"Dangerousness" in Unlawful act manslaughter

***R v F & E* [2015] EWCA Crim 351, Court of Appeal**

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In June 2013, the appellants, JF (a boy aged 14½) and NE (a girl aged 16), set fire to an old duvet in the basement of a derelict building in Croydon, south London. The fire spread from the duvet to a pile of old tyres which filled the basement with "thick, acrid smoke" as they burned. A 35-year-old Polish man, Sylwester Mendzelewski, who was sleeping rough in the building at the time, was trapped in the basement and died from the effects of smoke inhalation. JF and NE were charged with manslaughter (count 1) and aggravated reckless arson, contrary to s 1(2), Criminal Damage Act 1971 (count 2). They appeared before HH Judge McKinnon and a jury at Croydon Crown Court in June 2014. Neither appellant gave evidence to the court but, in interview, JF said that he had known that people slept in the building but said that he had believed no-one to be there at the time. NE said that she had thought there was no-one in the building.

The trial judge directed the jury on manslaughter based on an unlawful and dangerous act ("unlawful act manslaughter"). He told them that, in order to convict the appellants, it had to be proved that the appellants had committed an unlawful act, namely arson. He then told them that the Crown had to prove two further elements in order to establish manslaughter: first, that "at the time of starting the fire the defendant foresaw or contemplated the possibility that some person or persons, known or unknown, might be in the building"; second, that the unlawful act was dangerous "in that all sober and reasonable people would inevitably have recognised that such person or persons might sustain some physical harm however slight". The appellants were convicted of manslaughter but acquitted of aggravated reckless arson. However, they were convicted of reckless arson, contrary to s 1(1), Criminal Damage Act 1971. On appeal, the appellants submitted that their acquittal of aggravated reckless arson showed that the jury found that they did not have the subjective appreciation of the risk of harm to any person. It was also contended that the objective test regarding dangerousness should have been adapted to take into account (i) the ability of persons of similar ages to them to foresee risks and (ii) JF's mental capacity. A Consultant Forensic and Clinical Psychologist had given evidence that JF had a low IQ (in the range 68-74) and had "poor" reasoning skills.

HELD, DISMISSING THE APPEALS, that there had been no misdirection on the established law adverse to the appellants (at [22] and [27]).

For unlawful act manslaughter, two elements had to be "carefully differentiated: the requisite state of mind and the requirement of dangerousness in relation to the unlawful act" (at [16]). The Court of Appeal dealt with these in reverse order. Starting with the second element, and following *R v Larkin* [1943] 1 KB 174, *R v Church* [1966] 1 QB 59 and *DPP v Newbury & Jones* [1977] AC 500; [1976] 2 WLR 918, the test for determining whether an unlawful act was dangerous was objective (at [17] – [21]), with the key question being whether "all sober and reasonable people" would recognise the risk of some harm arising from the unlawful act. In the 1980s, a subjective gloss had been added to the test whereby

the circumstances known to the defendant were attributed to the sober and reasonable bystander (*R v Watson* (1989) 89 Crim App R 211), but otherwise the objective nature of the test had "been established since at least 1943" (at [21]). There was therefore "no doubt" that McKinnon J had correctly directed the jury on the meaning of dangerousness "on the basis of the well-established law" (at [22]).

With regard to the first element required for unlawful act manslaughter (the "requisite state of mind"), the trial judge had – correctly – directed the jury that, in order to establish the *mens rea* of the unlawful act (in the present case, reckless arson), the Crown had to make the jury sure that the appellants had either intended unlawful damage or that they were subjectively reckless with respect to such damage (as required by *R v G & Another* [2003] UKHL 50; [2004] 1 AC 1034). The judge had then – wrongly – directed the jury that the prosecution had to prove that the appellants had foreseen or contemplated the possibility that someone might be in the building. The latter direction "went further than was required, as it stated the law more favourably to the appellants" (at [26]).

The submission that the objective test for establishing "dangerousness" should be adapted took the court into an area "where the law is clearly established" (at [30]). It was therefore for Parliament to determine whether the "clear and well established law" needed to be changed in the light of various recommendations made by the Law Commission or whether a further examination by the Law Commission was needed (at [33]).

Commentary

As Lord Thomas CJ in the present case makes clear, an objective test for establishing "dangerousness" in unlawful act manslaughter has been used since 1943 (at least) and was confirmed by the House of Lords in *Newbury & Jones* in 1976. It is unsurprising, therefore, that the Court of Appeal declined to make any changes to such a "long established" rule and left the decision as to whether such a change should be made to Parliament pursuant to any recommendations made (or that may in future be made) by the Law Commission. If this area of law is to be re-examined, there are (at least) three options:

1. Change the test to a subjective test
2. Modify the objective test
3. Maintain the status quo

Option 1: Change the test to a subjective test

One option would be to change the *Larkin* / *Church* test to require proof that the accused had foreseen the risk of some harm, as opposed to that risk having been foreseen by "all sober and reasonable people". The case for making this change is that an objective test arguably sets the bar too low for homicide liability. As Lord Bingham observed in *R v G & Another* (albeit in the context of the meaning of the word "recklessness" in the Criminal Damage Act 1971):

> "It is a salutary principle that conviction of serious crime should depend on proof not simply that the defendant caused an injurious result to another but that his state of mind when so acting was culpable… It is clearly blameworthy to take an

> obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk if one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment." (at [32])

Such a change would be consistent with the general trend in English criminal law over the last 25 years or so, with decisions such as that of the House of Lords in *R v Savage; DPP v Parmenter* [1992] 1 AC 699, [1991] 3 WLR 914 and *R v G & Another* emphasising the subjective interpretation of recklessness in the context of the Offences Against the Person Act 1861 and Criminal Damage Act 1971, respectively. On the other hand, it must be acknowledged that Parliament, by enacting the Sexual Offences Act 2003, has "objectified" the *mens rea* for sexual offences, by replacing (subjective) recklessness as to (lack of) consent with a lack of reasonable belief in consent.

Nine years ago, the Law Commission (LC) proposed that the dangerousness test for unlawful act manslaughter should be changed to a subjective one (*Murder, Manslaughter and Infanticide* (2006), Law Com No 304, at [2.163]). The definition of "criminal act manslaughter" would require proof that the accused had caused the death of another person either "(a) through a criminal act intended to cause injury, or (b) through a criminal act in the awareness that it involved a serious risk of causing some injury" (at [3.45]). This definition closely followed proposals put forward by the Home Office, *Reforming the Law on Involuntary Manslaughter: The Government's Proposals* (2000) (at [2.11]).

One drawback with changing the test for dangerousness to a subjective test is that unlawful act manslaughter would then become little more than a watered-down version of subjective reckless manslaughter. This offence is committed if the accused causes death and "was aware of the necessary degree of risk of serious injury to the victim and nevertheless chose to disregard it, or was indifferent to it" (Evans LJ in *R v Lidar* (2000) 4 Arch. News 3).

Option 2: Modify the objective test

Another option would be to amend the *Larkin* / *Church* test to require proof that "all sober and reasonable people" would have foreseen the risk of "serious" harm, as opposed to "some" harm. This represents the law in the common law states of Australia (New South Wales, South Australia and Victoria). In *Wilson v R* [1992] HCA 31; (1992) 174 CLR 313, a majority of the High Court of Australia declared that "an appreciable risk of serious injury is required in the case of manslaughter by an unlawful and dangerous act" (Mason CJ, Toohey, Gaudron and McHugh JJ at [49]). The majority approved an earlier decision of the Supreme Court of Victoria in *R v Holzer* [1968] VR 481. In that case, the court explicitly departed from *Church*, whereas other Australian state courts had followed the English Court of Criminal Appeal. Recognising the need to resolve the conflict in the authorities, the High Court in *Wilson* preferred *Holzer*. The majority in *Wilson* said that "there are good reasons why the test in *Holzer* should be preferred... One is the development of the law towards a closer correlation between moral culpability and legal responsibility. Another is that the scope of constructive crime should be confined to what is truly unavoidable" (at [32]). More recently, the majority judgment in *Wilson* was approved by a majority of the same court in *R v*

Lavender [2005] HCA 37; (2005) 222 CLR 67 (Gleeson CJ, McHugh, Gummow and Hayne JJ at [128]).

Ten years before the 2006 Report, the LC recommended that unlawful act manslaughter be abolished (*Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237, at [5.16]). The justification for doing so was essentially based on the *Larkin* / *Church* test for "dangerousness" setting too low a threshold for homicide liability. The LC stated (emphasis in original):

> "We consider that it is wrong in principle for the law to hold a person responsible for causing a result that he did not intend or foresee, and which would not even have been *foreseeable* by a reasonable person observing his conduct. Unlawful act manslaughter is therefore, we believe, unprincipled because it requires only that a foreseeable risk of causing *some* harm should have been inherent in the accused's conduct, whereas he is convicted of actually causing death, and also to some extent punished for doing so." (at [3.6])

However, the LC did not recommend abandoning an objective standard altogether. Under the LC's proposals there would have been no direct replacement for unlawful act manslaughter; instead, the LC recommended the creation of a new offence of "killing by gross carelessness". This offence would have required proof that the accused had caused death when a "risk of death or serious injury would have been obvious to a reasonable person in the accused's position" (at [5.27]), i.e. an objective test, albeit subject to the proviso that "the accused must have been capable of appreciating the risk at the material time" (at [5.29]). The final element of the proposed offence would have added a subjective gloss, albeit not in every case; the Crown would have been required to prove either that (i) the accused's conduct "fell far below what could reasonably be expected of him in the circumstances", or (ii) the accused "intended by his conduct to cause some injury or was aware of, and unreasonably took, the risk that it might do so" (at [5.31]).

Option 3: Maintain the status quo

Of course, there is always the option of maintaining the *status quo*. On this point, it should be noted that English law is consistent with Canadian law. In *R v Creighton* [1993] 3 SCR 3; (1993) 105 DLR (4th) 632, a majority of the Supreme Court of Canada rejected an argument that the objective test for dangerousness in the context of unlawful act manslaughter was unconstitutional. In that case, McLachlin J (as she then was, and with whom L'Heureux-Dubé, Gonthier and Cory J agreed) said that "the test for the *mens rea* of unlawful act manslaughter in Canada, as in the United Kingdom [*sic*], is objective foreseeability of the risk of bodily harm which is neither trivial nor transitory, in the context of a dangerous act". In justifying this stance, McLachlin J drew an analogy with the thin-skull rule:

> "The thin-skull rule is a good and useful principle. It requires aggressors, once embarked on their dangerous course of conduct which may foreseeably injure others, to take responsibility for all the consequences that ensue, even to death. That is not, in my view, contrary to fundamental justice... In fact, when manslaughter is viewed in the context of the thin-skull principle, the disparity diminishes between the *mens rea* of the offence and its consequence. The law does not posit the average victim. It says

> the aggressor must take the victim as he finds him. Wherever there is a risk of harm, there is also a practical risk that some victims may die as a result of the harm. At this point, the test of harm and death merge."

The *Creighton* decision has been confirmed several times subsequently by the Supreme Court of Canada (*R v Sarrazin* 2011 SCC 54; [2011] 3 SCR 505 at [18]; *R v Maybin* 2012 SCC 24; [2012] 2 SCR 30 at [36]; *R v H* 2013 SCC 28, [2013] 2 SCR 269 at [91]). Meanwhile, the minority of the High Court of Australia in *Wilson* approved the *Larkin* / *Church* test on the basis that "we are unable to see why, in assessing an act as dangerous, it is necessary to disregard the risk of any injury which does not fall within the category of grievous bodily harm" (Brennan, Deane and Dawson JJ at [9]).

Conclusion

The Court of Appeal is undoubtedly right to refuse to even contemplate changing a rule of criminal law that has survived, more-or-less unchanged, for over 70 years and which has been explicitly endorsed by the House of Lords. That places the onus firmly on the government to put proposals for change before Parliament but, given that the (Labour) government decided not to do so when reforming voluntary manslaughter in 2009, it seems unlikely that the Conservative administration will make it a priority. Indeed, as Michael Allen says, "It is unlikely that any further reform of homicide will take place in the foreseeable future" (*Textbook on Criminal Law*, 13th edition (2015), OUP, at p.374).