UNLAWFUL AND DANGEROUS ACT MANSLAUGHTER: *R.* v. *WILLS*[1]

The defendant ("D") was out shopping with his de facto wife when he saw in the street his legal wife from whom he was separated. He went across to her and an incident occured in which he allegedly twisted her arm up behind her back.

The wife returned to her home in some distress and reported what had happened to her de facto husband, Scott ("S"). S then spoke to the wife's brother, Cornish ("C"), and the two of them decided to visit D at his home. On their arrival an altercation ensued during which S entered D's house and hit D in the eye. C pulled S away but as they were leaving C told D that they would be back to 'get' him later. C and S then left the house and got into their car which was parked a little way down the street. D took a rifle and went down to the bottom of his driveway. S and C were still sitting in their car on the opposite side of the road. D fired a shot which struck C killing him almost immediately.

D was charged with murder. He apparently believed that S was a dangerous type who used a gun and he claimed that he fired the shot not intending to hit anyone but to show S and C that he too had a gun and to scare them off from renewing their attack, which he said he believed they were about to do. The trial judge refused to allow self-defence to be left to the jury but he allowed them to consider provocation and he also directed them as to manslaughter by an unlawful and dangerous act. A question from the jury showed that they had found against murder and their subsequent verdict of manslaughter can only have been based on the unlawful and dangerous act doctrine.

D's appeal to the Full Court against conviction was dismissed, but what is of concern here is the treatment in the leading judgment of Lush J. of the issue as to the unlawfulness of D's act in firing the rifle. The theme of this commentary is that the courts have not always been as specific as they could be in identifying the particular unlawfulness of the act in question. The cases — e.g. *R* v. *Holzer*,[2] *R* v. *Lamb*[3] — make it clear that the act, for the purposes of unlawful and dangerous act manslaughter, must be unlawful in a criminal sense. This requirement necessarily involves that the act should constitute a specific offence in its own right and in order to do so it must satisfy all the technical elements in the definition of the offence. It is in regard to this latter requirement that the courts have on occasions left the unlawfulness of the act rather at large. The present case affords, I think, a useful illustration.

Once a jury has, as in the present case, negatived mens rea for murder and falls back upon manslaughter it obviously follows that in a case of

[1] [1983] 2 V.R. 201.
[2] [1968] V.R. 481.
[3] [1967] 2 Q.B. 981.

cannot be identified by reference to the consequence which has in fact occured — the death of the victim. Normally, therefore, the unlawful act will be defined quite independently of the death which has occurred. In order for the act to be unlawful in the relevant sense D must be proved to have had the appropriate mens rea for that act to constitute an offence. This is especially important as it is this mens rea which 'constructively' supplies the mens rea for the killing. Without that mens rea there can be no criminal liability for the actual death since this category of manslaughter is a 'constructive' one. It is for this reason that the accused in *Lamb's* case was acquitted as well as for the fact that there was no actus reus of the alleged assault in that case. It is therefore of some moment to know, in each case, what the alleged unlawful act precisely is.

In the present case the court accepted that the unlawful act was an assault committed by D when he pointed and fired the rifle. There was also a question as to whether the firing of the rifle was unlawful as a contravention of section 29D (1) of the *Firearms Act* 1958 (Vic.) but it seems clear that the court preferred the former ground of unlawfulness. However, Lush J. went on, at 213, to imply some criticism of the trial judge for referring, in his directions to the jury, "to the old problem of whether an assault can be committed upon a person who is ignorant of the threat made to him by the actions of the accused man".

There is obviously a point to criticism of trial judges who unnecessarily make the task of the jury more difficult by directing them as to matters which are not really raised by the facts of the case. But is that a fair criticism of the trial judge in this case? There is a difficulty here in knowing what was the factual basis upon which the finding of assault was made since the commission of an assault by D seems simply to have been assumed at the trial and the Full Court was more or less content to affirm the correctness of that assumption. It does seem odd that a court can simply assume against an accused that he has committed a criminal offence. One would have thought that the commission by D of an unlawful act sufficient to ground a conviction of manslaughter was as much a matter for proof as any other issue and that if an appellate court was prepared to hear an appeal a ground of which raised the question of unlawfulness it would wish to know what findings of fact bore on that question. However, such facts as appear in the leading judgment suggest that the trial judge's references to the "old problem" of whether a person must be aware of a threat before it can constitute an assault were well-founded. It is clear that the assault in question was an assault *strictu sensu* — what Glanville Williams calls a "psychic assault."[4] Had the sense of "battery" been meant or included a finding that D had committed an assault in this sense must inevitably have involved a conviction of murder since it is

[4] Glanville Williams, *Textbook of Criminal Law* (2nd ed., London, Stevens and Sons Ltd, 1983) pp. 172-3.

inconceivable that a person could have intended or been reckless as to a battery in the form of firing a bullet at someone without being found to have intended to inflict or to be reckless as to inflicting death or grievous bodily harm — the mens rea of murder.

It appears from the reported judgment that D approached the car in which S and C were sitting from the back or at least from an angle too far behind them for them to have observed him. When he fired his rifle the bullet passed through the rear door on the driver's side and on through the upright part of the driver's seat, killing C "almost instantly". If this is what happened neither S nor C can have had any realisation of what D was intending to do. They would not have been aware of his aiming his rifle, in which case they could not have suffered any apprehension of imminent physical impact — part of the actus reus of assault. In other words, it looks as though there is a real issue as to whether an assault was actually committed. Lush J. did go on to say that the relevant act was not just the pointing of the rifle but also the discharging of it. The discharge was relevant because it was intended to have "a discouraging effect on persons towards whom the firearm was pointing". This sounds odd. Assault is not defined in terms of an intention to discourage people but in terms of an intention to put them in apprehension of imminent violence. Of course, to most people letting off a rifle in a public street sounds like an offence but greater precision than this is to be expected in the judicial definition of why an act is unlawful.

On the facts in the report of the Full Court's judgment I respectfully suggest that no assault was committed by D when he pointed the rifle. Does the discharge of the rifle make any difference? If it does, I suggest, again with respect, that it is not for the reason given by Lush J. A possible argument is that a person who hears a rifle shot close at hand may instinctively apprehend that he is about to be hit. But in the present case no such apprehension could have been experienced by C since he was killed almost instantly. It therefore follows that D's act in both aiming and firing the rifle was not unlawful as against C. If any apprehension was experienced at all it can only have been by S — and he was not the person killed.

Surely the legal issue thrown up by such a situation was worthy of the attention of the court. In saying this I must add the qualification that in theory at least judges are confined in their reasons to the matters put before them by counsel and that D's counsel in this case may have had sound tactical considerations for not wishing to attack too strongly the elements that would ground a manslaughter conviction lest, given the facts of the case, the jury may have been driven back to a murder verdict rather than an acquittal. If D's counsel were in fact guided by this or similar considerations it would no doubt have been awkward for him to retract, at the hearing of the appeal, from his apparent acquiescence at the trial in the assumption than an assault had been committed.

With these qualifications, the situation described above raises an issue analogous to that in *Reg.* v. *Mitchell*[5] where the defendant ("D") physically assaulted the victim ("V1") who fell back against an 89 year old lady ("V2"), who died as a result. D was convicted of unlawful and dangerous act manslaughter of V2 and his appeal on the ground that his assault was only unlawful as against V1 failed. It is true that on the facts of *Mitchell's* case D could be held to have assaulted V2 directly with V1 as the innocent medium of the force applied to her, the mens rea being supplied by the doctrine of transferred malice — see *R.* v. *Latimer.*[6] The Court of Appeal, however, in the judgment of Staughton J. expressed itself in wider terms saying that where an unlawful and dangerous act is proved the only question is causation. On this basis, if, in the present case D's act in firing the rifle was indeed unlawful as being an assault against S it would be sufficient to ground D's conviction for the manslaughter of C, there being no issue on causation. A court would probably give short shrift to any contention on D's behalf that, C being killed almost instantly, he would have been dead before S was able to experience any apprehension for his own safety and that therefore, at the moment of C's death, the act was not unlawful since not all of the elements of the actus reus of assault had been satisfied.

As a rider to the foregoing the question arises as to what would have been the legal result had the bullet which killed C by some freak continued its course into S's body also killing him instantly. The conclusion seems inevitable that there would at least have been no assault and that unless D's act were unlawful on some other ground — e.g. under the *Firearms Act* — D would have been entitled to an acquittal, strange result though this may seem in the circumstances.

The theme which has prompted this commentary has been the imprecision which has occasionally characterised the courts' attempts to define the unlawfulness of the act in unlawful and dangerous act manslaughter. In the instant case the court adopted a rough and ready approach to the question, preferring to make a broad inference of criminality from the apparent flagrancy of the act instead of the kind of analysis which a still technical criminal law requires.

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[5] [1983] 2 W.L.R. 938.
[6] (1886) 17 Q.B.D. 359
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