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THE POSSIBILITY OF DEFENCES IN CRIMINAL LAW BEING A FREEWAY TO CRIME

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An obligatory Essay submitted to the School of Law of the University of Zambia in partial fulfillment of the requirements for the award of the Degree of Bachelor of Laws (LLB).

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DECLARATION

I, MICHAEL CHISENGELE COMPUTER NUMBER 22035982 DO HEREBY DECLARE that the contents of this directed research paper are entirely based on my own findings and I have not in any way used any persons work without acknowledging them as the source.

I therefore bear the absolute responsibility for the contents, errors, defects and any omission herein.
DEDICATION

First to God Almighty for his grace, which is always for sufficient for me. Secondly to my parents Mr. and Mrs. Chisengele for their love and support, and lastly to my elder brothers and sister for their encouragement.
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ABSTRACT

The pleading of defences is one essential aspect of criminal law. This is basically because defences in criminal law are applicable in almost every crime one would commit. This simply shows that not every act of theft, murder, robbery or assault is intentionally done and that not every person who commits such an offence deserves to be arrested. This emanates from the background that every accused person has got the right to be heard. Accused persons must be given a chance to explain the circumstances in which they committed the offence and state if they plead guilty or not guilty. It is in this light that one can state if they have any defence as provided for in the law.

This essay is an attempt to discuss the possibility of defences in criminal law being a leeway to crime. This is in recognition of the fact that in as much as they law provides for defences for ‘innocent’ offenders, there is a possibility that some offenders would want to use these defences as a leeway to crime. This essentially because when ones plea of a defence is successful, they are acquitted or get a much lesser sentence.
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CHAPTER ONE

1.0 INTRODUCTION

In the world of criminal law, among the many facets that are covered are defences to crime. These defences are imperative like any other area of criminal law. In fact defences in criminal law can arguably be said to be the most widespread or frequent as they cut across every area of criminal law. This simply means they can be discussed in almost every area in criminal law. It shows that defences are applied in nearly every crime. This can be illustrated by the reality that for instance when one commits an alleged crime of murder; they can apply a defence such as self defence. This would also apply to an accused charged with theft or assault, who would plead defences of mistake and intoxication respectively.

It must be mentioned, that defences in criminal law can be pleaded by any accused person who feels they ought not to be convicted for the alleged crime, and they are certainly recognized and accepted by any mature legal system of which they are provided for in various statutes. Kulusika asserts that defences are available to an accused person which she or he may use to negative criminal liability for whatever offence she or he is charged\(^1\). One can not plead a defence for the sake of evading the law, but must precisely have a reasonable plea in order for the judges to entertain the claim.

The court at times usually has a complicated task to analyze and accept the defence being pleaded. This is because it would be failing in its duties of ensuring there is justice in society if they allow a plea of a defence claimed by an accused person, not truly as an

honest claim, but essentially for the purpose of evading punishment of the law. Thus the court has to make sure that the defence being claimed is rational and acceptable.

It is from this background, therefore, as well as in promotion of good legal systems, that a concern has arisen to analyze the application of defences in criminal law. This is basically to assess the possibility of defences in criminal law, specifically insanity and intoxication, being used as a leeway to crime.

1.1 PROBLEM STATEMENT
The defences in criminal law have to an extent been misused and misapplied by the courts in Zambia. This is evidenced by a number of cases where theses defences have been pleaded inappropriately and have succeeded in part or in whole. This further also encourages other people to commit certain offences intentionally, relying upon these defences with the hope of succeeding. The problem is not with the defences themselves but lies with the approach that the courts have taken in the applicability of these defences of which they have not been strict enough in some cases to deal with the pleading of these defences allowing some accused who are supposed to be convicted to be acquitted.

The paper will seek to address the matters such as;

1. How can the defences of intoxication and insanity can be used as a leeway to crime?
2. What are the causes and effects of using these defences as a leeway to crime?
3. How can it be ensured that these defences are not used as a leeway to crime?

1.2 OBJECTIVES OF STUDY
This research seeks to critically analyse the defences of intoxication and insanity to crime in the Zambian context and assesses whether they are a possible excuse to the commition
of criminal activities. The paper will evaluate the approach and attitude the Zambian courts have taken in handling cases with such defences; to see where the court draws the distinction between an accused who is using these defences just as an excuse and one using them genuinely. Therefore, the paper is aimed at making a contribution towards making Criminal law in Zambia more relevant as regards to defences.

1.3 METHODOLOGY

The research will be done mostly by desk research with consulted material being published work such as text books and relevant pieces of legislation. Though unpublished work will also be consulted were necessary. Case law will be extensively and intensively used. This will be supplemented by interviews of Lawyers, Magistrates and Judges.

This research is divided into five chapters. Chapter one basically discusses the meaning of defences in general. It will give an explanation on the application of general defences. The chapter will hence narrow down in looking at the specific meaning and explanation of the defences of intoxication and insanity and their applicability.

In chapter two, an assessment on how the defences of intoxication and insanity can be used as a leeway to crime will be made. This will subsequently lead to a narrowing down of looking at the causes as well as the effects of using the aforementioned defences as a leeway to crime.

Chapter three will be an evaluation of the approach and attitude that the Zambian courts have taken in dealing with cases with the defence of intoxication and insanity. The
chapter will also give a comparison of the Zambian courts and the foreign jurisdiction in handling cases with the aforementioned defences.

Suggestions on how the defences of intoxication and insanity must not be used as a leeway to crime will be made in chapter four. This will include the way judges may respond to cases with such defences. Necessary recommendations will be made in chapter five, relation to the possibility of defences of insanity and intoxication, being used as a leeway to crime. This will thus lead to a conclusion being drawn based on the entire research.

1.4 GENERAL EXPLANATION ON DEFENCES

For any act done to constitute a crime, two elements have to be proved and these are the actus reus and the mens rea. As Lord Hailsham LC stated in the case of Haughton v. Smith, with regards to the maxim, actus non facit reum, nisi mens sit rea that ‘the phrase means an act does not make a man guilty of a crime unless his mind is also guilty. It is thus not the actus which is reus but the man and his mind respectively.’ The actus reus refers to the outward conduct of the accused and the mens rea refers to the state of mind of the accused, relevant at the time of the conduct. With these two elements, a conviction of the accused can be secured. However, it is generally accepted that upon the missing of one of the elements, an accused person cannot be convicted. This mans that the accused has been negatived of criminal liability.

This negativing of criminal liability is what defences do. They basically make the accused to stand in a position that he was not able to commit the said crime. ‘Defences

\[1\text{973]}\text{3 All ER 1109 at 1113-1114}
include those which affect the accused persons capacity to commit the offence charged e.g., infancy, insanity and automatism. Where these defences apply, the law presumes that the accused person is incapable of committing the offence. Other defences are those which operate to negative an element of crime such as mens rea: e.g. Self defence or mistake. This classification shows that, although used in a general way as defences, they can be divided according to how they apply. Kulusika, further notes that some defences, such as duress, necessity, etc are those where the prosecution can prove the various elements of the offence, including the actus reus and mens rea, but the law presumes that the criminal liability of the accused person is negated by excusatory circumstances.

There is also a classification of defences which an accused person is completely blank on the act of committing a crime. This is one were the accused did the act but in not being in their right state of mind, they claim they did the act not according to the claim by the prosecution but to something else. Thus it is noted that some defences are not necessarily defences. For example, insanity is not a defence in the literal sense of the word ‘defence’ because the accused is not saying that I killed the victim because I am insane. She or he is saying that they killed a dog, but the prosecution is saying that they killed a human being. This in essence has also been classified as a defence although it is somewhat of a different nature.

There are also defences which are classified as defences but do not in actuality make the accused to be set free when pleaded. On the other hand, they help the accused person to

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3 Supra note 1  
4 Ibid  
5 Op cit
have their sentence reduced as this states that the accused has accepted that they did the said act but this was due to some compelling or coercive reasons. This simply means that both the mens rea and the actus reus are present but the accused lost their self control when doing the said act as they did it under the ‘heat of passion’. ‘Defences which arise only on proof of actus reus and mens rea, such as diminished responsibility and provocation on murder charges, are not available when the jury considers whether the defendant did the act or made the omission charged.’ 6 Kulusika asserts that a successful plea of provocation will entitle an accused to be convicted of manslaughter instead of murder. Provocation is therefore a defence, a defence to murder only. But it’s not a defence to attempted murder nor to other criminal offences. In offences other than murder provocation is taken into account at the sentencing stage.7 It can be seen that some defences thus are of a different character as compared to others.

Defences in criminal law are also divided into two categories and these are justification and excuse. Those which are referred to as justificatory are those which are used to justify an accused person’s criminal conduct. The excusatory in nature are those that excuse an accused’s criminal conduct.8 Justification means that the defendant’s action is not disapproved of in the use of force. The accused is not blameworthy because it has been decided that what she did was permissible. With en excusatory defence, the criminal law declares the accused is not guilty owing to some law of blame which could not have been attributed to her.9

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7 Supra note 1.p. 346
9 Supra note 1.p.197
1.5 SPECIFIC EXPLANATION ON WHAT THE DEFENCE OF INTOXICATION IS

The defence of intoxication is one that has to an extent raised a number of controversies on how it must be dealt with. Some of the questions raised are; will any person who is drunk and commits an offence plead intoxication successfully? Another issue raised is whether a person who intoxicates him or herself can successfully plead intoxication or does it only have to be intoxication induced by another person. In order to address some of these important concerns, it is important to look at what intoxication is and thus consider the position of the law. This concern was raised in the case of Reniger v. Fogossa\(^{10}\) in the Exchequer Chamber that;

If a person that is drunk kills another shall be felony and shall he be hanged for it and yet he did it through ignorance, for he was drunk he had no understanding nor memory; but in as much as that though was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby.

Intoxication may be defined as a state of drunkenness, that the person does not know what he is about. From this it must be established that intoxication as a defence must not or is not available to be pleaded by a person who gets him or herself drunk and still have full control of their mental faculty such that they know what they are doing. The Penal Code\(^{11}\) provides that;

\(^{10}\) (1552) 1 Plowd 2, 19
\(^{11}\) Section 13
(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) 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 charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

From this, it can thus be seen that some of the controversies are answered. This simply means that the law in Zambia as stated above is that for an accused to plead intoxication, it must not be of his own doing, that is intoxication oneself. The Act^{12} goes on to state that;

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused person shall be discharged, and in a case falling under paragraph (b) the provisions of section one hundred and sixty-seven of the Criminal Procedure Code relating to insanity shall apply.

(4) 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.

(5) For the purposes of this section, “intoxication” shall be deemed to include a state produced by narcotics or drugs.

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^{12} Ibid
Intoxication is basically divided into voluntary and involuntary intoxication. Kulusika notes that voluntary intoxication could only be a defence to offences of specific intent and not to offences of basic intent. Specific intent offences include murder, theft, robbery and burglary while basic intent offences include assault and manslaughter.\(^{13}\) On the other hand, involuntary intoxication is a defence both to defences of specific and basic intent. It basically means one does not consent to the intoxication and this may happen in a situation where one puts some intoxicating substances in one’s drink without their knowledge.

**1.6 SPECIFIC EXPLANATION ON WHAT THE DEFENCE OF INSANITY IS**

The defence of insanity is very much similar to the defence of intoxication. This is for the main reason that both of them affect a person’s mind in that the person who commits the offence does not know that they were committing an offence. In fact some would admit doing the act but may say they were not killing a person but a dog. This simply means that despite the act being done, there is not necessary mens rea to secure conviction of the accused. A person who pleads the defence of insanity usually suffers from a disease of the mind, which makes them not to know what they are doing at the time of the act and this does not matter whether they are sane at the time of trial or before they committed the act. Smith and Hogan assert that if the accused is found fit to plead or, if that issue is not raised, he may raise the defence of insanity at his trial. Whereas at the two preliminary stages the concern is with the accused’s sanity at the time of the inquiry, at the trial the question concerns the accused’s sanity at the time when he did the act.\(^{14}\)

\(^{13}\) Supra note 1, p.280

\(^{14}\) Smith, J C and Hogan, B. *Criminal Law* (1978), p. 162
Insanity may be equated to madness. The law in Zambia, as well as many other country’s’ legal systems therefore have a presumption of sanity. ‘Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.'

The meaning of the aforesaid section is that the onus of proving insanity lies upon the accused and thus has a duty to discharge this burden failure to which the law will treat that person as having been sane at the time of committing the crime. The Penal Code further states, in elucidating insanity, that;

A person is not criminally responsible for an act or omission if at the time of an act of doing the act of making the omission he is, through any disease affecting his mind, incapable of understanding what he is doing or of knowing that he ought not to do the act or make the omission. But a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.

It can thus be seen, that any disease of the mind does not make one to automatically succeed in a plea of intoxication but it requires that did not know what he or she was doing at the time of the act.

The defence of insanity therefore has a standard followed and this is insanity in the legal sense and not in the medical sense or indeed any other sense. Similar to the provisions of insanity in the Penal Code are the M’Naghten rules which were espoused in the

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15 The Penal Code, Chapter 87 of the Laws of Zambia, Section 11
16 Ibid, Section 12
M'Naghten's Case\textsuperscript{17} were M'Naghten was acquitted on the defence of insanity after a charge of murdering Sir Edward Edmund Drummond' secretary. The rules are that; Every one is presumed innocent until the contrary is proved and that it is a defence to a criminal prosecution for the defendant to show that he was labouring under such a defect of reason, due to disease of the mind, as either not to know the nature and quality of his act or, if he did know this, not to know that he was doing wrong. As a result there is quiet substantial and reasonable law governing the defences of insanity and intoxication, which vary from statutes to judicial precedents. Though it must be emphasized, that each and every case is handled according to its facts depending on the circumstances.

\textsuperscript{17} [1843] 10 Cl & Fin 200
CHAPTER TWO

2.0 HOW THE DEFENCES OF INTOXICATION AND INSANITY CAN BE USED AS A LEEWAY TO CRIME

Defences in criminal law are there to allow the accused to have a claim that they did not intend to do the alleged crime. This intention is claimed, sometimes by saying that one was not in their right state of the mind at the time of committing the crime. They can say they were intoxicated or suffered from a disease of the mind such that they did not know that they were killing a human being but an animal. In such instances, one may say that he or she thought that they were killing a monkey but only to discover that it was a human being. Apart from that, they may claim that they committed the crime intentionally but were under duress or that they were defending themselves. These defences are generally available to everyone who feels they do not deserve to be convicted due to the aforementioned situations. With such knowledge, it is for a fact that many people are bound to plead these defences and thus most accused persons would not claim these defences genuinely but would rather claim them in order to evade conviction. The courts therefore have a task of making sure that only genuine pleas of these defences are allowed. It is therefore the attempt of this chapter to illustrate how defences of intoxication and insanity can be used as a leeway to crime as well as to show the causes and effects of using these defences as a leeway to crime.

Card notes that the defence of insanity is concerned with the defendant’s mental condition at the time of the alleged offence.\textsuperscript{18} In\textit{ Director of public Prosecutions V.}

\textsuperscript{18} Supra note p.724
Beard\textsuperscript{19}, Lord Birkenhead stated that the evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent. This shows that the defences of insanity and intoxication are mainly concerned with the mental condition of the accused at the time of the crime, which is the mens rea and it the most rebutted element in an incident of crime. This could be in cases such as those for murder were a person would claim insanity or intoxication. One would say they had no malice aforethought and thus plead that they must not be convicted. In Sikunyema V. The Queen\textsuperscript{20}, the appellant hit the deceased with a pounding stick, a one handed down ward blow in the chest. The court of appeal said that ‘the failure by the high court to take into account intoxication in determining whether the appellant had formed the specific intention of occasioning grievous harm to Saladi, deprived the appellant of a fair chance of acquittal on the charge of murder.’ The accused’s conviction of murder was set aside for five years of imprisonment with hard labour for manslaughter. In R V. Majewski\textsuperscript{21}, it was established that voluntary intoxication could only be a defence to offences of specific intent and not to offences of basic intent. This means that one who voluntarily intoxicates him or herself can plead the defence of intoxication to crimes such as murder, theft and robbery, which are offences of specific intent. This may lead to a situation were an accused is acquitted for a crime he or she is supposed to be convicted. This can be in a situation were X, under voluntarily intoxication commits a crime which falls under offences of specific intent. The defence

\textsuperscript{19} [1920] AC 479  
\textsuperscript{20} [1964] ZR 66  
\textsuperscript{21} [1976] 2 All ER 142
lawyer can claim that he was intoxicated and did not have the intention (*mens rea*) hence the accused may be acquitted.

The prosecution thus has a duty to ascertain that the accused actually intended to commit the crime. This might not be an easy task and failure to which may see the accused walk free. Conroy, CJ, in *Musole v. The People*\(^{22}\) stated:

'It is for the prosecution to prove all the ingredients of the offence; one of the ingredients of the offence is the intent of the appellant, and if the prosecution fails to prove beyond a reasonable doubt that he intended to kill or to do grievous harm, he cannot be convicted of murder. In deciding whether this ingredient has or has not been proved, the court has to consider the 'totality of the circumstances', and one most material circumstance in this regard is to whether the appellant was intoxicated and the extents of such intoxication.'

It is noted by Silving; on self intoxication for the purpose of crime commission that:

'Where a person engages in criminal conduct while in a state of intoxication or under the influence of a drug consumed, or administered, or caused to be administered, by him for the purpose of facilitating thereby his engagement in that conduct, shall be deemed to have possessed at the time of and prior to that conduct the state of mind with regard to it and with regard to the result, as described by statute, which he possessed before he became intoxicated or influenced by the drug.'\(^{23}\)

It can hence be seen that if one intoxicates him or herself for the purpose of committing a crime, it will not be considered as a defence by the courts.

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\(^{22}\) [1963] Z&NRLR 66 @ 175

In addition, involuntary intoxication is a defence to any crime even to crimes of basic intent. Kulusika notes that involuntary intoxication includes instances where someone adds alcohol to X’s soft drink without his knowledge. It may also include situations where X takes certain toxic drugs strictly on medical advice. 24 ‘If X is involuntarily intoxicated, he has a defence to any crime including those of basic intent, whenever it can be proved that intoxication negatives the mens rea.’ 25 This means that so long as the accused negatives the mens rea through the defence lawyer, he would not be convicted of a crime in such cases.

Insanity is also another defence that is pleaded by accused persons. This is usually a disease which affects the mind of an individual and as such they commit an offence without intention but they do so without being in control of their mental faculty.

**Disease of the Mind**

As the name suggests this is a disease which affects the mind and hence causes the accused to be violent and thus commit a crime. Kulusika states that disease of the mind could also arise as a result of the failure of the brain to function in a normal way owing to any identifiable organic cause, such as schizophrenia, melancholia or severe paranoia. The effect of some of the disease may be temporary, but may seriously disorient the person affected by it. 26 In **Bratty V. Attorney General for Northern Ireland**, 27 the court described disease of the mind as any internal bodily disorder which affects the functioning of the brain and has resulted in violence, which might recur. It must thus be

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24 Supra note 1. p 281  
25 Ibid  
26 Ibid. p 203  
mentioned that actual or total proof of such insanity is not certain. This means that if the accused proves, on the balance of probabilities that he or she is insane then they can be acquitted. It is mentioned that one must have suffered from disease of the mind at the time of the act. Therefore it follows that one may feign their ‘insanity’ and falsely claim that they were not in full control of their mental faculty and the time of the act. The other false claim may be in a situation were X strangles the wife, whom he has wanted to get rid of, and claims that he believed he was strangling a bear. As long as counterfeit medical evidence is made by conniving with a doctor to support the accused’s evidence and he manages to convince the court by proving that he was insane at the time of the act them he can be acquitted. This can clearly be a leeway to criminal activities and may to an extent allow people to commit crimes unwarrantedly. This may be the same situation in an event were one commits a crime and claim that the heard voices or were under a demonic influence. This on its own is difficult to prove and may on the other hand cause one who was under pure insanity to be convicted. Another difficult situation to prove is where one commits a crime and claims it is due to a disease of the mind of which that disease is occurring for the first time.

In addition, a person who from time to time suffers from hallucinations and sees ‘things’ may take advantage of such a condition and commit an offence. He may then claim that at the time of committing the offence, he did not know what he was doing and thus had no knowledge that he was killing a human being. Such are likely to be acquitted, since they would already have the necessary medical documentation stating that they do have hallucinations which recur from time and again. One such possible case is one of
Sankalimba V. The People. In this case, the appellant was charged with and subsequently convicted of murdering Theresa Sankalimba, his wife; by stabbing her three times in the chest thereby inflicting serious injuries from which she died a day later. A pathologist who conducted a post-mortem examination on her body attributed the cause of death to shock due to haemorrhage. The appellant had all along admitted responsibility in bringing about his wife’s death; the only issue being whether he appreciated immediately before, and during the process of inflicting the wounds, that the victim was a human being. The appellant stated that:

‘When I entered I did not see clearly because the bedroom was dark. I tried to open the wardrobe. It seemed as if I had provoked something which looked like a fox or a dog. I started struggling with it. There is very little space to manoeuvre. I took out a pocket knife and stabbed the thing I thought was an animal I stabbed it….more than once. I then heard my wife saying: ‘Oh Sankalimba help me I am being attacked.’

The court found the appellant not guilty by reason of insanity. That he was not criminally responsible for his actions because at the time, due to his illness, he was incapable of understanding what he was doing. The conviction for murder and the attendant sentence were set aside. In such cases, it is very difficult for the court to precisely establish that the accused had actually suffered from his usual illness which he occasionally suffers from. Because on the contrary, one might not suffer from his usual illness at the time of committing the offence but may rather commit the offence and thus using his known illness as an excuse to crime. This may, to a large extent be used as a leeway to crime.
2.1 THE CAUSES AND EFFECTS OF USING THESE DEFENCES AS A LEEWAY TO CRIME

Defences in criminal law are pleaded in different ways by different people. This mostly depends on the crime one has committed. The major and obvious cause of defences in criminal law is to negative criminal liability. This is simply because no one wants to be convicted, and this even applies to those accused persons who are even prima facie guilty of crimes. As a result of this many accused persons who commit crimes may thus be alerted to the defences that are available to them and thus they may engage lawyers to help them evade conviction and punishment of the law and thus take the opportunity to use the defences as a leeway to crime. Other accused persons however are knowledgeable of the defences that are available to them for a particular offence and know how they are applicable. Therefore they may use these defences as a leeway to commit a crime knowing that such a particular defence will highly likely secure them an acquittal or a much lesser sentence than usual. This could be in a situation where one murders another person but pleads involuntary intoxication or insanity while knowing all the legal technicalities that are involved in order not to be found guilty of the crime. It must be stated that this is very much undesirable because whether the accused is actually found guilty, or innocent (without mens rea), the damage of the crime would already have been done.

There are a number of effects which result to using defences in criminal law as leeway to crime. These defences are generally adverse to society. This can simply be reduced to a situation where one is allowed to commit a crime as long as they have an excuse for it. A
crime, being an offence against society means that such a situation produces undesirable and dreadful effects on society. One of the major and apparent effects of using defences in criminal law as a leeway to crime is that it encourages crime. This is because people who see accused persons who have committed crimes and are being released would also highly likely want to engage in criminal activities knowing that they will not be convicted. This would result in high levels of crime in society.

The aforesaid effect of encouraging crime would thus also result in having many innocent victims. This is because people would know that they have a leeway of evading the law and thus would even go to the extent of victimizing innocent people. This would see a rampant increase in crimes such as murder, assault and theft. Hatchard and Ndulo note that the House of Lords in Majewski were faced with the argument that if the law about the relevance of self-induced intoxication to criminal responsibility was logical, no distinction should be drawn between specific intent and any other kind of intent; and that evidence of intoxication tended to negative whatever kind of intent was necessary to prove a particular charge then there should be an acquittal.29 Their Lordships unanimously rejected this argument, Lord Simon of Galisdale recognizing that:

1. One of the prime purposes of the criminal law, with its penal sanctions, is the protection from certain proscribed conduct of persons who are pursuing their lawful lives. Unprovoked violence has, from time immemorial, been a significant part of such proscribed conduct. To accede to the argument on behalf of the appellant would leave the citizen legally unprotected from unprovoked violence where such violence was the consequence of drink or drugs having obliterated

the capacity of the perpetrator to know what he was doing or what were its consequences.\textsuperscript{30}

It is therefore clear that it is undesirable that the defences of insanity and intoxication be used as justification for committing heinous crimes. If used as such, consequently there would be no justice done in society and this would defeat the whole purpose of the law. Culprits would not be convicted of the crimes that they commit and thus leading to an increase in crime.

\textsuperscript{30} R V. Majewski [1977] AC 443 @ 476
CHAPTER THREE

3.0 EVALUATION OF THE APPROACH AND THE ATTITUDE THE ZAMBIAN COURTS HAVE TAKEN IN HANDLING DEFENCES OF INSANITY AND INTOXICATION

The approach and attitude that the courts in Zambia have taken in handling the defence of intoxication and insanity is determined by the position of the law. The courts are guided by the Penal Code as well as the Criminal Procedure Code in order to deal with the aforementioned defences. The Penal Code states that, every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.31 In the same vain, 'a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is, through any disease affecting his mind, incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission. But a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.'32 This simply means that the courts position is that every person is deemed to be normal and capable of understanding his actions until he proves to the court that he was insane or was not of sound mind to the effect that he did no know what he was doing at the time of the act. This entails that the onus or burden rests on the accused person to prove their insanity. In this case the burden of proof is on a balance of probabilities. Kulusika notes that the presumption of sanity requires the accused person to prove, on a balance of probabilities, her or his defence as

31 Section 11
32 Section 12
to insanity. The law presumes that every person is sane or rational at all times until the contrary can be established by evidence. The consequence of this presumption is that the rules of the criminal law are addressed to rational, or persons with sound mind who have the capacity to understand and comply with those rules. In the case of **Joseph Mutapa Tobo V. The People**, the accused was found guilty of murder. His plea of the defence of insanity did not stand. Kabamba, Commissioner stated that 'the accused person has not told me himself whether at the time he killed Salome Safeli Chitabo he did not know what he was doing or that he knew what he was doing but that did not know it was wrong; or that he heard voices threatening to kill him and he believed those voices to represent Salome Safeli Chitabo and therefore killed him in self defence.' The accused failed to rebut the presumption of sanity under Section 11 of the Penal Code. The court said it is impossible to accept an opinion based on data spoon fed to a doctor from the mouth of an accused himself for whom there is good reason to believe that he embarked upon a course of evading justice by deceiving the tribunal and those whose views it has been known to value highly in making decisions. Real value of the evidence of a medical expert consists in the logical inferences which he draws from what he has himself observed, not from what he merely surmises or has been told. Further it was stated that the fact that the character that the killing took place did not reflect the act of self defence as it is understood. It makes the attempted rebuttal against the sanity presumption fail despite the required standard (the preponderance of probability). It is not an action of a man who believes to be in immediate physical danger of death at the hands of a woman to concentrate on forcible sexual intercourse as a means of self defence before finally

33 Supra note 1 p 202
34 Ibid p 200
35 [1985] ZR 158
killing the woman by strangling her. This and the absence of any evidential data to show any systematic course of conduct pointing to a propensity to rape women or cause or involvement in violence of any kind as a product of the mental disease, completely makes the defence of insanity faked and therefore unacceptable.

The court dealing with an accused person, who is found to be of insane, may be adjudged as ‘not guilty by reason of insanity.’\textsuperscript{36} This is in accordance with the Criminal Procedure Code,\textsuperscript{37} which states that;

\begin{quote}
Where an act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane as not to be responsible for his actions at the time when the act was done or omission made, then, if it appears to the court before which such person is tried that he did the act or made the omission charged but was insane as aforesaid at the time when did or made the same, the court shall make a special finding to the effect that the accused was not guilty by reason of insanity.
\end{quote}

Such a special verdict entails that the person concerned may be detained and confined in any mental institution, prison or other place during the presidents pleasure until the President authorizes a discharge.\textsuperscript{38} The Criminal Procedure Code states that where any person is ordered to be detained during the Presidents pleasure, the order shall be sufficient authority for his detention, until otherwise dealt with under this Code, in any mental institution, prison or other place where facilities exist for the detention of persons, and for his conveyance to that place.\textsuperscript{39} In \textit{R V Wolomosi Phiri},\textsuperscript{40} the accused was

\begin{footnotes}
\item[36] Ibid
\item[37] Section 167
\item[38] Supra note 1 p 200
\item[39] Section 163
\end{footnotes}
charged with murder contrary to section 177 of the Penal Code. The evidence was to the
effect that the accused was sitting outside a hut with his wife, another woman, and his
grandmother. He suddenly killed his grandmother with great brutality. There was no
evidence of any prior vicious tendencies on the part of the accused or indeed any rational
explanation to the attack. The medical evidence was to the effect that the accused was
sane shortly after the attack but might have been temporarily insane at the time of the
attack. The accused, when he gave evidence stated that shortly before the attack on his
grandmother he felt sick in his mind and his head was going round; he agreed he
remembered picking up the stick but did not know what he was doing with it, neither did
he know that he was doing wrong. Evans, A.J stated that;

‘the accused was up to the day of the attack a good villager, who has admitted
that his grandmother was a kind woman, had never exhibited vicious tendencies
before. In my opinion no sane person could have acted in the way he did. I have
no hesitation in finding that the accused when he suddenly attacked Maria was
suffering from a disease of the mind in that he did not know what he was doing
or did not know that he was doing wrong.’

The accused was found guilty of the murder of Maria but was insane when he did the act.
He was thus kept in custody as a criminal lunatic at the Governors pleasure. This shows
that the court will to an extent look back at the accused’s behaviour and his relations with
the victim.

Procedure in Case of the Insanity of the Accused Person

The court has a procedure to follow in a case where the accused is not capable of making
defence due to their mental state. Kulusika notes that because of the complication

40 [1952] NRLR I

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surrounding the defence of insanity, and the public interest involved, the State should deal with persons of unsound mind who may pose some risk to society. Society also believes that it is unfair to deprive someone of his or her freedom of movement without ascertaining that the person to be detained is labouring under the disease of the mind. A plea of unfitness to plead, on the side of the person with unsound mind, may be made on the initiative of the defence, prosecution or judge.\textsuperscript{41} In accordance with this, the Criminal Procedure Code provides that where on the trial of a person charged with an offence punishable by death or imprisonment the question arises, at the instance of the defence or otherwise, whether the accused is, by reason of unsoundness of mind or of any other disability, incapable of making a proper defence, the court shall inquire into and such determine such question as it arises.\textsuperscript{42} Where the court finds the accused incapable making a proper defence, it shall enter a plea of "not guilty" if it has not already done so and, to the extent that it has not already done so, shall hear the evidence for the prosecution and for the defence.\textsuperscript{43} Depending on the evidence, the court may acquit and discharge the accused\textsuperscript{44} or make a special finding thereby ordering the defendant to be detained during the Presidents pleasure.\textsuperscript{45} The main essence of determining the accused's fitness or unfitness to plead is to ensure that one understands the criminal proceedings and thus ensuring that justice prevails. In the case of \textit{Pritchard}\textsuperscript{46} it was said that the accused person must demonstrate that he was possessed of sufficient intellect to comprehend the course of the proceedings in the trial. And in case \textit{Friend},\textsuperscript{47} Otton, L.J.

\begin{footnotesize}
\begin{enumerate}
\item Supra note 1 p 200
\item Section 160
\item Section 161
\item Ibid. Subsection 2 (a)
\item Subsection 2 (b)
\item [1836] 173 ER 135
\item [1997] 2 All ER 1012
\end{enumerate}
\end{footnotesize}
stated that 'the test of unfitness is whether the accused will be able to comprehend the
course of the proceedings so as to make a proper defence.' If the accused does not
understand the course of the proceedings, then they will not be able to defend themselves,
which is not in the interest of justice.

With regards to intoxication, the courts have to a great extent treated this defence like that
of insanity. This is simply because when one has to plead the defence of intoxication, his
mind should have been at a point where he did not know what he was doing or that he did
not know that what he was doing was wrong at the time of the act. This intoxicated state
of mind is thus synonymous to insanity. The Penal Code on insanity states that;

(1) Save as provided in this section, intoxication shall not constitute a defence to any
criminal charge.

(2) Intoxication shall be a defence to any criminal charge if, by reason thereof, the
person charged at the time of the act or 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 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.

(3) Where the defence under subsection (2) is established, then in a case falling under
paragraph (a) thereof the accused person shall be discharged, and in a case falling
under paragraph (b) the provisions of section one hundred and sixty seven of the
Criminal Procedure Code shall apply.
(4) Intoxication shall be taken into account for the purpose of determining whether
the person had formed any intention, specific or otherwise, in the absence of
which he would not be guilty of the offence.

(5) For the purpose of this section, 'intoxication' shall be deemed to include a state
produced by narcotics or drugs.\textsuperscript{48}

Kulusika notes that in the Zambian criminal law, the rules governing intoxication as a
defence may be summarized as follows:

(a) Voluntary intoxication is not a defence as a general rule

(b) Exception to the general rule; intoxication will be a defence where:

(i) it brings on a distinct disease of mind such as delirium tremens so that the
accused person is insane within the M'Naghten Rules, or

(ii) the offence charged is an offence of specific intent and the intoxication
prevents the accused person from having the necessary specific intent.

(c) It is never a defence to offences of basic intent, or offences involving proof of
recesslessness, subjective or objective.

(d) Involuntary intoxication will be a defence to any offence but only if it prevents
the accused person having the mens rea for the offence charged.\textsuperscript{49}

It must be stated that the courts, will not accept a defence of intoxication where the
accused intoxicated him self and committed an offence. The onus of proving that one
was intoxicated and did not know what he was doing rests on the accused and this is
on the balance of probabilities. In the case of \textit{Katundu V. The People}\textsuperscript{50} the accused
stated that; 'My committal of the offence is due to circumstances that I was drunk

\textsuperscript{48} Supra note 11
\textsuperscript{49} Supra note 1 p 280
\textsuperscript{50} [1967] ZR 181

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and could not act in actual order of sexual intercourse although I had made some sort of arrangements with the woman which she refused later.' The court said where the defence raised is insanity; and this would include insanity caused by intoxication; it is true that there is an onus on an accused person to show on the balance of probabilities that at the time he committed the offence he was (1) suffering from a disease of the mind, which (2) rendered him incapable of understanding what he was doing or, alternatively of knowing that he ought not to do it. Where there is evidence of intoxication, whether it is raised as defence or not, it is the duty of the court to examine and evaluate that evidence. If having done so the court is satisfied beyond reasonable doubt that the accused was not intoxicated then that is an end to the defence of intoxication.

3.1 A COMPARISON OF THE ZAMBIAN COURTS AND FOREIGN JURISDICTION IN HANDLING CASES WITH DEFENCES OF INTOXICATION AND INSANITY

The approach and attitude that the Zambian courts have taken in handling the defences of intoxication and insanity is guided by the law as it states. This equally applies to other foreign jurisdictions as every court is guided by what the law of that particular country provides. In comparison, Hatchard and Ndulo note that 'with regard to the rule concerning intoxication leading to insanity there is clearly no difference between the approach of the English case of Director of Public Prosecution V. Beard\textsuperscript{51} and that of the Penal Code. In this leading case Lord

\textsuperscript{51} [1920] AC 479
Birkenhead laid down three rules which have been the source of much comment. The rules are as follows:

1. That insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged.

2. That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he has this intent.

3. That the evidence of drunkenness falling short of proved incapacity in the accused to the intent necessary to constitute that crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his act.52

Card notes that at one time, the law in England was different. In DPP v. Beard Lord Birkenhead LC, giving judgment of the House, said that evidence of voluntary intoxication could be taken into consideration only if it rendered the defendant incapable of forming the specific intent essential to constitute the offence charged. This proposition had the following arbitrary result where, through intoxication, the defendant’s intoxication was such that he did not have the capacity to form the specific intent; he was exculpated; whereas if his intoxication did not render him incapable of forming that intent, although because of it he did not have that intent, he was criminally liable.53

52 Ibid @ p. 500
53 Supra note 6 p 758
It is thus clear that following the Criminal Justice Act 1967, s 8, Lord Birkenhead’s requirement of incapacity to form the requisite specific intent no exists longer. Under s 8 a person is not to be presumed to intend the natural and probable consequences of his act; instead the question whether the defendant had the necessary mens rea is to be decided by the jury or magistrates on all the evidence.\textsuperscript{54}

Hatchard and Ndulo discuss the relationship between the third rules formulated in \textit{Beard} and section 13(4) of the Penal Code. Two points are considered and these are the state of mind of the accused at the time of the commission of the offence; and the concept of ‘specific intention.’ The point raised, therefore, as to whether the question of incapacity forms part of the law in Zambia. According to the Federal Supreme Court in \textit{Silume}\textsuperscript{55} it does, for it was held that the provisions of the penal Code ‘do no more than state the relevant English common law as laid down by the house of Lords in \textit{Director of public prosecution V. Beard}. According to the wording of subsection 4 of the penal Code, there is no question of incapacity forming part of the law on intoxication under the Penal Code.\textsuperscript{56} In \textbf{Broadhurst V. R},\textsuperscript{57} the Privy Council was required to examine a precisely similarly worded section to section 13(4) contained in the Penal Code of Malta. After pointing out the apparent differences between the provisions of the Code and the propositions laid down by Lord Birkenhead, LC, he stated:

It may be that there is no substantial difference between the two propositions. Or it may be that the law as laid down in \textit{Beard} must now be interpreted in the light of later

\textsuperscript{54} Ibid
\textsuperscript{55} [1964] R&N 13
\textsuperscript{56} Supra note 26 p 36
\textsuperscript{57} [1964] 1All ER 111
decisions on the proof of guilty intent. But superficially at any rate [the wording] of the Code and Beard approach differently the problem of proving intent. One way of approaching the problem is to say that it is always for the Crown to prove that the accused actually had the intent necessary to constitute the crime: and that that proof may emerge from evidence or statements made by the accused about his own state of mind or may be made by way of inference from the totality of the circumstances to be taken into account and on this view, all the Code is doing is to make it plain that intoxication is not to be excluded. On the other hand, the sort of approach that is contemplated in Beard is that there must be proof (or at least some suggestion) of incapacity in order to rebut the presumption that a man intends the natural consequences of his acts. Therefore, the question of incapacity is still relevant in determining whether the accused was or was not sufficiently intoxicated. It has long been the law that the mere fact that a person had been drinking prior to thee commission of the offence is not a defence. Stephen, J in Doherty stated that ‘a drunken man may form an intention to kill another, or to do grievous bodily harm to him, or he may not; but if he did form that intention, although a drunken intention, he is just as much guilty of murder as if he had been sober.’ This approach was followed in Tembo V. The People were Baron, JP giving the judgment of the Court of Appeal, stated that the question of whether intoxication prevented the prosecution from proving the offence charged will only be relevant once there is evidence that the accused person’s capacities may have been affected to the extent that he may not have been able to form the necessary intention.

58 Ibid @ p 122
59 Supra note 26 p 37
60 16 Cox CC 306
61 [1972] ZR 220

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It must be stated that the approach taken by the English court is similar to that of the Zambia position as regards intoxication. In Attorney General for Northern Ireland V. Gallagher, the respondent was convicted of the murder of his wife. The defence was that of insanity under the M’Naghten Rules or, in the alternative, that at the time of the commission of the crime the respondent was by reason of drink incapable of forming the intent required in murder and was therefore guilty only of manslaughter. The respondent had indicated an intention of killing his wife before taking the alcohol. The Court of Criminal Appeal in Northern Ireland allowed an appeal on the ground that the judge in his summing-up directed the jury to apply the tests laid down in the M’Naghten Rules to the time when alcohol was taken and not to the time when actual murder was committed. Lord Denning stated that the general principle of English law is that, subject very limited exceptions, drunkenness is no defence to a criminal charge, nor is a defect of reason produced by drunkenness. It deprives men of reason and puts many men into a perfect, but temporary frenzy. By the laws of England such a person shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses. This is the same position as stated in section 13 of the Penal Code, subsections (1) and (2).

With regards to insanity, Smith and Keenan note that if the defence of insanity is successful, the verdict is ‘Not guilty by reason of insanity’ as provided for by s 2(1) of the Trial of Lunatics Act 1883. The judge was then required to order the defendant to be detained in a special hospital, e.g. Broadmoor. This was often a worse form of sentence

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62 [1963] AC 349
than might be given for a finding of guilty.\textsuperscript{63} This is similar to section \textit{one hundred sixty one} of the Criminal Procedure Code.

It must also be stated that the law in Zambia i.e. the Penal Code, does not expressly provide for the defence of automatism. In an attempt to define automatism, Smith and Keenan state that an overdose of insulin in diabetes leading to hypoglycaemia (a medical state with side-effects, e.g. double vision, and leading eventually to coma) is not malfunction of mind and may be put to a jury as automatism.\textsuperscript{64} Automatism can thus be classified as insane and non-insane automatism. In distinguishing between insane and non insane automatism, Card states that where the defendant was suffering from non-insane automatism he must be acquitted, but if the case is one where the defendant was suffering from a ‘defect of reason due to disease of the mind’ the M’Naghten Rules apply and, if the trial is on indictment, he must be found not guilty by reason of insanity and an order will be made against him under the Criminal Procedure (Insanity) Act 1964, s 5.\textsuperscript{65} This distinction was well explained in \textbf{Bratty V. The Attorney General for Northern Ireland}\textsuperscript{66}. D was charged with the murder of a girl. It was not disputed that he had strangled her. D said that he had a blackout and there was some evidence that he was suffering from psychomotor epilepsy, which is undoubtedly a disease of the mind. D relied on the defences of automatism and insanity, but the trial judge only directed the jury on the issue of insanity. D was convicted, and his appeals to the Northern Irish Court of Criminal and House of Lords were dismissed. It was held that, where the only

\textsuperscript{63} Keenan, D. \textit{Smith and Keenan’s English Law}. (2004). P. 671
\textsuperscript{64} Ibid p. 673
\textsuperscript{65} supra note
\textsuperscript{66} supra note
evidence of the cause of automatism is a disease of the mind, the case is one of insane automatism and the M’Naghten Rules apply. If one the other hand, the evidence is that was caused not by a disease of the mind (i.e. not by an internal cause) but by some other (external) cause, such as a blow, such as a blow on the head, the case is one of non-insane automatism.

It can therefore be stated that the approach that the Zambian courts as well as the foreign courts take in handling the cases of intoxication and insanity is to a great extent determined by what the law dictates. For instance, it is a common stance that the court in Zambia and in England will presume any person as sane unless the contrary is proved. This is one of the major similarities that both jurisdictions have.
CHAPTER FOUR

4.0 SUGGESTIONS ON HOW THE DEFENCES OF INTOXICATION AND INSANITY MUST NOT BE USED AS A LEeway TO CRIME

The defences in criminal law are used in situations where one did not intend to do the particular crime and thus seek to be acquitted. This is essentially because in certain situations, one may do an act which is deemed to be a crime but did not actually intend to do it. The alleged offender may do a particular act but did not know that what he or she was doing is an offence. Therefore it is only important that the law takes into consideration of the fact that not all criminal activities are done intentionally or that not all offenders who commit criminal activities intend to do so. Defences therefore recognize exceptional aforesaid situations and hence state that one who did not intend to commit a crime must be acquitted. This may be due to situations of insanity or intoxication. One who is insane is in a situation where they are not in there right state of mind and hence do not understand the nature of there acts. The law thus recognizes that these are rare situation but yet possible and thus every person is presumed to be sane unless the contrary is proved. The burden of proof hence rests on the accused person, that is, the alleged insane person to prove that they were insane at the time of committing the offence and this is on the balance of probabilities.

When the accused manages to discharge this burden, he then will not be convicted of the alleged crime as not all the elements of a crime would have been satisfied and in most cases it is the element of mens rea which is negatived. This equally applies to the defence
of intoxication. The law in Zambia states that for one to plead the defence of intoxication the accused's intoxication must have been caused without his consent and that the person charged was by reason of intoxication insane at the time of the act. The defences in criminal law therefore must be properly used. It has been stated in the second Chapter on how the defences in criminal law can be possibly used as a leeway to crime. This Chapter on the other hand aims at looking at the possible suggestions on how the defence of intoxication and insanity must not be used as a leeway to crime.

One of the most apparent ways that the defences in criminal law must not be used as a leeway to crime is a strict application of these defences by the courts. Intoxication (voluntary) could only be a defence to offences of specific intent and not to offences of basic intent.\(^{67}\) Specific intent offences include murder, theft, robbery, burglary.\(^{68}\) The accused person, through a defence lawyer may want to take advantage of this, as voluntary intoxication can be a defence to murder, theft etc, therefore they may want to claim that the accused was by reason of intoxication insane at the time of the act and did not know what he was doing or that did not know that what he was doing was wrong. The courts thus must be stricter in dealing with such offences in terms of one discharging the burden of proving that they were by reason of intoxication insane. This is also owing to the fact that in such cases, if one voluntarily intoxicates himself, he must not easily get away from a crime he commits because the intoxication is as a result of his consent. Thus in trying to distinguish between voluntary intoxication and involuntary intoxication in relation to offences of specific intent and offences of basic intent, the courts must put

\(^{67}\) R V. Majewski [1976] 2 All ER 142
\(^{68}\) Supra note 1 p.280
emphasis on the fact that voluntary intoxication though may be a defence to offences of specific intent is caused by the accused himself and this is not in accordance with Section 13 (2) of the Penal Code. This section states that ‘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.’69 This section clearly points out that intoxication must be without the consent of the accused and a strict application of this section by the courts must be done. This must override the decision in R V. Majewski70 were it was stated that voluntary intoxication can be a defence to offences of specific intent such as murder and theft. Unless otherwise in very exceptional circumstances, depending on the facts of a particular case, should such a stance be taken by the courts but emphasis should be put on the fact that voluntary intoxication is not a defence to a criminal activity. This will to a great extent assist in ensuring that the defence of intoxication is not used as a leeway to crime by those who voluntarily intoxicate themselves.

On excluding a defence of intoxication by someone for the purposes of committing a crime, Silving; notes that:

‘Where a person engages in criminal conduct while in a state of intoxication or under the influence of a drug consumed, or administered, or caused to be

69 Section 13 (2) (a)
70 [1976] 2 All ER 142
administered, by him for the purpose of facilitating thereby his engagement in that conduct, shall be deemed to have possessed at the time of and prior to that conduct the state of mind with regard to it and with regard to the result, as described by statute, which he possessed before he became intoxicated or influenced by the drug.\textsuperscript{71}

This is the stance that the court must strongly take so that self intoxication for the purposes of commission of a crime must be avoided by all means. This position will to a great extent assist the prosecution in establishing a case against the accused as the prosecution has a duty to ascertain that the accused had intention to commit the offence and thus prove the all the ingredients which constitute a crime. Conroy, CJ, in \textbf{Musole V. The People}.\textsuperscript{72} stated:

\begin{quote}
‘It is for the prosecution to prove all the ingredients of the offence; one of the ingredients of the offence is the intent of the appellant, and if the prosecution fails to prove beyond reasonable doubt that he intended to kill or to do grievous harm, he cannot be convicted of murder. In deciding whether this ingredient has or has not been proved, the court has to consider the ‘totality of the circumstances’, and one most material circumstance in this regard is to whether the appellant was intoxicated and the extents of such intoxication.’
\end{quote}

Thus the prosecution in proving all the ingredients of a crime would take the position that one who intoxicates himself and commits an offence had the necessary \textit{mens rea} and intended to commit the crime even before they were by reason of intoxication insane.

The defence of insanity may equally be very difficult in certain circumstances to establish as to whether the accused is pleading for genuine purposes or whether they just want to

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\textsuperscript{71} Supra note 23
\textsuperscript{72} [1963] Z\&NRLR 66 \@ 175
\end{flushleft}
evade conviction. This is because in certain circumstances, one may claim that they ‘killed a person in a situation that they did not know that they were killing a person but thought they were actually killing a fox or a bear.’ This may not be very easy to prove as it is logically very difficult to know exactly what was in one’s mind at the time they were committing the offence. Therefore the courts must be strict in the way they allow such defences so as to make sure they don’t allow accused persons who deserve to be convicted to be acquitted.

One of the key elements is establishing the defence of insanity is the production of medical documentation which supports the claim of insanity of the accused and assists to prove that the accused was actually insane at the time of doing the crime. It must be noted that other than medical documentation, it is very difficult for the accused to prove that they were insane at the time of committing the offence and hence may fail to discharge the burden of proof on the presumption of sanity. On the other hand, it must also be stated that the medical documentation being the key to the establishing of the accused’s defence may possibly be used manipulatively with assistance of a medical doctor and the defence lawyer in order to support the accused in his defence for the purposes evading conviction. Magistrate Kaoma points out that:

‘It is possible for an accused person, through a defence lawyer to evade conviction by pleading the defence of insanity in circumstances where an accused person can prove that at the time of commission of the offence he did not know what he was doing or if he knew but did not know that it was an offence. The case of insanity is difficult to evade because medical
examination will be carried out to prove ones insanity and this is from two independent government qualified medical officers.\textsuperscript{73}

The importance of having medical evidence in insanity cases was stressed in \textit{Winterwerp V. Netherlands}\textsuperscript{74} where the European Court of Human Rights stated that in a case of insanity;

- There must be strong correlation between the legal and medical criteria used to assess the issue of ‘unsound mind.’
- The court’s decision must be based on ‘objective medical expertise’ on the evidence of two or more doctors.
- The court must decide that the mental disorder is ‘of a kind or degree warranting compulsory confinement.

It must be stated therefore that the examination of an insane person must be thorough and strict in order to come up with a proper decision as to whether the accused was truly insane at the time of commission of the offence or not. Improper medical evidence without logic must not be accepted. This position well was stated in \textit{Joseph Mutapa Tobo V. The People}\textsuperscript{75} were Commissioner Kabamba pointed out:

\textquote{It is quite impossible for me to accept an opinion based on data spoon fed to a doctor from the mouth of an accused himself for whom there is good reason to believe that he embarked upon course of evading justice by deceiving the tribunal and those whose views it has been known to

\textsuperscript{73} Interview with Magistrate Kaoma from the Judiciary
\textsuperscript{74} [1979] 2 EHRR 387
\textsuperscript{75} Supra note 35

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value highly in making decisions. The doctor said himself in his
evidence before me that this attempt to contract the accused’s relatives
was prepared to come forward to confirm the accused’s illness story.
The doctor’s opinion is of course based on reason, but we know that
reasoning is a secondary industry which is fed with the raw material
of precepts. The kind of conclusions made from the process of reasoning
will of necessity reflect the rich flavour or the vacancy of the raw material
used in the exercise. Here, I have recognised the raw material supplied to
the doctor as pure deceit. The opinion cannot therefore be correct. It is
vacant. Let it be known from now on that the real value of the evidence
of a medical expert consists in the logical inferences which he draws from
what he has himself observed, not from what he merely surmises or has
been told by others as stated in AG v. Nottingham Corporation\textsuperscript{76} and
Metropolitan Asylum Dist v. Hill.\textsuperscript{77} The medical report lacks those logical
inferences. It has no value to this investigation.\textsuperscript{7}

The courts hence must be strict in allowing medical examination evidences. They should
only allow those defences that are logical and rational and not only rely on the oral
evidence of the accused as it is clear that he is most likely going to give evidence that
only supports his case.

In assisting the court to establish and only allow proper defences of insanity, the courts
must also look at the past behaviour of the accused person and if at all he is someone who
can possibly under reasonable circumstances behave in a way that he has behaved as well
as the relation of the accused person to the victim. The assumption could be that an
accused who is and has always been in good relations with his victim cannot possibly
injure or attack them unless otherwise one is not in his normal state of mind and does not
know what he was doing at the time of doing the offence. This was well stated by Evans,

\textsuperscript{76} Ch. 673
\textsuperscript{77} 474. T. 29
A.J in *R. V. Wolomosi Phiri*\(^7^8\) noted in referring to the accused:

‘Here is a man who up to the day of the attack was a good villager, who has admitted that his grandmother was a kind woman, had never exhibited vicious tendencies before, suddenly makes an attack upon this poor woman, striking at her dead body to break fourteen ribs, wielding this heavy piece of wood and cracking the skull to fragments. In my opinion no sane person could have acted in the way the accused did. I have no hesitation in finding that the accused when he suddenly attacked Maria was suffering from disease of the mind in that he did not know what he was doing or did not know that he was doing wrong.’

The courts therefore to ensure that the defence of insanity is not used as a leeway to crime can as one of the ways strictly assess the behaviour of the accused prior to the commission of the offence and this can to a great extent assist in distinguishing false claims of the defence of insanity to genuine ones.

It can be stated therefore that under normal circumstances, any accused person who pleads a defence either of insanity or intoxication would not want to be convicted. Kulusika notes that the accused aims at not falling within the prohibition as determined by the definition of crime so that she may be exempted from criminal sanctions and that excuse in the conduct of the defendant, the conduct of the accused person is carefully scrutinized.\(^7^9\) One who manages to show the court that she is not blameworthy must not be convicted. The court therefore has to play its role of carefully scrutinising an accused person so as not to allow one evade conviction. Strict application of these defences,

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\(^{7^8}\) Supra note 40
\(^{7^9}\) Supra note 1 p.197

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considering all the relevant factors, must thus be employed so that the defences of insanity and intoxication must not in any way be used as a leeway to crime.
CHAPTER FIVE

5.0 RECOMMENDATIONS

The defences in criminal law are an essential area of the law. They serve a purpose of ensuring that those people that are not guilty of the alleged offences are not convicted. Having analysed the defences of insanity and intoxication, in relation to being used as a leeway to crime, the following recommendations can thus be made:

One of the recommendations to this area of the law in Zambia is basically the change in the approach that the courts have taken in handling such defences. This is by way of strict application of these defences. One of the most practical ways in relation to intoxication is by the strict application of section 13 (2) (a) which stresses that 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 the state of intoxication was caused without his consent by the malicious act of another person. In this case, there would be very minimal cases where one pleads the defence of voluntary intoxication, which has got a high possibility of being used as a leeway to crime. This is because when one voluntarily intoxicates himself, he must be restricted from engaging in any activities which may be criminal in nature and hence using voluntary intoxication as an excuse or justification. This can be seen from the English law point of view where Card notes that if the defendant intended to kill but acted under a voluntary intoxicated belief that he was being attacked and had to kill to defend himself, he is guilty of murder even though, on the facts as he believed them the force used by him was reasonable, so that he did not intend unlawfully to kill or
cause grievous bodily harm. It follows that voluntary intoxication for the purposes of committing a criminal offence must not be allowed by all means.

Another recommendation in this area of the law is the strict requirement of medical examination as well as documentation to those accused persons who claim that at the time of the offence, they were either by reason of intoxication insane or were insane by reason of a disease of the mind. This medical evidence must be convincing for the court to allow it as documentary evidence, as this is an essential part of criminal law. This must certainly be accompanied by reviewing the accused persons past behaviour and assessing his relations to the victim.

Defences may at times be difficult to prove because of the mental technicalities that are involved but it must be categorically stated that the law should, through the courts, ensure that justice prevails.

5.1 CONCLUSION

In conclusion, the aim of this paper is to establish the possibility of the defences in criminal law being used as a leeway to crime. These are specifically the defences of intoxication and insanity. These defences are similar in that they both affect the mind and as such one who claims such defences states that he did not know what he was doing at the time of the offence or one who knew what he was doing but did not know that what he was doing was a wrong. This is different from the defence of self defence, for instance, where one may be in his right state of mind and certainly knows what he is

80 Supra note 6 p. 762
doing but commits the offence for the purposes of defending himself or preserve his life. Kulusika notes that the defences include those which affect the accused person’s capacity to commit the offence charged, e.g., infancy, insanity and automatism. Where these defences apply, the law presumes that the accused person is incapable of committing the offence. Other defences are those which operate to negative an element of crime such as mens rea: e.g., self defence.⁸¹

In Chapter one, the paper examined the specific explanation on what the defences of intoxication and insanity are. This is from the Penal Code, sections 11 and 12 which provides for the defence of insanity and section 13 which provides for the defence of intoxication. Justificatory defences which are those used to justify an accused person’s criminal conduct and those excusatory in natures, which are those that excuse an accused’ criminal conduct.

In Chapter two, the paper looked at how the defences of intoxication and insanity can be used as a leeway to crime. The use of these defences is not done by the offenders alone as most accused persons don’t know the legal technicalities of the defences and how they can be applied. It is usually done with the assistance of defence lawyers. One of the ways as seen is a situation where the accused intentionally commits a crime but claims through their defence lawyer and a doctor’s documentation, that one was hallucinating and therefore did not know what he was doing at the time of the act. The effects and the causes of using these defences as a leeway to crime where looked at and one of the apparent one is that this would encourage crime. This is because people who see

⁸¹ Supra note 1 p. 196
offenders constantly getting acquitted would for obvious crimes also be encouraged to commit similar offences and this would adversely affect society by eroding justice.

Chapter three was an evaluation of the approach and the attitude the Zambian courts have taken in handling cases with such defences as well as a comparison with foreign jurisdictions. The approach that the Zambian courts have taken in application of defences is determined by the position of the law. The law being that there is the presumption of sanity. This was also well espoused in the M’Naghtens Case as well as one who is found to be insane will be adjudged as ‘not guilty by reason of insanity’ and this is in accordance with section one hundred sixty seven of the Criminal Procedure Code. The court also has to follow a procedure of detaining one who is unfit to plead due to insanity these are detained at the presidents pleasure. Under intoxication, there are similarities between the Zambian law under Section 13 of the penal Code and the rules laid down in the English case of Director of Public Prosecution V. Beard. It has thus been established that the approach that any court will take in handling defences in criminal law will to a great extent be determined by what the law states.

Suggestions on how the defences of intoxication and insanity must not be used as a leeway to crime have been addressed in Chapter four of which the main emphasis on this is the strictness of the court in allowing defences such as that of voluntary intoxication and thorough medical examination as well as proper documentations, of the accused persons who claim they were insane (or insane by reason of intoxication) at the time of the crime. These recommendations have hence been made in Chapter five.
Finally, the law in Zambia does not leave much room for accused persons to manipulate and evade conviction through their defence lawyers. The defences of intoxication and insanity are not easy to prove and the accused has the burden of proofing that he was insane at the time of the act and did not know what he was doing or that he did not know that what he was doing was wrong. Further the requirement of medical evidence by the courts; from at least two independent government doctors make it very difficult for a criminal offender to use the defence of intoxication and insanity as a leeway to crime.
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