes 1988 SALJ 781). In *S v Mbele* (*supra*), the magistrate gave the accused the benefit of the doubt and held that the accused may have been intoxicated at the time of the act (theft in this instance), and held the accused not criminally liable. The magistrate convicted Mbele of a contravention of the Act instead. On review, the court held that Mbele’s lack of criminal capacity was also not proved beyond a reasonable doubt, and he therefore could also not be convicted of having contravened the Act. As in *Ramdass*, the accused in *Mbele* went scot-free (see also *S v Griessel* 1993 (1) SACR 178 (O) 181e).

The above-mentioned unsatisfactory situation stems from an unfortunate choice of words in the crime’s formulation (compare Snyman *Criminal Law* 203). The elements of the crime of statutory intoxication present numerous procedural difficulties for the State (Snyman *Criminal Law* 201–203; Burchell *Principles of Criminal Law* 309):

- In order to secure a conviction on contravening section 1, the State is required to prove that the accused is not guilty of a crime. While the accused only needs to raise doubt about their capacity, the State needs to prove the absence of capacity beyond reasonable doubt. The State thus has to prove the opposite of what it normally has to prove. The State either has to establish, beyond a reasonable doubt, the presence of criminal capacity for a conviction on the main charge, or the lack of criminal capacity beyond a reasonable doubt, in order to secure a conviction in terms of section 1.
- The State must prove lack of criminal capacity beyond reasonable doubt (see *S v September* 1996 (1) SACR 332 (A); *S v D* 1995 (2) SACR 375 (C)).

It is submitted that expert evidence will also play a vital role in cases where the State seeks a conviction in terms of section 1 of Act 1 of 1988. The reason for this lies in the fact that the State has to prove that the accused is

“not criminally liable”. Paizes correctly notes that non-liability is very different from non-conviction. If an accused is, for example, acquitted on a charge of assault, it merely indicates that the court was not convinced of their guilt beyond reasonable doubt – it does not mean they are “not liable” (Paizes 1988 SALJ 781).

Paizes observes the following:

“After seeking to establish X’s liability beyond reasonable doubt, the State now has to prove his non-liability beyond a reasonable doubt. An intoxicated wrongdoer will, therefore, escape the clutches of the criminal law if neither his liability nor his non-liability can be established on the stringent criminal standard or proof.” (Paizes 1988 SALJ 781)

In *S v Mbele* (*supra* 311C–D), Flemming J held:

“Dit is derhalwe onvoldoende as die Staat sake net so ver voer dat daar onsekerheid is of die beskuldigde se vermoëns ‘aangetas is’ en ‘aangetas was’ tot die nodige mate.”

It is clear that mere uncertainty as to whether an accused lacked criminal capacity is not sufficient for the State to discharge the onus. It is at this stage that expert evidence becomes pivotal to the State. The State will have to lead expert evidence of a high degree in order to prove lack of criminal capacity owing to intoxication beyond a reasonable doubt (see also *S v Griessel supra*, where Muller AJA held that a finding that the accused had “possibly” not known what they were doing was not sufficient to sustain a conviction under section 1(1)). A positive finding was required that the accused lacked criminal capacity as a result of consumption of alcohol when they committed the act complained of (*S v Griessel supra* 181D–E)). From a procedural perspective, the following should be noted in terms of section 1(2) of the Act:

- (a) Statutory intoxication is a competent verdict on any offence charged (see *S v Mpungatje* 1989 (4) SA 139 (EPD) 143H).
- (b) If any portion of a sentence flowing out of a conviction on statutory intoxication is suspended, the condition of suspension should refer to a future contravention of the actual offence: there should be a relationship between the offence of which the accused has been convicted and the one referred to in the condition of suspension (see *S v Oliphant* 1989 (4) SA 169 (EPD)).
- (c) When convicting an accused of the statutory crime, a description of the initial charge on which the accused would have been convicted had they not been intoxicated should be stipulated (see *S v Flanagan* [2005] JOL 14700 (E) 5; *S v Maki supra* 416A–C; *S v Pietersen* 1994 (2) SACR 434 (C) 439).

5 Assessing the way forward and possible solutions

The case under discussion once again exposes the intrinsic anomalies associated with the crime of statutory intoxication. The judgment in *Ramdass* exposes the inherent difficulties with which a court is confronted whenever

intoxication is raised as a defence in order to exclude a particular element of criminal liability. The Act, despite its good intentions, is still problematic more than three decades after it came into effect. The burden of proof for the State, where a conviction in terms of the Act is sought, becomes extremely problematic when the State has to prove beyond a reasonable doubt that the accused lacked criminal capacity. In *S v V* (1996 (2) SACR 290 (C) 295–296), the court held that there is no logical reason why the normal standard of proof in a criminal case was not applicable to proof of incapacity for the purpose of this statutory crime (see also Stoker “Nugterheid oor Dronkenskap: *V* 1979 (2) SA 656 (A)” 1979 *South African Journal of Criminal Law and Criminology* 280).

Where the accused is acquitted on the main charge owing to uncertainty as to their capacity, lack of capacity is not automatically proved beyond a reasonable doubt. The result is that a conviction in terms of the Act does not follow. In cases where the State fails to prove lack of capacity beyond a reasonable doubt for purposes of the Act, the accused will be acquitted on both the main charge as well as a contravention of the Act. If the evidence reveals that, at the time of the act, the accused happened to fall in the grey area between “slightly drunk” and “very drunk”, it would be impossible to convict the accused of any crime (see Paizes 1988 *SALJ* 781). The accused will escape liability completely. It is highly unlikely that the legislature could have intended that the section be circumvented so easily. This absurd outcome was evident in the case under discussion. In *S v September* (1996 (1) SACR 325 (A) 332), Hefer AJ alluded to the problematic nature of the burden of proof and held as follows:

“Subartikel (1) is ‘n misdaadskeppende bepaling wat, volgens geykte beginsels en ten opsigte van elke element van die misdryf, bewys bo redelike twyfel van die Staat verg. Dat die beskuldigde se vermoëns inderdaad aangetas was end at hy daarom nie strafregtelik aanspreeklik is vir ‘n verbode handeling deur hom in sy beskonke toestand verrig nie, moet dus positief bewys word. Bestaan daar bloot twyfel oor sy toerekeningsvatbaarheid kan hy nog weens sy handeling nóg aan oortreding van subartikel (1) skuldig bevind word.” See also *S v Griessel supra* 181e; *S v Mbele supra* 113C–D; *S v Lange supra* 204 e–h.

From the case under discussion, and mindful of the historical context of the Act, it is evident that the two main contentious areas in the practical application of the Act relate to its limited scope of application and the burden of proof. The provisions of the Act only become operative once an intoxicated accused has been found not guilty on the main charge owing either to voluntariness or criminal capacity not having been proved by the State beyond reasonable doubt. In the event that an accused, similar to the *Chretien* case, is acquitted owing to having lacked intention, the Act simply does not apply. In addition, the prosecution has an unrealistically heavy burden of having to prove criminal non-liability on the main charge for a specific reason, namely criminal incapacity.

More than three decades after its inception, the Act remains contentious and problematic. The question that inevitably arises is how do we cure the defective aspects of the Act?

To eradicate the first-mentioned obstacle, the wording of section 1(1) should be rephrased by Parliament in the following terms:

“Any person who consumes or uses any substance voluntarily, while knowing or foreseeing that such substance will have an intoxicating effect on him, and who, while intoxicated, commits any act or omission prohibited by law under any penalty, but is acquitted for such act or omission due to their intoxication, shall be guilty of an offence and shall be liable on conviction to the penalty which may be imposed in respect of the commission of that act or omission.”

Such a formulation will extend the field of application of the statutory crime to include all accused persons who were acquitted on the main charge on the strength of the *Chretien* decision. The suggested wording “*is acquitted for such act*” (rather than “but is not criminally liable” as the Act currently reads), will alleviate the unrealistically difficult burden of proof for the State. As Snyman points out, non-liability is very different from non-conviction (Snyman *Criminal Law* 201). The accused’s acquittal on the main charge merely means that the court was not convinced of his liability beyond a reasonable doubt because the accused succeeded in raising reasonable doubt as to any of the elements of the crime. It does not mean that the court found him “non-liable”. It certainly also does not mean that the accused’s non-liability has been proved beyond reasonable doubt. Although it is common knowledge that the use of alcohol and drugs lowers inhibitions, and that violent crimes are generally the type of crimes that result from intoxication, the authors submit that the Act should target all crimes and not only crimes of violence. Such broader formulation would include criminal charges concerning road fatalities that result from driving under the influence of alcohol and drugs.

Alternatively, it is submitted that statutory intoxication should be elevated: it should be a substantive crime with which an accused can be charged, irrespective of any previous acquittal on a main charge. Such a crime would give effect to the policy-based approach regarding the effect of intoxication on criminal liability (compare Snyman *Criminal Law* 194) and would see the pendulum revert back to the same approach that was followed by the courts decades ago (see *R v Schoonwinkel supra*; *R v Ahmed supra*; *R v Dhlamini supra*; *R v Mkize supra* and *R v Ngang supra*). The wording of such a policy-based crime could read as follows:

“Any person who consumes or uses any intoxicating substance voluntarily, while knowing or foreseeing that such substance will have an intoxicating effect on him, and who, while intoxicated, commits any act or omission prohibited by law under any penalty, shall be guilty of an offence and shall be liable on conviction to a fine or imprisonment, or to both such fine and imprisonment in the court’s discretion.”

Such a formulation would provide proportionality between the degree of punishment and the reprehensibility of the original offence.

Such a statutory crime would be based on policy considerations and not legal principle. According to the principle-based approach, an accused who has committed a crime while intoxicated and who manages to raise reasonable doubt as to the existence of any of the elements of the criminal charge, must be acquitted. A policy-based crime such as the one suggested would, of course, be open to criticism from a constitutional point of view in

that it may violate the accused's right to dignity, freedom of the person, and a fair trial. Snyman shares this reservation when he opines:

"To find X, who was genuinely deprived of capacity as a result of voluntary intoxication, blameworthy for deeds he commits whilst in that state, could not be consistent with the basic values underlying our criminal justice system, and indeed our Constitution." (Snyman *Criminal Law* 198)

In an attack on the constitutionality of liability based on the doctrine of common purpose, the appellants in *S v Thebus* (2002 (2) SACR 319 (CC) par 17) contended that the Supreme Court of Appeal failed to develop the common-law doctrine of common purpose in conformity with the Constitution of the Republic of South Africa, 1996 (the Constitution), as required by section 39(2), and thereby failed to give effect to their rights to dignity, freedom of the person, and a fair trial, which includes the right to be presumed innocent. The common-purpose doctrine is also policy-based and enables the prosecution to obtain a conviction in the absence of proof of individual causation provided that certain elements are proved beyond a reasonable doubt. In dismissing the appeal, the Constitutional Court stated:

"The mere exclusion of causation as a requirement of liability is not fatal to the criminal norm. There are no pre-ordained characteristics of criminal conduct, outcome or condition. Conduct constitutes a crime because the law declares it so. Some crimes have a common law and others a legislative origin. In a constitutional democracy, such as ours, a duly authorised legislative authority may create a new, or repeal an existing, criminal proscription. Ordinarily, making conduct criminal is intended to protect a societal or public interest by criminal sanction. It follows that criminal norms vary from society to society and within a society from time to time, relative to community convictions of what is harmful and worthy of punishment in the context of its social, economic, ethical, religious and political influences." (par 38)

The authors submit that the court in *Thebus* gave impetus to the crime-control model, or "socially expedient doctrines", as described by Watney (2017 *TSAR* 547 and Snyman *Criminal Law* 199). In the suggested formulation above, statutory intoxication would also be a competent verdict to any other charge and, in addition, the rules pertaining to the duplication of convictions would inadvertently also apply. The crime could potentially also overlap with offences such as driving under the influence in terms of section 65(1) of the Road Traffic Act (93 of 1996), to mention but one example. One should remain mindful of the *ius certum* and *ius strictum* requirements as they appear in the principle of legality (see s 35(3)(l) of the Constitution and Snyman *Criminal Law* 31–39). Irrespective of which formulation or suggestion is followed, the application of the Act, as illustrated once again by the decision in *Ramdass*, is contentious and in urgent need of reform. The history of the application of the Act proclaims this need emphatically.

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