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A sad case of manslaughter - gross negligence manslaughter where the deceased is engaged in criminal activity and the parties are acting in concert

R v Ibrahima Bah [2024] EWCA Crim 1499

Keywords

Gross negligence manslaughter, duty of care, causation, voluntary act, acting in concert

The applicant was convicted of four counts of gross negligence manslaughter and one count of doing an act to facilitate the commission of a breach of UK immigration law by a non-UK national, contrary to s.25(1) and (6) of the Immigration Act 1971. He applied to the Court of Appeal for leave to appeal and the applications were referred to the Full Court by the Registrar.

The applicant had travelled from Senegal to the area near Dunkirk known as ‘The Jungle’. He intended to travel to the UK to claim asylum and waited for the opportunity to cross the Channel. One of the traffickers offered him free passage for himself and a friend if he would agree to steer the boat. The applicant had some experience of handling boats and had assisted with piloting a boat when he travelled from Libya to Italy. The applicant agreed to steer the boat and he was taken to the departure point. There were approximately 45 people waiting to take part in the crossing. Some of the passengers were inflating the boat and taking it to the water. The traffickers were armed and were threatening the passengers. Upon seeing the inflatable boat and the number of passengers, the applicant expressed misgivings about the plan. However, he was put under verbal and physical pressure to steer the boat.

When the boat set off, two passengers navigated using their mobile phones. After around 45 minutes to one hour, water started to enter the boat. The applicant became alarmed and he steered towards a nearby fishing vessel. As passengers started to panic, they stood up and the floor of the boat broke, trapping some passengers inside. Passengers were able to board the fishing vessel and the applicant helped people board the fishing vessel by holding onto a rope to prevent the boat from drifting away. The applicant was one of the last passengers to leave the inflatable boat. At least four passengers on the inflatable boat died. The applicant was charged with four counts of gross negligence manslaughter. He was also charged with doing an act to facilitate the commission of a breach of UK immigration law by a non-UK national, contrary to s.25(1) and (6) of the Immigration Act 1971.

At the applicant’s trial, an expert witness gave evidence that, in his opinion, the applicant was the skipper of the boat. He was in charge and had responsibility for the safety of his vessel and its passengers. The boat was not of satisfactory construction and was not of

a type of vessel intended to be used in open seas and across large distances. The boat did not have the necessary safety and navigation equipment. The expert witness gave evidence that in light of the perilous nature of the crossing in such a small boat without any lights and the cold temperature of the sea and the air, there was a significant risk of death to those who were on board the boat. The risks would have been very obvious to most people.

The trial judge took the view that the passengers in the boat were well aware of the risks and that they 'freely and voluntarily embarked on the journey knowing of the risks' (at [11]). In helping to inflate the boat and navigating via their mobile phones, the passengers had participated in the undertaking of the crossing. The applicant claimed that he took part in the crossing under duress from the traffickers. This defence was rejected by the jury and they convicted the applicant of gross negligence manslaughter (by a majority of 10 to 2). They convicted him of doing an act to facilitate the commission of a breach of UK immigration law by a non-UK national by a unanimous verdict. The applicant was sentenced to 9 years 6 months' detention for each of the convictions for gross negligence manslaughter, with each sentence running concurrently. He was sentenced to 4 years' detention for the breach of UK immigration law, with this sentence also running concurrently. Thus, a sentence of 9 years 6 months' detention was imposed.

The applicant applied to the Court of Appeal for leave to appeal against his convictions and leave to appeal against his sentence. The applications were referred to the Full Court by the Registrar. The first ground related to an alleged jury irregularity, and this ground was deemed to be unarguable by the Court of Appeal. This case note is concerned with the grounds 2 and 3 of the application for leave to appeal against the convictions. These two grounds were related and required consideration of whether the voluntary actions of the deceased broke the chain of causation.

Ground 2 was that the trial judge was wrong to reject a submission of no case to answer which had been made on the basis that the prosecution had not proved causation. The submission relied on the argument that the chain of causation was broken by the voluntary actions of the deceased in choosing to board the boat and join the crossing. Ground 3 (argued in the alternative) was that the trial judge failed to direct the jury that the deceased's voluntary choice to risk death by joining the crossing was relevant to the issue of whether the applicant's acts were a significant (or more than minimal) cause of death.

The applicant relied on the decisions in *R v Kennedy (No. 2)* [2007] UKHL 38, *R v Rebelo (No 1)* [2019] EWCA Crim 633 and *R v Rebelo (No 2)* [2021] EWCA Crim 306. In *R v Kennedy (No. 2)*, in respect of unlawful act manslaughter it was held that a victim's voluntary act of self-injection breaks the chain of causation. The decisions in *R v Rebelo*

essentially apply the same principle to gross negligence manslaughter. It was held that the victim's voluntary act in taking dangerous weight loss capsules was a free, informed and deliberate act. This was an intervening act which broke the chain of causation between the appellant's breach of duty and the death. Using these authorities, the applicant argued that a properly directed jury could only conclude that the decision of the deceased to take part in the perilous journey was entirely voluntary and therefore that causation could not be established (at [24]).

The prosecution argued that the present case could be distinguished from *R v Kennedy (No. 2)* on the basis that that case was only relevant to unlawful act manslaughter and that the prosecution in *R v Kennedy (No. 2)* failed because it could not be established that there was an unlawful act for the purposes of unlawful act manslaughter. They also argued that *R v Kennedy (No. 2)* and *R v Rebelo* were very different cases from the present case. In the current case, the applicant's actions in driving the boat caused the deaths and there was no separate act undertaken by the deceased that broke the chain of causation. This was not a case where the applicant's acts were merely setting the scene or creating the background to the separate acts of the deceased which caused their death (at [25]).

The trial judge dismissed the application. He held that while each of the deceased had made a free, voluntary and informed decision to travel on the boat, there are some circumstances in which the free and voluntary act of the victim will negative legal causation, and some circumstances where it will not. The trial judge cited Hart and Honoré, *Causation in the Law*, 2nd ed (1985) and explained that there is a distinction drawn between cases where the victim and defendant act in concert, and those cases where the victim does not act in concert with the defendant but exploits the situation which he has created. The trial judge stated that *R v Kennedy (No. 2)* was an example of the latter type of case. He stated that '[t]he deceased and the defendant were not acting in concert. The deceased had not committed any criminal offence. The defendant had merely prepared the syringe. The deceased made the fully informed decision to exploit the situation that the defendant had created by injecting himself with the syringe' (at [27]). The trial judge held that *R v Rebelo* was also (in principle) an example of the latter type of case. The defendant had merely supplied the capsules and the deceased had made the decision to take the capsules. If the deceased's decision was truly free and voluntary, that would have negated any causal connection between the defendant's acts and deceased's death.

These cases can be contrasted with cases where the victim and defendant act in concert, in which the defendant freely and voluntarily accepts the risk of death, and which do not negative a legal causal link. The trial judge held that in the present case, the deceased and the defendant were acting in concert. They were all seeking to travel

together to the UK in breach of immigration law. They were all committing offences (albeit these were distinct offences and the defendant and the deceased were not joint offenders). Together, they were pursuing a common criminal enterprise to reach the UK. Thus, applying Hart and Honoré the deceased were acting in concert with the defendant such that their free and voluntary choice to travel on the boat does not break the chain of causation.

HELD (REFUSING LEAVE TO APPEAL), that grounds 2 and 3 of the application for leave to appeal were unarguable and could not succeed. Therefore, leave to appeal against conviction was refused. The Court of Appeal concluded that the trial judge was right to reject the applicant's submission of no case to answer and to direct the jury as he did. (As mentioned above, ground 1 (the alleged jury irregularity) was also held to be unarguable and was refused. The Court of Appeal also refused leave to appeal against sentence).

The Court of Appeal carried out an analysis of the law on causation. Citing *R v Wallace (Berlinah)* [2018] EWCA Crim 690, the Court held that '[a]ny assessment of legal causation should maintain focus on whether the accused should be held legally responsible for the consequences of his action' (at [28]). The Court summarised the law on causation as expressed in *R v Wallace*, stating that the 'meaning of causation is heavily fact-specific', but there are two well-recognised considerations, (i) 'the chain of causation between the act of A and a result may be broken by the voluntary, deliberate and informed act of B', and (ii) there is a distinction between "'cause" in the sense of a sine qua non, without which the consequence would not have occurred' (otherwise known as factual causation) and "'cause" in the sense of something which was a legally effective cause of that consequence' (otherwise known as legal causation) (at [30]). Where there are multiple legal causes, then the defendant's act or omission must be a significant (or substantial) cause. There is also a distinction between 'conduct which (merely) sets the stage for an occurrence and conduct which on a common-sense view is regarded as instrumental in bringing about the occurrence' (at [30]). Finally, the Court of Appeal in *R v Wallace* expressly endorsed the principle that 'the free, deliberate and informed intervention of a second person, who intends to exploit the situation created by the first, but not acting in concert with him, is normally held to relieve the first actor of criminal responsibility' (see *R v Wallace* [2018] EWCA Crim 690 at [47] and *R v Bah* [2024] EWCA Crim 1499 at [31]).

Turning to the current case of *R v Bah*, the Court of Appeal stated that while the duty of care owed to the deceased in this case was not in dispute, an examination of the foundation of that duty informs an understanding of the chain of causation and whether it could be broken by the decision of the passengers to board the boat. The existence of the applicant's duty of care is based upon the decision in *R v Wacker* [2002] EWCA Crim

1944, in which the Court of Appeal held that the fact that both the defendant and victim were engaged in a criminal activity did not preclude the existence of a duty of care. The different approach taken by the criminal law in this regard from that adopted by the civil law is justified by the distinct public policy aim of criminal law, namely the protection of citizens. The Court of Appeal in *R v Wacker* stated that ‘the criminal law will not hesitate to act to prevent serious injury or death even when the persons subjected to such injury or death may have consented to or willingly accepted the risk of actual injury or death. ... The state in such circumstances has an overriding duty to act to prevent such consequences.’ (at [34]). Thus, relying upon *R v Wacker*, the Court of Appeal in *R v Bah* held that the duty ‘was not obviated by the fact that the deceased freely volunteered to be passengers in the boat; or that this was a criminal activity designed to enable their illegal entry into the United Kingdom’ (at [36]).

While the applicant and the deceased were not joint offenders, they were acting in concert. The deceased voluntarily boarded the boat, and the applicant piloted it which gave rise to his duty of care. From that point on, there was no separate voluntary act by the deceased that could be said to have broken the chain of causation. Thus, there was no proper basis to conclude that the chain of causation had been broken. The Court of Appeal held that neither *R v Rebelo* nor *R v Kennedy (No. 2)* were of assistance to the applicant. In fact, Lord Bingham in *R v Kennedy (No. 2)* endorsed the point that where two people are acting in concert, the free, deliberate and informed act of one party will not break the chain of causation in respect of the other party. The Court of Appeal also stated that the parties need not be engaged in a joint criminal enterprise, ‘[t]he principle is clearly far broader’ (at [39]).

R v Kennedy (No. 2) and *R v Rebelo* were distinguished on the basis that they were very different from the facts of this case in that in these cases the voluntary act of the deceased was a separate and distinct action. The appellant and the deceased *R v Kennedy (No. 2)* were not acting in concert. At most, the appellant set the scene for what the deceased chose to do, namely self-inject heroin (at [41]). Similarly, the appellant and the deceased in *R v Rebelo* were not acting together, rather the decision of the deceased to take the capsules was a separate and distinct action (at [41]).

The Court of Appeal held that grounds 2 and 3 were interrelated and that they would either succeed or fail together. Since the trial judge had correctly concluded that the fact that the deceased voluntarily boarded the boat would not break the chain of causation, grounds 2 and 3 of the application for leave to appeal against conviction were unarguable and could not succeed.

Commentary

This is a gross negligence manslaughter case in which the applicant acted unlawfully in piloting a boat carrying passengers across the Channel in contravention of UK immigration law. Each of the deceased voluntarily boarded the boat in order to reach the UK, also violating UK immigration law. The applicant's convictions for four counts of gross negligence manslaughter seem harsh and unsympathetic when considered in the light of the reality of the young applicant's situation. He found himself legally responsible for the deaths of people who voluntarily boarded an inadequate boat for a perilous journey. The jury rejected the defence of duress and convicted the defendant. The application for leave to appeal was deemed to be unarguable by the Court of Appeal and this decision was based upon 'fundamental and not controversial' principles of causation, and on settled law on the duty of care. The decision of the appellate court is legally sound. However, it could be questioned whether it was truly in the public interest to bring this prosecution or whether Mr Bah has been used as a scapegoat to deter others from attempting crossings in small boats. Given the desperate context, Mr Bah's misgivings about the boat, and the situation that Mr Bah found himself in, in charge of steering the boat whilst others navigated, it is questionable whether Mr Bah was deserving of punishment at all, and certainly whether he was any more deserving of punishment than others involved in the criminal endeavour.

The causation question was whether the free and voluntary act of the deceased in boarding an obviously inadequate boat breaks the chain of causation. For many years, before the decision in *R v Kennedy (No 2)*, there had been a lack of clarity on the question of whether a defendant who supplies the deceased with a drug and the deceased self-administers that drug, could be guilty of unlawful act manslaughter. The House of Lords in *R v Kennedy (No 2)* clarified the position, answering the following certified question:

'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?'

Lord Bingham handed down a clear and comprehensive judgment in this case and answered the certified question with:

'In the case of a fully-informed and responsible adult, never'.

The rationale for this decision was based upon the fact that '[t]he criminal law generally assumed the existence of free will' and 'generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act' (*R v Kennedy (No 2)* at [14]). This means that the defendant cannot be regarded as

causing the victim to act in a particular way if the victim has made a free and voluntary choice to act in that way. Lord Bingham cited eminent academic support for this statement of law, such as Professor Glanville Williams, '*Finis for Novus Actus?*' (1989) 48(3) CLJ 391, 392:

'I may suggest reasons to you for doing something; I may urge you to do it, tell you it will pay you to do it, tell you it is your duty to do it. My efforts may perhaps make it very much more likely that you will do it. But they do not cause you to do it, in the sense in which one causes a kettle of water to boil by putting it on the stove. Your volitional act is regarded (within the doctrine of responsibility) as setting a new 'chain of causation' going, irrespective of what has happened before.'

Lord Bingham also relied upon the seminar work of Hart and Honoré, *Causation in the Law*, 2nd ed (1985), chapter XII, p.326:

'The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.'

There is a clear distinction drawn between cases where the victim and defendant act in concert and those cases where the victim does not act in concert with the defendant but exploits the situation which he has created. While *R v Kennedy (No 2)* was an example of the latter, the present case of *R v Bah* is an example of the former, and the Court of Appeal in *R v Bah* has rightly distinguished *R v Kennedy (No 2)* on this basis. Where two people are acting in concert, the free, deliberate and informed act of one party will not break the chain of causation in respect of the other party. Thus, the free, deliberate and informed act of the deceased would not break the chain of causation in respect of the applicant. As the Court of Appeal stated:

'We cannot identify a proper basis upon which it could be said that the chain of causation in this case was broken. Whilst the applicant and deceased were not joint offenders, they were undoubtedly acting in concert in the same, single episode which ended in the deaths. The voluntary boarding of the boat accompanied the applicant's piloting of the boat, giving rise to his duty of care to the passengers. From that point on, there was no separate, voluntary act by any of the deceased that could be said to have broken the chain of causation. There was no interference

with or interruption of the link between the applicant's breach of duty and each death' (at [37]).

The Court of Appeal also took the opportunity to carry out an analysis of the general principles of causation. The Court stated that the causation requirement in the context of gross negligence manslaughter was made clear in *R v Broughton* [2020] EWCA Crim 1093, namely that '[t]he breach of the duty caused or made a significant (i.e., more than minimal) contribution to the death of the victim'. As the Court of Appeal has done in several authorities over the past 10 years, the Court set out the six elements that the prosecution must prove in order to establish the offence of gross negligence manslaughter:

- (i) The defendant owed a duty of care to the victim;
- (ii) The defendant negligently breached that duty of care;
- (iii) At the time of the breach there was a serious and obvious risk of death;
- (iv) It was reasonably foreseeable at the time of the breach of the duty that the breach gave rise to a serious and obvious risk of death;
- (v) The breach of duty caused or made a significant (i.e. more than minimal) contribution to the death of the victim;
- (vi) In the view of the jury, the circumstances of the breach were truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence manslaughter and required criminal sanction.

In this particular case, the Court stated that the question of causation was linked to the foundation of the applicant's duty of care. Thus, the Court focused initially on the question of the applicant's duty of care owed to the deceased where the deceased had acted unlawfully. On this point, the Court applied *R v Wacker* and distinguished the approach to civil liability in negligence. The facts of *R v Wacker* bear some resemblance to those in *R v Bah* in that both cases involved the transportation of passengers unlawfully and in breach of UK immigration law. In *R v Wacker*, the fact that the defendant and the victims were both engaged in a criminal activity did not preclude the finding that the defendant owed the victim a duty of care. While in civil law, illegality on the part of the claimant will provide the defendant with a defence, in criminal law, no such approach exists. Rather, criminal law is concerned with protecting citizens from harm and will justify imposing a duty of care on the defendant even where the deceased has acted illegally. Thus, the applicant owed the deceased a duty of care.

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