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N2LR

M 514/83

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

X

370

BETWEEN: POLICE

Appellant

A N D: G KERAPA

Respondent

Hearing: 11 April 1984

Counsel: Mr C.O.M. Almao for Appellant
Mr L. de Jong for Respondent

Judgment: 19-4-84

RESERVED JUDGMENT OF GALLEN, J.

This is an appeal by way of case stated from the decision of District Court Judge Trapski.

The defendant was charged with three charges alleging assault with intent to injure; a fourth charge of having in his possession an offensive weapon, a pocket knife, in circumstances which showed an intention to use it to commit an offence involving bodily injury; and a fifth charge substituting the neck of a broken beer bottle for the pocket knife in the fourth charge. The circumstances are set out in the case stated in the following terms:

> "The defendant pleaded not guilty and after hearing the parties and the evidence adduced by them, on the 22nd day of April 1983 I dismissed the informations.

"The informant within fourteen days after the determination filed in the office of the District Court at Hamilton a notice of his intention to appeal by way of case stated for the opinion of this Honourable Court on a question of law only; and I therefore state the following case.

It was proved upon the hearing that the defendant attended a party at an address in Hamilton at which the three complainants were also present. The offences which are the subject of the informations were committed during the course of this party. I found that the evidence established the facts relating to each of the informations. The issue raised by the defence was lack of intent.

I also found as a fact that there was some evidence which indicated that the defendant was drunk. This evidence was that one complainant said that the defendant was drunk, that there was evidence from the defendant as to how much he had drunk and that he had been drinking quickly, and that at the Police Station the defendant could not stand and his speech was very slurred and he was mumbling. I further found that: "Here the evidence falls short of establishing that the accused was so drunk that his mind was not functioning - there is evidence that he had apologised to, in particular Carpenter and told Carpenter that he would not repeat his performance and that he had talked to other people - but that in my view does not mean that the case is proved. Far from it. In my view it is still open for the Court or a jury to say that the Crown has not discharged the onus which is clearly on it of proving an intent in these particular circumstances".

I determined that I was "in the position that I have a genuine doubt about the ability of the defendant to form an intent.... accordingly it is for the prosecution to prove that the defendant had the capacity or ability to form an intent. That is a burden of proof which remains with the prosecution throughout the whole of the case."

The learned District Court Judge dismissed all five Informations and the case stated now seeks the opinion of the Court on the following questions:

1. Whether the learned District Court Judge correctly applied R v Kamipeli (1975) 2 N.Z.L.R. 610 in approaching the question of intent on the basis that the prosecution had

to prove the defendant had the capacity or ability to form an intent.

2. Whether there was any material evidence suggesting intoxication that I could properly take into account for the purpose of determining whether it was weighty enough to leave me with a reasonable doubt as to the relevant guilty intent on the part of the defendant in respect of any one or more of the five charges.

3. If the answer to that question is "yes", was the learned District Court Judge correct in dismissing the charge when he held that he had a genuine doubt about the ability of the defendant to form an intent.

The law relating to the effect of evidence of intoxication in criminal proceedings is at present the subject of considerable dispute. In R v Kamipeli (1975) 2 N.Z.L.R. 610, the Court of Appeal considered questions relating to the effect of evidence of intoxication and this decision remains authoritative in New Zealand. In England, the House of Lords in D.P.P. v Majewski (1977) AC 443 considered the legal position in England, drawing a distinction between the situation which arose in crimes involving a specific intent from those which proceeded on the basis of a general intent. In New Zealand, the Court of Appeal in the case of R v Roulston (1976) 2 N.Z.L.R. 644 specifically left open the question as to whether or not the conclusion arrived at in Majewski's case would be followed in New Zealand. In the High Court of Australia, in the case of R v O'Connor (1979) 29 A.L.R. 449, the High Court declined to

follow Majewski and followed the stand taken in R v Kamipeli. In Kamipelli's case, the learned Judge of the High Court had summed up following the course which had been adopted since the decision of the House of Lords in D.P.P. v Beard (1920) AC 479. Effectively, he directed the jury that in deciding whether the Crown had discharged the onus of proving intent in a murder trial, the law required that for the person concerned to lack the necessary intent, he had to be so drunk that he was not responsible for his actions, that he was acting as a sort of automoton, without his mind functioning.

The position tends to be obscured by the confusion of a number of questions. These involve whether or not there is a different situation in the case of specific as against basic intent as was the position in Majewski, and the position regarding the onus of proof. There can be no doubt that the onus of proof remains throughout on the Crown and any direction which suggested that the contrary was the case would clearly be bad.

The general effect of Kamipeli's case is summed up in the following passage:

> "Drunkenness is not a defence of itself. Its true relevance by way of defence, so it seems to us, is that when a jury is deciding whether an accused has the intent or a recklessness required by the charge, they must regard all the evidence, including evidence as to the accused's drunken state, drawing such inferences from the evidence as appears proper in the circumstances. It is the fact of intent rather than the capacity for intent which must be the subject matter of the enquiry."

It is important to note that this passage is followed immediately by the following:

> "The alternative is to say that when drunkenness is raised in defence, there is some special exception from the Crown's general duty to prove the elements of the charge. We know of no sufficient authority for that, nor any principle which justifies it."

The importance of this reference is that it shows in context the earlier passage was one where the members of the Court of Appeal were considering the matter from the point of view of where the onus of proof lay. It is also important to note that in Kamipeli's case the Court was not narrowing the scope of intoxication when raised by an accused, but expanding it. The appeal was allowed because the direction suggested that drunkenness could only be relevant if it was so extreme as to prevent a person suffering from it from having any intent at all. The Court of Appeal made it clear that while a person who was intoxicated to such an extent could clearly not be guilty because he could not form an intent, drunkenness to some lesser degree might also be relevant in deciding on a consideration of all factors disclosed by the evidence whether the accused person had the necessary intent.

In placing an emphasis on the approach which requires a jury to take into account all factors in considering intent, the Court of Appeal, as I understand the position, was not, in Kamipeli's case, endeavouring to make the matter easier for the prosecution, but avoiding a situation where a factor of significance might be excluded from consideration because its application was too confined. This follows from the further discussion which appears in Kamipeli's case. The Court stated, for example:

> "We accept that if it is shown that the accused was, in the literal sense, so drunk that he does not know what he is doing, he should be acquitted of murder for he could not possibly have the necessary intent, statutory or common law, but what of the man whose drunkenness has not reached that stage? We cannot imagine that Lord Denning intended that a jury is never entitled to find intent not proved when the evidence relating to intoxication falls short of establishing that the accused was so drunk that he did not know what he was doing."

I would therefore understand Kamipeli as deciding that:

1. When an accused person is so drunk that he is incapable of forming an intent at all, the prosecution must fail;

2. If the evidence shows that there is some lesser degree of intoxication, it is nevertheless relevant as a factor to be taken into account with all other relevant factors in determining whether or not the necessary intent was present;

3. The onus of proof remains fairly and squarely on the Crown which must prove intent;

4. At least at present there is no distinction in New Zealand between the situation which exists in respect of basic and specific intents (but it may be more difficult to discharge the onus in respect of a specific intent).

In this case, the learned District Court Judge specifically stated that he was applying Woolmington v D.P.P. and Kamipeli. He stated that he was in the position that he had a genuine doubt about the ability of the defendant to form an intent. If that is so, then although it would normally be appropriate to consider the matter from a point of view of all relevant factors, he has obviously decided that the evidence before him was sufficient to raise the extreme case of lack of capacity to form an intent at all.

I do not consider that this approach is contrary to that required by Kamipeli. I note that the learned District Court Judge made the apparently contradictory statement, "Here the evidence falls short of establishing that the accused was so drunk that his mind was not functioning...." While the above statement does appear at first sight to be contradictory, it is not necessarily so, because the learned District Court Judge correctly accepted that the onus lay on the Crown, not on the defendant and his comment may be taken in the context of onus of proof.

I was referred to the decision of Hardie Boys J in Steinberg v Police, 18 August 1983. In that case, the learned Judge in the District Court appeared to have applied the decision in D.P.P. v Majewski rather than that in Kamipeli so that the case was concerned basically with a distinction in intent.

I cannot find that the learned District Court Judge was wrong and I would answer question 1 by saying "Yes", provided it is accepted that this is an example of the extreme case referred to in Kamipeli and not the situation which would normally arise in which case he would no doubt have considered all relevant facts, including possible intoxication, in considering whether or not intent had been proved.

This appeal is by way of case stated. I do not have available to me the notes of evidence, nor the full decision of the learned District Court Judge. In those circumstances, it is impossible for me to answer question 2.

As far as question 3 is concerned, in the light of the foregoing, the answer is "Yes".

The appeal will therefore be dismissed. The respondent is entitled to costs, which I fix at $250.00.

R D Gale J.

The Crown Solicitor,
Hamilton

Messrs McKinnon, Garbett & Co
Solicitors,
Hamilton