DAYARATNE
v.
THE REPUBLIC OF SRI LANKA

COURT OF APPEAL,
S. N. SILVA, J. and W. N. D. PERERA, J.
C. A. No. 469/87,
H. C. KALUTARA No. 828,
M. C. KALUTARA No. 58031,
FEBRUARY 07 and 08, 1990.

Criminal Law – Murder charge – Plea of voluntary intoxication – Section 79 of the Penal Code – Section 294 of the Penal Code – Proviso to S. 334(1) of the Code of Criminal Procedure Act.

(1) In regard to offences where knowledge is an essential ingredient, intoxication of whatever degree has no impact on the liability of the accused since Section 79 of the Penal Code imputes to him the knowledge of the sober man. In cases where intention is an essential ingredient of the offence the section does not impute to the accused any state of knowledge. It leaves the matter open for the application of the ordinary law. The basic premise of liability under our criminal law is that a man is presumed to intend the natural consequences of his act. This, however, is a rebuttable presumption. Therefore an accused who seeks to set up a plea of voluntary intoxication has to, on the evidence, rebut the application of that presumption?

In relation to the offence of murder the requisite intention is defined in the first, second and third limbs of S. 294 of the Penal Code. Such intention is generally described as "murderous intention". An accused who sets up a plea of voluntary intoxication in a charge of murder has to prove on a balance of probability, as in the case of any other general or special exception, that at the material time, due to his state of intoxication he did not have the capacity to form a murderous intention. This plea, postulates a high level of intoxication. The accused has to establish that at the material time, his state of intoxication was such that he did not know what he was about or that he imagined the act to be something contrary to its true nature. To draw from the examples given in the cases cited, that he imagined he was striking not a human being but a log or an animal. If the accused succeeds in proving that at the material time he did not have the capacity to form a murderous intention, the provisions of Section 79 will apply and he would be imputed the knowledge of a sober man, resulting in a conviction for the offence of culpable homicide.

(2) Evidence of intoxication falling short of a point where the accused succeeds in establishing that he did not have the capacity to form a murderous intention, may be taken into account in considering whether he was more susceptable to provocation, in relation to the special exception of grave and sudden provocation.

(3) Even if there be a misdirection in the failure to direct the jury on the question of voluntary intoxication, this is a proper case to apply the proviso to subsection (1) of S. 334 of the Code of Criminal Procedure Act. If the jury were properly directed on the mitigatory plea of intoxication they would "inevitably and without doubt have returned the same verdict".

Cases referred to :

(1) *The King v. Rengasamy 25 NLR 438. 445*
(2) *The King v. Velaiden 48 NLR 409*
(3) *The King v. Punchi Banda 48 NLR 313*
(4) *Ratnayake v. The Queen 73 NLR 487*
(5) *Basdev v. State of Pepsu AIR 1956 SC 488, 490*
(6) *D. P. P. v. Beard 1920 AC 479*
(7) *Sheehan and Moore (1975) 60 Cr. App. Rep. 308*
(8) *Clifford Patrick Garlick (1981) 72 Cr. App. Rep. 291*
(9) *The King v. Marshall Appuhamy 51 NLR 140*
(10) *The Queen v. Ekanayake 71 NLR 346*
(11) *Thangavelu v. The Queen 74 NLR 512*
(12) *Mannar Mannan v. The Republic of Sri Lanka 1990 1 Sri LR 280*

APPEAL from judgment of the High Court of Kalutara

Ranjith Abeysuriya, P C with *Shiromi Seneviratne, Chandana Prematilake* and *Dammika Ganepola* for accused-appellant.

C. R. de Silva, Senior State Counsel for Attorney-General.

Cur. adv vult

March 14, 1990

S. N. SILVA, J.

The accused-appellant was indicted before the High Court of Kalutara with having committed the murder of one Gamage Peter on 14.11.1984, an offence punishable under Section 296 of the Penal Code. He pleaded not guilty to the charge and after trial the Jury by their unanimous verdict returned on 19.11.1987 found the accused-appellant guilty of having committed the offence of murder. Thereupon the learned High Court Judge of Kalutara entered a conviction against the accused-appellant and sentenced him to death. This appeal has been filed against the said conviction and sentence.

The case for the prosecution rests mainly on the evidence of an eye-witness named Thotamunagamuwage Richard. He stated that on 14.11.1984 he went to the boutique of one Edin Mudalali situated at a place called the Bombuwala Town. At about 7 p.m. when he was in this boutique he saw the deceased coming to the outer area of the boutique. At that stage he saw the Accused-Appellant emerge from the gap between that boutique and the next building which houses the Co-operative Society Stores and attack the deceased with a wooden bar The first blow struck the deceased on the head. Thereupon the

deceased fell down and the Accused-appellant went on striking the fallen man. The witness then appealed to the Accused-appellant not to hit the deceased. The Accused-appellant responded by saying "I have killed this man and I will kill you as well". The witness got alarmed at this stage and ran to the office of the Grama Sevaka. The Grama Sevaka W. Somasiri stated in evidence that at about 7.10 p.m. the eye-witness informed him that the Accused-appellant had attacked the deceased and that the latter was lying injured at the Bombuwala Town. He recorded the statement of the witness, which was produced in evidence and, went to the place of incident. There, he questioned the deceased as to the identity of the person who attacked. The deceased looked at him and uttered the name 'Nimale' being a reference to the Accused-appellant. The Accused-appellant was arrested by witness Wilson Wickramaratne, sub-Inspector of Police at about 4.45 a.m., on the morning of the 15th. The police officer also found the pieces of a wooden door bar near the place where the witness stated that the Accused-appellant attacked the deceased. It was the evidence of the eye-witness that this wooden bar broke as a result of the attack. The police also found blood stains at the place where the deceased fell as a result of the injuries suffered by him.

According to the medical evidence the deceased had 26 external injuries. Many of them were lacerated injuries in the region of the head and the face. He also had two fractures of the skull bone in the left frontal area, left parietal area, and one fracture on the back of the head. The cause of death was stated as injuries to the brain with fractures of the skull bone. According to the medical evidence these injuries could have been inflicted with a blunt weapon.

The accused-appellant did not give evidence. He made a statement from the dock, in which he admitted having inflicted the injuries on the deceased with a wooden club. According to the dock statement, when he was about to make the purchases in the boutique, the deceased came from behind armed with a knife and theatened to stab him. At that stage he jumped over certain receptacles that were in the boutique and ran to the rear of the premises. Since there was a barbed wire fence in the rear, he armed himself with a club and walked to the front through the gap between the boutique and the Co-operative Stores. At that stage the deceased saw him and attempted to stab him. Thereupon he struck the deceased several blows with the club. The defence called two

witnesses. They are Lal Jayawardena who was working in the boutique at which this incident took place and K. D. Sirisena, the owner of the boutique. According to witness Jayawardena the accused-appellant came to the boutique and asked for certain items. When he was weighing these items he suddenly found that the accused-appellant was missing. Thereafter he saw the accused-appellant coming from the gap between the boutique and the Co-operative Stores and strike the deceased with the wooden bar. In answer to a specific question he stated that he did not see the deceased armed with any weapon or attempting to attack the accused-appellant. Thus it is seen that the version of the accused-appellant has been departed from by his own witness whose evidence is more in line with the evidence of the prosecution witness. It appears that witness Sirisena had not seen the incident. The learned trial Judge in his charge to the jury invited them to consider the general exception of self defence and the special exceptions of grave and sudden provocation and of a sudden fight. It is clear from the verdict of the jury that they have rejected any plea based on these exceptions.

Mr. Ranjith Abeysuriya, P. C., who appears for the accused-appellant submitted that he had no complaint to make with regard to the summing up in relation to the general exception of self defence and the special exceptions of grave and sudden provocation and of a sudden fight. The only ground urged by him was that the learned trial Judge failed to direct the jury on the plea of voluntary intoxication.

It was submitted that there is evidence of intoxication and that it was a question of fact for the jury to decide, guided by a proper direction on the law, whether the offence should be reduced to one of culpable homicide on this basis. This court cannot with certainity conclude that the jury would have inevitably rejected this plea if there had been such a direction. Learned President's Counsel relied on two decisions of the Court of Criminal Appeal, referred to below, in which he submitted, that based upon a similar non-direction the Supreme Court reduced the offence to one of culpable homicide. He urged that the conviction in this case too be reduced to one of culpable homicide.

Learned Senior State Counsel conceded that there was no direction in the summing up with regard to the question of voluntary intoxication He submitted relying on the judgments referred to below, that this plea

can be supported only on evidence that the accused-appellant had reached a high degree of intoxication at the time the act was committed and that the burden of establishing this matter, on a balance of probability was on the defence. It was submitted that there is no evidence in the case that could possibly establish that the accused-appellant was at the time he committed the offence, by reason of intoxication incapable of forming a murderous intention. Therefore, even if there be a mis-direction in the summing up, the court should act on the proviso to Sub-section (1) of Section 334 of the Code of Criminal Procedure Act, No. 15 of 1979 and dismiss the appeal.

The submissions of Counsel necessarily lead us to a consideration of the law relating to the aspect of voluntary intoxication.

Voluntary intoxication in relation to criminal liability is dealt with in Section 79 of the Penal Code which appears in chapter IV headed "General Exceptions". This section reads as follows :

79 : "In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated : unless the thing which intoxicated him was administered to him without his knowledge or against his will."

it is seen from the words, that this section does not expressly negative criminal liability as in the case of other sections dealing with general exceptions. *In The King v. Rengasamy*[1] *Bertram C.J.*, observed that the section is intended to deal with two categories of cases–

(1) cases in which knowledge is an essential element of the crime, and

(2) cases in which intention is an essential element of the crime.

In regard to the first category of cases the section specifically imputes to the person who does any act in a state of intoxication, the knowledge of the sober man. The section is silent as to what would happen in regard to the second category of cases, that is, where intention is an essential element of the crime. Bertram, C.J., observed that even in regard to the second category of cases, the section imputes to the person in a state of

intoxication., "the knowledge of the sober man in so far as that knowledge is relevant to his intention". It is stated that "the law does not allow the drunken man to say that owing to his intoxication he did not know that a particular blow or a particular stab with a particular instrument would be likely to cause the death of a human being. But if in fact the degree of intoxication was such that the man imagined that what he was striking was not a man but a log, proof of this circumstance would not be excluded. On the contrary, it would be the very strongest evidence that the man had formed no murderous intention" (page 445). However, his Lordship expressed a reservation that the imputation of an artificial knowledge would not irresistibly lead to an imputation of an artificial intention.

The observations of Bertram, C.J., with regard to the second category of cases, that is where intention is an essential element of the crime, do not appear to have been followed or endorsed in their entirety in any of the later cases that deal with this subject. The observations as to the imputation of knowledge in relation to this category of cases as well, seem to involve a complex process. In *The King v. Velaiden*[2] being a case heard by five Judges, Howard, C.J., adopted a slightly different approach with regard to this category of cases, without expressly dissenting from the observations of Bertram, C.J. Howard, C.J., rendered an interpretation to section 79, on this aspect, which is based mainly on a plain reading of its words. It was observed that the section is silent as to what would happen in cases where intention is an essential ingredient of the crime. Therefore the principle postulated in the section in relation to cases where knowledge is an essential ingredient, that is the imputation of the knowledge of the sober man should not apply to such cases. On this basis it was concluded that in cases where intention is an essential ingredient of the crime the ordinary law would apply. The consequences of this conclusion are two-fold :

(*a*) the maxim that a person intends the ordinary and natural consequences of his act will apply in relation to a person who does an act in a state of intoxication, where intention is an essential ingredient of the offence, and

(*b*) it may be established on evidence that the maxim does not apply because at the time the act was committed the person was incapable of forming the requisite intention due to his state of intoxication.

When the foregoing consequences are related to the question of burden of proof, it is clear, that the prosecutor can rely on the consequences stated in (*a*) above with regard to the proof of intention. As regards (*b*), it was held in the case of *The King v. Velaiden (Supra)* over-ruling a previous decision in *the King v. Punchi Banda*[3] that the burden of establishing this matter is on the accused as in any other general or special exception. Howard, C. J., held as follows: (pg. 419)

> "The authorities cited whether from Ceylon, England, India or South Africa have satisfied us that the burden of proof in a case of murder in which the defence of drunkenness is put forward rests on the accused who must prove that by reason of intoxication there was an incapacity to form the intention necessary to commit the crime. Evidence of drunkenness falling short of this and merely establishing that the mind of the accused was affected by drink so that he more readily gave way to some violent passion does not rebut the presumption that the man intended the natural consequences of his act".

Levels of intoxication can vary from a state of mere exhilaration down to a state of unconsciousness. The observations of Bertram, C.J., suggest that in order to negative intention it has to be established that the accused was in a state of delusion, where he "imagined that what he was striking was not a man but a log". The observations of Howard, C.J., also show that "merely establishing that the mind of the accused was affected by drink so that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his act". In the case of *Ratnayake v. the Queen*[4] the Court of Criminal Appeal considered the propriety of a summing up of a learned Commissioner of assize who stated as follows :

> "So, if you are certain on a balance of probability that the accused was so drunk, then you will go to consider what is the evidence of drunkenness ; what is the degree of drunkenness of the accused ; was he so drunk that he would not be able to form an intention ; was he so drunk that when he stabbed these two people he did not know that he was stabbing human beings ? Then did he think that he was stabbing two animals ? Was that his state of drunkenness ?"

It was held by the Court that this summing up on the whole was proper.

The corresponding provision in the Indian Penal Code is Section 86 which is identically worded as Section 79 quoted above. In the case of *Basdev v. State of Pepsu*[5] the Supreme Court of India considered a plea of voluntary intoxication based on this section in a charge of murder. According to the facts, the accused, a retired military officer was convicted of the murder of boy of the age of about 15 or 16 years. The incident took place at a wedding in the village. The evidence was that he was "excessively drunk" and that he staggered and his speech was incoherent, at times. He requested the deceased to move aside a little so that he may occupy a convenient seat. When the boy did not move the accused whipped out a pistol and shot him in the abdomen. The Supreme Court noted that although there was evidence that the accused was "very drunk" there was also evidence that he came there by himself and that he selected his own seat. He also made some attempts to get away after the shooting. On these facts the coviction for murder was upheld. The Court exhaustively dealt with the application of Section 86 in relation to offences where intention is an essential ingredient of the offence and several extracts of the judgment are cited in Gour's Penal Law of India 1982, 10th Edition, P. 718, 719).

With regard to this category of cases Chandrasekhara Aiyar, J., made the following observations in the judgment (at page 490) :

> "But so far as intent or intention is concerned, we must gather it from the attending general circumstances of the case paying due regard to the degree of intoxication. Was the man beside his mind altogether for the time being ?
>
> If so it would not be possible to fix him with the requisite intention. But if he had not gone so deep in drinking, and from the facts it could be found that he knew what he was about, we can apply the rule that a man is presumed to intend the natural consequences of his act or acts."

The case law both here and in India seems to have been influenced to a great extent by the leading case of *D. P. P. v. Beard*[6]. However, subsequently, in England the statutory position was altered by the enactment of Section 8 of the Criminal Justice Act of 1967, in terms of which a person is no longer presumed to intend or foresee the natural and probable consequences of his act. In those circumstances it would not be possible to advert to the more recent judgments in England dealing with the question of voluntary intoxication. I refer in this context

to the decisions of the Court of Appeal in the cases of *Sheehan and Moore*[7] and *Clifford Patrick Garlic*[8].

In considering the provisions of Section 79 with regard to voluntary intoxication in the light of the case law here and in India it is clear that the legal position is as follows :

> In regard to offences where knowledge is an essential ingredient, intoxication of whatever degree has no impact on the liability of the accused since the section imputes to him the knowledge of the sober man. In cases where intention is an essential ingredient of the offence the section does not impute to the accused any state of knowledge. It leaves the matter open for the application of the ordinary law. The basic premise of liability under our criminal law is that a man is presumed to intend the natural consequences of his act. This, however, is a rebuttable presumption. Therefore an accused who seeks to set up a plea of voluntary intoxication has to, on the evidence, rebut the application of that presumption. In relation to the offence of murder the requisite intention is defined in the first, second and third limbs of Section 294 of the Penal Code. Such intention is generally described as "murderous intention". An accused who sets up a plea of voluntary intoxication, in a charge of murder has to prove on a balance of probability, as in the case of any other general or special exception, that at the material time, due to his state of intoxication he did not have the capacity to form a murderous intention. This plea, in our view, postulates a high level of intoxication. The accused has to establish that at the material time, his state of intoxication was such that he did not know what he was about or that he imagined the act to be something contrary to its true nature. To draw from the examples given in the judgments cited above, that he imagined he was striking not a human being but a log or an animal. If the accused succeeds in proving that at the material time he did not have the capacity to form a murderous intention, the provisions of Section 79 will apply and he would be imputed the knowledge of a sober man, resulting in a conviction for the offence of culpable homicide.

Evidence of intoxication falling short of a point where the accused succeeds in establishing that he did not have the capacity to form a murderous intention, may be taken into account in considering whether he was more susceptible to provocation, in relation to the special exception of grave and sudden provocation. (*Vide The King v. Marshall*

Appuhamy[9]. In this case, learned President's Counsel did not urge that there was a mis-direction on the part of the learned trial Judge in failing to address the jury properly on the special exception of grave and sudden provocation. In any event a submission on that basis would not have helped the accused-appellant since the jury by their verdict clearly rejected the factual basis of the plea of grave and sudden provocation.

Mr. Abeysuriya, P. C., relied on the following items of evidence to support the plea of intoxication :

(1) a sentence in the dock statement of the accused-appellant where he stated that he was after liquor at the time of the incident ;

(2) another sentence in the dock statement where it is stated that he realised that he was without a sarong and a shirt when he went home ;

(3) the evidence of the Sub-Inspector of Police, who arrested the accused-appellant at his house at 4.45 a. m. the next morning, that at the time of the arrest the accused-appellant had mud patches on his hands and legs ; and

(4) the evidence of this officer that when he questioned the accused-appellant the latter behaved in an excited manner as if he were a mad man.

In answer to a specific question he stated that he drew the inference that the accused-appellant was after liquor.

On the other hand, learned Senior State Counsel submitted that the witnesses too both of the prosecution and the defence gave specific evidence with regard to the conduct of the accused-appellant attributing specific acts to him. They had not observed the accused-appellant staggering or behaving in any other manner suggestive of a high level of intoxication.

The eye-witness in his evidence specifically stated that the accused-appellant emerged from the gap between the boutique and the Co operative Stores and dealt blows on the deceased. It is clear from the medical evidence that these blows have been well aimed in that they

have all alighted in the region of the head, the face and the upper part of the body. In response to an intervention by the eye-witness the accused-appellant stated that he has killed one man and that he would kill another as well. Therefore in our view it is clear that the accused-appellant was fully aware of what he was doing and it could not be concluded that he was in such a state where he was incapable of forming a murderous intention.

In the cases of *The Queen v. Ekanayake*[10] and *Thangavelu v. The Queen*[11] relied upon by learned President's Counsel the Court of Criminal Appeal set aside convictions for the offence of murder and substituted in their place convictions for the offence of culpable homicide on the basis that there had been mis-directions on the question of voluntary intoxication. It is clear from the judgments in these cases that there was substantial evidence of intoxication established on the facts. In this context the Court did not go into the legal aspects of voluntary intoxication, fully. The cases have been decided on the facts and the accused-appellants were imposed the maximum sentences they were liable to for the offence of culpable homicide based on knowledge. These judgments do not in our view constitute a basis to uphold the submission of learned President's Counsel.

In these circumstances we are inclined to agree with the submission of the learned Senior State Counsel that even if there be a mis-direction in the failure to direct the jury on the question of voluntary intoxication, this is a proper case on the evidence to apply the proviso to sub-section (1) of Section 334 of the Code of Criminal Procedure Act No. 15 of 1979. On the evidence referred above we are of the view that if the jury were properly directed on the mitigatory plea of voluntary intoxication they would "inevitably and without doubt have returned the same verdict" (*vide* dicta of G. P. S. de Silva, J., in the case of *Mannar Mannan v. The Republic of Sri Lanka*[12] on the application of the proviso to Section 334(1) of the Code of Criminal Procedure Act.) We accordingly affirm the conviction and the sentence of death that has been imposed and dismiss the appeal of the accused-appellant.

W. N. D. Perera, J.– I agree.

Appeal dismissed.

Conviction and sentence affirmed.