

C.A. - Criminal law - Manslaughter - Charge - No previous convictions - Case rested on appellant's accounts - whether prima facie case based on criminal negligence established - whether defence of accident rebutted - whether prosecution JAMAICA had proved case - whether judges' direction on criminal negligence satisfactory.

IN THE COURT OF APPEAL

Appeal allowed, conviction quashed, sentence set aside

SUPREME COURT CRIMINAL APPEAL NO. 80/92

Case referred to p 10

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COR: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

EVIDENCE

CRIMINAL
PRACTICE

REGINA

VS.

CHARLIE WILLIAMSON

Carlton Williams for Appellant

Miss Paula Llewellyn for Crown

June 21 and October 19, 1993

RATTRAY P.:

On the 21st June, 1993 we allowed this appeal, quashed the conviction, set aside the sentence and promised to give our reasons at a later date. We do so now.

The appellant a Special Constable was found guilty of manslaughter in the St. Catherine Circuit Court on the 21st July 1992, and sentenced to three years hard labour.

The facts related to the tragic death on the 26th November, 1991 of one Bridgette Knight, a schoolgirl of 16 years from a gunshot wound to her abdomen.

The Crown presented no eye-witness evidence of how the fatal incident took place. However, Mr. Rupert Knight, the father of the deceased testified that the appellant on two occasions subsequent to the incident gave different versions of what he alleged had taken place.

It appeared that the appellant had amorous intentions towards the deceased. He was in lawful possession of a firearm.

On the relevant date some time in the afternoon, the appellant met the deceased Bridgette Knight and her friend Sophia, on the hospital compound in Spanish Town. Shortly after he met the two girls, Sophia departed the scene, and the appellant and the deceased were left alone. What took place afterwards resulted in Bridgette being shot by the appellant's firearm. The only persons present at the crucial time were Bridgette and the appellant. The important fact to be determined is what actually took place. The Crown's case substantially rested upon Mr. Knight's evidence of the two accounts given to him by the appellant.

In relation to this, as given by the evidence of the father of the deceased, the first version was that the appellant told him the day after the incident:

"Me see her and her friend, she a drink a juice. Me take it from her and drink some. I gave it back to her to throw it away. She asked me to see my gun. Mi give her. She gave her friend her bag to hold. ... As I was taking back the gun from her the gun go off."

Later in the same week, according to Mr. Knight, the appellant gave him the second version. The Learned Trial Judge relates it in his summing-up as follows:

"She asked to see the gun. I never know the gun on cock," and by that I think everybody will understand that the hammer was pulled back. As he draws, (that is the accused). As he draws the gun ... I point it on her and it fire, ..."

The Learned Trial Judge instructed the jury thus:

"This issue here now which we now isolate because, remember I told you that the sole general issue is whether or not he is guilty of

"criminal negligence. This sole issue now is whether or not you can believe Mr. Knight when he tells you of these two versions."

The real issue of fact is to be determined by the following considerations:

- (1) Did the appellant give these two accounts of how the incident took place to Mr. Knight?
- (2) Did he give only one account and if so, which account did he give?
- (3) Did he give any account at all?

The question of law is as to whether any or all of the answers to these questions could establish a prima facie case of manslaughter based on criminal negligence against the appellant.

In the first version as told by Mr. Knight, the appellant gives the deceased the gun. As he was taking it back from her the gun went off. In the second version, the deceased asked to see the gun. The appellant unaware that the gun was "on cock" draws it, points it in the direction of the deceased and the gun fires. The Judge's assessment of these versions is reflected in his direction to the jury in his summing-up that:

"... the account or the versions which he related they all go to excusing the accused for his conduct."

This being his assessment it recognizes that whatever version was accepted, the appellant was saying that what took place was an accident. The Learned Trial Judge should have recognized also that the defence of accident having been raised on the Crown's own case, there was a burden placed on the prosecution to meet that issue and rebut it. He could not have considered this when he rejected the no-case submission made on behalf of the appellant since it is clear that the Crown had not displaced the burden which the raising of the issue of accident had placed so firmly upon its shoulders.

Both these versions as told by Mr. Knight (and one or other or both constitute essentially the totality of the Crown's case) raised also the question of whether the necessary mens rea existed in the appellant.

It is the law that a very high degree of negligence is necessary to constitute the offence of manslaughter.

As was said by Lord Justice Sachs in R. v. Lamb [1967] 2 All E.R. p. 1282 at 1285:

"When the gravamen of a charge is criminal negligence - often referred to as recklessness - of an accused, the jury have to consider amongst other matters the state of his mind, and that includes the question of whether or not he thought that that which he was doing was safe."

Within this context the determination by the Judge at the end of the Crown's case should have been whether, at that stage there was any evidence fit to be left to the jury from which the jury could find on the required standard of proof that the appellant was guilty of manslaughter.

The Crown's case fell woefully short of presenting any evidence which could rebut the defence of accident which rose on the Crown's own case.

Consequently, in our view, the Learned Trial Judge should have withdrawn the case from the jury at the end of the case for the prosecution and directed that a formal verdict of not guilty be returned.

This would be sufficient to dispose of this appeal. However we take the opportunity of setting right certain directions which the Learned Trial Judge gave to the jury in respect of manslaughter by criminal negligence.

The following passages are examples of the Learned Judge's direction on the case:

"The accused man is guilty of manslaughter by criminal negligence, if the Crown has proved beyond all reasonable doubt, one, and this is in two parts, one I am giving you the first part; one, that at the time when Miss Knight died, at the time of the shooting, the time of the deceased's death, there was something in the circumstances which would have drawn the attention of any ordinary, prudent individual, in this case prudent Special Constable in the position of the defendant to the possibility that his conduct was capable of causing some injury, albeit not serious injury to the deceased and that the risk was not so slight that an ordinary, prudent individual would feel justified in taking that risk. So you see this part of it. I tell you it's two parts. This part is objective. Would an ordinary, prudent individual, Police Special Constable recognize that, whatever you accept that he did, was a risk. I leave that now and I will deal with that when I come to deal with the facts, putting the law to the facts. So that is the first part.

The second part is, and two, and before that gun went off the accused either failed to give any thought to the possibility of such risk, or having recognized that there was this risk, he nevertheless went on and took the risk. Now that is the direction in law and I am now going to correlate, put together the law there with the facts in this case. Let's take version one. You remember what version one was: The essence, 'She asked me to see the gun. She gave her friend her bag to hold. As I was taking back the gun,' apparently he was giving her the gun, 'As I was taking back the gun from her, the gun go off.' That is version one.

This is the question that you must now ask in respect to the legal directions that I have now given you: Would an ordinary, prudent Special Constable who has received basic training, because in evidence he has received basic training - five months - basic training in the efficiency and the safety of the use of firearms, not have had his attention drawn to the possibility that in handing Miss Knight his loaded gun, a person who he is handing it to is a school girl, that

"there was danger; that that conduct is - handling that gun was capable of causing harm to that school girl, albeit not serious harm. And in considering this Mr. Foreman and members of the jury, it is common knowledge to you, even moreso to any prudent Special Constable, that a firearm is a lethal barrelled weapon, it sends missiles on missions of death. If your answer to that first question is yes, then you go on to ask would a prudent Special Constable in the position of the accused not have taken into consideration the risk involved, because if he did, then he would be guilty of manslaughter. He would also be guilty of manslaughter if having recognized the risk, he nonetheless took out this firearm, this lethal barrelled weapon and handed it to this school girl. That is version one.

Let's go now to version two. That is, 'She asked me to see the gun. I never know the gun on cock. As I draw the gun ...' As he draw the gun and point it on her it fire. Would an ordinary, prudent Special Constable who has received basic training in the efficiency and the safety of the use of a firearm not have had his attention drawn to the possibility that in taking out his gun and pointing it at the deceased, that there was a danger that this conduct was capable of causing some harm to Miss Knight, albeit not serious bodily harm. IF YOUR ANSWER TO THAT IS NO, THEN THAT IS THE END OF THE MATTER. If your answer to the first part was no, then you don't go on to consider the second; but if your answer to that is yes, then you ask yourselves the question, now, did the accused man fail to consider the risk of pointing a loaded firearm at the deceased. Did he fail to consider that, because if he failed to consider it and the gun went off in those circumstances, that would amount to criminal negligence, or he recognized it and still yet did it, that would also amount in law to criminal negligence. It's entirely a matter for you."

In directing the jury as he did the Learned Trial Judge gave a direction very similar to that given by the Trial Judge in Kong Chuek Kwan (Appellant) v. The Queen (Respondent) [1986] 82 C.A.R. 18. In that case the direction to the jury on manslaughter by negligence at p. 22 of the Report was as follows:

"... this is the direction on the question of manslaughter by negligence. That is that the defendant and, of course, each of them considered separately, is guilty of manslaughter if the Crown have proved beyond reasonable doubt, firstly, that at the time he caused the deceased's death and, of course, you must be satisfied that each of the accused did cause the deceased's death, there was something in the circumstances which would have drawn the attention of an ordinary prudent individual and in this case you would consider the ordinary prudent deck officer or helmsman in the position of the defendant, to the possibility that his conduct was capable of causing some injury albeit not necessarily serious to the deceased including injury to health, which does not apply here, and that the risk was not so slight that an ordinary prudent individual would feel justified in treating it as negligible and that, secondly, before the act or omission which caused the deceased's death, the defendant either failed to give any thought to the possibility of there being any such risk or having recognised that there was such a risk he, nevertheless, went on to take the risk, or was guilty of such a high degree of negligence in the means that he adopted to avoid the risk as to go beyond a mere matter of compensation between subjects and showed in your opinion, such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment."

Lord Roskill at p. 23 of the Report stated:

"With profound respect this direction cannot be supported. There is (as in the paragraph in the Supplements to Archibold) confusion between (1) causing death by an illegal act of violence, (2) what was said in R. v. Caldwell (supra) (3) what was said in R. v. Lawrence (supra) and (4) what had half a century previously been said by the Court of Criminal Appeal in Bateman (1925) 19 Cr. App. R. 8; 28 Cox C.C. 33."

Like the Trial Judge in Kong Cheuk Kwan v. The Queen the Trial Judge in this case could have been misled by para. 20.49 of the Second Supplement to Archbold's Criminal Pleading, Evidence and Practice [1982] 41st Ed. which as pointed out by Lord Roskill wrongly purported to reflect the decisions of the House of Lords in Lawrence and in Caldwell.

In Caldwell [1981] 73 C.A.R. 13 Lord Diplock at p. 17 in defining "recklessness" (for which we can substitute the words "criminal negligence") states that it:

"... presupposes that if thought were given to the matter by the doer before the act was done, it would have been apparent to him that there was a real risk of its having the relevant harmful consequences."

In Lawrence [1981] 73 C.A.R. 1 at p. 1 Lord Diplock stated the law as follows:

"Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible."

Involuntary manslaughter can arise either from death resulting from gross negligence or from death resulting from an unlawful act.

When death results from an unlawful act the law is as was stated by Edmund Davies J. in R. v. Church [1965] 2 All E.R. 72 at p. 76:

"The unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm."

In the instant case we are not dealing with an unlawful act. [See R. v. Lamb (1967) 2 A.E.R. 1232]. When death is as a result of criminal negligence or recklessness the proper direction as gleaned from the cases of Lawrence and Caldwell and approved in Kong Chuek Kwan v. The Queen, should be that the jurors should be satisfied of two things: (i) that the appellant in doing as he did was in fact acting in such a manner as to create an obvious and serious risk of causing physical injury to the deceased and (ii) that in acting as he did he acted without having given any thought to the possibility of there being any such risk or having recognized that there was some risk involved had nevertheless gone on to take the risk. In his summing-up the Learned Trial Judge did not use the type of words generally resorted to by Judges in the summing-up in cases of that nature to wit gross negligence, recklessness etc. He spoke of "criminal negligence" but as Lord Atkins said in Andrew v. D.P.P. [1937] 26 C.A.R. 34 at p. 46:

"The word criminal in any attempt to define a crime is perhaps not the most helpful."

And at p. 47 he continued:

"Simple lack of care is not enough. For the purposes of the criminal law, there are degrees of negligence and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied 'reckless' most nearly covers the case."

Even if there was some evidence fit to be left to the jury, the Trial Judge's directions to the jury should have:

(a) carefully analysed the evidence presented by the prosecution and on which reliance was placed to assist the jury in determining, and in the light of the appellant's own sworn evidence:

- (i) whether the appellant did give one or both or any of the versions to the father of the deceased;
- (ii) which if any of the versions is accepted as truthfully establishing what took place;
- (iii) the effect of the appellant's evidence denying that he had given any version to Mr. Knight and giving his own account of what took place, on the Crown's case in terms of the jury coming to a conclusion on the standard of proof required for conviction of a criminal offence.

(b) a clear direction in law as it relates to:

- (i) the requirement for mens rea in manslaughter cases;
- (ii) the different legal considerations which arise in respect of death resulting from an unlawful act as against death resulting from a lawful act;
- (iii) manslaughter caused by gross negligence or recklessness and the very high degree of negligence required to be proved before the felony is established.

We allowed the appeal therefore for the following reasons:

- (1) At the end of the Crown's case, the prosecution had provided no evidence on which a jury should be called upon to determine that the appellant was guilty.
- (2) The directions of the Learned Trial Judge in respect of the areas indicated were unsatisfactory as it related to the law in respect of criminal negligence on the facts of this particular case.

Cases referred to

- ① *R v Lamb (1967) 2 AllER 1282*
- ② *King Cheuk Kwan (a.k.a. Kwan) v The Queen (Prosecution) (1986) 82 CA R 18*
- ③ *R v Lawrence (1981) 73 CA R 1*
- ④ *R v Gallowell (1981) 73 CA R 13*
- ⑤ *R v Church (1965) 2 AllER 72*
- ⑥ *Andrew v DPP (1937) 26 CA R 34*