Privy Council Appeal No. 18 *of* 1963

Malcolm Stewart Broadhurst – – – – – – *Appellant*

v.

The Queen – – – – – – – – – *Respondent*

FROM

THE CRIMINAL COURT OF MALTA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND OCTOBER, 1963

Present at the Hearing:

VISCOUNT RADCLIFFE
LORD MORTON OF HENRYTON
LORD DEVLIN

[*Delivered by* LORD DEVLIN]

This is an appeal from a judgment of the Criminal Court of Malta dated 28th October 1961 and given upon the verdict of a jury, whereby the appellant was found guilty of causing wilful grievous bodily harm from which death ensued and was sentenced to the punishment of hard labour for 15 years. The Chief Justice of Malta presided at the trial.

The appellant was at the time of the trial 24 years old and was a British naval radio operator stationed in Malta. His wife, whom he was accused of killing on 23rd July 1961 was four years younger than he. The two were married in August 1959 and lived in a flat on the first floor of a building in Brizebbugia. The wife's death resulted from a fracture of the skull when she fell or was thrown or pushed down the stone stairway leading up to the flat.

The marriage had apparently been a happy one and there was abundant evidence that they were an affectionate couple. There was no history of abnormal quarrelling but there was evidence of a rather unusual propensity for sky-larking. Neighbours and friends testified that they used to chase each other and fool around and thump one another; the wife especially was rather boisterous and sometimes she bit the husband.

On the Saturday evening before the tragedy the couple went out to a dance, leaving a baby-sitter with their child. At midnight the wife wanted to go home but the husband was enjoying himself and wanted to stay on, so the wife went home by herself. She was in a happy mood on her return, the baby-sitter said.

The appellant had a great deal to drink. There is other evidence besides his own that he was drinking hard, but there is no evidence that he showed any outward sign of being the worse for drink. He stayed until the dance finished at 1 a.m. and then started to walk home. He remembers an incident on the way back and then he says he remembers nothing more until he saw his wife lying on the stairway in a pool of blood. He carried her upstairs and laid her on the bed in their flat and then went to the flat next door which was occupied by a couple called McKinnell. McKinnell also was in the British navy. The appellant said something to McKinnell, he could not remember what, and McKinnell went to fetch the naval patrol and a doctor. Mrs. Broadhurst was taken to hospital; she never recovered consciousness and died about midday on Sunday, 23rd July.

There are three flights of steps leading up from the ground floor to the small landing which gives access to two adjoining doors, the one on the left being the door of the appellant's flat and that on the right the McKinnells. Each flight has half a dozen steps, more or less, and each is in the reverse direction to those above or below it. Mrs. Broadhurst was found at the bottom of the middle flight lying head downwards, so that she had fallen some distance. Apart from the fracture of the skull which must have occurred when her head struck a stone step, the only injuries were grazes probably caused by contact with the railing of the stairs or the edges of a step in the course of the fall. There was nothing on the body to show how the fall started. She might have fallen backwards or she might have been pushed or thrown.

If this were all the evidence available, there would be no proof of any crime against the appellant or anyone else. The crucial evidence in the case against the appellant is supplied by the McKinnells. They had gone to bed before midnight and went to sleep. There is immediately above the two flats a level roof which both couples were accustomed to use as a sort of garden or outside room. About 2 a.m. Mrs. McKinnell was wakened by the noise of running about on the roof and banging on the stairs. She heard Mrs. Broadhurst say:— " Stop it, Malcolm, or you will kill me ". The voice came from the stairs. It was a bit loud but not a scream. Then after a short interval she heard the appellant say, his voice coming from outside her door :—" That's the end of that ". Mr. McKinnell was also woken up by the noise but he did not hear the voices.

About ten minutes later their bell rang and they went to the door of their flat. The appellant was standing there with blood on his feet, chest and hands. He said, according to Mrs. McKinnell:—" Please go and see Jean because I have thrown her down the stairs ". Mr. McKinnell's recollection of the words differs very slightly:—" I have thrown Jean down the stairs, please come and see her ". Then he said (so Mrs. McKinnell deposed, but not her husband):—" I am not drunk, I am not drunk, I am not drunk ". Then he said (according to both McKinnells):—" I do not know why I have done it "; and (according to Mrs. McKinnell) he added:—" because Jean did not do anything to me ".

The McKinnells took the appellant into their flat. He was sobbing and crying and mumbling. Mrs. McKinnell went to look at Jean and found her unconscious with a big cut across her head. McKinnell went for help and came back with a naval patrol vehicle and a doctor. When the doctor was examining Mrs. Broadhurst, the appellant, who had remained in the McKinnells flat, became hysterical and had to be restrained by McKinnell from going into his own flat.

The appellant went in the naval patrol vehicle to the sick-bay where his wife was taken before she was moved on to hospital. After the doctor had examined Mrs. Broadhurst at the sick-bay, he examined the appellant also because he smelt of drink. He applied the usual tests and came to the conclusion that the appellant was under the influence of drink but sobering up. The appellant went home and spent the night in his flat. When Mrs. McKinnell wakened him the next morning, she asked him if he realised what he had done to his wife and he said:—" I have cut her head open ".

On this evidence there are three possible crimes which the appellant might have committed. The gravest is the crime of wilful homicide. Under section 225 of the Criminal Code of Malta a person is guilty of this crime " if maliciously with intent to kill another person or to put the life of such other person in manifest jeopardy, he causes the death of such other person ". The death penalty is prescribed. The appellant was charged with this crime and acquitted of it by the unanimous verdict of the jury.

Next there is the crime of grievous bodily harm. Under section 234 of the Code " whosoever shall be guilty of a grievous bodily harm from which death shall ensue " shall be liable to the terms of imprisonment prescribed by the section which in the circumstances of the present case may be from six to twenty years. It is to be observed that, unlike section 225, section 234 says nothing about intent. Nevertheless, it is the law of Malta that the crime is

not committed unless there is proof of some intent. But the intent need not be to cause *grievous* bodily harm; it is enough if there is an intent to cause any bodily harm. The law is stated by the learned Chief Justice as follows:— " For the crime of bodily harm, of whatever gravity, the law does not require a specific intent. It is satisfied if the person who causes the bodily harm, however serious, had the generic intent to cause any harm, if he acted in a hostile manner to the victim intending to hurt ". The appellant was convicted of this crime by a majority verdict of six to three, six being the minimum necessary for a good verdict.

It was not therefore appropriate for the jury to return a verdict on the third possible crime which is that of involuntary homicide. Under section 239 of the Code " whosoever, through imprudence, carelessness, unskilfulness in his art or profession, or non-observance of regulations, causes the death of any person shall, on conviction be liable to imprisonment for a term not exceeding two years ".

There is also a fourth possibility and that is that the death was accidental. This would mean an acquittal which would be the appropriate verdict if either the jury was wholly dissatisfied with the McKinnells' evidence or if, while accepting that that evidence proved that Mrs. Broadhurst's death was caused by some act of the appellant, the jury found the evidence to be consistent with that act being accidental.

If the jury were satisfied, as on the McKinnells' evidence they well might be, that the appellant committed some act which caused the death of his wife, then the whole matter in issue was as to his state of mind. Since he could not or did not testify about that himself, it has to be ascertained by inference from the known facts, that is, chiefly from what he said to the McKinnells interpreted in the light of the probabilities. Was it to be inferred that he intended to murder (section 225) or simply to hurt in a hostile manner (section 234); or was it to be inferred that he was acting carelessly (section 239) or accidentally? The burden of sustaining the necessary inference is upon the prosecution and the jury have to be satisfied beyond a reasonable doubt of the existence of the intent necessary for any crime of which they convict.

There are also two additional matters which have to be considered incidentally in relation to the proof of intent or negligence. The first is the appellant's loss of memory. This does not relieve the prosecution of any part of their burden. They are not entitled to have the prisoner's assistance in proving their case; even if his memory had been perfect, he is under no obligation to give evidence. On the other hand, loss of memory is no defence: *R.* v. *Podola* [1960] 1 Q.B. 325. Subsequent loss of memory does not mean that the accused may not have had a clear intent at the time of the act. As the learned Chief Justice told the jury in his summing up:—" The question really is not what the accused remembered or did not remember, subsequently to the fact, but what his state of mind was at the time of the deed ".

The other matter to be considered upon the issue of intent is the possibility that the appellant's state of mind was affected by the drink he had taken. This subject is covered by section 35 of the Code. Generally, intoxication is no defence. If it renders the accused incapable of understanding the physical or moral nature of his act, it is treated in the same way as insanity. Incapacity of that sort was not suggested in the present case. For this case the material part of the section is sub-section (4) which is as follows:— " Intoxication should be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence ".

This appeal is grounded upon alleged misdirections of law and of fact in the summing up. The misdirection of law is said to relate to the burden of proof of drunkenness. The misdirections of fact are said to be numerous and to have resulted in a denial of justice to the appellant in that the issues for the jury to decide were not fairly, clearly and accurately put before them. Mr. Le Quesne for the respondent admits some defects in the presentation of the facts but disputes that they were such as to affect the verdict. If the summing up in this case had been reviewed by a Court of Criminal Appeal

in Malta, their Lordships in accordance with their usual practice would be very reluctant to differ from the conclusions of such a court on matters of fact or to arrive at a different assessment of the weight of any misdirections of fact there might be. But there is not in Malta any provision for criminal appeal except to this Board by special leave. Thus it is their Lordships' duty to review the summing up for the first time. If they find that the summing up was of such a character as to deprive the appellant of the substance of a fair trial, it would be their duty to allow the appeal.

Their Lordships will now consider the misdirections of fact and since it is conceded by the Crown that the evidence of the McKinnells is vital to the prosecution, they will deal first with their creditworthiness. The credit of the McKinnells was attacked at the trial and it was submitted by the defence that their evidence was tainted by hostility or animosity towards the accused. Some rather trivial matters were relied upon as showing hostility, but there was also one very serious one. This was an allegation that McKinnell had said to several people including the witness Barker, that he hoped that the appellant would hang. There might, the learned Chief Justice suggested to the jury, be a simple explanation of this. A young woman their friend had been killed in circumstances which caused the McKinnells considerable personal trouble and worries and it was therefore not unnatural that they should wish the person responsible to suffer the penalty for his deed. If this explanation is sound, it means that the McKinnells had already made up their minds about the chief issue which in the Chief Justice's view the jury had to decide, viz. whether or not the crime amounted to murder. In that event they could hardly be regarded as entirely impartial witnesses. It was therefore an important question for the jury whether McKinnell did or did not say the words attributed to him by Barker. It is upon this issue that the first complaint is made about the way in which the Chief Justice dealt with the McKinnells' evidence.

Mrs. McKinnell gave evidence before her husband. In cross-examination she was asked whether her husband had told other people that he would like to see Malcolm hang. She said that she had never heard him do so. It was then put to her that her husband had said so several times in her presence to Mr. Barker. She said she could not remember and the Court observed that it was very unfair to run down the witness by mentioning other people of whom they had not even heard. The question was repeated and the witness broke down and was unable to continue giving evidence. The Court said that it would allow all relevant questions but that meanwhile the cross-examination of the witness was to be suspended.

McKinnell's evidence was then taken and in cross-examination he denied five times that he had said that he wished the accused to be hanged. When Mrs. McKinnell's evidence was resumed, she at once admitted that her husband had said he would like Malcolm to hang. She made some difficulty about admitting that he had said it to Barker, but eventually she admitted that. When Mr. Barker was called for the defence, his evidence was clear and precise. He said that McKinnell had said " I hope he hangs ", and that Mrs. McKinnell said " I hope so too ", and McKinnell said " I am going to do all that I can to see that he hangs ".

The Chief Justice dealt with this attack on the McKinnells credit in the following passage. " As regards Barker, John McKinnell denies having told him he wished the accused to hang or that he would hang him himself. He admits that he asked Barker jokingly whether he had heard of any hangings or murders recently and Barker himself admits that all this type of talk had started jokingly. I don't know how witness Barker struck you but it rather seemed to me—for what my impression may be worth—that if there was one witness in the whole of this trial who showed any animosity in giving his evidence, it was Barker against McKinnell... But assuming that you accept as a fact that John McKinnell did say to John Barker all that Donald Barker says, do you think there might not be a rather simple explanation? "

There is no reference in this passage to the evidence of Mrs. McKinnell which, it might be thought, conclusively corroborated Barker. The evidence

of Barker is contrasted with that of McKinnell and the jury given a clear indication that the latter should be regarded as more creditworthy. It was not pointed out to the jury at this stage that Mrs. McKinnell must have lied either on the first occasion when she denied that anything was said or on the second occasion when she admitted it; and that if, as would seem to be probable, she was telling the truth on the second occasion, then her husband had lied and had never retracted it.

It was not until a later stage of the summing up that the Chief Justice dealt with the evidence on this point of Mrs. McKinnell and then he dealt with it in a way of which complaint is made. He said:—" Brenda McKinnell was being asked whether her husband had told Barker if he wished the accused to hang. For reasons you may understand Brenda McKinnell was reluctant to answer that question and she said " I don't know "; but as soon as the Court told her she was bound to answer, she admitted at once that, in fact, her husband had said those words to John Barker and to other people as well in her presence ". In their Lordships' opinion this puts too favourable a gloss on the incident they have recounted. They think that on the whole issue the jury would probably have been left with the impression that they would do well to distrust Barker but that it did not matter very much whether they did or not since this was a simple explanation of it all. They think that His Honour gravely underestimated the weight of the attack on the McKinnells' reliability.

While it is properly conceded that in the end the Chief Justice left it to the jury to say whether or not they could safely act on the McKinnells' evidence, it is said that he himself did not contemplate the possibility of their rejecting it and that he made that too plain to the jury when he was discussing the defence of accident. Their Lordships will refer later to the main complaint about this passage. It is sufficient at present to say that the Chief Justice suggested to the jury that they would not find very great difficulty in disposing of the suggestion of accident, since to accept it would be to reject the whole of the evidence of the McKinnells.

Another complaint is that the Chief Justice did not direct the attention of the jury to the importance of their being satisfied about the accuracy as well as the honesty of the McKinnells' recollection. The word " thrown ", for example, is of great significance in their statement of what the appellant said. It is not uncommon for honest witnesses, having made up their own minds about what they think must have happened, to put into the mouths of others words that accord with their theory; and there is at least strong evidence that the McKinnells had made up their minds. The Chief Justice left this issue to the jury as one in which they had simply to decide whether, as he put it in one place, " John and Brenda McKinnell have deliberately plotted together to fabricate evidence on this most serious charge against the accused ".

Their Lordships will now pass from the criticisms about the way in which the McKinnells' credit was left to the jury, leaving them to be considered again when the totality of the objections to the summing up has to be weighed, and will turn to what is put forward as a basic defect in the summing up. This is that the learned Chief Justice struck the wrong balance between the various alternatives which on the McKinnells' evidence and in the surrounding circumstances were left open to the jury. As their Lordships have already indicated there were four alternatives—wilful homicide, grievous bodily harm causing death, involuntary homicide and accident. Their Lordships regard the first and last of these alternatives as about equally remote. Their Lordships are not definitely saying that either should have been excluded from the consideration of the jury, but it is their opinion that the real issue lay between the second and the third. Was there enough evidence to lead a jury to infer beyond a reasonable doubt that there was some sort of quarrel in which the accused did an act intending to hurt; or might the fatal act, whatever it was, have arisen out of some skylarking in which no harm was meant? It may well be that the evidence of the McKinnells points to the former conclusion and certainly the appellant does not contend that there was not ample evidence to justify that conclusion. But it is not for their Lordships to say how the question should be answered. They need say no more than that it should have been left to the jury fairly as an open question.

The learned Chief Justice took a different view. It is evident that in his view the real issue lay between the first and second alternatives with a strong inclination towards the first. Indeed the fact that the Court passed a sentence of fifteen years upon a young man of good character shows that even after the verdict of the jury the Court must still have regarded the intent as little short of murderous. In their Lordships' view the first alternative was only barely admissible; and if the jury had convicted upon it, the Board would have had to consider carefully whether there was any real evidence of intent to murder. The whole history of the relationship between the couple is very strongly against it. There were no marks on the body of any violence not caused by the fall itself. The case for murder depends on the sentence overheard by Mrs. McKinnell alone:—" Stop it Malcolm or you will kill me ", a sentence which was stressed by the Chief Justice. But in their Lordships opinion without some more detailed evidence than was given about the way in which the words were spoken, they afford no clue to the character of the struggle. The tone of voice would surely have indicated whether they expressed a real apprehension of danger to life or whether the words were used lightly. The only evidence is that they were said a bit loudly but not in a scream. Mrs. McKinnell remained awake and in bed for about ten minutes thereafter until the appellant came to the door. It is difficult to believe that if the words had conveyed to her a real impression of urgency or danger, she would not have done something about it.

The consequence of the view taken by the learned Chief Justice was that he devoted the greater part of his summing up to the charge of murder. The record of the summing up covers 22½ pages and it is not until the 20th that he referred to any alternative crime. He then addressed the jury as if there was virtually only one alternative, the crime of grievous bodily harm under section 234. In the penultimate paragraph he said this:—" I have about finished, Gentlemen of the Jury, but simply because learned Counsel for the Defence has also made reference to another kind of crime which conceivably, in his view, might be considered as fitting the circumstances of the case, I am going to just mention it to you. He suggested that at the utmost what you could find the accused guilty of was involuntary homicide, and he said that you should consider this if, as he hoped, you accepted the submission that the accused was, on account of drunkenness, incapable of forming any intent at all. The crime of involuntary homicide, unlike wilful homicide and also wilful bodily harm from which death ensues, does not require any intent, it is committed by mere negligence on the part of the accused. I do not know precisely what learned Counsel meant by negligence in the present context whether he makes it consist in the skylarking as he called it, or in the very act of the taking of the drinks. Well, there it is; but as I said, you need not trouble yourself with this third hypothesis unless you have first excluded not only the crime of wilful homicide but also that of bodily harm."

In their Lordships opinion this way of referring to the third alternative does not do justice to the case for the defence. Moreover, it will be observed that His Honour referred to it as if it need not be considered at all unless the jury thought that drunkenness was affecting the accused's faculties. The same observation may be made about the way in which the learned Chief Justice left the second alternative to the jury. In their Lordships opinion these two alternatives arise quite independently of the evidence about drunkenness and indeed, for reasons which they will give later, they do not think that drunkenness has a significant part to play in the consideration of either alternative.

The next complaint relates to the way in which the learned Chief Justice dealt with the appellant's credibility. Let it be supposed that the second and third alternatives had been fairly left to the jury. There can no be doubt that the jury making their choice between them would be influenced by the view they took of the appellant's statement that he had no memory of the crucial events. The Crown contended that the loss of memory was faked, that is to say, that in this vital matter the accused was seeking to protect himself by a lie.

It is very important that a jury should be carefully directed upon the effect of a conclusion, if they reach it, that the accused is lying. There is a natural

tendency for a jury to think that if an accused is lying, it must be because he is guilty and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so. Save in one respect, a case in which an accused gives untruthful evidence is no different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. But if upon the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends of course on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness.

This is the sort of direction which it is at least desirable to give to a jury. The learned Chief Justice did not give any direction of this sort. On the contrary, in one passage of his summing up he put the point in an erroneous and misleading way. He said:—" Although this skylarking business was thrown, left with you as a suggestion, the real substantial defence of the accused is exactly in those words 'I do not remember'." This is quite incorrect. Loss of memory is not a defence and was not put forward as such. It was put forward as the reason why the accused could not himself give direct evidence in his own defence. Later on in his summing up the learned Chief Justice put the point correctly in a passage that their Lordships have already quoted. But the earlier passage might well have led the jury to believe that if they were satisfied that the loss of memory was faked, the real substantial defence of the accused collapsed.

Added to this general criticism, there are points of detail in which it is said that the learned Chief Justice did not leave fairly and accurately to the jury the facts relating to the loss of memory. He told them quite properly that a statement by the accused that he does not remember is easy to advance and difficult to refute and that it must be examined with scrupulous care. In dealing with the evidence of the McKinnells, the Chief Justice had reminded the jury that the McKinnells had consistently from the beginning told the same story. He did not remind the jury that the accused had also said from the first that he had no memory of the crucial events; he said so to the doctor who examined him in the sick-bay. His Honour referred to the two previous occasions on which the accused had said that after a bout of drinking he had lost his memory in a similar way; he did not remind the jury that one of them was corroborated by the witness Collecott. He referred to the fact that the appellant remembered some things and not others and said:—" The amnesia here is so patchy that the Public Prosecutor tells you that it must obviously be faked ". It may be that a genuine amnesia is always uninterrupted. Their Lordships do not know and there was no expert evidence on the point. In the absence of expert evidence, their Lordships do not think it wise to suggest to a jury—the learned Chief Justice was virtually adopting the Public Prosecutor's criticism—that patchiness is an obvious sign of faking. His Honour then went through the appellant's evidence to point out the number of details which he did in fact remember. The appellant complains that the Chief Justice got some of the details wrong; their Lordships do not think that there was any very important inaccuracy. But at the end of his review His Honour said:—" You may think it strange that the real matter of importance which is skipped in the memory of the accused is how he caused the injuries to his wife... eventually it is only these important matters that he does not remember ". Their Lordships do not think that is quite a fair comment. This is not a case in which the circumstances were such as to drive a guilty man into taking refuge in loss of memory. It would have been quite easy to have invented a story, which, while consistent with the McKinnells' evidence, supported the suggestion of skylarking rather than that of a quarrel; or even a story which with some straining of the McKinnells' evidence could be made consistent with accident. No astute man, if he were considering what sort of lies to tell, would think that a story about loss of memory was the most convincing that the circumstances permitted. This is a case in which it is just as easy to say that the accused's defence was impeded by loss of memory as that it was assisted by it.

In *Russell* v. *H.M. Advocate* [1946] S.C.(J) 37 the Lord Justice Clerk at 48 said:—" Loss of memory in a person otherwise normal and sane plays its full part, if it is sufficiently proved, in increasing the onus on the Crown, and in raising doubts to which it may be the duty of the jury to give effect in a verdict of acquittal after investigation of the whole case ". In referring to this dictum in *R.* v. *Podola* Parker C.J. said at 356 that it did not mean that strictly the onus was any greater, but that " a judge should point out to a jury that they must take into consideration carefully the fact that the accused cannot remember the events ". Just as a faked loss of memory may make it easier for a jury to draw the inference of guilt, so a genuine loss of memory may make it more difficult, for a jury must then reflect that by the force of circumstances they have heard only one side of the case. Their Lordships consider that the learned Chief Justice should have pointed this out to the jury and that he did not hold the balance even in this respect.

In one respect he tilted it sharply and without justification the wrong way. He pointed out to the jury quite correctly that blood was found on the jeans and on the shoes which the accused had been wearing at the dance but that none was found on the fancy shirt which he had been wearing. This meant that he could not have found his wife on the stairs as he came home and before he went to his flat, for if he had straightway picked her up and carried her to his flat his shirt also would have shown bloodstains. So he must have been in the building and with his wife before the fall occurred; and this corroborates to that extent the evidence of the McKinnells. But the Chief Justice took it also as proof that the accused was lying. He broke off the chronological narrative of events which he was giving to the jury at the beginning of his summing up in order to draw particular attention to this point. He said:—" I think this is a convenient place to mention a circumstance which you may think may have very considerable importance in the assessment of the evidence, especially that given by the accused. Although he does not say so in so many words, yet the implication of the version given by the accused is clear: that he found his wife lying on the staircase when he returned home. . . .Now if the version of the accused is true that he found his wife lying on the staircase when he first came into the building and that he carried her to the bedroom and put her on the bed, we would expect the shirt to be also stained with blood. You may well ask yourselves why it is not. Since it is not, does that show that this part of the version given by the accused is not true?"

In truth the accused had not given that version either expressly or by implication. He never said that he remembered finding his wife on entering the building; he said that finding his wife was the first thing he could remember. He made this quite clear in answer to two questions put by the Court.

> " Q. Did you find your wife at the bottom of the staircase in that position injured on your coming straight from the dance?
>
> A. I have no idea.
>
> Q. You said when you went home you found your wife there?
>
> A. I said the next thing I remember is having seen my wife in a pool of blood ".

The remaining misdirection of fact alleged was with regard to the suggestion of accident. The Chief Justice said:—" Counsel suggested to you or asked you to imagine that the wife could have fallen down the stairs as the accused was chasing her for fun and therefore this was a case of pure accident. I do not know, but I do not think you will find very great difficulty in disposing of that suggestion. The circumstances appear to be hardly consistent with that explanation. To accept it would be to reject the whole of the evidence of the McKinnells and to disregard also the nature of the injuries ".

Whatever may be said for or against the suggestion of accident, it does not involve rejecting the *whole* of the evidence of the McKinnells, though it could fairly be pointed out that it is very difficult to reconcile it with the exact words which the McKinnells attributed to the appellant. The suggestion does not in any way involve disregarding the nature of the injuries: the medical evidence was quite clear that the nature of the injuries threw no light on the cause of the fall.

Before considering the total effect of these misdirections of fact, their Lordships will consider the complaint that there was a misdirection of law in relation to drunkenness. Their Lordships have already referred to section 35 of the Code which, it was said, embodies the law of England. Under sub-section 4 it would appear that drunkenness is to be taken into account for the purpose of determining whether the person charged had in fact formed any intention necessary to constitute the crime. The corresponding proposition laid down in *D.P.P.* v. *Beard* [1920] A.C. 479 at 501 is that evidence of drunkenness which renders the accused *incapable* of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent. There is no mention in the Code of incapacity. The proposition stated in *D.P.P.* 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; and it would not therefore be sensible to take the incapacity into consideration together with the other facts in order to determine whether he had the necessary intent. It may be that the wording of section 35 (4) of the Code is designed to avoid this logical difficulty and that there is no substantial difference between the two propositions. Or it may be that the law as laid down in *D.P.P.* v. *Beard* must now be interpreted in the light of later decisions on the proof of guilty intent.

But superficially at any rate section 35(4) of the Code and *D.P.P.* v. *Beard* approach differently the problem of proving intent. One way of approaching the problem is to say that it is always for the Crown to prove that the accused actually had the intent necessary to constitute the crime: and that that proof may emerge from evidence or statements made by the accused about his own state of mind or may be made by way of inference from the totality of the circumstances. *Prima facie* intoxication is one circumstance to be taken into account and on this view all that section 35 (4) is doing is to make it plain that intoxication is not to be excluded. On the other hand, the sort of approach that is contemplated in *D.P.P.* v. *Beard* is that there must be proof (or at least some suggestion) of incapacity in order to rebut the presumption that a man intends the natural consequences of his acts.

In his directions to the jury in this matter the learned Chief Justice adopted the language of *D.P.P.* v. *Beard* and talked throughout of incapacity. At first sight this might seem to make it necessary for their Lordships to explore further the difficulties they have just indicated. But on the particular facts of this case their Lordships find it unnecessary to do so. This is not a case in which there is direct evidence about the accused's state of mind and the effect of drink upon it. There is evidence about what the accused did in fact, but what he intended to do is a matter for inference. In a case in which the intent of an accused is to be ascertained solely by inference, nothing short of incapacity need be considered. If an accused cannot himself give evidence about his state of mind, he cannot say what intent he in fact formed or did not form; and it is therefore only if there is material to suggest that by reason of intoxication he could not have formed a guilty intent that the inference which would otherwise naturally be drawn from the circumstances can be questioned. No valid criticism can therefore be based on the fact that the learned Chief Justice throughout referred to incapacity as the test.

But in one place in his summing up (though not throughout) His Honour referred to the wrong sort of incapacity. " Do you think " he asked the jury " that this is the picture of a man who had lost his capacity to think, his consciousness and his understanding so that he was incapable of appreciating what he was doing and the nature both physical and moral of the consequences of his actions? This is what learned Counsel for the Defence is inviting you to say ". Incapacity of this sort is incapacity amounting to insanity and is dealt with in section 35 (2) and (3) of the Code. Counsel for the Defence was not inviting the jury to say that the appellant was insane; he was simply inviting them to take intoxication into account in accordance with section 35 (4).

The other passage which is complained of is as follows. " Evidence of intoxication falling short of a proved incapacity in the accused to form the

intent necessary to constitute the crime and merely showing that his mind was affected by drink so that the accused more readily gave way to some violent passion does not rebut the assumption that a man intends the natural consequences of his acts ". Objection is taken to the word " proved ". In putting the matter in this way the learned Chief Justice was following verbatim the words used by Birkenhead, L.C. in *D.P.P.* v. *Beard* at 502. But much has been said judicially since 1920 about proof of intent, notably in *Woolmington* v. *D.P.P.* [1935] A.C. 462. Before the Board the Crown conceded that it is not for an accused to prove incapacity affecting the intent and that if there is material suggesting intoxication the jury should be directed to take it into account and to determine whether it is weighty enough to leave them with a reasonable doubt about the accused's guilty intent. Their Lordships approve this concession. The dictum of Lord Birkenhead cannot be treated as laying down the law upon burden of proof and it is therefore unwise to use the dictum in a direction to a jury.

But in their Lordships opinion such misdirections as there were on this point do not now affect the issue. Their Lordships accept the submission of the Crown that in relation at any rate to the offence under section 234, which is all that the Board is concerned with and which requires proof only of intent to hurt, there is nothing at all to suggest that the appellant was incapable of forming the intent. It is not enough to show that before the event the accused had been drinking very heavily (as the learned Chief Justice told the jury, the effect of alcohol varies greatly with different people) and that when examined after the event he was pronounced to have been under the influence of alcohol. There is nothing in the evidence of the doctor who examined him or of those witnesses who observed him before or after the event to suggest that at the time of the event his physical and mental faculties were affected at all, let alone to the extent of affecting his capacity to form an intent to hurt. There was no evidence of defect in speech or movement except some evidence of incoherence after the event which could equally well, if not better, be attributed to the emotional shock and hysteria from which he then was plainly suffering. It was suggested that his amnesia would not have occurred if he had not drunk as much as he did. But there was no medical evidence on this topic and it was not suggested that the amnesia itself was any evidence of his state of mind at the time of the event. In their Lordships opinion the jury could properly have been directed not to consider intoxication at all in relation to the offence under section 234.

Accordingly the result of this appeal must turn solely on the weight to be given to the misdirections of fact which their Lordships have detailed. One further complaint of a general character should be noticed. The learned Chief Justice indicated his opinions very freely during his summing up and they were usually, if not invariably, against the accused. The opinions of the presiding judge on issues of fact can often be of great assistance to the jury. But it is very important that the jury should be told that they are not bound by them nor relieved thereby of the responsibility for forming their own view. Nevertheless, a jury is likely to pay great attention to them: and even in a case where a proper warning is given, an appellate court may still intervene if it considers them far stronger than the facts warrant. In the present case no warning was given; and their Lordships consider also that, even had there been a warning, the Chief Justice went too far in revealing his views, so far that there was a danger of the jury being overawed by them. Their Lordships appreciate that the learned Chief Justice was anxious only to help the jury to take a true view of the case as he saw it, but unfortunately in their Lordships opinion he saw it wrongly.

Fundamentally, it was the learned Chief Justice's view of the case as a whole and of the way in which the issues should be left to the jury that threw the summing-up out of a fair balance. This basic defect might well of itself be sufficient to invalidate the verdict. But there were also the other defects which their Lordships have noted, and the cumulative effect of all those substantiated was beyond any doubt such that the summing up as a whole cannot be accepted as a fair presentation of the case to the jury. A fair presentation is essential to a fair trial by jury. The appellant has thus been

deprived of the substance of a fair trial and so in accordance with the principles that govern the Board's jurisdiction, the Board has humbly advised Her Majesty to allow the appeal.

Their Lordships considered carefully whether they should advise Her Majesty to allow the appeal completely or whether they should advise her to substitute for the conviction under section 234 a conviction of the lesser offence of involuntary homicide under section 239. The matter is not governed by a statutory proviso, as in England, but their Lordships do not doubt that it would be within their powers to tender such advice. The substitution would not affect the corporal relief to be granted to the appellant as he has already served more than the maximum sentence which, even without remission, could be given for the lesser offence. But the appellant is of course entitled to have it determined whether he is to be held guilty of any offence.

Their Lordships could not advise the conviction of the lesser offence unless they are satisfied that on the facts a jury properly directed could not have acquitted of it. Their Lordships cannot put it as high as that. In the first place it is at least doubtful whether the credit of the McKinnells was fairly presented to the jury and without their evidence there was no proof of any offence at all. In the second place, on the footing that the McKinnells' evidence was acceptable, there has to be considered the misdirection on the facts relating to accident which their Lordships have already referred to. While it is difficult to reconcile the theory of accident with the statements made by the appellant to the McKinnells, it is not impossible. Their Lordships do not think this is a case in which a conviction for the lesser offence can, without a verdict of a jury, be imposed on the appellant.

For these reasons their Lordships have humbly advised Her Majesty that the appeal should be allowed, the conviction set aside and the sentence quashed.

(88961) Wt. 8052/97 110 1/64 Hw.

In the Privy Council

MALCOLM STEWART BROADHURST

v.

THE QUEEN

DELIVERED BY
LORD DEVLIN

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS
HARROW
1963