JAYATHILAKE
v.
THE ATTORNEY-GENERAL

COURT OF APPEAL
FERNANDO, J. AND
EDIRISURIYA, J.
CA 8/2000
HC ANURADHAPURA 178/99
OCTOBER 4, 2001, JANUARY 10,2002,
FEBRUARY 21, 2002, JUNE 12, 2002
SEPTEMBER 9, 2002
NOVEMBER 11, 2002 AND
FEBRUARY 17 AND 18, 2003

Penal Code, sections 78, 79 and 296 – Murder – Guilty – Defence of intoxication not taken up – Reducing offence of murder to culpable homicide not amounting to murder – Defence arises on evidence – Duty of jury to consider voluntary intoxication and involuntary intoxication – What is the degree of intoxication referred to in section 78?

Held:

(i) Through the accused has not taken up the defence of intoxication if such defence arises on the evidence. It is the duty of the jury to consider same.

(ii) In cases of involuntary intoxication the test is the same as that applicable to insanity, namely, that the degree of intoxication is such that, the accused was totally deprived of capacity to apprehend the nature of the act or its wrongful or illegal character. The section dealing with voluntary intoxication is of wider scope in that the effect of the provision is not confined to intoxication in this degree, but applies to all cases of self-induced intoxication in any degree so long as the offence specifies some definite knowledge or intent as an essential ingredient.

Per Edirisuriya J.

> "The learned trial judge has not directed the jury that the intoxication necessary to reduce an offence from murder to culpable homicide not amounting to murder on the ground of absence of murderous intention need not necessarily be the degree of intoxication referred to in section 78 of the Penal Code. He has also failed to direct the jury to the effect of section 79....."

APPEAL from the judgment of the High Court of Anuradhapura.

Cases referred to:

1. *King v. Rengasamy*, - 25 NLR 438 at p. 444
2. *King v. Marshall Appuhamy*, - 51 NLR 140 at 144, 142

Ranjit Abeysuriya, PC with *S. Gunaratne* and *Thanoja Rodrigo* for accused appellant.

P.G. Dep. PC Additional Solicitor - General with *Anoopa de Silva*,. State Counsel for respondent

Cur.adv.vult.

April 04, 2003

EDIRISURIYA, J.

The first and the second accused in this case were indicted for having committed the murder of one Rankoth Pedige Wijeratne an offence punishable under section 296 of the Penal Code. The

accused having pleaded not guilty to the charge were tried by a jury before the High Court Judge of Anuradhapura.

On an application made by the Learned State Counsel the learned trial judge directed the jury to acquit the second accused. Accordingly the jury by unanimous decision acquitted the second accused. After trial the jury by unanimous verdict found the first accused guilty of murder.

The only eye witness in this case Ranhawadi Durayalage Jayatissa giving evidence said that on 1992.12.07 the first accused, the second accused and he drank Kasippu around 8.00 p.m. at his grandmother's house. Thereafter on a request made by the first accused all three of them went to the house of the first accused and had dinner. At that stage the first accused had suggested that they should rob "Gini Damana Mudalali's boutique. The witness and the second accused had agreed to this proposal. Thereafter they had proceeded to the canal. The witness said that he carried his rifle when they went to this place.

At this place according to the witness they drank another half a bottle of arrack which they carried with them. The first accused had taken the rifle which witness had kept on the canal bund. The witness said thereafter all three of them went towards 'Wijemudalali's boutique. When they reached this boutique it was around 9.30 p.m. Since the first accused was drunk he knocked against the barbed wire which, was in the boutique. Thereafter Wijemudalali opened the kitchen door and came out aiming the torch. The first accused had ordered Wijemudalali not to come forward.

However Wijemudalali came forward disregarding the order given by the accused. He was smiling when he came. At that stage the first accused shot Wijemudalali on the chest. Thereafter the Mudalali fell on the ground crying "**මුදු අම්මෝ**". At this stage the second accused was standing close to the first accused. The witness said the 2nd accused did not do anything. After the shooting the second accused and the witness ran away. The first accused had threatened them uttering the words **කොහි දෙන්නට වෙඩි තියනවා දුවන්න එපා**". Thereafter he said they stopped running. Thereafter the first accused had said "**ආපු වැඩේ හරි නැහැ අපි මොනව හරි කරමු**". This meant

that what they came for did not materialise and that they should do something. When they were coming back the witness had taken the rifle from the first accused's hand. Since the first accused wanted him not to tell anyone about the incident the witness said he did not make a complaint to the Police at that stage. The first accused was taken tinto custody by the Police at that stage. The first accused was taken into custody by the Police after two years and one month. Only after the 1st accused was taken into custody that the witness made a statement to the Police.The witness himself was charged in the Magistrate's Court in this connection. Subsequently he was discharged.

The learned trial judge has correctly directed the jury that even though the accused has not taken up the defence of intoxication if such defence arises on the evidence it is the duty of the jury to consider the same. Sections 78 and 79 in the Penal Code which, deal with the question of intoxication was explained to the jury.

He had told the jury thus; "ඔහු මත් කරනු ලැබූ දෙය ඔහුගේ කැමැත්තට විරුද්ධව දෙනු ලබන නොවන අවස්ථාවක මෙම මත් වීම හේතු කොට ගෙන මෙම පුද්ගලයාට මිනී මැරීමේ චේතනාවක් ඇතිකර ගන්න බැරි මට්ටමට බීලා කියලා තමුන්නාන්සේලාට පෙනී යනවා නම් ඒ අවස්ථාවේදී ඔහු නොබීපු අවස්ථාවේ දී තිබුන දැනුම ඔහුට ආරෝපණය කර දඬුවම් කරන්න ඕන.". The learned trial judge has told the jury that when they consider the defence of intoxication they must examine whether the accused was intoxicated to the extent that he was unable to form a murderous intention. Professor G.L Pieris says that an obvious difference between the scope of the two sections relates to the degree of intoxication contemplated in each case. In cases of involuntary intoxication the test is the same as that applicable to insanity, namely, that the degree of intoxication was such that the accused was totally deprived of capacity to apprehend the nature of the act, or its wrongful or illegal character. The section dealing with voluntary intoxication is of wider scope in this respect, in that the effect of the provision is not confined to intoxication in this degree but applies to all cases of self-induced intoxication in any degree, so long as the offence in question specifies some definite knowledge or intent as an essential ingredient. (*General Principles of Criminal Liability in Ceylon* pg.184 and pg. 185)

In *Rengasamy*(1) at 444 the same principle has been recognized.

In *The King V. Marshall Appuhamy* (2) at 141,the jury had to consider (a) whether the appellant was so intoxicated as to be unable to form a murderous intention (b) whether he was so provoked as to be deprived of his self control (c) whether owing to some intoxication his faculties were so impaired that he was liable to be provoked more easily than when he was sober.

On the question of intoxication which, the jury had to consider under (a) and (c) above the only direction given by the learned trial judge was as follows:

1. Now Gentlemen intoxication to be an excuse in law for an offence must be intoxication which, is administered by another. In no case does intoxication which, is self induced - I mean that if a man takes drinks himself he cannot make that the occasion or excuse for an offence; it is only when drink is administered to a man without his knowledge or against his will and he commits an offence that is an excuse.
2. Learned counsel would have you take it that the intoxcation of this man was such as to provoke him more than a reasonable man. That state of intoxication that amount of intoxication is not taken into account by the law.
3. For intoxication to excuse a man apart from the circumstances I have already mentioned, it must be of such a degree as to deprive a man of any kind of intention. For instance, to be excused, a man must be intoxicated to that degree when he does not see the difference between a human being and a log of wood.
4. Now on the evidence of the prisoner himself he was not intoxicated because he rode four miles, he went to his friend he spoke to him, he returned his bicycle, he went to the boutique, lit a cigarette and had a chat so that in law the fact that the accused took two bottles of toddy and, shortly after a third is not sufficient to excuse him of any offence or to reduce the offence of culpable homicide not amounting to murder.

Delivering the judgement in this case Wijewadane C.J. With Nagalingm J and Gratiaen J agreeing states that "in paragraph 2 the Judge appears to have expressed himself in such a way as to give the impression to the jury that any intoxication falling short of the degree of intoxication contemplated by section 78 of the Penal Code should not be considered in dealing with the question whether a man's susceptibility to provocation was effected by intoxication. None of the above paragraphs 1 to 4 would have indicated to the jury that the intoxication necessary to reduce an offence from murder to culpable homicide not amounting to murder on the ground of absence of murderous intention need not necessarily be the degree of intoxication referred to in section 78 of the Penal Code (vide *King* v *Rengasamy. [supra]*)

In the instant case the learned trial judge has not directed the jury that the intoxication necessary to reduce an offence from murder to culpable homicide not amounting to murder on the ground of absence of murderous intention need not necessarily be the degree of intoxication referred to in section 78 of the Penal Code. He had failed to direct the jury that the effect of section 79 applies to all cases of self-induced intoxication in any degree when the offence in question specified some definite knowledge or intent as an essential ingredient.

Had the learned trial judge done so, on the evidence led at the trial the jury would well have brought in a verdict that the accused is guilty of culpable homicide not amounting to murder on the basis of knowledge. This clearly is a non-direction in law which, amounts to a misdirection in law.

In the circumstances I set aside the conviction for murder entered against the accused-appellant and substitute therefor a conviction for culpable homicide not amounting to murder on the basis of knowledge. I set aside the sentence of death imposed on the accused. Accordingly I impose a term of 10 years' rigorous imprisonment on the accused-appellant.

FERNANDO. J - I agree

Appeal allowed; sentence varied.