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*Feb. 16.
*Feb. 24.

WILLIAM N. MACASKILL.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Criminal law—Charge of murder—Accused's drunkenness as defence—Degree of incapacity—Murder or manslaughter—Directions to jury—New trial.

The accused appealed from the judgment of the Supreme Court of Nova Scotia (55 Can. Crim. Cas. 51) affirming (by majority) his convic-

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

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tion for murder. It had been contended in his defence that at the time of his act his condition from drink was such that the act could not be murder; and he alleged misdirection by the trial judge to the jury on this question, which involved the law as to what state of incapacity resulting from drink will reduce a crime from murder to manslaughter.

Held: In the circumstances of the case, an essential question for the jury was: Given the existence of some degree of capacity in the accused, and assuming the facts deposed to by Crown witnesses (if credited) in describing the accused's act in striking the fatal blow and his conduct and expressions before and after that act, whether or not he was so affected by drink as to be incapable of having the intent to kill or of having the intent (in reckless disregard of the consequences) to cause some bodily injury, "known" to him to be "likely to cause death" (*Cr. Code,* s. 259 (*a*) (*b*)). That question was one upon which the jury must pass in order to enable them to determine the existence or non-existence of the intent in fact. (*Beard's* case, [1920] A.C. 479, at 501-502, referred to). And as the trial judge, while properly directing the jury's attention to the defence as put forward by accused's counsel (that accused was in such a state that his mind was not functioning, that his "mind was gone," that he was incapable of a degree of "thought" enabling him to be aware of the nature of his physical acts), did not direct them to the question above defined, there should be a new trial.

APPEAL by the accused from the judgment of the Supreme Court of Nova Scotia *in banco* (1), sitting as a Court of Appeal under the provisions of the *Criminal Code,* which affirmed (Mellish and Carroll JJ. dissenting) his conviction, at trial before Chisholm J. and a jury, on an indictment for murder. A defence of the accused was that his condition of drunkenness, at the time of the commission of the offence, was such that he should not be convicted of the crime of murder; and his main ground of appeal to this Court was that there was misdirection by the trial judge in his instructions to the jury in this regard; the question involving the law as to what state of incapacity resulting from drink will reduce a crime from murder to manslaughter.

D. A. Cameron K.C. for the appellant.

F. F. Mathers K.C. for the respondent.

The judgment of the court was delivered by

DUFF J.—We have come to the conclusion that there must be a new trial, and the discussion of the facts will, therefore, be limited to what is strictly unavoidable in the elucidation of the points of law involved.

(1) (1930) 55 Can. Crim. Cas. 51.

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Culpable homicide (by stabbing) was not, at any stage of the proceedings, disputed. The defence rested upon the alleged condition of the appellant resulting from drink, and the real issue was whether or not his condition, at the time of the commission of the offence, was such as to bring the offence within the legal category of manslaughter. The defence appears from the learned judge's charge to have been thus presented to the jury. The accused, counsel seems to have urged, was in such a state that his mind was not functioning, that his "mind was gone," that he was incapable of a degree of "thought" enabling him to be aware of the nature of his physical acts. The learned trial judge told the jury that this view of the prisoner's condition could not be accepted unless they were satisfied that the witnesses for the Crown, who had described the prisoner's act in striking the fatal blow, and had given an account of his conduct and reported the expressions used by him before and after that act, were not worthy of credit.

This, we have no doubt, was a proper direction; but the appeal turns upon other considerations. The rules of law for determining the validity of a defence such as that put forward by the accused, are stated in two propositions in the judgment of Lord Birkenhead in *Beard's* case (1). These propositions, with which the other six Lords agreed, are as follows:

> 2. That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.
>
> 3. That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his 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.

These propositions embody the rules governing us on this appeal; but, before considering the application of them to the facts, it is desirable to advert to the provisions of the *Criminal Code* upon the subjects of murder and manslaughter. The Code (sections 250 and 252), begins by defining homicide. Homicide, it is declared, falls into two classes, culpable and not culpable, of which the last men-

(1) *Director of Public Prosecutions* v. *Beard*, [1920] A.C. 479, at 501-502.

tioned, homicide which is not culpable, is not an offence. Culpable homicide (which includes murder and manslaughter) is then defined; and is declared to be murder in the cases enumerated in sections 259 and 260. Section 261 formulates the conditions in which murder may, by "provocation," be reduced to manslaughter, and finally by section 262, it is declared that culpable homicide not amounting to murder is manslaughter. Cases of culpable homicide as defined by sections 259 and 260 constitute murder unless the provisions of section 261, dealing with the effect of provocation, come into play, or the person charged is, on some special ground, protected from criminal responsibility; other cases of culpable homicide, unless the offender is within some such protection, constitute manslaughter.

We are not concerned with section 260 or with the 3rd or 4th subsection of section 259. The definitions now pertinent are those found in subsections (*a*) and (*b*) of section 259, which are in these words:

> 259. Culpable homicide is murder,
>
> (*a*) if the offender means to cause the death of the person killed;
>
> (*b*) if the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not;

Subsection (*b*) comes into operation where the offender means to cause bodily harm which he knows to be likely to cause death, and when he is in the state of mind described by the words "reckless whether death ensues or not." In the circumstances of this case, the question of substance for the jury was whether the appellant was capable of having the intent to kill or of having the intent (in reckless disregard of the consequences) to cause some bodily injury, "known" to him to be "likely to cause death."

Section 259 seems to narrow somewhat the common law definition of murder. In the judgment quoted above (1) (at pages 503 and 504), Lord Birkenhead, referring to the judgment of the Court of Criminal Appeal in *Meade's* case (2), uses these words:

> Your Lordships have had the advantage of a much more elaborate examination of the authorities upon which the rule is founded than was placed before the Court of Criminal Appeal, and I apprehend can have

(1) *Director of Public Prosecutions* v. *Beard*, [1920] A.C. 479.

(2) *Rex* v. *Meade*, [1909] 1 K.B. 895.

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no doubt that the proposition in *Meade's* case (1) in its wider interpretation is not, and cannot be, supported by authority. The difficulty has arisen largely because the Court of Criminal Appeal used language which has been construed as suggesting that the test of the condition of mind of the prisoner is not whether he was incapable of forming the intent but whether he was incapable of foreseeing or measuring the consequences of the act. In this respect the so-called rule differs from the direction of Lord Coleridge J., which is more strictly in accordance with the earlier authorities.

The intent necessary to bring a given offence under the definition in subsection (*b*) involves a knowledge by the offender of the "likely" consequences of his act; and a direction to the jury that, in examining a defence based upon incapacity alleged to have been produced by drunkenness, they should not consider the capacity of the accused to "foresee or measure the consequences of his act" would hardly be a direction in conformity with the criteria formulated in section 259. The right direction in cases involving the application of subsection (*b*) is that evidence of drunkenness rendering the accused incapable of the state 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.

The learned trial judge instructed the jury that to justify a conviction for murder they must find that the accused was animated by the intent to kill. This was, technically, a little too favourable to the prisoner; although it is probable that such a departure from strict technical precision would seldom have any effect on the result of a trial. In this case, the learned judge no doubt considered that the jury was not likely to dwell upon the distinction between meaning to kill, and meaning to inflict injury known to be likely to cause death, and in reckless disregard of the consequences.

The issue as to capacity is an issue of fact and is primarily for the jury. There may be cases in which, the defence of want of capacity resulting from drunkenness

(1) [1909] 1 K.B. 895.

having been put forward, the trial judge would be justified in directing the jury that there was no evidence of that degree of incapacity which alone could properly be considered by them in passing upon the existence of intent in fact. This, however, we think, is not one of those cases. The jury evidently negatived the "absolute incapacity," the existence of which the learned judge asked them to consider, and which he exemplified by the illustration of a drunken mother destroying the life of her infant child by rolling over upon it in bed; but there still remained the question—given the existence of some degree of capacity, and assuming the facts deposed to by the witnesses for the Crown, whether the appellant was so affected by drink as to be incapable of having the intent to kill or of meaning to cause an injury which he knew was likely to result in death. This issue, as already observed, was primarily for the jury; and it was an issue upon which they must pass in order to enable them to determine the existence or non-existence of the intent in fact.

The able and experienced judge who presided at the trial properly directed the attention of the jury to the defence as it was put before them by counsel for the prisoner; and, having done this, he did not ask them to apply their minds to the further issue we have just defined. It was the prisoner's right, however, notwithstanding the course of his counsel at the trial, to have the jury instructed upon this feature of the case. We think, therefore, that there must be a new trial.

Appeal allowed, and new trial ordered.

Solicitor for the appellant: *D. A. Cameron.*

Solicitor for the respondent: *F. F. Mathers.*