

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 Codes SI/Ki/Tu s 13(5) provide:

For the purpose of this section "intoxication" shall be deemed to include a state produced by narcotics or drugs.

The significance of evidence of intoxication depends on the kind of mental 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. Indeed, the Penal Codes SI/Ki/Tu s 13(1) states: 'Save as provided in this section intoxication shall not constitute a defence to any criminal charge.' Nevertheless, where the consumption of the intoxicating substance was not self induced, the accused may be entitled to a special excusing defence under the Penal Codes SI/Ki/Tu s 13(2)-(3): see below, **12.12-12.13**.

12.3 Moreover, in some cases evidence of intoxication may support an argument that an element of an offence was not present: Penal Codes SI/Ki/Tu s 13(4); see below, **12.6-12.10**. 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, may 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 grievous bodily harm or recklessness respecting causing these results. 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.

12.4 Intoxication is often labelled a 'defence' in expositions of the law of criminal responsibility but it would be better to refer simply to the 'intoxication rules'. Admittedly,

s 13(2) does create a true exculpatory defence for some cases of intoxication that was not self induced. However, judges have observed that intoxication is not a true defence because, in the more common cases where it was self induced, it 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.

12.5 The accused carries an evidential burden to put intoxication in issue. When the evidentiary burden is discharged, the prosecution ordinarily carries the persuasive burden to negative the effect of intoxication beyond reasonable doubt: see **Chapter 2**. 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.

Intoxication and subjective fault elements

12.6 The Penal Codes SI/Ki/Tu s 13(4) provides:

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 guilty of the offence.

This changes the traditional position on intoxication at common law.

- At common law, evidence of intoxication that was *not* self induced can always be taken into account in determining whether any mental elements of an offence were present.
- However, there have traditionally been controversial restrictions on the kinds of mental state which can be negated by evidence of self induced intoxication: such evidence can be used in relation to crimes of so-called 'specific intent' but not crimes of 'general intent'.

The text of s 13(4) disavows the distinction between specific and general intent without qualification. This suggests that there are no restrictions on how evidence of self-induced intoxication can be used to negative subjective fault elements. In this context, the term 'intention' may be interpreted in its broadest sense, to include any subjective fault element, including recklessness. Thus, evidence of self induced intoxication can be used to challenge a fault element such as malice aforethought in the offence of murder, or intent or recklessness in the offence of assault, as well as intent to deprive in the offence of theft.

12.7 Furthermore, for offences with subjective fault elements, evidence of intoxication can be used to support a claim that a defendant was in a state of sane automatism, thereby negating voluntariness: see **11.19, 11.21**. If the defendant was an automaton, there would be neither an intention to commit the offence nor foresight of the risk if

doing so.

12.8 In *R v O'Connor* (1980) 146 CLR 64, [1980] HCA 17, the High Court of Australia rejected the traditional distinction between specific and general intent at common law but in a different way to that under the Penal Codes. 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, including voluntariness in offences which do not require intent as a fault element. However, it would perhaps stretch the language of the Penal Codes too far to adopt this position. Section 13(4) appears limited to offences with subjective fault elements. Thus, a person who kills another while in a state of intoxicated automatism would not commit murder but would still commit manslaughter.

12.9 Loose intoxication rules are less significant in the context of the Penal Codes than in some other jurisdictions because of the requirement under SI/Ki/Tu s 10 that a mistake of fact be reasonable if it is to provide a defence. A mistake that only intoxication can explain is not a reasonable mistake. The reasonable person is never intoxicated. Thus, on a charge of rape or indecent assault in Kiribati or Tuvalu, evidence of self-induced intoxication cannot be used to assist a defence of mistaken belief in consent. In contrast, in Solomon Islands, evidence of self induced intoxication can now be used to support a defence of mistaken belief in consent. This is because of the requirement for knowledge or recklessness introduced by the Penal Code (Amendment) Sexual Offences Act 2016 s 136F(1)(b): see **7.10**. There is no qualification respecting the use of evidence of self induced intoxication to negate either of these states of mind.

12.10 In many instances, the successful use of evidence of self induced 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 murder, there might still be a conviction of manslaughter under SI s 199; Ki/Tu s 192. Even if the evidence of intoxication goes so far as to suggest that there was no intention or recklessness respecting causing any bodily harm, there might still be a conviction of manslaughter based on criminal negligence: see **5.29-5.34**, **12.11**. Similarly, a successful defence against a charge of causing grievous harm with intent under SI s 224; Ki/Tu s 288 might still result in a conviction of unlawfully causing grievous bodily harm under SI s 226; Ki/Tu s 220.

Intoxication and negligence

12.11 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 prescribed as a fault element, as in offences of criminal negligence, the accused is measured against the standard of a sober person.

Intoxication and defences

12.12 Intoxication itself is not ordinarily a defence. However, the Penal Codes SI/Ki/Tu s 13 (2) create a special excusing defence for some exceptional cases. The provision states:

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 omission.

Only cases falling under paragraph (a) lead to an acquittal. Instead, cases falling under paragraph (b) lead to the special verdict for insanity and indeterminate detention. Section 13(3) provides:

Where the defence under the preceding subsection is established, then in a case falling under paragraph (a) thereof the accused shall be discharged and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.

On the special verdict for insanity and its consequences, see **11.5-11.6**.

12.13 The defence under SI/Ki/Tu s 13 (2) is complex.

- Intoxication must have produced one of two states of mind which echo those specified in the insanity defence:
 - Lack of knowledge of what was being done. This overlaps with a denial of intention under s 13(4). However, the defence under s 13(2) could also be available in cases of automatism. And it could be available in cases of delusions about exculpatory circumstances, such as a paranoid belief about being under attack.
 - Lack of knowledge that doing it was wrong. This is a true exculpatory defence, like its counterpart in the law of insanity: see **11.14-11.16**.
- Under s 13(2)(a), the intoxication must be caused by another person. This excludes cases where a person accidentally causes their own intoxication: for example, by misreading or forgetting the usage directions or warnings for prescription drugs.
- Section 13(2)(b) expands the defence to cover cases where the consequence of intoxication was insanity. The provision might apply to cases where repeated intoxication eventually caused brain damage. However, such a rare occurrence

would also fall under the insanity defence.

12.14 Evidence of intoxication may also underpin a provocation defence. Where a defence of provocation is raised on a charge of murder, evidence of intoxication may help to substantiate a claim that the accused actually lost self-control: see **5.44**. However, such evidence is immaterial in relation to the objective test which requires that the ordinary person could have lost self-control: see **5.50-5.55**.