

IN THE SUPREME COURT)
)
OF WESTERN AUSTRALIA)

Heard: 14th March, 1977

Delivered: 6th May, 1977

THE FULL COURT

COURT OF CRIMINAL APPEAL

CORAM: BURT C.J., LAVAN S.P.J., BRINSDEN J.

C.C.A. No. 12 of 1977

B E T W E E N:

RONALD JOSEPH DODD

Appellant

-and-

THE QUEEN

Respondent

JUDGMENT -

BURT C.J.

In my opinion the appeal should be allowed and the conviction quashed. I publish my reasons.

LAVAN S.P.J.

I agree, and I publish my reasons.

BRINSDEN J.

I agree, and I publish my reasons.

IN THE SUPREME COURT)
)
 OF WESTERN AUSTRALIA)

Heard: 14th March, 1977
 6 MAY 1977
Delivered: 7 MAY 1977

THE FULL COURT

COURT OF CRIMINAL APPEAL

CORAM: BURT C.J., LAVAN S.P.J., BRINSDEN J.

Appeal No. 12 of 1977

BETWEEN:

RONALD JOSEPH DODD

Appellant

-and-

THE QUEEN

Respondent

Mr. H. A. Wallwork appeared for the appellant.

Mr. K. H. Parker appeared for the respondent.

Authorities cited -

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 R. v. Lewis (1937) 4 All E.R. 360; 26 Cr.App. 110
 Peacock v. R., (1911) 13 C.L.R. 619
 R. v. Goddard & Goddard, (1962) 1 W.L.R. 1282; (1962) 3 All E.R. 5
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BURT C.J.

In the early hours of the morning of Sunday, 3rd October 1976, someone killed a man named David James Brown. The deceased had been the victim of an extremely savage and unrestrained attack. His throat had been cut. The details appear in the post mortem report as follows:

"On the front of the throat a large gaping wound 4½" in length was present at the level of the lower jaw; the wound was slightly higher on the left side than on the right. In the base of the wound the length of the cervical spine was exposed and a deep and slightly angled gash was present in the intervertebral disc between the third and fourth cervical vertebrae with a chip of the body of the third cervical vertebra severed from the main part.

On the left side of the neck the jugular vein was partially severed in two places whilst the carotid artery was completely divided at the level of the third cervical vertebra. At the right side of the neck the jugular vein was almost completely divided at one point with retraction of the ends away from each other. In the base of the wound the oesophagus and trachea were completely severed with the tip of the epiglottis separated from the main body. The trachea was divided above the vocal cords. The edges of the wound showed 'V' shaped doubling most prominent on the right side."

In addition, the lower part of his right ear had been severed as if by a single cut. His skull had been fractured and he had been stabbed in the chest and there were many other indications of violence done to him. The cause of death was said to be "incised wound of throat".

The Crown subsequently charged the appellant with wilful murder.

At his trial the appellant denied that he had had anything to do with the killing. His evidence was that at some time in the early hours of the morning of 3rd October he had found the body lying on the lawn of a house at 64 Robinson Avenue, Bayswater. This was a house occupied by a man named Bob Bamford. He and Bamford were both on parole. They did not want the body to be found where it lay so they put it into the back of a motor car and took it to a house at 49 Irvine Street, Bayswater, occupied by a man named Mannion. The appellant told Mannion of his discovery and at his, Mannion's, request he assisted to bury the body in the garden. On the following evening the appellant and a man named Frank Burton dug the body up, placed it in the car, took it to a pine plantation and re-buried it.

It appears to be common ground when expressed in general terms that the appellant had spent the best part of Saturday, 2nd October, running into the early hours of the morning of the 3rd October, drinking. During some of that time he was in the company of the deceased and others although the deceased was hardly known to him. The hard core of the evidence led against the appellant at his trial consisted of admissions alleged to have been made by him to a number of people. The appellant at

his trial denied that he had made any of the admissions to anyone. Clearly the questions for the jury to decide upon the charge as formulated in the indictment were: Did the accused kill the deceased and, if yes, did he do so intending to cause his death? And the appellant was convicted, from which it follows that the jury answered each question in the affirmative.

From that conviction the appellant appeals to this Court on a number of grounds to which one ground relative to the directions given to the jury by the trial Judge upon the relevance of the state of intoxication of the appellant, such as the jury might find it to have been, to the issue of intent was added in the course of the hearing. The appeal can I think be decided upon that ground alone.

In England it seems often to have been said that when a person is on trial for an offence of which an intent to cause a specific result is an element and when there is evidence capable of sustaining the conclusion that the accused was under the influence of alcohol when he did the act, the question for the jury to decide is whether the degree of intoxication as found was such as to render the accused person incapable of forming the necessary intention. See Director of Public Prosecutions v. Beard, (1920) A.C. 479 and The Attorney General for Northern Ireland v. Gallagher (1963) A.C. 349. Of course, if the jury is not persuaded that at the relevant time the accused person possessed that capacity that would necessarily deny a finding that he did act with the required intent. But the converse is not true, nor is it the law as enacted by the Criminal Code. Because an accused person had the capacity to form an intention is not to say that he did so and whether he did so must remain a question of fact for the jury to decide having regard to all the circumstances including the intoxication of the accused whether it be "complete or partial". Section 28 of the Criminal Code puts this beyond argument. It says: "When an intention to cause a specific result is an element of an offence, intoxication whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining

whether such an intention in fact existed". From this it would seem to follow that if under the Code a trial judge were to tell a jury that the question and the only question for it to consider when considering the intent with which an intoxicated person did an act was whether he was or was not by reason of intoxication capable of forming the necessary intent, it would be a misdirection. And in the Code States this is the received doctrine based as it is on the clear words of the section. Under the Code it would be a mistake and a serious misdirection for a trial judge upon an indictment charging wilful murder "to put to the jury, as if it were the ultimate question on this part of the case, the question whether the appellant was rendered by intoxication incapable of forming the intention to kill...".

The correct question which s. 28 and the law as to onus of proof combine to present being whether the evidence of intoxication has caused the jury to have a reasonable doubt as to whether the appellant had in fact the intention to kill: Thomas v. The King (1960) 102 C.L.R. 584, at p. 597 per Kitto J.. It has been so held in Queensland in a number of cases. Two of them, R. v. Nicholson (1956) Q.S.R. 520 and R. v. Herlihy (1956) Q.S.R.18, are referred to with approval by Kitto J. in Thomas's case and those cases have been followed since. See R. v. Crozier (1965) Qd.R. 133, and R. v. Crump (1966) Qd.R. 340. What is said to be a correct direction so as to give proper effect to s. 28 of the Code was formulated by Mack J. in Crozier's case as follows:

"If you are not satisfied beyond reasonable doubt that through intoxication the prisoner was capable of forming an intent or if you are left in doubt whether the prisoner did in fact form either of the necessary intents", - to kill or to do grievous bodily harm - "then it is your duty to acquit of wilful murder and murder". I would not disagree with that although I think that it would also be correct and perhaps preferable to direct the jury without any reference being made to capacity to form the intent, it being enough to say whether having regard to all the circumstances including the state of the accused person's intoxication as they might find it to be the jury is satisfied

beyond reasonable doubt that he did the act with the required intent. The idea of a capacity to form an intent seems to me to lack definition and to distract attention from the true question, which is simply whether the "intention in fact existed".

One must now turn to his Honour's directions so as to see whether upon a fair reading of all that he said it does appear either that he left the ultimate question to the jury as being whether the appellant was rendered by intoxication incapable of forming the intention to kill or that the jury might have reasonably understood him to have done so.

He correctly told the jury: "For the Crown to sustain its case it must satisfy you not only that Brown was killed by the accused but at the time he was killed, the time his throat was cut, the accused possessed the intention to kill Brown", and he went on to say, and again correctly: "There is no legal presumption that a man always intends the natural consequences of his acts. It is a question of what inference you think ought to be drawn from proven facts". From there he moved to "the question of intoxication" and as to that he instructed the jury as follows:

"In general, intoxication is no excuse for a crime but it is common knowledge that a man's mind may become so fuddled by drink that he ceased to be able to form any real intention. If an accused man is shown to have reached such a condition he may have committed various offences but he will not have committed either wilful murder or murder because he will lack the essential intent to produce the necessary result.

Adverting briefly to the evidence, it is quite clear that the accused had consumed a considerable amount of alcohol during his association with the deceased on the fateful day. Whether this was sufficient to deprive him of the capacity to formulate the necessary intent to commit the crime with which he is charged is for you to determine. You, as ordinary men and women of the world, are best fitted to determine such a question of fact. You will know that some men can consume a considerable amount of alcohol and yet be fully conscious of all they are doing whilst others are incapable of so conducting themselves."

That direction standing on its own is, I think, incomplete.

Later in his address, when considering the defence put forward by the appellant, he returns to this question of intoxication. He there says: "It must, however, also be said on his behalf that if you reach the conclusion that he did kill the deceased that he was so drunk at the time that he was unable

to formulate any intention to kill. You will recall that Mr. Wallwork used the term 'roaring drunk'. He emphasised the fact that the accused had been involved in a fight outside the Maylands Hotel where he had suffered some seven blows to the skull, that he had been drinking all day and was roaring drunk and therefore was incapable of forming the necessary intention. That is where you all come in as sane, sober, sensible people of the community having regard to the type of man who has been before you, the people with whom he cohabited and their habits particularly with regard to the taking of alcohol. You will also have regard to his recollection of the evidence as he gave it to you and as he answered to the cross-examination as to whether you believe he was so intoxicated as to be deprived of the intent to commit this crime". This is an accurate statement of the way in which the appellant's counsel at trial posed the question but again, as a direction upon the relevance of intoxication to the question of intent it is, I think, incomplete. At the end of his direction and at the invitation of the appellant's counsel, his Honour gave the jury a further direction as to onus of proof, with specific reference to the question of intoxication. He then said: "Mr. Wallwork has raised a very important question and that is, when you consider drunkenness not only is the accused entitled to the benefit of the doubt overall in the evidence, but if you hold a doubt in your minds as to whether the degree of his intoxication was sufficient to enable him to form the intent to kill, then he is entitled to the benefit of that doubt. In other words (I think I might have put it the reverse way) it is not necessary for him to establish that he was so drunk that he did not formulate the intent, but rather, if, having regard to the whole of the evidence, you reach your conclusion on it but there is a doubt in your mind that he possessed the intent to kill, then he is entitled to the benefit of that doubt". The jury then retired. At that stage, as it seems to me, and notwithstanding the last sentence which standing on its own contains no error, the jury might well have been in doubt as to the bearing which intoxication might have upon the question of intent. Specifically they might well have

been in doubt as to whether in the words of Kitto J. in Thomas's case, the ultimate question as to intent was whether or not "the appellant was rendered by intoxication incapable of forming the intention to kill".

The jury retired shortly after 4.30 in the afternoon. About one hour later they returned seeking a further direction. The foreman then said: "We wanted a definition again of wilful murder and manslaughter and the inferences concerning intoxication". This seems to have been understood as being a question as to three distinct matters - as to wilful murder, as to manslaughter and as to the "inferences concerning intoxication". For myself I think it to be just as likely that the jury was asking for a further direction as to the significance of intoxication upon the question of intent. Be this as it may, the trial Judge gave a further direction which, so far as it is now relevant, was as follows:

"I said to you, you will recall, that some people can consume a substantial amount of alcohol and still be capable of formulating an intent to kill. Others can drink but a small amount of alcohol and be incapable of formulating that intent and when you give consideration to this question of intent, you remove from your mind all suggestions of the absence of motive or malice.

The presence of motive and malice could help. The absence just makes it harder but it is basically immaterial when considering intent.

I went on to tell you that when one has regard to the force which was applied in the use of the knife on the neck of the victim, it would be difficult to conclude (although it is open to you to conclude) that all that was intended to be done was grievous bodily harm, since the knife blows were fatal. Therefore, murder is out. It is either an intent to kill, or no intent at all because of intoxication, or, if you are in doubt about whether the accused possessed that intent, then you must give him the benefit of the doubt and say that he did not possess that intent and the Crown has not succeeded in proving that intent."

For myself I am by no means sure what understanding those words would convey to a jury but certainly they would seem to me to be capable of being understood as saying that the ultimate question for them to decide was whether the appellant, if he killed the deceased, was or was not "because of intoxication" capable of forming an intent to kill. One cannot, of course, be sure that the jury so understood the direction and it may be that

there was no jury consensus as to what the direction meant. Questions of that sort can never be answered. I can only say that if the jury did so understand the direction which on a reading of the entire direction I think could well be the case, then they judged the case without regard to the appellant's intoxication to the extent that they found it to have been, which as their verdict shows must have fallen short of depriving him of the capacity to form the intention, for "the purpose of ascertaining whether such an intention in fact existed".

Overall and notwithstanding the direction given at the beginning of his address that "the saying that a man is presumed to intend the natural consequences of his act" is "not a statement of the law" the question of intent being "a question of what inference you think ought to be drawn from proven facts", the jury at the end of the day could well have understood the direction to be that if they found the appellant to have cut the deceased's throat then the proper verdict was guilty of wilful murder unless the appellant was at that time so far under the influence of alcohol as to be incapable of forming an intent to kill or unless they were not satisfied to the required standard of persuasion that he possessed that capacity. For this reason, in my opinion, the verdict should not be allowed to stand. It should, I think, be set aside and counsel should be heard as to the proper consequential order to be made.

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

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COURT OF CRIMINAL APPEAL

CORAM: BURT C.J., LAVAN S.P.J., BRINSDEN J.

C.C.A. NO. 12 of 1977

B E T W E E N :

RONALD JOSEPH DODD

Appellant

- and -

THE QUEEN

Respondent

LAVAN S.P.J.

The appellant, Ronald Joseph Dodd was charged on indictment that he wilfully murdered one David James Brown. He pleaded not guilty and was tried before Wallace J. and a jury at the February sittings of the Criminal Court. He was convicted and from that conviction he now appeals. The appeal is grounded on allegations of misdirection in law and fact in the summing up. The misdirection of law is said to relate to the burden of proof of drunkenness. The alleged misdirections of fact are said to have resulted in a denial of justice to the appellant in that the issues for the jury to decide were not clearly and accurately put before them.

Brown met his death in the early hours of the 3rd October 1976. The evidence before the Court established beyond doubt that he died as the result of a vicious attack with a knife in which he sustained a terrible wound in the throat in which the jugular vein was partially severed in two places and the carotid artery was completely severed. He also suffered a fractured skull and there were stab wounds in the chest and a portion of his right ear had been severed.

To the detectives investigating the killing, the appellant denied his guilt. According to his account, the day preceeding 3rd October had been spent by him in the company of various friends

and acquaintances. Throughout that day and until after 2.00 a.m. on the following morning when he left a nightclub, he had drunk steadily and everything pointed to the fact that at that time he was noticeably intoxicated. Amongst those in whose company he had been that day was the deceased man Brown who was merely a casual acquaintance but according to the appellant before he went to the nightclub he had parted company with Brown and that he did not see him alive again. As to his connection with the alleged crime, the appellant stated that at approximately 3.00 a.m. on the 3rd October, he had gone to the house of a man named Bamford at 64 Robinson Avenue, Perth and that on the lawn he had discovered Brown's dead body. Following his discovery, he had at Bamford's request, assisted him to bury the body in the garden of the home of one Manion at 49 Irvine Street, Bayswater but on the following day he had disinterred the body and re-buried it in a pine plantation where it was discovered by the police.

The appellant was arrested and charged with wilful murder. At his trial there was a considerable body of evidence connecting him with the crime, including the evidence of a number of persons to whom the appellant was alleged to have admitted killing Brown. Although the defence was a straight out denial by the appellant that he was responsible for Brown's death, there were on the evidence, four verdicts open on the indictment.

The gravest of these was a verdict of guilty as charged which was a proper verdict if the jury was satisfied that the appellant had killed Brown with the intention of killing him.

The next possible verdict in order of gravity was a verdict of guilty of murder which was the appropriate verdict if the jury was satisfied that the appellant had killed Brown but that he had done so not intending to kill him but intending to cause him grievous bodily harm. The learned trial Judge directed, and in my opinion correctly directed, the jury that on the evidence relating to the nature of the fatal injuries

sustained by the deceased, a verdict of guilty of murder could not be supported.

The third possible verdict - a verdict of guilty of manslaughter - was available if the jury was satisfied that the accused had killed Brown unlawfully but without an intent either of killing him or of causing him grievous bodily harm.

The verdict of not guilty was a proper verdict if the jury was of the opinion that the prosecution had failed to establish that the appellant had caused Brown's death at all.

Although the appellant throughout maintained his innocence of the charge, towards the end of the trial his counsel raised with the jury, the possibility of a verdict of guilty of manslaughter. Addressing the jury he stated:

"The other matter which I will mention to you in closing is the question of manslaughter. You might think or you might be sure that Dodd killed Brown but you might not be at all sure that he did not do it in an alcoholic daze, blind drunk.

" You might get that because Burton, you will remember, said that Dodd told him he didn't know why he did it.

" If you believe that evidence, you could convict Dodd of manslaughter - that is not guilty of wilful murder but guilty of manslaughter - because to be guilty of wilful murder the Crown must prove beyond a reasonable doubt every element of that crime and one of them is that he killed him intending to kill him and he may not have been in such a state of mental health as he could form any intention at all - he might have done it blind drunk for no rational reason at all.

" I do not for a moment suggest he did because I do not think you know...just what did happen, so it would be dangerous I suggest to you, to convict him of anything - manslaughter even - that you could I think....if you are not satisfied that he killed Brown when he intended to kill him when he was just plain in an alcoholic stupor. "

Counsel then proceeded to direct the attention of the jury to the evidence of the various witnesses who had testified to the fact that the appellant on the night of the offence, had

been visibly affected by alcohol.

In terms of S.28 of the Criminal Code

"When an intent to cause a specific result is an element of an offence, intoxication whether complete or partial and whether intentional or unintentional may be regarded for the purpose of ascertaining whether such an intent in fact existed."

During the course of his charge to the jury, the learned trial Judge, in dealing with the question of intent, adverted to the question of intoxication in the following terms.

"Whilst I am talking about intention, I will mention one other matter which I do not think myself arises in this case but I mention so that I can complete the picture for you and I repeat that you are not bound to the view I have formed - it is the question of intoxication. As I have explained, in both wilful murder and murder the proof by the Crown of an intent on the part of the accused is an essential element. Like every other element it must be proved affirmatively by the Crown.

" In general, intoxication is no excuse for a crime but it is common knowledge that a man's mind may become fuddled by drink so that he ceases to be able to form any real intention. If an accused man is shown to have reached such a condition he may have committed various offences but he will not have committed either wilful murder or murder because he will lack the essential intent to produce the necessary result.

" Adverting briefly to the evidence it is quite clear that the accused had consumed a considerably amount of alcohol during his association with the deceased on the fateful day. Whether this was sufficient to deprive him of the capacity to form the necessary intent to commit the crime with which he is charged is for you to determine.

" You are entitled to look at the evidence, having regard to being satisfied that the Crown has proved the necessary intent to kill on Dodd's part.

" The defence for its part says 'I did not do it'.....It must however be said on his behalf that if you reach the conclusion that he did kill the deceased, that he was so drunk at the time that he was unable to form an intention to kill, you will also have regard to his recollection of the evidence as he gave it to you and as he answered in cross-examination, as to whether you believe he was intoxicated

as to be deprived of the intent to commit the crime. It is very important that you remember the rule which is of universal application in this Court, that before you convict the accused of any offence, you must be satisfied beyond a reasonable doubt that the accused is guilty of each element of the offence - he does not have to prove his innocence. "

Within the wording of this direction are planted the seeds of uncertainty as to whether the Crown was required to negative the suggestion that on the one hand the accused was so intoxicated that he was unable to form an intention to kill and on the other that he did not form such an intention and at the conclusion of his Honour's direction he was asked by counsel for the accused to re-direct the jury on intoxication as affecting the ability of the accused to form an intention to kill. In consequence his Honour directed the jury

" When you consider drunkenness not only is the accused entitled to the benefit of the doubt overall in the evidence, but if you hold a doubt in your minds as to whether the degree of his intoxication was sufficient to enable him to form the intent to kill then he is entitled to the benefit of that doubt."

This was clearly a misdirection and there is no doubt that his Honour realised it to be so for immediately afterwards he conceded

" I think I might have put it the reverse way. It is not necessary for him to establish that he was so drunk that he did not formulate the intention, but rather, if having regard to the whole of the evidence you reach your conclusion on it that there is a doubt in your mind that he possessed the intent to kill, then he is entitled to the benefit of that doubt."

This appears to me still to be incorrect because it seems to be directing the jury that the onus is on the accused to prove that he did not have the necessary intent whereas the correct direction would have been

- a. That the burden of disproving intent did not lie on the accused but always on the Crown of proving that the accused had such an intent and

- b. That the test is not capacity to form but the absence of intent in the accused himself.

See The Queen v. Gordon, 1964 N.S.W.R. 1024 at p.1027.

Even the following statement "If you are satisfied he killed then the verdict must be manslaughter" does nothing in my opinion to clarify the issue.

This uncertainty apparently affected the jury. Approximately one hour after it had retired to consider its verdict, it returned to request a further direction. In terms the jury asked

"We wanted a definition again of wilful murder and manslaughter and the inferences concerning intoxication."

After dealing with the elements necessary to be proved to establish a conviction of a charge of wilful murder, his Honour proceeded to deal with the question of manslaughter and told the jury

" All that the Crown need to prove to your satisfaction and beyond reasonable doubt is that the accused killed Brown, but if it fails to establish any intent to kill then the verdict is manslaughter.Now this is where the reference to intoxication comes in, because although intoxication in itself is not an excuse for the commission of a crime under our Code it is well known that the taking of alcohol can affect the formulation of an intent in an accused person's mind and that is where you will recall I said to you as men and woman of the world, you are experienced in ways of life involving the taking of alcohol and you are best called upon to conclude whether on the evidence before you of what this accused person is said to have done during the whole of the second of October when his evidence recalls that he commenced drinking with Brandivino and beer at about 10 o'clock on the Saturday morning and it seems not only commenced to drink , but continued to drink throughout the day.

" I said to you you will recall that some people can consume a substantial amount of alcohol and still be capable of formulating an intent to kill; others can drink but a small amount of alcohol and be incapable of formulating that intent. "

Of this direction no criticism can be made but his Honour then proceeded to direct the jury

"But when you give consideration to this question of intent you remove from your minds all questions of the absence of motive or malice."

Standing alone such a statement is unobjectionable but when it is considered in the context in which it was made, it seems to me to be capable of causing considerable uncertainty in the minds of the jury. It must be realised that the jury was concerned at this time only with the question of the effect of alcohol on the issue of intent and to be directed that "when you give consideration to this question of intent you remove from your minds all suggestions of motive or malice" appears to be capable of and likely to create confusion in the minds of the jurors. Motive and malice are certainly relevant issues when considering whether or not the appellant killed Brown but they are unrelated to the question of intent, thus to be told

"The presence of motive and malice could help; the absence just makes it harder but it is basically material when you consider intent.

" It is either an intent to kill or no intent at all because of intoxication or if you are in doubt about whether the accused possessed that intent, then you must give him the benefit of the doubt and say that he did not possess that intent and the Crown has not succeeded in proving that intent. You have the added inference of intoxication."

could not serve to clarify the uncertainty.

It is true that the foreman indicated that the jury was satisfied with this explanation and after a further retirement of two hours, it returned a verdict of guilty but I am not satisfied that the direction given by the trial Judge afforded a satisfactory answer to the question which was posed by the jury.

In my opinion it would be unsafe to allow the conviction to stand and that the appeal should be allowed.

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B E T W E E N :

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Appellant

- and -

THE QUEEN

BRINSDEN J.

I do not propose to recite the facts of the case which are set out in the judgment of Burt C. J. It is clear from the injuries to the deceased Brown, that if the injuries were inflicted upon him intentionally, that intention must have been to kill him. Thus murder was not really in issue. As I understand the defence it was that no act of the appellant caused the death of the deceased, but if the jury decided beyond reasonable doubt that he had killed the deceased then the evidence of the appellant's intoxication should cause the jury to have a reasonable doubt as to whether the appellant had in fact an intention to kill.

The appellant appeals to this Court on the grounds that in a number of respects the learned trial Judge's direction to the jury was at fault. I propose to deal with the grounds of appeal relating to intoxication first, and in particular an amendment which the Court allowed the appellant to make at the hearing of the appeal. The grounds of the appeal before amendment complained that the learned trial Judge had placed on the appellant the onus of proof that by reason of his consumption of intoxicating liquor he did not in fact have the necessary intent to commit the offence of wilful murder, and that his Honour did not adequately direct the jury to consider the evidence that went to establish intoxication. In my view, on a fair reading of his Honour's summing up, it is not possible

to conclude that the jury would have been under any misapprehension as to where the onus lay other than on the Crown to prove beyond reasonable doubt that ^{notwithstanding} ~~by reason of~~ the consumption of alcohol the appellant did possess the intention to kill. There are a number of passages in the summing up where the Judge positively states that the onus is on the Crown to prove each element of the offence of wilful murder beyond reasonable doubt. If in the initial summing up it is fair to say that the jury may have been left with the impression that notwithstanding those statements some onus lay on the appellant to prove that by reason of intoxication he lacked the necessary intent, at the invitation of counsel for the appellant at the trial, His Honour redirected the jury in terms which could not have left them with a mistaken view concerning onus in this passage:

"....when you consider drunkenness not only is the accused entitled to the benefit of the doubt overall in the evidence, but if you hold a doubt in your minds as to whether the degree of his intoxication was sufficient to enable him to form the intent to kill, then he is entitled to the benefit of the doubt. In other words (I think I might have put it the reverse way) it is not necessary for him to establish that he was so drunk that he did not formulate the intent, but rather, if, having regard to the whole of the evidence, you reach your conclusion on it that there is a doubt in your mind that he possessed the intent to kill, then he is entitled to the benefit of that doubt. If you are satisfied he killed, then the verdict must be manslaughter."

Counsel agreed that that statement sufficed.

Furthermore in my view the Judge did adequately direct the jury towards the evidence that went to establish intoxication. Indeed, upon a re-direction immediately before the jury retired finally to consider their verdict, he referred to the evidence

that the appellant during the day preceding the death of the deceased, commenced drinking Brandivino and beer at 10 o'clock in the morning and continued to do the same throughout that day. So the jury, having asked for a re-direction in relation to inter alia "the inferences concerning intoxication", were reminded by the Judge of the extent of the appellant's drinking immediately before they retired again to consider their verdict. I scarcely believe it lies in the appellant's mouth to complain about that direction.

The more important attack, however, lies in the amendment and this was framed to read as follows:

"The learned Judge's direction to the jury read as a whole did not convey to the jury that having considered the evidence concerning the alcohol which had been consumed by the accused they had to be satisfied beyond a reasonable doubt that the accused had intended to kill the deceased before the accused could be convicted of wilful murder."

As I understand the attack under this ground, it lies in this: That a fair reading of the summing up leaves the impression that the jury would have thought that the ultimate question was whether the appellant was rendered by intoxication incapable of forming the intention to kill rather than whether by reason of intoxication he had in fact the intention to kill. It is clear law that S.28 of the Criminal Code which reads:

"When an intention to cause a specific result is an element of an offence, intoxication whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such intention in fact existed", directs the jury's attention to the ultimate question whether by reason of intoxication the appellant had the necessary intention.

In Thomas v. The Queen 102 C.L.R. 584 at 597, Kitto J. made this point quite clear when he said of a misdirection in that case that it "led the learned Judge to put to the jury, as if it were the ultimate question on this part of the case, the question whether the appellant was rendered by intoxication incapable of forming the intention to kill, whereas the question which s.28 and the law as to onus of proof combine to present was whether the evidence of intoxication caused the jury to have a reasonable doubt as to whether the appellant had in fact the intention to kill." But though the ultimate question is whether the intention in fact existed, the enquiry before reaching a conclusion on the ultimate question must be directed to whether an accused had the capacity to form an intention. Obviously if he did not have the capacity he could not in fact have the intention though the converse situation is not necessarily correct for an accused may have the capacity to form an intention but not in fact have formed that intention. It would seem to me therefore that there is nothing improper in a direction to the jury which directs them to consider whether by reason of intoxication the accused had a capacity to form an intention so long as they are clearly told that the ultimate question for them to be satisfied about beyond reasonable doubt is whether the accused had in fact the necessary intention. It is therefore necessary to look at His Honour's direction to decide whether the jury could have been left in doubt as to what was the true ultimate question.

At an early stage in his summing up, His Honour correctly stated that for the Crown to sustain its case of wilful murder it must satisfy the jury not only that Brown was killed by the appellant but in so doing he intended to kill Brown. He then went on to distinguish between murder and

manslaughter so far as the requisite intention is concerned and compared them to manslaughter. In opening up his first remarks concerning intoxication His Honour emphasized that again intent was a necessary part of the offence of murder or wilful murder and that it must be proved affirmatively by the Crown. He then said:

"it is common knowledge that a man's mind may become so fuddled by drink that he ceases to be able to form any real intention. If an accused man is shown to have reached such a condition he may have committed various offences but he will not have committed either wilful murder or murder because he will lack the essential intention to produce the necessary result.

Averting briefly to the evidence, it is quite clear that the accused had consumed a considerable amount of alcohol during his association with the deceased on the fateful day. Whether this was sufficient to deprive him of the capacity to formulate the necessary intent to commit the crime with which he is charged is for you to determine...You will know that some men can consume a considerable amount of alcohol and yet be fully conscious of all they are doing whilst others are incapable of so conducting themselves."

Then later his Honour said:

"It must, however, also be said on his behalf that if you reach the conclusion that he did kill [the deceased] that he was so drunk at the time that he was unable to formulate any intention to kill. You will recall that Mr. Wallwork used the term 'roaring drunk'. He emphasized the fact that the accused had been involved in a fight outside the Maylands Hotel where he had suffered some seven blows to the skull, that he had been drinking all day and was roaring drunk and therefore was incapable of forming the necessary intention....You will also have regard to his recollection of the evidence as he gave it to you and as he answered in cross-examination as to

whether you believe he was so intoxicated as to be deprived of the intent to commit this crime."

There is no doubt that during the above passages his Honour was concentrating mainly on the question of capacity to form an intention though the passages have come immediately after an emphatic statement that the Crown must prove as an element of the offence the appellant's intention to kill the deceased. Now if His Honour had made no further reference to the matter of intoxication, his address may perhaps have been open to objection (from a reading of it) that the jury may have been left with the impression that capacity to form an intention was the ultimate question, though it must be remembered that the address is spoken and not written to the jury and the exact impression conveyed by it is best understood by those who heard it rather than those who read a report of it. At the conclusion of his address His Honour invited counsel whether they would like him to direct the jury on any particular matter and the following passage occurred:

"MR. WALLWORK: I would like you to mention one matter, sir.

This question of intent due to drink: I rather gathered from the tenet of your direction it was that if you are satisfied that the accused has established that he was so drunk as not to have an intent then the verdict would be manslaughter.

WALLACE J.: Yes; only if they are satisfied that he killed the accused (deceased).

MR. WALLWORK: Yes, granted, but also if the jury had a doubt whether he had an intent to kill, then he would be entitled to a verdict of manslaughter.

WALLACE J.: I agree. Mr. Wallwork has raised a very important question and that is, when you consider drunkenness not only is the accused entitled to the benefit of the doubt overall in the evidence, but if you hold a doubt in your minds as to whether the degree of his intoxication was sufficient to enable him to form the intent to kill, then he is entitled to the benefit of that doubt. In other words (I think I might have put it the reverse way) it is not necessary for him to establish that he was so drunk that he did not formulate the intent, but rather, if, having regard to the whole of the evidence, you reach your conclusion on it that there is a doubt in your mind that he possessed the intent to kill, then he is entitled to the benefit of that doubt. If you are satisfied he killed, then the verdict must be manslaughter.

Does that suffice?

MR. WALLWORK: Thank you, sir. "

In my view this passage is instructive for two reasons, In the first place it is to be noted that Mr. Wallwork did not think apparently that the Judge's direction would have confused the jury as to the ultimate question to be decided by them, and after all Mr. Wallwork had heard His Honour speak. Indeed the original draftsman of the grounds of appeal did not think there was anything wrong in this aspect of His Honour's direction and Mr. Wallwork only adopted the amendment after being invited to do so by this Court. In my view His Honour's further address on the subject clearly brings home to the jury that in the end the ultimate question is whether "he possessed the intent to kill" and if the jury had any reasonable doubt about that he was entitled to the benefit of that doubt.

I have already referred to the fact that the jury asked for a re-direction in respect of intoxication and also in relation to wilful murder and manslaughter. On the re-direction His Honour said:

" Now, this is where the reference to intoxication comes in because although intoxication in itself is not an excuse for the commission of a crime under our code, it is well known that the taking of alcohol can affect the formulation of an intent in an accused person's mind and that is where you will recall I said to you, as men and women of the world, you are experienced in ways of life involving the taking of alcohol and you are best called upon to conclude whether, on the evidence before you of what this accused person is said to have done during the whole of the 2nd of October when his evidence records that he commenced drinking with Brandivino and beer at about 10 o'clock on the Saturday morning, and it seems not only commenced to drink, but continued to drink throughout the day.

I said to you, you will recall, that some people can consume a substantial amount of alcohol and still be capable of formulating an intent to kill. Others can drink but a small amount of alcohol and be incapable of formulating that intent and when you give consideration to this question of intent, you remove from you mind all suggestions of the absence of motive or malice. "

But to conclude his re-address His Honour finally said:

"It is either an intent to kill, or no~~ff~~ intent at all because of intoxication, or, if you are in doubt whether the accused possessed that intent, then you must give him the benefit of the doubt and say that he did not possess that intent and the Crown has not succeeded in providing that intent."

In my view this passage while it again directs the jury to capacity to form an intent at the same time does so by bringing to their attention that the ultimate question is really whether he possessed the intent. I therefore do not think that His Honour's direction can in this regard be faulted.

There are however other grounds of appeal which I shall shortly deal with. It will be remembered that one of the defences was that no act of the appellant caused the death of the deceased. It was complained that His Honour brushed over this defence leaving the jury with the impression that the real issue in the case was whether the act of the appellant amounted to wilful murder or manslaughter. In my view His Honour adequately put to the jury that they must determine firstly whether the act of the appellant caused the death of the deceased and in reaching that determination to do so beyond reasonable doubt if the appellant was to be convicted of any offence. There is therefore nothing of substance in this ground of appeal. However, in relation to the question of whether the appellant's act killed the deceased, there is another matter of which complaint is made. Though the grounds of appeal do not really clearly state this issue, as I understand it what the appellant says is that His Honour misunderstood his counsel's submission in relation to motive. His counsel said to the jury, words to this effect: "You should not reach a decision beyond reasonable doubt that the act of the appellant killed the deceased because it is clear on the evidence that the appellant had no motive to kill the deceased." His Honour does seem to have misunderstood the defence, because in his summing up he relates motive only to S.23 of the Code which provides "Unless otherwise expressly declared, the motive by which a person is induced

to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility." But the defence did not raise lack of motive to negative intention but to negative the act of killing. His Honour's direction so far as motive and intention is concerned is quite correct but it is said that in discussing something which was not raised by the defence he may have left the jury with the impression that motive was irrelevant in their consideration of whether the appellant's act had killed the deceased. At the conclusion of the passage of his summing up relating to motive His Honour stated as follows: "Certainly, it is true that if the Crown establish motive, that would be evidence of intent, but the absence of motive is irrelevant in determining the issues in this case. What matters is the intention of the accused, assuming he killed Brown: Did Dodd possess the intention to kill Brown when the deceased's throat was cut? That is the question you ask yourselves now: Did Dodd intend to kill Brown at the time the Crown claims he cut the deceased's throat?"

This ground of appeal is a result of hindsight. No objection was taken by counsel at the trial. Even though it is clear from a reading of the summing up that His Honour did not intend that his comments on motive should refer to its relevance to the act of killing, and indeed in the above passage he assumes a finding that the appellant killed the deceased, nevertheless it remains possible that the jury was left with the impression that it should dismiss consideration of lack of motive altogether. Particularly is this so because of the words "motive is irrelevant in determining the issues in this case". Before discussing the consequences of this opinion I shall turn to consider the only other ground of appeal which merits attention.

It is complained that His Honour did not give an adequate warning to the jury concerning the evidence of five witnesses whom the grounds of appeal claim were accomplices. During argument however, counsel for the appellant conceded that none of the persons he named were accomplices in law. Counsel then rested his argument on the submission that this was a case where these named persons, though not in law accomplices, were within the spirit of the rule as to the warning to be given about the evidence of accomplices and therefore His Honour should have given a voluntary or optional warning as described by Sholl J. in McMee v. Kay (1953) V.L.R. 520 at 529. I am not at all certain that any of these persons did come within the spirit of the rule but assuming that they did, I have reached the conclusion that His Honour gave a warning in terms adequate in the circumstances. Indeed perhaps His Honour went beyond what was strictly necessary for in my view all he need have said was that the persons concerned may have had an interest in not telling the truth and that therefore their evidence should be treated with caution. His Honour in fact went on to describe corroboration and gave an example.

What then should be done about this appeal? I am left with the opinion that the jury may not have considered lack of motive at all. But there was here an abundance of evidence to establish the accused did the killing. He is alleged to have confessed to a large number of people and those people gave evidence. His acts subsequent to the discovery of the body, though bizarre, are more consistent with having killed the deceased than otherwise and indeed strongly suggest belief in his own guilt. The Crown accepted in counsel's final address that it had not established motive but as he said "people do some strange things and it is because of strange things that you get strange cases like this".

Even so this is case of wilful murder so in the circumstances it appears to me that justice requires that the appeal should be allowed notwithstanding the strong case the Crown demonstrated towards a finding that the act of the accused killed the deceased.