JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 77/93

COR: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

R. v. RONALD HARRISON

Berthan Macaulay Q C & Miss Nerine Small for Appellant

Dr. D. Harrison for Crown

March 16 & May 30, 1994

FORTE J A

The appellant was tried on an indictment in which he was charged for the murder of Roderick Falconer but was convicted for manslaughter and sentenced to nine years imprisonment with hard labour. He however applied for leave to appeal his conviction and sentence, and having been granted leave, we heard the arguments of counsel on the 16th March 1994, and now record our conclusion.

The facts in the case were simple. The prosecution alleged that the appellant entered the room of the deceased, in the absence of the wife of the deceased, hit him with his fists and thereafter threw at him, a lighted kerosene lamp, hitting the deceased in his forehead and causing him to fall and the lamp to fall on top of him. The flames of the lamp set the clothes of the deceased on fire as also the deceased himself. By the time assistance came to him, he was severely burnt, and admitted to hospital he subsequently succumbed to those injuries. In support of these allegations the prosecution relied inter alia on the evidence of Ann Falconer, an eye-witness (to the above stated facts) and Joan Falconer the wife of the deceased, who maintained that she had gone to the shop and on returning home she saw the

appellant (the father of her two children) running away, and on entering her room she saw her husband afire lying between the two beds therein. She managed to put out the fire and with assistance took him to the hospital. On his way there the deceased kept saying that it was "Archie" (the **appellant**) who "burn him up."

As the case turned out, however, it appears that the jury, by convicting the appellant for manslaughter accepted the account of the appellant, either in part or in the whole, as his account formed the only basis on which the learned trial judge left a verdict of manslaughter open to the jury. The grevamen of the appeal therefore rests on the learned trial judge's treatment of the defence and consequently there may be no further necessity to refer to the allegations of the Crown.

In his defence, the appellant made an unsworn statement, which for obvious reasons, is set out in full hereunder, and as taken from the transcript of the summing-up of the learned trial judge:

> "Well, he gave his unsworn statement and this is what he said. He said he lives at Queensbury district in St. Elizabeth. He is a mason and a farmer. On a night in June of last year he went to Joan Falconer's house; Joan Falconer is his baby mother. He and Joan had an argument over money; Joan took off the lamp-shade and put on the table and lit the lamp. Same time he and Joan caught a fight and the lamp-shade turn over and dropped on the floor and caught the place afire. Mass Roderick shouted, "Stop it, stop it.' Mass Roderick came off the bed and then stepped on a piece of bottle and stepped into the fire. He started, he said, to put out Mass Roderick and he said they were successful in doing so. After that they got him out and then he rushed to get something to take Mass Roderick to the hospital. He went to his mother's house to try to get assistance to take Mass Roderick to the hospital. On his way back from his mother's house, he found out that somebody else had

> "taken Mass Roderick away to the hospital. He told you, 'I did not hit Mass Roderick with a lamp, I would never do a thing like that, he was good to me, me and Mass Roderick were friends, we lived like father and son, me and Mass Roderick had nothing. Joan did not tell me that she was married to Mass Roderick.' So that was his answer to this charge of murder, that was his defence."

The appellant firstly complained in ground I as follows:

> "The learned trial judge misdirected the jury in instructing them that if they were satisfied that the death of the deceased mentioned in the Indictment, arose from an unlawful act by the Appellant, their verdict should be either murder or manslaughter. He failed to direct them that it is only if the unlawful act caused serious bodily hurt or could reasonably have been foreseen to cause seriously bodily hurt that they could return a verdict of murder or manslaughter. He failed to direct the jury that if it was not the **act** of the accused that actually killed the victim they must be satisfied that it was such unlawful act that caused or contributed to the circumstances in which the victim suffered death."

In order to deal effectively with this ground it is necessary to refer to several passages in the summing-up which demonstrate that the complaint is without merit. This is how the learned trial judge dealt with the defence, which was based on the unsworn statement of the appellant, and which as far as can be gleaned from the reference to it by the learned trial judge, was lacking in detail. In direct reference to the statement he said:

> "... suppose you were to believe him that that is how it really happened, what then would be the position? Well, I direct you, Mr. Foreman and Members of the Jury, that all struggles in

> "anger, whether by fighting, wrestling or in any other mode are unlawful, and death occasioned by them is manslaughter at the least, because what this defendant is telling you or has told you is that he and Mrs. Falconer had an argument over money and the argument turned into a fight. So they were fighting between themselves."

The learned trial judge, later qualified this seemingly broad statement of law by directing the jury thus:

> "An unlawful act causing the death of another person can't simply, because it is an unlawful Act, render a verdict of manslaughter inevitable, since the existence of some degree of mens rea as an essential ingredient is now recognized. For such a verdict inevitably to follow, the unlawful act must be such that all sober and reasonable people would recognize must subject the victim to at least the risk of some harm resulting therefrom, albeit, not serious harm."

He thereafter assisted the jury as to how to apply the law to the facts of the case as follows:

> "So what I am saying to you now is, if you believe that there was a fight, then this is the law that you would have to apply. That fight between this Defendant and Mrs. Falconer would have been unlawful. So in fighting with Mrs. Falconer this Defendant would not have been doing something lawful, like peeling an orange, the example I gave you. He would have been doing something unlawful. Look at the circumstances in which that fight was taking place, if you find that there was a fight. Look at the size of the room, 12 by 12. That is where the fight is taking place. Look how crowded that room was, two beds, a stove, a what-not, a table, four chairs. If you believe the evidence for the Prosecution, all of that was in that room and a bucket of water too, if you believe Mrs. Joan Falconer, somewhere in the room. There was only a space of three feet between the two beds. That is where the fight would have been taking place. So you would have very little space to walk in that room, much less to fight."

Then he directs the jury as to the test to be applied in such circumstances in deciding whether there is any guilt in the appellant:

> "So if this Defendant is fighting in those circumstances and there is a lighted lamp on the table, fire is going in that room, there is a light, a flame on the table, ask yourselves the question, as a sober and reasonable man, must he not have recognized that his act in participating in this fight would have been likely to bounce the lamp off the table? ... and if the lamp falls from the table what would a reasonable sober person appreciate. Is it not that that lamp might start a fire in the room? Wasn't that foreseeable by a reasonably sober man, and this Defendant is telling you that is exactly what happened. The lamp fell from the table and started a fire, and this old man is in that room, not only old but infirmed. He is not well, that is why he is there.
> Wouldn't a sober reasonable man realize that if a fire was started in that room, that that fire might have done serious bodily injury at least to that old man."

At the end of these passages the jury would have clearly understood that if they found that the appellant was engaged in an unlawful act, which caused the death of the deceased, and that that unlawful act was dangerous in the sense that any reasonable and sober person would have forseen that it would cause some harm to the deceased, then in those circumstances the **appellant** could be found guilty of manslaughter. These directions are in accordance with the settled principle of law, which was once again reiterated and approved by Lord Salmon in the case of D.P.P. v. Newbury & D.P.P. v. Jones [1976] 2 W.L.R. 918 at page 921 as follows:

> "In my view the learned trial judge was quite right not to give such a direction to the jury. The direction which he gave is completely in accordance with established law, which, possibly with one exception to which I shall presently

"refer, has never been challenged. In Rex v. Larkin (1942) 29 Cr. App. R. 18, Humphreys J said, at page 23:

'Where the act which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently the doer of the act causes the death of that other person by that act, then he is guilty of manslaughter.'

I agree entirely with Lawton LJ that that is an admirably clear statement of the law which has been applied many times. It makes it plain (a) that an accused is guilty of manslaughter if it is proved that he intentionally did an act which was unlawful and dangerous and that that act inadvertently caused death and (b) that it is unnecessary to prove that the accused knew that the act was unlawful or dangerous. This is one of the reasons why cases of manslaughter vary so infinitely in their gravity. They may amount to little more than pure inadvertence and sometimes to little less than murder.

I am sure that in Reg. v. Church [1966] 1 Q B 59 Edmund Davies J., in giving the judgment of the court, did not intend to differ from or qualify anything which had been said in Rex v. Larkin, 29 Cr. App. R 18. Indeed he was restating the principle laid down in that case by illustrating the sense in which the word 'dangerous' should be understood. Edmund Davies J said, at p. 70:

For such a verdict (guilty of manslaughter) 'inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognize must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm.'

The test is still the objective test. In judging whether the act was dangerous the test is not did the accused recognise that it was dangerous but would all sober and reasonable people recognise its danger."

During the arguments before us, Mr. Macaulay contended that inherent in this established principle is the requirement that it must be an act of the accused that caused or contributed to the death of the deceased.

In the instant case, there was no evidence of any direct assault by the appellant upon the deceased. Such a requirement is however not necessary. See **R. v. Ronald James Mitchell** [1983] 76 Cr. App. R 293 where Staughton J stated at page 297:

> "We can see no reason of policy for holding that an act calculated to harm A cannot be manslaughter if it in fact kills B. The criminality of the doer of the act is precisely the same whether it is A or B who dies."

Mr. Macaulay's real contention, however related to the fact that the unlawful act of the appellant must be an assault he committed in the course of the fight and there was no evidence that any such assault was the direct cause of the death of the deceased.

In our view, the learned trial judge was correct in directing the jury that fighting is an unlawful act, when two persons are voluntarily engaging in assaults upon each other with anger in their hearts. If however, one of the parties is acting in self-defence from an unlawful attack upon him by the other, such conduct could not be said to be unlawful in the defender. The "evidence" as to the fight arose solely from the unsworn statement of the appellant, and consequently there was no opportunity to ferret out any further detail or clarification in relation to the circumstances of that fight. It would be expected, however, that if the appellant's participation in the fight was as a result of defending himself from an attack upon him by Joan, that he would have stated such an important aspect of his case, in his unsworn statement. Instead, the implication of his statement that "Joan took off the lamp shade and put on

a table and lit the lamp, sametime he and Joan caught a fight ..." is that the fight commenced immediately after Joan lit the lamp, and even before she was able to replace the shade. This clearly indicates that the hostilities were at the instant of the appellant, or at least that both of them assaulted each other simultaneously, and entered into the combat willingly, and with the deliberate intention of doing harm to each other. If that is a correct interpretation of the accused's statement from the dock, and we hold that it is, then the learned judge was correct in directing the jury that the fighting was an unlawful act, and in leaving the question of manslaughter to the jury based on that premise.

In doing so the learned trial judge correctly directed the jury thus:

> "Manslaughter arises if you believe that there was a fight or you are not sure whether there was a fight or not, because if you are not sure whether there was a fight or not you would have to give him the benefit of the doubt and say that there was no (sic) fight, and if you say now there was a fight, then decide after that whether as a reasonable man, a reasonable, sober man, he must have recognised that as a result of his action in fighting in those circumstances, in that little room with all those things in it, that old man, Mr. Roderick Falconer would have been subject to at least the risk of some harm being occasioned to him, albeit not serious harm."

In coming to a conclusion of guilt therefore the jury would have had to determine whether the act of fighting was the cause of the injuries received by the deceased, as a result of the fire which resulted from the fall of the lit lamp.

The clear implication from the accused's unsworn statement was that the fall of the lamp was a direct result of the fight in which he and "Joan" were engaged. If that were so the deceased being burnt from the consequent fire would have

suffered his injury as a direct and immediate result of the unlawful act i.e. the fight (See R. v. Ronald Mitchell supra). In those circumstances the directions of the learned trial judge cannot be faulted, and in particular this ground, which contends that he was in error must fail.

The appellant also contended that the learned trial judge incorrectly withdrew the defence of accident from the consideration of the jury, and consequently deprived the appellant of his defence. If such a defence arose on the evidence it could only have arisen in the context of the unsworn statement of the appellant which appears heretofore. That the learned trial judge did withdraw "accident" from the consideration of the jury is evidenced on page 44 of the transcript where he said:

> "Counsel for the defendant told you, Mr. Foreman and Members of the Jury, in addressing you that the defence is accident. What the defendant is saying is that the old man was accidentally burnt up. Well, in law no one is responsible for an accident; an accident is an accident, but in this case it is my opinion, and I direct you as a matter of law, that this defendant can't avail himself of a defence of accident, and I will tell you the reason why. He has told you out of his own mouth that he was fighting with Joan Falconer that night in that room. They had an argument and the argument turned into a fight. If that is so, he was doing something unlawful, and therefore in those circumstances, a person who is doing something unlawful can't plead accident in his defence."

As we have seen before, a person engaged in an unlawful act which causes the death of another is liable in manslaughter in circumstances reiterated in **DPP v. Newberry** (supra). In the instant case, the appellant did not allege an accident simpliciter - but gave an account which admitted his involvement in an unlawful act. In those circumstances the jury would be required

to consider his liability in manslaughter given the test already discussed in the contentions relating to ground 1. To say that the appellant was deprived of a consideration of his defence is a mis-statement given the actual defence to be gleaned from his unsworn statement. The questions which arose on the defence were (i) was the appellant engaged in an unlawful act, and (ii) if so, applying the test laid down in the cases, was he liable in manslaughter.

In relation to (i), if he were not engaged in an unlawful act, then he would not be guilty of any offence. In our view however given his admission that he was involved in a fight in the way he described it, there could be no other view other than that he was engaged in an unlawful act. The conclusions in respect of ground I would of course answer the question posed in (ii) above. The appellant, however was never deprived of his chances for acquittal as the learned trial judge directed the jury at page 57 as follows:

> "If you think that as a reasonable, sober person he could never have anticipated, he could never have foreseen that the fight might have hit over the lamp or that the lamp might have started a fire, or that Mr. Falconer might have been burnt up in the fire, and that he had no intention in his mind to kill Mr. Falconer or to cause him any really serious bodily injury, it would be opened to you to find him not guilty of murder or manslaughter."

and again at page 58:

> "If you think that no man could have foreseen, no reasonable man could have foreseen all of that, then you will have to find him not guilty of manslaughter ..."

In our view those directions left all the issues that arose in the defence, for the consideration of the jury, and consequently the complaint of the appellant must fail.

For these reasons, the appeal is dismissed, and the conviction and sentence are affirmed. We however order that the sentence be commenced from the 5th October, 1993.