Such an assessment was, in our opinion, illegal and we answer the question of law above stated in the negative and direct that the petitioners be paid their costs by the Crown.

C. H. O.

Application accepted.

APPELLATE CRIMINAL.

Before Mr. Justice Harrison and Mr. Justice Fforde.

WARYAM SINGH, Appellant

versus

THE CROWN, Respondent.

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Jan. 20.

Criminal Appeal No. 852 of 1925.

Indian Penal Code, 1860, section 302—Murder—Punishment—where accused was in a state of intoxication—Discretion of Sessions Judge to inflict the lesser punishment—Criminal Procedure Code, Act V of 1898, section 367 (5).

The appellant was found guilty of an offence punishable under section 302 of the Indian Penal Code, but sentenced by the Sessions Judge to the lesser punishment permitted by that section, *viz.* transportation for life, on the ground that he was in a state of intoxication at the time he committed the offence. It was found as a fact that the accused's state of intoxication was not such as to render him incapable of forming the intent of killing the deceased.

Held, that the Sessions Judge had failed to act in accordance with established principles in the exercise of his discretion in imposing the lesser sentence allowed by law, and that the application of the Crown for enhancement to a capital sentence must be accepted.

Unless drunkenness amounts to unsoundness of mind so as to enable insanity to be pleaded by way of defence, or the degree of drunkenness is such as to establish incapacity in the accused to form the intent necessary to constitute the crime, drunkenness is neither a defence nor a palliation.

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Director of Public Prosecutions v. *Beard* (1), *Nga Tun Baw* v. *Emperor* (2), and *Rex* v. *Meakin* (3), referred to, and also *Sheru* v. *Crown* (4).

Pal Singh v. *Crown* (5), distinguished.

Appeal from the order of Lala *Chuni Lal, Sessions Judge, Ferozepore, dated the 15th June 1925, convicting the appellant.*

Nemo, for Appellant.

R. C. SONI, for the Government Advocate, for Respondent.

JUDGMENT.

FFORDE J.

FFORDE J.—Waryam Singh has been convicted by the Sessions Judge under the provisions of section 302, Indian Penal Code, of the murder of Kesar Singh, and has been sentenced to transportation for life. Against that conviction and sentence he has appealed through the Jail authorities. The Local Government have presented a petition for revision under section 439 of the Criminal Procedure Code, against the sentence of transportation for life, praying that this sentence may be enhanced by the infliction of the death penalty.

The facts are very simple and may be stated shortly. On the 11th of July 1922, a number of villagers, of whom the deceased was one, were taking part in a musical entertainment at about 10 o'clock at night. While this performance was proceeding, the appellant arrived on the scene and requested the party to stop the music and disperse. The deceased retorted that the appellant did not own the ground on which the entertainment was being held and had no right to interfere. The appellant thereupon left in a temper, remarking that the party could continue the performance at their risk. Shortly afterwards he reap-

(1) (1920) L. R. A. C. H. L. 479.
(2) (1912) 17 I. C. 800 (F. B.).
(3) 7 C. & P. 297.
(4) (1923) I. L. R. 7 Lah. 50.
(5) 28 P. R. (Cr.) 1917.

peared on the scene armed with a *chhavi*, and after making some remarks walked up to the deceased and struck him a blow upon the head with the weapon, felling him to the ground. He then struck him two more blows while he lay on the ground.

The medical evidence shows three injuries to the deceased :—

1. An incised wound above the right ear extending to a point beneath the left eye, measuring $9'' \times 1''$ and cutting through the skull and brain membranes.

2. An incised wound through the upper portion of the right ear, measuring $5\frac{1}{2}'' \times 1\frac{1}{2}'' \times 1''$, cutting through the lower part of the skull.

3. An incised wound through the lobule of the right ear, measuring $6'' \times 1\frac{1}{2}'' \times 1\frac{1}{2}''$, cutting through the lower jaw and the back bone.

The skull was cut through under the first wound to the extent of $7''$, and under the second to the extent of $4''$. Death, according to the medical evidence, must have been instantaneous. Each one of the three injuries was fatal.

The learned trial Judge has found—as, indeed, he could not have otherwise found upon the facts—that the appellant struck the blow with the deliberate intent to kill the deceased. The finding of the learned Sessions Judge on this point is expressed as follows :—

" Taking into consideration the very dangerous weapon used, the vital part which was hit and the number as also the extent of injuries caused, there can be no reasonable doubt that Waryam Singh did the act by which the death was caused, either with the intention of causing such bodily injuries as were likely to cause death of the assailed person, or with the intention of causing bodily injuries to him which were

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sufficient in the ordinary course of nature to cause death, and that the offence therefore fell within the purview of section 300, Indian Penal Code."

Having come to this conclusion, and having held that the offence amounted to murder as defined by section 300 of the Indian Penal Code, the learned Judge awarded the lesser punishment permitted by section 302, Indian Penal Code, on the ground that the appellant was in a state of intoxication at the time he committed the offence—this, in the opinion of the learned Judge, being a sufficient reason for imposing the lesser penalty.

Now, so far as the guilt of the appellant is concerned, there is no possibility of doubt in this regard. He has not attempted any defence. He has produced no witnesses but has contented himself with a bald denial. The written statement which he put in is to this effect :—

"I am innocent. The case has been concocted against me out of enmity. I was not in the village on the day of the occurrence."

As against this the evidence of the prosecution is overwhelming, and there is no reason to disbelieve any of the witnesses with the exception of Indar Singh (P. W. 12), who tells a somewhat different story from the rest of the witnesses. This person, however, was not on the scene at the time of the occurrence and does not profess to be an eye-witness, and no weight need be attached to his testimony.

As it is obvious that the appellant has been rightly convicted, his appeal must be dismissed.

There remains to be considered the petition for enhancement of sentence. Mr. R. C. Soni, who appears for the Government Advocate, contends that in

imposing the lesser of the alternative punishments provided by section 302, Indian Penal Code, the learned Sessions Judge has not exercised his discretion judicially. Section 300 of the Indian Penal Code, provides that:

"Whoever commits murder, shall be punished with death, or transportation for life, and shall also be liable to fine."

This leaves a discretion to the trial Court as to which penalty shall be imposed. But section 367 (5) of the Code of Criminal Procedure enacts that where an accused person is convicted of an offence punishable with death, and the Court sentences him to any other punishment, the Court shall in its judgment state the reasons why the sentence of death was not passed. It need hardly be emphasized that the reasons justifying the infliction of the lesser penalty must be such as are in accord with established legal principles. In the present case the reason given by the trial Judge for not imposing the appropriate penalty for deliberate murder, that is, the capital sentence, is that intoxication furnishes a ground for mitigating the punishment. This is, in my opinion, an entirely insufficient reason for the course taken by the learned Sessions Judge. It is a maxim of English Law that voluntary drunkenness does not take away responsibility of any kind and, indeed, the older judicial authorities considered it rather an aggravation than otherwise. The rule is now qualified to this extent, that unless drunkenness either amounts to unsoundness of mind so as to enable insanity to be pleaded by way of defence, or the degree of drunkenness is such as to establish incapacity in the accused to form the intent necessary to constitute the crime, drunkenness is neither a defence nor a palliation. Any doubt which there may

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have been on this subject is removed by the judgment of the House of Lords in *Director of Public Prosecutions* v. *Beard* (1). I may add that the principles enunciated in this case are in strict accord with those laid down by the Full Bench of the Burma Chief Court in *Nga Tun Baw* v. *Emperor* (2), [cited in *Pal Singh* v. *The Crown* (3)].

Mr. C. L. Mathur, who appears for the respondent in the present petition, has argued that the discretion exercised by the learned Sessions Judge was in strict accordance with law, inasmuch as he followed the ruling of the Punjab Chief Court in *Pal Singh* v. *The Crown* (3). Having carefully considered the judgment in that case it seems to me clear that it does not support Mr. Mathur's contention. The headnote does not accurately represent the decision of the Court. The case is referred to in the text-books as laying down the proposition that intoxication forms a sufficient excuse for not exacting the extreme penalty. This is not in fact, as I read it, what that decision did establish. The judgment in that case definitely states that the Court was "unable to find directly or constructively that Pal Singh (one of the accused persons) intended to cause death or such "bodily injury as would be likely to cause death" and for these reasons the Judges considered that it was not necessary to inflict the death penalty. In other words the Judges found that the condition of drunkenness of the accused, taken in conjunction with the other circumstances of the case, negatived an intent on his part to cause death. It was not on account of his drunken condition that they imposed the lesser penalty, but because the Court found that he did not intend to kill the victim of his acts.

(1) (1920) L. R. A. C. H. L. 479. (2) (1912) 17 I. C. 800 (F.B.).
(3) 28 P. R. (Cr.) 1917.

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This is in accordance with the principles laid down in *Rex* v. *Meakin* (1), where Alderson B, stated that :—

"With regard to the intention, drunkenness might perhaps be adverted to according to the nature of the instrument used. If a man used a stick a jury would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as they would if he had used a different kind of weapon; but where a dangerous instrument was used, which, if used, must produce grievous bodily harm, drunkenness could have no effect on the consideration of the malicious intent of the party."

In Pal Singh's case the weapons used for inflicting injuries were sticks. In the present case the weapon used was a particularly deadly weapon, namely, a *chhavi*, and the learned Sessions Judge has emphatically found that the appellant did intend to cause the death of Kesar Singh, and, as I have already pointed out, he could not upon the facts have come to any other conclusion. The evidence does not lead to the conclusion that the appellant was in any very advanced state of intoxication. He was at least sober enough to walk from the scene of the occurrence to a ruined house near by, return with a *chhavi* and strike three deadly blows upon the head of the deceased. It would be impossible to hold upon the circumstances of this case that the state of intoxication of the appellant was such as to render him incapable of forming the intent to kill the deceased.

For the reasons I have given, I am of opinion that the learned Sessions Judge has failed to act in accordance with established principles in the exercise of his discretion in imposing the lesser sentence allow-

(1) 7 C. & P. 297.

ed by law, and accordingly I would accept the petition, set aside the sentence of transportation for life and impose in its place the capital sentence.

HARRISON J. HARRISON J.—I agree. The law on the subject has been clearly explained in the Division Bench judgment of this Court in *Sheru* v. *Crown* (1).

C. H. O.

Appeal dismissed.
Crown's application accepted.

REVISIONAL CRIMINAL.

Before Mr. Justice Broadway.

1926

Jan. 29.

DULLA AND ANOTHER, Petitioners

versus

THE CROWN, Respondent.

Criminal Revision No. 1759 of 1925

Criminal Procedure Code, Act V of 1898, section 562—Joint trial of 3 persons—one of them released under section 562, after confessing—in appeal by the other two the confessing accused called as witness against them—his evidence wrongly relied on by Appellate Court—Appeal—continuation of the criminal case.

B. S., D. and B. were tried jointly for burglary and convicted—B. S. who admitted his guilt was dealt with under section 562 of the Criminal Procedure Code. On appeal by D. and B. (only) the Appellate Court remanded the case for further evidence and relied upon the evidence of B. S. who had been examined as a witness.

Held, that the examination of B. S. as a witness, after he had made a full confession of his guilt and been convicted, was not warranted by law.

Held further, that a criminal appeal is a continuation of the criminal case and though section 428 of the Criminal Procedure Code justifies the Appellate Court in the exercise of a wide discretion to order further evidence, the evidence of B. S. in the circumstances should not have been taken or

(1) Since published, *vide* (1923) I. L. R. 7 Lah. 50.