

**ABEY MUDALALI
VS
ATTORNEY – GENERAL**

COURT OF APPEAL
BALAPATABENDI, J.
SISIRA DE ABREW, J.
C. A. 13/2003
H. C. BADULLA 62/97
MAY 31, 2005
JUNE 17, 2005
JULY 25, 2005

Penal Code – Section 77, 78, 79, 296 – Benefit under section 79 – Plea of drunkenness – State of Intoxication – Murderous intention ? – Reduction to culpable homicide not amounting to murder – Grave and sudden provocation – Dock Statement – Evidence Ordinance – Section 105 – Applicability.

The appellant stood trial on two counts of murder and was convicted on both counts and sentenced to death.

The appellant sought to reduce the conviction for murder to culpable homicide not amounting to murder on the ground of drunkenness raised in the Dock Statement.

HELD:

- (i) In a case of murder when the defence of drunkenness is put forward the burden is on the accused to prove that by reason of the intoxication that there was an incapacity to form the intention. The evidence suggests that the accused was not in a state of intoxication at the time he attacked the deceased. Thus the appellant is not entitled to the benefit under section 79.

Per Sisira de Abrew J.

"In a case of murder, if an accused person raises the plea of drunkenness under section 79, the burden is on the accused to prove on a balance of probability that he had reached the state of intoxication in which he could not have formed a murderous intention at the time of alleged act was done."

- (ii) When the evidence is evaluated, the question of grave and sudden provocation does not arise.

APPEAL from the judgment of the High Court of Badulla.

CASES REFERRED TO :

1. *King vs. Velaiden*, 48 NLR 409 (DB)
2. *Ratnayake vs. Queen*, 73 NLR 481

Dr. Ranjith Fernando for accused appellant

Yasantha Kodagoda, Senior State Counsel for Attorney-General

Cur.adv.vult.

22.09.2005

SISIRA DE ABREW, J.

The appellant, in this case, stood his trial at the High Court of Badulla on two counts of murder and was convicted on both counts. The appellant was sentenced to death. This appeal is against the said convictions and the sentences.

According to the version for the prosecution, about 6.00 p. m. on 7th February 1990 the appellant and the deceased Bandara Manika, the wife of the appellant, were seen coming to the compound of Loku Manika the mother-in-law of the appellant. At this time the appellant was assaulting his-wife with his hands. Upon witness Nilupa Priyadarshani, the daughter of the appellant, informing Loku Manika of the incident Loku Manika rushed out of the house and asked the appellant as to why he was assaulting Bandara Manika. Since the appellant did not respond, Loku Manika accompanied Bandara Manika into the Kitchen. About 15 minutes later the appellant came into the kitchen, took a pestle and assaulted both Bandara Manika and Loku Manika with the pestle. The blows alighted on their heads. Loku Manika, at this time, was bending and attempting to light the lamp, usually kept in the kitchen. Nilupa and Inoka, in fear of being assaulted, ran away from the house.

The main ground urged on behalf of the appellant was that the convictions for murder should be reduced to culpable homicide not amounting to murder on the ground of drunkenness raised in the dock statement. Learned Counsel urged that the appellant was entitled to the benefit of section 79 of the Penal Code which reads as follows. "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 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."

To give the benefit under section 79 of the Penal Code the fact that "the accused did the act in a state of intoxication must be proved". It is necessary to consider who should prove it and to what degree it should be proved. In this connection it is pertinent to consider certain decisions of the Court of Criminal Appeal. In the case of *King Vs Velaiden*⁽¹⁾ Howard CJ (Soertsz J, Jayatilaka J, Dias J, and Windham J agreeing) held that "where in a case of murder the defence of drunkenness is put forward the burden is on the accused to prove that by reason of the intoxication there was an incapacity to form the intention necessary to commit the crime."

In the case of *Ratnayake vs. Queen*⁽²⁾ Sirimana J (Samarawickrama J and Weeramanthy J concurring) held as follows. "For the purpose of section 79 of the Penal Code the state of intoxication in which a person should be is one in which he is incapable of forming a murderous intention; and whether he has reached the state of intoxication or not is a question of fact for the jury to determine depending on the evidence in each case; and it is for the person who raises the plea of drunkenness to establish on a balance of probability that he had reached the state of intoxication in which he could not have formed a murderous intention." It is pertinent in this regard to consider section 105 of the Evidence Ordinance which reads as follows. "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or any other law defining the offence, is upon him, and the court shall presume the absence of such circumstances." Illustration (a) to the above section reads as follows. "A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act. The burden of proof is on A."

Having considered the principles laid down in the above cases and section 105 of the Evidence Ordinance, I hold that in a case of murder, if an accused person raises the plea of drunkenness under section 79 of the Penal Code, the burden is on the accused person to prove on a balance of probability that he had reached the state of intoxication in which he could

not have formed a murderous intention at the time the alleged act was done. If an accused person raises a plea of drunkenness under section 78 of the Penal Code it is for the accused person to prove on a balance of probability that by reason of intoxication there was an incapacity to form the intention necessary to commit the crime. Learned Counsel for the appellant at the hearing of this appeal submitted that he would not claim relief under sections 77 and 78 of the Penal Code. It is necessary to consider whether the appellant, in the present case, was in a state of intoxication at the time the alleged act was committed, since the counsel for the appellant raised the plea of drunkenness under section 79 of the Penal Code. The appellant in his dock statement stated that on the day in question he came home severely drunk and fought with his wife.

Loku Manika and Bandara Manika were killed in Loku Manika's house which was half a mile away from the appellant's house. Soon before the incident the appellant and his wife came to the compound of Loku Manika. The appellant at this time was assaulting his wife with his hands. When Loku Manika made inquiries about the assault inside the kitchen, the appellant said that he would not assault his wife. After the appellant attacked both Bandara Manika and Loku Manika with the pestle he was walking in the direction of Dharmapala's boutique. Dharmapala who, on hearing about the incident, was running to his mother Loku Manika's house, met the appellant who addressed him in the following language. "I gave work to your mother and sister, go and see." This statement of the appellant clearly shows that he was conscious of what he had done. Dharmapala did not say that the appellant was drunk. Inoka and Nilupa who saw their mother being attacked by the appellant did not say the appellant was drunk. Although the appellant said that he was drunk on the day of the incident, the above evidence suggests that the appellant was not in a state of intoxication at the time he attacked Bandara Manika and Loku Manika. For the above reasons, I am unable to agree with the contention of the learned Counsel for the appellant. I therefore hold that the appellant is not entitled to the benefit under section 79 of the Penal Code.

The appellant, in his dock statement, stated after he came home he quarreled with his wife who went away leaving two children at home. I will therefore consider whether he was provoked at the time of the incident. The distance between the houses of Loku Manika and the appellant was about half a mile. The appellant attacked both women 15 minutes after he

came to the compound of Loku Manika. When Loku Manika asked the appellant as to why he was assaulting his wife, the appellant said that he would not do so again. When the above items of evidence are taken into account the question of grave and sudden provocation does not arise.

For the reasons set out in my judgment, I see no reason to interfere with the judgment of the learned High Court Judge. I Therefore affirm the convictions and the sentences of the appellant and dismiss the appeal.

BALAPATABANDI J, - I agree,

Appeal dismissed.
