When is an act dangerous in unlawful act manslaughter?

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There are two forms of involuntary manslaughter whose basis of fault is negligence. The first is killing by gross negligence where the defendant does a lawful act in a grossly negligent way so that it amounts to a crime (the crime of manslaughter) such as carelessly driving a train through a red light so that there is a crash in which people are killed. Lord Mackay's speech in *Adomako* [1995] 1 A.C. 171 at 187 indicates that (i) the defendant's conduct must have involved a risk of death to another, (ii) in respect of that risk his conduct must have fallen far below the standard to be expected of a reasonable person, i.e. be so gross, that it should be judged criminal (manslaughter) and (iii) this is an objective test for the jury. It should be noted that the requirement of a risk of death limits the ambit of this form of manslaughter because any lesser risk, such as a risk of serious injury is not enough for liability. The second is manslaughter by unlawful and dangerous act. Here, the prosecution must prove that the defendant was committing a crime, such a battery, that caused the victim's death and the crime was objectively dangerous. The test for dangerousness is that stated in *Church* [1966] 1 QB 59 at 70: "the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person, to at least, the risk of some harm resulting therefrom, albeit not serious harm." Thus, in respect of this form of manslaughter, there has to be a risk of harm, albeit not serious harm for the crime to be dangerous. This can be compared to killing by gross negligence where there has to be risk of death. The ambit of unlawful act manslaughter is much wider in that the danger in question need not relate to a risk of death or even serious bodily harm as the risk of minor physical harm is enough. The law is harsh.

But the question is what suffices for minor physical harm, in particular is fright or shock sufficient? This was first considered by the Court of Appeal in *Dawson* (1985) 81 Cr App R 150 where a petrol attendant, a middle aged man who was suffering from a heart condition, died of a heart attack during the course of a robbery in which, while the defendant remained outside the petrol station and the attendant was protected by armour plated glass, the defendant brandished a replica handgun. The jury was directed to take account of the victim's heart condition in deciding whether the *Church* test was satisfied. This was held to be a misdirection, because the heart condition (and therefore the heart attack) was not and could not be known to the reasonable sober bystander because middle aged men are not normally susceptible to heart attacks caused by shock. That bystander would have foreseen that the attendant would have been frightened, perhaps extremely frightened but fright or shock in itself was not a form of physical harm within the *Church* test. By contrast, in *Watson* (1989) 89 Cr App R 211 the victim was an 87-year-old man, living alone, who suffered from a serious heart condition. He was woken when a brick was thrown through his window. Two men then entered his flat, and there abused him verbally, and after a lengthy stay at his flat, they made off without stealing anything. Shortly afterwards the victim died as a result of a heart attack. The Court of Appeal endorsed the approach the judge had taken in his summing up when he directed the jury that in considering the recognition of possible harm required by a reasonable bystander, the knowledge gained by the defendants from their lengthy stay in the flat that the victim was frail and elderly was relevant. Elderly men are likely to have heart conditions which make them susceptible to heart attacks when put under stress and the reasonable bystander, with that knowledge, would have foreseen the victim would have been frightened but also that a coronary could be induced by that sudden strong feeling of fear. Thus the requirement for a dangerous act is not without limiting effect on liability for unlawful act manslaughter.

Contrast, however, *Carey* [2006] Crim L R 842 where a young victim of a minor affray ran some 109 yards up a slight incline from the scene of the crime where she suffered a heart attack and died. She had been suffering from a serious, but unknown, congenital heart condition. This was not a case of unlawful act manslaughter as the apparent health of the victim meant that the affray lacked the quality of dangerousness as it would not be recognised by a sober and reasonable bystander that an apparently healthy 15-year old was at risk of suffering shock as a result of the affray. Nor would a reasonable bystander known that an apparently healthy girl had a weak heart which could fail as a result of shock. But *Carey* suggests that fright or shock in itself can, in some circumstances, amount to physical harm for the purposes of the *Church* test.

This issue fell to be decided in *JM and SM* [2012] EWCA Crim 2293. The defendants were involved in an affray at a nightclub with a number of doormen during which one of the doormen, aged 40, who had appeared to be in good health but had a renal artery aneurysm, died of heart failure caused by the aneurysm. The defendants were charged with manslaughter on the basis that they had committed an unlawful act, namely affray, which had caused or significantly contributed to the victim's death. The prosecution alleged that the cause of death was the rupture of the aneurysm consequent on shock and a sudden surge in blood pressure due to the release of adrenalin during the affray. The judge ruled that, in order to sustain a conviction for unlawful act manslaughter, the prosecution would have to prove that the victim had died as a result of the sort of harm which any reasonable and sober bystander would inevitably realise the affray risked causing, and that, taking the evidence at its highest, it would not be open to the jury to be satisfied of that. This is because the reasonable bystander would not have foreseen the rupture of the aneurysm, that lead to the victim's death as men in early middle age are not normally susceptible to such a rupture caused by shock . This ruling had the effect of terminating the case and the prosecution appealed under section 58 of the Criminal Justice Act 2003, with the leave of the judge. The Court of Appeal allowed the appeal holding that that the judge misdirected himself when he required the Crown to establish, that the reasonable and sober bystander envisaged in *Church* test must have realised that that was a risk that the unlawful act would cause the physical harm (the heart failure) which killed the victim. Such a requirement was a gloss on the *Church* test which is not justified.

Lord Judge CJ makes it clear that what matters is whether the reasonable bystander would have recognised that the affray would have inevitably subject the victim to the risk of <u>some</u> physical harm resulting from it. That is what the *Church* test required. So it was sufficient the victim suffered some objectively foreseeable physical harm even though it was not the harm from which he died as that was unforeseeable. That would make the act dangerous. The question is what sort of physical harm? It has been suggested (Simester and Sullivan's Criminal Law (5th ed) p 412) that it was the harm to the victim caused by him restraining the defendants. Not so because, as Lord Judge makes it clear, there was no evidence that victim threw any punches at all or that he was pushed or struck or subjected to any direct physical violence. All victim did was talk the defendants into leaving and make himself available to offer immediate assistance to his fellow doormen if necessary. It is sufficient that the physical harm is shock or fright resulting from the affray. Lord Judge identifies the question for the jury to consider as whether "the reasonable sober person would inevitably recognise the risk of harm going beyond concern and fear and distress to physical harm in the form of shock". So the physical harm which makes the act dangerous is shock and not the consequences of shock. This extends liability for unlawful act manslaughter as it goes further than *Dawson* by allowing fright or shock itself to be the physical harm in the *Church* test. It is true that the Lord Judge contradicts himself by saying "we ...confine our decision

to circumstances of an affray in which the deceased was personally involved in the fighting which constituted the affray, rather than an individual who happened to be walking down the street and came to the fighting without getting involved in it". This does limit liability but only in a small way because there was no evidence of the victim fighting the defendants, so it would seem he needed only to be on the periphery of the fighting and not taking part himself.

The law relating to unlawful act manslaughter has always been harsh but the consequence of the decision in *JM and SM* is that it has become harsher as foreseeable shock is recognised as physical harm in the *Church* test and there is no longer the need for the harm that is foreseeable to be the result of shock, such as a heart attack. Foreseeable shock alone can now make the act dangerous. However, the prosecution must prove that the unlawful act caused death and it could be argued that the victim had an undiagnosed medical condition that could have triggered heart failure at anytime by, say, physical exertion. In other words, the death was not reasonably foreseeable for the purposes of causation. But here the law (see *Haywood* (1908) 21 Cox CC 692) is also harsh because the defendants had to take the victim as they found him and it was irrelevant that the heart failure was not foreseeable. The defendants caused the victim to die by triggering that unknown medical weakness.

In *JM and SM* the Court of Appeal could have put some limit on unlawful act manslaughter by holding that, as the victim was only on the periphery of the affray, the reasonable bystander would not have foreseen any harm to him. That would have put some limit on the liability for this form of manslaughter. As it is we now have a very wide liability for unlawful act manslaughter. We must look with expectation to the Supreme Court which it is hoped will, one day, look at this type of involuntary manslaughter as it is highly unlikely that Parliament will find time to do so.