

CHAPTER 12

INTOXICATION

Intoxication and criminal responsibility

12.1 Many offences are committed under the influence of intoxication by alcohol or other psychotropic substances that alter mood or awareness. The Penal Code s 31(2) states:

For the purpose of this section, intoxication means the impairment of the mental or physical faculties of a person arising from the taking of any foreign substance.

The significance of evidence of intoxication depends on the kind of change which is alleged and also on whether or not the intoxication was self-induced.

12.2 In most cases, evidence of intoxication will suggest that there has been no more than a change of mood such that the accused lost his or her inhibitions and did something which they would not have done if sober. Such evidence will usually be relevant only to sentencing, if at all. It will not be relevant to any determination of criminal responsibility.

12.3 However, in some cases evidence of intoxication may support an argument that an element of an offence was not present. The evidence may suggest that the accused's cognitive capacity was impaired such that the inferences that might be ordinarily drawn about a state of mind should not be drawn. The argument in a murder case, for example, might be that even though the victim was attacked with obviously lethal force, it would be wrong, in light of evidence of intoxication, to draw the inference that there was an intention to cause death or recklessness respecting causing this result. Evidence of intoxication in this respect is often described as a two-edged sword. On the one hand, it may suggest a state of mind so disordered that the prosecution is unable to prove the accused had an intention to achieve or foresight of a particular result. On the other hand, evidence of intoxication may support the conclusion that the person acted in a particular way even though it was out of character. In addition, in many jurisdictions including Vanuatu, there are restrictions on the use of evidence of intoxication in this way.

12.4 A distinction has traditionally been drawn between intoxication that was self-induced and intoxication that was not self-induced, with different sets of rules concerning how evidence of intoxication can be used. Under the Penal Code, the term 'voluntary intoxication' is used to describe self-induced states and 'involuntary intoxication' is used to describe states that were not self-induced. For the purposes of this distinction, intoxication is generally voluntary when there is awareness of consuming an intoxicating substance, even though there may be no appreciation of how severe the effect will be. Intoxication is involuntary when there is no such awareness. For example, intoxication is involuntary when a medicine is consumed without knowing of its intoxicating effects or when an intoxicating substance is surreptitiously slipped into a drink. However, the terms 'voluntary' and 'involuntary' are not defined in the Code and

there has been some uncertainty at common law about how the state should be characterised when the person was negligent in becoming intoxicated.

12.5 The Penal Code makes some allowance for the use of evidence of intoxication to negate criminal responsibility, but subject to severe restrictions.

- Voluntary intoxication is recognised as a defence under s 21(1) if and only if intention is an element of the offence and the person was so severely intoxicated as to be incapable of forming the intention. The Penal Code s 21(1) provides:

Voluntary intoxication shall not constitute a defence to any charge unless the offence charged is one in which criminal intention is an element and the intoxication was of so gross a degree as to deprive the accused of the capacity to form the necessary criminal intention....

This provision must be read subject to the Penal Code s 6(2), which makes recklessness equivalent to intention. Evidence of voluntary intoxication can therefore be used to support an argument that it would be wrong to infer foresight of a particular risk, although subject to a restriction respecting deprivation of the capacity for foresight.

- Involuntary intoxication is simply deemed by s 20(4) to be a mental disease. It can therefore permit an insanity defence if the person was so severely intoxicated as to be incapable of appreciating the probable effects of his conduct but not otherwise: see **Chapter 11**. Such a defence will entail the special verdict and liability to detention.

12.6 In some instances, the successful use of evidence of voluntary intoxication to negate a fault element of an offence will lead to a conviction of a lesser offence rather than to a complete acquittal. For example, if the intoxication claim succeeds for intentional homicide under s 106, there might still be a conviction of either intentional assault causing death under s 107 or unintentional harm causing death under s 108. However, there are also some instances where a successful claim will lead to a complete acquittal. An example is theft under ss 122, 125(a), where evidence of self-induced intoxication can be used to challenge an intent to deprive the owner. There will usually be no lesser offence which will be committed in the event that the claim is successful

12.7 As a matter of general principle, a person who was involuntarily intoxicated ought not to be in a worse position than a person who was voluntarily intoxicated. Yet, s 21(1) can sometimes entitle a voluntarily intoxicated person to a complete acquittal, whereas s 20(4) imposes on an involuntarily intoxicated person the special verdict and liability to detention. Many jurisdictions overcome this kind of problem by making their equivalents to s 21(1) available however the person became intoxicated. An involuntarily intoxicated person can then choose either to claim the equivalent of s 21(1) or, if its conditions cannot be met, resort to the equivalent of s 20(4) as an alternative. The text of the Vanuatu Penal Code may not permit adoption of this position.

It would, however, be open to a court to decline to make a detention order when an insanity defence has been grounded on involuntary intoxication. The provisions relating to detention orders in the Penal Code s 20(3) and the Criminal Procedure Code s 92 are permissive, not mandatory.

12.8 Section 21(1) can apply to any type of offence. The text does not distinguish between offences of so-called 'specific intent' and 'general intent' for voluntary intoxication. This is a departure from the traditional common law. It has traditionally been possible at common law to use evidence of self-induced intoxication in relation to crimes of so-called 'specific intent' but not crimes of 'general intent', but there have been disputes over the meaning and boundaries of these categories. In addition, in *R v O'Connor* (1980) 146 CLR 64, [1980] HCA 17, the High Court of Australia rejected any distinction between specific and general intent at common law. The High Court held that, for the purposes of the common law of Australia, evidence of self-induced intoxication can be taken into account in relation to any subjective mental element of an offence,

12.9 Section 21(1) restricts the defence to cases of such gross intoxication that the person was *incapable* to forming a necessary intent rather than simply happening in fact not to form it. This follows some traditional versions of the common law. The requirement for incapacity has, however, been abandoned on some modern formulations of the law of voluntary intoxication.

12.10 In extreme cases of intoxication, the person may be acting involuntarily, as an automaton without a conscious mind directing the conduct: see **3.28-3.31**, **11.17** on the concept of automatism. An automaton will be incapable of forming any intention or of foreseeing a risk. The terms of s 21(1) can therefore apply, even though there is a more fundamental failure of mental capacity. However, automatism will not assist in a case where intention is not required.

12.11 The accused carries an evidential burden to put intoxication and its effects in issue with some supporting evidence and also, under the Vanuatu Code, a persuasive burden to establish the defence on a balance of probabilities: see, for voluntary intoxication, s 21(1) and, for involuntary intoxication, the general provision on insanity in s 20(1). These burdens will usually be discharged by evidence relating to the accused's consumption of intoxicating substances. Medical evidence may also be given about the general effects of quantities of particular intoxicating substances upon mental processes.

12.12 In light of the restrictions on the use of evidence of intoxication, it would be better to refer to the 'intoxication rules' than the 'intoxication defence'. Intoxication does not provide a separate ground of exculpation. It bears upon criminal responsibility only where it provides evidence to support a claim that some element of an offence was absent and, in Vanuatu, only where the intoxication was so severe as to render the person incapable of forming a necessary intent. The overall effect of the rules is to restrict rather than expand the scope of defences available to an accused person.

Intoxication and objective tests

12.13 Negligence involves failure to live up to the standard of care of the reasonable person. The reasonable person is always sober. Therefore, where negligence is the fault element, as in the offences of unintentional harm under the Penal Code s 108, the accused is measured against the standard of a sober person.

12.14 Negligence is the underlying fault element for offences to which the Penal Code s 12 applies in the event of a mistake of fact. Examples are rape, indecent assault and drugs offences. To qualify under s 12, a mistake must be reasonable. However, a mistake that only intoxication can explain is not a reasonable mistake. Thus, for example, on a charge of rape or indecent assault, evidence of voluntary intoxication cannot be used to support a defence of mistaken belief in consent.

12.15 Evidence of intoxication is also generally immaterial to claims for defences such as self-defence and defence of property and for diminished responsibility. The relevant conditions are expressed in objective terms not in terms of any belief of the accused person. For example, self-defence under s 23(1) requires a proportionate act dictated by the immediate necessity of defence against an attack; compulsion under s 26 requires actual compulsion or threats, not otherwise unavoidable. In some other jurisdictions, the equivalent provisions are framed in terms of the beliefs of the accused, but not in Vanuatu. In cases of a mistaken belief, the defence of mistake of fact under s 12 may be available but, as discussed, this requires a belief to be reasonable. Evidence of intoxication therefore cannot be used to support the defence.

12.16 Evidence of intoxication may have a role to play in cases under s 27 of diminished responsibility due to provocation. Where provocation is raised as an issue, evidence of intoxication may help to substantiate a claim that the accused actually lost self-control. However, such evidence is immaterial in relation to the objective test which requires that the ordinary person would have lost self-control: see **10.28-10.30**.