1969 *Present:* Sirimane, J. (President), Samerawickrame, J., and Weeramantry, J.

A. M. P. RATNAYAKE, Appellant, *and* THE QUEEN, Respondent

C. C. A. APPEAL NO. 106 OF 1968, WITH APPLICATION NO. 157

S. C. 110/67—M. C. Kurunegala, 48236

(i) *Evidence Ordinance—Section 32—Scope—Charge of murdering two persons—Dying deposition of one of the deceased—Admissibility as to cause of death of the other deceased.*

(ii) *Charge of murder—Plea of intoxication—Burden of proof—Direction to jury—Sufficiency—Penal Code, ss. 78, 79.*

(i) The accused-appellant was charged with the murder of two persons P and H. The death of P was caused in the course of the same transaction in which H came by his death. H, in his dying deposition, stated that the appellant stabbed P and when he (H) tried to intervene the appellant stabbed him as well.

Held, that, under section 32 of the Evidence Ordinance, H's dying deposition was admissible in evidence against the appellant even in respect of the charge relating to the death of P.

(ii) In a prosecution for murder the accused raised the mitigatory plea of voluntary intoxication. In the summing-up the trial Judge explained to the jury that murderous intention must be present in order to constitute the offence of murder, and that the burden of proving the intention was on the Crown. He then told the jury that if the accused could show, on a balance of probabilities, that he was so drunk as to be incapable of forming a murderous intention, then he would be guilty of culpable homicide not amounting to murder, as the law attributed to a drunkard, in a case of voluntary intoxication, the knowledge of a sober man.

Held, that there was no misdirection on the plea of intoxication. " For the purposes 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 that 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 that state of intoxication in which he could not have formed a murderous intention ".

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

Colvin R. de Silva, with *M. L. de Silva*, *Nimal Senanayake*, *D. J. Walpola* and *G. O. Fonseka* (assigned), for the accused-appellant.

V. S. A. Pullenayegum, Senior Crown Counsel, with *Priyantha Perera*, Crown Counsel, for the Crown.

Cur. adv. vult.

1*——K 546—2,255 (1/71)

March 23, 1969. SIRIMANE, J.—

The appellant was convicted on two counts of murder.

The first related to the murder of one Punchi Nilame and the second to the murder of one Herathhamy.

The case against the appellant depended almost entirely on statements made by Herathhamy to the police and the Magistrate. Shortly, Herathhamy had said that the appellant stabbed Punchi Nilame and when he (Herathhamy), tried to intervene the appellant stabbed him as well.

In the statement to the Magistrate, Herathhamy described the assailant as "Ratnayake formerly of Bemmulla gedera but now living in Udugederawatte", and stated further that the assailant was a person whom he knew, that he was a dark unmarried person who was a watcher. Having examined the evidence led in the case, we are unable to say that the jury were unreasonable in holding that Herathhamy's description referred to this accused and no other.

There was evidence that earlier on that day, the appellant who had suspected that Punchi Nilame was responsible for the loss of some of his pots used for distilling, had gone to the latter's house and held out a threat to Punchi Nilame's wife that he would not allow her husband to return home that day. There was also evidence that the appellant was seen in the company of Punchi Nilame that afternoon about 5.15 p.m. The incident had taken place at some time between 5.30 and 6.30 p.m.

The learned Commissioner had given adequate directions to the jury in regard to the manner in which they should consider statements made by Herathhamy before his death, and we see no reason to interfere with the verdict on the ground that there was any misdirection or non-direction on that point.

It was urged, however, that the dying deposition of Herathhamy could not be used by the prosecution to support the first charge, i.e., the murder of Punchi Nilame.

Section 32 of the Evidence Ordinance provides that statements of a person who is dead are themselves relevant facts,

> " (1) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question."

The scope of the section is very wide.

It is conceded that the death of Punchi Nilame was caused in the course of the same transaction in which Herathhamy came by his death. The joinder of the two charges was permissible under section 180 (1)

of the Criminal Procedure Code and the entire statement was, therefore, admissible at the trial. There was no application for separate trials, and we do not think that such an application had it been made would have met with any success.

It was argued that if there had been a separate trial on the first count the statement would have been inadmissible. We do not think so. The circumstances relating to the two killings are so closely interwoven that Herathhamy's death would come into question in any charge relating to the death of Punchi Nilame. In the case of *The King v. Samarakoon Banda,*[1] the accused was charged with the murder of one Kiri Banda. This killing was one incident in a transaction in the course of which three persons were killed by the accused, one of them being Punchi Banda. The accused pleaded the right of private defence. The Crown relied on the dying declaration of Punchi Banda giving the circumstances in which he met with his death and which also brought Kiri Banda to the scene. It was held that the dying declaration was admissible under section 32 (1) referred to above.

There is also the case of *The Emperor v. Nga Hla Din and another*[2] where a husband and wife were killed by two persons who were a master and servant. The only evidence available was the dying deposition of the wife who said that her husband was killed by the master and that she was attacked by the servant. It was held that the statement was admissible not only against the servant but against the master as well.

In our view the learned Commissioner was right when he told the jury that they could " take into account the statement of Herathhamy even in respect of Punchi Nilame ".

The next point urged on behalf of the appellant was that the offences should in any event be reduced to culpable homicide not amounting to murder on the ground of drunkenness and that there was a misdirection on this point.

There was some evidence that the accused was after liquor on that day. For instance, Punchi Nilame's wife said that when he held out the threat at about 1.00 p.m. the accused appeared to be drunk. A witness called Ranbanda had said that the deceased, Punchi Nilame, and the appellant drank a bottle of cider at his house that afternoon, and that " at that time they had drunk a lot ". There was also the evidence of one Dingiri Appuhamy that at about 7.30 p.m. that night, i.e., an hour or so after the incident the appellant was smelling of liquor and staggering, though there was also evidence of one Punchi Appuhamy that about 5.15 p.m. on that day the appellant did not appear to be drunk.

One may, at this stage, refer to the injuries on the two deceased persons Both of them had been stabbed in the region of the abdomen and their

[1] *(1913) 11 N. L. R. 169.* [2] *A. I. R. 136, Rangoon 187.*

intestines were protruding through the stab wounds. The medical evidence was to the effect that in both cases death would have resulted in the ordinary course of nature.

The learned Commissioner explained to the jury that the murderous intention must be present in order to constitute the offence of murder, and that the burden of proving that intention was on the Crown. He then told the jury that if the appellant could show, on a balance of probabilities, that he was drunk, so drunk so as to be incapable of forming a murderous intention, then he would be guilty of culpable homicide not amounting to murder, as the law attributed to a drunkard the knowledge of a sober man, in a case of voluntary intoxication such as this one.

Learned Counsel for the appellant pointed out that there was a difference in the language in section 78 of the Penal Code (which deals with involuntary intoxication) and section 79 which deals with voluntary intoxication. He pointed out that the former section required that "by reason of intoxication" the drunkard should be incapable of knowing the nature of the act or that he was doing something which was wrong or contrary to law, while the latter section only required that at the time the drunkard commits the act he should be "in a state of intoxication". He submitted that when the learned Commissioner told the jury that the appellant must be able to show on a balance of probability that he could not have formed a murderous intention, an unnecessarily heavy burden was placed on the defence. We are unable to agree with this submission. For the purposes of section 79, 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 that 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 that state of intoxication in which he could not have formed a murderous intention.

Right throughout his charge, the learned Commissioner told the jury that the law imputed to the accused only the knowledge of a sober man if the accused could establish that it was probable that he could not have formed a murderous intention due to his drunkenness. One passage of his summing up has been criticised which reads 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? If there was that state of drunkenness, that is, he did not know anything that was happening, then he will not be in a position to form an intention. So, you will consider on the evidence whether the accused was, firstly,

> probably drunk and, secondly, if you hold that he was probably drunk, were the probabilities that he was so drunk that he could not have formed an intention ? "

The learned Commissioner was here emphasizing that the state of intoxication must be such as to render the person concerned incapable of forming a murderous intention. On reading the directions as a whole, we are unable to say that there was a misdirection on this point. Immediately after the above passage, the learned Commissioner said—

> " Now, gentlemen, from all this evidence and from the statement of Herathhamy it is for you to decide, firstly, whether it is more probable that the accused was drunk and, secondly, if that was so, whether it was more probable that he was so drunk that he could not have formed any intention. If you are of the view that he was so drunk that he could not have formed an intention, then, of course, the charge of murder cannot be sustained because to prove a charge of murder the Crown must also prove murderous intention. So, gentlemen, if you are of the view that he was so probably drunk, then the law imputes to him the knowledge of a sober man, and he will be guilty of culpable homicide not amounting to murder."

In regard to the submission that it was a misdirection to state that there was a burden on an accused to prove that he could not have formed the murderous intention, there is the case of the *King v. Velaiden*,[1] which was decided by five Judges of this Court. It was 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 concluding his judgment, Howard, C.J. stated as follows :—

> " 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 intent 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 a man intends the natural consequences of his act."

We consider this case to be binding on us.

In the course of his argument, learned Crown Counsel, while supporting the directions of the learned Commissioner submitted that they were unduly favourable to the appellant. He contended that section 79 was introduced into our Penal Code in an era in which intoxication was considered to aggravate an offence rather than mitigate it. He submitted that the section was enacted in order to assign to a voluntarily intoxicated

[1] *(1947) 48 N. L. R. 409.*

1**—K 546 (1/71)

offender the same knowledge and intention as that of a sober man. In short, that section 79 did not exculpate a person or mitigate an offence on the ground of voluntary drunkenness. We are unable to agree with this contention. The section itself refers to " cases where an act done is not an offence unless done with a particular *knowledge or intent* ", and then goes on to say that " 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 ". In *Velaiden's case* referred to above, Howard, C.J. also stated in the course of his judgment, " Section 79, therefore, enables a person to put forward a plea of a mitigatory and exculpatory character ".

As stated earlier, on a careful reading of the summing up as a whole, we are unable to say that there was a misdirection on the question of drunkenness.

The application is refused and the appeal dismissed.

Appeal dismissed.