08/77

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v NYDAM

Young CJ, McInerney and Crockett J

9 November, 17 December 1976 — [1977] VicRp 50; [1977] VR 430

CRIMINAL LAW – MANSLAUGHTER BY CRIMINAL NEGLIGENCE – REQUIREMENT TO BE ESTABLISHED BY THE PROSECUTION.

N. entered a hairdressing salon with a container of petrol, lit a cigarette lighter and approached a female customer. He threw petrol over her saying "you will pay for this". She and another girl were engulfed in flames and later died. The accused claimed that he intended only to take his own life and for the customer to suffer by witnessing that immolation. He stated that the petrol was spilt by his nervousness and stumbling.

HELD: In order to establish manslaughter by criminal negligence, it is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment. A direction to that effect was not given in the instant case and the direction which was in fact given by the trial Judge was not in accordance with the test as formulated.

THE FULL COURT: *[After setting out the facts, continued]* ... We may commence our consideration of the proper test to be applied for manslaughter by criminal negligence with the observation that there are many who think that constructive malice should have no place in our criminal law, but so long as murder by recklessness and manslaughter by criminal negligence remain as two classes of homicide, it is not reasonably practicable to formulate a subjective test for both. The authorities, however, have made it clear that the test for murder by recklessness is a subjective one: see *Pemble's Case* [1971] HCA 20; (1971) 124 CLR 107; [1971] ALR 762; (1971) 45 ALJR 333 and *Hyam v DPP* [1974] UKHL 2; (1975) AC 55; [1974] 2 All ER 41. To establish murder by recklessness the Crown must show that the accused did the act which caused the death with the knowledge that it would more than likely kill or inflict grievous bodily harm. It is, of course, not open to this Court to question that test. It has been formulated by courts of the highest authority and in any case it would be surprising indeed if the test for murder by recklessness were formulated as an objective test.

The same considerations, however, do not apply to manslaughter by criminal negligence. In the case of manslaughter by an unlawful and dangerous act, an objective test has been adopted. The Crown is not obliged to show that the accused "acted with realization of the extent of the risk which his unlawful act was creating ": see *R v Holzer* [1968] VicRp 61; [1968] VR 481, at p482; *R v Larkin* [1943] KB 174; [1943] 1 All ER 217; (1943) 29 Cr App R 18; *R v Church* [1965] EWCA Crim 1; [1966] 1 QB 59; [1965] 2 All ER 72; (1965) 49 Cr App R 206; [1965] 2 WLR 1220; 129 JP 366; *R v Lamb* [1967] 2 QB 981; [1967] 2 All ER 1282; *R v Lipman* [1970] 1 QB 152; [1969] 3 All ER 410; *R v Haywood* [1971] VicRp 93; [1971] VR 755; and the recent decision of the House of Lords in *DPP v Newbury* [1976] UKHL 3; [1977] AC 500; [1976] 2 WLR 918; [1976] 2 All ER 365.

What then is the appropriate test to be applied for manslaughter by criminal negligence? In Victoria a *dictum* of Smith J in *R v Holzer supra*, has been accepted as a correct statement of the law. In that case his Honour said, at p482:

> "...we are not here concerned with the doctrine of manslaughter by criminal negligence, under which, as I understand the law founded upon the House of Lords' decision in *Andrews v DPP* [1937] UKHL 1; [1937] AC 576; [1937] 2 All ER 552, the accused must be shown to have acted not only in gross breach of a duty of care but recklessly, in the sense that he realized that he was creating an appreciable risk of really serious bodily injury to another or others and that nevertheless he chose to run the risk."

Any *dictum* of Smith J, a very learned judge and a most distinguished lawyer, is entitled to the greatest respect. Yet we have come to the conclusion that it ought not to be accepted as correctly propounding the test to be applied in cases of manslaughter by criminal negligence. We have reached this conclusion for substantially three reasons, which may be summarized as follows:

> (1) Although the *dictum* of Smith J in *Holzer's Case* has not been expressly criticized in the High Court, it appears to be inconsistent with such guidance on the point as can be extracted from the judgments of that Court in *Pemble's Case* and *La Fontaine's Case*;
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> (2) The *dictum* may in any event represent a misreading of Lord Atkin's speech in *Andrews v DPP*, *supra*, which has been much criticized and which has been said to leave the position far from clear (cf. Smith and Hogan, *Criminal Law*, (1969), 2nd ed, p225);
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> (3) The weight of authority appears to favour an objective rather than a subjective test.
> We shall develop each of these reasons in turn.

In *Pemble v R* [1971] HCA 20; (1971) 124 CLR 107; [1971] ALR 762; (1971) 45 ALJR 333, counsel for the accused had invited the jury to convict the accused of manslaughter on the basis that the death had been caused by an unlawful and dangerous act which was done without any intention of killing or inflicting grievous bodily harm (see pp111-2). In his charge to the jury the trial Judge had, *inter alia*, left murder by recklessness as one of the ways open to the jury to convict the accused of murder (see p113). No question of manslaughter by criminal negligence was left to the jury, although as in many cases of manslaughter by an unlawful and dangerous act it is not clear that it would not have been open on the facts (see pp110-1). Barwick CJ, mentioned at p122, the concept that "culpable or criminal negligence resulting though by accident in a killing will make that killing manslaughter", but found no need to consider it. His Honour and McTiernan, J, who did not mention criminal negligence, treated the case as one of manslaughter by an unlawful and dangerous act.

Menzies J however, considered that specific directions were necessary as to manslaughter by an unlawful and dangerous act and as to manslaughter by criminal negligence (see p133). His Honour cited the observations of Smith J in *R v Longley* [1962] VicRp 23; [1962] VR 137, at p148. He also quoted, at p134, the very *dictum* of Smith J in *R v Holzer*, *supra*, which is here under discussion, and did so without any indication of disapproval. Indeed, his Honour preceded the reference by the observation: "It is no longer sufficient to sustain a verdict of manslaughter to establish merely that the homicide occurred in the course of the commission of an unlawful act...". In spite, however, of this apparent approval of Smith J's *dictum* in *Holzer's Case*, Menzies J proceeded, at p135, to define the difference between murder by recklessness and manslaughter by criminal negligence in a way that may be said, with the greatest respect, to be inconsistent with an acceptance of Smith, J's *dictum*. We shall quote the passage in full because in addition to containing his Honour's definition of the difference, it gives useful examples, as Crockett J pointed out in *Allwood's Case*, of the cases which the doctrine of murder by recklessness was developed to meet.

After saying that the trial Judge in *Pemble's Case* was in error because he directed the jury that the killing occurred in the course of doing an unlawful act likely to harm, rather than submitting that matter to the decision of the jury with a proper direction of law, his Honour said:

> "The conclusion which I have just expressed is sufficient to determine this case, but, I should add, that I do not think that his Honour succeeded in the very difficult task of distinguishing clearly between what may be described as a reckless killing constituting murder and a negligent killing constituting manslaughter. The difference, as I apprehend it, is that to do an unjustifiable act causing death, knowing that it is likely to cause death or grievous bodily harm is murder, whereas to do a careless act causing death, without any conscious acceptance of the risk which its doing involves is manslaughter, if the negligence is of so high a degree as to show a disregard for life deserving punishment. An instance of the former might be to kill a person in a street by intentionally dropping a large block of stone from a high building into the crowded street below: an instance of the latter might be to kill a person in a street by carelessly letting fall a large block of stone from a high building into a crowded street below. It would not be a misuse of language to use the word 'reckless' both in relation to dropping and to letting fall the stone, but that word without more in relation to the first would not, of itself, bring out the essential difference between the first and the second. The use of the words 'recklessness' or 'reckless indifference' of itself would not bring home to the jury that it

> is only a recklessness that involves actual foresight of the probability of causing death or grievous bodily harm and indifference to that risk which does constitute the mental element that must be found to support a conviction for murder. The difference between murder and manslaughter is not to be found in the degree of carelessness exhibited; the critical difference relates to the state of mind with which the fatal act is done."

That passage may, with great respect, be said to contain some suggestion that negligence is a state of mind rather than conduct, a view criticized by Smith and Hogan, *supra*, at p222, but the examples which his Honour gave seem clearly enough to involve the proposition that the test for manslaughter by criminal negligence is an objective and not a subjective test. Windeyer J appears to have considered the case as one possibly involving manslaughter by criminal negligence, but his Honour did not in any way define the difference between that crime and murder by recklessness. Similarly, Owen J did not discuss the distinction.

In *La Fontaine's Case* only Gibbs J adverted to the problem. After saying that "recklessness" or "reckless indifference" should not be used by a judge when summing up to a jury, because to do so is to invite confusion between murder and manslaughter resulting from criminal negligence, his Honour pointed out that in many, if not most, cases where the Crown alleges murder by recklessness, it will also allege in the alternative that the accused was guilty of manslaughter by criminal negligence. His Honour also said:

> "It is enough to tell them that it is only if the accused actually knows that his act will probably cause death or grievous bodily harm that he can be convicted of murder. The extreme gravity of his offence lies in the fact that he fully realized the probable consequences of his act and was prepared to take the chance that they would ensue. If he did not in fact foresee that death or grievous bodily harm would probably be caused by his act, he would not be guilty of murder even though a reasonable man would have foreseen that such a result was probable; in those circumstances he might however be guilty of manslaughter."

This passage suggests that his Honour had an objective test in mind in the case of manslaughter by criminal negligence.

We turn next to *Andrews' Case* itself. Lord Atkin's speech has been subjected to much comment and discussion, but with all respect to those who think otherwise (e.g., *Russell on Crime* (1964), 12th ed, vol 1 by JWC Turner, at p591, and see *Kenny's Outlines of Criminal Law* (1966), 19th ed. by JWC Turner, at p189 where the learned editor says that Lord Atkin oscillated between the adoption of an objective and a subjective test), we do not think that his Lordship was intending to lay down a subjective test. We shall not quote extensively from the speech. It is sufficient to refer to the passage, at p583, where his Lordship said:

> "Simple lack of care such as will constitute civil liability is not enough: for 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."

This formulation is entirely consistent with an objective standard and it is to be noted that a little earlier Lord Atkin said that he did not find the connotations of *mens rea* (a reference to what was said in *R v Bateman* [1925] All ER 45; (1925) 19 Cr App R 8, at p11 by Lord Hewart CJ) helpful in distinguishing degrees of negligence. Much of the difficulty in understanding the test being propounded has stemmed from Lord Atkin's use of the word "reckless" as being the epithet that most nearly covers the case. That word might be said to connote a subjective element, but there is a later indication in the speech that Lord Atkin may not have intended it to do so. His Lordship said:

> "...but it is probably not all-embracing, for 'reckless' suggests an indifference to risk whereas the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction."

This passage suggests that the negligence involved may be conduct only, the intention being to avoid the risk, and Starke J certainly seems to have regarded the case as establishing an objective test: see *R v Coventry* [1938] HCA 31; (1938) 59 CLR 633, at pp639-40; [1938] ALR 420.

So far as other authorities are concerned, there are undoubtedly cases of manslaughter by negligence in which a subjective test has been applied by most eminent judges: e.g., *R v Spencer* (1867) 10 Cox CC 525 (Willes J); *R v Nicholls* (1874) 13 Cox CC 75 (Brett J); *R v Handley* (1874) 13 Cox CC 79 (Brett J); *R v Gunter* (1921) 21 SR (NSW) 282; 38 WN (NSW) 97 (Cullen CJ); and see *R v Lowe* [1973] QB 702; [1973] 1 All ER 805, from which, however, having regard to its very special circumstances, we are unable to derive much assistance in the present problem. On the other hand, there are cases where the direction was given that where death followed from an intentional act done without lawful justification or excuse the killing was manslaughter if the death was fairly and reasonably to be considered as a consequence of the wrongful act, even though the act was done out of mere "wantonness and sport": e.g., *R v Fenton* (1830) 1 Lew CC 179; 168 ER 1004. In that case a civil wrong, viz. a trespass, was held sufficient to constitute an unlawful act, but although that sufficiency was doubted in *R v Franklin* (1883) 15 Cox CC 163, that doubt does not affect the point now under consideration.

In *R v Jones* (1874) 12 Cox CC 628 where the accused playing with a boy of eight pointed a gun at him and it went off, the direction of Lush J to the jury contained no suggestion of a requirement of subjective *mens rea*. See also *R v Finney* (1874) 12 Cox CC 625 and *R v Elliott* (1889) 16 Cox CC 710, and other cases collected in Smith and Hogan, *Criminal Law*, 2nd ed., p224.

A modern statement of the test for manslaughter by criminal negligence may be found in the reasons of the Court of Criminal Appeal for allowing the appeal in *R v Bateman* [1925] All ER 45; (1925) 19 Cr App R 8 which were delivered by Lord Hewart CJ. It was there pointed out, at p11, that in a civil case, if there has been a falling short of the standard of reasonable care required by law, it matters not how far from the standard the falling short is; the extent of the liability depends not on the degree of liability but on the amount of damage done. In the Criminal Court, on the other hand, the amount and the degree of negligence are the determining factors. Lord Hewart added: "There must be *mens rea*." The passage was quoted by Lord Atkin in Andrews' Case, supra, and save that his Lordship said that he did not find the connotations of *mens rea* helpful in distinguishing between degrees of negligence, he expressed no disapproval of the test thus propounded. On the contrary, as we have already suggested, he approved it. The problem has rather been to enunciate a test which enables a jury to decide whether there has been such a falling short of the standard of care that a crime has been committed.

The Irish Court of Criminal Appeal clearly preferred the objective test in *People v Dunleavy* (1948) IR 96 in which the Court said, at p101:

> "To say that a person is driving with a reckless disregard for life means that he does not care whether he kills anybody or not. Such a state of mind will ordinarily, but perhaps not universally, amount to general malice sufficient to justify a conviction for murder. To say that a person is driving with a reckless disregard for the safety of others, may mean no more than that he does not care whether or not he puts them in danger. This may amount to no more than dangerous driving. To associate these two ideas is not to achieve the desired mean, but possibly to import an ambiguity. On the other hand, if the reference to recklessness is merely omitted, the jury are hardly given all the assistance which they are entitled to expect.
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> "This Court is of the opinion that a more satisfactory way of indicating to a jury the high degree of negligence necessary to justify a conviction for manslaughter, is to relate it to the risk or likelihood of substantial personal injury resulting from it, rather than to attach any qualification to the word 'negligence' or to the driver's disregard for the life or safety of others. In this connection the American case of *Commonwealth v Welansky*, 55 NE2d 902; 316 Mass 383, a decision of the Supreme Court of Massachusetts, is of very considerable interest.
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> "If the negligence proved is of a very high degree and of such a character that any reasonable driver, endowed with ordinary road sense and in full possession of his faculties, would realize, if he thought at all, that by driving in the manner which occasioned the fatality he was without lawful excuse, incurring, in a high degree, the risk of causing substantial personal injury to others, the crime of manslaughter appears clearly to be established."

The Court concluded that the jury should be clearly told, *inter alia*:

> "That before they can convict of manslaughter, which is a felony and a very serious crime, they must be satisfied that the fatal negligence was of a very high degree; and was such as to involve, in a high degree, the risk or likelihood of substantial personal injury to others."

In laying down that test the Court clearly did not think that it was departing in any way from Andrews' Case, to which it had expressly referred. See also per Holmes J in *Commonwealth v Pierce* (1884) 138 Mass 165, at pp176-8 and *Commonwealth v Hawkins* (1892) 157 Mass 555. In several cases the Crown allegations have been left to the jury upon the basis that they might constitute manslaughter by criminal negligence or manslaughter by an unlawful and dangerous act. *R v Church*, *supra*, was such a case. In it an objective test of what constituted a dangerous act was adopted. This test was applied by Smith J in *R v Holzer*, *supra*, and it was approved by the House of Lords in *DPP v Newbury* [1976] UKHL 3; [1977] AC 500; [1976] 2 WLR 918, at pp921-2 and 924; [1976] 2 All ER 365. It has been said that *R v Lamb* [1967] 2 QB 981, at pp989-990; [1967] 2 All ER 1282 adopted a subjective test, but in *DPP v Newbury* Lord Salmon made it clear (WLR at p923) that he did not regard it as doing so.

No doubt manslaughter does involve *mens rea*. But to use the language of Lord Salmon in *Newbury's Case* (WLR at p923), the necessary intent is no more than an intent to do the acts which constitute the crime. The problem is to formulate the requirement in terms which will enable the jury to determine whether the case is one of murder by recklessness or manslaughter by criminal negligence. The requisite *mens rea* in the latter crime does not involve a consciousness on the part of the accused of the likelihood of his act's causing death or serious bodily harm to the victim or persons placed in similar relationship as the victim was to the accused. The requisite *mens rea* is, rather, an intent to do the act which, in fact, caused the death of the victim, but to do that act in circumstances where the doing of it involves a great falling short of the standard of care required of a reasonable man in the circumstances and a high degree of risk or likelihood of the occurrence of death or serious bodily harm if that standard of care was not observed, that is to say, such a falling short and such a risk as to warrant punishment under the criminal law. This formulation proceeds on the footing that the accused man did not in fact advert (although a reasonable man would have adverted) to the probability that death or grievous bodily harm wound ensue. It adopts the view of Menzies J in *Pemble v R supra*, and of Lord Hailsham in *Hyam v Director of Public Prosecutions*, *supra*, (AC at p79) that if the accused knows that the act is likely to cause death or grievous bodily harm, and consciously accepts that risk, it is murder. The formulation is consistent with the objective test of manslaughter by an unlawful and dangerous act approved by the House of Lords in *DPP v Newbury*, *supra*.

An alternative formulation would have to be along lines suggested by Turner in the 19th edition of *Kenny's Outlines of Criminal Law* (1966), at p191, viz. that involuntary manslaughter is constituted when a person has caused the death of another in the course of conduct which he realized would or might cause someone a physical harm falling short of grievous bodily harm but not being of a trivial or negligible character, provided that he had no lawful justification or excuse for inflicting or for risking the infliction of the physical harm which he foresaw.

Either of these formulations would offer an intelligible distinction between murder by recklessness and manslaughter by criminal negligence. The former, however, appears to us to be the only formulation consistent with the weight of authority. It is in line with the Irish decision in *People v Dunleavy*, *supra*, and with the decision of the Judicial Committee of the Privy Council in *Akerele v R* [1943] AC 255; [1943] 1 All ER 367, where the matter of manslaughter by criminal negligence is dealt with in terms solely of the degree of negligence involved and not in terms of any "subjective" carelessness on the part of the accused doctor. It is, in substance, the view put forward by Professor Howard in *Australian Criminal Law*, 2nd ed, at pp105-6. The formulation is also in line with the views propounded in Smith and Hogan, *Criminal Law*, (1969), 2nd ed, at pp222-7, and by Dr Glanville Williams in *The Criminal Law, The General Part* (1961), 2nd ed, par 39, at p111.

Moreover, in an interesting review of the case law on the subject, a former Solicitor-General of New South Wales (Mr HA Snelling QC) argued that if, in a prosecution for manslaughter by negligence, it were incumbent on the Crown to prove an awareness on the part of the accused of the danger of his action to life or health and conscious performance of the act despite the known possibility of death or injury resulting, this type of manslaughter would be virtually indistinguishable from murder: see (1958) 31 ALJ 630. In the result he too supported an objective test as propounded in *Dunleavy's Case*, *supra*. Furthermore, in the case of manslaughter by omission or the unintentional causing of death by the breach of the duty owed to someone who is in the custody of the accused, an objective standard has been adopted: see Cross and Jones,

An Introduction to Criminal Law, (1959), 4th ed, pp144-5; *R v Senior* [1899] 1 QB 283; *R v Russell* [1933] VicLawRp 7; [1933] VLR 59; 39 ALR 76; *R v Clarke and Wilton* [1959] VicRp 84; [1959] VR 645; [1959] ALR 1161.

Finally, we would draw support from the decision of the High Court in *Callaghan v R* [1952] HCA 55; (1952) 87 CLR 115; [1952] ALR 941. We have not referred to it earlier for it is a case which was concerned with the degree of negligence required to establish manslaughter under the Criminal Code of Western Australia. Its significance for present purposes is that the Court decided that the standard set by the Code for the degree of negligence punishable as manslaughter should be regarded as that set by the common law in cases where negligence amounts to manslaughter. The Court discussed many of the cases, including *Andrews' Case*, *supra*, in which manslaughter by negligence was involved, and nowhere suggested that the standard of negligence set by the common law was to be measured by a subjective test.

In order to establish manslaughter by criminal negligence, it is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment. A direction to that effect was not given in the instant case and the direction which was in fact given by the learned trial Judge was not in accordance with the test as we have formulated it. This consideration provides an additional reason for quashing the verdict and ordering a new trial, although the ground was not taken in the notice of appeal or argued before us.

Accordingly, the application will be granted; the appeal treated as heard instanter and allowed; the conviction quashed, and a new trial ordered. Application granted; appeal allowed; conviction quashed; new trial ordered.

Solicitor for the applicant: George Madden, Public Solicitor.
Solicitor for the Crown: John Downey, Crown Solicitor.
