HOUSE OF LORDS

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47th REPORT
([2007] UKHL 38)

on appeal from: [2005] EWCA Crim 685

APPELLATE COMMITTEE

R.
v.
KENNEDY (ON APPEAL FROM THE COURT OF APPEAL (CRIMINAL DIVISION))

REPORT

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Respondent:
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FORTY-SEVENTH REPORT

from the Appellate Committee

17 OCTOBER 2007

R *v.* Kennedy (On Appeal from the Court of Appeal (Criminal Division))

ORDERED TO REPORT

The Committee (Lord Bingham of Cornhill, Lord Rodger of Earlsferry, Baroness Hale of Richmond, Lord Carswell and Lord Mance) have met and considered the cause *R v. Kennedy (On Appeal from the Court of Appeal (Criminal Division)).* We have heard counsel on behalf of the appellants and respondents.

1. This is the considered opinion of the committee.

2. The question certified by the Court of Appeal Criminal Division for the opinion of the House neatly encapsulates the question raised by this appeal:

> "When is it appropriate to find someone guilty of manslaughter where that person has been involved in the supply of a class A controlled drug, which is then freely and voluntarily self-administered by the person to whom it was supplied, and the administration of the drug then causes his death?"

3. The agreed facts are clear and simple. The appellant lived in a hostel in which Marco Bosque and Andrew Cody, who shared a room, also lived. On 10 September 1996 the appellant visited the room which Bosque and Cody shared. Bosque was drinking with Cody. According to Cody, Bosque told the appellant that he wanted "a bit to make him sleep" and the appellant told Bosque to take care that he did not go to sleep permanently. The appellant prepared a dose of heroin for the deceased and gave him a syringe ready for injection. The deceased then injected himself and returned the empty syringe to the appellant, who left the room. Bosque then appeared to stop breathing. An ambulance was called and he was taken to hospital, where he was pronounced dead. The cause of death was inhalation of gastric contents while acutely intoxicated by opiates and alcohol.

4. The appellant was tried at the Central Criminal Court on an indictment containing two counts: an unparticularised count of manslaughter; and a count of supplying a class A drug (heroin) to another in contravention of section 4(1) of the Misuse of Drugs Act 1971. The appellant pleaded not guilty to both counts but on 26 November 1997 he was convicted of each. He was sentenced to five years' imprisonment on the first count and three years' concurrent on the second. He was granted leave to appeal against the conviction of manslaughter but his appeal was dismissed by the Court of Appeal Criminal Division (Waller LJ, Hidden J and His Honour Judge Rivlin QC) on 31 July 1998: [1999] Crim LR 65. On that appeal the appellant no longer disputed that he had supplied the heroin to the deceased, and that has not since been in issue.

5. Prompted by doubts as to the soundness of the Court of Appeal's grounds for dismissing the appellant's first appeal and the safety of his conviction, the Criminal Cases Review Commission on 24 February 2004 exercised its power under section 9 of the Criminal Appeal Act 1995 to refer the appellant's manslaughter conviction back to the Court of Appeal, for reasons which it set out in considerable detail. The reference therefore fell to be treated as an appeal, which the Court of Appeal (Lord Woolf CJ, Davis and Field JJ) heard on 31 January and dismissed on 17 March 2005: [2005] EWCA Crim 685, [2005] 1 WLR 2159. This is the decision which the appellant now challenges.

Manslaughter

6. It is well-established and not in any way controversial that a charge of manslaughter may be founded either on the unlawful act of the defendant ("unlawful act manslaughter") or on the gross negligence of the defendant. This appeal is concerned only with unlawful act manslaughter and nothing in this opinion should be understood as applying to manslaughter caused by gross negligence.

7. To establish the crime of unlawful act manslaughter it must be shown, among other things not relevant to this appeal,

(1) that the defendant committed an unlawful act;

(2) that such unlawful act was a crime (*R v Franklin* (1883) 15 Cox CC 163; *R v Lamb* [1967] 2 QB 981, 988; *R v Dias* [2001] EWCA Crim 2986, [2002] 2 Cr App R 96, para 9); and

(3) that the defendant's unlawful act was a significant cause of the death of the deceased (*R v Cato* [1976] 1 WLR 110, 116-117).

There is now, as already noted, no doubt but that the appellant committed an unlawful (and criminal) act by supplying the heroin to the deceased. But the act of supplying, without more, could not harm the deceased in any physical way, let alone cause his death. As the Court of Appeal observed in *R v Dalby* [1982] 1 WLR 425, 429, "the supply of drugs would itself have caused no harm unless the deceased had subsequently used the drugs in a form and quantity which was dangerous". So, as the parties agree, the charge of unlawful act manslaughter cannot be founded on the act of supplying the heroin alone.

8. The parties are further agreed that an unlawful act of the appellant on the present facts must be found, if at all, in a breach of section 23 of the Offences against the Person Act 1861. Although the death of the deceased was the tragic outcome of the injection on 10 September 1996 the death is legally irrelevant to the criminality of the appellant's conduct under the section: he either was or was not guilty of an offence under section 23 irrespective of the death.

9. As it now effectively reads, section 23 of the 1861 Act provides:

> "*Maliciously administering poison, etc, so as to endanger life or inflict grievous bodily harm*
>
> Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of [an offence] and being convicted thereof shall be liable . . . to [imprisonment] for any term not exceeding ten years . . .".

The opening and closing words of the section raise no question relevant to this appeal. The substance of the section creates three distinct offences: (1) administering a noxious thing to any other person; (2) causing a noxious thing to be administered to any other person; and (3) causing a noxious thing to be taken by any other person. It is not in doubt that heroin is a noxious thing, and the contrary was not contended.

10. The factual situations covered by (1), (2) and (3) are clear. Offence (1) is committed where D administers the noxious thing directly to V, as by injecting V with the noxious thing, holding a glass containing the noxious thing to V's lips, or (as in *R v Gillard* (1988) 87 Cr App R 189) spraying the noxious thing in V's face.

11. Offence (2) is typically committed where D does not directly administer the noxious thing to V but causes an innocent third party TP to administer it to V. If D, knowing a syringe to be filled with poison instructs TP to inject V, TP believing the syringe to contain a legitimate therapeutic substance, D would commit this offence.

12. Offence (3) covers the situation where the noxious thing is not administered to V but taken by him, provided D causes the noxious thing to be taken by V and V does not make a voluntary and informed decision to take it. If D puts a noxious thing in food which V is about to eat and V, ignorant of the presence of the noxious thing, eats it, D commits offence (3).

13. In the course of his accurate and well-judged submissions on behalf of the crown, Mr David Perry QC accepted that if he could not show that the appellant had committed offence (1) as the unlawful act necessary to found the count of manslaughter he could not hope to show the commission of offences (2) or (3). This concession was rightly made, but the committee heard considerable argument addressed to the concept of causation, which has been misapplied in some of the authorities, and it is desirable that it should be clear why the concession is rightly made.

14. The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, as also of deception and mistake. But, generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act, and none of the exceptions is relied on as possibly applicable in this case. Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another. There are many classic statements to this effect. In his article "*Finis for Novus Actus?*" (1989) 48(3) CLJ 391, 392, Professor Glanville Williams wrote:

> "I may suggest reasons to you for doing something; I may urge you to do it, tell you it will pay you to do it, tell you it is your duty to do it. My efforts may perhaps make it very much more likely that you will do it. But they do not cause you to do it, in the sense in which one causes a kettle of water to boil by putting it on the stove. Your volitional act is regarded (within the doctrine of responsibility) as setting a new 'chain of causation' going, irrespective of what has happened before."

In chapter XII of *Causation in the Law*, 2nd ed (1985), p 326, Hart and Honoré wrote:

> "The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility."

This statement was cited by the House with approval in *R v Latif* [1996] 1 WLR 104, 115. The principle is fundamental and not controversial.

15. Questions of causation frequently arise in many areas of the law, but causation is not a single, unvarying concept to be mechanically applied without regard to the context in which the question arises. That was the point which Lord Hoffmann, with the express concurrence of three other members of the House, was at pains to make in *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22. The House was not in that decision purporting to lay down general rules governing causation in criminal law. It was construing, with reference to the facts of the case before it, a statutory provision imposing strict criminal liability on those who cause pollution of controlled waters. Lord Hoffmann made clear that (p 29E-F) common sense answers to questions of causation will differ according to the purpose for which the question is asked; that (p 31E) one cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule; that (p 32B) strict liability was imposed in the interests of protecting controlled waters; and that (p 36A) in the situation under consideration the act of the defendant could properly be held to have caused the pollution even though an ordinary act of a third party was the immediate cause of the diesel oil flowing into the river. It is worth underlining that the relevant question was the cause of the pollution, not the cause of the third party's act.

16. The committee would not wish to throw any doubt on the correctness of *Empress Car*. But the reasoning in that case cannot be applied to the wholly different context of causing a noxious

thing to be administered to or taken by another person contrary to section 23 of the 1861 Act. In *R v Finlay* [2003] EWCA Crim 3868 (8 December 2003) V was injected with heroin and died. D was tried on two counts of manslaughter, one on the basis that he had himself injected V, the second on the basis that he had prepared a syringe and handed it to V who had injected herself. The jury could not agree on the first count but convicted on the second. When rejecting an application to remove the second count from the indictment, the trial judge ruled, relying on *Empress Car*, that D had produced a situation in which V could inject herself, in which her self-injection was entirely foreseeable and in which self-injection could not be regarded as something extraordinary. He directed the jury along those lines. The Court of Appeal upheld the judge's analysis and dismissed the appeal. It was wrong to do so. Its decision conflicted with the rules on personal autonomy and informed voluntary choice to which reference has been made above. In the decision under appeal the Court of Appeal did not follow *R v Finlay* in seeking to apply *Empress Car*, and it was right not to do so.

17. In his article already cited Professor Glanville Williams pointed out (at p 398) that the doctrine of secondary liability was developed precisely because an informed voluntary choice was ordinarily regarded as a *novus actus interveniens* breaking the chain of causation:

> "Principals cause, accomplices encourage (or otherwise influence) or help. If the instigator were regarded as causing the result he would be a principal, and the conceptual division between principals (or, as I prefer to call them, perpetrators) and accessories would vanish. Indeed, it was because the instigator was not regarded as causing the crime that the notion of accessories had to be developed. This is the irrefragable argument for recognising the *novus actus* principle as one of the bases of our criminal law. The final act is done by the perpetrator, and his guilt pushes the accessories, conceptually speaking, into the background. Accessorial liability is, in the traditional theory, 'derivative' from that of the perpetrator."

18. This is a matter of some significance since, contrary to the view of the Court of Appeal when dismissing the appellant's first appeal, the deceased committed no offence when injecting himself with the fatal dose of heroin. It was so held by the Court of Appeal in *R v Dias* [2002] 2 Cr App R 96, paras 21-24, and in *R v Rogers* [2003] EWCA Crim 945, [2003] 1 WLR 1374 and is now accepted. If the conduct of the deceased was not criminal he was not a principal offender, and it of course follows that the appellant cannot be liable as a secondary party. It also follows that there is no meaningful legal sense in which the appellant can be said to have been a principal jointly with the deceased, or to have been acting in concert. The finding that the deceased freely and voluntarily administered the injection to himself, knowing what it was, is fatal to any contention that the appellant caused the heroin to be administered to the deceased or taken by him.

19. The sole argument open to the crown was, therefore, that the appellant administered the injection to the deceased. It was argued that the term "administer" should not be narrowly interpreted. Reliance was placed on the steps taken by the appellant to facilitate the injection and on the trial judge's direction to the jury that they had to be satisfied that the appellant handed the syringe to the deceased "for immediate injection". But section 23 draws a very clear contrast between a noxious thing administered to another person and a noxious thing taken by another person. It cannot ordinarily be both. In this case the heroin is described as "freely and voluntarily self-administered" by the deceased. This, on the facts, is an inevitable finding. The appellant supplied the heroin and prepared the syringe. But the deceased had a choice whether to inject himself or not. He chose to do so, knowing what he was doing. It was his act.

20. In resisting this conclusion Mr Perry relied on *R v Rogers* [2003] 1 WLR 1374. In that case the defendant pleaded guilty, following a legal ruling, to a count of administering poison contrary to section 23 of the 1861 Act and a count of manslaughter. The relevant finding was that the defendant physically assisted the deceased by holding his belt round the deceased's arm as a tourniquet, so as to raise a vein in which the deceased could insert a syringe, while the deceased injected himself. It was argued in support of his appeal to the Court of Appeal that the defendant

had committed no unlawful act for purposes of either count. This contention was rejected. The court held (para 7) that it was unreal and artificial to separate the tourniquet from the injection. By applying and holding the tourniquet the defendant had played a part in the mechanics of the injection which had caused the death. There is, clearly, a difficult borderline between contributory acts which may properly be regarded as administering a noxious thing and acts which may not. But the crucial question is not whether the defendant facilitated or contributed to administration of the noxious thing but whether he went further and administered it. What matters, in a case such as *R v Rogers* and the present, is whether the injection itself was the result of a voluntary and informed decision by the person injecting himself. In *R v Rogers*, as in the present case, it was. That case was, therefore, wrongly decided.

21. It is unnecessary to review the case law on this subject in any detail. In *R v Cato* [1976] 1 WLR 110 the defendant had injected the deceased with heroin and the present problem did not arise. In *R v Dalby* [1982] 1 WLR 425 the deceased had died following the consumption of drugs which the defendant had supplied but the deceased had injected. There was apparently no discussion of section 23, but it was held that the supply could not support a conviction of manslaughter. At the trial of the present appellant there was no consideration of section 23 and the trial judge effectively stopped defence counsel submitting to the jury that the appellant had not caused the death of the deceased. In dismissing his first appeal the Court of Appeal said:

> "We can see no reason why, on the facts alleged by the Crown, the appellant in the instant case might not have been guilty of an offence under section 23 of the Offences against the Person Act 1861. Perhaps more relevantly, the injection of the heroin into himself by Bosque was itself an unlawful act, and if the appellant assisted in and wilfully encouraged that unlawful conduct, he would himself be acting unlawfully."

But the court gave no detailed consideration to the terms of section 23, and it is now accepted that the deceased's injection of himself was not an unlawful act.

22. In *R v Dias* [2002] 2 Cr App R 96 the defendant had been convicted of manslaughter. He had prepared a syringe charged with heroin which he had handed to the deceased, who had injected himself. The court recognised that the chain of causation had probably been broken by the free and informed decision of the deceased, and noted the error in the decision on the appellant's first appeal as to the unlawfulness of the deceased's injection of himself.

23. In rejecting the appellant's second appeal in the decision now challenged, the Court of Appeal reviewed the history of the case and the authorities in some detail. The court expressed its conclusion in these paragraphs:

> "51 In view of the conclusions that we have come to as a result of our examination of the authorities, it appears to us that it was open to the jury to convict the appellant of manslaughter. To convict, the jury had to be satisfied that, when the heroin was handed to the deceased 'for immediate injection', he and the deceased were both engaged in the one activity of administering the heroin. These were not necessarily to be regarded as two separate activities; and the question that remains is whether the jury were satisfied that this was the situation. If the jury were satisfied of this then the appellant was responsible for taking the action in concert with the deceased to enable the deceased to inject himself with the syringe of heroin which had been made ready for his immediate use.
>
> 52 In our view, the jury would have been entitled to find (and indeed it is an appropriate finding) that in these circumstances the appellant and the deceased were jointly engaged in administering the heroin. This was the conclusion of this court on the first appeal, as we understand Waller LJ's judgment, and we do not feel it necessary to take a different view, though we do accept that the

> issue could have been left by the trial judge to the jury in more clear terms than it was.
>
> 53 The point in this case is that the appellant and the deceased were carrying out a 'combined operation' for which they were jointly responsible. Their actions were similar to what happens frequently when carrying out lawful injections: one nurse may carry out certain preparatory actions (including preparing the syringe) and hand it to a colleague who inserts the needle and administers the injection, after which the other nurse may apply a plaster. In such a situation, both nurses can be regarded as administering the drug. They are working as a team. Both their actions are necessary. They are interlinked but separate parts in the overall process of administering the drug. In these circumstances, as Waller LJ stated on the first appeal, they 'can be said to be jointly responsible for the carrying out of that act'.
>
> 54 Whether the necessary linkage existed between the actions of the appellant and the deceased was very much a matter for the jury to determine. The question then arises as to whether the trial judge in the summing up expressed the issue in sufficiently clear terms for the jury? As to this, we share similar reservations to those expressed by Waller LJ in his judgment on the first appeal. There was no need for the jury to find the encouragement that Waller LJ thought was necessary. However, the jury did have to find that the appellant and the deceased were acting in concert in administering the heroin."

The court went on in the next paragraph to refer to the deceased and the appellant acting in concert in administering the heroin. Thus the essential ratio of the decision is that the administration of the injection was a joint activity of the appellant and the deceased acting together.

24. It is possible to imagine factual scenarios in which two people could properly be regarded as acting together to administer an injection. But nothing of the kind was the case here. As in *R v Dalby* and *R v Dias* the appellant supplied the drug to the deceased, who then had a choice, knowing the facts, whether to inject himself or not. The heroin was, as the certified question correctly recognises, self-administered, not jointly administered. The appellant did not administer the drug. Nor, for reasons already given, did the appellant cause the drug to be administered to or taken by the deceased.

25. The answer to the certified question is: "In the case of a fully-informed and responsible adult, never". The appeal must be allowed and the appellant's conviction for manslaughter quashed. The appellant must have his costs, here and below, out of central funds.

26. Much of the difficulty and doubt which have dogged the present question has flowed from a failure, at the outset, to identify the unlawful act on which the manslaughter count is founded. It matters little whether the act is identified by a separate count or counts under section 23, or by particularisation of the manslaughter count itself. But it would focus attention on the correct question, and promote accurate analysis of the real issues, if those who formulate, defend and rule on serious charges of this kind were obliged to consider how exactly, in law, the accusation is put.