J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 46 of 1973

BEFORE: The Hon. President
The Hon. Mr. Justice Luckhoo, J.A.
The Hon. Mr. Justice Swaby, J.A.

R. v. BARRINGTON FACEY

Mrs. Marva McIntosh for the appellant.

G. Andrade for the Crown.

October 26, November 9, 1973,
January 14, 1974.

LUCKHOO, J.A.:

The appellant was convicted of manslaughter in the Home Circuit Court on April 4, 1973, on an indictment charging him with murder and was sentenced to ten years imprisonment at hard labour. On June 11, 1973 his application for leave to appeal against conviction and sentence was refused by a single judge. On July 16, 1973 the Court granted leave to appeal in respect of both conviction and sentence and directed that legal aid be assigned the appellant.

The case for the prosecution was to the following effect. The deceased Stephanie Scafe a girl of about fifteen years of age had come from England to spend a little time with her grandmother and with her aunt Patricia Brown before going to the United States of America to reside with her mother. For some days before April 1, 1972, she was staying with Patricia Brown, who with her infant child, resided in

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a small room in a tenement yard in Kingston. Another room in the same yard was occupied by a man called "Borderman" who employed the appellant to do odd jobs and permitted him to sleep on the verandah of his (Borderman's) room. The deceased and the appellant were on speaking terms. At about 7.30 a.m. on April 1, 1972, the deceased was sitting on the bed in her aunt's room. The aunt was on the bed attending to her baby. The appellant came into the room with a revolver in his hand. The aunt asked the appellant if it was a toy gun and he replied that it was a real gun. She told the appellant to get outside with it whereupon he "pulled" the gun and started "pulling" shots from it. He then said that there was one shot left in the gun. He pointed the gun at the deceased who was sitting on the bed some 3 to 5 feet away from him. The aunt said that she heard the sound of an explosion and enquired first of the appellant and then of the deceased what went like that. She got no answer. The deceased then fell onto the bed. The deceased had been shot in the head on the left side some 4½" above the left eye. She died as a result of shock and haemorrhage from a fracture of the skull and laceration of the brain caused by the shot in the head. The appellant subsequently handed the revolver and four live bullets to the police and said "Me sorry me shoot her".

There was an absence of any sign of burn in the vicinity of the entry wound on the deceased's head which, in the ballistics expert's view, was inconsistent with the revolver having been fired at a range less than 4 feet from the deceased. Examination of the revolver by the expert showed that it was a double action revolver requiring a pressure of 13 lbs. on the firing pin before a bullet could be discharged from it. In view of the defence put forward at the trial a significant part of the prosecution's case was the aunt's denial of the following matters - that in "pulling" bullets from the revolver before the discharge occurred the appellant had said that one bullet had got

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got stuck, that the appellant had handed the revolver to the deceased, that the deceased had examined the revolver and that the deceased had returned it to the appellant.

The case for the defence as elicited from a statement made by the appellant from the dock was to the following effect. On March 29, 1972 in trying to retrieve a football which had gone under a staircase on church premises he came upon a rubber tyre and sponge tied together. He thereupon took this parcel to other premises where in the kitchen of those premises he opened the parcel and found a revolver therein. He secreted the revolver in the kitchen and went to 30½ Water Street where he saw the deceased playing dominoes. He told the deceased that he had found a gun and she asked him to show it to her. He promised to do so. On the following day, March 30, he saw her again and she asked where the gun was. Later that day she again enquired whether he was going to show her the gun. On April 1 he saw the deceased at a stand pipe on the premises where they both resided. She again asked that the gun be shown her. He left and returned with the revolver he had found on March 29. He went into the aunt's room where he saw the deceased combing her hair. He sat on a chair at the doorway. The aunt was lying on her bed with the baby. The appellant "broke" the revolver. She asked him what he was doing with the revolver. The appellant answered "Nothing". She sat up and looked at the revolver and lay down again. The appellant turned up the revolver and four bullets fell out of it. A fifth bullet stuck in the revolver and the appellant tried to get it out first with his fingers and then with a ball point pen. His efforts to get that bullet out did not succeed. He closed the revolver and holding it by the nozzle walked to the bedside and handed it to the deceased. He told her one bullet was left inside. She looked at the revolver and returned it to him holding it by the nozzle. As he took it by the handle he heard the sound "Bam". The aunt asked him what went like that. He was so frightened that he did not reply. He put down the

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revolver, held the deceased's hand and called her three times but she did not answer. He took up the revolver and bullets, ran outside and went to the end of the yard where he told a man what had occurred. He put the revolver under a stone. Eventually he saw some policemen and showed one of them where he had put the revolver. He was taken to Denham Town police station. On being arrested in connection with the deceased's death he told the police it was an accident.

In his summing up to the jury the learned trial judge left murder, manslaughter and not guilty as possible verdicts. The main ground of appeal advanced before us was that the learned trial judge erred in the directions he gave in respect of the issue of manslaughter as arising on the case for the prosecution and on the appellant's statement from the dock. The learned trial judge dealt with the issue of manslaughter as arising on the prosecution's case on two grounds, namely:- (a) criminal negligence; (b) death resulting from an unlawful and dangerous act on the part of the appellant. In respect of the ground of criminal negligence the learned trial judge gave the following directions -

> " if the accused man knowing that this firearm had a shot in it, or as he said, it was stuck, and you regard his behaviour, his conduct in all the circumstances was reckless, because handling a firearm can be a dangerous thing if you don't handle it properly, particularly in a small room where you have people around, and if his behaviour with regard to the firearm was such that he did not take proper precaution from danger arising and the deceased was killed as a result of not taking proper precaution, then he is guilty of manslaughter at least."

On the basis of the evidence of the prosecution that the appellant pointed the revolver at the deceased and had to exert a pressure of some 13lbs. on the trigger before the revolver could be fired we can see no real objection to the abovementioned direction. The learned

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trial judge left it as a matter for the jury's determination whether in all the circumstances they regarded the appellant's behaviour with respect to the revolver was such that he did not take proper precaution fron danger arising and that they regarded his conduct as reckless. In this connection it will be appreciated that it was no part of the defence that the appellant believed that pressure on the trigger of the revolver would not cause the bullet remaining in the gun to be discharged.

In respect of the ground of death resulting from an unlawful and dangerous act on the part of the appellant the learned trial judge told the jury -

> "Again, if you look at it from the standpoint of the prosecution's case, if you believe what Patricia Brown says, that the accused did point this revolver at the deceased - and we now know that this revolver was loaded - when he pointed that revolver at the deceased - even if he did not intend to kill her he was committing an assault on her. Why? Because an assault occurs when a person attempts to commit a forcible crime against another ..... According to the expert, a man like that using a gun and firing within a range of 150 yards - he is committing an assault at least - leaving the question of shooting at - for there would be the possibility of getting hit.
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> If a person is engaged in an act which is unlawful, then at the same time if it is dangerous and it is an act likely to injure another person, even if quite inadvertently the doer of the act causes the death of that person then he is guilty of manslaughter."

Mrs. McIntosh for the appellant submitted that this direction was erroneous in point of law as the doing of an unlawful act resulting in death did not necessarily result in a verdict of manslaughter. She contended that the learned trial judge was in error in omitting to direct the jury that proof of mens rea was essential in such a case and that it ought to have been left to the jury to decide whether in the mind of the appellant there

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was possible danger from the bullet which was stuck in the revolver. In support of this contention Mrs. McIntosh referred to the cases of R. v. Church (1965) 2 All E.R. 72, R. v. Lamb (1967) 2 All E.R. 1282 and Gray v. Barr (1971) 2 Q.B.D. 554 at p. 568. She further contended that in the instant case there was no evidence that the appellant intended to harm or frighten the deceased and that therefore in any event the prosecution had failed to prove that the appellant had committed an unlawful act, the unlawful act upon which the prosecution relied being an assault. We take the view that, unless done in protection of person or property or in jest the pointing of a loaded revolver at a person by another who knows that it is loaded and at such a distance where if the revolver is fired the bullet discharged could strike the person at whom it is pointed is at least an attempted assault even though there is no evidence that the latter apprehended injury or was frightened thereby. An attempted assault is an unlawful act. On the prosecution's case the revolver was actually fired by the appellant. In such circumstances it was open to the jury to find that the deceased's death was caused by an unlawful and dangerous act on the part of the appellant and that it was an act likely to injure the deceased.

On the basis of the prosecution's case we are of the view that the directions given by the learned trial judge on the issue of manslaughter were substantially correct.

On the statement from the dock the learned trial judge left the issues of manslaughter and accident. He directed the jury in terms that acceptance of the statement from the dock made by the appellant or a reasonable doubt about its truth would lead to a verdict of not guilty. He, however, gave the following direction leaving to the jury the issue of manslaughter as arising on the on the appellant's statement -

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> "On the other hand, on his own statement, if you think the accused was embarking on an act that was unlawful and at the same time it is dangerous, likely to injure another person, and even if inadvertently he pulls the trigger causing the bullet to go off and kill this girl, he would be liable to be convicted of manslaughter. Suppose you look at it this way and you say, well, it was All Fools' Day, some people think that that day is a day when you can be stupid - as one great author says "A fool sees not the same tree as a wise man sees", and so on this day, having this loaded firearm, for he knew it was loaded, playing about with it, pointing it as Patricia Brown said, and even if he did not intend to kill her, doing that dangerous act, even if inadvertently the gun went off, it would be open to you to convict him of manslaughter.....
> On the defence as put by the accused it would be open to you to convict him of manslaughter, having regard to the view you take and it would be open to you to acquit him ....."

As indicated in its opening words "On the other hand, on his own statement", this direction is intended to relate to the defence put forward at the trial. In essence the story told by the appellant was that he handed the revolver to the deceased who looked at it and he was in the act of receiving it back from her when the revolver went off. He does not say that his finger did not touch the trigger while he was receiving it from her and it was open to the jury on the evidence and as a matter of commonsense to infer that the revolver could not have gone off unless his finger had in fact touched the trigger. To that extent the trial judge's reference to the trigger being pulled inadvertently is not without evidential basis. However, there is nothing in the appellant's statement from the dock upon which the jury might reasonably conclude that the appellant was embarking on an act that was unlawful. The mere handing of a loaded revolver to another in such circumstances is not an

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unlawful act nor is it an unlawful act to receive back a loaded revolver from the person to whom it was handed. The inadvertent pulling of the trigger does not make either of those acts unlawful. The learned trial judge in giving the direction set out above seemed to have in mind that the appellant was playing about with the loaded revolver as he indicated by way of an example later in that direction but there is no warrant for any such conclusion on the basis of the appellant's statement. Additionally the learned trial judge's reference to Patricia Brown's testimony of the revolver being pointed at the deceased was out of place in the context of the appellant's statement from the dock and could only serve to confuse the jury as to what the appellant really did assert by way of defence. It is impossible to say that the verdict of manslaughter reached by the jury was not influenced by these matters which appear to us to be clear misdirections on the evidence. Consequently we would be unable to sustain the conviction inless it is clear, as Mr. Andrade for the Crown contended it is, that the proviso to s. 13 (1) of the Judicature (Appellate Jurisdiction) Law, 1962 (No. 15) can properly be applied. We do not think that we can fairly say that the jury upon a proper direction must inevitably have rejected the appellant's story apart from the fact that they must by their finding have concluded that the revolver was discharged by the application of pressure from the appellant's finger upon the trigger.

In the circumstances the verdict cannot stand. The appeal is allowed, the conviction is quashed and the sentence set aside. In the interests of justice we order that there be a new trial on an indictment for manslaughter at the next ensuing sitting of the Home Circuit Court and that in the meantime the appellant be remanded in custody.