

KATUNDU v THE PEOPLE (1967) ZR 181 (CA)

COURT OF APPEAL

BLAGDEN CJ, WHELAN AND MCCALL JJ

12th DECEMBER 1967

Flynote and Headnote

[1] Criminal law - Insanity, by intoxication or otherwise - Elements - Section 13 of Penal Code construed.

When the accused raises the defence of insanity, caused by intoxication or otherwise, he bears the burden of showing by a balance of probabilities that, at the time of the offence, he was (1) suffering from a disease effecting the mind, which (2) rendered him incapable of understanding what he was doing or alternatively of knowing that he ought not to do it.

[2] Evidence - Burden of proof - Insanity as defence to criminal prosecution.

See [1] above.

[3] Criminal procedure - Evidence of potential defence not raised by accused - Duty of court to consider.

Where there is evidence of intoxication, whether it is raised as a defence or not, the court must examine and evaluate that evidence.

[4] Criminal law - Intoxication -General outline of the defence - Section 14 of Penal Code construed.

If the court is not satisfied beyond reasonable doubt that the accused was not intoxicated at the time of the incident in question, then the court must consider the following two questions: (1) Was the accused so affected by intoxication that he did not know what he was doing or that he did not know it was wrong to do it? and (2) Was the accused so affected by intoxication that he was unable to form the intent necessary to commit the offence? If the court is not satisfied, again beyond reasonable doubt, that the answer to both questions is *no*, then the defence succeeds.

[5] Evidence - Burden of proof - Intoxication as defence to criminal charge.

See [4] above.

Statutes construed:

- (1) Penal Code (1965, Cap. 6), ss. 13 and 14.

Appellant in person.

Reilly, Senior State Advocate, for the respondent

Judgment

Blagden CJ: This is an appeal against a sentence of five years' imprisonment with hard labour for rape. The appellant has eight previous convictions, none for rape, but three for violence. In his grounds he states: "My committal of the offence is due to circumstances that I was drunk and could not act in actual order of sexual intercourse although I had made some sort of arrangements with the woman which she refused later." There is no evidence to support the allegation that the woman in this case made any arrangements with the appellant, and the grounds of appeal here advance nothing which would justify us in reducing the sentence.

There is one matter in the learned trial magistrate's judgment to which we think we should draw attention. At the trial the appellant did raise the defence of intoxication. The circumstances under which that defence could be raised, and prove successful, are set out in section 14 of the Penal Code. The learned trial magistrate said: "In order to bring himself within the defence laid down by Section 14 (1) of the Penal Code it is for him to show that either at the time of the act he did not know that it was wrong, or that he did not know what he was doing, and that the state of intoxication was caused without his consent, or that he was temporarily or otherwise insane by reason of his intoxication. The

accused must show this on the balance of probabilities. I have no doubt that all that he has failed in this *onus*."

[1] [2] This passage is a misdirection. Where the defence raised is insanity - and this would include insanity caused by intoxication - it is true that there is an *onus* on an accused person to show on the balance of probabilities that at the time he committed the offence he was (1) suffering from a disease affecting his mind, which (2) rendered him incapable of understanding what he was doing or, alternatively, of knowing that he ought not to do it (see section 13 of the Penal Code).

[3] Where there is evidence of intoxication, whether it is raised as defence or not, it is the duty of the court to examine and evaluate that evidence. If having done so the court is satisfied beyond reasonable doubt that the accused was not intoxicated, then that is an end of the defence of intoxication.

[4] [5] If, however, the court is not so satisfied then it must go further and consider whether it is satisfied, again to the standard of satisfaction beyond reasonable doubt, of two negatives:

- (1) that the accused was *not* so affected by intoxication that he did not know what he was doing or that he did not know it was wrong to do it (see section 14 (2) of the Penal Code),
- (2) that the accused was *not* so affected by intoxication that he was incapable of forming any intention necessary to commit the offence (see section 14 (4) of the Penal Code).

If the court *is* so satisfied of both these negatives, then the defence of intoxication fails. If the court is *not* so satisfied, then the defence succeeds.

The foregoing is a summary of the main provisions of section 14 of the Penal Code. In certain circumstances there are other considerations to be taken into account, but the principles underlying a trial court's proper approach to the issue of intoxication in a criminal case are, in brief, as stated.

In the instant case and from the evidence disclosed by the record - bearing in mind those parts accepted by the learned trial magistrate and those rejected, with which we can find no quarrel - we are satisfied that this misdirection cannot possibly have affected the appellant's conviction, which was inevitable. This was a bad case in which considerable violence was exercised, and the appellant behaved in a brutish manner.

In our view the sentence was richly deserved.

Appeal dismissed.