HIGH PRIORITY

IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 320/91
C.A. 321/91
C.A. 322/91

THE QUEEN

v.

H RENATA
R WHITE
R WINTERBURN

Coram: Cooke P.
Richardson J.
Hardie Boys J.
Gault J.
McKay J.

Hearing: 10 December 1991

Counsel: G.A. Rea and Barbara Morris for Crown
R.J. Collins for Renata and White
D.H. Quilliam for Winterburn

Judgment: 16 December 1991

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

A case stated by Greig J. under s.380 of the Crimes Act 1961 on a question of law reserved during the trial poses the following question:

> Was I correct in instructing the jury that before an accused could be convicted of manslaughter as a party under Section 66(1) Crimes Act 1961 that accused must know:
>
> 1. There was likely to be an assault and
>
> 2. That death could well eventuate though in some way or because of some circumstances that made it totally unexpected?

Four accused were jointly charged with three offences alleged to have been committed at Hastings on 21 June 1990: conspiring to rob Barry Owen Nathan of a leather jacket; assaulting him with intent to rob him; and causing his death by an unlawful act, namely assault, and thereby committing manslaughter. One of the accused was discharged by the trial Judge as there was insufficient admissible evidence of his participation, and indeed some evidence apparently pointing towards his not being involved. The other three accused were found not guilty by the jury on all three counts. No issue now arises about the verdicts on the first two counts, but the verdicts on the manslaughter count followed a direction to the jury by the trial Judge on lines indicated in a previous ruling by him during the trial, and it is the view of the law as to manslaughter embodied in that direction which is the subject of the case stated.

The Crown case was that in a gang-related incident at night in the carpark of a Hastings hotel shortly after closing time, the victim and the accused or some of them having earlier been drinking in the bar, there was a collective assault on the victim by two of the accused, Renata and Winterburn, and at least one other unidentified man. It was alleged that the other accused, White, drove the assailants in a car to a point within a hundred metres or so of the scene and also drove them away after the incident; and that he was privy to the

plan to attack the victim. A motive suggested was robbery, but the verdicts on the first two counts appear to show that the jury were not satisfied of that.

Another motive may have been simply ill-will towards the victim arising because he was considered to have behaved 'snobbishly' in the hotel. At all events a fight did break out between the assailants and the victim, but it may have stopped on the arrival from the hotel of associates of the victim. The Crown alleges that during the fighting stage of the incident the victim received a blow or blows or a kick or kicks from which he died later that night. There was pathological evidence that his death was due to the rupture of a large cyst on his kidney, to produce which considerable force must have been used. On the other hand it is accepted by the Crown that the death was neither intended nor readily foreseeable by the accused, being more in the nature of a freak result like an eggshell skull case.

The Crown evidence could not identify the fatal blow or kick or the perpetrator. The case advanced by the Crown was that there had been manslaughter consisting of an unlawful act (assault) causing the death of the victim and that all the assailants were parties to that culpable homicide either as the principal (the striker or kicker) or as secondary parties by aiding pursuant to a conspiracy between them.

Section 66 of the Crimes Act 1961 provides:

> **66. Parties to offences** - (1) Every one is a party to and guilty of an offence who -
> (a) Actually commits the offence; or
> (b) Does or omits an act for the purpose of aiding any person to commit the offence; or
> (c) Abets any person in the commission of the offence; or
> (d) Incites, counsels, or procures any person to commit the offence.
> (2) Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

Here the Crown relied at the trial solely on s.66(1). For the purposes of this case the difference between the two subsections is sufficiently stated in the following passage in the judgment of this Court delivered by McMullin J. in *R.* v. *Curtis* [1988] 1 N.Z.L.R. 734, 739-40:

> Section 66(1) is concerned with intentional acts of aiding or abetting or encouraging given by one party to another in the commission of the very crime which the principal offender commits. On the other hand s.66(2) contemplates a different situation. It is concerned, not with an act which is the very unlawful act to which an offender lends his aid or his encouragement, but with any act done by the principal party which, while not the result aimed at, was a probable consequence of the prosecution of the unlawful common purpose. As was said in the judgment of this Court in *R.* v. *Hamilton* [1985] 2 N.Z.L.R. 245 at p.250 by Cooke J.:

> Section 66(2) is the New Zealand statutory provision dealing with the class of case in which a conspirator is guilty as a secondary party because he foresees that the principal party in carrying out their unlawful plan may commit a crime of the type in question. Liability turns on the contemplated, albeit unwanted, consequences of the criminal enterprise: see *R.* v. *Gush* [1980] 2 N.Z.L.R. 92 and *Chan Wing-siu* v. *R.* [1984] 3 All E.R. 877.

> Regrettably, too often a case which can only be treated as a true case of aiding, abetting or encouraging under s.66(1) has been made more difficult and confusing to a jury by the Crown's attempted invocation of s.66(2).

Here, at the trial, the Crown did not attempt to invoke s.66(2). What was alleged was a true case of at least aiding, abetting or encouraging. The line of cases referred to in *Curtis*, concerned as they are with contemplated but unwanted consequences of criminal enterprises, were not relevant. Guilt in that line of cases turns on contemplation or foresight of possible consequences (see most recently the judgment of the Privy Council in *Hui Chi-ming* v. *R.*[1991] 3 All E.R. 897, 909-11) and as to that the jury may be called upon to draw a line between, for instance, sufficient foresight for murder and sufficient foresight for manslaughter. That question is adverted to in *R.* v. *Tomkins* [1985] 2 N.Z.L.R. 253, 256, in a passage which appears to have influenced Greig J. in the present case.

But of course the *Tomkins* judgment was not intended as a complete exposition of the law of manslaughter in New Zealand in cases of joint enterprise. In particular it was not directed at s.66(1). Under s.66(1) in a case such as the present guilt does not turn on contemplation of a possible consequence. It turns on actual agreement to commit or knowing participation in a particular criminal act. What the Crown was alleging here was that the accused were all in fact parties to the unlawful act of assault, in one or other of the ways specified in s.66(1). If the jury were satisfied of that beyond reasonable doubt, no further issue of contemplation or foresight arose.

Clearly, where one person unlawfully assaults another by a dangerous application of force, the assailant is guilty of manslaughter if death is caused even in a most unexpected way. Unlikelihood of the result is relevant only to penalty, although it may be of great significance in that regard. No different principle applies to a person who is guilty of the assault as a secondary party under s.66(1)(b), (c), or (d). In all such cases where manslaughter is charged, 'the offence' within the meaning of the subsection is culpable homicide being the causing of death by an unlawful act; and if the unlawful act is of a kind that attracts the operation of the law of manslaughter it matters not that the death was neither intended nor foreseen.

As to what kind of 'unlawful act' is sufficient, a question arising under s.160(2)(a) of the Crimes Act, reference may be made to the judgment of this Court delivered by Bisson J. in *R.* v. *Myatt* [1991] 1 N.Z.L.R. 674, 680. That judgment is not precisely in point, since it is concerned with the purposes of regulating legislation which may make an act unlawful within s.160(2)(a), but it does indicate the idea reflected in para (a). The expression 'unlawful act' in the context of the law of manslaughter is not one upon which the present case calls for any attempt at exhaustive definition; but an unlawful assault intended to cause some, even though minor, physical harm or hurt to the victim is undoubtedly within it.

In *R.* v. *Nathan* [1981] 2 N.Z.L.R. 473, 475, a case somewhat similar to the present (though murder was charged), Prichard J. expressed agreement with a view of counsel then representing the Crown that s.66(1) is not an appropriate provision for a case where the identity of the principal offender is not established. With respect, we can see no sustainable reason for that as a general proposition. Where the principal offender cannot be identified it must be enough for the purposes of s.66(1) to prove that each individual accused must have been either the principal offender or a party in one of the other ways covered by that subsection.

Whether the evidence in the present case is capable of supporting or will in fact lead to that conclusion on a proper direction at a retrial is not a question raised by the case stated. The evidence has not even been placed before us. At the first trial the Judge appears to have considered that even on his view of the law there was a case to go to the jury. At all events he dismissed a s.347 application. Like the jury (judging from one of their questions) we find it not easy to follow that; but on the view of the law which we hold to be correct we are certainly not prepared, on what we know of the case, to say that there is not a proper case to submit to a jury. This Court cannot usefully say more about the facts.

For the foregoing reasons we consider that the ruling and the summing up confused s.66(1) and (2) and that the question in the case stated should be answered No.

Mr Quilliam submitted that a new trial should not be ordered, partly because of delay (incident 21 June 1990; trial 22 to 25 July 1991; case stated 16 September 1991). He also relied on the alleged weakness of the Crown case and the circumstance that, if there are ultimately verdicts of manslaughter, the penalties are likely to be at least at the lower end of the scale by reason of the 'eggshell skull' factor. But it was a case of group violence of a kind disturbingly

prevalent. We hold that the Crown is entitled to ask for verdicts on the case from a properly directed jury, and that there has been no unreasonable delay. The acquittals of the respondents on the third count will be quashed and there will be a direction for a new trial.

R B Cooke P.

Solicitors:
Crown Solicitor, Napier, for Crown
Bate Hallett, Hastings, for Renata and White
Quilliam & Co., Hastings, for Winterburn