IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION:	Appeal from Judgment of the High Court of Solomon Islands (FaukonaJ.)
COURT FILE NUMBER:	Criminal Appeal Case No.28 of 2013(On Appeal from High Court Criminal Case No. 150of 2011)
DATE OF HEARING:	WEDNESDAY 30 April 2014
DATE OF JUDGMENT:	FRIDAY 9 MAY 2014
THE COURT:	Justice Goldsbrough, P., Justice Williams JA., Sir Gordon Ward, JA.
PARTIES:	THANG -V - Reginam
Advocates:	
Appellant:	Blundell, H
Respondent:	Aulanga, A
EX TEMPORE/RESERVED:	RESERVED
ALLOWED/DISMISSED	Allowed
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JUDGMENT OF THE COURT

1. This appeal against a conviction recorded on 30 November 2012 is brought with leave granted by this Court. That leave is based on an application on behalf of the Appellant by the Public Solicitor dated 23 October 2013. The grant of leave was not opposed.

2. Pursued in this appeal are two grounds of appeal from the original four.Both of those grounds concern the question of intention required for a murder conviction. At trial the Appellant put forward that his state of voluntarily induced intoxication was such that he was incapable of forming the necessary intent.

3. The appellant in 2011 was employed as a crew man on board the Pacific Pride fishing vessel which was moored in Honiara in February of that year. Having finished work around midday the appellant together with fellow crew members celebrated Chinese New Year.

4. During that evening two crew members were assaulted by the appellant, one of them fatally. Nguyen Van Huong was stabbed by the appellant in the room which the shared and shortly thereafter Nguyen Van Toan by the same appellant in a different location. Nguyen Van Huong died of his injury. Nguyen Van Toan survived the knife attack on him. There is no appeal against the conviction entered in respect of the injury to him.

5. During the trial there was little dispute as to how the injury inflicted on the deceased came about. As a prelude to what later took place in their room, the appellant and the deceased were observed arguing in the crew mess hall or dining room. There was evidence of the two of them fighting on an earlier occasion. Using a knife found in the room, a knife used to cut fruit, the appellant stabbed the deceased in the head through his left eye. The resultant damage to his brain and haemorrhaging was the cause of death.

6. In his closing address counsel for the appellant submitted that the only explanation for the two stabbings was that the accused was of unsound mind. The submission continued that the unsound mind came about as a result of the consumption of alcohol. "He was too drunk to assess the likely consequences of his drunken behaviour."is how the submission went.

7. Found at section 13 of the Penal Code [Cap 26] is a provision in relation to intoxication.

> **13.**-(1) Save as provided in this section intoxication shall not constitute a defence to any criminal charge.
>
> (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and-
>
> > (*a*) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
> >
> > (*b*) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
>
> (3) Where the defence under the preceding subsection is established, then in a case falling under paragraph (a) thereof the accused shall be discharged and in a case falling under paragraph (b) the provisions of this Code and of the CriminalProcedure Code relating to insanity shall apply.
>
> (4) Intoxication shall 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.
>
> (5) For the purpose of this section "intoxication" shall be deemed to include a state produced by narcotics or drugs.

8. The trial judge most carefully considered the relevant material in relation to the suggestion of a section 13 (2) (b) "defence" as it is termed in subsection 3, and rejected that defence. It seems to this court that his finding in that regard was both considered and correct. He took into account behaviour both before and after the fatal stabbing and concluded that the actions of the appellant did not demonstrate that he was so intoxicated.

9. To a great extent the appellant in this appeal does not disagree with those findings of the trial judge. The essence of this appeal is that, having determined that the appellant was indeed capable in law of forming the requisite intent, the trial judge did not then consider whether the appellant had indeed formed the necessary intent.

10. Once the question of intoxication has been raised by the defendant within a criminal trial, if he seeks to show that he falls within section 13 (2) (b) the onus is on him. Having once raised the question of intoxication, and faced with a finding that it does not come within that subsection, the burden remains with the Crown to show that the defendant actually had the necessary intent.

11. Put differently, the question raised in section 13 (2) (b) is whether the defendant was capable of forming the requisite intent. If he is not that is an end of the matter. If he is found to be capable of forming the necessary intent, it is necessary to further consider whether he actually formed that intent.

12. The above propositions are not novel. In *Baeoro v R* SICA 11 of 2010 at page 8 it is clear that this court considered that the question is whether the defendant was "capable of forming and ***in fact did form***" the relevant intent. This is further illustrated in authorities from various jurisdictions. In England and Wales in R v Sheehan 1975 1 WLR at 740 it was said:-

> "In cases where drunkenness and its possible effect upon the defendant's mens rea is an issue, the proper direction to a jury is, first, to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there; secondly, and subject to this, the jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent."

13. In New South Wales a similar direction can be found in *R v Gordon* S.R. (N.S.W.) 1983 at page 635.

> "The onus is always upon the Crown to show the guilt of the accused and this beyond reasonable doubt. 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 formed such an intent should be taken into consideration. The question is whether he had, in fact, formed the necessary intent to constitute the particular crime. If he was so drunk that he was incapable of forming or did not in fact form the intent required, he could not be convicted of a crime which is committed only if the intent is proved. The onus is on the Crown to establish his guilt in these circumstances, it is not for the accused to prove that he lacked intent. Such is often wrongly referred to as a defence, but it 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."

14. Throughout his judgment the trial judge referred to a state of intoxication "to a level of insanity" which was, indeed, that which he had been encouraged to consider by defence counsel. There are numerous examples where it is shown that the level of intoxication was found not to be to that level. See, for example paragraphs 46, 47, 48 and 50. To that extent the judgment is unassailable.

15. At paragraph 52 the trial judge summarizes his finding as regards the defence of insanity where he concludes that the defence of insanity which the appellant claims through intoxication does not negate any intention to act unlawfully and that therefore his defence must fail. That, with respect, fails to consider, after dismissing an insanity defence, whether the appellant actually formed the necessary intent.

16. In those circumstances the conviction for murder is unsafe and must be quashed. The order most usually made thereafter would be to remit the matter back to the High Court for retrial, but we are advised that this is impractical given the nationality and origins of the majority, if not all, of the witnesses. This incident took place on a fishing vessel which has long gone from Solomon Island waters.

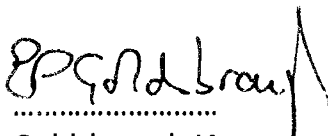
17. In his submissions the appellant accepts that the proper finding in his case should be a finding of manslaughter. Given our findings as to the lack of any consideration about actual intent and the impracticality of a retrial we are prepared to enter a verdict of manslaughter and deal with the appellant

accordingly. We then heard submissions as to the appropriate sentence for manslaughter.

18. The appellant does not submit that this offending falls at the lower end of the scale of offences of manslaughter. It took place at almost the same time as an unlawful wounding on another crew member on the same vessel. For that offence the appellant received a sentence of four and one half years. For this offence of manslaughter we consider that a sentence of seven years imprisonment to be the correct sentence given all of the circumstances including the notion that the appellant was prepared to enter a plea to that charge before trial.

19. The order of this court is that the conviction for murder is quashed and thus the consequent life sentence also quashed, a conviction for manslaughter is substituted and the appellant sentenced to seven years imprisonment for that offence, such sentence to run concurrently with the sentence for unlawful wounding and deemed to have commenced when the appellant first went into custody.

20. We note with some concern the fears expressed by the appellant about return to his native country. Whilst this Court cannot make any order in that respect, we refrain from making any recommendation as to deportation as might have been made. It is to be hoped that whilst serving his sentence the appellant can take whatever steps he deems necessary to establish some right to residence other than in his home country and in that regard we feel that whatever assistance may be available should be afforded to him, whether that be an invitation to the United Nations High Commissioner for Refugees to visit him or otherwise.



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Goldsbrough JA
President of the Court of Appeal

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Williams JA
Member of the Court of Appeal

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Sir Gordon Ward JA
Member of the Court of Appeal