No: 97/8626/Z5
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday 31st July 1998

B e f o r e :

LORD JUSTICE WALLER
MR. JUSTICE HIDDEN
and
HIS HONOUR JUDGE RIVLIN QC
(Acting as a Judge of the Court of Appeal Criminal Division)
- -

REGINA

- v -

SIMON KENNEDY

- -
Handed-down judgment of Smith Bernal Limited
180 Fleet Street, London EC4A 2HD
Tel No: 0171 421 4040 Fax No: 0171 831 8838
(Official Shorthand Writers to the Court)
- -

MR STUART MONTROSE appeared on behalf of the Appellant
MS S BENNETT-JENKINS appeared on behalf of the Crown

- -

JUDGMENT
(As approved by the Court)

- -

LORD JUSTICE WALLER:

On 26 November 1997 after a trial before His Honour Judge Hawkins QC at the Central Criminal Court, the appellant was convicted of the manslaughter of, and the supplying of heroin to, Marco

Bosque. He was sentenced to 5 years' imprisonment in respect of the charge of manslaughter with 3 years' imprisonment concurrent for the charge of supplying heroin.

The appellant appeals against his conviction for manslaughter by leave of the single judge. On his appeal the appellant takes essentially two points. First, it is submitted that *R v Dalby* 74 Cr. App. Rep. 348 is authority for the proposition that where A supplies drugs to B and B voluntarily takes the drugs supplied and dies as a result, then A is not guilty of the charge of manslaughter as his action in supplying the drug cannot constitute the actus reus of the offence. In reliance on *R v Dalby* the submission made at the close of the prosecution's case against Kennedy was that there was no case to answer.

In the alternative, if the facts of the instant case were distinguishable from those in *R v Dalby* (as Judge Hawkins ruled), it is submitted that the appellant's counsel ought not to have been precluded from seeking to persuade the jury in his closing speech that Bosque's death was caused by his own decision to take the drugs for which the appellant had no legal responsibility. It is further submitted that in dealing with the questions that the judge left to the jury, the judge failed to explain to the jury that there might or might not have been a break in the chain of causation if they formed the view that Bosque's death was due to his own decision to inject himself with the drugs for which act the appellant bore no legal responsibility.

There is no doubt that the facts of the instant case were on the Crown's case different from those in *Dalby*. In this case the Crown's case was as follows.

On Tuesday 10 September 1996 Bosque had gone in the company of Andrew Cody to the Post Office in Gloucester Road in order to collect his disability allowance. Following this Bosque went to the Irish Centre in Hammersmith. After this, at about 11.0am, Bosque and Andrew Cody returned to the

hostel where they shared a room. At the hostel Bosque met Cody again who described Bosque as looking a bit strange, Bosque explaining that he had drunk some vodka and still had half a bottle left. Bosque and Cody spent the afternoon together drinking. They later returned to the hostel for their dinner following which they went to their room at about 6.45pm. At that stage some more vodka was consumed and both went to sleep. Cody's evidence was that he woke up at about 9.30pm, being woken up by a knocking on the door. Bosque answered the door and the appellant was at the door. After a couple of minutes of conversation Bosque said that he wanted "a bit" to make him sleep and Cody understood that he wanted an intravenous injection of heroin. Cody heard the appellant say something to the effect that "Take care you don't go to sleep permanently". Cody saw that when the appellant entered the room he had brought two small syringes and two containers. He then saw the appellant pick up a teaspoon from the sink, take it to the bedside cabinet and place it on the cabinet. The appellant produced a small white envelope and he emptied the contents into the bowl of the teaspoon. He also emptied a small amount of white powder from a plastic bottle into the bowl of the teaspoon. The appellant then came back to the sink with one of the syringes, drew water from the tap into the syringe and went back to the cabinet and injected water into the teaspoon. He then came to Cody's bedside cabinet and took a cigarette filter from a box on that cabinet. He then went back towards Bosque, tore a cigarette filter in half, and half was placed next to the teaspoon. He produced a plastic lighter from his pocket, held up the teaspoon, ignited the lighter and held the flame under the bowl of the teaspoon for a second.

Then utilising the cigarette filter he took the first syringe and half-filled it with the mixture. The process was then repeated in relation to the second syringe and money changed hands between Bosque and the appellant. The appellant handed the first syringe to Bosque and

Bosque immediately injected the first syringe into the crook of his left elbow and handed the empty syringe to the appellant who then left quickly. Cody's evidence was that from filling the syringe and handing it to Bosque it all took seconds. As the heroin took effect Cody realised that Bosque was not breathing. An ambulance was summoned at 9.25pm and at 10.10pm Bosque was pronounced dead in hospital.

No case to go to the jury

In support of the submission of no case reliance was placed on the case of *R v Dalby* (supra). The facts in that case were that Dalby & O'Such were drug addicts. On 2 May 1980 Dalby had obtained 32 tablets of Diconal lawfully. At 8.0pm Dalby supplied O'Such with some tablets and probably certain further tablets during the evening. Dalby and O'Such each injected himself intravenously and they then went out shortly after 9.30pm to a discotheque where they parted company. O'Such met another friend at the discotheque who helped him administer an intravenous injection of an unspecified substance, shortly before midnight, and later a second intravenous injection. When Dalby returned to the flat at about 2.0am O'Such was already asleep in the living room and Dalby went to sleep himself. Mrs O'Such woke Dalby at about 8.0am and both of them attempted to wake O'Such but without success. Mrs O'Such asked Dalby whether an ambulance should be called but he said no. When Dalby went out at about 1.30pm O'Such was still asleep. At 3.0pm Mrs O'Such called an ambulance, and when the ambulance arrived some five minutes later the ambulance attendants found O'Such was dead. Waller LJ (for the avoidance of doubt, Senior), delivered the judgment of the court in that case. At p.351 having (a) put on one side cases of manslaughter concerned with negligence and (b) reviewed "unlawful act" manslaughter, he said as follows:-

> "The difficulty in the present case is that the act of supplying a scheduled drug was not an act which caused direct harm. It was an act which made it possible, or even likely, that harm would occur subsequently. Particularly if the drug was supplied to somebody who was on drugs. In all the reported cases, the physical act has been one which inevitably would subject the other person to the risk of some harm from the act itself. In this case, 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."

Then at p.352 he said:-

> "In the judgment of this Court, where the charge of manslaughter is based on an unlawful and dangerous act, it must be an act directed at the victim and likely to

cause immediate injury, however slight."

The facts in *Dalby* and the facts in the instant case were different in at least one material respect. If the jury accepted Cody's evidence, the appellant prepared a syringe and handed it to Bosque for Bosque immediately to inject himself. It follows that the appellant's unlawful conduct would not be limited to supply but would also be unlawful insofar as he assisted or encouraged Bosque to inject himself with the mixture of heroin and water. What we have in mind is what was said in *R v Cato* 62 Cr. App. Rep. 41 particularly at p.47. In that case Cato had injected another person with morphine which Cato had unlawfully taken into his possession. According to the judgment of The Lord Chief Justice in that case, first, by virtue of section 23 of the Offences against the Person Act 1861, which provides "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, ... shall be guilty of an offence", the act of injection was unlawful. But secondly, and in addition, even without the assistance of that section, it was held " .... that had it not been possible to rely on the charge under section 23 ...., ... there would have been an unlawful act here, and .... the unlawful act would be described as injecting the deceased Farmer with a mixture of heroin and water which at the time of the injection and for the purposes of the injection the accused had unlawfully taken into his possession." (See p.47). We can see no reason, why, on the facts as 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.

We have no doubt that, on the facts as alleged by the Crown, a jury not only could but in fact would be bound to take the view that the appellant wilfully encouraged Bosque to inject himself unlawfully. That being so, Judge Hawkins was undoubtedly right in allowing the case to be left to the jury.

Causation and the way the matter was left to the jury

It was not suggested to Judge Hawkins, and was not suggested to us, that *R v Dalby* did not other than represent an accurate statement of the law as confined to its own particular facts. In other words if drugs were supplied but it was entirely a matter for the person to whom the drugs had been supplied as to whether he injected himself or not, there could be no question of the supplier being convicted of manslaughter. What however the jury would have to decide in a case similar to the instant case is whether the unlawful act of the defendant caused, or was a significant cause of, the death of the deceased. That would require a direction to the jury which (a) identified the facts for them to find, which constituted the unlawful act and (b) what they needed to be satisfied of if they were to be sure that that act had caused or was a significant cause of the death of the deceased.

It is in this area that we have found some difficulty in the way that the trial was conducted and in the way the matter was left to the jury.

A useful starting point for consideration of the difficulties is *R v Pagett* 76 Cr. App. Rep. 279. That was a case in which the police had fired shots at Pagett but Pagett had used a 16 year old girl as a shield from the retaliation by the police. That resulted in the death of the girl, and the question was whether Pagett was guilty of manslaughter. Goff LJ delivering the judgment of

the court had this to say about causation at p.289:-

> "In cases of homicide, it is rarely necessary to give the jury any direction on causation as such. Of course, a necessary ingredient of the crimes of murder and manslaughter is that the accused has by his act caused the victim's death. But how the victim came by his death is usually not in dispute. What is in dispute is more likely to be some other matter: for example, the identity of the person who committed the act which indisputably caused the victim's death; or whether the accused had the necessary intent; or whether the accused acted in self-defence, or was provoked. Even where it is necessary to direct the jury's minds to the question of causation, it is usually enough to direct them simply that in law the accused's act need not be the sole cause, or even the main cause, of the victim's death, it being enough that his act contributed significantly to that result. It is right to observe in passing, however, that even this simple direction is a direction of law relating to causation, on the basis of which the jury are bound to act in concluding whether the prosecution has established, as a matter of fact, that the accused's act did in this sense cause the victim's death. Occasionally, however, a specific issue of causation may arise. One such case is where, although an act of the accused constitutes a *causa sine qua non* of (or necessary condition for) the death of the victim, nevertheless the intervention of a third person may be regarded as the sole cause of the victim's death, thereby relieving the accused of criminal responsibility. Such intervention, if it has such an effect, has often been described by lawyers as a *novus actus interveniens*. We are aware that this time-honoured Latin term has been the subject of criticism. We are also aware that attempts have been made to translate it into English; though no simple translation has proved satisfactory, really because the Latin term has become a term of art which conveys to lawyers the crucial feature that there has not merely been an intervening act of another person, but that that act was so independent of the act of the accused that it should be regarded in law as the cause of the victim's death, to the exclusion of the act of the accused. As the risk of scholarly criticism, we shall for the purposes of this judgment continue to use the Latin term.
> Now the whole subject of causation in the law has been the subject of a well-known and most distinguished treatise by Professors Hart and Honor_, *Causation in the Law*. Passages from this book were cited to the learned judge, and were plainly relied upon by him; we, too, wish to express our indebtedness to it. It would be quite wrong for us to consider in this judgment the wider issues discussed in that work. But, for present purposes, the passage which is of most immediate relevance is to be found in Chapter X11, in which the learned authors consider the circumstances in which the intervention of a third person, not acting in concert with the accused, may have the effect of relieving the accused of criminal responsibility. The criterion which they suggest should be applied in such circumstances is whether the intervention is voluntary, *i.e.* whether it is "free, deliberate and informed." We resist the temptation of expressing the judicial opinion whether we find ourselves in complete agreement with that definition; though we certainly consider it to be broadly correct and supported by authority. Among the examples which the authors give of non-voluntary conduct, which is not effective to relieve the accused of

> responsibility, are two which are germane to the present case, viz. A reasonable act performed for the purpose of self-preservation, and an act done in performance of a legal duty."

Whether one talks of novus actus interveniens or simply in terms of causation, that passage reveals, as it seems to us, that the critical question to which the jury must direct its mind, where (as in the instant case) there is an act causative of death performed by in this case the deceased himself, is whether the appellant can be said to be jointly responsible for the carrying out of that act.

Miss Bennett-Jenkins, who appeared for the Crown, suggested that for the jury to be able to solve the problem it was sufficient to direct them in accordance with the questions identified in the speech of Lord Hope in *Attorney-General's Reference* (No 3 of 1994) 1998 1 Cr. App. Rep. HL 91 where at 119 he says:-

> "The only questions which need to be addressed are (1) whether the act was done intentionally, (2) whether it was unlawful, (3) whether it was also dangerous because it was likely to cause harm to somebody and (4) whether that unlawful and dangerous act caused the death."

That, as she submitted, followed the Court of Appeal decision in *R v Goodfellow* [1986] 83 Cr. App. Rep. 23 and in particular the passage at p.27. The difficulty, as we see it, is that in relation to the situation in *Goodfellow* there was no question as to what the unlawful act was. In that case the act was setting fire to a house. Furthermore, in the *Attorney-General's Reference* case the act was the stabbing of the mother. Those two cases demonstrate that the unlawful but dangerous act may be aimed at one person and cause the death of another and allow for the conviction of manslaughter in such circumstances, but they do not assist in the present situation where the critical issue is whether an unlawful act by the appellant has caused or been a significant cause of the death of the deceased.

Issue as left to the jury

The trial had one unfortunate feature. Just before final speeches, and after the judge had submitted to counsel the questions that he intended to leave to the jury, Mr Montrose sought clarification as to precisely on what basis he was entitled to address the jury. We have to say that we are not absolutely clear why he needed such clarification because, as it would strike us, the ruling at the end of the case for the prosecution had simply ruled that there was evidence on which the jury would be entitled to convict the appellant of manslaughter. As we would see it this left it open to counsel for the appellant to submit (1) that his client had not supplied heroin at all, which was the appellant's primary case; and (2) (if he chose so to argue) that ultimately the decision of the deceased to inject himself was a decision taken of his own free will and without encouragement from the appellant. We have a transcript of the discussion which took place at this stage of the trial, and we have to say that it is very difficult to comprehend precisely what was being discussed and precisely what was being decided. But, it seems from what we were told by Mr Montrose that in his final speech to the jury he took the view that the only issue on which he was entitled to address the jury was whether his client supplied heroin. He understood the ruling to be that if that supply had taken place then as a matter of law it had been ruled that that supply was causative of the death of Bosque and that it was not open to Mr Montrose to argue to the contrary.

In the result the matter was left to the jury in the following form. First, the following questions were handed to the jury in order to assist them to consider the two counts on the indictment.

Count 2 Are we sure the Defendant on the 10th September 1996 deliberately

supplied what he knew to be heroin to Marco Bosque?

If No - not guilty to Counts 1 and 2.

If Yes - guilty Count 2

Count 1 1. Are we sure the Defendant prepared what he knew to be a heroin mixture for Bosque?

If No - not guilty

If Yes:- - Consider

2. Are we sure the Defendant handed the heroin to Bosque for immediate injection?

If No - not guilty

If Yes:- Consider

3. Are we sure the Defendant's act was one which all sober and reasonable people would inevitably realise was bound to subject Bosque to the risk of harm, albeit not serious harm?

If No - not guilty.

If Yes:- Consider

4. Are we sure that the Defendant's act was a significant cause of death?

If No - not guilty

If Yes, guilty of manslaughter.

The judge then continued as follows:-

> "Members of the jury, you will start by considering count 2 and you will ask yourselves: are we sure the defendant on 10th September 1996 deliberately supplied what he knew to be heroin to Marco Bosque? This means, in the circumstances of this case, that before convicting the defendant, you must feel

> sure that the defendant brought the heroin into Bosque's room, knew it was heroin and supplied it to Bosque. If the answer to the question on count 2 is 'no', then you find the defendant not guilty to counts 1 and 2. (So you will see why you must consider count 2 first.)
> If the answer is 'yes', then he is guilty on count 2. Then you go on to consider count 1, the manslaughter count, and there are a series of questions that you need to ask yourselves: firstly, are we sure the defendant prepared what he knew to be a heroin mixture for Bosque? If 'no', not guilty. If 'yes', you go on to question two. As far as that question is concerned, question one, if the defendant's account of bringing the syringe and the citric acid into Bosque's room and simply getting water for him and holding the lighter under the spoon may be true, the defendant should be acquitted. Having considered question one, as I say, if the answer is 'no', not guilty. If 'yes', you consider question two: are we sure the defendant handed the heroin to Bosque for immediate injection? If the answer is 'no', not guilty. If 'yes', then you go on to consider the next question: are we sure that the defendant's act was one which all sober and reasonable people would inevitably realise was bound to subject Bosque to the risk of harm -- albeit not serious harm? If the answer is 'no', you say not guilty, and if 'yes', you consider the fourth question: are we sure that the defendant's act was a significant cause of death? The defendant's act does not have to be the sole or even the main cause of death. But you must be sure that the defendant's act was a significant cause of death. Preparing the heroin mixture that he brought into the room and handing the heroin mixture in a syringe to Bosque for immediate injection is capable of amounting to a significant cause of death."

We think that the questions and the direction do in fact come very close to leaving the matter accurately to the jury. By question two to count 1 the judge identified the act not simply as the supply of heroin but the handing to Bosque for immediate injection. That, as it seems to us, connotes the element of encouragement that Bosque should immediately inject himself with the heroin mixture in the syringe handed to him, albeit it might have been better to use the phrase "wilfully encouraged". That it was the actions of not simply supplying the heroin on which the jury were to concentrate is further emphasised by the passage at p.9C where the judge said "preparing the heroin mixture that he brought into the room and handing the heroin mixture in a syringe to Bosque for immediate injection is capable of amounting to a significant cause of death."

However, what we are also concerned about is that albeit the direction is very close to leaving the matter accurately to the jury, there is no explanation by the judge of the alternative submission which Mr Montrose suggests he was prevented from making. For example the judge could have said and made clear that if the jury formed the view that the defendant had prepared the syringe but attempted to discourage the use of it by his words or conduct, then it was open to the jury to take the view that Bosque's self-injection was one for which the appellant could not be held to be responsible.

Accordingly, as is apparent, we take the view that this matter could have been put more clearly to the jury and we also take the view that it was unfortunate that Mr Montrose was not allowed to address the jury on the causation aspect if he thought it right to do so. But, that said, we take the view that, if the jury accepted Cody's evidence, which they must have done in relation to the supply alleged in this case, a contention that the appellant was not encouraging the injection was a totally hopeless one. This was a case about the supply of heroin in a made up syringe for immediate injection. That was the case which the appellant fought, but, if it was rejected, the jury were bound to be sure of the supply in that form. Once sure that the supply was in that form, then they could not but have formed the view that the appellant was encouraging injection. Even his words were not to discourage some injection but were indeed to encourage some injection. It must be remembered that all it is necessary for a sober and reasonable person to realise was that some risk of harm, albeit not serious harm, would result from the appellant's act. In this instance, an encouragement to inject carried with it the risk of some harm, even from the prick of the needle, never mind an injection of a lesser quantity of heroin than that which actually caused the death of Bosque.

In our view, despite the criticisms mounted by Mr Montrose, this conviction is safe and accordingly we dismiss the appeal.