03/80

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v O'CONNOR

Young CJ, Starke and Gray JJ

30 April 1979 — [1980] VicRp 60; [1980] VR 635

CRIMINAL LAW – ACCUSED CONVICTED OF UNLAWFUL AND MALICIOUS WOUNDING – ACCUSED CLAIMED TO BE INTOXICATED AT TIME OF COMMISSION OF OFFENCE – RULING BY TRIAL JUDGE THAT ACCUSED'S INTOXICATION WAS IRRELEVANT TO THE QUESTION OF INTENT TO COMMIT OFFENCE – OFFENCES OF GENERAL OR SPECIFIC INTENT – WHETHER TRIAL JUDGE IN ERROR.

O'C. was intercepted when he appeared to be going through the glove box of a motor car owned by a police officer. A short time later, the police officer questioned O'C. who then ran off. When he was intercepted, O'C. struck the police officer in the arm with a knife causing him considerable pain and a wound requiring several stitches. When O'C. was later interviewed he said that the stabbing must have been an accident and that he was doped at the time, having taken some car sickness tablets as well as some alcohol. The police evidence was that O'C. showed no signs of intoxication. O'C. was charged with theft and wounding with intent to do grievous bodily harm or with intent to resist lawful apprehension. In relation to the charge of unlawful and malicious wounding, the trial the judge charged the jury in conformity with the decision of the House of Lords in *DPP v Majewski* (1977) AC 443, where it was held that as the Crown was not obliged to prove any specific intent self-induced intoxication was to ignored by the jury in reaching their verdict. O'C. was acquitted on the other counts but was convicted of unlawful and malicious wounding. Upon appeal—

HELD: Appeal allowed. Conviction quashed. Order that a verdict of acquittal be entered.
What the law requires is that the Crown proves every element in the crime charged including, where relevant, the necessary intent. Intent will usually be proved as a matter of inference from all the circumstances including the state of intoxication (if any) of the accused. The question for the jury is whether they are satisfied that in all the circumstances the accused did in fact have the necessary intent. Accordingly, the trial judge was in error in telling the jury that if they were considering whether O'C. had formed the intent which was an ingredient of the offence of unlawful and malicious wounding – being a general and not a specific intent – they were to ignore any self-induced intoxication.

***Ryan v R* [1967] HCA 2; (1967) 121 CLR 205; 40 ALJR 488; [1967] ALR 577, noted 41 ALJ 493, applied.**

***DPP v Majewski* [1976] UKHL 2; (1977) AC 443; [1976] 2 All ER 142; (1976) 62 Cr App R 262; [1976] 2 WLR 623, not followed.**

YOUNG CJ: This is an application by Mark Norman O'Connor for leave to appeal against his conviction for unlawful and malicious wounding. He was presented on a count of theft and also on a count of wounding with intent to do grievous bodily harm or with intent to resist lawful apprehension. He was acquitted on each of those counts but was convicted of unlawful and malicious wounding which was an alternative verdict open to the jury pursuant to s423 of the *Crimes Act*. The applicant seeks leave to appeal against his conviction upon the ground:

> "That the learned trial judge erred in law when directing the jury in respect of the alternative offence of unlawful wounding that evidence of the applicant's intoxication was irrelevant to the question of intent to commit that offence."

The facts which gave rise to the conviction and to the ground of appeal may be stated very briefly. The Crown alleged that at about 10.30 pm on 2nd March 1978, the applicant was seen in the parking area of a block of flats in Sunshine known as "The Gables" where he appeared to be going through the glove box of one of the cars. The car belonged to a Constable Paterson who was the occupant of one of the flats. A neighbour summoned Constable Paterson who went to the car park where he saw the applicant who was personally known to him standing beside his (Constable Paterson's) car carrying a blue map holder. The map holder had been taken from Constable Paterson's car. When questioned the applicant ran off towards a vehicle which was being driven towards the street. Constable Paterson chased the applicant and caught him. He told the applicant he was under arrest for stealing his map holder. The applicant moved away from the constable but as he did so he tripped and fell to the ground. As Constable Paterson pulled the applicant to his feet he noticed that he held an open knife in his right hand. The knife in

fact belonged to the constable and had been left in the glove box of his car. The applicant struck Constable Paterson in the upper left arm with the knife causing him considerable pain and a wound which required several stitches. The applicant tried to strike the constable again but in the struggle which ensued the knife fell to the ground. Although the applicant tried to recover the knife he failed to do so. Eventually the applicant quietened down and was conveyed to the police station. When interviewed the applicant is alleged to have made certain admissions, said that the stabbing must have been an accident and also said that he was doped at the time, having taken some Avil car sickness tablets as well as some alcohol. The police evidence, however, was that he showed no signs of intoxication.

At the trial the applicant gave evidence on oath. He said amongst other things that on the afternoon of the 2nd March 1978, he had consumed fifteen Avil tablets and a certain amount of alcohol. He described the effect which the combination produced. In the evening he consumed some three bottles of beer whilst in friend's flat at The Gables until the room in which he was "began to look out of shape". He went outside as his friend was going to drive him home. He remembered placing his foot on an open door of a white car. Then he was grabbed from behind and "everything blacked out". He did not really know what had happened except that he was placed in the police divisional van. Other evidence was led in support of the applicant's defence but it is unnecessary to refer to it. What I have said is sufficient to raise the point to be decided.

The learned trial Judge considered that he was bound to charge the jury in conformity with the decision of the House of Lords in *DPP v Majewski* [1976] UKHL 2; (1977) AC 443; [1976] 2 All ER 142; (1976) 62 Cr App R 262; [1976] 2 WLR 623. Unless there is a decision or unless there are observations of the High Court or of the Full Court of this Court inconsistent with that decision, His Honour was plainly right to do so: see *R v Bugg* [1978] VicRp 25; (1978) VR 251 at p252. That report indicates that the question whether the law of this State is as stated in *Majewski's Case* has not hitherto come before this Court for decision although some members of the Court have on occasion made some observations by way of *obiter dicta* about it. Now, however, the question arises directly for decision.

In *Majewski's Case* the Appellant had been involved in a brawl in a public house. He was alleged to have assaulted the police officer who arrested him, another police officer on the way to the police station and a third in a cell at the police station the following morning. He was charged with three offences of assault occasioning actual bodily harm and three offences of assault on a police officer in the execution of his duty. His defence was that the offences had been committed whilst he was suffering from the effect of alcohol and drugs. He was convicted on all counts. He appealed on the ground that the trial judge was wrong in law in ruling that self-induced intoxication by drink and drugs did not raise any defence. The trial judge had told the jury that the Crown was not obliged to prove any specific intent and that the self-induced intoxication was to be ignored by them in reaching their verdict. The Court of Appeal (Criminal Division) and the House of Lords unanimously dismissed the appeal. It is unnecessary at this stage to examine the reasons of their Lordships in any detail. It is sufficient to summarise their conclusions by saying that whereas at common law self-induced intoxication was no defence to a criminal charge the harshness of that rule had been mitigated in the case of offences for which a special intent had to be proved. The Lord Chancellor concluded his speech as follows:

> "My noble and learned friends and I think it may be helpful if we give the following indication of the general lines on which in our view the jury should be directed as to the effect upon the criminal responsibility of the accused of drink or drugs or both, whenever death or physical injury to another person results from something done by the accused for which there is no legal justification and the offence with which the accused is charged is manslaughter or assault at common law or the statutory offence of unlawful wounding under section 20, or of assault occasioning actual bodily harm under section 47 of the *Offences against the Person Act* 1861. In the case of these offences it is no excuse in law that, because of drink or drugs which the accused himself had taken knowingly and willingly, he had deprived himself of the ability to exercise self-control, to realise the possible consequences of what he was doing, or even to be conscious that he was doing it. As in the instant case, the jury may be properly instructed that they can ignore the subject of drink or drugs as being in any way a defence to charges of this character."

Although these paragraphs are in terms confined to crimes involving death or physical injury it seems clear from a perusal of the whole of their Lordships' speeches that they did not intend

the principle to be limited to such offences. The Solicitor-General contended that the High Court had in effect decided in *Viro v R* [1978] HCA 9; (1978) 141 CLR 88; (1978) 18 ALR 257; (1978) 52 ALJR 418 that the law in Australia was as stated by the House of Lords in *Majewski's Case* and that accordingly this Court was bound to follow the latter case. It will be as well to examine this contention at once.

Viro was convicted of murder. He had stabbed the victim after having initially attacked him with the intention of robbing him and after the victim had according to Viro reacted with unusual violence and threatened him with a knife. Viro was a heroin addict and, according to his account, he was at the time "high on heroin". At the trial he relied on a plea of self-defence. An appeal to the Court of Criminal Appeal of New South Wales was dismissed. Viro then applied for special leave to appeal to the High Court and he relied upon two grounds:

> (1) that the trial judge had not directed the jury that his addiction to heroin might be relevant to the question whether he was capable of forming the intent necessary to justify a conviction for murder;
>
> (2) that the trial judge had directed the jury on the issue of self-defence in accordance with *Palmer v R* [1970] UKPC 2; [1971] AC 814; [1971] 1 All ER 1077; [1971] 2 WLR 831; (1971) 55 Cr App R 223 rather than with *R v Howe* [1958] HCA 38; (1958) 100 CLR 448; [1958] ALR 753; 32 ALJR 212.

The application was argued before five members of the Court. In view of the conflict between *Palmer's Case* and *Howe's Case* it was directed that two questions be argued before a Full Bench consisting of all the members of the Court. The two questions were, first, whether the High Court was bound by the decision in *Palmer's Case* and secondly, if the High Court was not so bound, whether *Palmer's Case* or *Howe's Case* correctly stated the common law in New South Wales in relation to self-defence as a defence to a charge of murder. Only the five judges who heard the first argument of the application dealt with the first contention. They held unanimously that the trial judge should have told the jury that if, because of the evidence of the intoxication of the applicant, they were not satisfied that the accused did in fact have the necessary intent they should acquit him of the crime of murder. That statement of their Honours' conclusion is taken in substance from the judgment of Gibbs J at p427. Accordingly on that ground special leave was granted, the appeal allowed and a new trial ordered. Stephen J (at p433) agreed that Gibbs J's view was sufficient to warrant a new trial. Similarly at p440 Jacobs J agreed and said that he could not usefully add anything to the reasons expressed by Gibbs J. Murphy J (at p448) agreed with Gibbs J, adding: "The jury were entitled in reaching a conclusion whether the prosecution had established the intent beyond reasonable doubt, to consider the effect, if any, of drugs taken by the applicant." Aickin J expressed his agreement with Gibbs J in this way (at p449);

> "The substantial point then argued was whether the trial had miscarried by reason of the trial judge's failure to instruct the jury that the accused may have been under the influence of drugs, according to his statement from the dock, and that such circumstances may be relevant to the question of whether he had formed the necessary intention to kill or to do grievous bodily harm to the deceased. With respect to that matter I have had the advantage of reading the reasons of Gibbs J and I am in agreement with the views which he there expresses. That omission from the instructions to the jury makes it inevitable that there must be a new trial."

In these circumstances it becomes necessary to examine the reasons of Gibbs J on the question of intoxication. First His Honour discussed felony-murder and referred to the fact that it had been held in *Ryan v R* [1967] HCA 2; (1967) 121 CLR 205; [1967] ALR 577; (1967) 40 ALJR 488 that to constitute that class of murder under s18(1)(a) of the *Crimes Act* 1900 (NSW) it is necessary that the act of the accused should have been a voluntary act but that no intention to kill or wound is necessary. His Honour went on (at p425):

> "It has never been suggested in the present case that the actions of the applicant were involuntary. In the light of the decision of the House of Lords in *Director of Public Prosecutions* v Majewski [1976] UKHL 2; (1977) AC 443; [1976] 2 All ER 142; (1976) 62 Cr App R 262; [1976] 2 WLR 623, it could not successfully have been contended that the applicant would have been exonerated from criminal responsibility if the drugs which he had voluntarily taken had deprived him of the ability to exercise self-control or to realise the possible consequences of what he was doing."

However, in *Viro's Case* the case of felony-murder does not appear to have been put in the forefront of the Crown case. Gibbs J said (at p425) that the jury might have convicted Viro because

they were satisfied that he intended to kill or inflict grievous bodily harm upon the victim and that therefore it was necessary to consider whether the directions on that question were sufficient. His Honour observed that the trial judge did not expressly tell the jury that the fact that Viro had used heroin might be relevant to the question whether he had formed the necessary intention and that at the conclusion of the summing-up he refused to re-direct the jury to that effect although requested to do so. Gibbs J proceeded (at p425):

> "The rules of the common law as to the criminal responsibility of a person who has voluntarily taken drugs are the same as those which relate to drunkenness voluntarily caused. There is no reason why intoxication caused by the use of drugs should be regarded any differently from intoxication caused by alcohol, and at common law (as under most Criminal Codes) the effect of drink and the effect of drugs on criminal responsibility are governed by the same principles: *R v Lipman* (1970) 1 QB 152, at p156; [1969] 3 All ER 410; *Director of Public Prosecutions v Majewski*. It is well established that intoxication voluntarily caused is no excuse for the commission of a crime. However, when an intention to cause a particular assault ('a special intent') is an element of the crime – as in a charge of murder based upon an intention to kill or to inflict grievous bodily harm – the fact that the accused was intoxicated may have an important bearing on the question whether he had the necessary intent."

Then after criticising two propositions of Lord Birkenhead in *DPP v Beard* (1920) AC 479 at pp499-505; [1920] All ER 21; (1920) 14 Cr App R 159; 89 LJKB 437, His Honour acknowledged that either authorities supported the view that drunkenness is only an answer to a charge of an offence in which a special intent must be proved if it rendered the accused incapable of forming that intent. Recently the English Courts had cast doubt on the authority of *DPP v Beard* and indicated that in a case of drunkenness the jury should be instructed to consider not whether the accused had the capacity to form but whether he had in fact formed, the requisite intent: *R v Sheehan* (1975) 2 All ER 960; (1975) 60 Cr App R 308; (1975) 1 WLR 739; *R v Pordage* (1975) Crim LR 575. Then after observing that in *Majewski's Case*, in which *Beard's Case* was much discussed by the House of Lords, the crime was not one involving a special intent and the question before the High Court in *Viro's Case* did not fall for direct decision, Gibbs J proceeded (at p426):

> "It would be contrary to fundamental principle to hold that evidence of intoxication not amounting to incapacity is irrelevant to criminal responsibility where the commission of the crime requires a special intent."

His Honour a little later quoted with approval a passage from the speech of Lord Salmon in *Majewski's Case* but it was a passage in which Lord Salmon was concerned to say that evidence of drunkenness may throw a doubt upon whether an accused had formed the special intent which was an essential element of the crime with which he was charged. In these circumstances, I do not think it can be said that a majority of the High Court had indicated acceptance of the *ratio decidendi* or the reasoning of the House of Lords in *Majewski's Case*. It was submitted to us that if the High Court had had any reservations about the decision in that case, it would have indicated them at some stage. I do not think that that is a sufficiently sound basis for a conclusion that a majority adopted the decision in a case in which it is clear that the point of *Majewski's Case* did not directly arise. It is true that in the first passage quoted above from Gibbs J's judgment His Honour would appear to have accepted *Majewski's Case* as correct, but the observation was clearly *obiter* and I do not think that the judgments in *Viro's Case* should be treated as amounting to acceptance by the other four judges of the correctness of that decision. I would accordingly not accede to the Solicitor-General's primary submission.

The next question is whether we should in any event follow *Majewski's Case* simply because it is a decision of the House of Lords. Ordinarily we would, of course, do so, but in this case it seems to me that the decision is inconsistent with observations of the High Court which we should follow. In *Ryan v R* [1967] HCA 2; (1967) 121 CLR 205 at p216; [1967] ALR 577; (1967) 40 ALJR 488 Barwick CJ said:

> "In my opinion, the authorities establish, and it is consonant with principle, that an accused is not guilty of a crime if the deed which would constitute it was not done in exercise of his will to act. The lack of that exercise which precluded culpability is not, in my opinion, limited to occasions when the will is overborne by that of another, or by physical force, or the capacity to exercise it is withdrawn by some condition of the body or of the mind of the accused. If voluntariness is not conceded and the material to be submitted to that jury wheresoever derived provides a substantial basis for doubting whether the deed in question was a voluntary or willed act of the accused, the jury's attention must be specifically drawn to the necessity of deciding beyond all reasonable doubt that the deed charged

> as a crime was the voluntary or willed act of the accused. If it was not then for that reason, there being no defence of insanity, the accused must be acquitted."

See also per Taylor and Owen JJ at p231 and per Windeyer J at p243.

It appears clearly I think from the passages referred to that the approach of the High Court is fundamentally inconsistent with the approach of the House of Lords in *Majewski's Case*. I am encouraged in this view by the fact that in *Majewski's Case* Lord Edmund-Davies quoted most of the passage from Barwick CJ's judgment in *Ryan's Case* which I have set out above, and continued (at p491):

> "Such is undoubtedly the logical basis of acquitting those who, owing to some such involuntary or inherent mental or physical conditions as have earlier been referred to, behave in a manner which in other circumstances would have caused them to be convicted of crime."

Lord Edmund-Davies also referred to *R v Keogh* [1964] VicRp 52; (1964) VR 400 and *R v Haywood* [1971] VicRp 93; (1971) VR 755 at p758 as indicating the result which logic requires. Lord Salmon also conceded that it is illogical to hold that intoxication is relevant to the question whether an accused person has formed the necessary special intent, where one is required, but not relevant to the question whether the accused had formed the general intention necessary to be guilty of the offence charged, where that is all that is required: see p483. I thus find in the speeches in *Majewski's Case* confirmation of the view that I would in any event otherwise take that the High Court in *Ryan's Case* expressed an approach different from that adopted by the House of Lords in *Majewski's Case*.

The Solicitor-General sought to justify the distinction drawn by the English Courts by an analysis of the *actus reus* and the *mens rea* necessary to constitute guilt. He adopted in substance the analysis propounded by Lord Simon of Glaisdale in *DPP v Morgan* [1975] UKHL 3; (1976) AC 182 at pp216-7; [1975] 2 All ER 347; (1975) 61 Cr App R 136, which was in turn accepted by the Lord Chancellor in *Majewski's Case* at p471. I do not find it necessary to consider that analysis because it does nothing to remove the illogicality of allowing intoxication to be relevant to the formation of one type of intention and not another. In the end the Solicitor-General was forced to concede that the law expounded in *Majewski's Case* stands, in crimes of general intent, voluntariness may be supplied by intoxication. In other words, if an accused person is so intoxicated as a result of the voluntary ingestion of alcohol or drugs as not to have formed the intention to do the act constituting the offence he may nevertheless be found guilty of the offence.

I do not think that this is an acceptable proposition in principle and for the reasons I have given I do not think that it is a view which we are bound to adopt. The observations of the Court in *R v Bugg* [1978] VicRp 25; (1978) VR 251 at p252 in which I joined were directed to the reported observations that most of the judges of this Court do not follow *Majewski's Case*, the question whether it represents the law in Victoria not having been examined. Now that there has been full argument upon it I am prepared to hold that it does not and that it should not be followed. Furthermore, I would add that the argument has not revealed any conflict of authority in this Court which could only be resolved by convening a Full Bench, a course suggested as possible in the addendum to the report of *R v Bugg*.

The determination of the true position in this State requires the consideration of three principles which at the beginning of the century formed part of the English criminal law. First, a man was presumed to intend the natural and probable consequences of his acts. Second, the onus of establishing matters of exculpation rested upon the accused. Third, intoxication could not be relied upon as a defence to a criminal charge, although the extreme harshness of this rule had begun to be relaxed, during the nineteenth century. All of these principles have been modified during the present century. I shall consider them in reverse order. In *R v Meade* (1909) 1 KB 895 the Court of Criminal Appeal held that if a man were so intoxicated as to be incapable of knowing that what he was doing was dangerous, i.e. likely to inflict serious injury, the presumption that he intended the natural consequences of his act was rebutted.

Next may be noticed the important decision of the House of Lords in *DPP v Beard* (1920) AC 479. That was a case of murder committed in the course of committing an act of rape. The

sole defence was a plea of drunkenness. The jury were told that if they were satisfied that the accused was so drunk that he did not know what he was doing or did not know that he was doing wrong, the defence of drunkenness succeeded to the extent of reducing the crime from murder to manslaughter. The accused was convicted of murder. The Court of Criminal Appeal substituted a verdict of manslaughter upon the basis that the trial judge should have directed the jury in accordance with *R v Meade*, *supra*, and that he was in error in applying to a case of drunkenness, the test appropriate to a plea of insanity. The House of Lords restored the conviction for murder upon the ground that drunkenness could only avail the accused if it were established that at the time of committing the acts constituting the offence the accused was so drunk that he was incapable of forming the intent to commit the acts. This had not been alleged and indeed a verdict of acquittal was not sought by counsel for the accused. In the leading speech Lord Birkenhead, LC reviewed the authorities and proceeded (at pp499-500):

> "Notwithstanding the difference in the language used I come to the conclusion that (except in cases where insanity is pleaded) these decisions establish that where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted of crime which was committed only if the intent was proved. This does not mean that the drunkenness in itself is an excuse for the crime but that the state of drunkenness may be incompatible with the actual crime charged and may therefore negative the commission of that crime. In a charge of murder based upon intention to kill or to do grievous bodily harm, if the jury are satisfied that the accused was, by reason of his drunken condition, incapable of forming the intent to kill or to do grievous bodily harm, unlawful homicide with malice aforethought is not established and he cannot be convicted of murder. But nevertheless unlawful homicide has been committed by the accused, and consequently he is guilty of unlawful homicide without malice aforethought, and that is manslaughter; per Stephen J in *Doherty's Case* 16 Cox CC 307. This reasoning may be sound or unsound; but whether the principle be truly expressed in this view, or whether its origin is traceable to that older view of the law held by some civilians (as expressed by Hale) that, in truth, it may be that the cause of the punishment is the drunkenness which has led to the crime, rather than the crime itself; the law is plain beyond all question that in cases falling short of insanity a condition of drunkenness at the time of committing an offence causing death can only, when it is available at all, have the effect of reducing the crime from murder to manslaughter."

A little later the Lord Chancellor's speech contained the following important *dictum* (at p504):

> "I do not think that the proposition of law deduced from these earlier cases is an exceptional rule applicable only to cases in which it is necessary to prove a specific intent in order to constitute the graver crime – e.g. wounding with intent to do grievous bodily harm or with intent to kill. It is true that in such cases the specific intent must be proved to constitute the particular crime, but this is, on ultimate analysis, only in accordance with the ordinary law applicable to crime, for, speaking generally (and apart from certain special offences), a person cannot be convicted of a crime unless the *mens* was *rea*. Drunkenness, rendering a person incapable of the intent, would be an answer, as it is for example in a charge of attempted suicide."

His Lordship went on to hold that since the evidence in that case could not have justified a conclusion that the respondent was <u>incapable</u> of forming the intent to commit the act of rape, it could afford him no defence. The passage last quoted has been thought by some to be inconsistent with the general tenor of Lord Birkenhead's speech: see, for instance, per Lord Russell of Killowen in *Majewski's Case* (at p499). I need not consider this question any further. It is sufficient to observe as Gray J observes in his judgment, a draft of which I have had the advantage of reading, that in referring to crimes of specific intent his Lordship may only have been concerned with that intent which according to the understanding of the time was the only intent which the prosecution was obliged to prove. It may be difficult now to recapture the full impact upon the criminal law which the decision of the House of Lords in *Woolmington v DPP* [1935] UKHL 1; (1935) AC 462; [1935] All ER 1; 25 Cr App R 72; 153 LT 232 must have had at the time of its delivery. We have become so accustomed to the principle embodied in it. Dixon J (as he then was) saw it as almost the completion of a long process whereby the criminal law had moved from an almost exclusive concern, in the law of homicide, with the external act which caused the death to a primary concern with the mind of the man who did the act. See *The Development of the Law of Homicide* (1935) 9 ALJ (Supp) 64, but, of course, the principle of *Woolmington's Case* is not confined to the law of homicide: it is of general application.

> "No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

per Lord Sankey LC (1935) AC at pp481-2.

The rule that a man is presumed to intend the natural and probable consequences of his acts is no part of the law of Australia: *Smyth v R* [1957] HCA 24; (1957) 98 CLR 163; [1957] ALR 441 and the cases there cited: *Parker v R* [1963] HCA 14; (1963) 111 CLR 610 at p632; [1963] ALR 524; (1963) 37 ALJR 3. (As to the position in England see s8 of the *Criminal Justice Act* 1967 discussed in *Majewski's Case* at pp475-6 & 497). When the onus rested upon an accused person to establish that he did not have, for example, the malice aforethought necessary to constitute the crime of murder, it was appropriate enough to say that he could not rely upon intoxication as a defence. But now that it is clear that it is for the Crown to establish each and every element in the offence charged, it seems to me that to speak of intoxication as not affording a defence to certain crimes or as doing so in the case of others is less than helpful.

If *Woolmington's Case* is given its full effect and it is not presumed that a man intends the natural and probable consequences of his acts, it seems to me impossible to confine consideration of intoxication to the question whether an accused person had the capacity to form the necessary intent, whether general or special. To do so would be to ignore altogether that intoxication is a question of degree. Moreover it would be quite inconsistent with Gibbs J's criticism of Lord Birkenhead's reasons in *Beard's Case*: see 52 ALJR at p425. What the law requires is that the Crown proves every element in the crime charged including, where relevant, the necessary intent. Intent will usually be proved as a matter of inference from all the circumstances including the state of intoxication (if any) of the accused. The question for the jury is whether they are satisfied that in all the circumstances the accused did in fact have the necessary intent. This seems to me to be a logical and simple proposition suitable to be put to a jury. It accords with my understanding of the views of the High Court in *Ryan v R*, *supra*, and also with accepted notions in the criminal law. To those who fear that the introduction of such an approach to the question of intoxication will result in a multitude of acquittals, I would with the greatest respect repeat the words of Dixon J in *Thomas v R* [1937] HCA 83; (1937) 59 CLR 279 at p309; [1938] ALR 37 to which we were referred by counsel for the applicant:

> "The truth appears to be that a reluctance on the part of courts has repeatedly appeared to allow a prisoner to avail himself of a defence depending simply on his own state of knowledge and belief. The reluctance is due in great measure, if not entirely, to a mistrust of the tribunal of fact – the jury. Through a feeling that, if the law allows such a defence to be submitted to the jury, prisoners may too readily escape by deposing to conditions of mind and describing sources of information, matters upon which their evidence cannot be adequately tested and contradicted, judges have been misled into a failure steadily to adhere to principle. It is not difficult to understand such tendencies, but a lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from inquiry the most fundamental element in a rational and humane criminal code."

His Honour was there speaking of a defence depending simply on an accused's own state of knowledge and belief. But the passage is equally applicable, in my opinion, to a defence of intoxication. It must not be forgotten that if the law relating to intoxication is put to a jury in the manner which I have suggested, the comment will often be open that the evidence of the consumption of alcohol or drugs may be thought to make it more likely that the accused, with the removal of inhibitions produced by intoxication, formed the necessary intent. The ingestion of alcohol or drugs will not invariably operate in favour of an accused. In the present case the learned Judge following *Majewski's Case* told the jury that when they were considering whether or not the applicant had in fact formed the specific intent which is an ingredient of each of the offences charged in the presentment they should take into account the intoxication of the applicant, if they found that he was intoxicated. But His Honour also told the jury that if they were considering whether the applicant had formed the intent which is an ingredient of the statutory alternative of unlawful and malicious wounding, being a general and not a specific intent, they were to ignore any self-induced intoxication. For the reasons I have given I think that the learned trial Judge must be held to have misdirected the jury by failing to tell them that in considering the statutory alternative of unlawful wounding they should take into account along with all the other circumstances proved the intoxication of the accused (if they found that he was intoxicated)

in deciding whether the Crown had proved the necessary intent. It follows that there has been a miscarriage of justice and that the application must be granted. The verdict must be set aside. But it is a question whether we should order a new trial.

The trial was conducted upon the basis that the defence to the charges laid in the presentment was intoxication although counsel ultimately realised that as the law then stood the learned trial Judge would be bound to direct the jury in accordance with *Majewski's Case* that intoxication would be no defence to the alternative charge of unlawful wounding. To this charge a defence of accident was raised, that is to say it was contended on the applicant's behalf, that the Crown had not excluded accident. In these circumstances the verdict of the jury acquitting the applicant on the two charges in the presentment and convicting him on the alternative charge of wounding can only be explained upon the basis that following the Judge's direction the jury ignored intoxication when considering the alternative charge. It follows that if they had been directed in accordance with the law as I have expounded it, the jury, consistently with their verdicts on the first two charges, must have acquitted the accused. Accordingly I think that instead of ordering a new trial we should direct that a judgment and verdict of acquittal be entered. In my opinion such a direction would be a proper exercise of the discretion conferred on this Court by s568(2) of the *Crimes Act*: see *R v Wilkes* [1948] HCA 22; (1948) 77 CLR 511.

Since completing the above we have been furnished with copies of the judgments in *R v Fahey and Lindsay* (1978) 19 SASR 577; noted 3 Crim LJ 13 (CCA of South Australia, Hogarth ACJ, Wells and White JJ delivered 17th July 1978) to which reference was made at the hearing. Copies of the judgments were not then available but reference was made to the note in (1978) 2 Crim LJ 283. I have now read the judgments with care but I am bound to say with the greatest respect that they do not persuade me to change the views I have expressed.

[Starke and Gray JJ delivered separate judgments and agreed with the orders proposed by the Chief Justice.]
