[COURT OF CRIMINAL APPEAL.]

1947 *Present:* **Wijeyewardene S.P.J. (President), Jayetileke and Dias JJ.**

THE KING *v.* PUNCHI BANDA.

APPLICATION 166 OF 1947.

S. C. 66—M. C. Panwila, 3,076.

Intoxication—Charge of murder—Knowledge and intention—Burden of proof—Penal Code—Sections 78 and 79—Evidence Ordinance, s. 105.

In all cases of self-induced intoxication it is a question of fact whether, in spite of the intoxication, the accused entertained a criminal intention. The burden of proving this intention lies on the prosecution and in deciding the question the Court must bear in mind the drunkenness of the accused.

Further, section 79 of the Penal Code does not enable an accused to put forward a mitigatory or exculpatory plea and does not therefore create a general or special exception such as is contemplated by section 105 of the Evidence Ordinance.

APPLICATION for leave to appeal against a conviction in a trial before a Judge and Jury.

H. V. Perera, K.C. (with him *V. K. Kandasamy* and *A. D. J. Gunawardene*), for the accused, appellant.

T. S. Fernando, C.C. (with him *E. L. W. de Zoysa, C.C.*), for the Crown.

Cur. adv. vult.

July 25, 1947. WIJEYEWARDENE S.P.J.—

The appellant was convicted on a charge of murder. Three of the witnesses for the Crown stated that their impression was that the appellant was drunk. Two of them said that the appellant was "staggering", while the third said that his eyes were "red".

Dealing with the question of intoxication and murderous intention, the learned trial Judge said in the course of his charge:—

"How is intention to be decided by you? Sometimes there may be direct expression of an intention and you may take that into account, but, I think, you will realize that those cases are extremely rare where a man who causes the death says what his intention is. Even if a man expresses an intention, you have after all to examine whether that really represents what he meant to do, or whether he may have done it through an act of bravado. Those are matters which you should have to consider. There is another means of arriving on this question of intention, and that is, by examining the circumstances of the case taking certain facts into consideration, for instance, facts such as these: What was the weapon used? Was it a dangerous weapon or not? What was the place where the injury was inflicted? Was it a dangerous or vital place or not? What is the apparent degree of force with which the injury had been inflicted? These facts you should weigh and take into account, and from that you may draw certain inference

as to what the man's intention was. You will always remember that it is open to you to presume that a man intends the ordinary and natural consequences of his acts. If he deliberately does an act, then you may presume that he intends the natural consequences of his act".

Thereafter, the learned trial Judge examined the medical evidence in the case and asked the Jury to bear in mind the injuries on the deceased along with "the other circumstances of the case" when they came to consider the question of intention. He explained, further, that if the Crown failed to prove beyond reasonable doubt that the appellant had a murderous intention, their finding should be one of culpable homicide not amounting to murder, if they found that the appellant knew that the injuries were likely to cause the death of the deceased. He then proceeded to say,

"I would also remind you to bear this in mind—it will be explained to you more fully later on—that, if the man was drunk at the time and caused this act, there may be a defence available to him. That defence would reduce his offence from that of murder to culpable homicide not amounting to murder. That is to say, you can take into account the fact of drunkenness. The fact that drunkenness may so affect a man's mind that you may have doubts as to whether he really had the intention to kill or not. It would depend, of course, on the extent of drunkenness. That is a very important feature, but you will kindly remember this. If the man gets drunk of his own accord, it is not the answer in law to say, "I was so drunk that I did not know what I did". It is no defence against the question of knowledge. As regards knowledge you have to judge on the footing that he was a sober and sane man. But on the question of intention, you take drunkenness into account and consider whether a verdict of murder or the lesser verdict should be brought in this case. Remember that it is rather an important fact bearing upon the question of intention. No doubt the burden is on the accused to prove that, but that burden is not so heavy a burden to establish that he was drunk at the time. But, of course, he is not required to prove this beyond reasonable doubt. That high degree of proof is not required from him as is required when the Crown has to prove certain facts; but he could merely prove it on the balance of evidence, and he is entitled to utilize any evidence which has been given by the prosecution itself. He can ask you to take into account any evidence which has been given by the prosecution which helps him in this respect. The burden that rests on him is not so heavy as that lies on the Crown. *He must satisfy you on the balance of evidence in the case as to whether he was drunk; that his drunkenness had obscured his idea of intention.* I think those are the main legal points I have to draw your attention to".

At a later stage in the charge he said:—

"Now the points you have to consider are: First of all, are you satisfied beyond reasonable doubt that it was this accused who caused the injuries which resulted in the death of the deceased? That is one important question. The second question is, if you do hold that he

did the act, did he have the intention ? Was he sober ? If he was sober, did he have the intention ? *If he was drunk, was he drunk to such an extent that you hesitate to hold that he had the intention ?* In that case you will hold that he is guilty of culpable homicide not amounting to murder ".

The appellant's Counsel argued that the earlier passage in italics contained a misdirection in law and that the wrong impression created on the minds of the Jury by the misdirection could not have been removed by the later passage in italics, as the latter was not so clear and unambiguous as to enable a lay Jury to understand that it stated something different from the former passage.

We have, therefore, to consider whether there was a misdirection in law as submitted by the appellant's Counsel, and, if there was such a misdirection, what effect it might have had on the verdict of the Jury.

Now the only provisions in the Penal Code with regard to intoxication are contained in sections 78 and 79. Section 78 deals with the effect of a certain state of intoxication on the criminal liability of a person when the intoxicant " was administered to him without his knowledge or against his will ". That section, therefore, need not be considered when we are dealing with the case of self-induced intoxication. The section we have to consider then is section 79. There has been some conflict of judicial opinion on the question whether that section contemplates only one group of cases in which knowledge or alternatively intention is an essential element of the offence or two groups of cases—one in which knowledge is an essential element and the other in which intention is an essential element of the offence. It is not necessary for the purposes of this appeal to decide which of these views is correct. It is sufficient to say that, in the case of offences to which that section applies, it imputes to an accused in a state of intoxication the knowledge of a sober man. The section is silent with regard to the effect of intoxication on intention.

In all such cases of self-induced intoxication it remains a question of fact to be decided whether, in spite of the intoxication, the accused entertained a criminal intention (vide *The King v. Rengasamy* [1].)

On whom then lies the onus to prove the facts necessary to establish whether or no an accused in such a case had the necessary criminal intention ? The accused would have to prove the fact of drunkenness, as that is a matter especially within his knowledge (*vide* Evidence Ordinance, Section 106). He may prove it either by evidence led by him or through the evidence of Crown witnesses. He would discharge this burden by establishing the fact of drunkenness on a balance of evidence. If the Court is so satisfied that the accused was drunk, the Court would then examine, taking the fact of drunkenness into consideration, whether the prosecution has proved the necessary criminal intention beyond reasonable doubt. For instance, in ordinary cases of murder, the Court usually decides this question by taking into consideration, the weapon used in inflicting the injury, the nature of the injury, the position of the injury and similar matters. In such cases the Court would also make use of the legal maxim that a normal man is presumed to intend the

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

natural and inevitable consequences of his acts. But where the Court is dealing with the case of an accused in a state of intoxication the Court will also have to take into consideration the fact of drunkenness and see how far the legal maxim mentioned by me could be applied in his case. In other words, while the burden of proving drunkenness rests on the defence, the burden of proving criminal intention rests throughout the case on the prosecution and in deciding that question the Court has to bear in mind the drunkenness of the appellant.

Section 105 of the Evidence Ordinance discussed by this Court in *The King v. James Chandrasekera* [1] does not apply to the present case, as this is not a case where an appellant seeks to claim the benefit of any general or special exception referred to in that section. I may add that, in any event, it is not possible to regard section 79 of the Penal Code as such an exception, as that section does not enable an accused person to put forward a mitigatory or exculpatory plea.

The Court was not concerned with the question of burden of proof in *The King v. Rengasamy* (*supra*), but there are certain passages in the judgments in that case which support the view taken by us.

In our opinion, it is a misdirection of law to state that the appellant must satisfy the Jury on a balance of evidence " that his drunkenness had obscured his idea of intention ".

We have to deal now with the second point as to the probable effect of the misdirection on the Jury. The passage referred to contains, no doubt, an observation made inadvertently in the course of a charge which, if I may say respectfully, deals in other parts with the question of burden of proof correctly and fully. In deciding this point it is helpful to consider the verdict in relation to the evidence in the case.

Three of the Crown witnesses—Kiri Banda, Janis, and Appuhamy—said that they saw the appellant stabbing the deceased. Their evidence was to the following effect :—The deceased was called by his acquaintances " the member "; as he was a member of a Village Committee. On the day in question he was playing a game of cards for stakes with a number of persons, all of them being seated in a circle, on mats spread on the floor of a boutique. The appellant came there unexpectedly. As he entered the boutique, he said, " none of the men should run " and then asked, " where is the member ? ". The appellant got to the centre of the circle of players and the deceased asked, " What is the matter, brother ? ". The appellant, then, pulled out a knife from his waist and stabbed the deceased and Kiri Banda and inflicted some injuries on Janis. Then the deceased rushed out of the boutique followed by the appellant. The deceased died shortly afterwards.

These Crown witnesses stated that there was no abuse or quarrel before the deceased was stabbed. The Crown did not even suggest any motive for the attack on the deceased. Kiri Banda was unable to say why the appellant stabbed him or the deceased and stated that, so far as he knew, the appellant and the deceased were on good terms. He added, " it is a most inexplicable conduct on the part of the appellant ". Janis could not explain " why the appellant stabbed the deceased ".

[1] *(1942) 44 N. L. R. 97.*

Kiri Banda said that the appellant "came up, more or less staggering, not in his usual way of walking". Janis said, "from the appearance of his (appellant's) eyes which were red to some extent I thought he was drunk. He had tucked up his cloth to some extent and appeared to be drunk". Appuhamy stated that the appellant "appeared to be after liquor and was staggering". All this evidence was given by the witnesses in answer to questions put by the learned trial Judge.

The appellant did not give evidence and it was suggested by the defence that the deceased must have been stabbed by one of the gamblers.

The learned trial Judge appears to have thought that this was a case where the appellant should not be found guilty of murder. Towards the close of his charge he said, "the question for you to consider is as to whether in all the circumstances either this accused is not guilty at all or that he is guilty of culpable homicide not amounting to murder. These are the alternatives". The Jury, however, returned a unanimous verdict against the appellant on the charge of murder. The appellant's Counsel attacked this verdict as an unreasonable verdict and one that could not be supported, having regard to the evidence. He pointed to the failure on the part of the Crown to prove, or even suggest, a motive and the absence of any provocation or any quarrel preceding the assault, characterised by a Crown witness himself as "inexplicable conduct" and submitted that these facts showed beyond doubt that the assault on the deceased was the act of a drunken man who was unable to form a murderous intention. He also drew our attention to the strange behaviour of the appellant in requesting all the players "not to run away", as if he wanted them to be in a position to see him stabbing the deceased.

It seems to us that in view of all these circumstances there must exist a substantial amount of doubt whether, as a result of his intoxication, the appellant could have entertained a murderous intention. Though in cases such as *Schrager's*[1] and *Parker's*[2] the Court of Criminal Appeal in England set aside the convictions when there was "a sufficient doubt as to the accuracy of the verdict" for the Court to give an accused the benefit of it, we would have hesitated somewhat to interfere with the unanimous verdict of the Jury, if we did not think that it was not quite improbable that the Jury returned a verdict of murder in the mistaken belief that the burden rested on the appellant to prove that he was so intoxicated as to be unable to form a murderous intention.

Taking all these matters into consideration, we would say in the words of Lord Alverstone, L.C.J. in *Bradley's* case[3] that "on the whole we think it safer that the conviction (for murder) should not be allowed to stand".

We substitute for the verdict of murder a verdict of culpable homicide not amounting to murder and sentence the appellant to ten years' rigorous imprisonment.

Verdict altered.

[1] *(1911) 6 Crim. Appeal Reports 253.* [2] *(1911) 6 Crim. Appeal Reports 285.*
[3] *(1910) 4 Crim. Appeal Reports 225.*