HENRY MALANIK .....APPELLANT; 1952

AND *Apr. 22, 23 *May 12.

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Murder—Drunkenness as defence—Capacity to form intent —Proper directions—Word "proved" should not be used in charge.

In a case where drunkenness is set up as a defence to a charge of murder, the trial judge should not use the word "proved", as taken from the third proposition formulated in *Beard's* case ([1920] A.C. 479 at 502), as Lord Birkenhead was not there dealing with the question of the burden of proof. The right direction in such cases appears at page 334 in *Mac Askill* v. *The King* ([1931] S.C.R. 330).

The charge, in the present case, which included the use of that word would be improper if it were not for the clear directions from the trial judge that the accused was entitled to the benefit of any reasonable doubt as to his capacity to form the necessary intent.

Director of Public Prosecutions v. *Beard* [1920] A.C. 479; *Mac Askill* v. *The King* [1931] S.C.R. 330; *The King* v. *Hughes* [1942] S.C.R. 517 and *Latour* v. *The King* [1951] S.C.R. 19 referred to.

APPEAL from the judgment of the Court of Appeal for Manitoba (1), affirming the conviction of the appellant on a charge of murder.

J. L. Crawford for the appellant. The defence of gross intoxication was not fairly presented to the jury and the evidence of drunkenness was unduly minimized. The decisions show that the trial judge must present the defence of the accused adequately and fairly to the jury, together with the evidence in support thereof. His presentation must insure the jury's appreciating (*a*) the nature and value of the evidence bearing upon the defence and (*b*) the full significance of the evidence as related to the essential questions of fact upon which guilt depends. Above all, the evidence in support of a defence must be presented to the jury as carefully as the case for the prosecution.

The trial judge neglected to tell the jury the limited purpose and use of evidence of character and criminal record which may have prejudiced the appellant. He should have instructed the jury that this evidence could only go towards the credibility of his testimony in the witness stand and was not proof of the charge against him.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

(1) 101 Can. C.C. 182.

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The trial judge misdirected the jury on the defence of drunkenness as affecting the capacity of the appellant to form the necessary intention to constitute murder. The jury should have been instructed that in order to find the accused guilty of murder they must (*a*) be sure beyond a reasonable doubt that the accused had the necessary capacity to be able to intend to commit murder; (*b*) that the crown had proved beyond a reasonable doubt that at the time the accused fired the gun, he intended to kill the deceased, or that he intended to inflict bodily injury which was known to the accused at the time he fired the shot to be likely to cause death and that the accused was reckless as to whether or not death ensued. *MacAskill* v. *The King* (1).

The trial judge erred in instructing the jury that the accused was presumed to intend the natural consequences of his act when in fact the presumption had been rebutted and no longer had any probative value against positive evidence of intoxication.

The trial judge erred in instructing the jury that a proved incapacity on the part of the accused to form the necessary intention was necessary in order that the jury would be able to find the accused guilty of manslaughter.

The trial judge erred in instructing the jury to the effect that an amnesic condition of the accused was necessary to find the appellant guilty of manslaughter.

W. J. Johnston for the respondent. The defence of gross intoxication was fairly presented and the evidence of drunkenness was not minimized. The trial judge dealt at length with that defence.

The reference to "a proved incapacity of forming the specific intent" was taken from the *Beard's* case (2), and it is quoted, adopted and followed by this Court in the *MacAskill* case (*supra*) and in *Latour* v. *The King* (3). The statement, itself, places no onus on the defence of proving incapacity and even if it could be said, that standing alone, without explanation, it might conceivably be so construed, the jury in the present case could not possibly have been under any such misapprehension. The trial judge made the statement only once in the whole course of his very

(1) [1931] S.C.R. 330. (2) [1920] A.C. 479.
(3) [1951] S.C.R. 19.

long charge and followed it immediately by pointing out that "if on any point whatever, you have a reasonable doubt, that doubt must be resolved in favour of the accused".

In his charge the trial judge referred to the question of amnesia on three occasions but he did so only in so far as it was necessary in order to place before the jury a clear picture of the defence put forward by the appellant in his evidence. This question of amnesia was raised by the accused's evidence as part of his defence.

As to the ground of dissent stating that the intention to shoot does not necessarily import capacity to commit murder and to so instruct the jury was misdirection, it is submitted that the jury could not but appreciate and understand that the question for their consideration was: Did the accused have the capacity to form an intent to kill or the capacity to form an intent to do grievous bodily injury together with the capacity to know that death would be likely to ensue therefrom.

The jury were instructed in clear and unequivocal terms that they were not trying the accused on his relationship with the Kafkas but solely on the charge of murder and that in considering the truthfulness of the accused's evidence they could have regard for the evasiveness of his answers with respect to the Kafkas situation. It is true that the trial judge did not, in express words, instruct the jury that the accused's record could not be considered by them for any other purpose than in judging his truthfulness, but having dealt with it solely on the issue of credibility and in view of the comparative insignificant nature of the conviction, the omission to do so was not such an error as would mislead the jury.

On the evidence presented at the trial any reasonable jury would be entitled to find that the accused fired the gun and that prior to the shooting he had consumed a considerable quantity of liquor. The only question of substance that remained for consideration was the effect of the alleged intoxication of the accused on his capacity to form the intent necessary to the crime of murder, and there was ample evidence from which any jury could find that there was no reasonable doubt as to the accused's capacity to have that intent.

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The instruction that a man is presumed to intend the natural consequences of his act was normal and proper. The appellant, however, contends that it should not have been given in view of the evidence of intoxication which might have negatived the accused's capacity to have the intent therein referred to. It is submitted on behalf of the respondent that the trial judge effectively guarded against any such error by immediately instructing the jury that the presumption would cease to apply in the event that there was any reasonable doubt as to the accused's capacity or, to put it another way, that the presumption applied only if they first found capacity in the accused beyond all reasonable doubt.

While there may have been some minor defects in the charge, none of them were of such a nature as could be regarded as having worked undue hardship or prejudice upon the accused. The verdict was reasonable and no miscarriage of justice occurred. *Schmidt* v. *The King* (1).

The judgment of the Court was delivered by:—

KERWIN J.:—The appellant's conviction of having murdered Detective Sergeant Sims in Winnipeg was set aside by the Court of Appeal for Manitoba on the ground of misdirection and non-direction but, on the new trial ordered by that Court, he was again convicted. An appeal from that conviction to the Court of Appeal (2) was dismissed, Adamson J.A. dissenting, and, upon the six grounds of dissent taken by the latter, the appellant now asks this Court to set aside the conviction for murder and substitute one for manslaughter.

Sims died as a result of a shot fired by the appellant from the latter's own shot-gun. This was not denied and the main defence was that of drunkenness. The sixth ground of dissent is:—

> 6. In view of the cogent evidence of drinking and intoxication, no reasonable jury properly instructed could find that there was not a reasonable doubt as to the mental capacity of the accused to have the intent necessary to the crime of murder.

In view of the result at which we have arrived, we are not concerned with this ground if it means merely that the dissenting judge would not only have set aside the con-

(1) [1945] S.C.R. 438. (2) 101 Can. C.C. 182.

viction but would have directed a verdict of manslaughter to be entered. If, however, it means that there was nothing to go to the jury upon which they could find the appellant guilty of murder, we are satisfied that there was such evidence. It need not be detailed as it appears sufficiently in the reasons for judgment of Coyne J.A.

The other five grounds of dissent are:—

1. The defence of gross intoxication was not fairly presented and the evidence of drunkenness was unduly minimized.

2. It was misdirection to require a "proved incapacity of forming the specific intent". This cast an improper onus on the accused.

3. The suggestion that something approaching amnesia was necessary to reduce the offence to manslaughter was misdirection.

4. Intention to shoot does not necessarily import capacity to commit murder and to so instruct the jury was misdirection.

5. The neglect to tell the jury the limited purpose and use of evidence of character and criminal record may have been prejudicial.

In connection with the first four, it will be recalled that this was a second trial granted because of certain objections to the charge to the jury on the first trial. The matters to be considered were, therefore, present to the minds of all concerned and not least to the learned Chief Justice of the King's Bench presiding at the new trial. In his charge he not only dealt with the defences put forward on behalf of the accused but also with others that he considered might possibly be open on the evidence. That, indeed, as has been pointed out on many occasions, was his duty. Throughout his charge he made it plain to the jury many times that the accused was entitled to the benefit of any reasonable doubt they might have as to whether the Crown had proved all the elements necessary to constitute the crime of murder. In addition to this, at the request of counsel for the accused, he recalled the jury and practically his last words to them were: "If in your considerations you come to any point whatever where you have a reasonable doubt on that point, it must be resolved in favour of the accused."

As to dissent No. 1, in dealing with the evidence of drunkenness, the trial judge drew to the jury's attention everything that counsel was able to point out to us had been said in evidence, with the one exception that while the trial judge mentioned the evidence of Dr. Burland at the time of the admission of the accused to the hospital, he

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did not refer specifically to what Dr. Burland said as to the accused's condition about five hours later. With this exception, everything relied upon by the accused in order to show his drunkenness at the time of the occurrence was specifically mentioned by the trial judge. The real complaint of the accused seems to be that the trial judge did not endorse all that had been said upon the question of drunkenness but we have no doubt that the defence was fairly presented and that the evidence of drunkenness was not minimized.

Dissent No. 2 refers to the passage in the charge where the trial judge stated to the jury:—

> Evidence of drunkenness falling short of a proved incapacity of forming the specific intent necessary to constitute the crime and merely establishing that the accused's mind 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 acts.

This is taken from the third proposition formulated by Lord Birkenhead in *Director of Public Prosecutions* v. *Beard* (1). The specific objection is to the word "proved". *Beard's* Case is referred to in *MacAskill* v. *The King* (2), *The King* v. *Hughes* (3) and *Latour* v. *The King* (4). While it is quite true that section 260(*d*) of the *Criminal Code* was added in 1947 as a result of the decision in the *Hughes* case, the point upon which reference is now made to that decision is of importance in considering the present appeal. It was there pointed out that in *Beard's* Case it was proved that there was a violent struggle in which the accused overpowered the child and stifled her cries by putting his hand over her mouth and pressing his thumb upon her throat, the acts which, in her weakened state resulting from the struggle, killed her. This, the House of Lords held, was murder, although the accused had no intention of causing death. There was no question that the act which caused the suffocation, the act of the prisoner in placing his hand on the mouth of the victim, was his voluntary act. In the *MacAskill* case it was pointed out at page 334 that the right direction in cases involving subsection (*b*) of section 259 of the *Code* is that evidence of drunkenness rendering the accused incapable of the state

(1) [1920] A.C. 479.
(2) [1931] S.C.R. 330.
(3) [1942] S.C.R. 517.
(4) [1951] S.C.R. 19.

of mind defined by that subsection may be taken into account with the other facts of the case for the purpose of determining whether or not in fact the accused had the intent necessary to bring the case within that subsection; but that the existence of drunkenness not involving such incapacity is not a defence. In such cases that has the effect of altering the words "a proved" in proposition 3 in *Beard's* case to "an existing" or some similar expression. In fact, Lord Birkenhead in proposition No. 3 was not dealing with the question of burden of proof. Notwithstanding that it was used in the present case, there is no doubt the learned Chief Justice was not directing the jury on a question of onus and that that is so is made abundantly clear by those parts of his charge that precede and follow the extract given above. It is not a question of there being a defect in the charge but of the charge as a whole being proper and being delivered in such a form that the jury could not possibly misunderstand that the onus throughout remained upon the Crown. Lord Birkenhead's third proposition is also set out in the *Latour* case at page 29 but at that point the question of onus was not being specifically dealt with. In order to avoid any misunderstanding, we think it proper to state unequivocally that a trial judge should not use the word "proved" in his charge in any case where drunkenness is set up as a defence to a charge of murder. Such a charge would be improper in the absence of clear directions, such as exist in the present case, that the accused is entitled to the benefit of any reasonable doubt as to the capacity of the accused to form the necessary intent.

As to dissent No. 3, Adamson J.A. suggested that the charge indicated that something approaching paralysis of the mind was required before the absence of capacity to form the necessary intention can be found. We must say that we are unable to discover any such indication.

Dissent No. 4 is that at two stages of his charge the trial judge directed the jury that capacity to intend to shoot was sufficient to constitute an intention to commit murder. The first quotation made by the dissenting judge is as follows:—

> Gentlemen, it is on that evidence that you have to come to the conclusion as to whether the accused at the time he fired that gun at Sims was capable of forming an intent to shoot the man who was in front of him. Remember that it didn't have to be Sims. He didn't have

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to know Sims. The question is, Was he capable of forming an intent to shoot the human being in front of him when he fired that shot? There is no question of motive in this case. Was he capable of forming an intent to shoot Sims, not Sims as Sims, not Sims as Detective Sims, but Sims as the human being that was standing before him in that room at the time he fired? If you come to the conclusion that he wasn't, then he is guilty of manslaughter.

However, this must be read in connection with what immediately follows:—

If you come to the conclusion that he was capable of forming that intent, that he intended to shoot that human being in front of him, then he is guilty of murder, subject to provocation or self-defence, and I will deal with those very briefly afterwards. If, on the other hand, you have to go further: If you find that he had an intent but if you decide that being capable of forming an intent his intent wasn't to kill the man, you must ask yourselves, Being capable of forming an intent, was his intent to do grievous bodily harm to that man, knowing and being capable of knowing that what he did was likely to result in death and being reckless as to whether death ensued or not?

The second quotation reads—

What you have to decide on this question of drunkenness is, Was the accused in such a state of drunkenness that he was unable to form an intent to shoot that gun that night, that is, to commit the crime with which he is charged? But if in your consideration of that question you have any reasonable doubt, that is, for instance, if in considering the evidence of the accused you feel that it might be true, that you have the impression in your minds that it might be true, then that would raise a reasonable doubt in your minds. Always, the benefit of the reasonable doubt must be given to the accused.

Again, there must be added to that what immediately follows:—

But if you come to the conclusion, after studying all the evidence, that there was a capacity to form the intention to fire that shot at that human being, then you ask yourselves, first of all, When he fired it did he intend to kill? If he did, the matter stops there. But if when he fired it he didn't intend to kill but intended only to do grievous bodily harm, then did he also have the capacity to know that death would be likely to ensue from that grievous bodily harm and was reckless.

Upon reading the whole of the charge, and particularly what followed each of the quotations appearing in the dissenting judgment, it is made abundantly clear that the trial judge was not giving any such direction as was suggested.

The only remaining ground of dissent is No. 5. The jury were instructed that they were not trying the appellant on his relationship with the Kafkas but only on the charge of murder, *and that in considering the truthfulness of the*

appellant's evidence, they could have regard to the evasiveness of his admissions with respect to the Kafkas situation. The trial judge made but one reference to a previous conviction of the appellant of firing a gun in the City of Winnipeg, and then only in connection with the latter's credibility. The evidence of the appellant's character and of the previous conviction was thus referred to only on the question of credibility.

The appeal fails and must be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Munson & Crawford.*

Solicitor for the respondent: *Hon. C. Rhodes Smith.*