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R v Aramakutu

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 294/90

THE QUEEN R

v.

CHARLES ARAMAKUTU

Coram: Cooke P.
Casey J.
Sir Gordon Bisson

Hearing: 24 April 1991

Counsel: D.D. Rishworth for Appellant
P.W. Cooper and J.C. Pike for Crown

Judgment: 2 May 1991

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

The appellant was found guilty on trial before a Judge and jury of murdering Donna Jones and of arson under s.294 of the Crimes Act by wilfully setting fire to a building. He appeals from the murder conviction on grounds relating to the definition of murder in s.167(d) of the Crimes Act and the Judge's ruling and summing up in that connection and also on two further grounds relating to the summing up.

The facts as outlined by counsel for the Crown for the purposes of the appeal, and accepted by counsel for the appellant, were these:

> The Appellant and Donna Jones (the deceased) had been involved in a de facto relationship since March 1989. In December 1989 they were living together in a rented house property at Arthur Street, Tokomaru Bay. This was a house they shared with the deceased's brother.

On 2 December 1989 the deceased and a girlfriend went to a hotel and afterwards to a function. The deceased was dropped off back at her home sometime after midnight. She was intoxicated (her blood alcohol level was 224 mg alcohol/ml of blood).

After she arrived home she got into an argument with her brother. In the course of this she was punched by her brother and may have received an injury which caused bleeding.

The Appellant had also been out drinking. He arrived home sometime after 1.00 am on 3rd December 1989.

An argument occurred between the Appellant and the deceased. It was loud enough to be heard at the next door neighbour's house.

The Appellant wanted to know who had hit the deceased. He appears to have also believed she had been with another man.

In the course of this argument the deceased told the Appellant in no uncertain terms to get out of her life and to leave the house.

The Appellant gathered up some of his belongings and left the house.

At the time he left the deceased had gone from the bedroom she shared with the Appellant to her brother's bedroom and was asleep or had passed out on her brother's bed.

The Appellant left the house but returned moments later to uplift his pup.

When he left the second time he set fire to a box of paper on the verandah in order to burn down the house.

At the time he left the house he knew that the deceased was asleep or had passed out on her brother's bed.

In the blaze that followed the house was destroyed. The deceased's brother managed to escape from the house but the deceased herself perished in the fire.

The house about 40 years old was timber framed and had a wooden verandah.

The accused did not give evidence at the trial. The prosecution put in evidence a police statement signed by the accused, taken some hours after the fire, in which he said that he had an argument with his girlfriend, burnt down the house because he was angry, did so by setting fire to some paper in a box on the verandah, and (in reply to the question 'Didn't you think that Donna or her brother could be hurt in the fire?') 'No I didn't think about it'. A little later in the interview he was asked again whether he had thought there was any danger to Donna and Fred by starting the fire; and he replied 'It was just something I done. I don't know'.

It is convenient to deal first with the two grounds of appeal not directly concerned with the interpretation of s.167(d). It was contended that, while the Judge was entitled to comment on the fact that the accused had refrained from giving evidence (s.366 of the Crimes Act), there were comments by the Judge here which were inappropriate and unfair. The accused had provided the police with a lengthy statement. It was submitted that the Judge ought not to have told the jury that they had not heard from the accused directly on oath in the witness box about what he did, what he intended and what he knew. The Judge made those points to them when emphasising that the onus of proof was on the Crown, that they did not have the advantage of having the accused's account tested in cross-examination, and that it should not be assumed that he

was guilty simply because he had not gone into the witness box. In our opinion there is no substance in this complaint; the Judge's observations of which complaint is made were justified, as the absence of the accused from the witness box deprived the jury of the opportunity of observing how he responded in cross-examination to the obvious allegation that he must have meant to put the occupants in danger of their lives.

Then it is said that the summing up was weighted in favour of the Crown case to such an extent as to be unfair to the accused; and that his comments on the facts and on the closing address of counsel for the defence went beyond mere comment and amounted to an expression of opinion as to the guilt of the accused. It is true that the Judge did put to the jury very clearly that it was open to them to find by inference beyond reasonable doubt on the totality of the evidence that the accused had the requisite guilty intention, that it was open to them to infer that he must have known that setting fire to the house was likely to cause death; but he also took them in detail through the accused's statement and concluded as follows:

> Now the circumstances have been stressed. The accused knew it was a timber-framed house, a wooden verandah, he knew that the deceased was asleep inside, he knew that she was intoxicated, he described her as having "conked out". A question you might want to consider is what the accused might have imagined or what would have had to happen for death not to occur? The deceased would have had to wake up or she would have been asphyxiated. The deceased

> would have had to wake up in time to get out of the house or she would have been burnt. She would not only have had to have woken up and woken up in time, but she would have had to have been able to effect her escape. Otherwise, she was going to be burned or asphyxiated. In other words, if she was not going to wake up, wake up in time, and then manage to get out of the house, she was going to be burned or asphyxiated? But it is a question for you. You have got to decide the answer to it; whether or not the accused knew in all the circumstances that setting fire to the house was likely to cause Donna Jones's death?
>
> Now, if, having considered all that, you don't feel sure that the accused is guilty of murder then it is your duty to acquit, and you would, in the circumstances of this case bring in a verdict of not guilty but guilty of manslaughter. But if you do conclude that the Crown has made out its case beyond reasonable doubt, it is your duty to convict. It is a duty that you have sworn to undertake, and it is a duty and responsibility that you cannot and must not shirk from carrying out. It depends on what your decision is. If the Crown has made out its case beyond reasonable doubt then you must return a verdict of guilty. If not, then the appropriate verdict is not guilty of murder but guilty of manslaughter.

The Judge certainly put the weaknesses in the accused's case effectively and emphasised them more than some Judges would have seen fit, but we do not consider that he went beyond his legitimate role or that the summing up as a whole was unfair. The suggested lack of balance does not really arise because of what the Judge said. It arises basically because, unless the accused was so affected by alcohol that he did not appreciate the consequences of what he was doing, it is not easy to see how a conviction for murder could be avoided. No explicit suggestion that the accused was drunk to that extent has been made either at the trial or on appeal. If the accused's intoxication had been

stressed by Judge or counsel it might well not have helped the accused, because of the familiar difficulty that a drunken intent is nevertheless a real intent. The truth was probably that he acted as he did in a drunken rage against the deceased.

As to what is perhaps the main ground of appeal, it is necessary to set out yet again the relevant provisions of the Crimes Act:

> **167. Murder defined** - Culpable homicide is murder in each of the following cases:
> ...
> (b) If the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not:
> ...
> (d) If the offender for any unlawful object does an act that he knows to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

Here the Crown's case was put in the alternative on paragraphs (b) and (d). It is of course accepted for the appellant that the Crown is entitled to have the case put to the jury on alternative bases of legal liability if both are available. Nor is it disputed that there was evidence to support a conviction under (b). The argument is, however, that (d) was not available. Prima facie there is no difficulty in holding otherwise on the ordinary and natural reading of the two New Zealand provisions. Thomas J. so held in a pre-trial ruling on a s.347 application and directed the jury accordingly. We think that he was right.

The common essential ingredient in both paragraphs (b) and (d) is that the offender knows that what he is doing is likely to cause death. The reference to recklessness in (b) is usually of little practical importance, as this Court has said in previous cases; it does serve to point the contrast with paragraph (a) whereunder there must be an actual intent to kill. The main difference between (b) and (d) is that (b) covers the case where the offender means to cause bodily injury to the person killed, whereas under (d) he has some other unlawful object. So, in this case, if in setting fire to the house the accused meant to cause bodily injury to the deceased, knowing it to be likely to cause death, the verdict was warranted under (b). On the other hand if his unlawful object was to damage property - for instance by burning the house down - and for that object he did an act knowing it to be likely to cause death, that is to say lit the paper, the verdict was warranted under (d).

Insofar as the offender's object is to cause bodily injury to the person killed, knowing it to be likely to cause death, the case is covered by (b). It would make no sense to try to apply (d), which concludes with 'though he may have desired that his object should be effected without hurting anyone'. This explains Downey v. R. [1971] N.Z.L.R. 97, as pointed out in R. v. McKeown [1984] 1 N.Z.L.R. 630. The trial Judge in Downey appears to have directed the jury that arson was not an unlawful object for the purpose of (d);

but that was treated in this Court as right on the view that the burning of the house in that case was not the object which the appellant had in mind: the relevant passages are at pp.101 and 103 of the report. The judgment delivered by North P. in Downey does not support the conclusion that an accused who does an act with the object of committing arson cannot be convicted under (d). As already indicated, if the jury are satisfied that the offender knew of the likelihood of causing death, whether (b) or (d) applies turns on whether he meant to injure the person killed by acting as he did or merely to commit arson.

All that is reasonably straightforward and follows from the natural and ordinary meaning of the New Zealand code; but Mr Rishworth, while acknowledging that there is no reason in principle why an offender who does an act with the object of committing arson, knowing that it is likely to cause death, should not be guilty of murder, argued that the wording of (d) and case law show otherwise. He relied primarily on Downey, with which we have already dealt. In addition he cited some overseas judgments containing the proposition that for the purposes of a provision such as (d) the unlawful object and the dangerous act must not be the same or that there must be 'a further unlawful object, clearly distinct from the immediate object of the dangerous act'. Examples are R. v. Nichols [1958] Q.W.N. 46, although Sheehy J. there thought it 'astonishing' that on authority as he understood it he had to so hold and his decision was

doubted in Downey at 102-3; and R. v. Vasil (1981) 58 C.C.C. (2d) 97, 107-113.

The latter judgment in the Supreme Court of Canada carries the high authority of Lamer J., as he then was, and some of his language does support the proposition in question. But the actual result of Vasil accords with the view that we have been expressing. The facts were broadly similar to those of the present case except that there the accused spread lighter fluid before starting the fire. There was also evidence that he intended particularly to damage furniture. It was held that the dangerous act of resorting to the use of fire as a means of prosecuting the unlawful object of the destruction of the furniture brought the paragraph into play. One would suppose that it could not have made any difference if his main object had been to burn the house itself rather than some of its contents.

The so-called 'clearly distinct' requirement would not seem easy to apply. The paragraph speaks first of an unlawful object and then of an act known to the offender to be likely to cause death. In the crime of arson these two merge and may be said to be one and the same; yet it is perfectly natural to say that with the unlawful object of burning the house down the offender lit a fire. We are driven to think that a 'clearly distinct' requirement has no place in applying the New Zealand paragraph (d) and would

serve only to complicate the application of our code unnecessarily.

It may well be that the Canadian and Australian Judges who have supported or suggested such a requirement have been influenced by the presence in the statutory paragraph interpreted by them of the further words 'or ought to know' after 'knows', as in Vasil, or other provisions imposing an objective test, as in Hughes v. The King (1951) 84 C.L.R. 170, 173, 175. There is a natural tendency to read down a provision imposing liability for major crime without subjective mens rea. This difficulty does not arise under the New Zealand paragraph (d), where the words 'or ought to have known' were discarded by the 1961 Act. There is no reason why the New Zealand provisions should not be interpreted in the simple and, in our opinion, correct way in which the Judge ruled here.

For these reasons we dismiss the appeal.

RB Cooke P.

Solicitors:
Crown Solicitor, Gisborne, for Crown