12/74

SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

R v MENNISS

McClemens CJ, Taylor and Lee JJ A

19 October 1973

CRIMINAL LAW – INTENT – DRUNKENNESS – TESTS TO BE APPLIED.

The accused was convicted of malicious wounding with intent to do grievous bodily harm. One ground of appeal was based on the direction to the jury on the question of consumption of liquor by the accused and its relationship to the charge of wounding with intention to do grievous bodily harm. [Both Taylor J and Lee J agreed with the conclusions of McClemens CJ on this point.]

HELD:
1. The proper tests to be applied, in New South Wales at any rate, when the effect of intoxicating liquor on the mind of an accused person in a trial for murder is being discussed before a jury, are —

(a) that the burden of disproving intent does not lie upon the accused but always the onus is on the Crown to prove that the accused had such intent. An accused whose conduct is said to be affected by drink, for who relies on drunkenness as a defence to a charge of murder, (in fact any offence requiring a specific intent) does not bear the burden of establishing this affirmatively unless the defence is that of insanity based upon intoxication. In a criminal charge the onus is always upon the Crown to prove guilt beyond all reasonable doubt. The state of drunkenness may cast doubt upon the accused's capability of forming an intent where a specific intent is an ingredient of the offence; in such circumstances, there is an onus upon the Crown to establish guilt and not upon the accused (as there is in the defence of insanity) to prove lack of intent.
and
(b) the test is not incapacity to form but the absence of the intent in the accused himself.
***R v Gordon* (1963) 80 WN (NSW) 957; [1964] NSWR 1024; 63 SR (NSW) 631; and**
***R v Stones* (1955) 56 SR (NSW) 25; 72 WN (NSW) 465), followed.**

2. If the question of specific intent is material then the directions should follow the principles set out above, but a reference to the principles shows the importance of incapacity to form an intent where specific intent is an ingredient of the offence though the ultimate question is intent at the material time. The trial judge in the instant case though he left incapacity to form the intent to the jury, also left to them the question of the existence of the specific intent at the time of the acts of stabbing. This being so it appeared on reading the summing up as a whole, it contained no error because the way he put it was that incapacity went to the existence or non-existence of the specific intent.

McCLEMENS CJ: ... In the decided cases there has been some lack of clarity as to what is the proper test to be applied where a question of drunkenness exists which might negative an inference of specific intent that would otherwise inevitably arise. In *Broadhurst v R* (1964) AC 441; [1964] 1 All ER 111, Lord Devlin refers to the proposition laid down in *DPP v Beard* [1920] AC 479 at 501; [1920] All ER 21; (1920) 14 Cr App R 159; 89 LJKB 437:

> "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."

Lord Devlin goes on to say:

> "The proposition stated in *DPP v Beard* is 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 ..."

A reference to the transcript in the instant case will show that this lack of clarity affected

the submissions made in this trial because in one place counsel for the appellant at the trial spoke of incapacity to form an intent; the Crown Prosecutor said the Crown had to prove that the appellant did have the ability to form an intent and, on the strength of those submissions, the trial judge, who apparently had not referred to *R v Gordon* (1963) 80 WN (NSW) 957; [1964] NSWR 1024; 63 SR (NSW) 631, told the jury:

> "It is for the Crown to prove that he was not so affected by liquor that he was not able to form an intent."

Of course all this may mean, in the ultimate analysis, is that if a man is incapable of forming a specific intent he in fact does not have it.

In *R v Stones* [1956] SR (NSW) 25 at 30, this Court said:

> "If a specific intent is an essential element in the offence, evidence of a state of drunkenness such as to throw doubt upon whether the accused was capable 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."

One will see there the reference to capacity to form the intent as being the factor to be taken into account. Again, in *Attorney-General for Northern Ireland v Gallagher* [1961] UKHL 2, (1963) AC 349 at 381, Lord Denning said:

> "If a man is charged with an offence in which a specific intention is essential (as in murder, though not in manslaughter), then evidence of drunkenness, which renders him incapable of forming that intention, is an answer."

In *R v Gordon* (*supra*) there was a complaint of the summing up by the Crown that the judge's direction left the jury with the impression that the state of insobriety of the appellant was to be taken into account only if he was so drunk as to be incapable of forming any intent, whereas the proper charge should have been directed to the question whether the appellant in fact did not have the intent alleged because of the effect of liquor. There this Court said:

> "The proper tests to be applied, in New South Wales at any rate, when the effect of intoxicating liquor on the mind of an accused person in a trial for murder is being discussed before a jury, are -
>
> (a) that the burden of disproving intent does not lie upon the accused but always the onus is on the Crown to prove that the accused had such intent. An accused whose conduct is said to be affected by drink, for who relies on drunkenness as a defence to a charge of murder, (we add in parenthesis any offence requiring a specific intent) does not bear the burden of establishing this affirmatively unless the defence is that of insanity based upon intoxication. In a criminal charge the onus is always upon the Crown to prove guilt beyond all reasonable doubt. The state of drunkenness may cast doubt upon the accused's capability of forming an intent where a specific intent is an ingredient of the offence; in such circumstances, there is an onus upon the Crown to establish guilt and not upon the accused (as there is in the defence of insanity) to prove lack of intent": *R v Stones* (1955) 56 SR (NSW) 25; 72 WN (NSW) 465):
>
> and (b) the test is not incapacity to form but the absence of the intent in the accused himself."

We are of opinion that *Gordon's case* should be followed and if the question of specific intent is material then the directions should follow the principles set out above, but a reference to the principles shows the importance of incapacity to form an intent where specific intent is an ingredient of the offence though the ultimate question is intent at the material time. The learned trial judge in the instant case though he left incapacity to form the intent to the jury, also left to them the question of the existence of the specific intent at the time of the acts of stabbing. This being so it appears to us, on reading the summing up as a whole, it contains no error because the way he put it was that incapacity went to the existence or non-existence of the specific intent.
