[COURT OF CRIMINAL APPEAL]

1969 *Present :* **H. N. G. Fernando, C.J. (President), Sirimane, J., and Alles, J.**

M. A. MARIKKAR, Appellant, *and* THE QUEEN, Respondent

C. C. A. No. 86 OF 1968, WITH APPLICATION No. 126

S. C. 170 of 1968—M. C. Puttalam, 3943

Charge of murder—Plea of intoxication—Proof—Whether intoxication can result from the smoking of ganja—Misdirection.

Intoxication affecting the question of intention to commit an offence may be caused by the smoking of ganja.

APPEAL against a conviction at a trial before the Supreme Court.

E. R. S. R. Coomaraswamy, with *T. Jokanathan*, *M. S. Azeez*, *C. B. Walgampaya* and *E. St. N. D. Tillekeratne* (assigned), for the accused-appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Attorney-General.

Cur. adv. vult.

January 26, 1969. SIRIMANE, J.—

The appellant was convicted of the murder of his 2 little sisters, aged 10 and 11 years, by a divided verdict (5 to 2) of the Jury.

The appellant had shot the 2 girls in the early hours of the morning while they were asleep, and the prosecution could suggest no motive for this act.

The evidence shows that the appellant looked after his sisters, and was very fond of them.

According to the evidence of the appellant he had taken a bottle of beer and some arrack on the previous night, and had smoked 'ganja' thereafter. One part of his evidence indicates that this smoking had been done some time after midnight.

There is no doubt that ganja is a powerful intoxicant, and may even by itself cause a state of intoxication in which a person may not know the nature of his act, or that what he was doing is wrong or contrary to law.

The evidence of Dr. Sittampalam, Psychiatrist, on this point is as follows :—

"*To Court :*

Q. What do you understand by intoxication ?

A. The state that is produced in the mind by drugs.

Examination contd. :

Q. Poisoning by alcohol ?

A. That is one form of intoxication.

Q. Alcoholism is a form of narcotic poisoning ?

A. Yes.

Q. Ganja is also a narcotic ?

A. Yes.

Q. Can acute confusional insanity arise from the effect of ganja smoking ?

A. Yes, sometimes."

So that the question of intoxication arose on the evidence in this case. Unfortunately the Doctor had been questioned at length as to whether on the evidence available, the appellant was of *unsound mind*, at the time he committed the act, and the Doctor expressed the opinion that he probably was not. But, his opinion was not clearly sought on the question of intoxication. According to the evidence, the appellant had, immediately after he fired the shot, said, "I have shot", and again, "Have I shot ?". The Doctor's evidence when these facts were placed before him is of significance and is as follows :—

"Q. The 3rd factor is that having shot the children he first said "I have shot" and later said "Have I shot ?".

A. It indicates a certain doubt and that there wasn't full awareness. There seems to have been some doubt whether he had done it or not and that is in keeping with a confusional state".

The learned Judge, in his charge to the Jury dealt with the medical evidence in so far as it related to insanity and unsoundness of mind. But, when he came to the question of *intoxication*, he always told the Jury that there must be evidence that the accused was *drunk*; for example, the learned Judge said :—

> " If you hold that at the time he fired the gun, he was so drunk —not merely drunk, but so drunk—as to have been incapable of forming a murderous intention, imputing to a drunken man the knowledge of a sober man, you can only reduce the offence that far and no more. "

And again —

> " You will remember that I told you, gentlemen, that intoxication may reduce the offence of murder to one of culpable homicide not amounting to murder , , , , , , , You must have evidence that at the time he fired he was so drunk that he was incapable of forming a murderous intention. "

A little later he said :—

> " . . . . . if you take the view that at 6 o'clock that morning he was so *drunk* as to be incapable of forming a murderous intention, then the offence of murder will be reduced from murder to one of culpable homicide not amounting to murder. "
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> " . . . . . the D.R.O. says that he was not smelling of alcohol . . . . . The question is, was he drunk and not only was he drunk, was he so drunk as to be incapable of having a murderous intention when he used that gun. I will put it in a different way : was he so drunk that he was incapable of intending death ".

Just before he concluded his charge, the learned Judge said :—

> " First you have to ask yourselves—was he drunk that morning—if he was drunk, was he so drunk as to be incapable of forming a murderous intention. "

The Jury were therefore repeatedly told that the accused must be drunk in order to reduce the offence to culpable homicide not amounting to murder. They were not directed to consider whether a state of intoxication might have resulted from the smoking of ganja.

A lay jury may very well have thought that the law recognised only " drunkenness " resulting from the intake of an excess of alcoholic liquor as an extenuating factor. Had they been correctly directed on this point, it is impossible to say, on the facts of this case, that they would have found the appellant guilty on the capital charge.

We therefore altered the conviction to one of culpable homicide not amounting to murder, and sentenced the appellant to ten (10) years' rigorous imprisonment on each count, the sentences to run concurrently.

Conviction altered.