Provided that such notice in writing as the court in each case thinks sufficient has been given to the surety ".

In *Ram Coomar Coondoo v. Chunder Canto Mookerjee*[1] it was held that this section applies to arrest and attachment before judgment and to cases where a plaintiff may be called upon to give security for costs. In the present case no action was pending between the 1st and 2nd respondents at the time the bond was executed by the appellant and section 348 is therefore clearly inapplicable.

I would accordingly allow the appeal. The appellant will be entitled to the costs of appeal and of the inquiry in the Court below.

CANEKERATNE J.—I agree.

Appeal allowed.

[COURT OF CRIMINAL APPEAL]

1949 *Present* : **Wijeyewardene C.J. (President), Nagalingam J. and Gratiaen J.**

THE KING *v.* MARSHALL APPUHAMY

APPEAL NO. 61 WITH APPLICATION NO. 165

S. C. 28—M. C. Negombo, 58,963

Court of Criminal Appeal—Charge of murder—Provocation—Intoxication—Can affect susceptibility to provocation—Misdirection—Penal Code, section 78.

Where the accused, who was indicted for murder, pleaded that his offence should be reduced from murder to culpable homicide not amounting to murder for the reasons that he acted on grave and sudden provocation and that he was so drunk that he was unable to form a murderous intention—

Held, that intoxication which fell short of the degree of intoxication contemplated by section 78 of the Penal Code could be considered in dealing with the question whether a man's susceptibility to provocation was affected by intoxication.

APPEAL, with application for leave to appeal, against a conviction in a trial before a Judge and Jury.

T. B. Dissanayake, for accused appellant.

R. R. Crossette-Thambiah, K.C., Solicitor-General, with *A. C. M. Ameer, Crown Counsel*, for the Crown.

Cur. adv. vult.

[1] *4 Ind. App. at 23.*

December 14, 1949. WIJEYEWARDENE C.J.—

The appellant was found guilty of the murder of a young widow called Elizabeth. It was not disputed that the appellant stabbed Elizabeth and inflicted a number of injuries, one of which was necessarily fatal. The appellant pleaded, however, that he acted on grave and sudden provocation and that he was so drunk that he was unable to form a murderous intention and that, for each of these reasons, his offence was reduced from murder to culpable homicide not amounting to murder.

I shall set out briefly the conflicting versions given by the Crown and the defence as to the circumstances in which the stabbing took place.

According to the Crown, the appellant, a fellow villager of Elizabeth, " was not in the habit of coming " to the house of Elizabeth. On September 17, 1949, the appellant came and spoke to Elizabeth and Elizabeth told her mother that the appellant " suggested to have intercourse with her (Elizabeth) ". Then both Elizabeth and her mother asked the appellant not to come to their house in future. " The appellant went away saying nothing ". On September 19, the appellant came to Elizabeth's house " rushing in like a mad fellow as if he were possessed " and saying, මගේ වැඩේ හරියි (My work is all right). He stabbed Elizabeth. The only motive suggested by Elizabeth's mother for the act of the appellant was his displeasure at being asked on September 17 not to come to her house.

On the other hand, the appellant suggested that Elizabeth used to encourage men to visit her house for immoral purposes. He saw on September 17, one Charles entering Elizabeth's house and said, " you have a new man now ! May I also come ? ". Elizabeth was offended and abused him. There was a report in the village that some stones were thrown at Elizabeth's house that night. On September 19, he left home to visit his mother who was living four miles away. He rode a cycle belonging to one Arthur. He drank two bottles of toddy on his way, took a meal of hoppers at his mother's and, a little later, drank a bottle of " Yakka Ra ". He rode back to Arthur, returned the cycle and was walking homewards when Elizabeth accused him of throwing stones at her house and abused him, saying, " Go and lie with your mother ". He replied, " I did not throw stones at your house ; it must be people who are in the habit of coming to your house ". The abuse went on for a few minutes and then Elizabeth said, " I have never given birth to illegitimate children. It is your wife who has behaved in this manner ". He lost his self control then and stabbed Elizabeth.

On the evidence led in the case 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 (*vide The King v. Punchi Rala* [1] and *Letenock's* case [2]).

[1] *(1924) 25 N. L. R. 458.* [2] *(1917) 12 Criminal Appeal Reports 221.*

On the questions of intoxication which the jury had to consider under (*a*) and (*c*) above, the only direction given by the learned 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 wish and he commits an offence that it is an excuse ".

2. " Learned Counsel would have you take it that the intoxication 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 murder to that of culpable homicide not amounting to murder ".

I have numbered the various paragraphs in the above passage for facility of reference.

In paragraphs 1 and 3 the learned Judge appears to be dealing only with the provisions of section 78 of the Penal Code which enacts :—

" Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law :

Provided that the thing which intoxicated him was administered to him without his knowledge or against his will ".

I do not propose to deal with that statement of the law as we are not concerned with section 78.

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 affected 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 The King v. Rengasamy* [1]).

[1] *(1924) 25 N. L. R. 438 at page 444.*

In dealing with the general plea of provocation the Judge read out to the Jury the provisions of exception 1 to section 294 of the Penal Code and then proceeded to say—

" Provocation must be some kind of passion as will make the person not master of his mind. That is implicit in the words 'deprived of the power of self-control'. He must not know what he is doing, in order to bring the offence of murder down to the offence of culpable homicide not amounting to murder ".

There is no doubt that the sentence in that passage which an ordinary Juror would have most easily understood and remembered was " He must not know what he is doing ". That passage would have given the Jury an incorrect view of the law.

On the question of the relevancy of good character the learned Judge remarked :—

" That is a circumstance which you can take into account but, in this case, it is not necessary to go into that because he had admitted the fact that he stabbed. You have to decide in what circumstances did he stab. Did he have the intention of killing ? If he did what are the circumstances ? "

This is a misdirection. The evidence of good character would have been relevant when the Jury was considering whether the act of stabbing was or was not an unprovoked act.

In no part of the charge has the learned Judge given a direction to the Jury as to the nature of the burden that rested on the defence to prove the facts necessary to support the pleas of intoxication and provocation.

For these reasons we quash the conviction and order a fresh trial.

Fresh trial ordered.

1949 *Present :* **Pulle J.**

MISILIN, Appellant, *and* BABUNHAMY, Respondent.

S. C. 142—C. R. Tangalla, 17,557

Damages—Tort—Defence of bona fides.

Defendant shot plaintiff's trespassing cow in the mistaken belief that it was a wild boar.

Held, that the plaintiff was not entitled to recover damages.

APPEAL from a judgment of the Commissioner of Requests, Tangalla.

Vernon Wijetunge, for plaintiff appellant.

A. K. Premadasa for defendant respondent.

Cur. adv. vult.