



Pleading Intoxication as a Defence under the Nigerian Legal System

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Abstract

The state of mind of the accused is always difficult to ascertain as it is said that even the devil knoweth not the intention of a man, therefore it's pertinent to always look at the state of mind of an accused while he was committing the crime for which he is being charged. Thus, whenever an offence is committed it becomes the duty of the court to discover not only how was the crime committed, but under what frame and state of mind was the accused when committing the crime. Therefore, the tendency might have brought about impairing perception, judgment and muscular co-ordination as a result of drunkenness and drugs, among others. This affects the capacity and, therefore, the liability of an accused person.

Keywords: Criminal Code, Involuntary Intoxication, Nigerian Legal System, Penal Code, Voluntary Intoxication

Introduction

Intoxication is perceived and held to be a person's inability to control his mental being and actions as a result of the influence of either drugs or alcoholic substances. Thus, when 'Mr. A under the influence of alcohol poses the mental ability to determine the consequence of his actions, he is said to have been intoxicated. Under many legal systems around the world today, such state of mind as stated above provides a limited and in some cases an unlimited defense against liability for crimes committed.

Is Intoxication a Defense in Nigeria?

In Nigeria, involuntary intoxication affords a valid ground for complete exculpation provided that it renders the accused unable to know what he was doing or unable to appreciate the wrongfulness of his act. Section 29 of the Criminal Code provides, in part as follows:

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Intoxication shall be a defense to any crime charged if by reason therefore, 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 the intoxication was caused without his consent by the malicious or negligent act of another person.

Section 52 of the Penal Code provides:

Nothing is an offense which is done by a person who, at the time of doing it is by reason of intoxication caused by something administered to him without his knowledge against his will incapable of knowing the nature of the act or that he is doing what is either wrong or contrary of law.

It is submitted that the code's provisions dealing with involuntary intoxication are wanting in two respects:

- A. Firstly, neither Section 29 of the Criminal Code nor Section 52 of the Penal Code would seem applicable to a situation where one gets intoxicated by mistake. In such a case it can hardly be said that intoxication is brought about "by a malicious or negligent act of another." Nor is the intoxicant "administered" against a person's will.

It is suggested that even if the state of intoxication is not brought about by an act of a third party (which strict interpretation of the Codes' provision will entail) a person can still be within the provisions if he becomes intoxicated by taking something on his own but under a mistake.

It will be ridiculous to insist on the proof of a third party's intervention where in cases of mistake the accused is clearly laboring under a misconception of fact (e.g. taking palm wine and getting drunk under the mistaken belief that it is sweetened milk). To regard his intoxication as not involuntary in accordance with the Codes' provisions will appear illogical and punishment can hardly be justifiable.

- B. The Penal Code does not have provisions similar to those codified in Section 29(5) of the Criminal Code with the effect that a court in the Northern States may find it difficult to regard drugs as capable of bringing about the intoxication mentioned in Section 44 and 52 of the Penal Code.

Section 29(5) of the Criminal Code provides:

Elsewhere in the Penal Code "drunkenness" and intoxication" seemed to have been used interchangeably and it is quite conceivable that it can be argued that intoxication under the Penal Code does not and should not include impaired state of the mind produced by drugs.

Thus a plea of involuntary intoxication founded on drug-taking may be rejected. That could work hardship and involve the defense in further research in medicine to establish the similarity of drug taking to the consumption of alcohol. There has not been a case on the point but perhaps a Court called to decide the issue will interpret the Penal Code's provisions widely to cover cases of intoxication brought about by drugs. Be that as it may, a provision similar to section 29(5) of the Criminal Code ought to have been inserted in the Penal Code to avoid that difficulty of interpretation arising.



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

It is the question of whether or not voluntary (as opposed to involuntary) intoxication can furnish a ground of exemption that is far from being resolved. However, it is a settled law in both England and Nigeria that when a person gets drunk voluntarily in order to gain the courage to commit a crime he will not benefit from the defense of intoxication. The law regards a person who forms a prior intention to commit a crime and later drinks merely to make his scruples more damnable if he subsequently commits the crime. He is thought to be more deserving of public condemnation and therefore punishment than the case of a man who had no prior intention of engaging in criminal activity. Thus in *Attorney-General of N. Ireland vs Gallagher*² where the accused, after expressing a desire to kill his wife consumed a bottle of whisky to get Dutch courage to perform the dastardly act, he was found guilty of murder.

In the Nigerian case of *R. vs Owarey*,³ the accused and the deceased were co-workers of a company in Sokoto. After a small quarrel, the accused got drunk and went home to fetch a gun. Later he came back and, while looking out for the deceased, uttered a remark to the effect that somebody would die that day. He thereafter fired a fatal shot at the deceased who died a few hours later. On these facts, the West African Court of Appeal dismissed his plea of intoxication. Perhaps his conviction was proper because it was clear that he did not lack the capacity to form an intention to kill. Similarly, an Indian court rejected the plea of intoxication in the case of *Sheru vs. Emperor* where, prior to getting drunk, the accused had expressed an intention to kill his wife.

The Sudanese court above considered drunkenness as an aggravating and not a mitigation factor. Whereas the legal position is clear with regard to the accused forming an intention to kill his victim prior to becoming drunk, what will be his liability if no such prior intention could be inferred? In the early 19th century the position in English Law was that drunkenness, if voluntary, could only aggravate the offence. That view was based upon the principle that a man who by his own voluntary act destroys his will-power should be in no better situation with regard to criminal responsibility than a sober man.

This view would appear to be reflected in Section 44 of the Northern States Penal Code and is examined more fully later on in this paragraph. Blackstone, writing in 1840, said:

As to artificial voluntary contracted madness by drunkenness or intoxication which depriving men of their reason puts them in a temporary frenzy, our law looks upon this as an aggravation of the offence rather than an excuse for any criminal misbehavior.⁴

As years rolled by, however, this view appeared to have been softened and by the dawn of the 20th Century voluntary intoxication came to be regarded as a vital factor to be taken into account in ascertaining whether a person accused of committing a crime had formed the necessary intent.

² (1963) A. C 349

³ (1939) 5 W.A.C.A 66

⁴ Blackstone: Commentaries Book W.P.25



A similar direction was given by Lord Coleridge in *R. vs. Mead* where after getting drunk; the accused struck an old woman to death. Lord Coleridge remarked.

If the mind at that time is so absorbed by drink, if reason is dethroned and the man is incapable therefore of forming an intent it justifies the reduction of the sentence from murder to manslaughter.⁵

On the submission of defense counsel that there had been misdirection, the Court of Appeal held that though clumsily put Coleridge's formulation accurately represented the law at the time. A decade later the issue of voluntary intoxication under English Laws again fell to be decided in the celebrated case of *D.P.P. vs Beard*.⁶ The accused had some drinks at various bars and meeting a thirteen year old girl he demanded to have sexual intercourse with her. She refused and threatened to raise an alarm whereupon the accused placed a rag into her mouth and placed his finger on her throat. The girl died of asphyxiation. Reviewing the authorities and the steady development of the law on the subject, Lord Birkenhead laid down three principles which have since become the most authoritative pronouncement of the common law position on the subject of voluntary intoxication. These principles are summarized below:

- (a) Short of rendering a person insane temporarily or otherwise, voluntary intoxication perse is not a defense.
- (b) Notwithstanding (a) above, where a crime with which the accused is charged has specific "intent" as it's required. Mental element than intoxication, though voluntary will be a factor to be taken into account in ascertaining whether or not it negatives such intent without which the accused will be entitled to an acquittal.
- (c) Insanity can be brought about by voluntary or involuntary intoxication and in such a case a person charged with a criminal offence committed during a period of temporary madness can plead insanity directly and be treated in the same way as somebody suffering from a defect of reason due to disease of the mind.

Voluntary Intoxication under Section 29 of the Criminal Code:

Section 29 of the Criminal Code (corresponding to Section 13 of the Kenyan Code and Section 14 of the Tanzanian Penal Code) appears to be a codification of Lord Birkenhead's judgment in *Beard* and an interpretation given to it by Okonkwo & Naish⁷ would seem to suggest that a person who commits a crime while drunk could be exempted if, at the time of committing the alleged offence, he did not in fact form the necessary intent though he might have been able to.

The learned authors were of the view that in all cases where voluntary intoxication is raised as a defense, it is not enough for the prosecution to adduce evidence to show that the accused had the capacity to form the necessary intent but must go further and prove subjectively that the accused did in fact form that intent without which he will not be liable for the crime. On a cursory look, this view would appear to saddle the prosecution with the duty of proving the accused sober, however, the prosecution's duty is not as formidable as it seems, for in cases, involving voluntary intoxication the courts are entitled to view, the weapon used by the accused, the part of the victim's body hit, and other relevant matters as indicative of accused malicious intent. Hence, the use of a lethal

⁵ (1909) 16 Cox. CC. 306

⁶ (1920) A.C 479

⁷ Okonkwo & Naish (1964 ed). Pp 153 to 154



weapon repeatedly on the deceased abdomen would seem inconsistent with an uncoordinated action of a drunken man. Thus, the nature of the weapons used may be indicative of the accused malicious intent as it is highly improbable that a person who is really drunk could choose his weapon, lie in wait or select a particular part of his victim's body to hit.

It must be realized, however, that not very many crimes require the proof of specific intent. On the contrary, most crimes impose an objective liability and a person who commits any of them will suffer by reason of his drunkenness the theory being that he drinks at his own peril. In the case of homicide under the Criminal Code for instance the accused might not have formed the actual intention to kill but nonetheless may be held liable for causing death negligently since a reasonable and sober person would not have been so negligent.

Voluntary Intoxication under Section 44 of the Penal Code:

The precise effect of Section 44 of the Penal Code which deals with voluntary intoxication has been a subject of much debate. The section reads.

A person who does an act in a state of intoxication is presumed to have the same knowledge as he would have had if he had not been intoxicated.

Where the crime with which the accused is charged has 'Knowledge' as the requisite mental element, then clearly, Section 44 of the Penal Code can preclude the accused from pleading voluntary intoxication as a sober man would have had. The issue arose in the unreported case of *Musa Kwoi vs State*.⁸ The accused who was drunk had a quarrel with his wife and later killed her during scuffle. The High Court of the former Northern Nigeria, delivering a lengthy judgment, held that the accused could be rightly convicted of culpable homicide punishable with death created in Section 221 of the Penal Code has either 'intention' or 'knowledge' as its requisite mental element and though the accused, because of drunkenness, might not have formed the intention to kill, his action was such that a sober man ought to have known that death was a probable consequence. As to his voluntary intoxication, Section 44 of the Penal Code has placed on the intoxicated the same capacity of knowing the circumstances connected with his act as a sober man.

While the situation seems clear with regard to homicide and all other crimes in which 'knowledge' is a mental element, there appears to be an uncertainty as regards other crimes that do require the proof of specific intent. In particular, can Section 44 of the Penal Code be interpreted as presuming intent as well as knowledge even if it is only the latter, can this presumption of knowledge be rebutted? From the drafting style adopted by the Penal Code, there is much to support the contention that Section 44 lays down an irrebuttable presumption of knowledge. Section 44 (i.e. Section 43) states that every person is presumed to know all matters that are of common knowledge but has added the phrase "unless the contrary is proved". On the other hand, Section 44 of the Penal Code simply states that a person who is drunk is presumed to have the same knowledge as if he was sober without the slightest suggestion that he can prove something to the contrary.

It is one of the recognized rules of statutory interpretation that a change in the drafting style signifies a change in the draftsman's intention.

⁸ DJ/54C/65 (Unreported)



Hence it can be convincingly argued that the then legislature of the former Northern Nigeria wanted to lay down an irrefutable presumption of knowledge in Section 44 of the Penal Code. If the legislature had wanted to allow a defense to be raised in case of voluntary intoxication there seems to be no valid reason for omitting the phrase “unless the contrary is proved” as embodied in the preceding Section 43. On the other hand, some English judges seem not to read too much in the changing techniques of drafting and Mr. Justice Days for instance regarded a change in the draftsman’s style as only relevant in shifting the burden of proof. Similarly, an English court has held, in *Harding vs. Price*,⁹ that the mere mention of the adverb ‘knowingly’ in one section of a statute and its non-mention in another section did not necessarily mean that the legislature had wanted to create a strict liability offense in the latter section. The only significance of the change was regarded as a desire by the legislature to shift the burden of proof from its traditional place i.e. the prosecution to the defense.

Be that as it may, both the Nigerian judges and their Sudanese counterparts have regarded the Penal Code provision as not only laying down an irrebuttable presumption of Knowledge but also as presuming intent as well. While there is some justification for the former view, there is hardly anything in Section 44 of the Penal Code (or Section 42 of the Sudan Penal Code) to suggest a presumption of intent. A retired Chief Justice of Nigeria had an occasion to pronounce on the effect of section 44 of the Penal Code in the case of *Tonara Bakuri vs State*.¹⁰ The accused in that case killed his father after he (the accused) had got drunk. In a brief judgment dismissing the appeal. Ademola C.J. noted:

It will be enough to state that voluntary intoxication is no defense.

Some four years later Fatayi-Williams J.S.C. (as he then was) grappled with the problem of voluntary intoxication under the Penal Code. Delivering the Supreme Court’s judgment in *Patrick Okeke vs State*,¹¹ where the accused had got himself intoxicated by taking beer and smoking cannabis, his Lordship thought that under the Penal Code, only involuntary intoxication as provided in Section 52 can be a defense. He noted that the Penal Code does not contain a provision similar to Section 29(4) of the Criminal Code, which regards voluntary intoxication as an important factor in negating intent.

It is however respectfully submitted that Mr Justice Fatayi-Williams was in error in thinking that voluntary intoxication can in no case be a defense under the Penal Code. Earlier Sudanese decisions based on Section 42 of the Sudan Penal Code have also been to the same effect, namely, that under the Sudan Penal Code voluntary intoxication can never be a defense and that Section 42 of the Sudan Penal Code should be interpreted so widely as to include a presumption of intent. In *Sudan Government vs Hassan-Mohammed Al-Sayyad*,¹² the accused was charged with murder in having killed the deceased during a drinking brawl. On the plea of intoxication, the court held that Section 42 of the Sudan Penal Code was irrebuttable and the accused ought to have known that death would be a probable consequence of his act. The fact that he was drunk and might not have known was

⁹ (1948) 1.kb 695.

¹⁰ (1965) NMLR 163

¹¹ (1969) 1 NWLR 275

¹² (1961) NLR 153



treated as immaterial as Section 42 of the Sudan Penal Code ascribes to him the same Sudan Penal Code is taken to be committed if death was a probable consequence of his act.

A similar ruling was given in *Sudan Government vs Eidalla Saeed Abu Bakr*¹³ where the deceased was killed by her lover, rejecting the defense based on voluntary intoxication, Abu Rannat C.J. remarked.

The Penal Code requires it to be assumed that a man voluntarily drunk had the same knowledge as he would have had if he had been sober and intention in many cases is an inference from knowledge...

He then proceeded to quote Lord Birkenhead's judgment in *D.P.P vs Beard*¹⁴ and concluded:

In the light of this precedent, I find that this defense of drunkenness should not succeed...

It is hard to see the necessity of delving into English decisions, for our Codes are supposed to be comprehensive in the matters they deal with. This is one evidence of the neo-colonial mentality of some African judges who, being English-trained, tend often to slip into this habit of reading the Codes as if they simply restate English law. It does seem to some people that any judgment not supported by English decisions would be branded as unlearned! The almost utter conviction by some of our judges that English judicial pronouncements are infallible is further evident from the remarks made by the same judge while upholding the plea of voluntary intoxication in the *Sudan Government vs Mursal Saeed Fadi Elimula*.¹⁵ He said:

I read part of the report of the Commissioners on Criminal Law who was appointed in England in the first half of the 19th century which displays outstanding qualities of logical thought and lucid exposition. The report said inter alia the proper test of guilty is that of knowledge and consciousness on the part of the offender that hurt or damage is likely to result from what he does.

In *El Mula's* case, the accused was charged with murder for having overrun two persons who were attending a wedding ceremony in a village. The accused was a driver and there was evidence that he had taken a lot of Marissa (a locally brewed gin) and was very drunk. Despite the fact that Section 248 of the Sudan Penal Code (the section which defines murder) mentions 'knowledge' one of the mental elements of Section 42 of the same Code whose effect is to presume such knowledge in the case of an intoxicated person, Abu Rannat C.J. thought that the defense of intoxication could be raised. It is hard to reconcile this decision with the previous ones by the same judge for the combined effect of Section 248 of the Sudan Penal Code and Section 42 of the same Code is to reject the possibility of the defense of voluntary intoxication being successfully raised in homicide cases under the Sudanese Code. This, at any rate, is the impression one gets from reading Ademola's and Fatayi-Williams' judgment in cases tried under the Northern States Penal Code whose provisions are verbatim reproduction of the Sudan Penal Code with his earlier rulings. Mr. Justice Abu Rannat thought that Section 42 of the Sudan Penal Code which presumes knowledge to the voluntarily intoxicated person can be rebutted. He concluded. It may be argued that Section 42 of the Penal Code attributes knowledge to an intoxicated person but it should be observed that the presumption

¹³ (1956) NLR 42

¹⁴ Ibid.

¹⁵ (1926) S.K.J.R 214



of knowledge in Section 42 is rebuttable and the accused can disprove it. The circumstances of this case do not show that the accused was deliberately driving the lorry at the deceased knowing that death would be likely or probable. It was the case of a drunken person recklessly driving a lorry in the direction of persons not knowing that his lorry would knock them down.

It is hard to interpret Section 32 of the Sudan Penal Code as laying down a rebuttable presumption of knowledge as the learned judge claimed.

The section, which is couched in the same terminology as Section 44 of the Northern Nigeria Penal Code provides:

A person who does an act in a state of intoxication is presumed to have the same knowledge as he would have had if he had not been intoxicated.

This section, immediately following Section 41 of the Sudan Penal Code to which the words “unless the contrary is proved” are added, can only be constructed as having laid down an irrebuttable presumption of knowledge with respect to an intoxicated person who cannot, therefore, benefit from the defense of intoxication in a murder trial. If, however, Abu Rannat’s judgment in *EL-Mula* revealed an attempt to adopt a more rational approach with regard to cases involving voluntary intoxication then this is a welcome development even if the ruling appears inconsistent with his prior decisions. As Mr Justice Stephen observed in *R. vs Tolson*,¹⁶ the modern concept of means real encompasses many states of the mind. It may sometimes mean intention or knowledge. For certain offences, the term may mean nothing more than negligence or recklessness. Over the years, the term has acquired such a technical meaning that the mind needed not in many cases be ‘malicious’ at all!

Thus where a person is voluntarily drunk and commits an offense that has ‘knowledge’ as a mental element to be proved then it is proper to reject the Plea of intoxication as Section 44 of the Penal Code (or Section 42 of the Sudan Penal Code) having presumed knowledge will preclude such a plea. But where a person is charged with an offense that requires the proof of intent then Section 44 of the Penal Code cannot preclude such a plea since its presumption of knowledge cannot be equated with a presumption of intent.

It is therefore humbly submitted that the rather blanket pronouncement made on Section 44 of the Penal Code by Chief Justice Ademola in *Toniara Bakuri* is wrong if it purported to cover all offences in the Penal Code is correct only to the extent of those offences having ‘knowledge’ as the impression that voluntary intoxication under the Penal Code can never be a defense to all crimes contained in that Code was given in the case of *Musa Kwai vs State*¹⁷. The accused had taken a lot of drink and was intoxicated. On coming home, he picked a quarrel with his wife whom he later struck to death. Having been charged with culpable homicide punishable with death under Section 221 of the Penal Code he raised the defense of intoxication. Since the two mental elements mentioned for the offence are either ‘intention’ or ‘knowledge’, the question arose as to whether he could benefit from the defense founded on voluntary intoxication in view of the presumption of knowledge in Section 44. The court convicted him of murder as charged but in the course of the judgment, it left nobody in doubt that it required proof of intent rather than knowledge, Section 44 of the Penal Code could not have precluded the defense of intoxication, through voluntary.

¹⁶ (1969) 1 NWLR 275

¹⁷ Ibid, at 324



The court remarked, obiter:

It should be noted that this section (i.e. 44 of the Penal Code) refers to knowledge and not intent. This section is taken from Section 42 of the Sudan Penal Code. In his commentary on the Penal Code, Mr. S.S. Richardson stated with reference to this section that it was intended to make clear that voluntary intoxication should not be an excuse for the commission of a crime. It should rather be a specie of madness for which the person himself is to blame. With great respect to the learned authored we do think that statement fully represents the law where the only mental element required is knowledge but it makes no reference to intent.

Later in the judgment, the court reviewed the rather confused state of the law in the Sudan and continued:

Counsel for the prosecution had directed our attention to the case of Sudan Government vs. Hassan Mohammed Al-Sayyad where the learned Chief Justice (Abu Rannat) considered the effect of Section 42 of the Sudan Penal Code. In that case, however, the Chief Justice dealt with the question of knowledge and not specifically with intent. If this judgment is to be taken to mean that Section 42 of the Sudan Penal Code (corresponding to Section 44 of the Northern Nigeria Penal Code) covers intent as well as knowledge we respectfully dissent.

Though rather an obiter it is submitted that the decision in *Musa Kwoi* truly represents the law, and voluntary intoxication can be an exonerating factor for all offenses in the Penal Code that have 'intent' as the requisite mental element. *Musa Kwoi* was a High Court case decided after *Tonara Bakuri and Patrick Okeke* and its remarks were obiter but it is submitted that the Supreme Court's pronouncements in the latter two cases are wrong. It should therefore take a more thorough look at the issue whenever an occasion arises in the future.

It is also suggested that the provision in Section 51 of the Penal Code as regards insanity be interpreted to include cases where "unsoundness of mind" is brought about by intoxication even though voluntary. By using identical phraseology with section 52 (i.e. involuntary intoxication) one gets the impression that under the Penal Code, only involuntary intoxication that leads to temporary insanity is recognized; In other words, insanity as defined in Section 51 of the Penal Code can be brought about by involuntary intoxication but not by voluntary intoxication. This of course will be absurd.

In any case, an accused will prefer to plead involuntary intoxication rather than insanity, which, if accepted, will result in his being sent to an asylum for an indefinite period. What ought to have been included in the Penal Code is a provision similar to Section 29(2b) of the Criminal Code which recognizes the simple fact that temporary insanity caused by drink is still insanity and can be pleaded as a defense. The absence of such a provision in the Penal Code has led to absurd interpretations, with S.S. Richardson for instance saying "drunkenness cannot be pleaded".

Conclusions/Observations

From what we has been discussed, it's clear that there are degrees of intoxications, only some of which can relieve an accused of criminal liability assuming all other factors exist, in our law



therefore, the wording of Section 29(2) of the Criminal Code places the third condition set out above outside the ambit of the defense contemplated by the subsection.

It is also my opinion that, the above section was reflected (by the) draftsman in section 29 of the criminal code. For the defense to be available to an accused person as a defense, he must prove on the preponderance of evidence that at the time of the act or omission that is called by question, he was in such a state that he did not know that such an act or omission was wrong or did not know what he was doing. He has to further prove either that the state of intoxication was not self-induced or was caused without his consent by the malicious or negligent act of another person.

Therefore, the use of the wording by the Penal Code of such terms as fraudulently, knowingly, and intentionally would make it to be at *par* with the definition of a voluntary intoxication. I, in this direction, wish to state that since those terms as above were consistently used by the Penal Code, then voluntary intoxication should be viewed and held to be the same as involuntary intoxication.

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