[COURT OF CRIMINAL APPEAL]

1968 *Present:* **H. N. G. Fernando, C.J. (President), Sirimane, J., and Samerawickrame, J.**

THE QUEEN *v.* E. M. EKANAYAKE

APPLICATION No. 28 OF 1968

S. C. 11 of 1968—M. C. Kalmunai, 29381

Trial for murder—Evidence that accused was drunk—Degree of intoxication—Question of fact for Jury to decide.

Where, in a prosecution for murder, there is evidence that the accused was drunk when he inflicted the fatal injury on the deceased, a clear direction should be given to the Jury that the question whether the degree of drunkenness was such as to negative murderous intention is a question of fact for them to decide.

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

C. Ganesh (assigned), for the accused-appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Crown.

June 18, 1968. SIRIMANE, J.—

The appellant was indicted on two counts, one of Murder and the other of Attempted Murder.

He was found guilty on the 1st Count and sentenced to death, and on the 2nd count he was found guilty of causing simple hurt (under section 315) and sentenced to 2 years' rigorous imprisonment. The appeal was pressed on the conviction on the 1st count.

According to the prosecution, the appellant had come into the house of the deceased armed with an electric torch and a knife, when the latter and one Herman were about to take their dinner, and stabbed the deceased first, and then Herman who tried to interfere. The appellant's plea that he acted in self-defence after the deceased had invited him into the house and set upon him with certain others was rejected. In the course of the cross-examination of the widow of the deceased it was suggested that the injuries had been inflicted in the course of a fight in which the participants were drunk. It was Sinhalese New Year day, and there was evidence that the deceased, Herman, and one Sarath who were in the house at that time, had taken liquor.

In the course of his evidence the appellant said that he had taken a fair amount of liquor, and when examined further on the point said that he and four others whom he named, had consumed a bottle of arrack shortly before this incident. In answer to Court, he stated that he had taken both arrack and gin on that day, and that he was drunk at the time of this incident.

One Romiel, a witness for the prosecution, said that at about 7.30 p.m. that day, presumably very shortly before this incident, the appellant who carried a torch and a knife kicked him for no apparent reason, and attempted to stab him as well. Though Romiel could not say whether the appellant was drunk or not, the impression created in his mind was that the appellant was behaving in a very queer manner, for, he says that he asked the appellant, " Ekanayake, are you mad ? ".

There was therefore some evidence of drunkenness.

In this situation, we are of the view that a clear direction should have been given to the Jury, that the degree of drunkenness was a question of fact for them to decide, and that if they were of the view that the appellant was so drunk that he was incapable of forming a murderous intention, then he could only be found guilty of the lesser offence of culpable homicide not amounting to murder.

The learned Judge gave no direction at all on the question of drunkenness except for a passing reference to it, when he was dealing with the plea of grave and sudden provocation. He said :

"Certain other defences also have been raised by him—the plea of grave and sudden provocation, for instance."

Here, he explained to the Jury the law relating to an act done under grave and sudden provocation, and continued—

"Of course, *in this connection*, you will also bear in mind his evidence that he had taken a fair quantity of liquor, that he took some liquor in his house and he had come here and taken liquor ; he says he was drunk. Of course, gentlemen, that is an abstract term. You have to consider, having regard to his conduct, whether he was in a position to understand what he was doing."

Once they rejected the plea of grave and sudden provocation, a lay Jury would not have known, in the absence of a direction, that they had still to consider the question of drunkenness quite independently of that plea. Had the law relating to drunkenness been adequately explained to the Jury, it is impossible to say that they would still have found the appellant guilty of the capital charge.

We therefore altered the conviction on the 1st count to one of culpable homicide not amounting to murder under section 297 of the Penal Code, and substituted a sentence of ten (10) years' rigorous imprisonment.

Conviction altered.