**DAVID SIKUNYEMA v THE QUEEN (1963 - 1964) Z and NRLR 66 (CA)**

**1963 - 1964 Z and NRLR p66**

COURT OF APPEAL

[Before the Honourable the Chief Justice, Sir DIARMAID CONROY, the Honourable Mr. Justice DENNISON and the Honourable Mr. Justice CHARLES on the 17th March, 1964.]

**Flynote**

**Intoxication as a defence to a criminal charge - section 14 (4) of the Penal Code, cap. 6.**

**Headnote**

The accused killed a fellow villager in the course of a beer drink. The accused had been drinking at the time of the incident. The court was concerned with the effect of the accused's intoxication upon the question of intent. In the court below, the accused had been found guilty of murder.

*Held:*

(a) The court below should have taken the evidence of intoxication into account, with all other evidence, in deciding whether the Crown had proved the actual intent necessary in a charge of murder.

(b) The principle established in the *Director of Public Prosecutions v Beard* [1920] All ER 21 must now be read in the light of *Broadhurst v Reginam* [1964] 1 All ER

Conviction and sentence for murder set aside. A conviction for manslaughter and a sentence of 5 years imprisonment with hard labour substituted therefor.

Cases cited:

(1) *Director of Public Prosecutions v Beard* [1920] All ER Rep. 21; [1920] AC 479; 14 Cr. App. R 159.

(2) *Broadhurst v Reginam* [1964] 1 All ER 111.

(3) *Lubinda Silume v The Queen. Federal Supreme Court Judgment No.*7 *of* 1964 (unreported).

*D A O'Connor, Esq., Crown Counsel* for the Crown

*F Chuula, Esq.* for the appellant

**Judgment**

**Conroy CJ:** The appellant was convicted by the High Court, sitting at Livingstone, of murdering Saladi Shandongo at Sikunyema Village in the Kalomo District, on the 13th January, 1964. He appealed against that conviction, and on 17th March, 1964, we allowed his appeal, set aside the verdict of guilty of murder, substituted a verdict of guilty of manslaughter and sentenced him to five years imprisonment with hard labour. I now give my reasons for this decision.

The Crown case was that a beer drink was held near Sikunyema Village in January. The appellant and other persons attended and in the course of the beer drink the appellant and a man called Donald started arguing about beer. Donald said to the appellant, " You are already drunk. That is why people beat you ". The appellant objected to this and he and Donald had a fight. In the course of this fight the appellant threw a stool at Donald which hit George (another participant at the beer



drink) on the head and injured him. George was attended to by the people present and shortly afterwards the appellant picked up a pounding stick which happened to be lying there, and hit the deceased a one - handed downward blow in the chest with it, rupturing his spleen and breaking a rib. From these injuries the deceased died.

The appellant was defended by counsel. By way of defence it was put forward that the appellant had been provoked by the conduct of Donald, and that the fatal blow was, in fact, aimed at Donald, who evaded it, and that it landed on the deceased by accident. Therefore it was contended on behalf of the appellant that he should only have been convicted of manslaughter.

The learned judge found as a fact that the fatal blow was deliberately aimed at the deceased while he was on the ground and was not accidental. He also held that on the facts provocation had been negatived. There is ample evidence to support these findings of fact, and I see no justification for interfering with them.

The learned judge found that when the appellant struck the deceased " he intended, at least, to cause him grievous harm. Such an intention amounts to malice aforethought." The medical evidence was that with a stick of the type and weight of the pounding stick, only moderate force would be required to inflict the fatal injury. It would therefore appear that the learned judge was satisfied from the circumstance of a deliberate blow aimed with this stick, that the Crown had discharged the burden of proving that the appellant at the time of striking such blow must have intended to do grievous harm to the deceased. From this it would follow that the Crown had proved malice aforethought within section 180 (a) of the Penal Code.

Section 14 (4) of the Penal Code provides that intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence. This matter was recently discussed by the Judicial Committee of the Privy Council in *Broadhurst v Reginam* [1964] 1 All ER 111. In that case, the board was dealing with a criminal appeal from Malta which was, in part, based upon the interpretation of section 35 (4) of the Criminal Code of Malta. As that section is precisely the same as section 14 (4) of our Penal Code, the decision is binding on this court. At page 122 of the judgment of the board (which was delivered by Lord Devlin) the following passage appears:

Their lordships have already referred to section 35 of the code which, it was said, embodies the law of England. Under subsection (4) it would appear that drunkenness is to be taken into

account for the purpose of determining whether the person charged had in fact formed any intention necessary to constitute the crime. The corresponding proposition laid down in *Director of Public Prosecutions v Beard* is 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. There is no mention in the code of incapacity. The proposition stated in *Director of Public Prosecutions v Beard* is

**1963 - 1964 Z and NRLR p68**

CONROY CJ

not altogether easy to grasp. If an accused is rendered incapable of forming an intent, whatever the other facts in the case may be, he cannot have formed it; and it would not, therefore, be sensible to take the incapacity into consideration together with the other facts in order to determine whether he had the necessary intent. It may be that the wording of section 35 (4) of the code is designed to avoid this logical difficulty and that there is no substantial difference between the two propositions. Or it may be that the law as laid down in *Director of Public Prosecutions v Beard* must now be interpreted in the light of later decisions on the proof of guilty intent. But superficially at any rate section 35 (4) of the code and *Director of Public Prosecutions v Beard* approach differently the problem of proving intent. One way of approaching the problem is to say that it is always for the Crown to prove that the accused actually had the intent necessary to constitute the crime; and that that proof may emerge from evidence or statements made by the accused about his own state of mind or may be made by way of inference from the totality of the circumstances. Prima facie intoxication is one circumstance to be taken into account and on this view all that section 35 (4) is doing is to make it plain that intoxication is not to be excluded. On the other hand, the sort of approach that is contemplated in *Director of Public Prosecutions v Beard* is that there must be proof (or at least some suggestion) of incapacity in order to rebut the presumption that a man intends the natural consequence of his acts.

It seems to me that the approach laid down by the board is the correct one to follow in the instant case. The court of trial should have considered whether there was evidence of intoxication. If there were such evidence, the court should then have taken it into account, together with all other evidence, in arriving at a conclusion as to whether the Crown had proved the actual intent necessary in a charge of murder. The principle in *Beard*'s case (which was that incapacity arising from drunkenness must be the criterion) seems to me to be the wrong one to follow.

In the recent Federal Supreme Court judgment in *Lubinda Silume v The Queen* (F.S.C. judgment 7/64) the following passage appears:

"I have got the impression, not only from this case but from one or two other recent cases, that there may be a little confusion in Northern Rhodesia in relation to defences in murder cases which are based on intoxication, and, as there does not appear to be a reported judgment of this court dealing with the matter, I take this opportunity to state the position.... (The learned Justice of Appeal then set out subsections (2) and (4) of section 14 and continued) -

These provisions do no more than state the relevant English common law as laid down by the House of Lords in *Director of Public Prosecutions v Beard*."

The latter dictum, in view of *Broadhurst*'s case, cannot be regarded as good law and should not be followed.

**1963 - 1964 Z and NRLR p69**

CONROY CJ

There was some evidence that the appellant was intoxicated at the time he struck the blow, although the evidence on this issue is conflicting. The first prosecution witness, Sixpence Kombe, said that the beer was in drums and free, and that there were some drunk people there. He arrived about 3 p.m. and left about two hours later. When he left the deceased (his son) was still there. The second prosecution witness, Mangality Mweme, said that she did not see anyone drunk, and that the appellant appeared sober and was quite all right. The third prosecution witness, Malambo Sikunyema, was the village headman. He said that there was one small drum of beer, containing about five gallons, which was drunk by about ten people. He said:

Some were getting drunk - notably David and Donald. David was born in 1943. He does drink very much. He is always drunk. He could stand up and talk so people understood him. Donald and David started arguing about beer. Donald said to David, " You are already drunk. That is why people beat you ".

The prosecution witness, No. 4, Muzamba Munkonbwe, brewed the beer and gave the beer drink party. He said that there was one drum of beer brewed, containing about five gallons, but that he did not see David drunk.

The appellant elected to give evidence and he deposed that he had been to two beerdrinks that day, it was at the second that the trouble occurred, that there was a fight between him and Donald because Donald said, " You are already drunk, and that is why my young brother beats you ". He later said, in cross - examination, " I was not drunk ".

There was, therefore, a good deal of conflict as to whether the appellant was intoxicated or not. I incline to attach considerable weight to two factors. The first is the evidence given by the village headman that David was notably getting drunk. My experience of African villagers is that they tend, when giving evidence about intoxication, to minimise the state of inebriety for fear that they would be blamed by the court for permitting drunkenness. They also incline only to say a man is drunk when he is dead drunk, and do not accept graduations of intoxication between complete sobriety and unconsciousness. This may well be the reason that the appellant said he was not drunk. There is also the real evidence of two witnesses that the cause of the fight was the accusation made to the appellant by Donald that the appellant was drunk. That is direct evidence of what happened, it is not opinion evidence expressed later by persons as to whether the appellant was intoxicated or not.

In the circumstances I am satisfied that there was some considerable evidence of intoxication on the part of the appellant. This should have been put forward by the defence to the court, and the

court should have taken it into account for the purpose of determining whether the appellant had an intention of doing grievous harm when he picked up the stick from the ground and struck the deceased a one - handed blow in the chest. Had the question of intoxication been raised by defence counsel, then I think the judge may well have come to the view that the Crown had failed to prove that the appellant had the specific intention necessary to constitute malice aforethought.

**1963 - 1964 Z and NRLR p70**

CONROY CJ

The report of the judgment in *Broadburst*'s case was not received in this country until after the learned judge gave his judgment convicting the appellant. He may well have followed the line of reasoning laid down by the Federal Supreme Court in *Lubinda Silume's case*, which is now known to be wrong.

Crown counsel argued that this was a case in which the first *proviso* to section 13 (1) of the Federal Supreme Court Act, 1955, should be applied. I do not agree. The failure to take intoxication into account, in determining whether the appellant had formed the specific intention of occasioning grievous harm to Saladi, deprived the appellant of a fair chance of acquittal on the charge of murder.

For these reasons we allowed the appeal, substituted a verdict of manslaughter, and imposed a sentence of five years imprisonment with hard labour.

**Judgment**

**Dennison J:** I agree.

**Judgment**

**Charles J:** I agree.