[COURT OF CRIMINAL APPEAL.]

1947 *Present:* **Howard C.J. (President), Soertsz S.P.J. Jayetileke, Dias and Windham JJ.**

THE KING *v.* VELAIDEN.

Application 193 of 1947.

S. C. 46—M. C. Balapitiya, 57,354.

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

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.

The King v. Punchi Banda (1947) *48 N. L. R. 313* overruled.

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

Mackenzie Pereira (with him *Cecil Jayetileke* and *G. L. L. de Silva*), for the petitioner.—Our law with regard to the effect of intoxication on criminal responsibility is contained in sections 78 and 79 of the Penal Code. The draftsman evidently was adopting the principles of English law at a certain stage of its development. Originally intoxication under the English law was no defence at all to a criminal charge but the English law in the course of its development adopted certain modifications in that respect, and section 78 represents one phase of such development.

Section 78 affords a complete defence and the essential conditions for the section to come into operation are clearly laid down, *i.e.*, (1) An advanced stage of intoxication where the offender is incapable of knowing the nature of his act or that he is doing what is wrong or contrary to law. (2) The thing that intoxicated him was administered to him against his will or without his knowledge. There can, therefore, be no doubt that section 78 is a general exception and consequently section 105 of the Evidence Ordinance comes immediately into operation if and when an accused seeks the benefit of that exception.

Section 79 deals with self-induced intoxication and there are obvious differences between the two sections 78 and 79 both as to the actual wording and the underlying principles. Firstly, the degree of intoxication for section 79 to come into operation is not defined, not even described. Secondly, it only applies to a particular class of offences, *i.e.*, to offences where a particular intention or knowledge is a necessary ingredient.

[SOERTSZ S.P.J.—What do the words "liable to be dealt with" in the section mean? Do they mean shall be dealt with?]

In all cases which involve knowledge as an ingredient of *mens rea* the offender, notwithstanding his intoxication, is imputed the knowledge of a sober man. See dicta of Bertram C.J. in *King v. Rengasamy* [1]. But the question of intention is left at large. The prosecution must prove intention apart from knowedge. It is not possible, as Garvin J. says in *King v. Rengasamy* (*supra*), to proceed from an imputation of artificial knowledge to an imputation of artificial intention. Knowledge and intention are different instances of *mens rea*. The requisite *mens rea* differs in various offences. For murder under section 294 of the Penal Code intention is the requisite *mens rea* except under the fourth head where knowedge is sufficient. In this case the question of knowledge does not arise and intention is the ingredient of the offence.

The maxim that a person must be presumed to intend the natural consequences of his act does not apply in cases where intoxication has been proved. See observations of Patterson J. in *R. v. .Cruse* [2]. In *R. v. Doherty* [3] Stephen J. definitely adopted the view that in considering murderous intention the fact of the intoxication must be taken into account. These principles have been in substance adopted in *Director of Public Prosecutions v. Beard* [4]. See also *R. v. Monkhouse* [5]. The principles of English criminal law are the same as ours and it is perfectly legitimate to seek guidance from these principles in interpreting section 79.

[HOWARD C.J.—Do you say that the judgment of Wijeyewardene J. in *King v. Punchi Banda* [6] is correct ?]

That judgment is correct. The burden of proving intention in this case is on the Crown. That burden can never be shifted. The law does not require that the accused should prove a negative, *i.e.*, that he had no murderous intention.

Where intoxication has been proved Crown cannot claim to have established the murderous intention by proof of the nature of the weapon, character of the injury, and the fatal consequences that followed. These together with the maxim that a person must be presumed to have intended the natural consequences of his act may establish *prima facie* the necessary intention in the normal type of case. But where intoxication is proved the criminal reponsibility of the accused must be assessed on the footing that the accused had the knowledge of a sober man and it is still on the prosecution to prove murderous intention notwithstanding the intoxication. If the Crown fails to do that, then the verdict should be culpable homicide not amounting to murder on the footing of knowledge.

It is quite sufficient for the accused to involve the intention in doubt so long as section 79 is not a general or special exception. See observations of Soertsz J. in *King v. Chandrasekere* [7]. Section 79 is not a general or special exception. No mitigatory or exculpatory plea can be founded on section 79. The section merely enunciates a principle of liability as for instance section 32 of the Penal Code does, or, the section may be

[1] *(1924) 25 N. L. R. 438.*
[2] *(1838) 2 Moody 53.*
[3] *(1887) 16 Cox 306.*
[4] *(1920) 14 C. A. R. 159.*
[5] *(1849) 4 Cox. 55.*
[6] *(1947) 48 N. L. R. 313.*
[7] *(1943) 44 N. L. R. 97.*

considered as a rule of construction on the application of a particular *mens rea*. Lord Macaulay in his Legislative Minutes says he did not adopt any scientific method of classification when inserting sections under various heads. So that the mere fact that section 79 comes under the head of general exceptions does not mean it is an exception.

The exception "burden of proof" as used in our law has two meanings. It may mean either establishing a fact or introducing evidence. Under section 79 the burden is on the accused to adduce evidence of intoxication.

In this case the charge to the Jury contains serious misdirections with regard to the burden of proof as regards intoxication. Further, the exception of grave and sudden provocation has not been put to the Jury, though it arises on the evidence.

M. F. S. Pulle, Acting Solicitor-General (with him *T. S. Fernando*, C.C., and D. *Jansze, C.C.*), for the Crown.—The *provisions* in Chapter IV of the Penal Code are exhaustive of the grounds on which a person may seek to avoid responsibility for acts which would otherwise expose him to the full penalties provided by law. Minority. unsoundness of mind and involuntary intoxication are specially provided for. If section 79 were not in the Code it would not be open to any accused person to plead intoxication caused by his own act either by way of exculpation or mitigation. Therefore, voluntary intoxication can be pleaded only to the limited extent laid down in section 79 and no further.

The intoxication contemplated by section 79 is not any and every degree of intoxication. The words "as if he had the same knowledge as he would have had if he had not been intoxicated" clearly indicate that the intoxication must reach at least that degree which renders the accused incapable of possessing the knowledge required to constitute the offence. The question of intention is left at large. If on a charge of murder the prosecution proves such acts as would in the case of a sober person establish a murderous intention, then the burden would rest on the accused to prove that he was incapable of forming the intention which the acts committed by him would lead one to infer. The proposition laid down in *Punchi Banda's* case "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" is not precise for the reason that one is left to speculate as to what is meant by the term "drunkenness" in that context. The facts from which drunkenness was inferred in *Punchi Banda's* case threw no light on the mental condition of the accused.

If it is held, upon proof that the accused was under the influence of liquor, that it was enough for him to create a doubt as to intention and thus entitle him to an acquittal on the charge, then certain anomalous results would flow. Where a person is charged with theft it would be sufficient for him to plead self-induced intoxication to raise a doubt as to his intention, whereas if the plea were unsoundness of mind or involuntary intoxication, the accused would have affirmatively to prove his incapacity to form the intention. The result is that a greater burden

would be thrown on an accused pleading unsoundness of mind or involuntary intoxication than on one who pleads intoxication which was self-induced. It is hardly likely that the framers of the Penal Code intended to place the latter in a more advantageous position.

The Crown does not accept the position taken up in *Punchi Banda's* case that it is not possible to regard section 79 as an exception because it does not enable an accused person to put forward a mitigatory or exculpatory plea. If section 79 is pleaded to reduce what would otherwise be murder to culpable homicide not amounting to murder, then it can be said that that section enables an accused person to put forward a mitigatory plea. If section 79 can be availed of to obtain a complete acquittal on a charge like theft, then it can be said that the section enables an accused person to put forward an exculpatory plea. In the case of *Nga Tun Baw* [1] decided by the Full Bench of the Burma High Court, Hartnoll J. said (page 870) in regard to section 86 of the Indian Code which is identical with our section 79—

> "As it stands amongst the general exceptions, I think that it was enacted so as to form a general exception in the case of a man who has made himself voluntarily drunk to the ordinary presumption of law that is drawn when deciding whether a certain intention should be held to exist or not, where the intention is of the essence of the offence. That general presumption of law is that a man is taken to intend the ordinary and natural consequences of his acts and it is that presumption that a man who pleads drunkenness is allowed to rebut, and moreover, if he pleads that through drunkenness he could not have had the intention imputed to him, the burden of proof lies strictly on him to show that the ordinary presumption should not be drawn. This is laid down by section 105 of the Evidence Act. The concluding words of that section enact that the Court shall presume the absence of circumstances bringing the case within the general exception and, in my opinion, it cannot be too strongly laid down, that, where a plea of being incapable to form an intention through drunkenness is urged, very strict proof should be insisted on, for men who have made themselves drunk should not be lightly excused the consequences of their acts."

The result reached is in line with the English Law. In *Rex v. Monkhouse* [2] the issue was put in the form whether the prisoner was rendered by intoxication entirely incapable of forming the intent charged. Coleridge J. said in that case, "Drunkenness is ordinarily neither a defence nor excuse for crime and where it is available as a partial answer to the charge it rests on the prisoner to prove it."

That a person in a state of intoxication may form an intention to kill, appears from *Rex v. Doherty* [3]. Stephens J. said, "A drunken man may form an intention to kill another or to do grievous bodily harm to him. or he may not; but if he did form that intention, although a drunken intention, he is just as much guilty of murder as if he had been sober." In *Beard's case* [4] the trial Judge placed the same burden on the prisoner as

[1] *(1912 13 Criminal Law Journal Reports 864.*
[2] *(1849) 24 Cox C. C. 55.*
[3] *(1887) 16 Cox C. C. 306.*
[4] *(1920) 14 Cr. App. R. 159.*

in a case of insanity. While the charge was criticized by the House of Lords as being favourable to the prisoner exception was not taken to the burden being put on him. The law in South Africa is that the burden is on the accused person to prove by a preponderance of probability that by reason of intoxication he was incapable of forming the requisite intention. See *Rex v. Kankani.*[1]

Mackenzie Pereira, in reply.—The case of *Nga Tun Baw* (*supra*) touched on the question of burden of proof only incidentally and is not binding on this Court.

Cur. adv. vult.

September 8, 1947. HOWARD C.J.—

The main ground of the appeal of the applicant in this case, who was convicted on a charge of murder, is based on the contention that the learned Judge misdirected the Jury in regard to the burden of proof. It was also contended by the applicant's Counsel that the question as to whether the applicant committed the act when he had lost his power of control by reason of grave and sudden provocation should have been put to the Jury. The learned Judge did not put such an aspect of the case to the Jury. We do not consider that it was incumbent on him to do so. The question of grave and sudden provocation was not raised by Counsel for the applicant at the trial. This would not relieve the Court from doing so if there was any evidence to support such a plea. Such evidence does not, however, appear either in the case put forward by the Crown or in the unsworn statement made by the applicant from the dock. In the circumstances there were no materials on which the Jury could come to the conclusion that the act was committed by the applicant when he had lost his power of self-control by reason of grave and sudden provocation. This question was not, in our opinion, one to be left for the Jury's decision.

The contention in regard to the burden of proof raises the question as to the effect of intoxication on the intention of an accused person. The applicant did not elect to go into the witness box and give evidence on oath. He made an unsworn statement from the dock. In that statement he says "As a result of the toddy I drank I lost complete control of my senses. I cannot completely say how I must have acted. I was in a state of unconsciousness. I was semi-conscious at one time." The applicant was seen by the Inspector and the Doctor about 4 or 5 hours after the stabbing had taken place. The Inspector says that the applicant was smelling of liquor, while the Doctor says that he was not drunk. The defence was raised that the applicant was so drunk that he could not form an intention to kill. This defence has been dealt with by the learned Judge at page 14 of the charge in the following passage:—

> "The burden is on the accused to prove that he was so drunk as not to be able to form the necessary intention and in this case you have to ask yourselves: How has the accused proved it?"

In other similar passages in the charge the trial Judge has placed the burden of proof in regard to his intention on the accused. Mr. Mackenzie

[1] *South African Law Reports (1947), Pt. II, p. 807.*

Pereira's main support in his contention that the trial Judge has misdirected the Jury is the judgment of Wijeyewardene J. in the recent Court of Criminal Appeal case of *The King v. Punchi Banda.*[1] The headnote of this case is as follows :—

"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. "

At p. 315 of the judgment Wijeyewardene J. says :

" 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* (1924) 25 N. L. R. 438).

" On whom then lies the onus to prove the facts necessary to establish whether or not 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 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* (1942) 44 N. L. R. 97 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

[1] *(1947) 48 N. L. R. 313.*

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'."

It has, therefore, been held in *The King v. Punchi Banda* that as it is not possible to regard section 79 of the Penal Code as a general or special exception section 105 of the Evidence Ordinance interpreted as in *The King v. James Chandrasekera*[1], does not apply. The burden of proving criminal intention rested therefore throughout the case on the prosecution.

The question which we have to decide is whether the Court in *The King v. Punchi Banda* was correct in law in holding that section 79 of the Penal Code was not a general or special exception. Apart from *The King v. Punchi Banda* Mr. Mackenzie Pereira was unable to call in aid any other authority. He invited our attention to the case of *The King v. Rengasamy*[2]. But as Wijeyewardene J. states at p. 316 in his judgment in *The King v. Punchi Banda* the Court in that case was not concerned with the question of the burden of proof. Mr. Mackenzie Pereira has however argued that certain passages from the judgment of Garvin J. support the argument that he has adduced. In particular he relies on the following passage that appears at p. 446:—

"In the very few instances in which a particular knowledge and not a particular intention is essential before an act is punishable as an offence, whether or not the doer of the act possessed the necessary knowledge is a question of fact, and must be determined accordingly. It is, I think, desirable to add that where the prosecution has established a *prima facie* case, it is for the person charged, if he relies on intoxication as a defence, to satisfy the jury that he had reached a state of intoxication which rendered him incapable of forming the required intention, or to prove facts or point to circumstances which are necessarily sufficient to raise a real doubt in the minds of the jury as to his capacity to form the intention imputed to him in the charge."

We do not consider that the use of the words "or point to circumstances which are necessarily sufficient to raise a real doubt in the minds of the Jury as to his capacity to form an intention imputed to him in the charge" threw the burden of proof in each case on the Crown. Those words must of necessity refer to a case in which the evidence adduced by the Crown points to a reasonable doubt as to the capacity of the accused. The passage from the judgment of Garvin J. read as a whole supports the argument put forward by the Solicitor-General. The latter has moreover put forward arguments and produced authorities supporting the contention that the trial Judge's direction to the jury was a correct

[1] *(1942) 44 N. L. R. 97.* [2] *(1924) 25 N. L. R. 438.*

statement of the law. Section 79 of the Penal Code appears in Chapter IV which is headed "General Exceptions". The section is worded 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 the 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."

The section refers to cases where an act done is not an offence unless done with a particular knowledge or intent. It then provides that if the act is committed in a state of intoxication, that person, in the case of self-induced intoxication, shall be liable to be dealt with as if he had the same knowledge as a sober man. The inference to be drawn from this provision is that in cases where intent is an ingredient of the offence the principle formulated in cases where knowledge is an ingredient does not apply. Without section 79 the ordinary law would apply, namely that a person would be presumed to intend the ordinary and natural consequences of his act. Vide *Reg. v. Monkhouse*[1]. Section 79 therefore enables a person to put forward a plea of a mitigatory and exculpatory character. Support for the argument that section 79 does provide an exception to criminal responsibility can also be derived from Gour's classification of General Exceptions in the 4th Edition Vol. I, Chapter IV., p. 414. In paragraph 567 the learned author states that the first main principle is "where there is an absence of criminal intent (sections 81 to 86 and 92 to 94)." The wording of section 86 of the Indian Penal Code is similar to that of section 79 of the Ceylon Penal Code. In his commentary on section 86 Gour at page 560 states that where intention is a constituent of an offence, the question must be dealt with on the general principles of law which are the same both here and in England. It is, therefore, relevant to inquire what principles have been formulated in English cases in regard to the burden of proof. In this connection our attention has been directed to the case of *Reg. v. Monkhouse* (*supra*). In this case the accused was charged with discharging a loaded pistol with intent to murder. The question arose whether by reason of drunkenness the accused had the necessary intent. The following passage from the charge of Coleridge J. to the Jury is in point :

> "Drunkenness is ordinarily neither a defence nor excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention."

This case, therefore, places the burden of proving that intoxication produced complete lack of control or incapacity to form any specific intention squarely on the accused. The leading case in English Law

[1] *4 Cox 55.*

in regard to the defence of drunkenness where intention is one of the ingredients of the charge is the House of Lords case of *Director of Public Prosecution v. Beard*[1]. The judgment of their Lordships delivered by Lord Birkenhead L.C. reviewed in comprehensive manner the history of English Law in regard to this matter. The appeal to the House of Lords was instituted on a certificate of the Attorney-General that the decision of the Court of Criminal Appeal involved a point of exceptional importance. The Court of Criminal Appeal had held that the direction of the trial Judge Bailhache J. was calculated to mislead the Jury by imposing a test applicable only to the defence of insanity, instead of the test imagined to be generally laid down in *Meade's case*[2] for application to the defence of drunkenness. The relevant part of the trial Judge's direction to the Jury appears on page 186 of the report and is as follows :

> "It is no defence to say, 'I should not have done that wicked thing if I had not been so drunk.' But if he has satisfied you by evidence that he was so absolutely drunk at the time that he really did not know what he was doing or did not know that he was doing wrong, then the defence of drunkenness succeeds to this extent—that it reduces the crime from murder to manslaughter. What I mean by that is a sort of thing like this : Supposing he cuts a woman's throat under the impression that he is cutting the throat of a pig, then the crime of murder is reduced to the crime of manslaughter. But if a man says, 'I was mad, and turned into a brute by drink,' it is no defence unless he satisfies you that he was so far out of his senses that he did not know what he was doing."

With regard to this direction it will be observed that Bailhache J. placed the burden of proof on the accused and applied the same test with regard to the effect of the accused's intoxication as if the defence had been one of insanity. On pages 197 and 198 of the report the Lord Chancellor deals with the direction of Bailhache J. He held that the test of insanity should not be applied to a case of drunkenness, which *a concessis* did not amount to insanity. This distinction had been preserved throughout the cases and it ought to be preserved, for the result of insanity is not a conviction. The Lord Chancellor further went on to say that Bailhache's direction on this point was an innovation which is not supported by authority and which should not be repeated or imitated. On the other hand there was no criticism by the Lord Chancellor on that part of the charge that placed the burden of proof on the accused. In fact the Lord Chancellor held that the summing-up was unduly favourable to the prisoner, and he, the Lord Chancellor, was not prepared to hold that the Jury were disabled from reaching a true conclusion upon the matters which required decision. The appeal was therefore allowed and the conviction of murder restored.

It has been contended by Mr. Mackenzie Pereira that the two English cases I have cited have no bearing on the point at issue inasmuch as the Ceylon Penal Code requires as one of the ingredients of the offence of

[1] *14 Criminal Appeal Reports 159.* [2] *(1909) 2 Criminal Appeal Reports, 54.*

murder, proof of an intention to cause death or deal such bodily injury as is sufficient in the ordinary course of nature to cause death, whereas in English Law such offence is committed if the accused had an intention to kill or an intention to do grievous bodily harm or commit some felony. The point at issue, however, is the burden of proof when an accused raises the defence that intoxication deprived him of the necessary intention. Intention is a necessary ingredient of the offence of murder whether the latter offence is defined by Ceylon or English Law. In these circumstances there is no substance in Mr. Mackenzie Pereira's contention.

If we turn to the law as expounded by Judges in India we find the same principle applied to the burden of proof. In *Nga Tun Baw v. Emperor*[1] the following passage from the judgment of Fox C.J. is relevant:

> "It may be gathered from the above cases that from the year 1819, the English Law has been that the drunkenness of an accused person at the time he committed the act charge as an offence may be, and should be taken into consideration on the question whether he did the act with the intention necessary to constitute the offence charged, and that law does not require that the intention, which would be ascribed to a sober man in connection with an act, must necessarily be ascribed to a drunken man who does the same act. The English Law, as stated in the above extracts, appears eminently reasonable; it does not involve blind adherence to any rule of law, it recognises that there are degrees of intoxiction, and that a drunken man may have the capacity for forming the intention necessary to constitute an act an offence. A voluntary drunkard, like every other person, is in the first instance presumed to have intended the natural consequences of his act, but this presumption may be rebutted by his showing that at the time he did the act his mind was so affected by the drink he had taken that he was incapable of forming the intention requisite for making his act the offence charged against him. The result of such law is that the question of intention must be determined in each individual case according to the actual facts proved in the case according to the principles laid down. The Indian Law has, in section 86 of the Penal Code, made an expressed provision regarding the knowledge which should be imputed to a voluntary drunkard committing an act which is an offence when done with a particular knowledge or intent. The effect of the omission to make any expressed provision regarding the intention which is to be attributed to such a man doing such an act appears to me to be that the question of intention is left to be dealt with on the general principles of law and the general principles of Indian Law on the matter do not appear to me to differ from the general principles of the English Law as stated in the judgment and summings-up I have quoted from."

Mr. Pulle has also invited our attention to the South African case of *Rex v. Kaukani*[2]. In this case decided by the Appellate Division the Court decided that both in the case of insanity or drunkenness the

[1] *(1912) 13 Criminal Law Journal Report 864 at pages 868 and 869.*

[2] *South African Law Reports 1947 (2) May, page 807.*

burden is on the accused to prove such defence by a preponderance of probability. In this connection the following passage at page 815 from the judgment of Davis A.J.A. is most relevant :—

"And I would again emphasise the correctness of Wigmore's statement (3rd ed., vol. 9, sec. 2,486 in fin.) which was accepted in *Pillay v. Krishna and another* (*1,946, A. D.*, not yet reported) that rules as to the incidence of proof rest 'for their ultimate basis upon broad reasons of experience and fairness.' The learned author had said earlier in the same section that

'In criminal cases the innovation, in some jurisdictions, of putting upon the accused the burden of proving his insanity has apparently also been based on an experience in the abuses of the contrary practice.'

In my opinion the same consideration—as well as that of commonsense ; cf. *Rex v. Ngxongo* (1947 A. S. A. R. 152)—require that the onus should be on the accused, not only in a defence of insanity but also in one of drunkenness. The latter defence is one which is so easy to raise, and so difficult entirely to disprove, that it seems to me that the dictates of reason and of justice, based upon one's own experience of presiding at criminal sessions, whether in a large town or on circuit, requires that the onus should be on the accused to prove this defence by a preponderance of probability, and not upon the Crown to disprove it beyond all reasonable doubt.

For these reasons I come to the conclusion that in a defence of drunkenness, as in one of insanity, the onus is on the accused and not on the Crown. I may add that I have the authority of the Chief Justice and of my brother Greenberg, who sat in *Ndhlovu's* case, to say that they concur in this result. And it is fatal to the argument advanced on behalf of the accused in the present case, which consequently fails."

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 consequence of his act. In the circumstances we have come to the conclusion that there was no misdirection and the application must be dismissed. In conclusion we feel constrained to say that, if the Crown had presented the same line of reasoning and produced the same arguments as in this case, the decision in the case of the *King v. Punchi Banda* would have been different.

Application dismissed.