Court of Appeal

A Dangerous Situation: The Duty of Care in Gross Negligence Manslaughter R v Bowler [2015] EWCA Crim 849, Court of Appeal
R v S [2015] EWCA Crim 558, Court of Appeal
Gross Negligence Manslaughter; Duty of Care

R v Bowler

Richard Bowler (B) suffered from cerebral palsy and had a live-in carer, David Connor (C). The deceased, Alun Williams (W), was 'interested in extreme masochistic sexual experiences'. B met W after the latter advertised on a gay networking website using the name 'Bondage Kent', expressing his interest in mummification, in which a person was wrapped in cellophane or PVC or both. B and W engaged in sexual activity, during which the latter was wrapped in cellophane, on 'about 10 or 15 occasions' at B's flat in Dover. One evening in August 2013, W emailed B and invited himself to B's flat. W arrived at the flat at around 11.30 pm and went upstairs to the bedroom where B wrapped him in cellophane, leaving air holes to enable him to breathe. He then wrapped him in PVC, all done with W's con-sent (even encouragement). There were no air holes in the PVC, but B said that he had wrapped it loosely enough to allow W to breathe. C helped with the PVC wrapping. B had sex with W and then left him. W had previously said he liked to be left 'mummified' after sex and then to sleep. B checked on W about half an hour later when he was still moving. However, when B checked again later, W was lifeless. At that point, B and C panicked, and waited three hours before calling the emergency services. The post-mortem report indicated that suffocation was not the cause of death but did reveal that W had taken drugs, including ketamine and methamphetamine, before his death. Rather, the tight wrapping in cellophane and PVC, exacerbated by sexual activity and drug use, had increased W's body temperature whilst simultaneously preventing the body from cooling itself by sweating, resulting in dehydration and lowering of the blood pressure and eventual heart failure. Both B and C were charged with manslaughter by gross negligence and appeared before HH Judge Williams and a jury at Canterbury Crown Court in December 2014. B was convicted and sentenced to five years' imprisonment; C was acquitted. B appealed against sentence.

R v S

In March 2014, S, on his 15th birthday, shot and killed his girlfriend, Shereka Marsh (M), also 15, at his mother's house in northeast London. S was a member of a gang, the Balance Boys of Hackney, and had been given a 'Birevetta' 7.65 mm self-loading pistol to look after by another gang member. S was showing off with the gun and pointed it at M and pulled the trigger, apparently to scare her. However, it fired and M was shot dead. The pathologist determined that when M was shot she was holding her left hand across her face as if to protect herself; the bullet passed through her wrist and entered her neck. S was charged with murder, with manslaughter by gross negligence as an alternative charge, and appeared before HH Judge Wide and a jury at the Central Criminal Court in September 2014. S said that he had removed the magazine from the handle of the gun but had not realised that there was a bullet in the chamber. He was acquitted of murder but convicted of manslaughter on the basis that he had failed to check sufficiently that the gun was not loaded. The judge imposed an extended sentence of 14 years (comprising a custodial element of 9 years and a four-year extension period). S appealed against both conviction and sentence.

HELD, DISMISSING S'S APPEAL AGAINST CONVICTION BUT ALLOWING THE APPEALS AGAINST SENTENCE, both appellants had breached their duty of care to the deceased and in doing so had fallen so far below the standard of care to be expected of them that it amounted to gross negligence, causing death. In both cases the duty of care was said (either explicitly or implicitly) to be based on the fact that the appellants had created dangerous situations. According to Gilbart J in Bowler:

> [N]otwithstanding the fact that W was an enthusiastic participant in being wrapped in cellophane and PVC and being left thus, the fact is that he was left helpless and in a situation which was *obviously dangerous*. No doubt a man of firmer resolve than the appellant would not have panicked as he did, and not thereby made the situation worse. (at [20]; emphasis added)

The court in S was less explicit, but Cranston J said that 'In essence, the prosecution case on count 2 was that it amounted to gross negligence to point the gun and pull the trigger, without having ensured that it was safe to do so' (at [10]).

Both appellants had also demonstrated gross negligence sufficient to justify the imposition of criminal liability. In *Bowler*, the appeal court accepted the trial judge's assessment of the facts:

> [T]o leave W as he had was an act of gross negligence. He had gone downstairs and fallen asleep or just did not bother, and he had failed to monitor him or check him and that had led to his death ...[W]hen he got no response, his continuing delay was also reprehensible. (at [12])

In *S*, counsel for the appellant suggested that his conviction for gross negligence manslaughter was unsafe because 'there was nothing that could give rise to an inference of foreseeability'; specifically 'there was no evidence from which it could safely be inferred that he either knew or believed there was a bullet in the chamber at the crucial time'. The Court of Appeal rejected this argument. Cranston J justified upholding the guilty verdict as follows:

> In our judgment, the issue for the jury on count 2 was not based on a subjective test (what did the applicant know, believe or foresee) but rather an objective one: whether a reasonable and prudent person of the applicant's age and experience would have foreseen a serious risk of death and, if so, whether the applicant's con-duct fell so far below the standard of care required that it was grossly negligent such that it constituted a crime. In answering that objective question, it was open to the jury to conclude on the evidence before it that the applicant's conduct fell below the standard of care in pointing a gun and pulling the trigger when just a short distance away from Shereka. (at [20])

Nevertheless, the sentence passed in each case was reduced. In the case of Bowler, the appropriate sentence was three years' imprisonment. In S's case, 'there was the difficulty of basing a conclusion [that S met the criteria for an extended sentence] on a verdict of gross negligence manslaughter' (at [37]). The author of S's pre-sentence report had not concluded that S posed a significant risk of serious harm to members of the public from the commission of further specified offences. An extended sentence could not be justified; a determinate sentence of nine years' imprisonment was appropriate.

Commentary

Duty of Care

These cases provide illustrations of the situations in which a duty of care for the purposes of manslaughter by gross negligence will be imposed if the accused creates a dangerous situation. The precedent for imposing a duty of care in such circumstances is *R v Evans* [2009] EWCA Crim 650, [2009] 1 WLR 1999, in which the accused, Gemma Evans (E), was charged with manslaughter by gross negligence following the death of her 16-year-old half-sister, Carly Townsend (T). E had procured heroin for T, who was a recovering drug addict. After T self-injected, she suffered an overdose but, rather than call for an ambulance, E and her mother Andrea Townsend (A) put T to

bed hoping that she would sleep it off. Unfortunately, she was found dead in bed the next morning. Both A and E were convicted of T's manslaughter, the former on the basis of her parental duty and the latter on the basis that she was responsible for creating the situation in the first place. Upholding E's conviction, Lord Judge CJ said:

> The duty necessary to found gross negligence manslaughter is plainly not confined to cases of a familial or professional relationship between the defendant and the deceased ...[F]or the purposes of gross negligence manslaughter, when a person has created or contributed to the creation of a state of affairs which he knows, or ought reasonably to know, has become life threatening, a consequent duty on him to act by taking reasonable steps to save the other's life will normally arise. (at [31])

Although not cited in either *Bowler* or *S*, it is clear that the duty of care, and hence convictions, in both cases can be supported on the basis of *Evans*.

Gross Negligence

Counsel for the appellant's argument in *S*—that gross negligence requires subjective awareness of the risk of death—was correctly rejected. Although the appeal court did not cite any authority in support of its decision on this point, the case law has consistently emphasised that, in determining gross negligence, what is most important is the accused's conduct, not his or her state of mind. In the leading case, *R v Adomako* [1995] 1 AC 171, Lord Mackay LC said:

> The jury will have to consider whether the extent to which *the defendant's conduct* departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal. (at p.187, emphasis added)

> This point was confirmed by Rose LJ in *Attorney General's Reference (No.2 of 1999)* [2000] QB 796:

> Although there may be cases where the defendant's state of mind is relevant to the jury's consideration when assessing the grossness and criminality of his conduct, evidence of his state of mind is not a prerequisite to a conviction for manslaughter by gross negligence. The Adomako test is objective. (at p.809, emphasis added)

Unlawful Act Manslaughter as an Alternative?

It is interesting that the prosecution in S pursued a manslaughter conviction via gross negligence rather than via an unlawful act, given that the facts would seem to support a conviction via that alternative route. The possibility that the same set of facts could support a verdict of manslaughter via either route is rarely explored but was explicitly accepted by the Court of Appeal in *R v Willoughby* [2004] EWCA Crim 3365; [2005] 1 WLR 1880. In that case, Rose LJ said:

> It is necessary to point out that, as a matter of law, the two categories of manslaughter, by an unlawful and dangerous act and by gross negligence, are not necessarily mutually exclusive. In some circumstances a defendant may be guilty of the offence by both routes. (at [19])

As Treacy LJ explained in *R v Bristow and Others* [2013] EWCA Crim 1540, 'The crime of unlawful act manslaughter comprises (a) an unlawful act intentionally performed (b) in circumstances rendering it a dangerous act (c) causing death' (at [32]). In S, there was very strong evidence that the accused had committed an assault on M, which is an unlawful act for the purposes of unlawful act

manslaughter (*R v Larkin* [1943] KB 174; *R v Pagett* (1983) 76 Cr App R 279; *R v Lewis* [2010] EWCA Crim 151).

The appeal court in S appeared to accept as accurate the trial judge's remarks during sentencing that the appellant 'pointed the gun at the deceased, and pulled the trigger, in order to scare her' (at [32]). The fact that M was holding her hand across her face (indicated in the pathologist's report) suggested that S's actions had made her apprehensive of immediate unlawful force, sufficient to fulfil the *actus reus* of assault; S's apparent intention to scare her fulfilled the *mens rea*.

The presence of all of the elements of assault would therefore distinguish S from the superficially similar case of *R v Lamb* [1967] 2 QB 981. In that case, the appellant (L) shot and killed his friend and was convicted of manslaughter. However, unlike that of S, the conviction in *Lamb* was quashed on the basis that there was no unlawful act because there was neither the *actus reus* nor the *mens rea* for an assault. According to Sachs LJ in *Lamb*:

> The undisputed facts in evidence were that [L] possessed a Smith & Wesson revolver, with a five-chambered cylinder, and that each time the trigger was pulled the cylinder rotated clockwise; that [L], in jest and with no intention to do harm, pointed the revolver at [the deceased], his best friend, *who was treating the incident as a joke*; that the revolver had two bullets in the chambers, neither bullet being in the chamber opposite the barrel; that [L], *having no intention to fire the revolver*, pulled the trigger, its pulling rotated the cylinder and so placed a bullet opposite the barrel, the bullet was struck by the striking pin and [the deceased] was killed.(at p.982, emphasis added)

Moreover, S's conduct in pointing a loaded gun at M and pulling the trigger would almost certainly satisfy the element of dangerousness. As was recently confirmed by Lord Thomas CJ in the Court of Appeal in *R v F&E* [2015] EWCA Crim 351 (at [21]), '[i]t has been established since at least 1943 that in determining whether the act was dangerous, the test is objective'. Hence, the fact that S believed the gun to be unloaded would not exonerate him. The case of *R v Ball* [1989] Crim LR 730, in which the accused shot and killed his neighbour, is instructive on this point. His defence was that he thought he had loaded his shotgun with a blank cartridge but had mistakenly loaded a live cartridge. He was nevertheless convicted of manslaughter (on the basis of an unlawful and dangerous act) and his conviction was upheld. Professor J.C. Smith explained the verdict in *Ball* in the following terms:

> The sober and reasonable man cannot be treated as having come on the scene at the moment of the fatal act with no knowledge of any earlier events. His knowledge must surely include awareness of the preparatory acts done by the defendant—in the present case his taking up a handful of cartridges from a pocket which he knew to contain both live ones and blanks. It was this act which made the subsequent pulling of the trigger dangerous and the sober and reasonable person would have recognised it as such.

Applying this analysis to the facts of *S*, the sober and reasonable person would have awareness of the fact that S had inserted a magazine clip into a self-loading pistol, then removed the clip, but had not checked whether a bullet remained loaded in the chamber. These acts 'made the subsequent pulling of the trigger dangerous and the sober and reasonable person would have recognised it as such'.

Meanwhile, it would not have been possible to convict B in *Bowler* via the unlawful act route, on the basis that there was simply no unlawful act. A similar situation occurred in *R v Slingsby* [1995] Crim LR 570. In that case, the accused (D) had met the victim (V) at a Nottingham nightclub. Back at her flat, D penetrated V's vagina and rectum with his hand. She suffered cuts caused by a signet ring

worn by D, septicaemia developed and she died. D was charged with manslaughter. At the outset of the trial at Nottingham Crown Court, the judge was asked to make a ruling on whether D could be liable for manslaughter. He ruled that V had consented to the 'vigorous sexual activity', and the fact that she suffered unforeseen (indeed unforeseeable) injuries did not convert their consensual sexual activity into a crime. He concluded that '[i]t would be contrary to principle to treat as criminal activity which would not otherwise amount to assault merely because in the course of the activity an injury occurred.'

The same point was explained very clearly by Gilbart J in *Bowler*:

> A man has died needlessly, and another must face condign punishment for indulging in their mutual fondness for a dangerous form of seeking sexual satisfaction. But we make it clear right at the start that the fact that death resulted from a most unusual sexual practice is not an aggravating factor. Provided that what they do remains within the law, the sexual preferences of those outside the sexual mainstream are a matter for them and not for the criminal courts. The only relevance of the unusual predilections of [B] and W is that, if not conducted with care, they involved the creation of a very real source of danger. (at [16])