1952

* Oct. 28.
* Dec. 22.

DONALD CAPSON .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Criminal law—Murder—Drunkenness—Reasonable doubt—Incapacity to form specific intent—Objections to charge of trial judge.

A jury found the appellant guilty of murder with "the strongest recommendation for mercy". His appeal, mainly on grounds of misdirections on the issue of drunkenness which he had raised at the trial, was dismissed by the Supreme Court of New Brunswick, Appeal Division, on the ground that, though some of the involved directions might have been objectionable or that the principles could have been more clearly worded, the evidence supported no finding other than that of murder and that, in any event, no substantial wrong or miscarriage had occurred.

Held (Rinfret C.J. and Locke J. dissenting): That the appeal should be allowed and a new trial ordered.

The instructions given to the jury were confusing, incomplete, illegal and were not corrected. The appellant was not bound to prove beyond a reasonable doubt that drunkenness had produced a condition such as did render his mind incapable of forming the pertinent specific intent essential to constitute the crime of murder. Furthermore, the jury should have been clearly instructed that the accused should only be found guilty of manslaughter if, in their view, the evidence indicated such incapacity or left them in doubt as to the matter. (*Latour* v. *The King* [1951] S.C.R. 19 referred to).

On the evidence, it cannot be safely asserted that the jury, properly instructed and acting honestly and reasonably, might not have found itself in doubt as to the accused's incapacity, on account of drunkenness, to form the specific intent to murder. The length of the jury's deliberation coupled with the fact that they came back for further instructions as to the effect of intoxication, support the view that drunkenness was at least considered and support the conclusion that it is impossible to say that the verdict would have necessarily been the same had they been properly instructed that any reasonable doubt had to be given to the accused. There was substantial wrong or miscarriage.

Rinfret C.J. and Locke J. (dissenting) agreed with the unanimous judgment of the Appeal Division of the Supreme Court of New Brunswick, and would have dismissed the appeal.

APPEAL from the judgment of the Supreme Court of New Brunswick, Appeal Division, maintaining the verdict of murder found by a jury against the appellant.

J. T. Carvell for the appellant.

H. W. Hickman Q.C. for the respondent.

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

The dissenting judgment of Rinfret C.J. and Locke J. was delivered by

LOCKE, J.:—I respectfully agree with the unanimous judgment of the Appellate Division delivered by Mr. Justice Hughes and would dismiss this appeal.

The judgment of Kerwin, Taschereau, Estey, Cartwright and Fauteux JJ. was delivered by

FAUTEUX, J.:—On the 6th day of March 1952, a jury in the Supreme Court of New Brunswick (Queen's Bench Division) presided over by Mr. Justice W. A. I. Anglin, after four hours of deliberation, returned against the appellant a verdict of guilty—to which they added "the strongest recommendation for mercy"—on the following charge:—

> That Donald Capson, on or about the 2nd day of October A.D. 1951, at the City of Moncton, in the County of Westmorland, in the Province of New Brunswick, did unlawfully murder Rosie Wing in violation of section 263 of the Criminal Code of Canada.

This verdict, appealed mainly on ground of misdirections on the issue of drunkenness raised at trial by the accused, was unanimously maintained by the Appeal Division of the Supreme Court of New Brunswick, on the view that, though some of the involved directions might be objectionable or that the principles could have been more clearly worded, the evidence in the case would support no finding other than that of murder and that, in any event, no substantial wrong or miscarriage of justice had actually occurred.

Leave was thereafter granted to the appellant to appeal to this Court on two questions of law, namely:—

> Did the trial Judge misdirect the jury as to the burden of proof with respect to the defence of drunkenness?
>
> Did the trial Judge misdirect the jury in omitting to direct them that the accused was entitled to the benefit of any reasonable doubt upon the whole case, including the reduction of the crime of murder to manslaughter?

The directions in the address of the trial Judge that are attacked are:—

> (1) I must direct you that if you think the accused was so intoxicated that *he did not have the mind to appreciate what he was doing*, then the charge of murder may be reduced to manslaughter.
>
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(2) If he is so drunk that you are satisfied *beyond a reasonable doubt* he did not know what he was doing because of the alcohol, then it is impossible for you to say that he intended to murder. So, under those circumstances, the law is that a charge of murder must then be reduced to manslaughter.

* * *

(3) If, however, he has drunk so much he does not know what he is doing at all and you are *well satisfied beyond a reasonable doubt* that his mind is so blurred by liquor that he does not appreciate what he is doing at all, then you are unable to find that he had any one of these intents which I will speak to you about later, so a charge of murder would have to be reduced to a finding of manslaughter.

* * *

(4) *As I told you before,* if you think that he had enough to drink that he did not know what he was doing in respect of any of these occasions when he must have a specific intent, then you may bring in a verdict of manslaughter instead of murder.

* * *

(5) ...and you have to be satisfied *beyond a reasonable doubt* that his mind was so affected by liquor that he could not have meant to inflict grievous bodily harm to facilitate robbery, if you say it was robbery, or that he did not have the mind to intend to cause bodily injuries known to him to be likely to cause death or that he was reckless whether death ensued or not.

* * *

(6) But if you think that he had so much liquor during that day that his mind was not in the state of *appreciating what he was doing* and not just only influenced to do more readily and he would not probably have done it, if he was sober, then you may find him guilty of manslaughter.

* * *

(7) So that if you think, *not necessarily beyond a reasonable doubt,* but if you are satisfied that the influence of liquor was such that he could not appreciate what he was doing in the sense that he could not form the necessary intent to cause the death, then you may find him guilty of manslaughter instead of murder.

With these instructions, the jury retired and returned, two hours later, to ask the trial Judge "to explain again the effect which the different degrees of intoxication as regards to the accused, would have upon the verdict of murder as distinguished from manslaughter." The following instructions were then given:—

(8) So in that intermediate stage you must satisfy yourselves that the accused was so much under the influence of liquor that he just could not be said to be capable or have the mental capacity to form any of these specific intents...

* * *

(9) If he had so much liquor in him and his mind was so affected that you can say he did not mean to cause her death then he would be guilty of manslaughter only and not guilty of murder.

It must be added that, with these conflicting instructions related to doubt on the specific issue of drunkenness, the jury were not instructed in a manner sufficiently clear that any reasonable doubt they might have on the specific issue had to be given to the accused and that the verdict should then be reduced from murder to manslaughter.

The jury retired again and after two more hours of further deliberation, returned to give the above verdict and recommendation for mercy.

Appreciated in the light of well settled principles, as to the burden of proof, in the matter, it is manifest that the instructions given in this respect are confusing, incomplete and illegal. The appellant was not bound to prove beyond a reasonable doubt that drunkenness had produced a condition such as incapacitating his mind of forming the pertinent specific intent essential to constitute the crime of murder. Furthermore, the jury should have been clearly instructed that the accused should only be found guilty of manslaughter if, in their view, the evidence indicated such incapacity or left them in doubt as to the matter. (See *Latour* v. *The King* (1) and authorities therein referred to).

The contention of the Crown that the instructions given were innocuous or were corrected is, I think, undefendable.

The second submission of the Crown—accepted by the Court of Appeal—is that there was no evidence upon which a jury could reasonably find that the appellant's mind was incapacitated by drunkenness to form the intent to commit murder; consequently, says counsel for the respondent, the jury should not have been invited to consider the issue at all and even if the directions given to them, in this respect, were illegal, no substantial wrong or miscarriage of justice resulted therefrom since a verdict of manslaughter could not, for the reason of drunkenness, be legally returned by the jury.

Since there is to be a new trial, no reference will be made to the evidence.

In the opinion of the Court of Appeal, the appellant entered Rosie Wing's house "probably with the idea of trying to make a loan of some money"; but what took place from then on up to the moment at which the injuries

(1) [1951] S.C.R. 19.

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were inflicted is not apparent in the evidence. On any view that would bring the case under the provisions of ss. (*b*) of s. 259 of the Criminal Code, the jury, properly instructed and acting honestly and reasonably, might have had no hesitation in finding that Capson was not, on account of drunkenness, incapacitated to form the specific intent therein provided, but it cannot safely be asserted that the jury, equally properly instructed and acting honestly and reasonably, might not have found itself in doubt on the point. The very fact that, after two hours of deliberation, the jury required from the trial Judge further instructions as to "the effect which the different degrees of intoxication as regards to the accused, would have upon the verdict of murder as distinguished from manslaughter", together with the fact that, after receiving such additional instructions, they deliberated again for two more hours before bringing a verdict of murder "with the strongest recommendation for mercy" support the view that drunkenness to some degree was at least considered and support the conclusion that it is impossible to say that the verdict would have necessarily been the same had they been properly instructed that any reasonable doubt had to be given to the appellant. It was, therefore, necessary for the trial Judge to instruct the jury on the issue of drunkenness and to do so according to law.

This conclusion also disposes of the ultimate contention of the Crown that no substantial wrong or miscarriage of justice actually resulted from the illegal manner in which the jury were instructed.

The appeal should be maintained and a new trial ordered.

Appeal allowed; new trial ordered.

Solicitor for the appellant: *J. T. Carvell.*

Solicitor for the respondent: *H. W. Hickman.*