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THE FOUR FACES OF INTOXICATION IN THE BOTSWANA CRIMINAL JUSTICE SYSTEM: "DEFENCE", EXTENUATION, MITIGATION, AND AGGRAVATION

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ABSTRACT. Intoxication plays a role in the commission of crimes in most, if not all, jurisdictions. Botswana is no exception. Our law reports are replete with cases in which intoxication is alleged to have contributed to the commission of the offence. In this regard, courts continually find themselves contending with the consideration that they ought to give to the intoxication, in respect to both the criminal culpability of the accused person and their moral blameworthiness when it comes to sentencing. This paper highlights that, in the context of Botswana, intoxication may be treated as a defence, an extenuating circumstance, a mitigating factor, or an aggravating factor. It interrogates the approaches adopted by the courts in considering intoxication in these four roles. Given the divergence of judicial approach to intoxication in sentencing, the paper highlights the necessity of sentencing guidelines in order to attain a measure of predictability and consistency. Consequently, the paper assesses the sentencing guidelines adopted by other jurisdictions in respect of intoxication and the lessons to be drawn from such guidelines.

I INTRODUCTION

The criminogenic effect of alcohol was aptly captured by the Court of Appeal in Botswana by Moore JA in *Kebafitlhetse and Others* v. *The State,*[1] as follows:

> It is a notorious fact that the consumption of alcoholic beverages leads to intoxication which brings with it an alteration of behaviour characterised by unpredictability or aggressiveness, together with an inhibition of restraint and

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[1] 2008 (3) BLR 72 (CA).

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> prudence which enable a sober person to maintain the requisite degree of self-control even in the face of provocative or aggressive conduct.[2]

Unfortunately, the impaired judgment brought about by intoxication may contribute to the commission of offences.[3] It is not uncommon for accused persons to attribute their actions to intoxication thereby seeking the indulgence and leniency of the court. More often than not, courts in Botswana decry the prevalence of offences committed by intoxicated persons. For example, in *State* v. *Gwapela*,[4] the court referenced the *Kebafitlhetse* case and proceeded to note:

> ...I must once again deplore the rise in cases where at the centre of criminal activity there are the terrible twins of excessive alcohol consumption and violence. The invariable result where this ugly duo manifests itself on the scene is the needless loss of life with the miscreant subsequently cutting a pitiful and sorrow figure before the court as you do today.[5]

When accused persons seek to attribute the commission of offences to the effects of intoxication, they either raise it as a defence or as an extenuating circumstance. Although there is no concrete data reflecting the extent to which intoxication contributes to the commission of offences in Botswana, the sheer volume of cases in which accused persons seek to rely on intoxication is indicative of a problem worthy of concern and attention. Of even greater concern is that intoxication appears to be a prevalent factor in the commission of murder, manslaughter, and other violent crimes.[6] Consequently, courts have repeatedly interacted with intoxication in deciding the role that it must play in sentencing. Whereas there are instances in which courts have treated intoxication as an extenuating circumstance, there are also instances in which courts have rejected intoxication as an extenuating circumstance. In some instances, courts have treated intoxication as a mitigating factor while in other instances they have treated it as an aggravating factor. Unfortunately, there is

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[2] *ibid* at p. 75.

[3] SV Hoctor, *Snyman's Criminal Law* (7th edn, LexisNexis 2021) noted that alcohol may "induce conditions such as impulsiveness, diminished self-criticism, over-estimation of one's own abilities, and underestimation of danger", at p.192.

[4] 2008 (2) BLR 351 (CA).

[5] *ibid* at p. 354. In *State* v. *Saamu* 1989 BLR 191 (HC), the court said that excessive consumption of alcohol and smoking of narcotics have always been regarded as an enemy to life.

[6] *Kebafitlhetse and Others* v. *The State* 2008 (3) BLR 72 (CA).

no consistency as to what informs the courts in making the decision whether to treat intoxication as an extenuating circumstance, a mitigating factor, or as an aggravation factor. The absence of consistency in this regard is also attributable to the absence of sentencing guidelines on how intoxication should be treated at sentencing. However, even in jurisdictions where sentencing guidelines exist, they have been criticised for their failure to provide adequate clarity on how intoxication should be treated at sentencing.[7] Moreover, it has been observed that, given the contentious nature of the subject of intoxication and sentencing, there is a dearth of academic literature on the subject.[8]

This paper engages with the treatment of intoxication in the Botswana criminal justice system. Firstly, it discusses intoxication as a defence under Section 12 (2) of the Penal Code. Secondly, it discusses the approaches adopted by the courts when dealing with intoxication at sentencing. The paper observes that courts treat intoxication either as an extenuating circumstance, a mitigating factor, or as aggravating factor. We assess the justifications advanced by the courts for the manner in which they treat intoxication at sentencing. We note that, for an offence such as murder, the role that the court ascribes to the intoxication, either as extenuating or aggravating, can be the difference between imprisonment and imposition of the death penalty. Furthermore, we highlight the absence of consistency and predictability in the manner that intoxication is treated at sentencing, and we recommend the adoption of sentencing guidelines on intoxication. In light of the concerns that have been raised as to whether an accused person should be permitted to benefit from intoxication arising from the consumption of illegal substances, the paper argues that the sentencing guidelines must, to a degree, make a distinction between intoxication induced by legal substances and that induced by illicit substances. We contend that the sentencing guidelines must be crafted in such a manner that they strike a healthy balance between the need for consistency and predictability and the need to defer to the exercise of judicial discretion in sentencing.

The challenges posed by intoxication to the criminal justice system are not exclusive to Botswana. Consequently, the paper gleans at the

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[7] N. Padfield, *Intoxication as a sentencing factor: Mitigation or Aggravation*. In J. Roberts (Ed) Mitigation and Aggravation at Sentencing (Cambridge Studies in Law and Society, pp 81–101) (Cambridge University Press, 2011)

[8] G. Dingwall, *Alcohol and Crime*. Cullompton: William Publishing, 2006 at p. 170.

approaches adopted by comparable jurisdictions regarding the treatment of intoxication. In arguing for the adoption of sentencing guidelines, we interrogate the guidelines adopted in other jurisdictions and note the criticisms that have been levelled against those guidelines. We therefore propose the adaptation of those guidelines, taking into account some of the peculiar features of Botswana's criminal justice system. For example, unlike the United Kingdom and South Africa, Botswana makes a distinction between extenuating circumstances and mitigating factors. Therefore, a comprehensive sentencing guideline for Botswana, although inspired by guidelines from other jurisdictions, would have to make the necessary accommodations for the inherent distinctions of its criminal justice system.

II INTOXICATION AS A "DEFENCE" UNDER SECTION 12 OF THE PENAL CODE

Section 12 of the Penal Code[9] provides for circumstances under which intoxication may be a defence. For completeness, it is necessary to duplicate Section 12 (1) and (2) of the Penal Code. The section provides as follows:

> 12 (1) Except 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 person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

In *State* v. *Ntwayakgosi,*[10] the court reiterated the criminogenic effect of alcohol. It acknowledged that continuous intake of alcohol may impair a person's faculties and render him incapable of appreciating the consequences of his actions. The court then posited that it was precisely for this reason that the Penal Code of Botswana introduced Section 12 (4) and provided that intoxication shall be taken into account in determining whether a person formed an intention to

[9] (Cap 08:01).

[10] 2003 (1) BLR 618 (HC).

commit an offence. The provision is applicable in instances where the accused person contends that, as a result of intoxication, he was incapable of forming the *mens rea* for the offence in question.[11] The High Court has held that, if it is determined that the person was incapable of forming an intention, then he cannot be found guilty of the offence.[12] It is to be highlighted that Section 12 (4) of the Penal Code does not make a distinction between crimes of specific intent and crimes of basic intent.[13] To this end, the provision is applicable to all offences irrespective of whether they require specific intent or basic intent. Watney contends that, in any event, the distinction between specific intent and basic intent is fraught with difficulties and, to a large extent, borders on an artificial distinction.[14] That notwithstanding, some jurisdictions, such as the United Kingdom, maintain the distinction between crimes of specific intent and crimes of basic intent in their treatment of the effect of intoxication.[15]

Section 10 of the Penal Code creates a presumption of sanity. In terms thereof, a person is presumed to be of sound mind, and to have been of sound mind at all material times, until the contrary is proved.[16] Section 11 of the Penal Code creates the defence of insanity.[17] In order to sustain intoxication as a defence, an accused person bears the evidentiary burden of proving that, at the time of the commission of the offence, he was insane in the manner anticipated by Section 12 (2) of the Penal Code.[18] The evidentiary burden is placed on every accused person who seeks to attribute their criminal

[11] *State* v. *Apadile* 2011 (1) BLR 1 (HC). The court noted that the inability of the accused person to form the required *mens rea* under Section 2 (4) may be determined from assessing whether, in the circumstances, the accused person either did not know that what he was doing was wrong or he did not know what he was doing as stipulated in Section 2 (2).

[12] *State* v. *Kashamba* 2007 All Bots 299 (HC); *State* v. *John Bunga* 1964–1967 BLR 161 (HC); *State* v. *Letsholathebe* 2001 (1) BLR 42 (HC).

[13] M. Watney, *Voluntary Intoxication as a Criminal Defence: Legal Principle or Public Policy?* (2017) Journal of South African Law 547 at p. 561.

[14] *ibid* at p. 565.

[15] *Director of Public Prosecutions* v *Majewski* 1977 AC 443 (HL).

[16] *State* v. *Masinga* 1990 BLR 47 (HC); *State* v. *Mogampana* 1990 BLR 534 (HC).

[17] Section 12 (3) of the Penal Code provides that, if the defence of intoxication is established under Section 12 (2) then the person shall be dealt with in terms of Section 11 of the Penal Code.

[18] *State* v. *Apadile* 2011 (1) BLR 1 (HC); *State* v *Saamu* 1989 BLR 191 (HC).

actions to some imbalance of the mind.[19] Therefore, in order for intoxication to be upheld as a defence under Section 12 (2) of the Penal Code, there must be sufficient evidence placed before the court to justify a conclusion that the intoxication resulted in insanity, temporary or otherwise. In *State* v. *Sebogisi*,[20] the court reiterated that the onus lies on the accused person to prove that, at the time of the commission of the offence, he was insane by reason of intoxication and that, as a result, he did not know that what he was doing was wrong or did not know what he was doing. Justice Chinhengo pointed out that the burden on the accused was reasonable because to require otherwise and permit an accused person to simply allege that he does not remember what happened and his actions were involuntary would place an unfair burden on the prosecution "to disprove an assertion that may have no foundation at all".[21] The court further noted that the sole evidence of the accused person that he was intoxicated to the point of insanity would rarely ever be sufficient. Thus, it is ideal that the evidence of intoxication must be supported by medical evidence pointing to the mental incapacity of the accused person.[22]

The conclusion that the accused person was intoxicated to the required degree is not one that the trial court must reach lightly on the basis of speculation. This point was specifically dealt with by the Court of Appeal in *The State* v. *Charles*.[23] Therein, there were two psychiatric reports to the effect that the accused person did not suffer from any mental disturbance at the time of committing the offences. Moreover, the accused person did not adduce any evidence to substantiate the position that, at the time of the commission of the offence, he was intoxicated to the point of temporary insanity. However, the trial judge expressed the view that, although the psychiatric reports discounted possible mental disturbance on the part of the accused, it was "humanely impossible" for the accused person to behave in the manner that he did unless he was under a state of temporary insanity induced by intoxication. The trial judge accord-

[19] *State* v. *Motlhake* 2002 (2) BLR 283 (HC); *State* v. *Sefelani* 1996 BLR 259 (HC); *State* v. *Ramathaka* 1989 BLR 265 (HC).

[20] 2008 (2) BLR 288 (CC).

[21] *ibid* at p. 293.

[22] In this regard, the court relied on the sentiments of Lord Denning in the oft cited case of *Bratty* v *Attorney General for Northern Ireland* 1961 (3) All ER 523 at p. 530.

[23] 2002 (1) BLR 89 (CA).

ingly upheld the defence of intoxication under Section 12 (2) of the Penal Code. However, the Court of Appeal held that this finding of insanity by the trial judge was based purely on the speculative opinion by the trial judge that the only way that the accused person could have behaved in the manner he did was if he was temporarily insane. The Court of Appeal accordingly held that, in the absence of evidence to controvert the expert opinions of the psychiatrists as to the state of mind of the accused person, the opinion of the trial judge was unsubstantiated and unsustainable.[24]

Similarly, in *Mokhe* v. *The State,*[25] the accused sought to rely on intoxication as a defence. He asserted that he was intoxicated from traditional beer and that he had also smoked dagga. The psychiatrist who examined him reported that there was nothing to suggest that he was suffering from any disease of the mind at the time of committing the offence. The court placed reliance on the evidence of the psychiatrist and accordingly dismissed the defence of intoxication. In *State* v. *Saamu,*[26] the accused person was charged with murder and he sought to raise the defence that he had been temporarily insane due to dagga and alcohol. The psychiatric who examined him testified that, at the time of the commission of the offence, the accused was conscious of his acts; he could appreciate wrong from right and the wrongfulness of his act; he knew he was assaulting his wife; and he was not suffering from any disease of the mind. In his report, the psychiatrist had concluded that, in his opinion, on the day in question, the accused was not suffering from a psychosis caused by dagga or alcohol. That notwithstanding, the psychiatrist noted that the accused was drunk and in a state of intoxication. Based on the evidence presented, including the evidence of prosecution witnesses who were present at the scene who testified that the accused appeared to be in his right senses, the court dismissed the defence of the accused person that he was temporarily insane at the time of committing the offence. To this end, medical evidence as to the state of mind of the accused person plays a critical role in the consideration of intoxication as a defence.

It is important to highlight that, for the accused person to rely on intoxication as a defence, in addition to being intoxicated, it must be proved that he was unable to distinguish right from wrong or that he did not know what he was doing. Mere evidence of intoxication

[24] See also *Tlhokamolelo* v. *The State* 2013 (1) BLR 678 (CA).

[25] 2008 All Bots 44 (CA).

[26] 1989 BLR 191 (HC).

without proving either of these additional elements is not sufficient.[27] Furthermore, it must be proved that the accused person was, at the time of the commission of the offence, temporarily insane by reason of the intoxication.[28] When intoxication is being considered as a defence under Section 12 (2) of the Penal Code, the degree of intoxication is a critical factor. When the court makes the determination whether the accused was insane by reason of the intoxication, and whether he either did not know what he was doing or that what he was doing was wrong, the court takes into account the actions of the accused person at the time of commission of the offence. If the accused person undertook lucid actions, either before, during or after the commission of the offence, the court is likely to discount that the accused was intoxicated to the required degree. For example, in *Tsobane* v. *The State,*[29] the accused person murdered his 10 years old daughter by strangling her with an electric cable because he could not afford to pay child maintenance. He raised intoxication as a defence and claimed that he was acting under a state of confusion from alcohol and dagga. The court considered the lucid actions that he undertook at the time. In this regard, the court noted that the accused person had been able to navigate an unmarked dirt road, which required driving skills of a high regard, without any mishap. Moreover, that he took meticulous steps in dragging the deceased deep into the bush through a narrow path in an effort to conceal her body. The court also considered that the accused deliberately tied the cable with which he hung the deceased in a manner that attempted to disguise it as a suicide. Finally, the court observed that the accused tied the cable around a branch that was high up on the tree and that such required ''skill, dexterity and athletic ability, quite incompatible with a high degree of intoxication''.[30] Consequently, the court rejected the defence of intoxication.

Furthermore, in *State* v. *Saamu,*[31] the court made observations relating to the conduct of the accused in assessing whether he was not lucid. In this respect, the court observed that the accused person ran away after fatally assaulting his wife, and that he equally eluded those who tried to apprehend him because he knew that what he had done

[27] *Odirile Moreo* v. *The State* Court of Appeal Criminal Appeal No 38 of 1999 (Unreported) (CA); *State* v. *Dube (2)* 2007 (3) 318 (HC); *State* v. *Sebogisi* 2008 (2) BLR 283 (CC).

[28] Section 12 (2) (b) of the Penal Code.

[29] 2008 (3) BLR 142 (CA).

[30] *ibid* at p. 148.

[31] 1989 BLR 191 (HC).

was wrong. The court also took into account the fact that, after the accused allegedly gained consciousness, he spent three days hiding in the bushes avoiding arrest. The court concluded that the accused person's version of events that he did not know what happened was a fabrication that he concocted up as an afterthought in order to try and extricate himself from the predicament he was in.[32] Finally, in *State* v. *Apadile,*[33] the court rejected intoxication as a defence on account of the fact that the accused person "had a presence of mind to specifically ask for onions; send for a knife; lock the door before butchering his mother".[34]

More often than not, an accused person seeking to rely on intoxication as a defence will claim that he has no recollection of what transpired at the time that he is alleged to have committed the offence. It is for that reason that, in the English case of *Cooper* v. *Mckenna,*[35] Stable J formulated his oft-cited dictum that "…"black-out" is one of the first refuges of a guilty conscience and a popular excuse".[36] In *State* v. *Apadile,*[37] the court cautioned of the dangers of placing any significance on the claim by the accused person that he has no recollection of the events. The court expressed this caution as follows:

> If recollection was to be a chief consideration, many accused persons would choose not to remember or choose to say that they do not remember what exactly occurred and would therefore be acquitted, an eventuality that can inspire little confidence in the administration of justice in the minds of the common right-thinking man.[38]

In *State* v. *Sebogisi,*[39] the accused had killed his mother and he claimed that he was under a state of automatism induced by extreme

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[32] *ibid* at p. 206.

[33] 2011 (1) BLR 1 (HC).

[34] *ibid* at paragraph 45 of the judgment. In *State* v *Tome* 2009 All Bots 236 (HC), although the court found that the accused person was drunk, it found that he was in control of his senses and that he knew what he was doing. The defence of intoxication was accordingly dismissed.

[35] 1960 Qd R 406.

[36] *ibid* at p. 419. Cited with approval by Lord Denning in *Bratty* v. *Attorney General for Northern Ireland* 1963 (3) AER 523.

[37] 2011 (1) BLR 1 (HC).

[38] *ibid* at paragraph 44 of the judgment. In this regard, the court relied on the case of *Queen* v. *O'Connor* 1980 54 ALJR 349. See also *State* v. *Sebogisi* 2008 (2) BLR (2) 283 (CC).

[39] 2008 (2) BLR 283 (HC).

intoxication. He claimed that he had consumed alcohol and dagga and that he had no recollection of assaulting his mother, and that, at the time, he was not aware of what he was doing or that it was wrong. The court observed that the accused seemed to recollect everything that happened on that day up until just before the moment he killed his mother. In this regard, the court concluded that his testimony as to loss of either consciousness or recollection appeared conjured up in order to avoid accounting for the critical time when he fatally assaulted his mother.[40]

It is important to highlight that, in terms of Section 12 (3) of the Penal Code, involuntary intoxication is a complete defence which entitles the accused to be discharged and acquitted. On the other hand, an accused person who does not know what he is doing or that what he is doing is wrong on account of insanity brought about by self-induced intoxication is dealt with in terms of Section 11 of the Penal Code and Part XII of the Criminal Procedure and Evidence Act.[41] The net effect of this is that the court shall enter a special verdict of guilty but insane.[42] The accused shall then be committed to a designated place of safe custody where he is to be held, as a ''criminal lunatic'', at the pleasure of the President.[43] In *Mhlanga* v. *The State*,[44] the Court of Appeal indicated that the finding of ''guilty but insane'' does not amount to a conviction. The court also highlighted that it might have been better for the legislature to use the phrase ''not guilty by reason of insanity'' as used in other jurisdictions.[45]

Finally, it is important to note that, for the purposes of Section 12 of the Penal Code, ''intoxication'' is deemed to include a state produced by narcotics or drugs.[46] To this end, an accused person who is

[40] *ibid* at p. 292.

[41] *State* v. *Apadile* 2011 (1) BLR 1 (HC).

[42] Section 160 (1) of the Criminal Procedure and Evidence Act. See *Ditshotlo* v. *The State* 2017 (1) BLR 81 (CA); *State* v. *Moaro* 2008 (3) BLR 35 (HC); *The State* v. *Ndjavera* 2016 (2) BLR 457 (HC); *Makuku* v. *Director of Public Prosecutions* 2013 (1) BLR 20 (HC); *State* v. *Kgosinaga* 2007 (2) BLR 772 (CA).

[43] Section 160 (2) and (3) of the Criminal Procedure and Evidence Act (Cap 08:02).

[44] 2010 (1) BLR 33 (CA).

[45] See also J. Maphisa Maphisa, *Lunacy Defence in Botswana's Criminal Law: Reflections of a Mental Health Practitioner*, (2016) University of Botswana Law Journal, 82. The author pointed out that the phrase guilty but insane was paradoxical and misleading in that it was improper to use the word ''guilty'' for someone who was not criminally responsible.

[46] Section 12 (5) of the Penal Code (Cap 08:01).

able to satisfy the requirements of Section 12 (2) of the Penal Code is entitled to rely on the intoxication as a defence irrespective of the fact that the intoxication may be as a result of consuming illicit substances. The absence of a distinction between intoxication induced by legal substances and intoxication induced by illicit substances will be discussed in more detail later in the paper when dealing with intoxication in sentencing and the formulation of sentencing guidelines.

III INTOXICATION AS AN EXTENUATING CIRCUMSTANCE

Before delving into the discussion about intoxication as an extenuating circumstance, a mitigating factor, and an aggravating factor, it is necessary to highlight the distinction between extenuating circumstances and mitigating factors. Unlike some jurisdictions such as the United Kingdom and South Africa, Botswana makes a distinction between extenuating circumstances and mitigating factors. This distinction was underscored by the Court of Appeal in *The State* v. *Masoko*[47] as follows:

> While extenuating circumstances are those which operate on or affect the mind of the accused at the time of the commission of the crime so as to lessen his moral blameworthiness when committing it, mitigating circumstances are factors which at the time of imposition of punishment are indicators that a less severe punishment should or might be imposed than if those factors had not been present.[48]

In this regard, courts have repeatedly held that extenuation and mitigation are two separate and distinct enquiries in the sentencing process, and that they serve different purposes.[49] In *Tsietso* v. *Directorate of Public Prosecutions,*[50] the Court of Appeal acknowledged that factors which have been taken into account under extenuation may still be considered under mitigation. However, it is not

[47] 2017 (1) BLR 531 (CA).

[48] *ibid* at p. 532. See also *Kobedi* v. *The State (2)* 2005 (2) BLR 76 (CA). See also *Gaonakala* v. *The State* 2006 BLR 485 (CA); *Mosimane* v. *The State* 2008 All Bots 13 (HC); *George* v. *The State* 2007 All Bots 95 (HC).

[49] *Ntshebetsa* v. *State* 2019 All Bots 160 (CA); *Mookets*i v. *Directorate of Public Prosecutions* 2013 All Bots 517 (CA); *Kalimukwa* v. *The State* 1995 BLR 425 (CA); *Gaonakala* v. *The State* 2006 (2) BLR 485 (CA); *Mosimane* v. *State* 2008 All Bots 13 (HC).

[50] 2013 (3) BLR 120 (CA).

automatic that if a factor plays the role of an extenuating circumstance it will invariably be considered to be a mitigating factor. This remains at the discretion of the sentencing court.[51] Thus, in *State* v. *Holland,*[52] the court accepted intoxication as an extenuating circumstance and also accepted the intoxication as a mitigating factor.

This portion of the paper considers the role that intoxication plays as an extenuating circumstance. The consideration of intoxication as an extenuating circumstance in Botswana is particularly significant in relation to the offence of murder. This is because, in terms of Section 203(1) of the Penal Code once a court find an accused person guilty of murder it shall impose the sentence of death unless there are extenuating circumstances.[53] Consequently, the attitude of the court towards the treatment of intoxication as an extenuating circumstance in a murder trial can be the difference between imprisonment and imposition of the death penalty. Intoxication has been held to amount to an extenuating circumstance by numerous decisions of courts in Botswana.[54] Extenuating circumstances have been judicially defined as facts bearing on the commission of the offence which reduce the moral blameworthiness of the accused person, as distinct from his legal culpability.[55] The acceptance of intoxication as an extenuating circumstance is also premised on the acknowledgement of the criminogenic effect of alcohol in the commission of offences. In *The State* v. *Aobakwe Lehupu,*[56] Leburu J quoted with approval the following seminal passage from the South African case of *Fowlie* v. *Rex*[57]:

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[51] *Nteseletsang* v. *The State* 2019 All Bots 160 (CA).

[52] 2013 All Bots 39 (HC).

[53] Section 203(2) provides that where there are extenuating circumstances the court shall impose a minimum mandatory sentence of 15 years imprisonment and not the death penalty. See Baboki J. Dambe, *Legislative Erosion of Judicial Discretion in Relation to Murder with Extenuating Circumstances in Botswana: A Critique of the Amendment of Section 203 (2) of the Penal Code*, (2021) Criminal Law Forum 32, 285.

[54] *Tapologo* v. *The State* 2005 (2) BLR 220 (CA); *Diboneng and Others* v. *The State* 1997 BLR 675 (CA); *State* v. *Porosanta* 2011 (2) BLR 717 (HC); *Tumedi* v. *The State* 2008 (1) BLR 123 (CA); *Kebafitlhetse and Others* v. *The State* 2008 (3) BLR 72 (CA); *State* v. *Mediyamere* 2010 (2) BLR 208 (HC); *State* v. *Mmesha* 2006 (2) BLR 72 (HC).

[55] *S* v. *Letsolo* 1970 (3) 476 (AD); *Rex* v. *Fundakubi and Others* 1948 (3) SA 810 (AD); *Masoko* v. *The State* 2017 (1) BLR 531 (CA); *Thamo* v. *The State* 2011 (2) BLR 846 (CA); *Phiri* v. *The State* 2005 (2) BLR 240 (CA).

[56] Case No. MAHGB-000439-20 (Unreported) (HC).

[57] 1906 TS 505.

> It would be absurd to say that if a man in his cold, sober senses did the act, he should be punished with no greater severity than the man who did it whilst under the influence of liquor. That there should be a difference in degree of punishment has been recognized in almost every system of jurisprudence. In the *Digest*, 48:49.11 we find the distinctions drawn between the punishment of a sober man and of a man who has been drinking and Matthaeus says (*de Criminibus*, page 33): *Ebrius aliquot mitius puniri debet quia non proposito sed impetu delinguit*. Although a man may not be so drunk as to be excused, the commission of a crime requiring special intent, yet he may have been so affected with liquor that his punishment should be softened.[58]

When intoxication is taken into account as an extenuating circumstance, it only serves to reduce the sentence meted out to the accused person and it does not absolve them.[59]

The nature of the assessment of intoxication as a defence in terms of Section 12 of the Penal Code has been outlined above. However, when it comes to assessing intoxication as an extenuating circumstances, the inquiry is different, and the standard of proof is lower. This was confirmed by the Court of Appeal in *Tonderai Kakamba* v. *The State*.[60] The court noted that, when dealing with intoxication as an extenuating circumstance, the proper test is simply to consider whether the intoxication could have had an influence on the mind of the accused person at the time of committing the offence. To this end, the court highlighted that it is not required that the accused person must not have known what he was doing or that it was wrong in the manner required for the purposes of Section 12 (2) of the Penal Code. The Court of Appeal had to address that distinction particularly because, in assessing the question as to whether there was intoxication as an extenuating circumstance, the trial court had applied the wrong test. The trial court had indicated that the question that it had to address in this regard was whether the accused person was at the time "so intoxicated that he could not appreciate the consequences of his actions".[61] The Court of Appeal noted that this was a serious misdirection on the part of the High Court, and that application of this wrong test invariably had an impact on the conclusion reached by the trial court that the intoxication was not sufficient for extenuation. The Court of Appeal also relied on the South African case of *S*

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[58] *ibid* at p. 511.

[59] *State* v. *Kibitwe* 2008 (3) BLR 207 (HC).

[60] Court of Appeal Criminal Appeal No. CLCGB-056-20 (Unreported) (CA).

[61] *State* v. *Tonderai Kakamba* High Court Criminal Trial No. CTHGB-000010-13 (Unreported) (HC).

v. *Babada*[62] to the effect that it was an incorrect test to assume that only a defined degree of intoxication was required in order for intoxication to be considered as an extenuating circumstance. Therefore, on the basis of the evidence that the accused person had, prior to committing the murder, consumed various blends of alcohol, the Court of Appeal held that there were extenuating circumstances. The death penalty imposed by the High Court was accordingly set aside. This case demonstrates the potentially catastrophic consequences of a court failing to appreciate the principles applicable to the treatment of intoxication in its various roles. In incorrectly applying the principles applicable to intoxication as a defence to the consideration of intoxication as an extenuating circumstance, the trial court improperly sentenced the accused to death. Save for the intervention of the Court of Appeal, he would have been executed.

When an accused person seeks to rely on intoxication as an extenuating circumstance, there is no onus on them to prove the intoxication.[63] Even without any probe from the accused person, it remains the duty of the court to consider the evidence and make a finding on the existence or otherwise of extenuating circumstances.[64] In *State* v. *Maselwa,*[65] the court confirmed that the only requirement is that there must be a factual foundation upon which a court can base a finding that the accused person was drunk. In *State* v. *Maake,*[66] the evidence indicated that the accused person drank alcohol at around 8pm the previous night and the murder was committed around 7.15am the following morning. The prosecution argued that intoxication could not be a consideration as an extenuating circumstance because enough time had lapsed for the accused person to sober up. The court rejected this argument and held that there had been no scientific proof availed to the effect that, due to the effluxion of time, the alcohol would have entirely dissipated from his body to the extent that it can be safely said that he was not drunk at the material time.[67] Moreover, in *State* v. *Thupane,*[68] the court noted

[62] 1964 (1) SA 26 (A).

[63] *Mosarwa* v .*The State* 1895 BLR 258 (CA); *Molale* v. *The State* 1995 BLR 146 (CA); *State* v. *Lesole* 2017 All Bots 595 (HC); *State* v. *Xase* 2017 All Bots 600 (HC).

[64] *Koitsiwe* v. *The State* 2001 (2) BLR 317 (CA); *Diboneng and Others* v. *The State* 1997 BLR 675 (CA).

[65] 2017 All Bots 174 (HC).

[66] 2017 All Bots 431 (HC).

[67] See paragraph 21 of the judgment.

[68] 2010 All Bots 543 (HC).

that, from the evidence, the accused had been drinking from mid-day up to 5pm. On the issue of intoxication as an extenuating circumstance, the court held that, although the accused person could not positively say that he was drunk, objectively viewed, the length of time he was drinking justified a finding that his rationality could have been impaired by intoxication. Consequently, the court upheld intoxication as an extenuating circumstance.

3.1 *Intoxication arising out of the consumption of illegal substances*

In assessing intoxication as an extenuating circumstance, courts have not made a distinction as to whether the intoxication arises as a result of drugs or any such illegal substances. To this end, courts have consistently taken into account the consumption of dagga as an extenuating circumstance despite it being illegal in Botswana.[69] As indicated above, when intoxication is considered as a defence under Section 12 of the Penal Code, it includes intoxication induced by narcotics or drugs. In that regard, the Penal Code does not make a distinction between intoxication induced by legal substances and that induced by illicit substances. It is therefore appropriate that, even in the consideration of intoxication as an extenuating circumstances, the legality of the substances consumed remains immaterial. This is in the appreciation that the primary consideration when dealing with extenuating circumstances is whether, at the time of the commission of the offence, the accused person's state of mind was appreciably affected so as to abate their moral blameworthiness.[70] Intoxication induced by illegal substances affects the accused person's state of mind no less. It is impossible to sustain the argument that, under Section 12 of the Penal Code, one is entitled to rely on intoxication induced by illegal substances but that, if the illegal substances do not affect him to the point of temporary insanity, though his state of mind may have been affected, he cannot rely on such intoxication as an extenuating circumstance.

However, in *Thokamolemo* v. *The State,*[71] the Court of Appeal, albeit *obiter*, expressed a measure of reservation as to whether

[69] *State* v. *Noga Alias Mokwepa* 2007 (1) BLR 27 (CC); *State* v. *Makirika* 2008 All Bots 483 (HC); *State* v. *Selomo* 2016 All Bots 378 (HC); *State* v. *Medupe* 2012 All Bots 92 (HC); *Mokhe* v. *State* 2008 All Bots 44 (CA).

[70] *Tadubane* v. *The State* 2011 (2) BLR 825 (CA); *Kelaletswe and Others* v. *The State* 1995 BLR 100 (CA).

[71] 2013 (1) BLR 678 (CA).

someone whose intoxication is on account of having taken illegal substances should really be given the benefit of that intoxication as an extenuating circumstance. Lesetedi JA opined as follows:

> It is questionable whether the taking of an illegal substance such as dagga which is specifically prohibited by legislation and the taking of which attracts criminal punishment should readily be taken by the trial court as an extenuating factor which abates moral blameworthiness of an accused.[72]

There is no evidence that this reasoning by the Court of Appeal has been followed in any subsequent cases. However, it is impossible to simply ignore such observations when they emanate from the apex court. Admittedly, there is merit in the argument that the moral blameworthiness of one who engages in the criminality of the consuming illicit substances should not be the same as one whose state of intoxication is induced by consuming legal substances. That notwithstanding, the argument that illicit substances affect a person's mind no less than legal substances remains. To this end, we contend that the approach by the courts in equally accepting intoxication induced by illicit substances as an extenuating circumstance is well founded.

3.2 *The Influence of South African Criminal Law on Botswana's Application of Extenuating Circumstances*

The discussion above, on the consideration of intoxication as an extenuating circumstance, reflects that courts in Botswana reference and rely on South African decisions on extenuating circumstances. It is therefore necessary to briefly discuss the context of such reliance. The doctrine of extenuating circumstances was developed in South Africa and passed on to the criminal law of some of its neighbouring countries, including Botswana.[73] Gardiol notes that South African case law and academic authorities feature prominently in cases in Botswana, particularly in cases where the provisions of the Penal Code under consideration have "Roman-Dutch antecedents".[74] He

[72] *ibid* at p 693.

[73] Andrew Novak, *Capital Sentencing Discretion in Southern Africa: A Human Rights Perspective on the Doctrine of Extenuating Circumstances in Death Penalty Cases*, (2014) African Human Rights Law Journal 14, 24.

[74] Gardiol J Van Nierkerk, The Application of South African Law in the Courts of Botswana, (2004) Comparative and International Law Journal of Southern Africa 37:3, 312 at p. 317. See also

specifically highlights that one such area is on the concept of extenuating circumstances. The Court of Appeal in Botswana has repeatedly acknowledged that the concept of extenuating circumstances has its origins in South African Criminal Law, and that decisions of South African courts should be treated as persuasive authority.[75] By way of example, the definition of extenuating circumstances as formulated in the South African cases of *S* v. *Letsolo*[76] and *Rex* v. *Fundakubi and Others*[77] have been consistently relied upon by both the Court of Appeal and the High Court in Botswana and they accept them as "settled law".[78] Prior to the abolition of the death penalty in South Africa,[79] South African courts accepted intoxication as an extenuating circumstance which entitled the court to impose a sentence other than death.[80] In *S* v. *Ndhlovu*,[81] the court held that, when considering the relevance of intoxication as an extenuating circumstance, the trial court must understand the human frailties of the accused person and balance them against his evil deeds.[82] To this end, it is noted that there are significant similarities in the treatment of intoxication as an extenuating circumstance in both South Africa and Botswana. It is not within the scope of this paper to extensively engage in an analysis of the origin of the concept of

[75] *State* v, *Masoko* 2017 (1) BLR 531 (CA); *Kelaletswe and Others* v, *The State* 1995 BLR 100 (CA); *Gofhamodimo* v. *The State* 1984 BLR 119 (CA).

[76] 1970 (3) SA 476 (AD).

[77] 1948 (3) SA 810 (AD).

[78] *State v. Masoko* 2017 (1) BLR 531 (CA) at p.533. See also *Mminakgomo* v. *The State* 1996 BLR 65 (CA); *Lekolwan*e v *The State* 1985 BLR 245 (CA); *Thamo v. The State* 2011 (2) BLR 846 (CA); *Tadubane v. The State* 2011 (2) BLR 825 (CA); *Koitsiwe v. The State* 2001 (2) BLR 317 (CA); *Phiri v. The State* 2005 (2) BLR 240 (CA); Baboki J. Dambe, *Legislative Erosion of Judicial Discretion in Relation to Murder with Extenuating Circumstances in Botswana: A Critique of the Amendment of Section 203 (2) of the Penal Code*, (2021) Criminal Law Forum 32, 285 at p. 290–291.

[79] The Constitutional Court of South Africa abolished the death penalty in the landmark case of *S* v. *Makwanyane and Another* 1995 (3) SA 391 (CC). See also Peter Norbet Bouckaert, *Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa*, (1996) Stanford Journal of International Law 32, 287.

[80] In *Makie v. State* (414/89) [1990] ZASCA 9 the Supreme Court of South Africa overturned a death sentence on the basis that the intoxication of the accused person, considered cumulatively alongside other factors, constituted an extenuating circumstance. See also *S* v. *Meyer* 1981 (3) SA 11 (A); *S* v. *Shoba* 1982 (1) SA 36 (A); *S* v. *Van Rooi* 1976 (2) SA 580 (A).

[81] 1965 (4) SA 692 (A).

[82] See also *S* v. *Sigwahla* 1967 (4) SA 566 (A).

extenuating circumstances as formulated in South Africa and subsequently adapted by Botswana. However, it suffices to reiterate that, due to the brief historical context provided above, South African authorities on extenuating circumstances, prior to the abolition of the death penalty in South Africa, continue to be relied on by Botswana courts as persuasive authority.

IV THE CONSIDERATION OF INTOXICATION IN MITIGATION

As indicated above, the major concern of the contribution of intoxication to the commission of offences is in respect of murder, manslaughter and other violent crimes. In respect of manslaughter, courts have repeatedly treated intoxication as a mitigating factor .[83] In *State* v. *Ndlovu,*[84] the court convicted the accused person of manslaughter. The court highlighted that, although self-induced intoxication is not an excuse for criminal behaviour, it could not ignore the fact that intoxication had played a part in the manner that the accused had reacted to being assaulted. Consequently, the court took intoxication into account as a mitigating factor.[85]

In *Kebafitlhetse* v. *The State,*[86] the court noted that, due to the troubling frequency of offences of murder committed by persons who have consumed large quantities of alcohol over long periods of time, it was necessary to address the question as to the appropriate weight to be given to intoxication as a mitigating factor. In this regard, the court dealt with the distinction between extenuating circumstances and mitigating factors and the role played by intoxication in both considerations. The court couched its observations as follows:

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[83] *Keromang* v. *State* 2018 All Bots 170 (CA); *State* v. *Ramodimoosi* 2007 All Bots 9 (HC); *State* v. *Njipe* 2016 All Bots 427 (HC); *State* v. *Ramosomane* 2012 All Bots 270 (HC); *State* v. *Mosepele* 2008 All Bots 460 (HC); *State* v. *Hans* 2017 All Bots 89 (HC); *State* v. *Keitiretse* 2012 All Bots 115 (HC); *State* v. *Taolo* 2010 All Bots 204 (HC); *State* v. *Kebonyemodisa* 2008 All Bots 419 (HC); *State* v. *Sompane* 2013 All Bots 408 (HC); *State* v. *Xao* 2010 All Bots 146 (HC); *State* v. *Moselwa* 2016 All Bots 492 (HC); *State* v. *Koosentse* 2015 All Bots 394 (HC), *State* v. *Katse* 2013 All Bots 40 (HC).

[84] 2008 All Bots 516 (HC).

[85] See also *State* v. *Nyathi* 2010 All Bots 243 (HC); *State* v. *Ramokgwaneng* 2017 All Bots 488 (HC). In South Africa, the approach is that, where intoxication does not affect the accused person's liability for the crime, it may serve as mitigation in relation to the sentence. See SV Hoctor, *Snyman's Criminal Law* (7th edn, LexisNexis 2021) at p.199. See also *S* v. *Chretien* 1981 (1) SA 1097 (A).

[86] 2008 (3) BLR 72 (CA).

> Another relevant consideration concerns the distinction between extenuating circumstances which enable the court to avoid imposing the death penalty and mitigating circumstances which allows adjustment of penalty. Intoxication clearly can amount to extenuating circumstances, but once the question of capital punishment is out of the way, the mitigating effect of voluntary intoxication may be minimised to a vanishing point.[87]

In applying the principle espoused above, in *Ditlhakeng* v. *The State,*[88] the Court of Appeal held that, although alcohol was an inhibiting factor and some consideration should be given to it, the weight of such consideration was not substantial. The weight that ought to be given to intoxication both as an extenuating factor and as a mitigating factor remains purely within the discretion of the trial judge.[89]

In appreciating the difference between extenuating circumstances and mitigation factors, it is perhaps necessary to highlight that the consideration of extenuating circumstances does not arise in respect of offences for which there is no prescribed minimum mandatory sentences.[90] The existence of extenuating circumstances serves to empower the court to impose a sentence that is less than a prescribed minimum sentence. For example, in the context of the offence of murder, the prescribed sentence is the death penalty.[91] However, where the court finds that there are extenuating circumstances, it is mandated to impose a minimum of 15 years imprisonment, and not a death sentence.[92] In this regard, whether a court considers intoxication as an extenuating circumstance or an aggravating factor could be the determining factor as to whether the accused person is sentenced to death. For the offence of assault occasioning grievous bodily harm, Section 230 (1) of the Penal Code imposes a sentence of not less than 7 years and not more than 14 years imprisonment. However, Section 230 (2) empowers the court to impose a sentence of less than 7 years where there are extenuating circumstances. Thus, in *Mathe* v. *State*,[93] the court took account of intoxication of the accused person

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[87] *ibid* at p. 76.

[88] 2013 All Bots 485 (CA).

[89] *Motsumi* v. *The State* 2012 (2) BLR 71 (CA); *Gabakalelwe* v. *The State* 2018 (3) BLR 168 (CA).

[90] *Makgetla* v. *The State* 2017 (1) BLR 474 (CA).

[91] Section 203 (1) of the Penal Code.

[92] Section 203 (2) of the Penal Code.

[93] 2013 All Bots 134 (HC).

convicted of assault occasioning grievous bodily harm in terms of Section 230 of the Penal Code. The accused person had been sentenced to the minimum mandatory of 7 years by the trial court. Upon appeal to the High Court, the High Court held that his intoxication should have been accepted as an extenuating circumstance justifying a sentence less than the minimum of 7 years. Consequently, the court reduced the sentence to 3 years imprisonment. Lastly, if the extenuating circumstances in question meet the threshold of being ''exceptional'', the court is empowered to impose a sentence less than the prescribed minimum mandatory sentence if the circumstances render the prescribed minimum ''totally inappropriate''.[94] Exceptional extenuating circumstances have been defined as extenuating circumstances that are beyond the ordinary circumstances that courts are routinely confronted with.[95]

V INTOXICATION AS AN AGGRAVATING FACTOR

As indicated above, intoxication can operate as either an extenuating circumstance, a mitigating factor, or an aggravating factor, depending on the circumstances of the case. This reality was embraced by the Court of Appeal in *The State* v. *Masoko*[96] as follows:

> In one case intoxication may serve as an extenuating circumstance to the extent that it has served to further inflame a troubled mind, while in another case, where binge drinking was involved, with the foreseeable result of knife related crime, it may not.[97]

It is to be noted that there are instances where courts have expressed a dim view towards the role played by alcohol in the commission of offences and, thus, the manner which it should be treated at sentencing. In *Segokgo* v. *The State,*[98] the Court of Appeal observed the alarming increase of cases in which murders and woundings were occurring in Botswana. The court noted that, in most instances, the perpetrators were ''young men in their early adulthood who have

[94] Section 27 (4) of the Penal Code. See *Monnaesi* v. *The State* 2010 (1) BLR 99 (CA).

[95] *Ndou* v. *The State* 2008 (3) BLR 115 (CA); *Semente* v. *The State* 2015 BLR 184 (HC).

[96] 2017 (3) BLR 531 (CA).

[97] *ibid* at p. 555.

[98] 2008 (8) BLR 90 (CA).

voluntarily consumed alcohol in copious amounts over long periods of time''.[99] Additionally, in *Kebafitlhetse* v. *The State,*[100] the Court of Appeal issued a caution that drunken rages as a sequel to excessive voluntary consumption of alcohol can no longer be condoned as being the result of youthful exuberance. The court indicated that ''such behaviour must now be looked at for what it really is- lawlessness of an unacceptable character and treated as such''.[101] The court went on to reiterate that those who commit offences while under the influence of self-induced intoxication should be punished severely. Furthermore, in *Kealotswe Daniel* v. *The State,*[102] the Court of Appeal sounded the following caution:

> Unrestrained debauchery caused by an over-consumption of alcohol and an apparent inability by those who over-indulge in this manner to cope with the effects of alcohol- in common parlance, to ''hold their liquor''- resulting in their loss of control of their tempers, has become a far too frequent feature of murder, manslaughter and assault cases in the courts of this country. The resort to violence by persons affected in this manner requires to be curbed and the manner in which the courts can assist in doing that is by passing sentences of suitable severity. Persons who go and get drunk and then assault their fellow citizens, often resulting in the deaths of the latter, must know that they can expect scanty mercy for their deeds.[103]

The above passage has been cited with approval in a number of cases by both the High Court and the Court of Appeal.[104] There are indications that some courts are inclined to treat intoxication as an aggravating factor justifying the imposition of severe sentences.

Another consideration taken into account in determining how intoxication is treated at sentencing is the purpose for which the accused person got intoxicated. In the English case of *Attorney*

[99] *ibid* at p. 91.

[100] 2008 (3) BLR 72 (CA).

[101] *ibid* at p.73. In *State* v. *Rabasimane* 2016 All Bots 394 (HC), the High Court acknowledged the *Kebafitlhetse* case but avoided applying it by distinguishing the case on the facts.

[102] Court of Appeal Criminal Appeal No. CLCLB-016-06 (Unreported) (CA).

[103] *ibid* at p. 5–6 of the judgment. In *Kebojakile* v. *The State* 2011 (1) BLR 241 (CA) the Court of Appeal noted that, in most cases, abuse of alcohol is an aggravating feature as opposed to a mitigating one.

[104] *State* v. *Dzaruba* 2010 All Bots 165 (HC); *State* v. *Mothobi* 2009 All Bots 216 (HC); *State* v. *Kibitwe* 2008 (3) BLR 207 (HC); *Mooketsi* v. *The State* 2007 All Bots 20 (CA); *Binikwa* v. *The State* 2008 All Bots 7 (CA); *Paeya* v. *The State* 2014 All Bots 346 (HC).

General for Northern Ireland v. *Gallagher,*[105] Lord Denning made the following seminal observation in relation to people who deliberately drink for the specific purpose of giving themselves courage to commit an offence:

> If a man, whilst sane and sober, forms an intention to kill and makes preparation for it, knowing it is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out this intention, he cannot rely on this self-induced drunkenness as a defence to a charge of murder, nor as reducing it to manslaughter.[106]

In the context of Botswana, this principle has been interrogated in a number of cases. In *State* v. *Sekati,*[107] the court held that if a man deliberately fortifies himself with alcohol to enable him to insensitively carry out an offence then he cannot rely on the intoxication for leniency. The court noted that, to the contrary, the intoxication may be used as an aggravating circumstance which increases his moral blameworthiness. Further, in *State* v. *Gaopatwe,*[108] the court observed that where someone drinks for the purpose of getting ''dutch courage'', that drunkenness may be an aggravating factor which increases their sentence, as opposed to being a defence or an extenuating circumstance.[109] To this end, in cases where alcohol is involved, courts have purposefully assessed the circumstances under which the alcohol was consumed in trying to discern whether it was so done for the purposes of gaining ''dutch courage''.[110] In *The State* v. *Masoko,*[111] the Court of Appeal held that intoxication existed as an extenuating circumstance because there was no evidence to indicate that the accused person had consumed the alcohol to ''embolden'' himself. In *State* v. *Saamu*, although the court took intoxication into account as an extenuating circumstance, in passing its judgment, the

[105] 1963 AC 349.

[106] *ibid* at p. 382.

[107] 2007 (2) BLR 124 (HC).

[108] 1997 BLR 522 (HC).

[109] In South Africa, the approach of the courts where a person voluntarily gets intoxicated in order to give himself courage to commit an offence is to treat such intoxication as an aggravating factor. It cannot be regarded as either a defence or a mitigating factor. See SV Hoctor, *Snyman's Criminal Law* (7th edn, LexisNexis 2021) at p. 193. See also *S* v. *Baartman* 1983 (4) SA 393 (NC).

[110] *State* v. *Kebojakile* 2007 All Bots 397 (HC); *State* v. *Makgolo* 2007 All Bots 317 (HC); *State* v. *Kgaodi* 2007 All Bots 306 (HC).

[111] 2017 (1) BLR 531 (CA).

court sounded the caution that the society must be protected from people whose sip of alcohol or puff of narcotics leads them to violence. The court indicated that the accused person must receive a condign sentence which took into account this need to protect the society from drunken violence.[112]

It is impossible to find fault with the concerns by the courts that intoxication has become too prevalent in crimes of violence, and that there is need to protect the society from such offenders and punish them appropriately. Although other courts have held intoxication to be an extenuating circumstance, they have equally voiced concerns about the prevalence of offences in which intoxication features. With these concerns in mind, the primary focus should be in the promulgation of sentencing guidelines with a view of attaining predictability and consistency in the manner that intoxication is dealt with in any given situation.

VI RECOMMENDATIONS: THE NEED FOR SENTENCING GUIDELINES

Sentencing guidelines may be formulated by a body specifically mandated with that, or they may be developed by the courts. The recommendations below discuss both these possibilities and the potential challenges of each approach. It is accepted that the crafting of suitable sentencing guidelines is a process that ought to be informed by a myriad of factors. Among other things, it must entail the collection and analysis of data indicating the role played by intoxication in contributing to the commission of offences or specific offences. This may also entail a further breakdown of the contribution of intoxicating substances with distinctions being made between legal substances and illicit substances. Such analysis would appropriately inform the extent to which intoxication must influence the sentence imposed. Cognisant of these realities, however, there is no harm in offering insight on sentencing guidelines, as well as highlighting areas of concern.

One of the jurisdictions that have made an attempt at attaining predictability on the manner in which intoxication is to be treated at sentencing through sentencing guidelines is England and Wales. In terms of their sentencing guidelines, intoxication is regarded as an

[112] *ibid* at p. 208.

aggravating factor.[113] The sentencing guidelines further provide that it is immaterial whether the intoxication arises out of legal or illegal substances. In terms of the guidelines, if an accused person commits an offence whilst under the influence of alcohol or drugs, this increases the seriousness of the offence, if it is established that the intoxication contributed to the offending.[114] The guidelines further provide that an offender who voluntarily consumes alcohol or drugs must accept the consequence of the resultant behaviour, even if such behaviour is out of character. However, when the court deals with an accused person who is addicted to ether drugs or alcohol, the court may hold that the intoxication was not voluntary. In doing so, the court is enjoined to consider the extent to which the accused person has sought help with the addiction or made use of any assistance that has been offered.[115] The sentencing guidelines have been criticised for not providing a rationale as to why intoxication should be treated as an aggravating factor, nor guidance on the extent to which it should serve to increase the sentence.[116] Some of the criticisms will be weaved into the discussion hereunder as we highlight the lessons to be learnt by Botswana as she crafts her own sentencing guidelines.

Firstly, although predictability and consistency in the manner that intoxication is treated in sentencing is inherently desirable, the need for judicial discretion in sentencing can never be overstated.[117] In *State* v. *Mpelegang*,[118] the court observed that sentencing can be a complex exercise irrespective of any guidelines issued by superior courts or sentencing traditions.[119] The court highlighted the fact that two sentencing judges can look at the same facts, use the same lan-

[113] https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/ (Accessed on 15 July 2023).

[114] *ibid.*

[115] *ibid.*

[116] C. Lightowlers, *Intoxication and Sentencing: A Review of Policy, Practice and Research*, January 2022. See also C. Lightowlers and J. Pina-Sanchez, *Intoxication and Assault: An Analysis of Crown Court Sentencing Practices in England and Wales* (2017) British Journal of Criminology 58:1, 132.

[117] B. J. Dambe, *Legislative Erosion of Judicial Discretion in Relation to Murder with Extenuating Circumstances in Botswana: A Critique of the Amendment of Section 203 (2) of the Penal Code*, (2021) 32 Criminal Law Forum 285.

[118] 2007 All Bots 349 (HC).

[119] In *Molatlhiwa* v *State* 2019 All Bots 127 (CA) the Court of Appeal accepted that sentencing is not capable of arithmetical equation. However, the court emphasised the need for uniformity, in so far as that can be reasonably done.

guage and yet arrive at different sentences makes sentencing guidelines necessary in order to attain consistency and uniformity. The court held that such would in turn inspire public confidence in the criminal justice system.[120] Lastly, the court emphasised that it was neither possible nor desirable to create restrictive rules governing sentencing. To this end, it is essential for the trial judge to retain a measure of discretion in order to cater for the unique circumstances of each case. Sentencing guidelines are not intended to shackle the discretion of the sentencing judge.[121] Sentencing guidelines must be crafted in such a manner that they attain the objectives of predictability and consistency without being so rigid as to divest trial courts of their discretion to take into account the particular circumstances of any given case and pass an appropriate sentence. Despite this need for flexibility in sentencing guidelines, it is necessary to create a binding framework that ensures that the guidelines are followed.[122] For example, in the United Kingdom, the Sentencing Act, 2020 mandates a sentencing court to identify any sentencing guidelines applicable to the offence under consideration.[123] The court is permitted to deviate from the sentencing guidelines if it is satisfied that it would not be in the interest of justice to follow them.[124] However, in order to ensure accountability in respect of the sentencing guidelines, if the court deviates from the sentencing guidelines, it is mandated to state its reasons for doing so.[125] This framework permits courts to exercise their judicial discretion in sentencing whilst ensuring that they do so cognisant of the applicable sentencing guidelines.

Secondly, it is to be noted that, even in those countries with sentencing guidelines, the absence of a distinct approach for intoxication arising out of illicit substances has proved an area of concern.[126] In crafting her own sentencing guidelines, Botswana must draw lessons

[120] *Kebojakile* v. *The State* 2011 (1) BLR 241 (CA).

[121] Joseph v. State 2014 All Bots 434 (CA).

[122] J. V. Roberts, *Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of the Courts to Comply in England and Wales*, (2011) British Journal of Criminology 51, 997.

[123] Section 52 (6) of the Sentencing Act, 2020.

[124] The duty of the court to follow sentencing guidelines unless it is in the interests of justice to do so is also echoed under Section 59 of the Sentencing Act, 2020.

[125] Section 56 (6) (b) of the Sentencing Act, 2020.

[126] C. Lightowlers, *Intoxication and Sentencing: A Review of Policy, Practice and Research*, January 2022.

from the shortfalls of sentencing guidelines adopted elsewhere. Consequently, the sentencing guidelines crafted may reflect that, although intoxication will be taken into account as an extenuating circumstance irrespective of the legality of the inducing substance, if the intoxication arises as a result of illicit substances, it shall not be taken into account in mitigation. Alternatively, the guidelines may provide that, at the stage of considering mitigating factors, intoxication arising out of illicit substances will be treated as an aggravating factor. As discussed above, the Botswana criminal justice system is unique to the extent that it treats extenuation and mitigation as two separate enquiries in the sentencing process. Given this unique approach, it is possible to accept intoxication through illicit substance as an extenuating circumstance at the stage of extenuation, whilst treating it as an aggravating factor at the mitigation stage. This approach will partly address the concerns raised in some cases that a person who engages in the criminal activity of consuming illegal drugs and then commits a further offence should not be permitted to rely on the resulting intoxication for a lenient sentence. For example, in *State* v. *Mothobi*,[127] the court considered the accused person's use of marijuana prior to the commission of the offence to be an aggravating factor. The court noted that it was a shocking submission for the accused person to seek to rely on his deliberate and voluntary commission of an offence, being the use of marijuana, as a mitigating factor.

Thirdly, it is an incontrovertible fact that, usually, intoxication has to be considered alongside other, extenuating, aggravating, and mitigating factors. A sentencing guideline must, to the greatest extent possible, give guidance on how intoxication is to be treated in combination with other factors. For example, it has been suggested that when one commits an offence whilst intoxicated, the court must consider whether they have previously committed an offence whilst intoxicated. If they have previously done so, then intoxication should be treated as an aggravating factor. On the other hand, if it is their first time committing an offence whilst intoxicated, the intoxication should be treated as a mitigating factor.[128] The reality remains that it is impossible to predict all the various combinations of factors attendant to the commission of offences. Consequently, it is impos-

[127] 2009 All Bots 216 (HC).

[128] G. Dingwall and L. Koffman, *Determining the Impact of Intoxication in a Desert-Based Sentencing Framework* (2008) Criminology and Criminal Justice, 8:3, 335.

sible to craft sentencing guidelines that perfectly provide guidance for all such combinations. However, the existence of sentencing guidelines would serve to bring a measure of the required uniformity and consistency in sentencing. The empirical research that must precede the crafting of the sentencing guidelines will, at the very least, indicate the prevalent combination of factors and enable for the guidelines to make provisions for such factors. For example, cases have already reflected that the combination between intoxication and youthfulness is an area of concern.Furthermore, the sentencing guidelines must provide for how intoxication should be treated in circumstances where the accused person became intoxicated with the specific purpose of emboldening themselves to commit an offence. At the very least, courts in Botswana have been consistent in their indication that this would amount to an aggravating factor.

Lastly, it must be emphasised that the call for sentencing guidelines is made in the fullness of the appreciation that courts are best placed to determine the appropriate sentences to be imposed, and the factors to be taken into account whether in extenuation or in aggravation. To this end, it is most desirable that sentencing guidelines be issued by the courts themselves. In *Thatayaone Kgoboki* v. *The State*,[129] the Court of Appeal advised that, in determining an appropriate sentence, a court had to take into account, among other factors, sentencing guidelines, norms, and trends obtaining in Botswana as disclosed in the pronouncements of superior courts of the Republic.[130] Furthermore, in *Mpofu* v. *The State*,[131] the court held that, where sentencing guidelines have been issued by the Court of Appeal, trial judges of lower courts should follow those guidelines unless the particular facts of the case restrain them from doing so, in the exercise of their discretion.[132] The ability and desirability of the Court of Appeal to issue sentencing guidelines in order to attain consistency in sentencing is best illustrated by the Court of Appeal case of *Ntesang* v. *The State*.[133] Therein, the Court of Appeal set sentencing guidelines in respect of murder with extenuating circumstances. These guidelines were effective in attaining uniformity and

[129] Court of Appeal Criminal Appeal No. CLCLB-013-11 (Unreported) (CA).

[130] Referenced in *State* v. *Hodie* 2012 All Bots 284 (HC). See also *State* v. *Mothobi and Others* 2011 (2) BLR 330 (HC).

[131] 2009 All Bots 29 (HC).

[132] See also *State* v. *Phaladi* 2010 (3) BLR 162 (HC); *Chalebgwa* v. *The State* 2017 (1) BLR 38 (CA).

[133] 2007 (1) BLR 387 (CA).

consistency in sentencing until 2018 when a minimum mandatory sentence of 15 years imprisonment was introduced for murder with extenuating circumstances.[134] Moreover, in *Dlamini* v. *The State*,[135] the Court of Appeal issued a sentencing guideline in respect of unlawful possession of ivory. This guideline has been subsequently endorsed.[136] In *Oatlhotse* v. *The State*,[137] the Court of Appeal set sentencing guidelines for the offence of infanticide, and those were relied upon in subsequent cases.[138]It is noted that, when sentencing guidelines are developed by the courts, they do so without the benefit of empirical research. However, courts draw extensively from their own jurisprudence in dealing with the matter under consideration and this capacitates them to formulate equally effective sentencing guidelines.

In the ultimate, whether through sentencing guidelines formulated by a sentencing council or through court-developed guidelines, Botswana has to adopt sentencing guidelines in respect of intoxication that are best suited for its criminal justice system. It has been observed that, given the varied approaches that different jurisdictions adopt in relation to the role of intoxication in sentencing, there is no ''right'' or ''wrong'' approach.[139] That notwithstanding, the sentencing guidelines adopted in other jurisdictions, as well as the strengths and weaknesses thereof, can serve as a lesson for Botswana in crafting more effective guidelines and suitably adapting them to the unique features of its criminal justice system and other relevant factors. As reflected by the experience of England and Wales, it is impossible to craft sentencing guidelines that are free from error and criticism. Once sentencing guidelines are crafted, it is necessary to

[134] For a detailed discussion on the effectiveness of the sentencing guidelines established in Ntesang v. The State 2007 (1) BLR 387 (CA) see B. J. Dambe, *Legislative Erosion of Judicial Discretion in Relation to Murder with Extenuating Circumstances in Botswana: A Critique of the Amendment of Section 203 (2) of the Penal Code*, (2021) 32 Criminal Law Forum 285.

[135] 2015 All Bots 525 (CA).

[136] *Bondo* v. *State* 2018 All Bots 5 (CA).

[137] 1988 BLR 232 (CA).

[138] *State* v. *Mangole* 2006 (2) BLR 135 (CC); *State* v. *Magasa* 2008 All Bots 44 (HC).

[139] C. Lightowlers, *Intoxication and Sentencing: A Review of Policy, Practice and Research*, January 2022.

continually monitor and improve them to ensure that they effectively serve their intended purpose.[140]

VII CONCLUSION

The challenges posed by intoxication in any given criminal justice system are incapable of resolution with the wave of a magic wand. It is for this reason that it is impossible to identify any jurisdiction that has flawlessly addressed these challenges. However, the mere difficulty in the crafting of effective solutions should not be a hindrance to continued efforts towards the better appreciation of the role played by intoxication in the commission of offences and the approaches to be taken by courts in cases involving intoxication. This immense undertaking requires the active participation of all stakeholders culminating in a concerted interdisciplinary effort. For its part, this paper has highlighted the place of intoxication in the Botswana criminal justice system either as a defence, an extenuating circumstance, a mitigating factor, or an aggravating factor. Through the assessment of reported cases, the paper demonstrated the lack of predictability and consistency in the role that intoxication plays, particularly at sentencing. Some cases regard intoxication as an extenuating circumstance which reduces the moral blameworthiness of the accused person, thus entitling them to leniency. On the other hand, some cases regard intoxication as an aggravating factor which increases the moral blameworthiness of the accused person. These cases argue that those who voluntarily ingest intoxicating substances and then engage in criminal behaviour should be punished more severely. There is merit in both these approaches. However, it is undesirable that the approach to be adopted by the court in any given case should depend on the individual philosophy of the presiding officer. The paper has proposed the adoption of sentencing guidelines to be followed by the courts in their consideration of intoxication. Furthermore, the paper has proposed that the sentencing guidelines should not be so rigid as to unduly interfere with the exercise of judicial discretion in sentencing. Lastly, we demonstrated that the unique feature of the Botswana criminal justice system in making a distinction between extenuating circumstances and mitigating factors

[140] J. Pina Sanchez and R Linacre, *Enhancing Consistency in Sentencing: Exploring the Effects of Guidelines in England and Wales,* (2014) Journal of Quantitative Criminology 30, 731; M. K. Dhami, *Sentencing Guidelines in England and Wales: Missed Opportunities?* (2013) Law and Contemporary Problems, 76:1, 289.

presents an opportunity for greater flexibility in the manner that intoxication can be treated at sentencing. Given the paucity of literature extensively interrogating the treatment of intoxication within the criminal justice in Botswana, it is hoped that this paper will go some way in contributing to the jurisprudence, and may serve as a source of insight for judicial officers, practitioners, and policy makers.

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