

Manslaughter and Drug Suppliers: *Kennedy's case*.

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Simon Kennedy lived in a hostel in which Marco Bosque and Andrew Cody, who shared a room, also lived. On 10 September 1996 Kennedy visited the room which Bosque and Cody shared. Bosque was drinking with Cody. According to Cody, Bosque told Kennedy that he wanted “a bit to make him sleep” and Kennedy told Bosque to take care that he did not go to sleep permanently. Kennedy prepared a dose of heroin for Bosque and gave him a syringe ready for injection. Bosque then injected himself and returned the empty syringe to Kennedy, who left the room. Bosque then appeared to stop breathing. An ambulance was called and Bosque was taken to hospital, where he was pronounced dead. Death was caused by inhalation of gastric contents while acutely intoxicated by opiates and alcohol.

Kennedy was convicted of supplying a class A drug (heroin) to another contrary to section 4(1) of the Misuse of Drugs Act 1971 and of unlawful act manslaughter contrary to common law. Kennedy appealed against the manslaughter conviction and started a process which would see two appeals to the Court of Appeal with the appeal finally culminating in a House of Lords decision.

In the first appeal *Kennedy*<sup>1</sup> the Court of Appeal upheld Kennedy’s conviction on the basis he had, as a secondary party, unlawfully assisted or encouraged Bosque to unlawfully inject himself. The problem was that Bosque’s injection of himself was not an unlawful act. At common law if a defendant assisted or encouraged the victim,

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<sup>1</sup> [1999] Crim L. R. 65.

a person of full capacity, to kill himself then the victim's suicide was self-murder and the defendant was an accomplice to that offence. But since the Suicide Act 1961 the victim does not commit a criminal offence and the defendant would be guilty of the substantive offence of aiding and abetting a suicide contrary to s 2 of the Suicide Act 1961. Bosque did not commit suicide but the same principle applies to manslaughter. Bosque's self injection was not an unlawful act as there has never been a crime of self-manslaughter. The law of secondary participation requires that the secondary party's liability derives from the principal committing an offence but there was no principal as Bosque committed no offence. This was a bad decision because it undermined the derivative basis of the law of secondary participation. This was recognised by the Criminal Cases Review Commission which referred the case back to the Court of Appeal on the basis there was real possibility that the conviction would not be upheld<sup>2</sup>.

Kennedy's second appeal did not come before the Court of Appeal until 2005 but in the meantime there were two further decisions by the court concerning drug users and manslaughter which compounded the error in *Kennedy*. In *Rogers*<sup>3</sup> the victim self injected himself with heroin after Rogers had held a tourniquet to raise a vein. The Court upheld Rogers' manslaughter conviction on the basis that his holding the tourniquet was part and parcel of the process of injection and therefore Rogers was guilty as a principal offender first in respect of the offence under section s23 of the Offences Against the Person Act 1861 in that he had *administered* a noxious substance (heroin) to the victim and secondly he was guilty of manslaughter as that

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<sup>2</sup> Sections 9 & 13 of the Criminal Appeal Act 1995.

<sup>3</sup> [2003] 2 Cr. App. R. 10. CA.

unlawful act had caused the victim's death. In *Finlay*<sup>4</sup>, on the same facts as in *Kennedy*, the court upheld Finlay's conviction for manslaughter on the basis that that he had *caused to be administered* a noxious substance (heroin) to the victim because it was reasonably foreseeable that the victim would inject herself when Finlay handed her the syringe. The court held that causation was thus established for both the section 23 offence and for unlawful act manslaughter. In so finding the court followed the much criticised decision of the House of Lords in *Environment Agency v Empress Car Co.(Abertillery)Ltd*<sup>5</sup> in which the House assimilated the rules of causation relating to natural intervening events with those of third parties so that if a deliberate voluntary act was reasonably foreseeable (a normal fact of life) rather than something extraordinary the chain of causation will not be broken. The court rightly rejected the view that Finlay was a secondary party to the victim's act because the victim committed no crime by the act of self-injection. Instead the court held that Finlay was a joint principal. But with whom was he a joint principal? The victim was not a principal because she committed no crime. These decisions stand to be criticised because they fail to recognise the fundamental principle of causation namely that voluntary and fully- informed conduct acts as an obstacle to any other causal investigation in the law of crime: an actor's voluntary and informed conduct is regarded as the cause of a result if it was the last conduct by a human being before that result<sup>6</sup>. In other words in each of these cases the victim's voluntary and informed act of self-injection was the cause of death and not the appellants' conduct prior to the injection.

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<sup>4</sup>[2003] EWCA Crim 3868.

<sup>5</sup>[1998] 2 W.L.R. 351 H L.

<sup>6</sup> See Principles of Criminal Law Andrew Ashworth (4<sup>th</sup> ed) OUP p127.

The law was therefore in a mess when Kennedy's second appeal came before the Court of Appeal and it was hoped that the court would sort the mess out. Unfortunately this was not to be as in *Kennedy (No 2)*<sup>7</sup> the court upheld Kennedy's conviction. It did so by rejecting the *Empress* approach to causation and applying the House of Lords decision in *Latif* where Lord Steyn qualified the general rule of causation by stating it would only apply when two persons were 'not acting in concert'<sup>8</sup> Thus the essential ratio of the decision of the Court of Appeal in *Kennedy (No 2)* was that the administration of the injection was a joint activity of Kennedy and Bosque acting together and therefore when Kennedy participated in this joint activity he was guilty of an offence under s23 and that offence would be the unlawful act for the crime of manslaughter. Ormerod and Fortson have pointed out that this decision could have led to some awkward consequences<sup>9</sup>. First when would the joint activity start? Would it start when the heroin is drawn into the syringe or before that? Second the decision was another attack on the law of secondary participation because the principle of joint activity could have been applied to other offences which were 'capable of being committed by a "team" in such a way as to render'<sup>10</sup> all the participators as principals. This means both decisions of the Court of Appeal in *Kennedy* had the effect of undermining the law of secondary participation. Third those who assisted a suicide by preparing a lethal dose of morphine for self injection by the

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<sup>7</sup> [2005] EWCA Crim 685.

<sup>8</sup> [1996] 2 Cr. App. R. 92 at 104. HL.

<sup>9</sup> 'Drug Suppliers as Manslaughterers (Again)' David Ormerod and Rudi Fortson [2005] Crim L. R. 819 at 827-828.

<sup>10</sup> *Ibid* at 827.

victim could have faced a murder charge instead of the offence provided for by Parliament of aiding and abetting a suicide<sup>11</sup>.

The question is why in these cases was the Court of Appeal so anxious to uphold the convictions? The answer is because the court wanted to warn those engaged in intravenous drug use that they could face a manslaughter conviction. The policy aim behind the decisions is an attempt to reduce the number of deaths resulting from drug use by discouraging the supply and use of class A drugs. It is estimated that in England and Wales up to 3,000 people per year die as a result of drug overdose. Some of those deaths were suicides but most were accidental especially where the victim returned to drug use after a period of abstinence without realising their tolerance to the drug had reduced.<sup>12</sup> But the decisions culminating in *Kennedy (no2)* conflicted with the principles of personal autonomy and informed voluntary choice. This conflict was recognised by House of Lords when Kennedy's case reached that court.

In *Kennedy*<sup>13</sup> the House was faced with the following point of law of general public importance namely:

“When is it appropriate to find someone guilty of manslaughter where that person has been involved in the supply of a class A controlled drug, which is then freely and voluntarily self administered by the person to whom it was supplied, and the administration of the drug then causes his death?”<sup>14</sup>

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<sup>11</sup> Suicide Act 1961 s 2.

<sup>12</sup> That is the estimated figure given by the Advisory Council on the Misuse of Drugs. Available at <http://drugs.homeoffice.gov.uk/drugs-laws/acmd/>

<sup>13</sup> [2007] UKHL 38.

<sup>14</sup> *Ibid* at [2]. Criminal Appeals Act 1968 s 33.

In a unanimous judgment given by Lord Bingham the answer to the certified question was ‘[i]n the case of a fully-informed and responsible adult, never’<sup>15</sup>. The House regarded Bosque as such an adult. ‘The appellant supplied the heroin and prepared the syringe. But the deceased had a choice whether to inject himself or not. He chose to do so, knowing what he was doing. It was his act.’<sup>16</sup> Thus Kennedy’s manslaughter conviction was quashed and in a mere 26 paragraphs the House restored the fundamental principle of causation namely that voluntary and fully- informed conduct acts as an obstacle to any other casual investigation in the law of crime. This means that orthodoxy is also restored to the distinction between principals and secondary parties. In doing so Lord Bingham distinguished *Empress* as only applying to statutory provisions imposing strict criminal liability on those who cause environmental crime.<sup>17</sup> The policy behind that distinction appears to be that corporations must make great efforts to prevent pollution. The application of the *Empress* approach to causation in *Finlay* was recognised to be wrong in the context of drug users.<sup>18</sup> The decision in *Rogers* was overruled ‘[w]hat matters, in a case such a *R v Rogers* and the present [case], is whether the injection itself was the result of a voluntary and informed decision by the person injecting himself. In *R v Rogers*, as in the present case, it was. That case was, therefore, wrongly decided.’<sup>19</sup>

Conclusion.

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<sup>15</sup> Ibid at [25].

<sup>16</sup> Ibid at [19].

<sup>17</sup> Ibid at [15].

<sup>18</sup> Ibid at [16].

<sup>19</sup> Ibid at [20].

The decision of the House of Lords means that those engaged in intravenous drug use will only be liable for the section 23 offence and consequently manslaughter where one person injects another with heroin (or some other class A drug). This is because the House of Lords made it clear that the only form of the section 23 offence applicable to such cases is ‘*administering* a noxious thing to another person’ as that would establish the causal element essential to the section 23 offence and (if the victim dies) the causal element required for unlawful act manslaughter. Lord Bingham maintains that there is a difficult

‘borderline between contributory acts which may properly be regarded as administering a noxious thing and acts which may not. But the crucial question is not whether the defendant facilitated or contributed to administration of the noxious thing but whether he went further and administered it.’<sup>20</sup>

It is difficult to assess where this borderline exists because surely *Rogers* was an example of it but that decision was overruled. It is submitted the borderline is only passed when the defendant supplies the victim.<sup>21</sup> The decision of the House in *Kennedy* does leave two questions to be answered. First when is an adult fully-informed and responsible? A drug user's act of self-injection may not be voluntary due to age or because they are inexperienced in drug use. Second the House makes it clear that nothing in its decision should affect the possibility of a manslaughter conviction based on gross negligence.<sup>22</sup> This issue could arise where the drug supplier realizes the victim, after self-injecting, is in difficulty because the dose was too strong

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<sup>20</sup> Ibid at [20].

<sup>21</sup> As in *Cato* [1976] 1 All E.R. 260. CA.

<sup>22</sup> No 12 at [6].

but does nothing to help. In that situation the supplier, it could be argued owes the victim a duty of care and ‘if he fails to fulfill that duty (it being sufficient perhaps to call the emergency services) he is at risk of conviction if V dies and a jury finds his conduct “grossly” negligent.’<sup>23</sup> Finally Parliament may wish to change the law in England and Wales so that a drug supplier's act of supply would be a cause of death despite the victim’s voluntary and informed self-injection. That is the law in Scotland.<sup>24</sup>

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<sup>23</sup> Professor Ormerod’s commentary to *Kennedy* [2007] Crim L.R. 223 at 225.

<sup>24</sup> *Khaliq v HM Advocate* 1984 JC 23 and *Ulhaq v HM Advocate* 1991 SLT 614.